Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

29 March 2012*

(Direct taxation — Conclusion of proceedings pending before the court giving judgment at final instance in tax matters — Abuse of rights — Article 4(3) TEU — Freedoms guaranteed by the Treaty — Principle of non-discrimination — State aid — Obligation to ensure the effective application of European Union law)

In Case C-417/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Italy), made by decision of 27 May 2010, received at the Court on 23 August 2010, in the proceedings

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate

v

3M Italia SpA,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, L. Bay Larsen, C. Toader and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2011,

after considering the observations submitted on behalf of:

— 3M Italia SpA, by G. Iannotta, avvocato,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— Ireland, by D. O'Hagan, acting as Agent,

— the United Kingdom Government, by H. Walker, acting as Agent,

— the European Commission, by E. Traversa and R. Lyal, acting as Agents,

* Language of the case: Italian.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of European Union law in the field of direct taxation.

2 The reference has been made in proceedings between the Ministero dell'Economia e delle Finanze (Ministry of Economic and Financial Affairs) and the Agenzia delle Entrate (Revenue Authority) and 3M Italia SpA ('3M Italia') concerning the taxation of dividends distributed by that company in respect of the years 1989 to 1991.

National legal context

3 Article 3(2*bis*) of Decree-Law No 40/2010 (GURI No 71, 26 March 2010), converted, with amendments, into Law No 73/2010 (GURI No 120, 25 May 2010) ('Decree-Law No 40/2010'), reads as follows:

'In order to ensure that judicial proceedings in tax matters are kept within a reasonable time, as required by the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950 ("the ECHR")], ratified by Law No 848 of 4 August 1955, having regard to the failure to comply with the reasonable time requirement laid down in Article 6(1) of that Convention, pending tax disputes arising from actions lodged at first instance more than 10 years before the date of entry into force of the law converting the present decree into law, in which the State Tax Authority has been unsuccessful at first and second instance, shall be concluded in accordance with the following rules:

…

(b) tax disputes pending before the Corte suprema di cassazione may be extinguished by payment of an amount equivalent to 5% of the value of the claim … with concurrent abandonment of any claim to fair compensation within the meaning of Law No 89 of 24 March 2001. The taxpayer may lodge an application to that effect with the relevant secretariat or registry within 90 days of the entry into force of the law converting the present decree into law, accompanied by proof of the relevant payment. The proceedings referred to in this paragraph shall be suspended until the expiry of the time-limit set out in the second sentence hereof and shall be concluded with an order apportioning the full costs of the proceedings. In no event shall there be any reimbursement.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

4 3M Company, a company established in the United States, created a right of usufruct over the shares of 3M Italia, which it controls, in favour of Shearson Lehman Hutton Special Financing, also established in the United States. That company in turn transferred the right of usufruct to Olivetti & C., a company established in Italy, the voting rights remaining with the legal owner, namely 3M Company.

5 Following a check, the Italian tax authorities took the view that the transfer of the right of usufruct to Olivetti & C. was a sham and that the dividends distributed to that company by 3M Italia had in fact been received by Shearson Lehman Hutton Special Financing, a company not resident in Italy. They

consequently decided that the withholding tax of 32.4% laid down by the Italian legislation on the taxation of income from property should be applied to those dividends instead of the retention on account of tax of 10% and the corresponding tax credit applicable to taxpayers resident in Italy. The tax authorities further considered that liability for the incorrect application of withholding taxes could be attributed to 3M Italia. They therefore claimed from 3M Italia the sums of ITL 20 089 887 000 for 1989, ITL 12 960 747 000 for 1990 and ITL 9 806 820 000 for 1991 together with penalties and interest.

6 3M Italia brought proceedings against the corresponding tax notices before the Commissione tributaria provinciale di Caserta (Provincial Tax Court, Caserta), which annulled the notices. That decision was confirmed by judgment of the Commissione tributaria regionale Campania (Regional Tax Court, Campania) of 14 July 2000.

7 The Ministero dell'Economia e delle Finanze and the Agenzia delle Entrate appealed on a point of law to the Corte suprema di cassazione (Supreme Court of Cassation), arguing in particular that the transaction in question, namely the transfer of the right of usufruct, was in reality a mere sham designed to evade tax. At this stage of the proceedings, 3M Italia sought to rely on Article 3(2*bis*)(b) of Decree-Law No 40/2010, with a view to having the proceedings before the Corte suprema di cassazione concluded.

8 The Corte suprema di cassazione is uncertain, however, as to the compatibility of that provision with European Union law.

9 It considers that the question arises whether the principle of the prohibition of abuse of rights, as defined in Case C-255/02 *Halifax and Others* [2006] ECR I-1609 and Case C-425/06 *Part Service* [2008] ECR I-897 in the field of harmonised taxation, can apply to non-harmonised taxes such as direct taxes. It is uncertain in particular whether 'there is a Community interest in cases such as the present involving transnational financial matters, in which the recourse to legal forms which do not correspond to genuine financial transactions could be regarded as an abuse of fundamental freedoms guaranteed by the EC Treaty, primarily the free movement of capital'.

10 If that is so, it must, in its view, be examined whether the national provision at issue in the present case, which imposes an 'almost symbolic' obligation on the taxpayer, is contrary to the obligation to suppress abuse and to Article 4(3) TEU, which requires the Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaties and to refrain from any measure which could jeopardise the attainment of the European Union's objectives.

11 The Corte suprema di cassazione is also unsure about the compatibility with the principles governing the single market of the provision in question, which in its view entails a virtually complete waiver of recovery of the tax claim. Referring to the 'fundamental freedoms and principles guaranteed by the Treaty', it asks in particular whether such a provision may be regarded as 'a proper application of tax competition' where, as in the present case, the payment of tax is circumvented by abusive practices. It also observes that this waiver of tax entails 'discrimination in favour of undertakings established in Italy'.

12 It also considers that the rules of the FEU Treaty on State aid should be taken into consideration, in view of the advantage the provision in question confers on a beneficiary and the selective nature of the provision. In its view, a tax amnesty consisting in the mere waiver of tax, even if it takes place only at the judicial stage of the procedure, in return for the payment of a much reduced or indeed derisory amount cannot be justified by the nature or structure of the tax system concerned, and should in principle be classified as State aid.

13 Finally, it asks whether such a provision, in that it deprives the court giving judgment at final instance of its power of review of lawfulness, including review of the interpretation and application of European Union law, and its power to refer a question to the Court for a preliminary ruling, is contrary to the obligation to ensure the effective application of European Union law.

14 In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Does the abuse of rights principle in taxation matters, as defined in … *Halifax and Others* … and … *Part Service* …, constitute a fundamental principle of Community law only in the field of harmonised taxes and in matters governed by provisions of secondary Community law, or does it extend, as a category of abuse of fundamental freedoms, to matters involving non-harmonised taxes, such as direct taxes, where the tax relates to transnational financial matters, such as the acquisition by a company of rights of usufruct over the shares of a second company established in another Member State or in a non-member country?

2. Irrespective of the answer to the first question, is there a Community interest in provision being made by the Member States for adequate anti-avoidance measures in the field of non-harmonised taxes, and is such an interest thwarted by the failure to apply — in the context of a tax amnesty measure — the abuse of rights principle which is also recognised as a rule of national law, and if so are the principles that may be inferred from Article 4(3) of the Treaty on European Union infringed?

3. Do the principles governing the single market impliedly preclude not only extraordinary measures in the form of a total waiver of a tax claim but also an extraordinary measure for concluding tax disputes whose application is limited in time and conditional upon payment of only part of the tax due, which is considerably less than the full amount?

4. Do the principle of non-discrimination and the rules governing State aid preclude the system for concluding tax disputes at issue in the present case?

5. Does the principle of the effective application of Community law preclude extraordinary procedural rules of limited duration which remove the power to review legality (in particular concerning the correct interpretation and application of Community law) from the court of final instance, which is under an obligation to refer questions of validity and interpretation requiring a preliminary ruling to the Court of Justice of the European Union?’

Consideration of the questions referred

15 By its questions the referring court asks essentially whether European Union law, in particular the principle of the prohibition of abuse of rights, Article 4(3) TEU, the freedoms guaranteed by the FEU Treaty, the principle of non-discrimination, the rules on State aid and the obligation to ensure the effective application of European Union law, must be interpreted as precluding the application, in a case such as that in the main proceedings relating to direct taxation, of a provision of national law which provides for proceedings pending before the court giving judgment at final instance in tax matters to be concluded in return for payment of a sum equivalent to 5% of the value of the claim, where those proceedings originate in an application made at first instance more than 10 years before the date of entry into force of that provision and the tax authorities have been unsuccessful at first and second instance.

Admissibility

16 3M Italia and the Italian Government submit that the reference for a preliminary ruling is inadmissible.

17 In view of the absence of a definitive finding of intentional or negligent fault in the main proceedings, the inapplicability of European Union law to the dispute in the main proceedings, and the existence in Italian law of a constitutional principle prohibiting abuse of rights, the referring court’s first two questions, in the opinion of 3M Italia, bear no relation to the actual facts of the main action or its purpose and concern a hypothetical issue.

18 The Italian Government for its part submits that the order for reference does not comply with the obligation to provide all the elements of fact and law characterising the main proceedings in order to enable the Court to give an interpretation that will be of use in resolving those proceedings. In particular, the order for reference does not contain any analysis of Article 3(2*bis*) of Decree-Law No 40/2010 to show why that provision should entail a waiver of tax. Nor does it indicate in what respect the facts of the main proceedings are of a transnational nature and should be regarded as an abuse of rights. The questions referred are thus abstract and hypothetical.

19 It must be recalled that a reference for a preliminary ruling made by a national court may be declared inadmissible only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61, and Case C-450/09 *Schröder* [2011] ECR I-2497, paragraph 17).

20 With regard more specifically to the information that must be provided to the Court in a reference for a preliminary ruling, that information not only serves to enable the Court to provide answers which will be of use to the referring court, it must also enable the Governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is settled case-law that, for those purposes, it is necessary, first, that the national court should define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based. Secondly, the order for reference must set out the precise reasons why the national court is unsure as to the interpretation of European Union law and considers it necessary to refer questions to the Court for a preliminary ruling (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 40 and the case-law cited).

21 In the present case, the order for reference contains an account of the facts behind the main proceedings and the relevant national law, namely Article 3(2*bis*)(b) of Decree-Law No 40/2010. It also indicates the reasons why the referring court is uncertain as to the compatibility of that provision with European Union law and considered it necessary to make a reference to the Court for a preliminary ruling.

22 While in its third question, relating generally to the interpretation of 'the principles governing the single market', the referring court does not specify the principles thus referred to, the account in the order for reference of the elements of fact and law and the doubts as to the compatibility of Article 3(2*bis*)(b) of Decree-Law No 40/2010 with European Union law is none the less sufficient, taken as a whole, to enable the Member States and other interested parties to submit observations on the point and to take an effective part in the proceedings, as evidenced by the written and oral observations of the parties who have taken part in the proceedings, and to enable the Court to provide the referring court with an answer which will be of use to it.

23 Finally, whether European Union law is applicable to the main proceedings is a question which relates to the examination of the substance of the questions referred, as reformulated in paragraph 15 above. Those questions appear to be decisive for the outcome of those proceedings, since what is at stake is the conclusion of the proceedings by a decision of the referring court pursuant to the national provision in question. It follows that the questions are manifestly related to the actual facts of the main action and are neither abstract nor hypothetical.

24 The reference for a preliminary ruling must therefore be regarded as admissible.

Substance

25 It should be recalled that, in accordance with settled case-law, while direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with European Union law (see, inter alia, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 34 and the case-law cited).

26 In the present case, Article 3(2*bis*)(b) of Decree-Law No 40/2010 provides for the conclusion, on payment of an amount equivalent to 5% of the value of the claim and with the abandonment of any claim to compensation for failure to comply with the reasonable time requirement, of tax proceedings pending before the Corte suprema di cassazione which have lasted for more than 10 years since the action was brought at first instance and in which the tax authorities have been unsuccessful at first and second instance, in order 'to ensure that judicial proceedings in tax matters are kept within a reasonable time, as required by the [ECHR], having regard to the failure to comply with the reasonable time requirement laid down in Article 6(1) of [the ECHR]'.

27 It should also be pointed out that Article 3(2*bis*)(b) of Decree-Law No 40/2010, which the referring court interprets as a waiver of tax, aims, according to its very wording, at reducing the length of tax proceedings in order to comply with the reasonable time principle laid down by the ECHR and at putting an end to violations of the ECHR.

28 According to the documents in the case, the facts of the main proceedings go back more than 20 years.

29 It is in the light of those factors that it must be examined whether the rules and principles of European Union law mentioned in the order for reference preclude the application, in a case such as that in the main proceedings, of a provision of national law such as Article 3(2*bis*)(b) of Decree-Law No 40/2010.

30 First, as regards the principle of the prohibition of abuse of rights and Article 4(3) TEU, it must be observed to begin with that the dispute in the main proceedings is not one in which taxpayers rely or are liable to rely on a provision of European Union law for fraudulent or abusive ends. Consequently, the judgments in *Halifax and Others* and *Part Service*, cases concerning value added tax which the referring court mentions in connection with its uncertainty as to whether the principle of the prohibition of abuse of rights defined in those judgments extends to the field of non-harmonised taxes, are not relevant in the present case.

31 It must be observed, next, that the documents in the case likewise do not show that the application of a national provision entailing a restriction of one of the freedoms guaranteed by the FEU Treaty and the possible justification of such a restriction on the ground of the need to prevent abusive practices are at issue in the main proceedings. Consequently, the Court's case-law on abuse of rights in the field of direct taxation, deriving in particular from Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, Case C-330/07 *Jobra* [2008] ECR I-9099 and *Glaxo Wellcome*, is not relevant either.

32 Finally, in any event, it is clear that no general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation and which would preclude the application of a provision such as that at issue in the main proceedings where the taxable transaction proceeds from such practices and European Union law is not involved.

33 It follows that the principle of the prohibition of abuse of rights and Article 4(3) TEU, under which the Member States are required to take any appropriate measure, general or particular, to ensure fulfilment of the obligations resulting from European Union law and to refrain from any measure which could jeopardise the attainment of the Union's objectives, cannot in principle preclude the application, in a case such as that in the main proceedings, of a provision of national law such as Article 3(2*bis*)(b) of Decree-Law No 40/2010.

34 Secondly, as regards the freedoms guaranteed by the FEU Treaty and the principle of non-discrimination, it must be observed that only the free movement of capital appears to be concerned by the transaction at issue in the main proceedings, as that transaction is a transfer by a company of a non-member country of the right of usufruct over shares in an Italian company to another Italian company. It suffices to state here that there is nothing in the case-file to show that, in a case such as that in the main proceedings, a provision such as Article 3(2*bis*)(b) of Decree-Law No 40/2010 affects the free movement of capital, or indeed, in general, the exercise of any of the freedoms guaranteed by the FEU Treaty.

35 Since those freedoms are the specific expression, in their respective fields, of the general principle of the prohibition of all discrimination on grounds of nationality (see, to that effect, Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 31), that principle does not preclude either the application, in a case relating to direct taxation, of a provision of national law such as Article 3(2*bis*)(b) of Decree-Law No 40/2010.

36 Thirdly, as regards the rules on State aid, the Court has held on numerous occasions that the objective pursued by State measures is not sufficient to exclude those measures from classification as 'aid' for the purposes of Article 107 TFEU. That article does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (see Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraphs 84 and 85 and the case-law cited).

37 It is settled case-law that classification as State aid requires all the following conditions to be fulfilled. First, there must be intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient. Fourthly, it must distort or threaten to distort competition (Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 31 and the case-law cited).

38 With respect to the third condition, it should be recalled that a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places those to whom it applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 107(1) TFEU (see Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 78).

39 On the other hand, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of that article (see *Italy* v *Commission*, paragraph 99).

40 To assess whether a measure is selective, it must be examined whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. However, the concept of State aid does not refer to measures which differentiate between undertakings and are therefore a priori selective where that differentiation arises from the nature or scheme of the system of which they form part (see *British Aggregates* v *Commission*, paragraphs 82 and 83 and the case-law cited).

41 In the present case, even supposing that the application of Article 3(2*bis*)(b) of Decree-Law No 40/2010 may in a particular situation lead to an advantage for a beneficiary of that provision, it must be noted, with respect to the selectiveness of the measure, that it applies generally to all taxpayers who are parties to tax proceedings pending before the Corte suprema di cassazione, whatever the nature of the tax at issue, where those proceedings originate in an application at first instance made more than 10 years before the date of the entry into force of that provision and the tax authorities have been unsuccessful at first and second instance.

42 The fact that only taxpayers satisfying those conditions can benefit from the measure cannot in itself make it into a selective measure. It is clear that persons unable to claim its benefit are not in a comparable factual and legal situation to those taxpayers from the point of view of the national legislature's objective of ensuring compliance with the principle that judgment must be given within a reasonable time.

43 The measure is indeed of limited temporal application, since in order to benefit from it taxpayers must submit an application to the relevant secretariat or registry within a period of 90 days from the entry into force of the law converting the decree into law. However, that limitation is inherent to measures of this kind, which are necessarily one-off measures, and the period appears sufficient to allow all taxpayers to whom this general one-off measure applies to seek to benefit from it.

44 It follows, without there being any need to examine the other conditions mentioned in paragraph 37 above, that a measure such as that in Article 3(2*bis*)(b) of Decree-Law No 40/2010 cannot be classified as State aid.

45 Finally, as regards the obligation to ensure the effective application of European Union law, it follows from all the foregoing that the principle of the prohibition of abuse of rights, Article 4(3) TEU, the freedoms guaranteed by the FEU Treaty, the principle of non-discrimination and the rules on State aid do not preclude the application in a case relating to direct taxation of a provision of national law such as Article 3(2*bis*)(b) of Decree-Law No 40/2010.

46 In the absence of an infringement of European Union law, it cannot therefore be considered that such a provision, in that its consequence, like that of any other provision providing for proceedings to be terminated before a decision is made on their substance, is to prevent the national court of final instance from exercising its power of review of lawfulness in the proceedings concerned in accordance with European Union law, possibly after making a reference to the Court under Article 267 TFEU, is contrary to the obligation on national courts of final instance to ensure, within their respective jurisdictions, the effective application of European Union law.

47 In the light of all those considerations, the answer to the referring court's questions is that European Union law, in particular the principle of the prohibition of abuse of rights, Article 4(3) TEU, the freedoms guaranteed by the FEU Treaty, the principle of non-discrimination, the rules on State aid and the obligation to ensure the effective application of European Union law, must be interpreted as not precluding the application, in a case such as that in the main proceedings relating to direct taxation, of a provision of national law which provides for proceedings pending before the court giving judgment at final instance in tax matters to be concluded in return for payment of a sum equivalent to 5% of the value of the claim, where those proceedings originate in an application made at first instance more than 10 years before the date of entry into force of that provision and the tax authorities have been unsuccessful at first and second instance.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

European Union law, in particular the principle of the prohibition of abuse of rights, Article 4(3) TEU, the freedoms guaranteed by the FEU Treaty, the principle of non-discrimination, the rules on State aid and the obligation to ensure the effective application of European Union law, must be interpreted as not precluding the application, in a case such as that in the main proceedings

relating to direct taxation, of a provision of national law which provides for proceedings pending before the court giving judgment at final instance in tax matters to be concluded in return for payment of a sum equivalent to 5% of the value of the claim, where those proceedings originate in an application made at first instance more than 10 years before the date of entry into force of that provision and the tax authorities have been unsuccessful at first and second instance.

[Signatures]