JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2008 *

In Case C-282/07,

REFERENCE for a preliminary ruling under Article 234 EC by the Cour d'appel de Liège (Belgium), made by decision of 6 June 2007, received at the Court on 13 June 2007, in the proceedings

État belge — SPF Finances

v

Truck Center SA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, Presidents of the Chamber, T. von Danwitz, R. Silva de Lapuerta (Rapporteur), G. Arestis and J. Malenovský, Judges,

* Language of the case: French.

Advocate General: J. Kokott,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2008,

after considering the observations submitted on behalf of:

— Truck Center SA, by X. Thiebaut and X. Pace, avocats,

— the Belgian Government, by C. Pochet and J.-C. Halleux, acting as Agents,

— the French Government, by J.-C. Gracia, acting as Agent,

— the Netherlands Government, by C.M. Wissels and Y. de Vries, acting as Agents,

— the Portuguese Government, by L.I. Fernandes and V.B. Guimarães, acting as Agents,

— the United Kingdom Government, by T. Harris, acting as Agent, assisted by K. Bacon, Barrister,

— the Commission of the European Communities, by J.-P. Keppenne and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2008,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC respectively).

2 The reference has been made in the course of proceedings between the Belgian State and Truck Center SA (formerly Truck Restaurant Habay; 'Truck Center'), which is established in Belgium, concerning the taxation of interest due, during 1994 to 1996, by that company on the repayment of a loan granted by SA Wickler Finances ('Wickler Finances'), established in Luxembourg.

Legal context

3 According to the referring court, the provisions of the national legislation applicable to the main proceedings are as follows.

4 Article 266 of the Code des impôts sur les revenus (Income Tax Code 1992; 'the CIR 1992') provides:

'The King may, under the conditions and within the limits which he shall specify, refrain, wholly or partly, from charging withholding tax on income from capital, movable property and miscellaneous income, provided that it is income of parties whose identity can be established …. '

5 Article 267 of the CIR 1992 reads as follows:

'Allocation or payment of income, in cash or in kind, shall result in the withholding tax becoming due. The placing of income in an account opened in favour of the beneficiary shall in particular be considered to be an allocation, even if that account cannot be drawn on, provided that that situation results from an express or tacit agreement with the beneficiary. …'

6 Articles 105 to 119 of the Royal Decree of 27 August 1993 implementing the Income Tax Code 1992 ('the Royal Decree') deal with the complete or partial waiver of the charging of withholding tax (tax deducted at source on income from movable property).

7 Article 105(3)(b) of the Royal Decree provides that, for the application of those articles, the term 'professional investors' means resident companies.

8 Under Article 107(2)(9)(c) of the Royal Decree, the charging of withholding tax is to be waived completely on income from debt-claims and loans, the beneficiaries of which are identified as professional investors.

9 The Convention between Belgium and Luxembourg for the prevention of double taxation and for the settlement of other matters in the field of taxation of income and capital, and the final protocol relating thereto, signed in Luxembourg on 17 September

1970 ('the Belgium–Luxembourg Convention'), lay down the rules governing the allocation of powers of taxation as between the Kingdom of Belgium and the Grand Duchy of Luxembourg.

10 Article 11 of that Convention provides:

'Article 11 Interest

(1) Interest originating in one Contracting State and allocated to a resident of the other Contracting State shall be taxable in that other State.

(2) However, that interest may be taxed in the Contracting State in which it originates and in accordance with the legislation of that State, but the tax so payable may not exceed 15% of that interest.

(3) By derogation from paragraph (2), interest may not be taxed in the Contracting State in which it originates where it is allocated to an undertaking from the other Contracting State.

The previous paragraph shall not apply in the case of:

1. interest from bonds and other loan stock, with the exception of negotiable instruments representing commercial debts;

2. interest allocated by a company resident in one Contracting State to a company resident in the other Contracting State which holds, directly or indirectly, at least 25% of the shares or shares carrying voting rights in the first company.'

11 Article 23 of the Convention states:

'(1) So far as concerns Luxembourg residents, double taxation shall be avoided in the following manner:

…

2 tax charged in Belgium in accordance with this Convention:

…

(b) on interest subject to the rules laid down in Article 11(2) shall be set off against the tax on that same income which is charged in Luxembourg. The amount thus set off may not, however, exceed either the fraction of the tax which corresponds proportionately to that income received from Belgium or an amount corresponding to the tax which is deducted at source in Luxembourg on equivalent income allocated to Belgian residents. That tax charged in

Belgium can be set off against income taxable in Luxembourg to the extent only that it exceeds the tax which is deducted at source in Luxembourg on equivalent income allocated to Belgian residents.

…'

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

12 On 25 February 1992, Wickler Finances, which held 48% of the share capital of Truck Center, granted to the latter company a loan in the amount of BEF 50 000 000.

13 For the years 1994 to 1996, the interest on that loan was entered in the accounts but not paid, and no withholding tax was retained.

14 On 11 December 1997, notification was sent to Truck Center of automatic assessment to withholding tax at the rates of 13.39% for 1994 and 1995 and 15% for 1996.

15 On 17 December 1998, Truck Center lodged a complaint before the competent regional director for taxes against that automatic assessment.

16 By decision of 15 December 2004, the regional director maintained the principle of applying withholding tax to the interest.

17 On 15 March 2005, Truck Center brought proceedings before the Tribunal de première instance d'Arlon (Court of First Instance, Arlon).

18 By decision of 17 May 2006, the Tribunal de première instance d'Arlon ruled in favour of Truck Center, on the ground that the Belgian legislation was contrary to Article 56 EC in so far as it limited the benefit of the waiver in respect of withholding tax exclusively to companies resident in the Kingdom of Belgium.

19 On 7 July 2006, the Belgian State appealed against that decision to the Cour d'appel de Liège (Court of Appeal, Liège).

20 It was in those circumstances that the Cour d'appel de Liège decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 105(3)(b) and 107(2)(9) of the Royal Decree implementing the CIR 1992 adopted pursuant to Article 266 of the CIR 1992, read in conjunction with Article 23 of the Belgium–Luxembourg Double Taxation Convention …, infringe Article 73 … of the Treaty …, in that, by limiting the waiver in respect of withholding tax provided for in Article 107(2)(9) exclusively to interest allocated to resident companies, they have, in particular, first, the effect of discouraging resident companies from borrowing capital from companies established in another Member State and, second, they constitute for companies established in another Member State an obstacle to investing capital, by way of loans, in companies having their seat in Belgium?'

The question referred for a preliminary ruling

21 By its question, the referring court asks, in essence, whether Articles 73b and 73d of the Treaty preclude legislation of a Member State which provides for the retention of tax at source on interest paid by a company resident in that Member State to a recipient company resident in another Member State, while exempting from that retention interest paid to a recipient company resident in the first Member State.

22 It should be noted at the outset that, in the absence of any unifying or harmonising measures at Community level, in particular under the second indent of Article 293 EC, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double

taxation (see Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 24 and 30; Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 57; Case C-376/03 *D.* [2005] ECR I-5821, paragraph 52; Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 49; Case C-470/04 *N* [2006] ECR I-7409, paragraph 44; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 52; and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 43).

23 However, the fact remains that, as far as the exercise of the power of taxation so allocated is concerned, the Member States may not disregard Community rules (see *Saint-Gobain*, paragraph 58, and *Denkavit Internationaal and Denkavit France*, paragraph 44). In particular, such an allocation of fiscal jurisdiction does not permit Member States to introduce discriminatory measures which are contrary to the Community rules *(Bouanich,* paragraph 50, and *Denkavit Internationaal and Denkavit France*, paragraph 44).

24 In those circumstances, it is necessary to establish whether legislation such as that at issue in the main proceedings falls within the scope of Article 73b of the Treaty concerning the free movement of capital or within the scope of Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Article 58 of the EC Treaty (now Article 48 EC) concerning the freedom of establishment.

25 It should be noted in this regard that, in accordance with settled case-law, national provisions which apply to holdings by nationals of the Member State concerned in the capital of a company established in another Member State, giving them definite influence on the company's decisions and allowing them to determine its activities,

come within the scope of the provisions of the Treaty on freedom of establishment (Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 31; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 27; and Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 29).

26 In the present case, the application of point 2 of the second subparagraph of Article 11(3) of the Belgium–Luxembourg Convention depends on the size of the shareholding which the company receiving the interest holds in the capital of the company paying that interest.

27 Under that provision, interest allocated by a company resident in one Contracting State to a company resident in the other Contracting State which holds, directly or indirectly, at least 25% of the shares or shares carrying voting rights in the first company may be taxed in the Contracting State in which it originates.

28 In addition, according to the order for reference, Wickler Finances held 48% of the capital of Truck Center.

29 In principle, a holding of that magnitude is of such a nature as to confer on Wickler Finances definite influence over the decisions and activities of Truck Center.

30 As a consequence, that legislation must be examined in the light of Articles 52 and 58 of the Treaty.

31 Freedom of establishment, which Article 52 of the Treaty grants to Community nationals and which includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails, in accordance with Article 58 of the Treaty, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Community, the right to exercise their activity in the Member State concerned through a subsidiary, branch or agency (see Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 20; *Saint-Gobain*, paragraph 35; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 41; *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 42; and *Denkavit Internationaal and Denkavit France*, paragraph 20).

32 In the case of companies, it should be borne in mind that their registered office for the purposes of Article 58 of the Treaty serves, in the same way as nationality in the case of individuals, as the connecting factor with the legal system of a Member State. Acceptance of the proposition that the Member State of residence may freely apply different treatment merely by reason of the fact that the registered office of a company is situated in another Member State would deprive Article 52 of the Treaty of all meaning. Freedom of establishment thus aims to guarantee the benefit of national treatment in the host Member State, by prohibiting any discrimination based on the place in which companies have their seat (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 43; *Denkavit Internationaal and Denkavit France*, paragraph 22; and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 77).

33 Furthermore, it is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be regarded as constituting such restrictions (see Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; and *Columbus Container Services*, paragraph 34).

34 In the present case, the effect of the legislation at issue in the main proceedings is that the procedure for the charging of the tax varies depending on the place where the company receiving the interest has its registered office.

35 Under that legislation, withholding tax is charged on interest paid to a non-resident recipient company, whereas it is not charged on interest paid to a resident recipient company, which is taxed, where appropriate, by means of the corporation tax to which the latter company is subject.

36 In order to determine whether a difference in tax treatment is discriminatory, it is, however, necessary to consider whether, having regard to the national measure at issue, the companies concerned are in an objectively comparable situation (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 46).

37 According to well-established case-law, discrimination is defined as treating differently situations which are identical, or as treating in the same way situations which are different (see Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 17; and *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 46).

38 In relation to direct taxes, the situations of residents and non-residents are, as a rule, not comparable (*Schumacker*, paragraph 31, and *Wielockx*, paragraph 18).

39 A difference in the treatment of resident and non-resident taxpayers cannot therefore in itself be categorised as discrimination within the meaning of the Treaty (*Wielockx*, paragraph 19, and *Denkavit Internationaal and Denkavit France*, paragraph 24).

40 It is for that reason necessary to examine whether that is the position in the case in the main proceedings.

41 In that regard, the difference in treatment between companies receiving income from capital, established by the tax legislation at issue in the main proceedings, consisting in the application of different taxation arrangements to companies established in Belgium and to those established in another Member State, relates to situations which are not objectively comparable.

42 Firstly, when both the company paying the interest and the company receiving that interest are resident in Belgium, the position of the Belgian State is different to that in which it finds itself when a company resident in Belgium pays interest to a non-resident company, because, in the first case, the Belgian State acts in its capacity as the State of residence of the companies concerned, while, in the second case, it acts in its capacity as the State in which the interest originates.

43 Secondly, the payment of interest by one resident company to another resident company and the payment of interest by a resident company to a non-resident company give rise to two distinct charges which rest on separate legal bases.

44 Thus, on the one hand, while it is true that withholding tax is not charged on interest paid by one resident company to another resident company, the fact none the less remains that, in accordance with the provisions of the CIR 1992, that interest is taxed by the Belgian State because it remains subject to corporation tax in the hands of the latter company and on the same footing as that company's other income.

45 On the other hand, the Belgian State retains at source withholding tax on interest paid by a resident company to a non-resident company pursuant to the discretionary power which, by virtue of the Belgium–Luxembourg Convention, the Belgian State and the Grand Duchy of Luxembourg have mutually reserved for themselves in the allocation of their powers of taxation.

46 Those different procedures for charging tax thus constitute a corollary to the fact that resident and non-resident recipient companies are subject to different charges.

47 Finally, those different taxation arrangements reflect the difference in the situations in which those companies find themselves with regard to recovery of the tax.

48 While resident recipient companies are directly subject to the supervision of the Belgian tax authorities, which can ensure compulsory recovery of taxes, that is not the case with regard to non-resident recipient companies inasmuch as, in their case, recovery of the tax requires the assistance of the tax authorities of the other Member State.

49 Moreover, in addition to the fact that it relates to situations which are not objectively comparable, the difference in treatment resulting from the tax legislation at issue in the main proceedings does not necessarily procure an advantage for resident recipient companies because, firstly, as was pointed out by the Belgian Government at the hearing, those companies are obliged to make advance payments of corporation tax and, secondly, the amount of withholding tax deducted from the interest paid to a non-resident company is significantly lower than the corporation tax charged on the income of resident companies which receive interest.

50 In those circumstances, that difference in treatment does not constitute a restriction of the freedom of establishment within the terms of Article 52 of the Treaty.

51 As to whether there is a restriction of the movement of capital within the terms of Article 73b of the Treaty, suffice it to hold that the conclusion arrived at in the preceding paragraph of this judgment applies in equal measure to the Treaty provisions relating to the free movement of capital (Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 60, and *Columbus Container Services*, paragraph 56).

52 Consequently, in the light of all the foregoing, the answer to the question referred is that Articles 52, 58, 73b and 73d of the Treaty must be interpreted as not precluding tax legislation of a Member State, such as that at issue in the main proceedings, which provides for the retention of tax at source on interest paid by a company resident in that Member State to a recipient company resident in another Member State, while exempting from that retention interest paid to a recipient company resident in the first Member State, the income of which is taxed in that Member State by way of corporation tax.

Costs

53 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:

Articles 52 of the EC Treaty (now, following amendment, Article 43 EC), 58 of the EC Treaty (now Article 48 EC), 73b of the EC Treaty and 73d of the EC Treaty (now Articles 56 EC and 58 EC respectively) must be interpreted as not precluding tax legislation of a Member State, such as that at issue in the main proceedings, which provides for the retention of tax at source on interest paid by a company resident in that Member State to a recipient company resident in another Member State, while exempting from that retention interest paid to a recipient company resident in the first Member State, the income of which is taxed in that Member State by way of corporation tax.

[Signatures]