Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

13 July 2016*

(Reference for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Restrictions — Tax legislation — Taxation of interest received — Difference in treatment between resident financial institutions and non-resident financial institutions))

In Case C-18/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 29 October 2014, received at the Court on 19 January 2015, in the proceedings

Brisal — Auto Estradas do Litoral SA,

KBC Finance Ireland

v

Fazenda Pública,

THE COURT (Fifth Chamber)

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen (Rapporteur), A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 January 2016,

after considering the observations submitted on behalf of:

— Brisal — Auto Estradas do Litoral SA and KBC Finance Ireland, by J. Lampreia, R. Seabra Moura and F. Antas, advogados,

— the Portuguese Government, by L. Inez Fernandes, J. Martins da Silva and M. Rebelo, acting as Agents,

— the Belgian Government, by J.C. Halleux, N. Zimmer and M. Jacobs, acting as Agents,

— the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

* Language of the case: Portuguese.

— the European Commission, by W. Roels and P. Guerra e Andrade, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU.

2 The request has been made in proceedings between, on the one hand, Brisal – Auto Estradas do Litoral SA ('Brisal'), established in Portugal, and KBC Finance Ireland ('KBC'), a bank established in Ireland, and, on the other, the Fazenda Pública (State Treasury, Portugal), concerning the calculation of corporation tax ('IRC') on interest received by KBC and the collection of that tax at source.

Legal context

Portuguese Law

3 Under Article 4(2) of the Código do Imposto sobre o Rendimento das Pessoas Colectivas (Corporation Tax Code), approved by Decreto-Lei No 442-B/88 (Decree-Law No 442-B/88) of 30 November 1988 (*Diário da República* I, Series I-A, No 277, of 30 November 1988), as amended by Decreto-Lei No 211/2005 (Decree-Law No 211/2005) of 7 December 2005 (*Diário da República* I, Series I-A, No 234 of 7 December 2005) ('the CIRC'), legal persons and other entities which have neither their headquarters nor their place of actual management in Portuguese territory are subject to IRC only in respect of income obtained in that territory. Under Article 4(3)(c) of the CIRC, such income includes interest paid by debtors who are resident, or who have their headquarters or place of actual management, in Portuguese territory, or the payment of which is attributable to a permanent establishment in that State.

4 In the absence of a convention for the avoidance of double taxation, under Article 80(2)(c) of the CIRC such income is taxed, as a rule, at a rate of 20%, and the taxable amount is made up of the gross income received in Portugal. IRC is, in accordance with Article 88(1)(c), Article 88(3)(b) and Article 88(5) of the CIRC, levied by way of definitive retention at source.

5 Income from interest received by resident financial institutions is, by virtue of Article 80(1) of the CIRC, taxed at 25%. However, the taxable amount is made up only of the net amount of the interest received. Furthermore, in accordance with Article 90(1)(a) of the CIRC, IRC, in respect of those financial institutions, is not levied by retention at source.

The double taxation convention between the Portuguese Republic and Ireland

6 Article 11 of the Convenção entre a República Portuguesa e a Irlanda para Evitar a Dupla Tributação e Prevenir a Evasão Fiscal em Matéria de Impostos sobre o Rendimento (Convention between Ireland and the Portuguese Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income), concluded in Dublin on 1 June 1993 (*Diário da República* I, Series I-A, No 144, of 24 June 1994, p. 3310), provides:

'1 — Interest received in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2 — However, such interest may also be taxed in the Contracting State in which it arises, and in accordance with the laws of that State, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 15 percent of the gross amount of such interest.

The competent authorities of the Contracting States shall, by mutual agreement, settle the mode of application of this limitation.

…'

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

7 On 30 September 2004, Brisal entered into an external financing agreement, known as *Loan, Bond and Guarantee Facilities*, in the amount of EUR 262 726 055, designed to guarantee the performance of all the activities covered by a concession contract previously concluded with the Portuguese State. That external financing agreement was concluded with a syndicate of banks, some of which were resident solely in Portuguese territory.

8 On 29 March 2005, that syndicate was extended to other financial institutions, including KBC, by means of a transfer of contract.

9 As regards the part of the contract relating to KBC, Brisal withheld at source, and paid to the Portuguese State, the sum of EUR 59 386 by way of IRC. That amount was calculated on the basis of interest accrued in favour of KBC between September 2005 and September 2007 and totalling EUR 350806.07.

10 On 28 September 2007, Brisal and KBC brought an administrative appeal before the relevant tax authority in which they sought a review of that taxation on the ground that it contravened Article 56 TFEU.

11 Following the dismissal of that administrative appeal, Brisal and KBC brought an application before the Tribunal Administrativo e Fiscal de Sintra (Sintra Administrative and Tax Court, Portugal), which was also unsuccessful. That court took the view that it was clear from the judgment of 22 December 2008 in *Truck Center* (C-282/07, EU:C:2008:762) that the fact that national legislation makes provision for treating resident companies and non-resident companies differently with regard to the obligation to withhold income tax at source does not, in itself, constitute an infringement of the principle of freedom to provide services, since those two categories of companies are not in an objectively comparable situation. That court also added that the Court of Justice had already dismissed an action for failure to fulfil obligations brought by the European Commission against the Portuguese Republic, an action which was based on the same grounds as those relied on by Brisal and KBC in the dispute in the main proceedings.

12 In support of the appeal brought before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), Brisal and KBC claim that the interest received in Portugal by non-resident financial institutions is subject to a withholding tax at a definitive rate of 20%, or at a lower rate if there is an agreement to avoid double taxation — a rate that is applied to gross income — whereas interest received by resident financial institutions, which is not subject to withholding tax, is taxed on its net value at the rate of 25%. Non-resident financial institutions are therefore subject to a heavier tax burden than are resident financial institutions, something which, they submit, is contrary to the freedom to provide services and to the free movement of capital, provided for, respectively, in Articles 56 and 63 TFEU.

13 The Supremo Tribunal Administrativo (Supreme Administrative Court) states that the dispute in the main proceedings concerns the freedom to provide services and that the restrictive effects on the free movement of capital and the freedom of payments are merely the direct and natural consequence of possible restrictions on the freedom to provide services. It is therefore, in its view, appropriate only to examine whether Article 80(2)(c) of the CIRC is compatible with Article 56 TFEU, as interpreted by the Court, in particular in its judgments of 12 June 2003 in *Gerritse* (C-234/01, EU:C:2003:340), 3 October 2006 in *FKP Scorpio Konzertproduktionen* (C-290/04, EU:C:2006:630), and 15 February 2007 in *Centro Equestre da Lezíria Grande* (C-345/04, EU:C:2007:96).

14 In the opinion of that court, it is necessary to refer, not to the judgment of 22 December 2008 in *Truck Center* (C-282/07, EU:C:2008:762), in order to resolve the present case, but rather to the judgment of 12 June 2003 in *Gerritse* (C-234/01, EU:C:2003:340). However, although the rationale of that latter judgment may be regarded as having similarities with the rationale at issue in the case in the main proceedings here, the Court has not, in the view of the referring court, given an express ruling on the taxation of cross-border interest payments involving financial institutions.

15 The question therefore remains open, in the view of the referring court, as to whether resident financial institutions and non-resident financial institutions are in a comparable situation, and whether the taxation in question must take into account, for both, the costs of financing loans granted or the expenses directly related to the economic activity carried out, and, if so, as to what is the difference which can lead to the conclusion that non-resident institutions are actually in a less favourable situation compared with resident institutions. That issue, in its opinion, was also not dealt with in the judgment of 17 June 2010 in *Commission* v *Portugal* (C-105/08, EU:C:2010:345).

16 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 56 TFEU preclude national tax legislation under which financial institutions not resident in Portuguese territory are subject to tax on interest income received in that territory, withheld at source at the definitive rate of 20% (or at a lower rate if there is an agreement to avoid double taxation), a tax applied to *gross* income with no possibility of deducting business expenses directly related to the financial activity carried out, whereas the interest received by resident financial institutions is incorporated in the total taxable income, with deduction of any expenses related to the activity pursued when determining the profit for the purposes of [IRC], so that the basic rate of 25% is applied to the *net* interest income?

(2) Does the same hold good even if the tax base of resident financial institutions, after deduction of the financing costs related to the interest income, or of expenses directly related, economically, to such income, is or may be subject to a higher tax than is deducted at source from the gross income of non-resident institutions?

(3) For this purpose, can the financing costs associated with the loans granted, or the expenses directly related, economically, to the interest income received, be proved by the data provided by the Euribor (Euro Interbank Offered Rate) and by the Libor (London Interbank Offered Rate), which represent the average interest rates charged on interbank financing used by banks to carry out their activity?’

Consideration of the questions referred for a preliminary ruling

17 It must be stated at the outset that, given that the facts at issue in the main proceedings took place before 1 December 2009, that is to say, before the entry into force of the FEU Treaty, the interpretation sought by the referring court must be regarded as concerning Article 49 EC, and not Article 56 TFEU.

18 By its questions, which it is appropriate to consider together, the referring court asks, in essence, first, whether Article 49 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings, which taxes non-resident financial institutions by means of withholding tax on income from interest received inside the country with no possibility of deducting business expenses, whereas resident financial institutions are not subject to such withholding tax and may deduct business expenses directly related to the financial activity pursued, and secondly, how those expenses should be determined.

19 In order to answer those questions, it is necessary, first of all, to examine whether Article 49 EC precludes national legislation under which withholding tax is applied to the income of non-resident financial institutions, whereas the income received by resident financial institutions is not subject to such tax. Next, it is necessary to determine whether the fact that non-residents, unlike residents, cannot deduct business expenses directly related to the financial activity in question constitutes a restriction for the purposes of that provision, and, if so, whether such a restriction can be justified. Finally, it is necessary to determine whether average interest rates such as those referred to in the request for a preliminary ruling can be regarded as constituting business expenses directly related to the financial activity in question.

20 As regards the first of those issues, it is clear from the request for a preliminary ruling that the referring court itself takes the view that the difference in treatment at issue in the main proceedings does not stem so much from the application of two different taxation methods as from the refusal to allow non-resident financial institutions the opportunity to deduct business expenses, whereas resident financial institutions do have that opportunity. Moreover, the file submitted to the Court does not contain any other information relating to that first aspect of the order for reference.

21 In those circumstances, suffice it to recall, as the Advocate General stated in point 22 of her Opinion, that it is clear from the case-law of the Court that the application of withholding tax, as a method of taxation, to non-resident service providers, when resident service providers are not subject to such tax, whilst constituting a restriction on the freedom to provide services, may be justified by overriding reasons in the general interest, such as the need to ensure the effective collection of tax (see, to that effect, judgments of 3 October 2006 in *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 35, and 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 39).

22 Therefore, Article 49 EC must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which a procedure for withholding tax at source is applied to the income of non-resident financial institutions in the Member State in which the services are provided, whereas the income received by financial institutions resident in that Member State is not subject to such withholding tax, provided that the application to the non-resident financial institutions of the withholding tax is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued.

23 As regards the second aspect of the request for a preliminary ruling, it must be recalled that the Court has already held, in relation to the deduction of business expenses which have a direct connection to the activity pursued, that resident providers and non-resident providers are in a comparable situation (see, to that effect, judgments of 12 June 2003 in *Gerritse*, C-234/01, EU:C:2003:340, paragraph 27; 6 July 2006 in *Conijn*, C-346/04, EU:C:2006:445, paragraph 20; and 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 23).

24 The Court concluded that Article 49 EC precludes national tax legislation which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses (judgments of 12 June 2003 in *Gerritse*, C-234/01, EU:C:2003:340, paragraphs 29 and 55; 3 October 2006 in *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 42; and 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 23).

25 In the present case, in view of the argument, relied on in particular by the Portuguese Government, that the provision of services by financial institutions should, in the light of the principle of the freedom to provide services referred to in Article 49 EC, as a matter of principle, be treated differently from the provision of services in other areas of activity, given that it would be impossible to establish any characteristic link between costs incurred and interest income received, the referring court is unsure whether the case-law cited in the preceding paragraph can be applied to the case in the main proceedings.

26 In that regard, it must be pointed out that the Court has not established any distinction between the different categories of services. In addition, Article 49 EC, read in conjunction with Article 50 EC, refers, without distinction, to all the categories of services listed in the latter provision. Only Article 51(2) EC provides that the liberalisation of banking services connected with movements of capital is to be effected in step with the liberalisation of the movement of capital. The provisions of the EC Treaty on the free movement of capital do not contain anything to support the argument that banking services should be treated differently from other services due to the fact that it is impossible to establish any characteristic link between costs incurred and interest income received.

27 Consequently, the services provided by financial institutions cannot, in the light of the principle of the freedom to provide services referred to in Article 49 EC, as a matter of principle, be treated differently from the provision of services in other areas of activity.

28 It follows that national legislation, such as that at issue in the main proceedings, under which non-resident financial institutions are taxed on the interest income received within the Member State concerned, without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions, constitutes a restriction on the freedom to provide services which is prohibited, as a rule, by Article 49 EC.

29 However, in accordance with settled case-law of the Court, a restriction on the freedom to provide services may be permitted if it is justified by overriding reasons in the public interest. Even if that were so, the application of that restriction would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (judgment of 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 36).

30 It is appropriate therefore to determine whether a restriction such as that at issue in the main proceedings can be validly justified by the reasons relied on in the present case.

31 In that regard, first, it is clear from the order for reference that the justification put forward before the national court is derived from the fact that a more favourable tax rate is applied to non-resident financial institutions than the one which is applied to resident financial institutions.

32 However, the Court has repeatedly held that unfavourable tax treatment contrary to a fundamental freedom cannot be regarded as compatible with EU law because of the potential existence of other advantages (see, to that effect, judgments of 1 July 2010 in *Dijkman and Dijkman-Lavaleije*, C-233/09, EU:C:2010:397, paragraph 41, and 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 31).

33 It follows that a restriction on the freedom to provide services, such as that at issue in the main proceedings, cannot be justified by the fact that non-resident financial institutions are subject to a tax rate which is lower than the rate for resident financial institutions.

34 Secondly, in the proceedings before the Court, the Portuguese Republic argued that the legislation at issue in the main proceedings is justified by the need to preserve a balanced allocation of taxation powers between the Member States, by the desire to prevent the double taxation of the business expenses at issue and by the need to ensure the effective collection of tax.

35 As regards, first, the balanced allocation of taxation powers between Member States, it should be borne in mind that the Court has, admittedly, accepted that the preservation of the balanced allocation of taxation powers between Member States constitutes a legitimate objective and that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, with a view to eliminating double taxation (judgment of 21 May 2015 in *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 42).

36 However, it is also clear from the case-law of the Court that, where Member States make use of that freedom and determine the connecting factors for the allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation, they are required to respect the principle of equal treatment and the freedoms of movement guaranteed by primary EU law (see, to that effect, judgment of 19 November 2015 in *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 37).

37 As the Advocate General has stated in points 59 to 62 of her Opinion, there is in the present case nothing which can explain in what way the allocation of taxation powers require that non-resident financial institutions, with regard to the deduction of business expenses directly related to their taxable income in that Member State, must be treated less favourably than resident financial institutions.

38 Secondly, as regards the desire to prevent double deduction of business expenses, which may be linked to the fight against tax evasion, suffice it to state that, by merely relying on, without further clarification, the potential risk that the expenses in question may be deducted a second time in the State of residence of the service provider, without establishing how that risk was not prevented by the implementation of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), in force at the time of the facts at issue in the main proceedings, the Portuguese Republic does not make it possible for the Court to assess the scope of that argument (see, to that effect, judgment of 24 February 2015 in *Grünewald*, C-559/13, EU:C:2015:109, paragraph 52).

39 Thirdly, as regards the need to ensure the effective collection of tax, it must be recalled that, although the Court has held that such an objective constitutes an overriding reason of public interest, capable of justifying a restriction on the freedom to provide services (see, inter alia, judgments of 3 October 2006 in *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraphs 35 and 36, and 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 39), that restriction must still be applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (judgment of 18 October 2012 in *X*, C-498/10, EU:C:2012:635, paragraph 36).

40 With regard to a restriction such as that at issue in the main proceedings, it is important to note that such a restriction is not necessary to ensure the effective collection of IRC.

41 As the Advocate General stated in points 70 to 72 of her Opinion, it must first be pointed out that the argument advanced by the Portuguese Republic, to the effect that giving taxpayers with limited liability the opportunity to deduct business expenses directly related to the services provided in the territory of that Member State would give rise to an administrative burden for the national tax authorities, also applies, *mutatis mutandis*, in the case of taxpayers with unlimited liability.

42 Next, the additional administrative burden which may fall on the recipient of the service, where the latter must enter into the accounts the business expenses which the service provider seeks to deduct, exists only in a system which provides that that deduction must be made before withholding tax is applied and may therefore be avoided in the case where the service provider is authorised to claim its right to deduction directly from the authorities once IRC has been levied. In such a case, the right to deduct will take the form of a reimbursement of a fraction of the tax withheld at source.

43 Finally, it is for the service provider to decide whether it is appropriate to invest resources in drawing up and translating documents intended to demonstrate the genuineness and the actual amount of the business expenses which it seeks to deduct.

44 With regard to the third aspect of the request for a preliminary ruling, that is to say, how to determine the business expenses directly related to interest income arising from a financial loan agreement such as that at issue in the main proceedings, it must be recalled that the Court has held that a Member State which grants residents the opportunity to deduct such expenses may not, in principle, preclude the deduction of those same expenses for non-residents (judgment of 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 23).

45 It follows that, as regards the account to be taken of those expenses, non-residents must, in principle, be treated in the same way as residents and must be able to deduct the same expenses as those which residents are allowed to deduct.

46 Furthermore, it is clear from the case-law of the Court that business expenses directly related to the income received in the Member State in which the activity is pursued must be understood as expenses occasioned by the activity in question, and therefore necessary for pursuing that activity (see, to that effect, judgment of 24 February 2015 in *Grünewald*, C-559/13, EU:C:2015:109, paragraph 30 and the case-law cited).

47 With regard to the service at issue in the main proceedings, that is to say, the granting of a loan, it must be noted that the performance of that service necessarily gives rise to business expenses such as, for example, travel and accommodation expenses, and legal or tax advice, for which it is relatively easy both to establish the direct link with the loan in question and to prove the actual amount involved. Since taxpayers with limited liability must be able to enjoy the same treatment as taxpayers with unlimited liability, they must be granted, as regards those expenses, the same opportunities to make deductions, whilst being subject to the same requirements as regards, in particular, the burden of proof.

48 It is important to add that the pursuit of that activity also occasions financing costs which must, in principle, be regarded as necessary to the pursuit of that activity, but in respect of which it may prove more difficult to establish a direct link with a given loan or the actual amount involved. The same is true, as the Advocate General stated in point 39 of her Opinion, as regards the fraction of the general expenses of the financial institution which may be regarded as necessary for the granting of a particular loan.

49 Nevertheless, the mere fact that that evidence is more difficult to provide cannot authorise a Member State to deny categorically to non-residents, as taxpayers with limited liability, a deduction which it grants to residents, as taxpayers with unlimited liability, given that it cannot *a priori* be ruled out that a non-resident is able to provide relevant documentary evidence enabling the tax authorities of the

Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the business expenses in respect of which deduction is sought (see, by analogy, judgments of 27 January 2009 in *Persche*, C-318/07, EU:C:2009:33, paragraph 53, and 26 May 2016 in *Kohll and Kohll-Schlesser*, C-300/15, EU:C:2016:361, paragraph 55).

50 Nothing prevents the tax authorities concerned from requiring a non-resident to provide such proof as they may consider necessary in order to determine whether the conditions for deducting expenses provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested (see, by analogy, judgments of 27 January 2009 in *Persche*, C-318/07, EU:C:2009:33, paragraph 54, and 26 May 2016 in *Kohll and Kohll-Schlesser*, C-300/15, EU:C:2016:361, paragraph 56).

51 In that context, it must be noted that the Portuguese Government did not provide any indication of the reasons which might prevent the national tax authorities from taking into account evidence provided by non-resident financial institutions.

52 It is for the referring court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the main proceedings, first, which of the expenses claimed by KBC may be regarded as business expenses directly related to the financial activity in question for the purposes of national legislation, and secondly, what is the fraction of the general expenses which may be regarded as directly related to that activity (see, by analogy, judgment of 15 February 2007 in *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 26).

53 In that regard, it is appropriate to add that, unless national legislation authorises resident financial institutions to use, in the calculation of the financing costs incurred, interest rates such as those mentioned by the referring court in its third question for a preliminary ruling, that court cannot take those rates into account in a situation such as that at issue in the main proceedings.

54 Those rates constitute only average rates charged in the context of interbank financing and do not correspond to the financing costs actually incurred. Furthermore, as is apparent from the file submitted to the Court, the loan at issue in the main proceedings was not financed exclusively by funds borrowed from KBC's parent company and other banks, but was also financed through funds deposited by KBC's clients.

55 Therefore, in light of all the foregoing considerations, the answer to the questions referred for a preliminary ruling is that:

— Article 49 EC does not preclude national legislation under which a procedure for withholding tax at source is applied to the income of financial institutions that are not resident in the Member State in which the services are provided, whereas the income received by financial institutions that are resident in that Member State is not subject to such withholding tax, provided that the application of the withholding tax to the non-resident financial institutions is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued;

— Article 49 EC precludes national legislation, such as that at issue in the main proceedings, which, as a general rule, taxes non-resident financial institutions on the interest income received within the Member State concerned without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions;

— it is for the national court to assess, on the basis of its national law, which business expenses may be regarded as being directly related to the activity in question.

Costs

56 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 (Fifth Chamber), hereby rules:

Article 49 EC does not preclude national legislation under which a procedure for withholding tax at source is applied to the income of financial institutions that are not resident in the Member State in which the services are provided, whereas the income received by financial institutions that are resident in that Member State is not subject to such withholding tax, provided that the application of the withholding tax to the non-resident financial institutions is justified by an overriding reason in the general interest and does not go beyond what is necessary to attain the objective pursued.

Article 49 EC precludes national legislation, such as that at issue in the main proceedings, which, as a general rule, taxes non-resident financial institutions on the interest income received within the Member State concerned without giving them the opportunity to deduct business expenses directly related to the activity in question, whereas such an opportunity is given to resident financial institutions.

It is for the national court to assess, on the basis of its national law, which business expenses may be regarded as being directly related to the activity in question.

[Signatures]