JUDGMENT OF THE COURT (Third Chamber)
10 March 2005 *

In Case C-39/04,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tribunal administratif, Dijon (France), made by decision of 30 December 2003, received at the Court on 2 February 2004, in the proceedings

Laboratoires Fournier SA

v

Direction des vérifications nationales et internationales

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet, S. von Bahr (Rapporteur), J. Malenovský and U. Lõhmus, Judges,

* Language of the case: French.

Advocate General: F.G. Jacobs,
Registrar: K. Sztranc, Administratror,

having regard to the written procedure and further to the hearing on 28 October 2004,

after considering the observations submitted on behalf of:

— Laboratoires Fournier SA, by B. Eme, avocat,

— the French Government, by C. Jurgensen-Mercier, acting as Agent,

— the Commission of the European Communities, by R. Lyal and C. Giolito, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 49 EC in relation to national legislation providing for a a tax credit for research available solely for research activities carried out in France.

2 The reference was made in the context of proceedings between Laboratoires Fournier SA ('Fournier'), a company governed by French law, and the Direction des vérifications nationales et internationales de la direction générale des impôts du ministère de l'Économie, des Finances et de l'Industrie (National and International Audit Directorate, Ministry of the Economy, Finance and Industry) ('Direction des vérifications') concerning adjustments, which had been notified by the latter and resulted from the fact that a tax credit for research which Fournier had received in respect of corporation tax had been challenged.

National legislation

3 Article 244(c)B of the French Code général des impôts (General Tax Code) ('Code général'), in the version in force at the time of the facts giving rise to the main proceedings, provided:

'I. Industrial and commercial or agricultural undertakings assessed on their actual profit may receive a tax credit equal to 50% of the amount by which research expenditure in the course of a year exceeds the average expenditure of the same nature, recalculated in line with any increase in the retail price index excluding tobacco, incurred in the course of the two preceding years ...'

4 Article 49(g)H of Annex III to the Code général provided, in the version in force at the time of the facts giving rise to the main proceedings:

'Expenditure relating to activities carried out in France gives rise to entitlement to the tax credit mentioned in Article 244(c)B of the Code général des impôts.'

The main proceedings and the questions referred for a preliminary ruling

5 The order for reference indicates that Fournier, which manufactures and sells pharmaceuticals, subcontracted to research centres based in various Member States numerous research projects and took the resultant expenditure into account in calculating its tax credit for research for the years 1995 and 1996.

6 In 1998 Fournier was audited for those years.

7 Following that audit, tax adjustment notices were issued to Fournier, pursuant to Article 244(c)B of the Code général and Article 49(g)H of Annex III to that code, as the Direction des vérifications had disallowed the aforementioned expenditure for the calculation of the tax credit for research claimed by Fournier. The resultant additional tax assessments were levied on Fournier for the period at issue in the main proceedings.

8 Fournier lodged an objection against those assessments. That objection was rejected on 25 July 2001.

9 Fournier brought proceedings before the Tribunal administratif (Administrative Court), Dijon, on 8 September 2001. By that application it seeks the discharge of the additional assessments to corporation tax resulting from the adjustments notified to it, together with interest for late payment.

10 The national court states that Fournier submits that Article 244(c)B of the Code général and Article 49(g)H of Annex III to that code are contrary to Article 49 EC.

11 According to the national court, the Direction des vérifications maintains that, by its judgment in Case C-204/90 *Bachmann* [1992] ECR I-249, the Court accepted that the requirements of Article 49 EC may be restricted with the aim of preserving the coherence of the domestic tax system in each Member State.

12 In those circumstances, the Tribunal administratif, Dijon, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'Are the provisions mentioned in Article 244(c)B of the Code général des impôts and in Article 49(g)H of Annex III to the said code, in so far as they restrict the benefit of the tax credit for research to research activities performed in France, contrary to the provisions of Article 49 [EC]?

If the answer to that question is in the affirmative, is the condition that the research activities be performed in France laid down by those tax provisions partaking of the principle of coherence of corporation tax and thus allowing restriction of the requirements of Article 49 [EC]?'

On the questions referred for a preliminary ruling

13 By its two questions, which it is appropriate to consider together, the national court asks essentially whether Article 49 EC precludes legislation of a Member State which restricts the benefit of a tax credit for research only to research carried out in that Member State.

14 Although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law (see, inter alia, Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, and Case C-242/03 *Weidert and Paulus* [2004] ECR I-7379, paragraph 12).

15 Moreover, the legislation of a Member State, such as that at issue in the main proceedings, by restricting the benefit of a tax credit for research only to research carried out in that Member State, makes the provision of services constituted by the research activity subject to different tax arrangements depending on whether it is carried out in other Member States or in the Member State concerned (see, to that effect, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 21).

16 Such legislation differentiates according to the place where the services are provided, contrary to Article 49 EC.

17 The French Government submits, however, that that difference of treatment flows directly from the principle of fiscal territoriality, which the Court expressly recognised in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 22, and hence cannot be regarded as giving rise to overt or covert discrimination prohibited by the EC Treaty.

18 In that case, however, the Court was considering the compatibility with the Treaty provisions on the freedom of establishment of national tax rules applying to resident and non-resident undertakings, whereas the main proceedings in the present case involve an assessment of the compatibility with the Treaty of national tax provisions which confer a benefit on companies established in a Member State in return for the provision of services provided on their behalf in that Member State alone. Such provisions are contrary to Article 49 EC because they are, albeit indirectly, based upon the place of establishment of the provider of services and are consequently liable to restrict its cross-border activities.

19 It is however necessary to determine whether the unequal treatment under such provisions may be justified having regard to the Treaty provisions on the freedom to provide services.

20 Although it is true that It is true that in *Bachmann* (paragraph 28) and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 21, the Court accepted that the need to safeguard the coherence of the tax system could justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. Subsequently, however, it has stated that, in *Bachmann* and *Commission* v *Belgium*, there was a direct link, with respect to the taxpayer subject to income tax, between the deductibility of the insurance contributions from taxable income and the later taxation of the sums paid by the insurers under pension and life assurance contracts, and that link had to be maintained in order to preserve the coherence of the tax system concerned (see, inter alia, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 18, and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42). Where there is no such direct link, the argument based on the need to safeguard the coherence of the tax system cannot be relied upon (see, inter alia, *Weidert and Paulus*, paragraphs 20 and 21).

21 In a situation such as that in the main proceedings, there is no such direct link between general corporation tax, on the one hand, and a tax credit for part of the research expenditure incurred by a company, on the other.

22 The French Government submits, however, that the national legislation in question in the main proceedings is justified by the objective of promoting research and by the need to ensure effective fiscal supervision.

23 Although the promotion of research and development may, as argued by the French Government, be an overriding reason relating to public interest, the fact remains that it cannot justify a national measure such as that at issue in the main proceedings, which refuses the benefit of a tax credit for research for any research not carried out in the Member State concerned. Such legislation is directly contrary to the objective of the Community policy on research and technological development which, according to Article 163(1) EC is, inter alia, 'strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level'. Article 163(2) EC provides in particular that, for this purpose, the Community is to 'support [undertakings'] efforts to cooperate with one another, aiming, notably, at enabling [them] to exploit the internal market potential to the full, in particular through ... the removal of legal and fiscal obstacles to that cooperation.'

24 Effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty (see, inter alia, *Futura Participations and Singer*, paragraph 31). A Member State may therefore apply measures which enable the amount of costs deductible in that State as research expenditure to be ascertained clearly and precisely (Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18).

25 However, national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred and satisfies the prescribed requirements cannot be justified in the name of effectiveness of fiscal supervision. The possibility cannot be excluded a priori that the taxpayer 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 research expenditure incurred in other Member States (see *Baxter and Others*, paragraphs 19 and 20).

26 Accordingly, the answer to the questions referred must be that Article 49 EC precludes legislation of a Member State which restricts the benefit of a tax credit for research only to research carried out in that Member State.

Costs

27 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 (Third Chamber) rules as follows:

Article 49 EC precludes legislation of a Member State which restricts the benefit of a tax credit for research only to research carried out in that Member State.

[Signatures]