Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

23 November 2017*

(Reference for a preliminary ruling — Freedom of establishment — Direct taxation — Corporation tax — Directive 90/434/EEC — Article 10(2) — Transfer of assets — Non-resident permanent establishment transferred, in the course of a transfer of assets, to a receiving company also non-resident — Right of the Member State of the transferring company to tax that establishment's profits or capital gains resulting from the transfer of assets — National legislation providing for immediate taxation of the profits or capital gains in the year of transfer — Collection of the tax due as revenue of the tax year in which the transfer of assets took place)

In Case C-292/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland), made by decision of 20 May 2016, received at the Court on 25 May 2016, in the proceedings brought by

A Oy,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund (Rapporteur), J.-C. Bonichot, A. Arabadjiev and E. Regan, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2017,

after considering the observations submitted on behalf of:

– A Oy, by T. Torkkel,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the German Government, by T. Henze, acting as Agent,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, U. Persson and N. Otte Widgren, acting as Agents,

– the European Commission, by W. Roels and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2017,

* Language of the case: Finnish.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU and Article 10(2) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1, 'the Mergers Directive').

2 **The request has been made in proceedings brought before the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) by A Oy, a company incorporated under Finnish law, concerning the immediate taxation of the capital gains of a non-resident permanent establishment of that company resulting from the transfer of that establishment to a company that was also non-resident in the course of a transfer of assets, and the collection of the tax due as revenue of the tax year in which the transfer took place.**

Legal context

EU law

3 In accordance with Article 2(c) of the Mergers Directive:

'For the purposes of this Directive:

…

(c) "transfer of assets" shall mean an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;

…'

4 Article 10(2) of the Mergers Directive provides:

'… Where the Member State of the transferring company applies a system of taxing worldwide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.'

Finnish law

5 Under the first indent of the first subparagraph of Paragraph 9 of the Tuloverolaki (Law on income tax), a person, corporation, joint venture or estate of a deceased person, resident in Finland in the tax year, is obliged to pay income tax on income received from there and elsewhere (general tax liability).

6 The Mergers Directive was transposed into Finnish law by the Laki elinkeinotulon verottamisesta annetun lain muuttamisesta (1733/1995) (Law amending the law on taxation of business income) of 29 December 1995, which entered into force on 1 January 1996.

7 The third subparagraph of Paragraph 52e of the Laki elinkeinotulon verottamisesta (Law on taxation of business income), as so amended, ('the EVL') states as follows:

'If the transferred assets and liabilities are connected with a Finnish corporation's permanent establishment in another Member State of the European Union, the probable disposal price of the assets and the provisions deducted in the taxation of the income of the permanent establishment are to be regarded as taxable income of the transferring company. From the tax payable on that income in Finland there is deducted the tax which would have been paid in the State in which the permanent establishment is situated were it not for the provisions of the [Mergers Directive] mentioned in Paragraph 52.'

8 According to the statement of reasons for the draft law which became the Law amending the law on taxation of business income, the third subparagraph of Paragraph 52e of the EVL, which transposes the derogation in Article 10(2) of the Mergers Directive into Finnish law, concerns situations in which, by reason of the transfer of the assets of a non-resident permanent establishment to a company that is also non-resident, those assets are no longer within Finland's tax jurisdiction. In such a situation, the market value of the transferred assets, like the provisions deducted previously in the taxation in Finland of that permanent establishment, are included in the permanent establishment's taxable income in the tax year in which the transfer takes place. The tax due in Finland on the income to be realised is reduced by the tax which would be levied on the same income in the Member State of the permanent establishment if the directive did not apply.

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

9 In 2006, in the course of a transfer of assets, A transferred a permanent establishment in Austria to an Austrian company and received in return shares in that company. Pursuant to the third subparagraph of Paragraph 52e of the EVL, A was taxed on the capital gains resulting from that operation for the 2006 tax year, and the tax was collected in that tax year.

10 A applied to the Verotuksen oikaisulautakunta (Tax Appeals Board, Finland) for rectification. When that application was rejected, A brought proceedings before the Helsingin hallinto-oikeus (Administrative Court, Helsinki), arguing that the legislation at issue in the main proceedings was an obstacle to freedom of establishment, since in an equivalent national situation taxation would not take place until the time of realisation of the capital gains, that is, the disposal of the assets transferred.

11 The referring court states that, according to t**he Veronsaajien oikeudenvalvontayksikkö (Tax recipients' legal services unit, Finland)**, the third subparagraph of Paragraph 52e of the EVL cannot be regarded as contrary to EU rules and legal principles, since the purpose of that provision is to transpose Article 10(2) of the Mergers Directive into Finnish law.

12 The referring court observes, however, that while Article 10(2) allows the taxation of capital gains in a situation such as that at issue in the main proceedings, it does not determine the point in time at which that taxation is to take place.

13 The referring court is therefore uncertain whether, by providing for the taxation of the capital gains in the tax year in which the transfer of assets takes place, whereas in an equivalent national situation the taxation does not take place until the income is realised, that is, the transferred assets are disposed of, the legislation at issue in the main proceedings constitutes a restriction of freedom of establishment. If that is the case, it asks whether the legislation may be justified by an overriding reason of the public interest in connection with the distribution of powers of taxation between the Member States and, if so, whether it is proportionate to that objective.

14 In those circumstances, the Helsingin hallinto-oikeus (Administrative Court, Helsinki) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 49 TFEU preclude Finnish legislation under which, where a Finnish company, by way of a transfer of activity, transfers assets of a permanent establishment situated in another EU Member State to a company established in that State in return for new shares, the transfer of the assets is taxed immediately in the year of transfer, but in a corresponding national situation is not taxed until the time of realisation?

(2) Is there indirect or direct discrimination if Finland levies tax immediately in the year of the transfer of activity before the income has been realised, and in a domestic situation not until the time of realisation?

(3) If the answer to Questions 1 and 2 is in the affirmative, may the restriction of the right of establishment be justified on grounds such as an overriding reason of the public interest or the preservation of the national power of taxation? Does the prohibited restriction comply with the principle of proportionality?’

Consideration of the questions referred

15 By its questions, which should be considered together, the referring court essentially asks whether Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, where a resident company, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident, first, provides for the immediate taxation of the capital gains resulting from the transfer and, second, does not allow deferred collection of the tax, whereas in an equivalent national situation such capital gains are not taxed until the disposal of the transferred assets.

16 It should be noted, as a preliminary point, that it is common ground that the operation at issue in the main proceedings, by which A transferred a non-resident permanent establishment to a company that was also non-resident, is a transfer of assets within the meaning of Article 2(c) of the Mergers Directive. It is also not in dispute that the taxation of the capital gains of the permanent establishment resulting from that operation is covered by Article 10(2) of the Mergers Directive.

17 It follows from Article 10(2) of the Mergers Directive that, where the assets transferred in a merger, division or transfer of assets include a permanent establishment of the transferring company situated in a Member State other than that of the company, the Member State of the transferring company has the right, if it applies a system of taxing worldwide profits, to tax the profits or capital gains of that permanent establishment resulting from the transfer, on condition that it gives relief for the tax that, but for the provisions of that directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.

18 That provision thus authorises the Member State of the transferring company to tax the profits or capital gains resulting from a merger, division or transfer of assets, provided that that State complies with the conditions set out in that provision.

19 In the present case, the documents before the Court show that, under the legislation at issue in the main proceedings, first, the capital gains of a non-resident permanent establishment of a resident company are taxed when the permanent establishment is transferred, in the course of a transfer of assets, to a company that is also non-resident. The tax due is reduced by the tax which, were it not

for the provisions of the Mergers Directive, would have been charged on those capital gains in the Member State in which the permanent establishment is situated. Second, the tax is collected as revenue of the tax year in which such an operation takes place.

20 By providing for the taxation of such capital gains while giving relief for the tax which, were it not for the provisions of that directive, would have been charged on them in the Member State in which the permanent establishment is situated, that legislation confines itself to exercising the option given to the Member States in Article 10(2) of the Mergers Directive.

21 On the other hand, neither Article 10(2) nor any other article of the Mergers Directive contains provisions on when the collection of the tax due is to take place.

22 It is therefore for the Member States, in compliance with EU law, to lay down such provisions.

23 According to the Court's case-law, operations covered by the Mergers Directive are a particular method of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore economic activities in respect of which the Member States are required to comply with that freedom (see, to that effect, judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraph 28 and the case-law cited).

24 It is settled case-law of the Court that Article 49 TFEU requires the abolition of restrictions of freedom of establishment. Even though, according to their wording, the provisions of the FEU Treaty on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraph 58 and the case-law cited).

25 All measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions of that freedom (judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraph 59 and the case-law cited).

26 In the present case, the documents before the Court show that it is only where a resident company, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident that the legislation at issue in the main proceedings provides for immediate taxation of the capital gains and for collection of the tax due as revenue of the tax year in which the transfer of assets takes place.

27 Such a difference in treatment may deter companies established in Finland from exercising an economic activity in another Member State through a permanent establishment, and is therefore an impediment to freedom of establishment.

28 Such an impediment is permissible only if it relates to situations which are not objectively comparable or if it can be justified by overriding reasons of the public interest recognised by EU law. It is further necessary, in such a case, that it is appropriate for ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective (judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 42 and the case-law cited).

29 As to whether the situations are comparable, it must be stated that, with reference to legislation of a Member State which seeks to tax capital gains generated within its tax jurisdiction, the situation of a company which, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident is, as regards the taxation of the capital gains of that permanent establishment which were generated within the tax jurisdiction of that Member State

before the transfer, comparable to that of a resident company which, in the course of a transfer of assets, transfers a permanent establishment to another resident company (see, to that effect, judgment of 21 May 2015, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 38 and the case-law cited).

30 As to whether the impediment can be justified by overriding reasons of the public interest recognised by EU law, it must be recalled, first, that the need to preserve the allocation of powers of taxation between Member States is a legitimate objective recognised by the Court, and that, in the absence of any unifying or harmonising measures of 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, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 42 and the case-law cited).

31 Second, in accordance with the principle of fiscal territoriality, a Member State is entitled, in the case of a transfer of a non-resident permanent establishment to a non-resident company by way of a transfer of assets, to charge tax at the time of the transfer on the capital gains generated within its tax jurisdiction before the transfer. Such a measure is intended to prevent situations that might jeopardise the right of that Member State to exercise its powers of taxation in relation to activities carried on within that jurisdiction (see, to that effect, judgment of 21 May 2015, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 43 and the case-law cited).

32 Therefore the transfer of a non-resident permanent establishment of a resident company, by way of a transfer of assets, to a non-resident company cannot mean that the Member State concerned must waive its right to tax the capital gains generated within its tax jurisdiction before the transfer (see, to that effect, judgment of 21 May 2015, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 44).

33 In the present case, since the transfer, in the course of a transfer of assets, of a non-resident establishment to a company that is also non-resident has the consequence of depriving Finland of any link with that establishment, and hence of its power to tax the capital gains relating to the assets of the permanent establishment after the transfer, it must be considered that national legislation such as that at issue in the main proceedings is appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States.

34 As to the proportionality of the legislation at issue in the main proceedings, it follows from the Court's case-law, first, that it is in accordance with the principle of proportionality for the Member State of the transferring company, for the purpose of safeguarding the exercise of its powers of taxation, to determine the amount of tax on the capital gains generated within its tax jurisdiction at the time when its tax jurisdiction over the assets concerned ceases to exist, in the present case at the time of the transfer in question (see, to that effect, judgment of 21 May 2015, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 48 and the case-law cited).

35 It has been held, second, that legislation of a Member State offering a taxpayer the choice between immediate payment of tax, which creates a disadvantage for the taxpayer in terms of cash flow but frees it from subsequent administrative burdens, and deferred payment of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the taxpayer in connection with tracing the transferred assets, constitutes a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, is less harmful to freedom of establishment than immediate collection of the tax due (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 73).

36 As regards the administrative burden, the Court has explained that the taxpayer should be given the option to choose between, on the one hand, bearing the administrative burden relating to deferred payment of tax and, on the other, immediate collection of the tax. If the taxpayer considers that the

burden is not excessive and chooses to bear it, the burden to be borne by the tax authorities cannot be regarded as excessive either (see, to that effect, judgment of 16 April 2015, *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 73 and the case-law cited).

37 It follows that, in so far as the legislation at issue in the main proceedings does not give a resident company which, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident the choice between immediate payment of tax on the capital gains of that permanent establishment, on the one hand, and, deferred payment of that tax, on the other, that legislation goes beyond what is necessary to attain the objective of preserving the allocation of powers of taxation between the Member States.

38 That assessment cannot be called in question by the fact that the legislation, pursuant to Article 10(2) of the Mergers Directive, gives relief for the tax that, but for the provisions of that directive, would have been charged on such capital gains in the Member State in which the non-resident permanent establishment is situated, given that the disproportionality of that legislation does not derive from the amount of tax due but from the fact that it makes no provision for the taxpayer to defer the time at which it is collected (see, to that effect, judgment of 14 September 2017, *Trustees of the P Panayi Accumulation & Maintenance Settlements*, C-646/15, EU:C:2017:682, paragraph 60).

39 As regards the justification based on the need to ensure the effective collection of tax, raised by the German and Swedish Governments, it should be observed that, while the Court has previously accepted that it may constitute an overriding reason of the public interest capable of justifying a restriction of the freedoms of movement guaranteed by the FEU Treaty (see, to that effect, judgment of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 46 and the case-law cited), the legislation at issue in the main proceedings is not appropriate for attaining it, so that that objective cannot, in a case such as that in the main proceedings, justify an impediment to freedom of establishment. As the Commission observed, for a Member State to allow a resident transferring company to opt for deferred payment of tax would not affect that Member State's possibility of requesting from that company the necessary information for collecting the tax due or of proceeding effectively to collecting it (see, by analogy, judgment of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraphs 49 to 53).

40 In the light of all the above considerations, the answer to the questions referred is that Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, where a resident company, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident, first, provides for the immediate taxation of the capital gains resulting from the transfer and, second, does not allow deferred collection of the tax, whereas in an equivalent national situation such capital gains are not taxed until the disposal of the transferred assets, in so far as that legislation does not allow the deferred collection of the tax.

Costs

41 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 (First Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, where a resident company, in the course of a transfer of assets, transfers a non-resident permanent establishment to a company that is also non-resident, first,

provides for the immediate taxation of the capital gains resulting from the transfer and, second, does not allow deferred collection of the tax, whereas in an equivalent national situation such capital gains are not taxed until the disposal of the transferred assets, in so far as that legislation does not allow the deferred collection of the tax.

[Signatures]