JUDGMENT OF THE COURT (First Chamber)

1 July 2010 *

In Case C-233/09,

REFERENCE for a preliminary ruling under Article 234 EC from the hof van beroep te Antwerpen (Belgium), made by decision of 16 June 2009, received at the Court on 26 June 2009, in the proceedings

Gerhard Dijkman,

Maria Dijkman-Lavaleije

v

Belgische Staat,

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, E. Levits (Rapporteur), M. Ilešič, M. Safjan and M. Berger, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Dijkman and Ms Dijkman-Lavaleije, by themselves,

— the Belgian Government, by J.-C. Halleux, acting as Agent,

— the European Commission, by R. Lyal and W. Roels, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 56(1) EC.

2 The reference has been made in the course of proceedings between Mr Dijkman and Ms Dijkman-Lavaleije and the Belgische Staat (Belgian State) concerning the refusal of the Belgian tax authorities to reimburse them, in particular, the municipal tax additional to personal income tax ('the supplementary municipal tax') levied for the years of assessment 2004 and 2005 in proportion to the personal income tax ('PIT') imposed on certain income from moveable assets from investments made in the Netherlands.

National legal context

3 Under Article 261 of the Income Tax Code 1992 ('TC 1992'), the following are among those liable to pay withholding tax: residents of the Kingdom of Belgium, resident

companies, associations, institutions, establishments and bodies; legal persons subject to corporation tax which are liable to pay income from capital and moveable assets and intermediaries established in Belgium who intervene in any capacity in the payment of income from capital and moveable assets from abroad, unless, in particular, it is shown that the deduction of withholding tax was effected by a previous intermediary.

4 Under Article 313 of the ITC 1992, taxpayers subject to PIT are not required to state in their annual tax return either the income from capital and moveable assets in respect of which withholding tax has been paid or income which is exempt from withholding tax by law or regulation, without prejudice to certain types of income not at issue in the main proceedings. The withholding tax due on such undeclared income may neither be set against PIT due nor refunded.

5 Article 465 of the ITC 1992 provides that conurbations and municipalities may establish a tax additional to PIT.

6 Article 466 of the ITC 1992 provides:

'Supplementary municipal tax … and conurbation tax additional to [PIT] shall be calculated on the assessed [PIT]:

— before deduction of the advance payments referred to in Articles 157 to 168 and 175 to 177, withholding tax, the fixed percentage of foreign tax and tax credits, referred to in Articles 134 and 277 to 296;

— before application of the increases provided for in Articles 157 to 168, the subsidy provided for in Articles 175 to 177 and the tax increases provided for in Article 444.'

7 Under Article 467 of the ITC 1992, the tax additional to PIT is established either by a municipality or a conurbation, chargeable to the residents of the Kingdom of Belgium who are liable to tax either in the municipality or in the municipalities making up the conurbation.

8 Article 468 of the ITC 1992 provides:

'The supplementary tax shall be set for all the taxpayers of the same conurbation or municipality at a standard percentage of the tax due to the State.

... .'

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

9 The applicants in the main proceedings, Belgian residents, declared, in their PIT return for the year of assessment 2004, income from moveable assets received abroad, in the present case from the Netherlands, namely deposit interest amounting to EUR 33 780 and dividends amounting to EUR 90 030.52, without deduction of withholding tax.

10 In the assessment relating to the 2004 tax year, that interest and those dividends were taxed separately at rates of 15% and 25% respectively. Furthermore, the tax so assessed was increased by the supplementary municipal tax, set by the municipality of the applicants' residence at 8% of the tax owed to the State.

11 The applicants in the main proceedings lodged an objection to that assessment, contesting, first, the levying of the 25% tax on the dividends, on the ground that tax had already been levied in the Kingdom of the Netherlands on dividends originating in that country, and, secondly, the levying of the supplementary municipal tax.

12 For the year of assessment 2005, the applicants in the main proceedings submitted a PIT return in which they declared, inter alia, income from moveable assets received abroad, namely dividends amounting to EUR 14 551.23 for Mr Dijkman and EUR 15 359.53 for Ms Dijkman-Lavaleije, in respect of which there was no deduction of withholding tax.

13 Since those amounts were taxed separately at a rate of 25% in the assessment relating to that tax year and were also subject to the corresponding supplementary municipal tax, the applicants in the main proceedings lodged an objection to that assessment, setting out the same complaints as those in respect of the 2004 year of assessment.

14 Upon rejection of their objections, the applicants in the main proceedings brought proceedings before the rechtbank van eerste aanleg van Antwerpen (court of first instance, Antwerp), which dismissed their actions.

15 Before the hof van beroep te Antwerpen (court of appeal, Antwerp), the applicants in the main proceedings requested, first, that the Netherlands withholding tax levied on the dividends declared for the years of assessment 2004 and 2005 be set off against the PIT due in Belgium and, consequently, that the Belgische Staat be ordered to reimburse them the amounts of EUR 11 906 and EUR 3 479, being the State taxes levied on those dividends. Secondly, they requested reimbursement of the amounts of EUR 2 206 and EUR 800 corresponding to the supplementary municipal tax.

16 The hof van beroep te Antwerpen held that the claims of the applicants in the main proceedings concerning the offsetting of the Netherlands withholding tax against the tax due in Belgium were unfounded.

17 Concerning the supplementary municipal tax, that court finds that, when taxpayers receive foreign income from moveable assets which has not yet been subject to withholding tax, they may not benefit from the arrangement provided for in Article 313 of the ITC 1992 relating to release upon payment of withholding tax from the obligation to declare certain income ('exonerating withholding tax') and are obliged to declare that income. When income from moveable assets is declared, the supplementary municipal tax is always due pursuant to Articles 465 and 466 of the ITC 1992. By contrast, when taxpayers receive income from Belgian moveable assets, that income is subject to exonerating withholding tax. Under the system of exonerating withholding tax, the amount of income from moveable assets which has been taxed at source need not be declared and is consequently not subject to the supplementary municipal tax. The only way that the taxpayers in this case could benefit from the arrangement provided for in Article 313 of the ITC 1992 and thus avoid the supplementary municipal tax on their foreign income from moveable assets would be by having that income paid out by a Belgian intermediary, who would deduct withholding tax.

18 In those circumstances, the hof van beroep te Antwerpen decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it an infringement of Article 56(1) EC for residents of Belgium who invest in other countries, such as the Netherlands, with a view to avoiding the supplementary municipal tax due under Article 465 of the [ITC 1992] to be obliged to use a Belgian intermediary for the payment out of income from moveable assets, whereas residents of Belgium who invest in Belgium always benefit from the system of exonerating withholding tax under Article 313 of the [ITC 1992] and are thus able to avoid the supplementary municipal tax provided for in Article 465 of the [ITC 1992], since withholding tax on moveable assets has already been withheld at source?'

The question referred for a preliminary ruling

19 By its question, the referring court asks essentially whether Article 56 EC precludes legislation of a Member State under which taxpayers resident in that Member State who receive interest or dividends from investments made in another Member State are subject to a supplementary municipal tax where they have not elected that that income from moveable assets be paid to them by an intermediary established in their Member State of residence, whereas the same type of income from investments made in their Member State of residence can, due to the fact that it is subject to withholding tax at source, avoid being declared and, in that case, is not subject to such a tax.

The existence of a restriction on the fundamental freedoms guaranteed by the EC Treaty

20 It should be recalled that, according to well-established case law, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with European Union law (see, *inter alia*, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16; and Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 28).

21 It must first of all be noted that the Belgian Government considers that the present case must be examined under Article 49 EC and not under Article 56 EC. According to that government, since only Belgian intermediaries can deduct the exonerating withholding tax, whether or not a taxpayer resident in Belgium who invests capital in another Member State can benefit from the system of that withholding tax depends on the place where he receives his income from moveable assets, and not on the place where he invested his capital.

22 It is therefore necessary to determine at the outset whether, and to what extent, national legislation such as that at issue in the main proceedings is liable to affect the exercise of the freedom to provide services and the free movement of capital.

23 It should be borne in mind, first, that Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides

similar services (see Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 51 and the case-law cited).

24 Furthermore, it is settled case-law that Article 49 EC confers rights not only on the provider of services but also on the recipient (see, to that effect, Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 32 and the case-law cited).

25 Secondly, measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of Article 56(1) EC (see, *inter alia*, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 18; and Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* ECR I-5093, paragraph 33).

26 It is apparent from settled case-law that, in order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the Treaty, the purpose of the legislation concerned must be taken into consideration (see, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22 and the case-law cited).

27 Legislation such as that at issue in the main proceedings introduces a difference in treatment on the basis both of the origin of the income of resident taxpayers from moveable assets and of the service provider who pays them that income.

28 In particular, first, as stated by the referring court, the legislation at issue in the main proceedings introduces a difference in treatment as between income of Belgian residents from moveable assets from investments made in another Member State and income from investments made in Belgium, the former needing to be declared and, consequently, subject to supplementary taxation, namely the supplementary municipal tax, whereas the latter is exempted therefrom as a result of the system of exonerating withholding tax.

29 Secondly, as the Belgian Government contends, a Belgian resident who has made investments in another Member State can elect that the income from moveable assets relating to those investments be paid to him by an intermediary established in Belgium, in which case that income can benefit from the system of exonerating withholding tax and, therefore, escape the supplementary municipal tax. The payment of income from investments made in another Member State constitutes a provision of services within the meaning of Article 49 EC.

30 Such legislation is, consequently, liable to affect the exercise of both the free movement of capital and the freedom to provide services.

31 The introduction by a Member State of a difference in treatment on the basis of the place of investment of capital thus has the effect of discouraging residents of that Member State from investing their capital in a company established in another Member State and also has a restrictive effect on companies established in other Member States in that it constitutes an obstacle to their raising capital in the first Member State (see, to that effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 166, and Case C-436/06 *Grønfeldt* [2007] ECR I-12357, paragraph 14).

32 Similarly, since only intermediaries established in Belgium can collect the exonerating withholding tax, national legislation such as that at issue in the main proceedings puts intermediaries established in Belgium in a more advantageous position to provide services linked to the payment to Belgian residents of income from investments made in other Member States than intermediaries established in those other Member States and, consequently, makes the services of the latter less attractive.

33 However, it is apparent from the case-law that the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the main proceedings, that one of them is entirely secondary in relation to the other and may be considered together with it (Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34; see also, by analogy, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 37).

34 In the present case, the dispute in the main proceedings relates to the levying of supplementary municipal tax on income from investments made in another Member State and concerns therefore the consequences of the exercise of the free movement of capital for resident taxpayers.

35 Thus, it is precisely the exercise of that freedom which results, for the taxpayer, in the need to elect an intermediary for the payment of income from the investments concerned. The choice of that intermediary and, consequently, the issues concerning the freedom to provide services are, in such a situation, secondary in relation to the issues concerning the free movement of capital.

36 Therefore, in the light of the considerations set out in paragraph 31 of the present judgment, it must be held that national legislation, such as that at issue in the main proceedings, constitutes a restriction on the free movement of capital, prohibited, in principle, by Article 56 EC.

37 That conclusion is not undermined by the Belgian Government's arguments which, first, seek to minimise the effects of the difference in treatment resulting from the national legislation at issue in the main proceedings and, secondly, contend that, concerning the system of exonerating withholding tax, a taxpayer who invests in Belgium is in a different position from a taxpayer who invests in another Member State.

38 Concerning the first point, it should first of all be noted that, with regard to the treatment of the interest and dividends at issue in the main proceedings, it is irrelevant that certain other types of income from moveable assets are not subject to exonerating withholding tax even where they are received in Belgium and are, as a result, always subject to supplementary municipal tax, since interest and dividends of the same type which are received in Belgium are subject to the system of withholding tax.

39 The Belgian Government also contends that the difference in treatment does not necessarily unfavourably affect the recipients of income from moveable assets from another Member State, inasmuch as the payment of the tax by means of exonerating withholding tax results in a cash-flow disadvantage for the taxpayer, who is immediately deprived of the amount of that tax, whereas, where the tax is paid in the normal context of the PIT assessment, he can retain that amount in general for two years and, therefore, receive income therefrom.

40 In that regard, it should be stated that the imposition, by a Member State, of a supplementary tax on income from moveable assets from investments made in another Member State, as opposed to income from investments made in the first Member State, constitutes in itself unfavourable tax treatment which is inconsistent with the free movement of capital.

41 In accordance with the case-law, unfavourable tax treatment contrary to a fundamental freedom cannot be considered to be compatible with European Union law as a result of the existence of other advantages, even supposing that such advantages exist (see, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 61, and *Amurta*, paragraph 75).

42 Moreover, a restriction on a fundamental freedom is prohibited by the Treaty, even if it is of limited scope or minor importance (see, to that effect, Case C-34/98 *Commission* v *France* [2000] ECR I-995, paragraph 49; Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 43; and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 50).

43 The Belgian Government cannot therefore successfully contend that charging income from investments made in another Member State to supplementary municipal tax can be compensated by the cash-flow advantage which would result to resident taxpayers who receive that income, in contrast to the income of resident taxpayers from investments made in the Member State of residence, which is subject to withholding tax.

44 Concerning the second point, the Belgian Government submits that the situation of a taxpayer who has made investments in Belgium differs from that of a taxpayer who has made investments in another Member State. In the latter case, the management and collection of exonerating withholding tax cannot be entrusted to the

non-resident person liable to pay out income from moveable assets without there being a likelihood of recovery difficulties in the event of an insufficient payment of that withholding tax. In Case C-282/07 *Truck Center* [2008] ECR I-10767, the Court implicitly acknowledged that such difficulties are not satisfactorily resolved by international recovery assistance instruments and that taxpayers established abroad are therefore in a different situation from resident taxpayers with regard to the recovery of the tax.

45 In that regard, it suffices to note that, in the context of legislation such as that at issue in the main proceedings, a resident taxpayer who has received income from investments made in another Member State is just as liable to pay tax on that income in his Member State of residence as a resident taxpayer who has received income from investments made in that latter Member State.

46 Therefore, in such a situation, the fact that that income is subject to different taxation arrangements is precisely what gives rise to the difference in treatment which results in only income received from investments made in another Member State being necessarily subject to the supplementary municipal tax, but it does not reflect a different situation on the part of the taxpayers concerned with regard to that tax.

47 Concerning a tax such as that at issue in the main proceedings, established by the conurbations and municipalities for all the taxpayers of the same conurbation or municipality and the basis of assessment of which is personal income tax, a resident taxpayer who receives income from investments made in another Member State is not in

a situation which is objectively different from that of a resident taxpayer who receives income from investments made in his Member State of residence.

48 In those circumstances, it must be held that Member State legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital.

The justification for the restriction on the free movement of capital

49 As is apparent from settled case-law, national measures restricting the free movement of capital may be justified on the grounds set out in Article 58 EC or by overriding reasons in the public interest provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (see, to that effect, Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraphs 72 and 73 and the case-law cited).

50 According to the Belgian Government, the legislation at issue in the main proceedings is justified by reasons relating to the coherence and specific nature of the Belgian tax system and the need to guarantee the effectiveness of fiscal supervision.

51 Thus, in its submission, the monopoly granted to intermediaries established in Belgium regarding the drafting of the ad hoc declaration of the deduction and payment of the withholding tax is inherent to the Belgian tax system and constitutes a method of tax collection which is simple for taxpayers and cheap for the State, since

intermediaries who are liable for that withholding tax bear the administrative burden of the collection and payment of that tax.

52 By centralising the collection of tax on income from moveable assets received from abroad on Belgian intermediaries, the Belgian tax system rationalises control measures by limiting them to a few hundred actors, which, by allowing the financial flows of each intermediary who is liable for the withholding tax to be comprehensively monitored, guarantees the effectiveness of fiscal supervision. If the personal taxpayer resident in Belgium were allowed to deduct the withholding tax due on his own income from moveable assets received from abroad, such monitoring of those flows would be rendered almost impossible, because it would be necessary to assess them on the basis of the withholding tax declarations made by millions of actors.

53 Likewise, authorising (i) persons liable to pay out income from movable assets or (ii) financial intermediaries established in another Member State to collect exonerating withholding tax on behalf of Belgian residents would also not allow the effectiveness of fiscal supervision by the Belgian tax authorities to be guaranteed, as international instruments to facilitate the establishment of taxes could not entirely guarantee the effectiveness of fiscal supervision so far as traders established in other Member States are concerned.

54 With regard to the grounds of justification thus mentioned, it must be pointed out that the Court has already acknowledged that the need to maintain the coherence of a tax system can justify a restriction on the exercise of fundamental freedoms guaranteed by the Treaty (Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 43).

55 For an argument based on such a justification to succeed, the Court requires, however, that a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (see *Papillon*, paragraph 44 and the case-law cited).

56 As has already been held in paragraph 46 of this judgment, a difference in treatment such as that at issue in the main proceedings is not limited to the application of different taxation arrangements according to whether the income concerned derives from investments made in another Member State or in the Member State of residence. The different taxation arrangements concerned result in income from moveable assets from an investment made in another Member State, and not subject to withholding tax, being liable to an additional tax in the form of the supplementary municipal tax, whereas income from an investment made in Belgium can be exempt from that municipal tax by virtue of the fact that it need not be declared where it has been subject to withholding tax.

57 The Belgian Government, however, has not shown that there is any particular tax levy offsetting the advantage represented by that exemption.

58 Secondly, the Court has acknowledged that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty (see, to that effect, *X and Passenheim-van Schoot*, paragraph 45 and the case-law cited).

59 However, although the need to maintain the effectiveness of fiscal supervision may support the Belgian Government's view that the levying of the exonerating withholding

tax can be effected only by intermediaries established in Belgium, it cannot justify the fact that income subject to that withholding tax and income not so subject are treated differently for the purposes of the supplementary municipal tax.

60 Moreover, the Court has already held that practical difficulties cannot of themselves justify the infringement of a fundamental freedom guaranteed by the Treaty (see *Papillon*, paragraph 54 and the case-law cited).

61 Therefore, it must be held that the grounds put forward by the Belgian Government cannot justify the restriction on the free movement of capital resulting from legislation such as that at issue in the main proceedings.

62 In light of the foregoing, the answer to the question referred is that Article 56 EC precludes legislation of a Member State according to which taxpayers resident in that Member State who receive interest or dividends from investments made in another Member State are subject to a supplementary municipal tax when they have not elected for that income from moveable assets to be paid to them by an intermediary established in their Member State of residence, whereas income of the same type from investments made in their Member State of residence, because it is subject to withholding tax at source, need not be declared and, in that case, is not subject to the supplementary municipal tax.

Costs

63 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 56 EC precludes legislation of a Member State according to which taxpayers resident in that Member State who receive interest or dividends from investments made in another Member State are subject to a supplementary municipal tax when they have not elected for that income from moveable assets to be paid to them by an intermediary established in their Member State of residence, whereas income of the same type from investments made in their Member State of residence, because it is subject to withholding tax at source, need not be declared and, in that case, is not subject to the supplementary municipal tax.

[Signatures]