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JUDGMENT OF THE COURT (First Chamber)

5 July 2012 (*)

(Freedom to provide services — Tax legislation — Deduction as business expenses of expenses incurred as payment for the provision of services — Expenses incurred in relation to a service provider established in another Member State in which that provider is not subject to tax on income or is subject there to a tax regime which is appreciably more advantageous — Deductibility conditional upon the provision of proof of the genuine and proper nature of the services and the normal nature of the related payments — Obstacle — Justification — Combating tax evasion and avoidance — Effectiveness of fiscal supervision — Balanced allocation between Member States of the power to impose taxes — Proportionality)

In Case C-318/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Belgium), made by decision of 18 June 2010, received at the Court on 2 July 2010, in the proceedings

Société d'investissement pour l'agriculture tropicale SA (SIAT)

v

État belge,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, E. Levits (Rapporteur), J.-J. Kasel and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2011,

after considering the observations submitted on behalf of:

– the Société d'investissement pour l'agriculture tropicale SA (SIAT), by D. Garabedian and E. Traversa, lawyers,

– the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,

– the French Government, by G. de Bergues and N. Rouam, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes and J. Menezes Leitão and by S. Jaulino, acting as Agents,

– the United Kingdom Government, by H. Walker, acting as Agent,

– the European Commission, by R. Lyal and J.-P. Keppenne, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 29 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 49 EC.

2 The reference has been made in proceedings between the Société d'investissement pour l'agriculture tropicale SA ('SIAT') and the État Belge, represented by the Minister for Finance, regarding the refusal of the Minister for Finance to deduct, as business expenses, the sum of BEF 28 402 251 which SIAT had entered as expenses in its accounts made up to 31 December 1997.

National legal context

3 Article 26 of the Code des impôts sur les revenus of 1992 ('the 1992 Income Tax Code') provides:

'Without prejudice to the application of Article 49, and subject to Article 54, where an undertaking established in Belgium grants unusual or gratuitous advantages, those advantages shall be added to its own profits, unless they are used in order to determine the taxable income of the recipients.

Notwithstanding the restriction laid down in the first paragraph, unusual or gratuitous advantages shall be added to the undertaking's own profits where those advantages are granted to:

…

2. a taxpayer as referred to in Article 227, or a foreign establishment, which, by virtue of the legislation of the country of establishment, is not subject there to a tax on income or is subject there to a tax regime which is appreciably more advantageous than the applicable tax regime in Belgium;

…'

4 Article 49 of the 1992 Income Tax Code provides:

'Expenditure shall be regarded as deductible business expenses if it has been incurred or borne by the taxpayer during the taxable period for the purposes of acquiring or retaining taxable income and if the authenticity and amount of that expenditure is demonstrated by documentary evidence or, where that is not possible, by any other form of evidence admissible under general law, other than by oath.

Expenditure shall be treated as having been incurred or borne during the taxable period if, during that period, it was actually paid or borne or if it acquired the characteristics of proven and established debts or losses and is entered as such in the accounts.'

5 Under Article 53 of the 1992 Income Tax Code:

'Business expenses shall not include:

…

10. any expenditure which exceeds business needs to an unreasonable extent;

…’

6 Article 54 of the 1992 Income Tax Code is worded as follows:

‘Interest, fees for granting use of patents, manufacturing processes and other similar rights or payments for supplies or services shall not be regarded as business expenses where they are made or attributed, directly or indirectly, to a taxpayer as referred to in Article 227, or to a foreign establishment, which, by virtue of the legislation of the country of establishment, is not subject there to a tax on income or is subject there to a tax regime which is appreciably more advantageous than the applicable tax regime in Belgium, unless the taxpayer proves, by any legal means, that such payments relate to genuine and proper transactions and do not exceed the normal limits.’

7 Under Article 227(2) of the 1992 Income Tax Code, foreign companies which do not have their seat, principal place of business or centre of management or administration in Belgium are among those entities which are subject to the tax on non-residents.

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

8 In 1991, SIAT — a Belgian company — established a joint subsidiary with a Nigerian group for the exploitation of palm plantations with a view to the production of palm oil.

9 Under the agreements between the parties, SIAT was to supply services in return for payment and to sell equipment to the joint subsidiary, but was required — as commission for the introduction of business — to give back part of the profit which it obtained from that subsidiary to the company heading the Nigerian group, namely, a Luxembourg company called Megatrade International SA (‘MISA’).

10 In 1997, discussions took place between the parties regarding the exact amount of the commission payable by SIAT. Those discussions culminated in the termination of the partnership and in an undertaking by SIAT to pay MISA USD 2 000 000 in settlement of all accounts.

11 Accordingly, SIAT entered as expenses in its accounts made up to 31 December 1997 the sum of BEF 28 402 251 for payment of the commission payable to MISA.

12 Noting that MISA had the status of a holding company governed by the Luxembourg Loi sur le régime fiscal des sociétés de participations financières (Law on the tax regime governing financial holding companies) of 31 July 1929 and was accordingly not liable to pay any tax analogous to the corporation tax applicable in Belgium, the Belgian tax authority (‘the tax authority’) applied Article 54 of the 1992 Income Tax Code and did not allow the sum of BEF 28 402 251 to be deducted as business expenses.

13 Following the action brought by SIAT challenging the tax authority’s decision, the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) (Belgium), by judgment of 21 February 2003, and the Cour d’appel de Bruxelles (Court of Appeal, Brussels), by judgment of 12 March 2008, upheld the tax authority’s position.

14 SIAT brought an appeal before the Belgian Cour de cassation (Court of Cassation), which, having some doubts as to the interpretation of Article 49 EC, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article [49 EC], in the version applicable to the present case (the facts giving rise to the dispute having occurred prior to the entry into force of the Treaty of Lisbon on 1 December 2009), be interpreted as precluding national legislation of a Member State under which payments for supplies or services are not to be regarded as deductible business expenses where they are made or attributed directly or indirectly to a taxpayer resident in another Member State, or to a foreign establishment, which, by virtue of the legislation in the country of establishment, is not subject there to a tax on income or is subject there, as regards the relevant income, to a tax regime which is appreciably more advantageous than the applicable tax regime in the Member State whose national legislation is at issue, unless the taxpayer proves, by any legal means, that such payments relate to genuine and proper transactions and do not exceed the normal limits, whereas such proof is not required as a precondition for the deduction of payments for supplies or services made to a taxpayer residing in that Member State, even if that taxpayer is not subject to any tax on income or is subject to a tax regime which is appreciably more advantageous than the tax regime provided for under the ordinary law of that State?'

Consideration of the question referred

Preliminary observations

15 As is clear from the order for reference and from the observations submitted to the Court, the general rule relating to the deduction of business expenses is laid down in Article 49 of the 1992 Income Tax Code, under which expenditure is to be regarded as deductible business expenses if it is necessary for acquiring or retaining taxable income and if the taxpayer demonstrates the authenticity and amount of that expenditure ('the general rule').

16 In the case before the referring court, SIAT calls in question the compatibility with EU law of the special rule laid down in Article 54 of the 1992 Income Tax Code, which the tax authority relied on as a basis for refusing SIAT's application for the deduction of business expenses. Under that provision, payments for supplies or services made by Belgian taxpayers to taxpayers established in another Member State, in which the latter are not subject to tax on income or are subject there, as regards the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in Belgium, are not to be regarded as deductible business expenses unless the Belgian taxpayer provides proof that such payments relate to a genuine and proper transaction and do not exceed the normal limits ('the special rule').

17 It is accordingly appropriate to hold that, by its question, the referring court is in essence asking whether Article 49 EC is to be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which payments made by a resident taxpayer to a non-resident company for supplies or services are not to be regarded as deductible business expenses where the non-resident company is not subject, in the Member State of establishment, to tax on income or is subject, as regards the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in the former Member State, unless the taxpayer proves that such payments relate to genuine and proper transactions and do not exceed the normal limits, whereas, under the general rule, such payments are to be regarded as deductible business expenses if they are necessary for acquiring or retaining taxable income and if the taxpayer demonstrates the authenticity and amount of those expenses.

Existence of a restriction on the freedom to provide services

18 The Court has consistently held that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services entirely within a single Member State (see, inter alia, Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, paragraph 32 and the case-law cited). Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (see, inter alia, Case

C-330/07 *Jobra* [2008] ECR I-9099, paragraph 19, and Case C-287/10 *Tankreederei I* [2010] ECR I-14233, paragraph 15).

19 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 Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 34; Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 32; and Case C-233/09 *Dijkman and Dijkman-Lavaleije* [2010] ECR I-6645, paragraph 24).

20 That said, it cannot — contrary to the assertions made by the French Government in its written observations — be found that, as regards the deduction of business expenses, the same substantive criteria apply under the general rule as under the special rule.

21 Thus, under the general rule, the taxpayer must provide proof of the authenticity and amount of the expenditure incurred, there being a presumption on the part of the tax authority, according to the Belgian Government, that the expenditure is necessary for acquiring or retaining taxable income. In addition, under Article 53(10) of the 1992 Income Tax Code, the amount of that expenditure must not exceed business needs to an unreasonable extent.

22 By contrast, under the special rule, in order to rebut the presumption that that expenditure is not deductible, the taxpayer must prove, first, that it relates to genuine and proper transactions, which means — according to the administrative guidelines for the 1992 Income Tax Code, to which both SIAT and the Commission have made reference before the Court — that he must prove that the expenditure falls within the normal framework of business transactions, that it meets an industrial, commercial or financial need and that, over time, recompense is forthcoming, or should as a rule be forthcoming, through the activities of the undertaking as a whole. It also follows from that commentary that it is not sufficient, in this connection, to submit acts and documents which meet legal requirements as to form, but that it is essential above all that the tax authority official be reasonably satisfied that the transactions in question are genuine and proper. As the Belgian Government notes in its written observations as submitted to the Court, in order to obtain a deduction, the resident taxpayer must prove that there has been no simulation of business transactions.

23 Secondly, the taxpayer must prove that the business expenses in question do not exceed the normal limits, which means, according to the explanations provided by the Belgian Government at the hearing before the Court, that a comparison must be made between the transaction in question and the normal practice of operators on the market, whereas — as was noted in paragraph 21 above — in the case of business expenses incurred towards taxpayers established in Belgium, Article 53(10) of the 1992 Income Tax Code prohibits the deduction only of those expenses which are shown to be ‘unreasonable’.

24 Accordingly, it should be observed that the presumption that business expenses are not deductible, as well as the substantive conditions for their deductibility, as laid down in Article 54 of the 1992 Income Tax Code, make it more difficult to obtain such a deduction on the basis of that provision than under the general rule laid down in Article 49 of that Code.

25 In addition, it should be emphasised that the special rule may be applied where payments are made to suppliers who, by virtue of the legislation of the Member State in which they are established, are not subject there to a tax on income or are subject there, in respect of the relevant income, to a ‘tax regime which is appreciably more advantageous than the applicable regime in Belgium’.

26 As the Belgian Government acknowledges, in the absence of a statutory definition, or

administrative instructions as to what is to be understood by ‘a tax regime which is appreciably more advantageous than the applicable regime in Belgium’, the assessment concerning the applicability of the special rule is carried out on a case-by-case basis by the tax authority, under the supervision of the national courts.

27 In those circumstances, the scope of that special rule is not delimited with sufficient precision at the outset and, in a situation where the service provider is established in a Member State other than the Kingdom of Belgium and is subject there to a tax regime which is more advantageous than the applicable regime in Belgium, there is uncertainty as to whether the foreign regime will be considered to be a ‘regime which is appreciably more advantageous’ and whether, as a result, the special rule will apply.

28 Accordingly, that special rule — which lays down stricter conditions for being allowed to deduct business expenses than those laid down in the general rule and the scope of which has not been delimited with precision beforehand — is liable both to dissuade Belgian taxpayers from exercising their right to the freedom to provide services and from making use of the services of providers established in another Member State and to dissuade those providers from offering their services to recipients established in Belgium (see, to that effect, Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 28 and the case-law cited).

29 It follows that Article 54 of the 1992 Income Tax Code constitutes a restriction on the freedom to provide services for the purposes of Article 49 EC.

30 That conclusion is not undermined by the arguments of the Belgian, French and Portuguese Governments, according to which, in the light of the requirements relating to the burden of proof, a resident taxpayer who makes a payment to another resident finds himself in a situation which is objectively different from that of a resident taxpayer making a payment to a non-resident who is subject to a tax regime which is appreciably more advantageous than the Belgian tax regime. Those governments claim, in essence, that the risk that the transaction would have as its essential aim the circumvention of the tax normally payable exists only in the latter situation and that the resident taxpayer who is the recipient of the services is better placed to produce the evidence relating to the genuine and proper nature of the transaction, since service providers established in a Member State other than the Kingdom of Belgium are not directly subject to the supervision of the Belgian tax authority.

31 It should be noted that, with regard to the tax advantage — namely, the possibility of deducting as business expenses those payments made to a service provider — the recipient of those services who resides in Belgium is not placed in a different situation depending on whether the service provider is established in the same Member State or whether the provider is subject, in another Member State, to a more or less advantageous tax regime. In all of those situations, it is possible that the recipients of the services have incurred genuine expenses, justifying their deduction as business expenses where the necessary conditions for receiving that tax advantage are satisfied.

32 It is true that non-resident service providers are not directly subject to the supervision of the Belgian tax authority. However, the difference in treatment at issue in the main proceedings does not concern the service providers, depending on whether or not they are established in Belgium, but the resident recipients of those services who are directly subject to the supervision of that authority. As it is, with regard to those recipients, not only can the tax authority impose conditions which must be met if the tax advantage is to be allowed, which are intended to ensure that the advantage is not granted in cases where the transaction has as its essential aim the circumvention of the tax normally payable, but it can also carry out the necessary inspections and checks for those purposes.

33 In those circumstances, the fact that, from the point of view of the tax authority, the risk of tax evasion is higher in certain situations than in others does not detract from the fact that the recipients of the services are in similar situations.

Justification of the restriction on the freedom to provide services

34 It is clear from the case-law of the Court that a restriction on the freedom to provide services is regarded as warranted only if it pursues a legitimate objective compatible with the EC Treaty and is justified by overriding reasons relating to the public interest, in which case it must be suitable for securing the attainment of that objective and must not go beyond what is necessary in order to do so (see, inter alia, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 101; and *Jobra*, paragraph 27).

35 According to the Belgian, French, Portuguese and United Kingdom Governments and the Commission, the legislation at issue in the main proceedings can be justified by the need to combat tax avoidance and evasion, by the need to preserve the balanced allocation between Member States of the power to impose taxes and, according to the French and Portuguese Governments, by the need to ensure the effectiveness of fiscal supervision.

36 In that regard, the Court has already held that the prevention of tax evasion is an overriding reason relating to the public interest, capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty (see, inter alia, Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 81), as is the need to guarantee the effectiveness of fiscal supervision (see, inter alia, Case C-101/05 *A* [2007] ECR I-11531, paragraph 55).

37 By the same token, it has been held that a restriction on the exercise of freedom of movement within the European Union can be justified in order to safeguard the allocation between the Member States of the power to impose taxes (see Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, paragraph 121 and the case-law cited).

38 First, regarding the prevention of tax evasion, it should be noted that the mere fact that a resident taxpayer uses the services of a non-resident service provider cannot provide a sound basis for a general presumption of abusive practices and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, by analogy, Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 62; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 50; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 73; Case C-105/07 *Lammers & Van Cleeff* [2008] ECR I-173, paragraph 27; and *Jobra*, paragraph 37).

39 The Court has also held that any tax advantage for service providers resulting from the low taxation to which they are subject in the Member State in which they are established cannot, by

itself, be used by another Member State as justification for according less favourable treatment in tax matters to recipients of services established in the latter State (see *Eurowings Luftverkehr*, paragraph 44, and *Skandia and Ramstedt*, paragraph 52).

40 In order for a restriction on the freedom to provide services to be justified by the need to combat tax evasion and avoidance, the specific objective of that restriction must be to prevent conduct consisting in the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on the national territory (see, to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 55, and *Test Claimants in the Thin Cap Group Litigation*, cited above, paragraph 74).

41 In the present case, Article 54 of the 1992 Income Tax Code is intended to prevent conduct which consists in reducing the taxable amount applicable to resident taxpayers by paying for services which were never actually provided, with the sole aim of escaping the tax normally due on the profits generated by activities carried out on the national territory.

42 By providing that payments made to non-resident providers are not to be regarded as business expenses unless the taxpayer demonstrates that they relate to genuine and proper transactions and do not exceed the normal limits, the legislation at issue in the main proceedings facilitates attaining the objective of preventing tax evasion and avoidance, for which that legislation was adopted.

43 Secondly, it should be noted that the legislation at issue in the main proceedings can be justified by the need to ensure the effectiveness of fiscal supervision. That legislation does not absolutely exclude the deduction, as business expenses, of payments made to providers who, by virtue of the legislation of the Member State in which they are established, are not subject there to tax on income or are subject there, in respect of the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in Belgium; rather, it allows the resident taxpayers to provide proof that the transactions carried out were genuine and proper and that the expenses incurred were normal.

44 It is clear from the case-law of the Court that, in order to ensure the effectiveness of fiscal supervision, which is intended to combat tax evasion, a Member State may apply measures which enable the amount of expenditure deductible in that State as business expenses to be ascertained clearly and precisely (see, to that effect, Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18; Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 24; and Case C-248/06 *Commission* v *Spain* [2008] ECR I-47, paragraph 34).

45 Thirdly, as regards the balanced allocation between Member States of the power to tax, it should be recalled that such a justification is acceptable, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its tax jurisdiction in relation to activities carried out in its territory (see Case C-311/08 *SGI* [2010] ECR I-487, paragraph 60 and the case-law cited).

46 Conduct of the kind described in paragraph 41 above is such as to jeopardise the right of a Member State to exercise its tax jurisdiction in relation to the activities carried out by resident taxpayers in its territory and to undermine the balanced allocation between Member States of the power to impose taxes (see *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 56).

47 Accordingly, since the legislation at issue in the main proceedings impedes fraudulent conduct of the kind described in paragraph 41 above and thus enables the État Belge to exercise

its tax jurisdiction in relation to the activities carried out in its territory, that legislation is such as to facilitate the protection of the balanced allocation between Member States of the power to impose taxes.

48 It must therefore be held that legislation such as that at issue in the main proceedings is suitable for attaining the objectives of preventing tax evasion and avoidance and of preserving both the effectiveness of fiscal supervision and the balanced allocation between Member States of the power to impose taxes, all of which — as is apparent from the foregoing — are closely linked in the case before the referring court.

49 None the less, it must be ascertained whether that legislation goes beyond what is necessary in order to attain those objectives.

50 In that regard, it is clear from the case-law of the Court that, where legislation is predicated on an assessment of objective and verifiable elements for the purposes of determining whether a transaction represents a wholly artificial arrangement entered into solely for tax reasons, it may be regarded as not going beyond what is necessary to prevent abusive practices, if, on each occasion on which the existence of such an arrangement cannot be ruled out, that legislation gives the taxpayer an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement (see, to that effect, *Test Claimants in the Thin Cap Group Litigation*, paragraph 82).

51 Moreover, neither the tax reasons nor the fact that the same transactions could have been carried out by providers established in the territory of the Member State in which the taxpayer is established warrant, in and of themselves, the conclusion that the transactions in question are not genuine and proper (see, to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 69).

52 Similarly, the Court has held that, where the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must, in order not to be considered disproportionate, be confined to the part which exceeds what would have been agreed under such conditions (see, to that effect, *SGI*, paragraph 72).

53 Thus, in so far as the conditions referred to in paragraphs 50 to 52 above are complied with, the need to provide proof of the genuine and proper nature of the transactions and the normal nature of the expenses incurred does not seem, in and of itself, to go beyond what is necessary to attain the objectives pursued.

54 However, as has been indicated in paragraph 25 above, the special rule may be applied where payments are made to providers who, by virtue of the legislation of the Member State in which they are established, are not subject there to a tax on income or are subject there, for the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in Belgium.

55 Accordingly, as the Advocate General noted in point 71 of his Opinion, the special rule requires the Belgian taxpayer to provide, as a matter of course, proof that all the services are genuine and proper and that all related payments are normal, without the tax authority being required to provide even prima facie evidence of tax evasion or avoidance.

56 The special rule can be brought to bear without any objective criterion, verifiable by a third party, being applied to test for the existence of a wholly artificial arrangement which does not reflect economic reality and which has been made with the aim of escaping the tax normally due

on the profits generated by activities carried out in the national territory, since account is taken only of the level of tax imposed on the service provider in the Member State in which that provider is established.

57 It must be stated that, as has been noted in paragraph 27 above, a rule framed in such terms does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty.

58 Such a rule does not, therefore, meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80, and Joined Cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECR, paragraph 74).

59 As it is, a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued.

60 In the light of all of the foregoing, the answer to the question referred is that Article 49 EC must be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which payments made by a resident taxpayer to a non-resident company for supplies or services are not to be regarded as deductible business expenses where the non-resident company is not subject, in the Member State of establishment, to tax on income or is subject, as regards the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in the former Member State, unless the taxpayer proves that such payments relate to genuine and proper transactions and do not exceed the normal limits, whereas, under the general rule, such payments are to be regarded as deductible business expenses if they are necessary for acquiring or retaining taxable income and if the taxpayer demonstrates the authenticity and amount of those expenses.

Costs

61 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 EC must be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which payments made by a resident taxpayer to a non-resident company for supplies or services are not to be regarded as deductible business expenses where the non-resident company is not subject, in the Member State of establishment, to tax on income or is subject, as regards the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in the former Member State, unless the taxpayer proves that such payments relate to genuine and proper transactions and do not exceed the normal limits, whereas, under the general rule, such payments are to be regarded as deductible business expenses if they are necessary for acquiring or retaining taxable income and if the taxpayer demonstrates the authenticity and amount of those expenses.

[Signatures]

** Language of the case: French.