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Case C-9/11

Waypoint Aviation SA

v

État belge - SPF Finances

(Reference for a preliminary ruling from the Cour d'appel de Bruxelles)

(Freedom to provide services – Tax legislation – Tax credit on income from loans granted for the acquisition of assets used in national territory – Exclusion of assets for which the right to use is transferred to a third party established in another Member State)

Summary of the Judgment

Freedom to provide services – Restrictions – Tax legislation – National legislation granting a tax credit on income from loans provided to certain companies for the acquisition of new assets used in national territory

(Art. 49 EC)

Article 49 EC must be interpreted as precluding a legislative provision of a Member State which provides for the grant of a tax credit on income from loans provided to certain companies for the acquisition of new assets used in national territory subject to the condition that the right to use the asset is not transferred, by the company which acquired it through the loan conferring entitlement to the tax credit or by any other company in the same group, to third parties other than members of that group established in that Member State.

Such a national provision is likely to discourage undertakings that would be eligible for that tax advantage from providing services intended to finance the acquisition of assets when the right to use will be transferred to economic operators established in other Member States. Similarly, given that the tax advantage may be added to the cost of the loan borne by the borrower, such a provision is likely to discourage undertakings wishing to acquire an asset by means of a loan from providing services leading to the transfer of the right to use that asset, such as leasing services, to economic operators established in other Member States. Furthermore, if it is not only the undertaking which acquires the asset by means of the loan conferring entitlement to the tax advantage, but also all the companies belonging to the same group as that company, that may not transfer the right to use to economic operators established in other Member States, that provision is likely to discourage those companies too from carrying out cross-border activities which lead to the transfer of that right to use.

(see paras 23-25, 29, operative part)

JUDGMENT OF THE COURT (Eighth Chamber)

13 October 2011 (*)

(Freedom to provide services – Tax legislation – Tax credit on income from loans granted for the acquisition of assets used on national territory – Exclusion of assets for which the right to use is transferred to a third party established in another Member State)

In Case C?9/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour d'appel de Bruxelles (Belgium), made by decision of 25 November 2010, received at the Court on 7 January 2011, in the proceedings

Waypoint Aviation SA

v

État belge – SPF Finances,

THE COURT (Eighth Chamber),

composed of A. Prechal, President of the Chamber, acting for the President of the Eighth Chamber, K. Schiemann and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Waypoint Aviation SA, by A. Huyghe and B. Philippart de Foy, avocats,

– the European Commission, by R. Lyal and J.-P. Keppenne, 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 Articles 10 EC and 49 EC.

2 The reference has been made in proceedings between Waypoint Aviation SA ('Waypoint Aviation') and État belge – SPF Finances (Service public fédéral finances) (Belgian State – Public Federal Finance Authority) concerning a refusal to grant the tax credit, known as 'notional withholding tax on movable assets', for the tax years 1995 and 1996.

National legal context

3 The Income Tax Code provides that the tax on interest on debt?claims and loans is to be levied at source in the form of a withholding tax, known as ‘withholding tax on movable assets’.

4 Royal Decree No 187 of 30 December 1982 on the establishment of coordination centres (*Moniteur belge* of 13 January 1983, p. 502; ‘the Royal Decree’) established a particular tax regime for companies fulfilling certain criteria, known as ‘coordination centres’.

5 Article 29 of the Law of 11 April 1983 on fiscal and budgetary provisions (*Moniteur belge* of 16 April 1983), as amended by the Law of 4 August 1986 on fiscal provisions (*Moniteur belge* of 20 August 1986; ‘the Law of 11 April 1983’), provides:

‘The following exemptions are applicable for each taxable period in respect of which companies receive the advantages provided for … in Article 5 of Royal Decree No 187 …:

…

2(a) …

2(b) For the determination of its net amount taxable in the hands of the beneficiaries … the income from debt-claims or loans shall be increased by a notional withholding tax on movable assets which is equal to 25/75 of the net amount received or collected and, for the application of Articles 18, 97 and 211 of the Income Tax Code, that notional withholding tax shall be deemed equivalent to the actual withholding tax referred to in Article 174 of that Code;

...

(d) as regards the income from debt-claims or loans the grant of a notional withholding tax shall be applicable only in so far as the capital borrowed is applied by those undertakings or centres or by members of the group of which the centre forms part either to the acquisition in new condition or to the reinstatement to new condition of fixed tangible assets which they use in Belgium in the exercise of their business activity and the right to use such assets is not transferred, under any agreement whatsoever, to third parties other than the Belgian members of the group …’.

6 That provision enables undertakings which lend to a coordination centre to add to the interest which they charge a notional withholding tax which is then set off against their tax liability. The provision therefore grants those undertakings a tax advantage, in the form of a tax credit, thereby allowing the coordination centre to obtain financing at a lower cost.

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

7 Waypoint Aviation, a company incorporated under Belgian law, has as its object all operations directly or indirectly linked with the acquisition, leasing and financing of aircraft intended for the transport by air for payment of passengers and goods.

8 During the 1990s, Waypoint Aviation acquired two Airbus aircraft by a financial leasing contract entered into by Lizad, a European Economic Interest Grouping (EEIG) governed by French law. The two Airbus aircraft were then acquired by the Sabena group’s coordination centre, Sabena Interservices Center SA (‘the coordination centre’), by means of a second financial leasing contract concluded with Waypoint Aviation, stipulating that the latter would return the notional withholding tax in its entirety to the coordination centre.

9 By a third financial leasing contract, those two aircraft were acquired by Atrix SA, a company in the Sabena group, to be leased to Sabena. In the context of a cooperation agreement, Sabena

subleased the planes for three years to Air France.

10 On the basis of Article 29(2)(b) of the Law of 11 April 1983, Waypoint Aviation sought the grant of the notional withholding tax for the tax years 1995 and 1996, in the amounts of BEF 201 229 077 and BEF 82 854 305 respectively, on the interest included in the charges paid by the coordination centre under the leasing contract concluded between them.

11 On 12 March 1997, the tax authorities, refusing the application of the notional withholding tax, sent Waypoint Aviation a notice of rectification. The complaint lodged by Waypoint Aviation on 29 April 1998 against the tax levied on the basis of that notice of rectification was rejected by a decision of 8 July 2003 of the Regional Director for taxation on the ground that the two aircraft were used by Air France, a company established in France.

12 Waypoint Aviation brought proceedings before the Tribunal de première instance de Bruxelles (Court of First Instance of Brussels)(Belgium) which dismissed its claims by a judgment of 11 May 2005. Waypoint Aviation then appealed against that judgment before the referring court, arguing, inter alia, that Article 29(2)(d) of the Law of 11 April 1983 created a restriction on freedom to provide services and an obstacle to freedom of establishment.

13 In its decision, giving a teleological interpretation of that provision, the referring court takes the view that it prohibits the transfer to a third party, other than a Belgian member of the group concerned, of the right to use an asset acquired by means of financing conferring entitlement to notional withholding tax, irrespective of the person making that transfer.

14 The referring court states that the notional withholding tax is an advantage which directly influences, for a Belgian company wishing to invest, the cost of financing since, where it is granted, it has the effect of reducing the burden of financing, to the benefit of the lender.

15 That court finds that Article 29(2)(d) of the Law of 11 April 1983 has the effect that the notional withholding tax is granted where the provision of aircraft leasing services is made in favour of a Belgian company, whereas it is refused where the lessee is established in a Member State other than Belgium. It concludes that that provision is in principle contrary to Article 49 EC since it discourages a Belgian undertaking from providing a leasing service to a company established in another Member State by making that provision of services more onerous for the group of which that Belgian company forms part, since the notional withholding tax is not then granted to the lender. It refers to Case C?330/07 *Jobra* [2008] ECR I?9099.

16 In those circumstances, the Cour d’appel de Bruxelles decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 49 [EC] prelude the application of a national provision such as Article 29(2)(d) of the Law of 11 April 1983, in so far as:

first, that provision permits the grant of a tax credit, the notional withholding tax on movable assets, to the recipients of income from debt-claims or loans granted to a coordination centre, within the meaning of Royal Decree No 187 …, where the company which uses the funds borrowed by or through the coordination centre in order to acquire a tangible asset which it uses in Belgium in the exercise of its business activity confers the right to use that asset on a company which forms part of the same group of companies and which is resident in Belgium, whereas, second, that provision does not permit the grant of a tax credit where the same company confers a right to use the same tangible asset on a company which also forms part of the same group of companies but which is resident in a Member State other than Belgium?

(2) Must Article 10 [EC], read in conjunction with Article 49 [EC], be understood as prohibiting an interpretation of a provision such as Article 29(2)(d) of the Law of 11 April 1983, which makes the grant of a tax credit, the notional withholding tax on movable assets, to the recipients of income from debt-claims or loans granted to a coordination centre, within the meaning of Royal Decree No 187 …, subject to the condition that no right to use the tangible asset financed by means of those debt-claims or loans is conferred on a member of the group established in another Member State, by any company in the group, and not only by the company which acquires the tangible asset through that financing, and which uses it in Belgium in the exercise of its business activity?'

Consideration of the questions referred

17 As a preliminary point, it must be observed that the referring court interprets Article 29(2)(d) of the Law of 11 April 1983 as prohibiting the transfer of the right to use an asset acquired by means of financing conferring entitlement to notional withholding tax to a company not established in Belgium, irrespective of the person making that transfer. The court concludes that, by reason of that provision, Waypoint Aviation cannot benefit from the notional withholding tax for the financing which permitted the acquisition of the aircraft where the right to use those aircraft was transferred by Sabena to Air France during the tax years at issue. It takes the view, however, that that provision is in principle contrary to Article 49 EC.

18 In those circumstances, the Court finds that, by the questions referred, which should be considered together, the referring court asks, in essence, whether Article 49 EC must be interpreted as precluding a legislative provision of a Member State, such as that in issue in the main proceedings, which provides for the grant of a tax credit on income from loans provided to certain companies for the acquisition of new assets used on the national territory subject to the condition that the right to use the asset is not transferred, by the company which acquired it through the loan conferring entitlement to the tax credit or by any other company in the same group, to third parties other than members of that group established in that Member State.

19 It has been consistently held that, whilst 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?287/10 *Tankreederei I* [2010] ECR I?0000, paragraph 14 and case?law cited).

20 However, the leasing and hiring of aircraft constitute services within the meaning of Article 50 EC (see, by analogy, Case C?451/99 *Cura Anlagen* [2002] ECR I?3193, paragraph 18, and *Jobra*, paragraph 22), so that the provisions of the EC Treaty on the freedom to provide services apply to a situation such as that in issue in the main proceedings.

21 The freedom to provide services may be relied on by an undertaking against the Member State in which it is established where the services are provided to recipients established in another Member State and, in general, whenever a provider of services offers services in a Member State other than the one in which he is established (see, inter alia, *Tankreederei I*, paragraph 16 and case-law cited).

22 The Court has repeatedly held that national measures which prohibit, impede or render less attractive the exercise of the freedom to provide services are restrictions on that freedom (see, inter alia, *Jobra*, paragraph 19, and *Tankreederei I*, paragraph 15).

23 In the present case, it must be held that a national provision such as that in issue in the main proceedings – which applies a less favourable tax regime to income from a loan financing the

acquisition of an asset, where the right to use that asset is transferred to a company established in another Member State, than to income from a loan financing the acquisition of an asset used by a company established in the national territory – is likely to discourage undertakings that would be eligible for that tax advantage from providing services intended to finance the acquisition of assets where the right to use will be transferred to economic operators established in other Member States (see, to that effect, *Jobra*, paragraph 24, and *Tankreederei I*, paragraph 17).

24 Similarly, given that the tax advantage may be added to the cost of the loan borne by the borrower, a matter moreover acknowledged in the present case as is clear from paragraph 8 of this judgment, such a provision is likely to discourage undertakings wishing to acquire an asset by means of a loan from providing services leading to the transfer of the right to use that asset, such as leasing services, to economic operators established in other Member States.

25 Furthermore, if, under that provision, the right to use may not be transferred to such economic operators not only by the undertaking which acquires the asset by means of the loan conferring entitlement to the tax advantage, but also by all the companies belonging to the same group as that company, that provision is likely also to discourage those companies from carrying out cross-border activities which lead to the transfer of that right to use.

26 Consequently, national legislation such as that in issue in the main proceedings constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

27 That restriction may be accepted only if it is justified by overriding reasons in the public interest. Even if that were so, application of that restriction would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (*Tankreederei I*, paragraph 19 and case-law cited).

28 In the present case, however, no justification has been put forward by the Belgian Government nor contemplated by the referring court.

29 Consequently, the answer to the questions referred is that Article 49 EC must be interpreted as precluding a legislative provision of a Member State, such as that in issue in the main proceedings, which provides for the grant of a tax credit on income from loans provided to certain companies for the acquisition of new assets used on the national territory subject to the condition that the right to use the asset is not transferred, by the company which acquired it through the loan conferring entitlement to the tax credit or by any other company in the same group, to third parties other than members of that group established in that Member State.

Costs

30 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 (Eighth Chamber) hereby rules:

Article 49 EC must be interpreted as precluding a legislative provision of a Member State, such as that in issue in the main proceedings, which provides for the grant of a tax credit on income from loans provided to certain companies for the acquisition of new assets used on the national territory subject to the condition that the right to use the asset is not transferred, by the company which acquired it through the loan conferring entitlement to the tax credit or by any other company in the same group, to third parties other than members of that group established in that Member State.

[Signatures]

* Language of the case: French.