JUDGMENT OF THE COURT (Second Chamber)

19 July 2012 (*)

(Freedom of establishment — Free movement of capital — Direct taxation — Inheritance tax — Conditions for the calculation of the tax — Acquisition through inheritance of a shareholding, as sole shareholder, in a capital company established in a third country — National legislation excluding shareholdings in such companies from tax advantages)

In Case C-31/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 15 December 2010, received at the Court on 20 January 2011, in the proceedings

Marianne Scheunemann

v

Finanzamt Bremerhaven,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus (Rapporteur), A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the European Commission, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 63(1) TFEU and Article 65 TFEU.

2 The reference has been made in proceedings between Mrs Scheunemann and Finanzamt Bremerhaven (Bremerhaven Tax Office; ‘the Finanzamt’) concerning the notice relating to the calculation of inheritance tax on an estate which includes a shareholding in a capital company established in a third country.

Legal context

European Union law

3 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provides:

‘Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.’

4 In Annex I to Directive 88/361, mention is made under Heading XI (‘Personal capital movements’) of inheritances and legacies being among the capital movements referred to in Article 1 of that directive.

German law

5 Point 1 of Paragraph 1(1) of the Law on Inheritance Tax and Gift Tax (Erbschaftsteuer- und Schenkungsteuergesetz), in the version published on 27 February 1997 (BGBl. 1997 I, p. 378), as amended by the Law of 10 October 2007 (BGBl. 2007 I, p. 2332) (‘the ErbStG’), provides that ‘Inheritance tax (gift tax) shall apply to … acquisitions *mortis causa*’.

6 Under point 1 of Paragraph 2(1) of the ErbStG, all assets of a deceased person who is resident in Germany on the date of death are subject to inheritance tax. This also applies to assets located in another State.

7 Under Paragraph 13a(1) and (2) of the ErbStG:

‘1. Subject to the second sentence hereof, operating assets, agricultural and forestry assets and shareholdings in capital companies, within the meaning of subparagraph 4, amounting in total to no more than [EUR] 225 000 shall not be taken into account

1. if acquired by inheritance; …

2. The value of the assets defined in subparagraph 4 remaining after the application of subparagraph 1 shall be set at 65%.’

8 Under point 3 of Paragraph 13a(4) of the ErbStG, ‘the tax-free amount and the reduced-rate valuation [shall apply] … to … shares in a capital company where the capital company has its registered office or principal place of business in Germany at the time when the tax is incurred and the testator or donor had a direct holding in the nominal capital of that company amounting to more than one quarter thereof’.

9 Under point 4 of Paragraph 13a(5) of the ErbStG, the tax-free amount and the reduced-rate valuation are to be disapplied retrospectively if the acquirer disposes of some or all of a shareholding in a capital company within five years of acquisition.

10 It appears from the documents before the Court that the German tax authority decided, in the light of the judgment in Case C-256/06 *Jäger* [2008] ECR I-123, to apply the advantages provided for under Paragraph 13a(1) and (2) of the ErbStG also to shares in unlisted capital companies with their registered office in a Member State other than the Federal Republic of

Germany. Shares in companies established outside the European Union or the European Economic Area continued to be excluded.

The dispute before the referring court and the question referred for a preliminary ruling

11 Mrs Scheunemann, who is resident in Germany, is the sole heir of her father, who also resided in Germany and who died in February 2007. In Germany, inheritance tax was charged to the estate, which included a shareholding, as sole shareholder, in a capital company which had its registered office in Canada.

12 By decision of 24 November 2008, the Finanzamt fixed the inheritance tax payable by Mrs Scheunemann at EUR 299 381.95, on the view that the value of the testator's shareholding in the capital company amounted to EUR 1 142 115. Since neither the registered office nor the principal place of business of that company was in the territory of Germany or of another Member State, no application was made of the provision under Paragraph 13a(1) of the ErbStG for a tax-free amount of EUR 225 000 or under Paragraph 13a(2) of that law for reduced-rate valuation.

13 On the view that she was entitled to those tax advantages, Mrs Scheunemann raised an objection against the Finanzamt's decision.

14 Following the decision rejecting her objection, Mrs Scheunemann brought an action before the Finanzgericht Bremen (Finance Court, Bremen), which was dismissed. According to that court, the tax advantages under point 3 of Paragraph 13a(4) of the ErbStG must be assessed, not in the light of the free movement of capital, but solely in the light of the freedom of establishment, since the minimum shareholding to be held by the deceased, as specified in that provision — namely, over one quarter of the nominal capital of the capital company — brings with it the possibility of exerting an influence over that company. However, the freedom of establishment does not apply in relation to a shareholding in a company located in a third country, such as the company concerned in the case under consideration.

15 Hearing the appeal on a point of law against the judgment of the Finanzgericht Bremen, the Bundesfinanzhof (Federal Finance Court) finds that the provisions of the Treaty on the Functioning of the European Union ('the Treaty') relating to the freedom of establishment are not intended to apply to the situation in the case before it. In that regard, the Bundesfinanzhof notes that, according to the case-law of the Court of Justice, the tax treatment of inheritances of any kind falls within the scope of the Treaty provisions on the free movement of capital. The Bundesfinanzhof therefore asks whether those provisions preclude the legislation at issue in the main proceedings.

16 Accordingly, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article [63(1) TFEU], read in conjunction with Article [65 TFEU], be interpreted as precluding legislation of a Member State which, for the purposes of calculating the inheritance tax on an estate, provides that account be taken of the entire value of a shareholding, forming part of private assets, held as sole shareholder in a capital company with its registered office and principal place of business in Canada, whereas where such a shareholding in a capital company with its registered office or principal place of business in Germany is acquired a tax free amount is granted and only 65% of the remaining value is taken into account?'

The question referred for a preliminary ruling

17 By its question, the referring court asks in essence whether the Treaty provisions on the free movement of capital are to be interpreted as precluding legislation of a Member State which, for

the purposes of the calculation of inheritance tax, excludes the application of certain tax advantages to an estate in the form of a shareholding in a capital company established in a third country, while conferring those advantages in the event of the inheritance of such a shareholding when the registered office of the company is in a Member State.

18 As a preliminary point, both the German Government and the European Commission argue that the national legislation at issue in the main proceedings does not fall within the scope of the free movement of capital but of the freedom of establishment, since the shareholding at issue in the main proceedings makes it possible for the shareholder to exert a definite influence over the company's decisions.

19 It should therefore be determined at the outset whether it is Article 49 TFEU on the freedom of establishment or Article 63 TFEU on the free movement of capital which applies to that legislation.

20 In order to determine whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from now well established case-law that the aim of the legislation concerned must be taken into consideration (see, to that effect, Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, paragraph 33, and Case C-132/10 *Halley* [2011] ECR I-8353, paragraph 17).

21 In the main proceedings, the aim of the measure at issue is to make provision for the tax treatment of inheritances which include, in particular, a shareholding in capital companies.

22 It is also clear from the case-law of the Court that the tax treatment of inheritances falls, in principle, under Article 63 TFEU on the free movement of capital. Inheritances consisting in the transfer to one or more persons of assets left by a deceased person, falling under heading XI of Annex I to Directive 88/361, which is entitled 'Personal capital movements', are movements of capital for the purposes of Article 63 TFEU (see, inter alia, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 39; Case C-43/07 *Arens-Sikken* [2008] ECR I-6887, paragraph 30; Case C-35/08 *Busley and Cibrian Fernandez* [2009] ECR I-9807, paragraph 18; and Case C-25/10 *Missionswerk Werner Heukelbach* [2011] ECR I-497, paragraph 16).

23 However, it should be noted that, according to settled case-law, national legislation which is intended to apply only to shareholdings enabling the holder to exert a definite influence over a company's decisions and determine its activities is covered by the Treaty provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of capital (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 35 and the case-law cited).

24 It follows that, in order to determine which freedom the national legislation at issue in the main proceedings falls under, it is necessary to examine whether the shareholding referred to in that legislation is sufficient to enable the shareholder to exert a definite influence over the company's decisions and to determine its activities.

25 In the case under consideration, it is apparent from Paragraph 13a(1) and (2) of the ErbStG, read in conjunction with point 3 of Paragraph 13(4) thereof, that the possibility of receiving the tax advantages at issue is conditional upon having a direct holding of more than one quarter of the capital of the company.

26 The German Government argues that, under German law, such a shareholding in the capital

of a company enables the shareholder to exert a definite influence over its decisions and to determine its activities. After all, such a holding gives the shareholder a blocking minority in the context of important decisions determining the undertaking's continued existence.

27 According to the German Government, one of the aims of the tax advantages provided for under the national provisions at issue in the main proceedings is to encourage persons inheriting substantial shareholdings in a company to become involved in its management so as to be able ultimately to ensure the survival of the undertaking and save jobs.

28 The achievement of that aim is ensured — that government argues — through the provision made under Paragraph 13a(5) of the ErbStG for the tax advantages at issue to be retroactively disapplied in cases where the heir disposes of his shareholding in a company, in whole or in part, within five years of acquiring those shares.

29 It should accordingly be noted that, for the purposes of granting the tax advantages at issue in the main proceedings, the German legislature specified a shareholding threshold so high that the shareholder in the capital company is able to influence its management and control, and imposed conditions designed to ensure that the shareholder does not intervene solely with the intention of making a financial investment.

30 It should therefore be held that the legislation at issue in the main proceedings primarily affects freedom of establishment and that, in accordance with the case-law of the Court, it falls solely within the scope of the Treaty provisions concerning that freedom. If it were to be found that such a national measure has restrictive effects on the free movement of capital, those effects would have to be seen as an unavoidable consequence of a restriction on freedom of establishment and would not justify an independent examination of that measure in the light of the Treaty provisions on the free movement of capital (see, to that effect, Case C-464/05 *Geurts and Vogten* [2007] ECR I-9325, paragraph 16 and the case-law cited).

31 In any event, as regards the facts in the case before the referring court, it is established that the testator had a 100% holding in the capital of the company concerned and, accordingly, it cannot be denied that he was able to exert a definite influence over its decisions and to determine its activities.

32 Consequently, there is no need to examine the national measure at issue in the main proceedings in the light of the Treaty provisions on the free movement of capital.

33 As regards the Treaty chapter on freedom of establishment, it does not contain any provision which extends the scope of that chapter to cover situations concerning a shareholding in a company which has its registered office in a third country (see, to that effect, Case C-102/05 *A and B* [2007] ECR I-3871, paragraph 29, and Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 28) and, as it is, the case before the referring court concerns a shareholding in a capital company which has its registered office in Canada.

34 Accordingly, Article 49 TFEU et seq. does not apply in a situation such as that at issue in the case before the referring court.

35 In the light of all of those considerations, the answer to the question referred is that legislation of a Member State, such as that at issue in the main proceedings, which, for the purposes of the calculation of inheritance tax, excludes the application of certain tax advantages to an estate in the form of a shareholding in a capital company established in a third country, while conferring those advantages in the event of the inheritance of such a shareholding when the registered office of the company is in a Member State, primarily affects the exercise of the freedom

of establishment for the purposes of Article 49 TFEU et seq., since that holding enables the shareholder to exert a definite influence over the decisions of that company and to determine its activities. Those Treaty provisions are not intended to apply to a situation concerning a shareholding held in a company which has its registered office in a third country.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Second Chamber) hereby rules:

Legislation of a Member State, such as that at issue in the main proceedings which, for the purposes of calculating inheritance tax, excludes the application of certain tax advantages to an estate in the form of a shareholding in a capital company established in a third country, while conferring those advantages in the event of the inheritance of such a shareholding when the registered office of the company is in a Member State, primarily affects the exercise of the freedom of establishment for the purposes of Article 49 TFEU et seq., since that holding enables the shareholder to exert a definite influence over the decisions of that company and to determine its activities. Those Treaty provisions are not intended to apply to a situation concerning a shareholding held in a company which has its registered office in a third country.

[Signatures]

* Language of the case: German.