Jurisdiction
JUDGMENT OF THE COURT (First Chamber)

23 January 2014 (1)

„Taxation — Corporation tax — Transfer of an interest in a partnership to a capital company — Book value — Value as part of a going concern — Agreement on the prevention of double taxation — Immediate taxation of unrealised capital gains — Different treatment — Restriction on free movement of capital — Preserving the balanced allocation of powers to impose taxes between the Member States — Proportionality“

In Case C?164/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Germany), made by decision of 26 January 2012, received at the Court on 3 April 2012, in the proceedings

DMC Beteiligungsgesellschaft mbH

v

Finanzamt Hamburg-Mitte,

THE COURT (First Chamber),

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

Advocate General: N. Wahl,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2013,

after considering the observations submitted on behalf of:

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DMC Beteiligungsgesellschaft mbH, by O.-F. Graf Kerssenbrock and H. Bley, Rechtsanwälte,

—

the Finanzamt Hamburg-Mitte, by M. Grote, acting as Agent,

—

the German Government, by T. Henze, A. Wiedmann and J. Möller, acting as Agents,

—

the European Commission, by W. Mölls 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 request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2

The request has been made in proceedings between DMC Beteiligungsgesellschaft mbH, the applicant in the main proceedings, a company constituted under Austrian law established in Vienna (Austria) and successor in title of Schillhuber Beteiligungsgesellschaft mbH ('S-GmBh') and of Klausnitzer Ges.mbH ('K?GmbH'), and the Finanzamt Hamburg-Mitte ('the Finanzamt') concerning the determination of a capital gain for the purpose of establishing the tax on the profits of a German limited partnership for the 2000 tax year.

Legal context

German law

3

The third sentence of Paragraph 6(1)(1) of the Einkommensteuergesetz (Law on Income Tax) defines the value of a business asset as part of a going concern as the amount which the purchaser of the entire undertaking would attribute to the asset, as an individual asset, as part of the overall value of the undertaking. The value of the asset as part of a going concern must be distinguished from the book value, which is the value of an asset as it appears in an undertaking's balance sheet, that is the value after allowing for, inter alia, depreciation. The book value can never be greater than the value as part of a going concern.

4

Paragraph 20 of the Umwandlungssteuergesetz (the Law on taxation of business reorganisations) of 11 October 1995 (BGB1. 1995 I, p. 1250), in the version applicable at the material time ('UmwStG 1995'), was worded as follows:

'(1) Where an undertaking, part of an undertaking or a partnership interest is transferred by way of contribution to a capital company subject to unlimited liability to corporation tax [point 1 of Paragraph 1(1) of the Körperschaftsteuergesetz (Law on Corporation tax)] and the transferor receives in consideration new shares in the company (non-cash consideration), the assets transferred and the new shares shall be valued in accordance with the following paragraphs …

(2) The capital company may value the business assets contributed at their book value or a higher value …

(3) The capital company must value the business assets contributed at their value as part of a going concern where, at the time of the non-cash consideration, the Federal Republic of Germany does not have the right to tax the gain arising as a result of the grant of company shares to the transferor.

(4) The value which the capital company assigns to the business assets contributed shall be

deemed for the transferor to be the transfer price and the acquisition cost of the shares.

…

(6) In the cases referred to in Paragraph 20(3), the second to sixth sentences of Paragraph 21(2) shall apply by analogy to deferment of payment of any income tax or corporation tax due.'

5

The third to sixth sentences of Paragraph 21(2) of the UmwStG 1995 provided as follows:

'In the cases referred to in points 1, 2 and 4 of the first sentence, the income tax or corporation tax due in respect of a capital gain may be paid in annual instalments, each of at least one fifth of the tax due, on condition that the payment of the instalments is secured. No interest shall be charged where payment is deferred. Any disposal of shares during the deferral period shall put an immediate end to that arrangement. The fifth sentence shall apply by analogy where, during the deferral period, the capital company in which shares are held is dissolved and put into liquidation, where the capital in the company is reduced and repaid to the shareholders, or where it has been converted within the meaning of Part 2 or Part 4 of this Law.'

The agreement on the avoidance of double taxation

6

Paragraph 1(2) and (3) of the Agreement between the Federal Republic of Germany and the Republic of Austria concerning the avoidance of double taxation with respect to taxes on income and capital, taxes on businesses and land taxes of 4 October 1954 (BGB1. 1955 II, p. 750) ('DBA 1954') was worded as follows:

'(2) A natural person is resident for the purposes of this agreement in the signatory State in which that person occupies a dwelling in circumstances which suggest that he will maintain and use that dwelling. Where such a person is not resident in one of the signatory States, the place of his habitual residence shall be regarded as that person's residence.

(3) In the case of a legal person, the place at which that person targets his business activities shall be regarded as his place of residence. Where that place is not in either of the signatory States, the place of that person's registered office shall be regarded as his place of residence.'

7

Paragraph 4 of the DBA 1954 provided as follows:

'(1) Where a person resident in one of the signatory States receives income, as owner or partner, from a business whose activities extend to the territory of the other State, the latter shall be entitled to tax such income only in so far as it is attributable to an establishment of the undertaking situated in its territory.

(2) Accordingly, the income to be attributed to the establishment shall be the income which would have accrued to had it been an independent undertaking engaged in the same or similar activities under the same or similar conditions and wholly independent of the undertaking of which it is an establishment.

(3) For the purposes of this Agreement, the term "establishment" means any permanent entity of the business carrying on all or part of the activities of the business.

(4) Paragraph 4(1) shall apply to income obtained as a result of the direct management and use of the business, to income obtained from the letting, making available or any other form of use of the business and to income deriving from the sale of an entire undertaking, an interest in such an undertaking, a part of the undertaking or an object used in it.'

8

Paragraph 7 of the DBA 1954 provided as follows:

'(1) Where a person resident in one of the signatory States receives income as a result of disposal of a substantial shareholding in a capital company whose place of management is situated in the other State, the State of establishment shall have the right to tax that income.

(2) Paragraph 7(1) shall not apply where a person resident in one of the signatory States has an establishment in the other State and receives income through that establishment. In such a case, the other State shall have the right to tax that income (Paragraph 4).'

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

9

Until 28 August 2001, DMC Design for Media and Communication GmbH & Co. KG ('DMC KG') was a limited partnership established in Hamburg (Germany). The limited partners in the partnership at that time were K-GmbH and S-GmbH (formerly Hubert Schillhuber ('HS')). The general partner of DMC KG was DMC Design for Media and Communication GmbH ('DMC GmbH'), a company incorporated under German law. Until 28 November 2000, half the shares in that capital company were held by K-GmbH and the other half by HS, the value of each holding being 50000 German marks (DEM).

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On 28 November 2000, HS transferred its shares in DMC GmbH and its interest in DMC KG to S-GmbH.

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By notarial instrument of 28 August 2001, the share capital of DMC GmbH was increased by DEM 100000, thus totaling DEM 200000.

12

That increase came about as a result of the non-cash contribution in the form of the interests held by K-GmbH and S-GmbH in DMC KG. In consideration of the transfer of those interests, K-GmbH and S-GmbH obtained shares in the capital of DMC GmbH, as the acquiring company. The book value of the interest of each of those transferring companies was given as DEM 50000, respectively. The transfer of the interests to DMC GmbH of 1 January 2001 took effect retrospectively on 31 December 2000, the transfer date for tax purposes.

13

As all the interests in DMC KG had been transferred to DMC GmbH, the limited partnership was dissolved. The business assets contributed by K-GmbH and S?GmbH were shown in DMC GmbH’s take-over balance sheet at their book values.

14

During the course of a tax inspection, the Finanzamt was required to determine DMC KG’s taxable amount for the 2000 tax year.

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Ascertaining that the limited partners in DMC KG, as partners liable for tax in respect of profits, no longer had an establishment in Germany following the dissolution of DMC KG, the Finanzamt concluded that, pursuant to Article 7 of the DBA 1954, the Federal Republic of Germany no longer had the right to tax the gains accruing to K-GmbH and S-GmbH as a result of the grant of the shares in DMC GmbH in consideration of the contribution of the interests held by those companies in DMC KG.

16

Accordingly, in accordance with Paragraph 20(3) of the UmwStG 1995, the Finanzamt assessed the interests contributed by K-GmbH and S?GmbH to DMC GmbH at their value as part of a going concern, not at their book value, thus giving rise to taxation of the unrealised capital gains on the interests in DMC KG.

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A capital gain in the sum of DEM 194172,70 arose in respect of the interest contributed by K-GmbH, and DEM 9051,77 in respect of the interest contributed by S-GmbH. Those gains were subject to corporation tax for the year 2000.

18

The applicant in the main proceedings, as successor in title to K-GmbH and S?GmbH, brought proceedings before the referring court against the notice of assessment issued to it for 2000, contending that Paragraph 20(3) of the UmwStG 1995 is incompatible with European Union law.

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The referring court states that the Finanzamt correctly applied national law in the present case. Accordingly, DMC GmbH was required to assess the business assets contributed by K-GmbH and S-GmbH at their value as part of a going concern. It is the Republic of Austria, as the State in which the transferring companies are established, which, under the DBA 1954, has the right to tax the gain arising in respect of the grant of company shares to K-GmbH and S-GmbH in consideration of the interests held in DMC KG.

20

However, that court is unsure as to the compatibility with EU law of the mechanism in Paragraph 20(3) of the UmwStG 1995, which results in the immediate taxation of unrealised capital gains generated in German territory, since the holder of the assets is no longer liable to tax in Germany on the gains accruing from the subsequent disposal of the assets. First, such unequal treatment is liable to deter companies established in Austria from acquiring holdings in companies established in Germany. Second, such a restriction cannot be justified by the objective of a balanced allocation of the power to impose taxes between the Member States concerned, as the Federal Republic of

Germany will not have had at any time the power to tax the shares held by K?GmbH and S-GmbH in DMC GmbH.

21

In those circumstances, the Finanzgericht Hamburg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1.

Is it compatible with Article 43 EC ([now] Article 49 TFEU) for a national provision to provide that, in the event of the contribution of partnership interests to a capital company, the business assets contributed must be assessed at their value as part of a going concern (and consequently, as a result of revealing undisclosed reserves, a capital gain arises for the transferor) where, at the time of the non-cash contribution, the Federal Republic of Germany has no right to tax the gain arising on the grant of the new company shares to the transferor in return for his contribution?

2.

In the event that the first question must be answered in the negative: is the national provision compatible with Article 43 EC … if the transferor is entitled to apply for the deferment, on an interest-free basis, of the tax arising as a consequence of revealing the undisclosed reserves, with the effect that the tax due on the gain may be paid in annual instalments, each of at least a fifth of the tax due, provided that the payment of the instalments is secured?’

Consideration of the questions referred

Admissibility of the questions

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First, the Finanzamt contends, in its written observations, that the questions referred are inadmissible.

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The Finanzamt has submitted that, under German procedural law, the action before the referring court is inadmissible, with the result that the questions referred are hypothetical.

24

In that regard, it should be pointed out that, according to settled case?law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Joined Cases C?78/08 to C?80/08 Paint Graphos and Others [2011] I?7611, paragraph 31 and the case-law cited).

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With regard to the present reference for a preliminary ruling, contrary to what is claimed by the

Finanzamt, it is not apparent that the problem which arises in the main proceedings is hypothetical on the basis that the action in those proceedings is, as alleged, inadmissible. Indeed, the Finanzgericht Hamburg specifically stated in its order for reference that, in the event that Paragraph 20(3) and (4) of the UmwStG 1995 is deemed incompatible with EU law, the action will automatically be admissible.

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It follows from the foregoing that the questions referred for a preliminary ruling are admissible.

Question 1

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By its first question, the Finanzgericht Hamburg asks, in essence, whether Article 49 TFEU must be interpreted as precluding the legislation of a Member State which requires assets contributed by a partnership to the capital of a capital company with its registered office in the territory of that Member State to be assessed at their value as part of a going concern, thus giving rise to the taxation – before they are in fact realised – of the capital gains arising in that territory on those assets, on the basis that that State cannot exercise its powers of taxation in relation to those capital gains when they are actually realised.

The freedom at issue in the main proceedings

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Whereas all the other interested parties which have submitted observations to the Court agree, along with the referring court, that the facts in the main proceedings may be linked to freedom of establishment, the European Commission is of the view that Paragraph 20(3) and (4) of the UmwStG 1995 falls within the scope of free movement of capital.

29

As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, according to well established case-law, it is the purpose of the legislation concerned that must be taken into consideration (see Case C157/05 Holböck [2007] ECR I?4051, paragraph 22, and Case C-182/08 Glaxo Wellcome [2009] ECR I-8591, paragraph 36).

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It is also clear 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, and Glaxo Wellcome, paragraph 37).

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The Court has held that national legislation not intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company’s decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the scope of both Article 49 TFEU and Article 63 TFEU (Case C-543/08 Commission v Portugal [2010] ECR I-11241, paragraph 43 and the case-law cited).

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As regards the purpose of the provisions of the UmwStG 1995 at issue in the main proceedings, it is apparent from the order for reference that they are intended to protect the fiscal interests of the Federal Republic of Germany in relation to capital gains generated in Germany territory where the international allocation of the right to impose taxes may undermine those interests.

33

In particular, the legislation in question is directed at capital gains on assets contributed by investors who are no longer subject to tax in Germany on gains arising as a result of the transfer of such assets from a limited partnership to a capital company.

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It follows from this, first, that the application of the legislation at issue in the main proceedings to an individual case is not dependent on the extent of an investor’s interest in the limited partnership whose share in the partnership is transferred to a capital company in return for company shares. Thus, under that legislation, the investor is not required to have a holding which enables him to exert a definite influence on the partnership’s decisions, or indeed those of the capital company.

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Indeed, to restrict the application of the legislation at issue in the main proceedings to cases in which the interest in the limited partnership that is transferred is held by an investor with a definite influence on the decisions of the partnership would be inconsistent in the light of the objective of protecting the fiscal interests of the Federal Republic of Germany.

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Second, it is clear that, in the main proceedings, the obligation which the capital company is under to assess the assets contributed in return for shares at their value as part of a going concern is justified by the fact that the transferring companies are no longer subject to unlimited liability to tax in Germany in respect of gains accrued there, since the partnership in which they were limited partners has been dissolved.

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Accordingly, the legislation at issue in the main proceedings has less bearing on the procedure for establishment than on the procedure for the transfer of assets between a limited partnership and a capital company.

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It follows from all the foregoing considerations that the legislation at issue in the main proceedings must be examined solely in the light of free movement of capital, enshrined in Article 63 TFEU.

Whether there is a restriction on free movement of capital

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According to the legislation at issue in the main proceedings, where, as a consequence of the exchange of interests held in a limited partnership by a company that is not resident for tax purposes in Germany in return for shares in a capital company with its registered office in

Germany, the unrealised capital gains on those interests, which were generated in the territory of that Member State, can no longer be taxed by that State, those gains must be disclosed and the amount of tax due on the gains in the event of disposal of the shares exchanged is determined at the point at which the interests in the limited partnership were transferred and is collected in accordance with the rules laid down in Paragraph 20(6) and the third to sixth sentences of Paragraph 21(2) of the UmwStG 1995. However, if the transferring company remains liable to tax in Germany, the determination of the amount of tax due on the unrealised capital gains arising in connection with the limited partnership assets which now reside in the shares granted and the collection of that tax will take place when those gains are actually realised, that is, usually, when the shares concerned are disposed of.

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The fact that the unrealised gains relate to shares held by an investor who is no longer liable to tax in Germany in respect of the income he receives from those assets places the investor at a disadvantage in terms of cash flow by comparison with investors who remain liable to tax there, in so far as the conversion of interests in a limited partnership into shares in a capital company gives rise, in the first instance, to immediate taxation of the capital gains arising in relation to the interests concerned whereas, in the second instance, such gains are taxed only when they are actually realised. That different treatment as regards the taxation of capital gains is liable to deter investors who are not resident in Germany for tax purposes from contributing capital to a limited partnership governed by German law, since the conversion of an interest in that partnership into shares in a capital company will give rise to the tax disadvantage referred to above (see, to that effect, Case C-371/10 National Grid Indus [2011] ECR I-12273, paragraph 37).

41

Accordingly, the legislation at issue in the main proceedings is liable to deter such investors from having holdings in a limited partnership governed by German law, since they will be required, in the event of the subsequent conversion of their holdings into shares in a capital company, to pay immediately the tax on any profit in connection with the unrealised capital gain generated in Germany, if those investors are no longer, as a result of the conversion of their holdings, subject to such tax in the future in Germany.

42

The different treatment thus established cannot be explained by an objective difference of situation, contrary to what is claimed by the Finanzamt and the German Government. From the point of view of the legislation of a Member State aiming to tax capital gains generated in its territory, the situation of an investor who transfers his interest in a limited partnership established in that territory in return for shares in a capital company also established in that territory and who, as a result, is no longer subject to tax on any profit he may receive from the sale of those shares is similar to that of an investor who carries out the same transaction but remains subject to tax on any profit he may receive as regards the capital gains relating to the interest in the limited company which were generated in that Member State before the interest was exchanged (see, to that effect, National Grid Indus, paragraph 38).

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It follows that the different treatment, under the legislation at issue in the main proceedings, of investors who hold an interest in a limited partnership that is converted into shares in a capital company and who, as a result of that transaction, are no longer liable to tax in Germany on the income they make in that Member State, as compared with investors who, in the same circumstances, remain liable to such tax, constitutes a restriction that is, in principle, prohibited by the provisions of the FEU Treaty on free movement of capital.

Whether the restriction on free movement of capital is justified

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It is established case-law that a restriction of free movement of capital is permissible only if it is justified by overriding reasons in the public interest (Case C-446/03 Marks & Spencer [2005] ECR I-10837, paragraph 35; Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-7995, paragraph 47; Case C-524/04 Test Claimants in the Thin Cap Group Litigation [2007] ECR I-2107, paragraph 64; and Case C-303/07 Aberdeen Property Fininvest Alpha [2009] ECR I-5145, paragraph 57).

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According to the referring court, the purpose of the legislation at issue in the main proceedings is to ensure the balanced allocation of the power to impose taxes between the Member States, in accordance with the principle of territoriality. The Federal Republic of Germany thus seeks to exercise its power to tax capital gains generated in its territory which, as a result of the combined effect of the conversion of the assets in question and the application of a bilateral agreement on the avoidance of double taxation, cannot be taxed by that Member State when they are actually realised.

46

It should be recalled in this regard, first, that the preservation of the balanced allocation of the power to impose taxes between Member States is a legitimate objective recognised by the Court (see, to that effect, Marks & Spencer, paragraph 45; Case C-470/04 N [2006] ECR I-7409, paragraph 42; Case C-231/05 Oy AA [2007] ECR I-6373, paragraph 51; and Case C-414/06 Lidl Belgium [2008] ECR I-3601, paragraph 31).

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Secondly, it is settled case-law that, in the absence of any unifying or harmonising measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (Case C-540/07 Commission v Italy [2009] ECR I-10983, paragraph 29 and the case-law cited, and National Grid Indus, paragraph 45).

48

In that context, the conversion of an interest in a limited partnership into shares in a capital company cannot have the effect of requiring the Member State in which those entities are established to relinquish its right to tax a capital gain that was generated in its territory and fell within its tax jurisdiction before the conversion, on the ground that the capital gain has not in fact been realised.

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The Court has thus held , in the context of the transfer of a company’s place of effective management from one Member State to another Member State, that the former State is – in accordance with the principle of fiscal territoriality, connected with a temporal component, namely the fact that the taxable person is resident for tax purposes within national territory during the period in which the capital gains arise – entitled to tax those gains at the time the tax payer leaves the country (see N, paragraph 46). Such a measure is intended to avoid situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the balanced allocation of powers to impose taxes between the Member States (see Marks & Spencer, paragraph 46; Oy AA, paragraph 54; Case C-311/08 SGI [2010] ECR I-487, paragraph 60; and National Grid Indus, paragraph 46).

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It is apparent from the order for reference that, following the transfer of all their interests in DMC KG to DMC GmbH, K-GmbH and S-GmbH no longer had a permanent establishment in Germany within the meaning of Paragraphs 4(3) and 7(2) of the DBA 1954. As K-GmbH and S-GmbH were no longer, under Paragraph 7(1) of the DBA 1954, subject to tax in Germany on any gain arising from a future disposal of the shares in the capital of DMC GmbH granted in return for their contribution, the interests contributed were assessed, pursuant to Paragraph 20(3) and (4) of the UmwStG 1995, at their value as part of a going concern and the resulting capital gains were taxed. Thus, in order to preserve the Federal Republic of Germany's power to tax income generated within its territory, the legislation at issue in the main proceedings requires disclosure of the unrealised capital gains relating to an interest in a limited partnership when such an interest is converted into shares in a capital company.

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Against that background, first of all, the fact that the legislation at issue in the main proceedings entails the taxation of unrealised capital gains is not, in itself, capable of calling into question the legitimacy of the objective of preserving the balanced allocation of the powers to impose taxes between the Member States concerned.

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On the one hand, the Court has held that a Member State is entitled to tax the economic value generated by an unrealised capital gain in its territory even if the gain concerned has not yet actually been realised (National Grid Indus, paragraph 49).

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On the other hand, Member States entitled to tax capital gains generated when the assets in question were in their territory have the power, for the purposes of such taxation, to make provision for a chargeable event other than the actual realisation of those gains, in order ensure that those assets are taxed (see, to that effect, Case C?261/11 Commission v Denmark [2013] ECR, paragraph 37).

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Secondly, from the perspective of the preservation of the balanced allocation of the power to impose taxes between Member States, the fact that capital gains taxed under Paragraph 20(3) and (4) of the UmwStG 1995 relate, following the conversion of the interests concerned, to assets of a different nature – that is, first, to a holding in a limited partnership and, subsequently, to a holding in a capital company – is not decisive. In fact, the capital gains relating to the interest in the limited partnership necessarily reside in the shares in the capital company granted in return for the contribution of that interest.

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Accordingly, the simple fact that the conversion of an interest in a limited partnership into shares in a capital company has the effect of removing income from the exercise of the powers of taxation of the Member State on whose territory the income was generated is sufficient justification for a provision such as that at issue in the main proceedings, in so far as it provides that the amount of tax payable on that income is to be established at the time of the conversion.

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However, the objective of preserving the balanced allocation of the powers to impose taxes between Member States can justify legislation such as that at issue in the main proceedings only where, in particular, the Member State in whose territory the income was generated is actually prevented from exercising its power of taxation in respect of such income.

57

In the present case, it is not unquestionably clear from the facts of the main proceedings that the Federal Republic of Germany actually loses all power to tax unrealised capital gains on an interest in a partnership when that interest is exchanged in return for shares in a capital company. Indeed, the possibility would not appear to be precluded that such capital gains relating to the partnership interests contributed to the business assets of the capital company may be taken into account in determining the corporation tax payable in Germany by the acquiring company, namely in the present case DMC GmbH, which is a matter for the national court to establish.

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In the light of the foregoing, the answer to Question 1 is that Article 63 TFEU must be interpreted as meaning that the objective of preserving the balanced allocation of the power to impose taxes between Member States may justify the legislation of a Member State which requires assets in a limited partnership contributed to the capital of a capital company with its registered office in the territory of that Member State to be assessed at their value as part of a going concern, thus giving rise to the taxation, before they actually realised, of the capital gains relating to those assets generated in that territory, if it will in fact be impossible for that Member State to exercise its powers of taxation in relation to those gains when they are in fact realised, which is a matter for the national court to determine.

Question 2

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By its second question, the referring court asks, in essence, whether the legislation at issue in the main proceedings and the restriction it entails go beyond what is necessary to attain the objective of preserving the balanced allocation of the power to impose taxes between Member States, having regard, in particular, to the methods for collecting income tax such as those provided for in Paragraph 20(6) and the third to sixth sentences of Paragraph 21(2) of the UmwStG 1995.

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It should be noted, at the outset, that it is proportionate for a Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the tax due on the unrealised capital gains that have arisen in its territory at the time when its powers of taxation in respect of the investor in question cease to exist, namely, in the present case, at the time when the investor converts his interest in a limited partnership into shares in a capital company (see, to that effect, National Grid Indus, paragraph 52).

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With regard to the collection of the tax due in respect of the unrealised capital gains, the Court has held that it is appropriate to give the taxable person a choice between, first, immediate payment of the amount of tax due on the unrealised capital gains relating to the assets held by that person and, second, deferred payment of that tax, possibly together with interest in accordance with the applicable national legislation (see, to that effect, Nation Grid Indus, paragraph 73, and Case C?38/10 Commission v Portugal [2012] ECR, paragraphs 31 and 32).

62

In that context, in the light of the fact that the risk of non-recovery increases with the passing of time, the ability to spread payment of the tax owing before the capital gains are actually realised over a period of five years constitutes a satisfactory and proportionate measure for the attainment of the objective of preserving the balanced allocation of the power to impose taxes between Member States.

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In the present case, the combined provisions of Paragraph 20(6) and the third to sixth sentences of Paragraph 21(2) of the UmwStG 1995 enable a taxable person to spread over a period of five years, without being required to pay interest, payment of the tax due in respect of the transfer of the shares which that person holds.

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Accordingly, by giving the tax payer the choice between immediate recovery or recovery spread over a period of five years, the legislation at issue in the main action does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States.

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Lastly, with regard to the requirement to provide a bank guarantee, the Court has held that a Member State may take account of the risk of non-recovery of the tax in the national legislation applicable to deferred payments of tax debts (see, to that effect, National Grid Indus, paragraph 74).

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However, such guarantees in themselves constitute a restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as guarantee (Case C-9/02 Lasteyrie du Saillant [2004] ECR I-2409, paragraph 47, and N, paragraph 36).

67

Therefore, such a requirement cannot, as a matter of principle, be imposed without prior assessment of the risk of non-recovery.

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In particular, in the main proceedings, it is necessary to assess that risk, inter alia, in the light of the fact that, first, the unrealised gains, which are subject to the contested tax, relate solely to one form of assets, namely shares held by only two companies with their registered office in Austria and, second, that those shares are held in a capital company with its registered office in Germany.

69

Consequently, the answer to the second question is that the national legislation of a Member State which provides for the immediate taxation of unrealised capital gains generated in its territory does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States, provided that, where the taxable person elects for deferred payment, the requirement to provide a bank guarantee is imposed on the basis of the actual risk of non-recovery of the tax.

Costs

70

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:

1.

Article 63 TFEU must be interpreted as meaning that the objective of preserving the balanced allocation of the power to impose taxes between Member States may justify the legislation of a Member State which requires assets in a limited partnership contributed to the capital of a capital company with its registered office in the territory of that Member State to be assessed at their value as part of a going concern, thus giving rise to the taxation, before they are actually realised, of the capital gains relating to those assets generated in that territory, if it will in fact be impossible for that Member State to exercise its powers of taxation in relation to those gains when they are in fact realised, which is a matter for the national court to determine.

2.

The national legislation of a Member State which provides for the immediate taxation of unrealised capital gains generated in its territory does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States, provided that, where the taxable person elects for deferred payment, the requirement to provide a bank guarantee is imposed on the basis of the actual risk of non-recovery of the tax.

[Signatures]

(1) Language of the case: German.