JUDGMENT OF THE COURT (Grand Chamber)

17 July 2014 (*)

(Tax legislation — Freedom of establishment — National tax on profits — Group taxation — Taxation of the activity of foreign permanent establishments of resident companies — Avoidance of double taxation by set-off of tax (credit method) — Reincorporation of the losses deducted previously in the event that the permanent establishment is transferred to a group company over which the Member State in question does not exercise powers of taxation)

In Case C?48/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (Denmark), made by decision of 22 January 2013, received at the Court on 28 January 2013, in the proceedings

Nordea Bank Danmark A/S

v

Skatteministeriet,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ileši?, E. Juhász and A. Borg Barthet, Presidents of Chambers, A. Rosas, J. Malenovský, J.-C. Bonichot (Rapporteur), C. Vajda, S. Rodin and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Nordea Bank Danmark A/S, by H. Hansen, advokat,

– the Danish Government, by V. Pasternak Jørgensen, acting as Agent, and K. Lundgaard Hansen, advokat,

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

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

– the Austrian Government, by A. Posch, acting as Agent,

– the European Commission, by W. Roels and C. Barslev, acting as Agents,

– the EFTA Surveillance Authority, by X. Lewis, G. Mathisen and A. Steinarsdóttir, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 13 March 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU and 54 TFEU and of Articles 31 and 34 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement'), provisions which relate to freedom of establishment.

2 The request has been made in proceedings brought by Nordea Bank Danmark A/S ('Nordea Bank'), a company incorporated under Danish law, against decisions of the Skatteministeriet (Ministry of Taxation) reincorporating into its basis of assessment losses previously deducted in respect of some of its permanent establishments abroad.

Legal context

International law

3 Article 7(1) of the Convention between the Nordic countries for the avoidance of double taxation with respect to taxes on income and capital, concluded in Helsinki on 23 September 1996 (SopS 26/1997; 'the Nordic Convention'), provides:

'The profits of an undertaking of a Contracting State shall be taxable only in that State unless the undertaking carries on business in the other Contracting State through a permanent establishment situated therein. If the undertaking carries on business as aforesaid, the profits of the undertaking may be taxed in the other State, but only so much of them as is attributable to that permanent establishment.'

4 Under Article 25 of the Nordic Convention, the Contracting States chose to neutralise the double taxation of permanent establishments by means of the 'credit' method. For that purpose, the State in which the undertaking is resident grants a deduction in an amount equal to the income tax paid in the source State.

Danish law

5 Under the Danish legislation applicable to the dispute in the main proceedings, all resident companies took account on an ongoing basis of profits and losses of permanent establishments situated abroad when determining the taxable income of the company.

6 In the event of the total or partial transfer of a permanent establishment's business to a third party or to another company in the same group, a Danish company was taxed on the gains or losses in respect of all the assets in the transferred business, including intangible off-balance-sheet assets.

7 For that purpose, the assets transferred had to be valued at market value, pursuant to Paragraph 2 of the Law on the assessment of State income tax (lov om påligningen af indkomstskat til staten 'ligningsloven'; 'the ligningsloven'), which, in the version applicable to the dispute in the main proceedings, provided:

'Taxable persons who

(1) are controlled by natural or legal persons,

(2) control legal persons,

(3) are affiliated with a legal person,

(4) have a permanent establishment situated outside Denmark, or

(5) are foreign natural or legal persons with a permanent establishment in Denmark,

shall, in calculating their taxable income, apply prices and terms for commercial or financial transactions with the abovementioned natural and legal persons and permanent establishments (controlled transactions) in accordance with what could have been obtained had the transactions taken place between parties at arm's length.'

8 Paragraph 33 D(5) of the ligningsloven, which is applicable to the dispute in the main proceedings, was worded as follows:

'If all or part of a permanent establishment situated in a foreign State, or in the Faroe Islands or Greenland, is sold to an affiliated company, … deducted losses which are not matched by profits in subsequent years shall be included in the calculation of taxable income, irrespective of which relief method is applied …'

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

9 Nordea Bank has its seat in Denmark.

10 Between 1996 and 2000 it engaged in retail banking activities in Finland, Sweden and Norway through loss-making permanent establishments and therefore lawfully deducted the losses from its taxable income in Denmark.

11 In 2000 the activities of those permanent establishments were restructured: their offices were closed, their customers were offered the possibility of retaining their accounts on identical terms with subsidiaries of Nordea Bank in the same States and half of their staff were taken on by those subsidiaries or by other local companies in the same group.

12 According to the statements of the referring court, which are not contested by the parties to the main proceedings, that transaction was analogous to a partial sale of a business over which the Kingdom of Denmark exercised its powers of taxation to companies in the same group over which it did not exercise those powers.

13 Applying Paragraph 33 D(5) of the ligningsloven, the Skatteministeriet reincorporated into Nordea Bank's taxable profit the losses which had previously been deducted in respect of the business sold, which had not been matched by subsequent profits.

14 Since Nordea Bank considered that that reincorporation was contrary to freedom of establishment, it brought a complaint before the Landsskatteretten (National Tax Appeals Commission), and then challenged the complaint's dismissal before the Østre Landsret (Eastern Regional Court).

15 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Article 49 TFEU, read together with Article 54 TFEU (formerly Article 43 EC, read together with Article 48 EC) and Article 31 of the EEA Agreement, read together with Article 34 thereof, to be interpreted as precluding a Member State, which allows a company situated in that State to deduct on an ongoing basis losses from a permanent establishment situated in another Member State, from making full recapture from the company in respect of the losses arising from the permanent establishment (in so far as they are not matched by profits in subsequent years) in the event of the permanent establishment closing down, in connection with which part of the establishment's business is transferred to an affiliated company within the group which is resident in the same State as the permanent establishment, and where it must be assumed that the possibilities for applying the losses in question have been exhausted?'

Consideration of the question referred

16 By its question, the referring court asks, in essence, whether Articles 49 TFEU and 54 TFEU and Articles 31 and 34 of the EEA Agreement preclude legislation of a Member State under which, in the event of transfer by a resident company to a non-resident company in the same group of a permanent establishment situated in another Member State or in another State that is party to the EEA Agreement, the losses previously deducted in respect of the establishment transferred are reincorporated into the transferring company's taxable profit.

17 Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes the right for them to take up and pursue activities as self?employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. It entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (see, to this effect, the judgments in *Saint-Gobain ZN*, C?307/97, EU:C:1999:438, paragraph 35, and *Marks & Spencer*, C?446/03, EU:C:2005:763, paragraph 30).

18 Whilst the provisions of the FEU Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of a company incorporated under its legislation, in particular through a permanent establishment (see, to this effect, the judgment in *Lidl Belgium*, C?414/06, EU:C:2008:278, paragraphs 19 and 20).

19 It is apparent from the Court's case-law that freedom of establishment is hindered if, under a Member State's legislation, a resident company having a subsidiary or a permanent establishment in another Member State or in another State that is party to the EEA Agreement suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a permanent establishment or a subsidiary in the first Member State (see to this effect, in particular, the judgments in *Papillon*, C?418/07, EU:C:2008:659, paragraphs 16 to 22, and *Argenta Spaarbank*, C?350/11, EU:C:2013:447, paragraphs 20 to 34).

20 A provision which allows losses incurred by a permanent establishment situated in another Member State or in another State that is party to the EEA Agreement to be taken into account in calculating the profits and taxable income of the principal company constitutes a tax advantage (see, to this effect, the judgment in *Lidl Belgium*, EU:C:2008:278, paragraph 23).

21 It is clear that the provisions of Paragraph 33 D(5) of the ligningsloven at issue in the main proceedings result in such an advantage being denied to Danish companies having permanent establishments abroad compared with those having permanent establishments in Denmark. They lay down a rule requiring the reincorporation of losses lawfully deducted in respect of the foreign

establishments transferred which does not apply if establishments in Denmark are transferred in identical circumstances.

22 That disadvantageous treatment is liable to deter a Danish company from carrying on its business through a permanent establishment situated in a Member State or in a State that is party to the EEA Agreement other than the Kingdom of Denmark and therefore constitutes a restriction prohibited in principle by the provisions of the Treaty and the EEA Agreement that relate to freedom of establishment.

23 It is clear from the Court's case-law that such a restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest (see, to this effect, the judgment in *Philips Electronics UK*, C?18/11, EU:C:2012:532, paragraph 17 and the case-law cited).

24 As regards comparability of the situations, it should be pointed out that, in principle, permanent establishments situated in another Member State or in another State that is party to the EEA Agreement are not in a situation comparable to that of resident permanent establishments in relation to measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company's profits. However, by making the profits of permanent establishments situated in Finland, Sweden and Norway subject to Danish tax, the Kingdom of Denmark has equated those establishments with resident permanent establishments so far as concerns the deduction of losses (see, by analogy, the judgment in *Denkavit Internationaal and Denkavit France*, C?170/05, EU:C:2006:783, paragraphs 34 and 35).

25 The restriction can therefore be justified only by overriding reasons in the public interest. It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (see the judgment in *Lidl Belgium*, EU:C:2008:278, paragraph 27 and the case-law cited).

26 In this connection, the Danish Government invokes the need to ensure a balanced allocation of the power to impose taxes between Member States in connection with the prevention of tax avoidance.

27 It should be recalled 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, and that preservation of that allocation is a legitimate objective recognised by the Court (see, in particular, the judgment in *Argenta Spaarbank*, EU:C:2013:447, paragraph 50 and the case-law cited).

28 As set out in the explanatory memorandum for the ligningsloven, the rule requiring the reincorporation of losses deducted in respect of foreign permanent establishments 'has the purpose of preventing, for example, Danish companies from making deductions for losses in foreign branches, and subsequently, when the branch begins to generate a profit, selling it to an affiliated foreign company, so that actual reincorporation of the losses in Denmark is impossible'.

29 The objective of the Danish legislation is thus to avoid the risk of tax avoidance which would consist, in particular, in a group organising its business in such a way that it deducts from its taxable income in Denmark the losses incurred by a loss-making permanent establishment situated in Finland, Sweden or Norway, and then, once that establishment has become profitable, transfers the establishment's business to a company which it controls but which is liable to tax not in Denmark but in Finland, Sweden or Norway.

30 If the Kingdom of Denmark were denied the power to reincorporate the losses thereby deducted into the taxable profit of the Danish company carrying out the transfer, when it has lost the power to tax any future profits, arrangements of the above kind would artificially erode its tax base and, therefore, affect the allocation of the power to impose taxes resulting from the Nordic Convention.

31 However, the legislation goes beyond what is necessary to attain that objective.

32 It should be recalled that the balanced allocation of the power to impose taxes has the objective of safeguarding the symmetry between the right to tax profits and the right to deduct losses (see the judgment in *K*, C?322/11, EU:C:2013:716, paragraph 51 and the case-law cited).

33 The need to safeguard that symmetry means that the losses deducted in respect of the permanent establishment must be capable of being offset by taxation of the profits made by it under the tax jurisdiction of the Member State in question, that is to say, both the profits made throughout the period when the permanent establishment belonged to the resident company and those made at the time of the permanent establishment's transfer.

34 It is not disputed that the profits of a permanent establishment belonging to a resident company that are made before the permanent establishment's transfer to a non-resident company in the same group are taxable in Denmark, even though Article 25 of the Nordic Convention provides for the grant of a tax credit to the resident company in order to neutralise the risk of any double taxation.

35 Furthermore, Paragraph 2 of the ligningsloven lays down in particular a rule that assets transferred within a group are to be valued on market terms. Any gain made upon the transfer is then added to the taxable income of the Danish company carrying out the transfer.

36 Therefore, a provision of a Member State, such as Paragraph 33(5) of the ligningsloven, which provides, in the event that a resident company transfers to a non-resident company in the same group a permanent establishment situated in another Member State or in another State that is party to the EEA Agreement, for the reincorporation of the losses previously deducted in respect of the establishment transferred goes beyond what is necessary to attain the objective relating to the need to safeguard the balanced allocation of the power to impose taxes if the first Member State taxes the profits made in respect of that establishment before its transfer, including those resulting from the gain made upon the transfer.

37 This conclusion is not altered by the fact, put forward by the Danish Government, that it would be difficult for it in the event of an intragroup transfer to verify the market value of the business transferred in another Member State.

38 Such difficulties are not specific to cross-border situations since the Danish authorities necessarily already carry out similar checks when a business is sold in the context of an intragroup transfer of a resident establishment.

39 Moreover, the Danish tax authorities in any event always have the power to request from the transferring company the documents that appear to them necessary in order to verify whether the value of the business adopted for the purpose of calculating the gain on transfer of a foreign establishment is the same as the market value under the rule laid down in Paragraph 2 of the ligningsloven.

40 It follows from the foregoing considerations that Articles 49 TFEU and 54 TFEU and Articles

31 and 34 of the EEA Agreement preclude legislation of a Member State under which, in the event of transfer by a resident company to a non-resident company in the same group of a permanent establishment situated in another Member State or in another State that is party to the EEA Agreement, the losses previously deducted in respect of the establishment transferred are reincorporated into the transferring company's taxable profit, in so far as the first Member State taxes both the profits made by that establishment before its transfer and those resulting from the gain made upon the transfer.

Costs

41 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 (Grand Chamber) hereby rules:

Articles 49 TFEU and 54 TFEU and Articles 31 and 34 of the Agreement on the European Economic Area of 2 May 1992 preclude legislation of a Member State under which, in the event of transfer by a resident company to a non-resident company in the same group of a permanent establishment situated in another Member State or in another State that is party to the Agreement on the European Economic Area, the losses previously deducted in respect of the establishment transferred are reincorporated into the transferring company's taxable profit, in so far as the first Member State taxes both the profits made by that establishment before its transfer and those resulting from the gain made upon the transfer.

[Signatures]

* Language of the case: Danish.