



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 29 September 2011¹

Case C-318/10

SIAT SA
v
État belge

(Reference for a preliminary ruling from the Cour de cassation (Belgium))

(Freedom to provide services — Article 49 EC — Direct taxation — Tax on income — Regime for the deduction of business expenses — Non-deductibility of payment for services provided by persons established in Member States where the tax regime is appreciably more advantageous than that of the Member State of taxation — Deductibility conditional upon the provision of proof of the genuine and proper nature of the services and the normal nature of the related payments — Restriction of the freedom to provide services — Justifications — Combating tax evasion and avoidance — Effectiveness of fiscal supervision — Proportionality)

1. In recent years, the Court has had several opportunities to examine the compatibility with the provisions of the EC Treaty on freedom of establishment² or the free movement of capital,³ and more rarely with the provisions on freedom to provide services⁴ — as in the case before the referring court⁵ — of national tax legislation establishing regimes under which the rules differ, with cross-border implications, as regards the deductibility of tax on the income of natural or legal persons.

2. More specifically, the cases most akin to the case before the referring court concerned either companies which are mutually interdependent⁶ or the taxation of non-residents, as taxpayers, as compared with the taxation of residents.⁷

1 — Original language: French.

2 — See Case C-141/99 *AMID* [2000] ECR I-11619; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107; Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647; Case C-231/05 *Oy AA* [2007] ECR I-6373; Case C-293/06 *Deutsche Shell* [2008] ECR I-1129; Case C-414/06 *Lidl Belgium* [2008] ECR I-3601; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061; Case C-314/08 *Filipiak* [2009] ECR I-11049; and Case C-440/08 *Gielen* [2010] ECR I-2323.

3 — See, inter alia, Case C-377/07 *STEKO Industriemontage* [2009] ECR I-299; Case C-318/07 *Persche* [2009] ECR I-359; Case C-35/08 *Busley and Cibrian* [2009] ECR I-9807; Case C-450/09 *Schröder* [2011] ECR I-2497; and Case C-10/10 *Commission v Austria* [2011] ECR I-5389.

4 — See, inter alia, Case C-55/98 *Vestergaard* [1999] ECR I-7641; Case C-234/01 *Gerritse* [2003] ECR I-5933; Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461; Case C-318/05 *Commission v Germany* [2007] ECR I-6957; and judgment of 13 March 2008 in Case C-248/06 *Commission v Spain*, not published in the ECR.

5 — And even on European citizenship; see Case C-544/07 *Rüffler* [2009] ECR I-3389.

6 — See, for example, the abovementioned judgments in *Marks & Spencer*, *Test Claimants in the Thin Cap Group Litigation*, *Rewe Zentralfinanz*, *Oy AA*, and Case C-311/08 *SGI* [2010] ECR I-487.

7 — See, in particular, *FKP Scorpio Konzertproduktionen*.

3. In the present case, the Court is specifically called upon to rule on a provision of the 1992 Belgian Code des impôts sur les revenus (Income Tax Code),⁸ which, as we shall see, introduces for Belgian taxpayers a marked difference in the rules governing the deduction of business expenses from tax on income, depending on whether (Article 54 of the 1992 Income Tax Code) or not (Article 49 of the 1992 Income Tax Code) the service provider in respect of whom the expenditure was incurred resides in a Member State whose tax regime is appreciably more advantageous than the regime in Belgium, quite independently of any relationship of interdependence between the taxpayer and the service provider.⁹

4. The Court must therefore assess whether the restriction resulting from the difference in treatment is legitimate and proportionate.

I – Legislative framework

5. Article 49 of the 1992 Income Tax Code provides:

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

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

6. Article 53 of the 1992 Income Tax Code provides:

‘Business expenses shall not include:

...

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

...’

7. Under Article 54 of the 1992 Income Tax Code:

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

8 — ‘The 1992 Income Tax Code’.

9 — In these circumstances, only the Court’s judgment in *Vestergaard* can specifically provide us with a few relevant reference points.

II – Facts

8. In 1991, the Société d'investissement pour l'agriculture tropicale (SIAT), a Belgian company, established with a Nigerian group (Presco International Limited (PINL)) a joint subsidiary (Presco Industries Limited (PIL)) for the exploitation of palm plantations with a view to the production of palm oil.

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

10. In 1997, the parties terminated their partnership after failing to reach agreement on the exact amount of commission payable by SIAT. By a first agreement, signed on 3 December 1997, SIAT repurchased its interest in PIL from the PINL group. By a second agreement signed on the same date, SIAT undertook to pay MISA the sum of USD 2 million in settlement of all accounts.

11. Following the agreement of 3 December 1997, SIAT entered as a charge in its accounts made up to 31 December 1997 the sum of BEF 28 402 251, corresponding to the amount of commission payable under the 1991 agreement at the end of 1997.

12. Noting that MISA had the status of a holding company governed by the Luxembourg Loi sur le régime fiscal des sociétés de participations financières (Law on the tax regime governing financial holding companies) of 31 July 1929 and that, in consequence, it was not liable to pay any tax analogous to Belgian corporation tax, the Belgian tax authority notified SIAT, pursuant to Article 54 of the 1992 Income Tax Code, of a revised assessment of its tax return for the 1998 financial year (income from 1997), disallowing the deduction, as business expenses, of the sum of BEF 28 402 251.

13. The action brought by SIAT contesting the refusal of this deduction as business expenses was dismissed at first instance and again by judgment of the Cour d'appel de Bruxelles (Court of Appeal, Brussels) of 12 March 2008, as both courts found that the commission in question fell within the scope of Article 54 of the 1992 Income Tax Code.

III – The question referred for a preliminary ruling

14. Hearing the appeal brought by SIAT against the judgment of the Cour d'appel de Bruxelles of 12 March 2008, the Cour de cassation (Belgian Court of Cassation) has decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

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

IV – The observations of the parties

15. Written observations have been submitted by SIAT, by the Belgian, French, Portuguese and United Kingdom Governments and by the European Commission. SIAT, the Belgian Government and the Commission also presented oral argument at the hearing on 16 June 2011.

16. The various governments which submitted observations all argue, as does the Commission, that the Belgian legislation is not incompatible with Article 49 EC in so far as it is justified by overriding reasons relating to the public interest, such as the need to combat tax evasion, to preserve the balanced allocation between the Member States of the power to impose taxes and to ensure the effectiveness of fiscal supervision, and to the extent that it is proportionate to those objectives. SIAT, on the other hand, submits that the Belgian legislation constitutes an obstacle to freedom to provide services and that it cannot be justified by the overriding reasons relating to the public interest relied on by the Belgian Government.

V – Analysis

A – *Preliminary remarks*

1. The comparison proposed by the referring court

17. There is one point on which I must comment at the outset, namely that concerning the comparator proposed by the referring court for the assessment of the regime established by Article 54 of the 1992 Income Tax Code. As we have just seen, by its sole question referred for a preliminary ruling, the referring court brings to our attention the difference in treatment arising from that provision, highlighting the way in which the tax treatment of a Belgian taxpayer differs, depending on whether he has incurred business expenses vis-à-vis a service provider residing in Belgium or vis-à-vis a service provider established in another Member State, where — in either case — each provider, albeit for different reasons, receives tax treatment which is appreciably more advantageous than it would be under the Belgian tax regime laid down ‘by the ordinary law’. In the first case, the taxpayer is subject to the rule laid down in Article 49 of the 1992 Income Tax Code, whilst in the second he is subject to the rule laid down in Article 54 of that Code, the only difference being the place of establishment of the service provider.

18. That way of highlighting the difference in treatment stemming from the two provisions of national law in question seems needlessly artificial, not least because the national legislation would have to be able, at least occasionally, to subject business expenses incurred in connection with domestic transactions to tax treatment which is appreciably more advantageous, a point which is not substantiated.

19. It seems obvious, however, that the difference in treatment in question is brought about as a result of the contrast between the special rule laid down in Article 54 of the 1992 Income Tax Code, which applies specifically to taxpayers who have incurred expenses vis-à-vis service providers established in Member States in which the regime governing taxes on income proves to be appreciably more advantageous than the corresponding Belgian regime, and the general rule laid down in Article 49 of the 1992 Income Tax Code, which relates to other taxpayers, including — it should be stressed — those who have incurred expenses vis-à-vis service providers established in Member States whose tax regime is not appreciably more advantageous than its Belgian counterpart.

20. Admittedly, that difference does not come down merely to a question of residence. It is nevertheless clear that Article 54 of the 1992 Income Tax Code applies only where a cross-border provision of services has taken place, even if that factor is not sufficient in itself.

21. In order to examine the question, therefore, I propose to focus on the contrast between the provision laying down the exception (Article 54 of the 1992 Income Tax Code) and the provision laying down the rule governing the deduction of business expenses (essentially Article 49 of that Code).

2. An argument to be rejected from the outset

22. One final preliminary remark should be made. The Belgian Government states that Article 54 of the 1992 Income Tax Code cannot apply to payments made within the European Union. Under the Code of conduct for business taxation,¹⁰ the extraordinary tax regimes laid down by the ordinary law of the Member States, which have the effect of making certain elements of income subject to zero taxation or almost zero taxation, (and, in particular, Luxembourg's 1929 holdings regime (H29)) must be dismantled completely by 31 December 2010 at the latest. SIAT, on the other hand, has essentially argued, in its observations and at the hearing, that the mechanism introduced by Article 54 of the 1992 Income Tax Code, which dates from 1954,¹¹ establishes a general presumption of tax evasion, which is no longer acceptable within the European Union.

23. It is not necessary to decide on the soundness of the assertions made by the Belgian Government and it need merely be stated in that regard that the Code of conduct for business taxation, mentioned above, cannot have any bearing at all on the outcome of the main proceedings since, as is made clear in the last recital in the preamble to the resolution of 1 December 1997, the Code of conduct is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community.

B – *The substance of the national legislation*

24. In its order for reference, the referring court describes the Belgian legislation as raising a 'presumption that business expenses are not deductible'. SIAT argues that Article 54 of the 1992 Income Tax Code establishes a 'general presumption of tax evasion'. Lastly, in the view of the Belgian Government, the national legislation establishes a 'legal presumption of simulation'.¹² In whichever way that provision may fall to be categorised, it is necessary, first and foremost, clearly to identify its main characteristics.

1. The main characteristics of the Belgian legislation

25. Before identifying the differences between the two tax regimes — the regime under Article 49 of the 1992 Income Tax Code and the regime under Article 54 thereof — two points must be made. First, we must take as a basis the reason behind the entire national provision in question, which is, as we have just seen, the coexistence within the European Union of appreciably different regimes for taxing income, which, far from being merely possible, is a frequent reality. Accordingly, the provision of national law in question makes reference, without further clarification, to a 'tax regime which is appreciably more advantageous' in other Member States than the Belgian regime (Article 54 of the 1992 Income Tax Code). The referring court has not provided any additional information in that regard. When questioned on this point at the hearing, the Belgian Government stated that, whilst there were lists of 'tax havens',¹³ whether within or outside the Community, it was nevertheless for

10 — Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 (OJ 1998 C 2, p. 1).

11 — It can be observed in this regard that, in its written observations, the Belgian Government refers to the explanatory memorandum for the law which inserted it into the Income Tax Code, which was adopted during the 1953-1954 parliamentary session.

12 — In accordance, moreover, with the literature from the tax authorities, as is clear from the very title of Issue 54/26 of the *Commentaire du code des impôts sur les revenus 1992* (http://fiscus.fgov.be/interfaoiffr/publicaties/lijst_aoif.htm).

13 — This is the terminology used by the agent of the Belgian Government at the hearing.

the tax authorities, subject to review by the competent national courts, to decide this point in each individual case. It is already possible to observe here that, for Belgian taxpayers, legal certainty is not all that it could be as regards the choice of their business strategies, with significant repercussions for the freedom to provide services.

26. Secondly, it should be noted that, under the Belgian legislation, *all* business expenditure incurred by the taxpayer as a result of transactions carried out with service providers established in Member States with appreciably more advantageous tax regimes is regarded as *prima facie* suspect. That characteristic of Article 54 of the 1992 Income Tax Code merits a brief comment. Unlike other situations previously considered by the Court, and as has already been pointed out,¹⁴ the Belgian legislation takes no account of any interdependence between the taxpayer claiming deduction of business expenses and the service provider receiving the payment corresponding to that expenditure.

27. The mere fact that the service provider in question is subject to a tax regime which is appreciably more advantageous than the Belgian regime is sufficient for the Belgian legislature to identify as suspect any business expenditure incurred by a Belgian taxpayer vis-à-vis that service provider and, in consequence, the service provider is subject to the general rule of non-deductibility. It is in that sense that it is possible to say that the national legislature has established a general presumption of tax evasion in the case of any business expenditure incurred by a Belgian taxpayer vis-à-vis a non-resident service provider solely because that provider is established in a Member State where the tax on income is appreciably lower than in Belgium.

2. The differences between the regimes relating to deductibility of business expenses: the contrast between Article 54 of the 1992 Income Tax Code and Article 49 of that Code

a) The principle

28. Whilst Article 49 of the 1992 Income Tax Code establishes a general rule that business expenses stemming from domestic transactions are deductible, albeit subject to conditions which may be regarded as normal, Article 54 of that Code lays down a general rule that business expenditure is not deductible where it is incurred vis-à-vis service providers established in Member States in the circumstances described above.

29. This produces a first difference, which can be described as an inversion of the rule, thereby placing the taxpayers concerned in markedly different situations depending on the origin of the services used. As I shall immediately go on to show below, the deductibility rule and the non-deductibility rule are 'qualified': deductibility is not unconditional, whilst non-deductibility is subject to exceptions, granted on a case-by-case basis. However, there is already a difference in treatment by virtue of that fact alone: it is always much more difficult, but only from a procedural point of view, to obtain from the authorities the benefit of the exception to the rule than to satisfy the conditions laid down by the rule.

14 — I am thinking, in particular, of the case-law on controlled foreign companies and, more broadly, relationships between parent companies and subsidiaries, including the judgments cited in footnote 6 above.

b) The conditions

30. It is not surprising, therefore, that the conditions governing the deduction of business expenses are substantively different depending on the case. Whilst the two provisions both impose on taxpayers the obligation to prove that the transactions underlying the payments to be deducted as business expenses are ‘genuine’, Article 54 of the 1992 Income Tax Code incorporates two additional, cumulative conditions:¹⁵ (i) the services provided must be ‘proper’ and (ii) the payment for those services must not exceed ‘normal limits’. I must now endeavour to assess the possible implications of those two additional conditions.

31. First of all, it is not clear what the condition relating to ‘properness’ adds to that of ‘genuineness’. There are nevertheless certain indications which allow us to understand the substance of this condition. It is clear from the *travaux préparatoires* for the Belgian legislation mentioned in the order for reference that proof that the services provided are genuine and proper imposes on taxpayers the obligation to show that the related expenditure ‘falls within the normal framework of their business transactions’, that it ‘meets an industrial, commercial or financial need and that, over time, recompense is forthcoming, or should as a rule be forthcoming, through the activities of the undertaking as a whole’.¹⁶ The point is therefore that the services in question must meet a real need.

32. Secondly, neither the Belgian legislation nor the *Commentaire du code des impôts sur les revenus 1992* (the administrative guidelines for the 1992 Income Tax Code) defines with precision what is entailed by the obligation to prove that business expenses do not exceed the normal limits. When asked about this point at the hearing, the Belgian Government merely stated that the test to be applied involved comparing the transaction in question with normal practice between economic operators on the market. Article 54 of the 1992 Income Tax Code requires the taxpayer to prove that the payment for the provision of services which he intends to deduct from tax as business expenses is not abnormal as compared with normal practice.

33. If the difference between the two regimes is to be correctly understood, it should be stated, however, that Article 53(10) of the 1992 Income Tax Code¹⁷ provides, in relation to ‘ordinary’ deductions, that business expenses are not to include ‘any expenditure which exceeds business needs to an unreasonable extent’.

34. Through that wording, the Belgian legislature seems to have wanted to exclude from deductibility business expenses which are unreasonable, whether in terms of their necessity (‘needs’) or — as cannot be ruled out entirely — in terms of the related remuneration (‘exceeds’). From that point of view, the rule laid down in Article 53(10) of the 1992 Income Tax Code would ultimately be predicated on the same reasoning as the rule laid down in Article 54 of that Code. Yet there are obvious quantitative differences: Article 53(10) of the 1992 Income Tax Code excludes from deduction only what proves to be ‘unreasonable’, whereas Article 54 of that Code requires positive proof both of the necessity (‘properness’) of the services underlying the expenditure and of the normality of the payment corresponding to that expenditure.

15 — As is clear from Issue 54/28 of the *Commentaire du code des impôts sur les revenus 1992*, quoting the judgment of the Cour de cassation of 10 November 1964, SA Anc. Éts. Paul Auerbach (Bull. 423, p. 151). The Commission mentions ‘reinforced procedural conditions’.

16 — These words are also reproduced in Issue 54/28 of the *Commentaire du code des impôts sur les revenus 1992*.

17 — This provision, cited by the Commission in its written observations, is not mentioned at any time either by the referring court in its order for reference or by the Belgian Government in its written and oral observations.

c) Forms of evidence

35. Lastly, the two provisions differ as regards the admissible forms of evidence. Article 49 of the 1992 Income Tax Code merely requires ‘documentary evidence’ or, failing which and in the alternative, ‘any other form of evidence admissible under general law’, other than oath. In contrast, Article 54 of the 1992 Income Tax Code refers, apparently more permissively, to ‘any legal means’, without formally excluding any form of evidence. It would therefore seem that Article 54 of the 1992 Income Tax Code is more generous. However, the context in which this difference arises calls for a certain degree of mistrust of any rash conclusion. It should be stated that, according to the *Commentaire du code des impôts sur les revenus 1992*, it is necessary for the tax official to be ‘*reasonably satisfied* that the transactions which gave rise to the expenditure referred to in the law are genuine and proper’.¹⁸ This reveals a broad margin of discretion in the evaluation of the value of the various forms of evidence, which, for the time being, we shall simply note.

36. In summary, Article 54 of the 1992 Income Tax Code establishes clear differences in treatment. In brief, by inverting the rule governing the right to deduct, it somewhat reverses the burden of proof, which also varies from one case to the next, whilst ultimately making that burden heavier. That being so, we should examine whether those differences in treatment constitute a restriction of the freedom to provide services for the purposes of Article 49 EC.¹⁹

C – The existence of a restriction of, or an obstacle to, the freedom to provide services

37. In the light of the foregoing, it is not very difficult to show that the difference in treatment described constitutes a restriction of the freedom to provide services. In general terms, Article 49 EC precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising that freedom.²⁰

38. More specifically, the Court has repeatedly ruled that Article 49 EC precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services wholly within one Member State.²¹ Furthermore, it is settled case-law that Article 49 EC confers rights not only on the provider of services but also on the recipient.²²

39. In the case under consideration, the regime governing the right to deduct business expenses corresponding to payments for services provided by persons established in the Member State of taxation is more favourable than that applied to business expenses corresponding to payments for services provided by persons established in another Member State, to the extent that the tax regime there is regarded as appreciably more advantageous than the Belgian regime.

18 — See Issue 54/29 of the *Commentaire du code des impôts sur les revenus 1992*.

19 — It should be stated here that the referring court is explicitly asking the Court a question of interpretation concerning Article 49 EC (now Article 56 TFEU) relating to freedom to provide services. In the light of the nature of the relationship between the companies in question in the main proceedings (a joint subsidiary), however, the question arises whether other Treaty provisions, and in particular Articles 43 EC (Article 49 TFEU) and 48 EC (Article 54 TFEU) concerning freedom of establishment, are applicable in accordance with the rule in Case C-251/98 *Baars* [2000] ECR I-2787; see also, in this regard, *SGI*, paragraphs 23 to 37. Nevertheless, having regard to the characteristics of the Belgian legislation described above, and in so far as this question has not been discussed at all, that legislation will be examined in the light of the Treaty provisions relating to freedom to provide services. See, by analogy, inter alia Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 33.

20 — See Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 12, and Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 16.

21 — See, inter alia, *Commission v France*, paragraph 17; Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 33; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 61; and Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 67.

22 — See, inter alia, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377; Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 34; *FKP Scorpio Konzertproduktionen*, paragraph 3; and Case C-233/09 *Dijkman and Dijkman-Lavaleije* [2010] ECR I-6649, paragraph 24.

40. Belgian taxpayers who use services provided by persons established in Member States whose tax regime is appreciably more advantageous than the Belgian regime, thereby exercising their right to a passive form of the freedom to provide services, are accordingly in a less advantageous situation than taxpayers who have not availed themselves of that freedom and who have confined their activities to the territory of the Member State of taxation. The Belgian legislation in question thus acts as a deterrent. It is also likely to discourage the supply of services from persons established in Member States whose tax regime is more advantageous than the Belgian regime to taxpayers residing in Belgium.²³

41. Lastly, the fact that the difference in treatment concerns procedural aspects (such as a heavier burden of proof), rather than substantive aspects (such as a difference in the tax base or rate), is clearly wholly unable to call that assessment into question. Moreover, the Court has held that procedural differences may constitute restrictions of, or obstacles to, a freedom.²⁴

42. It should nevertheless be stated that the objection has been raised²⁵ that the difference in treatment in question is not discriminatory, because resident service providers and non-resident service providers are not objectively in the same situation as regards the fiscal supervision obligations for taxpayers.²⁶

43. Service providers established in a Member State are subject to the supervision of the tax authorities of that Member State. Those authorities are thus able to verify directly whether the costs deducted as business expenses by a taxpayer relate to genuine transactions. In contrast, where the transactions justifying the deduction are carried out by service providers established in another Member State, verifying whether they are genuine requires the assistance of the authorities of that Member State. In those circumstances, it is normal — so the argument goes — for the taxpayer to be responsible for proving that the costs for which he has accounted are genuine.

44. However, to dismiss those objections of principle, as it were, it need only be noted that they must be addressed at the next stage of our analysis, namely that concerning possible justifications for restrictions of the freedom to provide services and, in particular, the justification relating to the need to ensure the effectiveness of fiscal supervision.

45. The Belgian legislation therefore constitutes a restriction of the freedom to provide services for the purposes of Article 49 EC. Restrictive national legislation may be warranted, however, if it pursues a legitimate objective compatible with the Treaty, if it is justified by overriding reasons relating to the public interest, if it is suitable for securing the attainment of the objective which it pursues and if it does not go beyond what is necessary in order to attain that objective.²⁷

23 — See *Schwarz and Gootjes-Schwarz*, paragraph 66; *Commission v Germany*, paragraph 80; and Case C-56/09 *Zanotti* [2010] ECR I-4517, paragraph 41.

24 — Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, with regard to an extended recovery period for assets held outside the Member State of taxation.

25 — This is the main line of argument of the Portuguese Government and it is also the position of the Belgian Government.

26 — This was noted by the French and Portuguese Governments.

27 — See, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-522/04 *Commission v Belgium* [2007] ECR I-5701, paragraph 47; and Case C-330/07 *Jobra* [2008] ECR I-9099, paragraph 27.

D – *The overriding reasons capable of justifying the restriction of the freedom to provide services*

46. As justification for the restriction in question, the Belgian, French, Portuguese and United Kingdom Governments argue, as does the Commission, that the restriction is justified by reasons relating to the need to combat tax avoidance taken together with the need to preserve the balanced allocation between the Member States of the power to impose taxes.²⁸ Additionally, the French and Portuguese Governments argue that the Belgian legislation is also justified by the need to ensure the effectiveness of fiscal supervision.

47. In view of those multiple possible justifications, which have all been effectively accepted by the Court, it is important to identify, as far as possible, the aim which the Belgian legislature might have pursued in conceiving the provision in question.

48. The Court has recognised that the need to preserve the balanced allocation between the Member States of the power to impose taxes, or the allocation of fiscal jurisdiction²⁹ or of the power of taxation³⁰ between the Member States, can constitute an overriding reason relating to the public interest capable of justifying an obstacle to the freedoms.³¹ That may be accepted as justification, *inter alia*, where the tax system in question is designed to prevent conduct capable of jeopardising the right of the Member States to exercise their powers of taxation in relation to activities carried on in their territory.³² However, as the Court itself has stated,³³ it has been accepted as justification only in conjunction with other grounds.³⁴

49. That is why the Belgian Government has very specifically argued, with reference to *Oy AA*,³⁵ that Article 54 of the 1992 Income Tax Code was justified by the need to preserve the balanced allocation between the Member States of the power to impose taxes, taken together with the need to combat tax avoidance.³⁶ However, the relevance of the purported justification relating to the balanced allocation of the power to impose taxes must be rejected in the case before the referring court.

50. Article 54 of the 1992 Income Tax Code does not seek — at least, not according to its wording — to enable Belgium to retain tax resources which are liable to escape it. It should not be forgotten that Article 54 of the 1992 Income Tax Code applies to persons who are, and can only be, taxpayers in Belgium and seeks merely to ensure that deductions from tax on their income are justified. Accordingly, it does not allocate, as between the Member States concerned, the power to impose taxes on the earnings corresponding to those payments.³⁷ Of course, that does not mean that that provision cannot have the indirect effect of deterring Belgian taxpayers from using service

28 — In accordance with the judgment in *SGL*, paragraphs 66 and 69.

29 — See Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 24 and 30; Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraphs 34 to 40.

30 — See Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 87.

31 — Thus far, the Court has accepted this justification in only five cases: see the abovementioned judgments in *Oy AA*, *Lidl Belgium*, *SGL*, and Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, and Case C-337/08 *X Holding* [2010] ECR I-1215.

For rejections, with regard to freedom of establishment, see the abovementioned judgments in *Saint-Gobain ZN*, *Rewe Zentralfinanz*, and Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-5145; with regard to free movement of capital, Case C-379/05 *Amurta* [2007] ECR I-9569; Case C-540/07 *Commission v Italy* [2009] ECR I-10983; and Case C-487/08 *Commission v Spain* [2010] ECR I-4843; with regard to freedom to provide services, *Jobra*.

32 — *Oy AA*, paragraph 54, referring to *Rewe Zentralfinanz*, paragraph 42, itself referring to the abovementioned judgments in *Marks & Spencer*, paragraph 46 and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraphs 55 and 56.

33 — See the abovementioned judgments in *Rewe Zentralfinanz*, paragraph 41, and *Oy AA*, paragraph 51.

34 — See *Marks & Spencer*, paragraphs 43 and 51.

35 — Paragraph 51 *et seq.*

36 — See *SGL*, paragraph 66.

37 — See the abovementioned judgments in *Rewe Zentralfinanz*, paragraph 42, and *Jobra*, paragraph 33.

providers established in other Member States and, in consequence, of ultimately affecting the allocation of tax resources between those Member States and Belgium. However, that possible indirect consequence does not allow the conclusion that the Belgian legislation is justified by the need to preserve the balanced allocation between the Member States of the power to impose taxes.

51. In conclusion, the simple exercise by Belgian taxpayers of the *passive* freedom to provide services³⁸ cannot be assimilated with conduct which is capable of jeopardising Belgium's right to exercise its powers of taxation: otherwise, that freedom would be divested of all substance.³⁹

52. It remains to be examined whether the Belgian legislation can be justified by the need to ensure the effectiveness of fiscal supervision and to combat tax evasion, avoidance or abuse.

53. It is true that the Court has recognised that the need to ensure the effectiveness of fiscal supervision can, as such, constitute an overriding reason relating to the public interest⁴⁰ capable of justifying a restriction of freedoms. And it is clear that Article 54 of the 1992 Income Tax Code strengthens the authorities' supervision of business expenses which may be deducted from income tax.

54. However, the primary aim of Article 54 of the 1992 Income Tax Code is to combat tax evasion, avoidance or abuse and, more specifically, to protect the Belgian State against the practice of deducting business expenses which are not genuine, proper and normal. The national legislature is evidently combating this practice by strengthening the supervision of deductions and even by excluding certain deductions without exception. Yet it is primarily as a means of combating tax evasion by Belgian taxpayers that the legitimacy of the Belgian legislation falls to be examined.⁴¹

55. In the case under consideration, it can be accepted that the Belgian legislation may be justified by the need to combat certain forms of tax avoidance and, more specifically, to detect practices which take the form of payments for fictitious services or abnormal payments for genuine services which, presented as business expenses and, as such, eligible for deduction from the taxable amount in Belgium, are likely indirectly to affect, by reason of their abusive character, the exercise by Belgium of its powers of taxation in relation to activities carried on in its territory.

56. Accordingly, combating tax evasion, avoidance or abuse forms the centre of gravity of the special regime established by Article 54 of the 1992 Income Tax Code and, consequently, that is the justification in the light of which the proportionality of the Belgian legislation — or the conditions for its practical and effective application — must be examined.

38 — Adopting the terminology employed, inter alia, by Advocate General Stix-Hackl, in point 53 of her Opinion in Case C-42/02 *Lindmann* [2003] ECR I-13519, and Advocate General Kokott, in point 35 of her Opinion in Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821.

39 — See *Rewe Zentralfinanz*, paragraph 43.

40 — See, inter alia, Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8; Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31; Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18; Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 24; Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 47; Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraph 57; and Case C-262/09 *Meilicke and Others* [2011] ECR I-5669, paragraph 41.

41 — The referring court also mentioned, in its order for reference, the question of the effect of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) on the assessment of the justifications for the Belgian legislation. However, and without going into a detailed examination of the question here, it is not certain that Directive 77/799 is obviously applicable in a case like the main proceedings, having regard to Articles 2 and 8 thereof and to the Court's case-law. Compare, in particular, the abovementioned judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraphs 70 and 71; *X and Passenheim-van Schoot*, paragraphs 65 to 67, and *Persche*, paragraph 61 et seq. See also Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 32.

57. The Court has repeatedly held in this regard that a restriction of the freedom to provide services can be justified by the need to combat the risk of tax avoidance⁴² and, more broadly, to prevent abusive practices,⁴³ albeit subject to the criterion of specificity.

58. Restrictive national legislation satisfies the condition of specificity if it specifically targets wholly artificial arrangements which do not reflect economic reality and the only purpose of which is to obtain a tax advantage, to escape tax, or to circumvent or escape national tax law,⁴⁴ or if that legislation is specifically designed to exclude from a tax advantage for which it makes provision wholly artificial schemes designed to circumvent it.⁴⁵

59. As has been pointed out above in connection with the characteristics of the Belgian legislation, that legislation imposes on all taxpayers the obligation to prove that transactions the payment for which is eligible for deduction from income tax as business expenses are genuine. However, this requirement — which may be regarded as elementary for the purposes of obtaining a tax advantage, whatever it may be, and accordingly capable in itself of ensuring the attainment of the objectives pursued — is not at issue in the main proceedings.

60. The question raised by the Belgian legislation is whether the obligation on taxpayers wishing to deduct from income tax, as business expenses, payments for services provided by persons established in Member States whose tax regimes are appreciably more advantageous than the regime in Belgium to prove that the transactions are proper and that the related payments are normal is justified and, assuming that it is capable of attaining the objectives thus defined, does not go beyond what is necessary in order to attain that objective.

61. The two requirements laid down in Article 54 of the 1992 Income Tax Code — namely, that proof must be provided that the transactions are proper and that the related payments are normal — may in principle be regarded as appropriate for attaining the identified objectives of combating tax evasion, avoidance or abuse.

62. Requiring taxpayers wishing to obtain a tax advantage, such as the deduction of the business expenses at issue in the main proceedings, to provide proof that those expenses relate to proper transactions and are within the normal limits undoubtedly has the objective of preventing those taxpayers from arranging the reduction of their taxable income through the production of false or abnormally high invoices.⁴⁶

63. Accordingly, those requirements are undoubtedly likely to contribute to combating tax evasion, avoidance and abuse. As the Portuguese Government stated in its observations, those requirements are also likely to deter taxpayers from engaging in fraudulent practices by simulation or exaggeration or by declaration of fictitious or overcharged transactions.

64. Lastly, however, it must still be verified that they do not go beyond what is necessary in order to attain the objectives pursued.

42 — See Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 26; Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779, paragraph 37; and Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 50.

43 — See the abovementioned judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraphs 51 and 55; *Test Claimants in the Thin Cap Group Litigation*, paragraph 74; *Jobra*, paragraph 35, and Case C-287/10 *Tankreederei I* [2010] ECR I-14233, paragraph 28.

44 — See, inter alia, the abovementioned judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 55; *Test Claimants in the Thin Cap Group Litigation*, paragraph 74; *Jobra*, paragraph 35; *Aberdeen Property Fininvest Alpha*, paragraph 64; *Glaxo Wellcome*, paragraph 89; *Tankreederei I*, paragraph 28; and Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, paragraph 165.

45 — See, inter alia, *ICI*, paragraph 26; *Lankhorst-Hohorst*, paragraph 37; *De Lasteyrie du Saillant*, paragraph 50; *Marks & Spencer*, paragraph 57; *Test Claimants in the Thin Cap Group Litigation*, paragraph 79, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 61.

46 — As the Commission and the Belgian Government stated in their observations, it is clear from the preparatory documents for the law which gave rise to Article 54 of the 1992 Income Tax Code that this provision sought to prevent practices by which Belgian companies fictitiously reduce their basis for assessment by paying for non-existent services provided by companies which have a preferential tax regime.

E – *The proportionality of the Belgian legislation*

65. In order to be able to make an overall assessment of the proportionality of the Belgian legislation, I propose to draw a distinction between the various conditions laid down in Article 54 of the 1992 Income Tax Code. Those conditions can be divided into two groups: (i) those which can be interpreted and applied by the Belgian tax authorities, subject to review by the competent national courts, in a manner compatible with the requirements of the freedom to provide services under Article 49 EC, and (ii) those which cannot be interpreted and applied in a manner compatible with those requirements.

66. First of all, in requiring the taxpayer to prove that the provision of cross-border services is proper and that the payments relating to those services are normal, Article 54 of the 1992 Income Tax Code lays down two conditions additional to those laid down in Article 49 of that Code, which establishes the ordinary rules of law. However, those additional conditions do not appear, in themselves, to be unreasonable in relation to the objective pursued of combating tax avoidance and evasion, provided that, in practice, they are interpreted and applied in a measured manner by the tax authorities and the national courts, even though they are different from the conditions laid down *inter alia* in Article 53(10) of the 1992 Income Tax Code.

67. Secondly, whilst it is true that Article 54 of the 1992 Income Tax Code does not expressly guarantee⁴⁷ that, where it has been established that the payment relating to a cross-border service is abnormal, the right of deduction is denied only in respect of the part which exceeds what would have been agreed in normal conditions of competition,⁴⁸ it seems that the practice of the courts has moved in that direction.⁴⁹ On this point, too, the Belgian legislation could perfectly well, therefore, be regarded as compatible with Article 49 EC, provided that the tax authorities and the national courts disallow the deduction only within the limits established by the case-law of the Court cited above.⁵⁰

68. Lastly, by the same token, the view might also be taken that it is for the referring court to ensure that the obligation on the taxpayer to convince the tax official that the services in question are genuine and proper is applied in a measured manner, if necessary by creating a framework for the exercise of that discretion. As the Commission stated at the hearing, the checks undertaken by the authorities to ascertain that the transactions are genuine and proper must be limited by making it out of bounds for them to interfere in any way with the management of the company.

69. Accordingly, if those three elements accounted for all the difficulties raised by Article 54 of the 1992 Income Tax Code, it would be possible to conclude that, subject to the verifications to be made by the referring court with regard to the interpretation and application of national law in the light of EU law, the Belgian legislation is proportionate in relation to the main objective which it pursues. However, Article 54 of the 1992 Income Tax Code raises additional difficulties which cannot be ignored.

47 — It is clear in particular from Issue 54/28 of the *Commentaire du code des impôts sur les revenus de 1992*, quoting an old judgment (Cour de cassation, 12 February 1963, SA Oftri, Bull. 411, p. 1758), that where the abnormal character of an item of expenditure is established, it is the expenditure *in its entirety* and not just the abnormal part which must be disallowed as general expenses.

48 — The arm's-length principle constitutes the appropriate test by which to distinguish artificial arrangements from genuine economic transactions, to take up the expression used by Advocate General Geelhoed, in point 66 of his Opinion in *Test Claimants in the Thin Cap Group Litigation*, and Advocate General Kokott, in point 68 of her Opinion in *SGL*. With regard to the application of that principle, see in particular *SGL*, paragraphs 71 and 72. See also the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 10 December 2007, The application of anti-abuse measures in the area of direct taxation — within the EU and in relation to third countries [COM(2007) 785 final, p. 5 and 6].

49 — This is claimed by the Commission, with reference to a judgment of the Cour de cassation of 27 November 1966 which returned to the approach taken in the judgment of 12 February 1963.

50 — For a specific example of a reservation relating to interpretation, see *inter alia SGL*, paragraph 75.

70. The main problem posed by Article 54 of the 1992 Income Tax Code in relation to the freedom to provide services for the purposes of Article 49 EC lies in its lack of specificity or, in other words, the universality of its scope.

71. As was stated above, Article 54 of the 1992 Income Tax Code requires a Belgian taxpayer wishing to deduct as business expenses payments for services provided by operators established in other Member States whose tax regime is appreciably more advantageous than the Belgian regime to provide, as a matter of course and in the absence of any objective suspicion of tax evasion or abuse, proof that all the services thus provided are proper and that all the related payments are normal. In so doing, Article 54 of the 1992 Income Tax Code relieves the Belgian tax authorities of any obligation to provide even prima facie evidence of tax evasion, avoidance or abuse and establishes a general suspicion of tax evasion⁵¹ and a general presumption of tax fraud, avoidance or abusive practices.⁵²

72. It is clear in that regard that, if Article 54 of the 1992 Income Tax Code were applicable only in specific circumstances — for instance, only where there is a relationship of interdependence⁵³ between the Belgian taxpayer and the service provider established in a Member State whose tax regime is appreciably more advantageous than the Belgian regime — it would be easier to find that it does not go beyond what is necessary in order to attain the main objective which it legitimately pursues.⁵⁴ It is also clear that Article 54 of the 1992 Income Tax Code does apply in those circumstances, a matter which it is for the referring court to establish in the case before it. However, a relationship of interdependence is, to be precise, no more than one set of circumstances, the possible presence of which in a given case does not mean that the all-embracing scope of Article 54 of the 1992 Income Tax Code, its lack of specificity, can be regarded as relative.

73. The situation of the Belgian taxpayer is further complicated by the fact that he does not have any information on which Member States have tax regimes which are appreciably more advantageous than the Belgian regime. He is thus compelled, if he intends to use the services of a person established in another Member State, to carry out his own assessment as to whether taxation in that Member State is appreciably more advantageous than in Belgium, in order to determine which of the Belgian tax arrangements governing deduction of business expenses will fall to be applied in his case, which places him in a situation of legal uncertainty. In addition, it is particularly difficult to identify precisely the situations which the adverb ‘appreciably’ is intended to cover. Of course, the difficulty created by this legal uncertainty could be dispelled if the Belgian tax authorities were able to draw up a list of tax regimes which are appreciably more advantageous than the ordinary Belgian regime and which are liable to be covered by Article 54 of the 1992 Income Tax Code. However, that is not the practice. Furthermore, and whatever the case may be, it seems particularly difficult to foresee all possible applications of such a provision.

74. In conclusion, it is my view that, even though it is possible to regard some of the specific characteristics of the Belgian legislation in question as compatible, the legislation considered as a whole establishes a disproportionate, hence unjustified, restriction of the freedom to provide services.

51 — See Case C-397/07 *Commission v Spain* [2009] ECR I-6029, paragraph 30.

52 — See, inter alia, the abovementioned judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 50; *ICI*, paragraph 26; *X and Y*, paragraph 62, and Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 91.

53 — In the present case, it is clear from Issue 54/26 of the *Commentaire du code des impôts sur les revenus 1992*, that Article 54 of the CIR 1992 is applicable, as SIAT pointed out at the hearing, irrespective of any relationship of dependence between the service provider and the recipient of the services.

54 — As the Commission stated in its Communication of 10 December 2007, ‘national anti-abuse rules may comprise “safe harbour” criteria to target situations in which the probability of abuse is highest’. It adds that ‘the setting out of reasonable presumptive criteria contributes to a balanced application of national anti-abuse measures as it is in the interest of both legal certainty for the taxpayers, and workability for tax authorities’. It goes on to state, however, that that the anti-abuse rules must not be framed too broadly, but must cover only situations where there is a lack of commercial underpinning.

VI – Conclusion

75. I therefore propose that the Court state as follows in answer to the question asked by the Belgian Cour de cassation:

Article 49 EC must be interpreted as precluding a provision of the national legislation of a Member State, such as Article 54 of the Belgian Code des impôts sur les revenus de 1992, at issue in the main proceedings, under which business expenses are not deductible from tax on income where they relate to payments for services provided by a person established in another Member State, in which that person is not subject to tax on income or is subject there to a tax regime which is appreciably more advantageous than the regime in the Member State of taxation, unless the taxpayer proves that such payments relate to genuine and proper transactions and do not exceed the normal limits, whereas the general rule is that business expenses are deductible from income tax where such circumstances do not obtain.