Case C-157/10

Banco Bilbao Vizcaya Argentaria SA

v

Administración General del Estado

(Reference for a preliminary ruling
from the Tribunal Supremo)

(Free movement of capital — Corporation tax — Convention for the avoidance of double taxation — Prohibition of deducting tax due but not recovered in another Member State)

Judgment of the Court (First Chamber), 8 December 2011 . . . . . I - 13026

Summary of the Judgment

1. *Preliminary rulings — Jurisdiction of the Court — Identification of relevant Union law*
   (Art. 267 TFEU)

2. *Free movement of capital — Restrictions — Disadvantages resulting from the parallel exercise by the Member States of their tax competences — Whether permissible — Condition — No discrimination*
   (Arts 63 TFEU and 65 TFEU)

3. Free movement of capital — Restrictions — Tax legislation — Corporation tax — System preventing the double taxation of income, received by way of interest, obtained in another Member State

(EEC Treaty, Art. 67 (now Art. 67 EC Treaty, repealed by the Treaty of Amsterdam); Arts 63 TFEU and 65 TFEU; Council Directive 88/361, Art. 1)

1. In the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the question referred to it. Similarly, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Union law to which the national court did not refer in its questions.

(see paras 18-19)

2. In the absence of any unifying or harmonising European Union measures, 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. It is for the Member States to take the measures necessary to prevent situations of double taxation by applying, in particular, the criteria followed in international tax practice. The disadvantages which could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions of the freedom of movement. Accordingly, if the Member States are not obliged to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate double taxation, a fortiori, those States are not required to

adapt their tax legislation to enable tax payers to benefit from a tax advantage granted by another Member State in the exercise of its powers in tax matters, so long as their rules are not discriminatory.

(see paras 31, 38-39)

which, in the context of corporation tax and within the framework of provisions for the avoidance of double taxation, prohibit the deduction of amounts of tax due in other Member States of the European Union on income subject to corporation tax and obtained in their territory where those amounts, though due, are not paid by virtue of an exemption, a credit or any other tax benefit, in so far as those rules are not discriminatory as compared with the treatment applied to interest obtained in that Member State, which it is for the national court to ascertain.

3. Article 67 of the EEC Treaty and Article 1 of Directive 88/361 for the implementation of Article 67 of the Treaty (repealed by the Treaty of Amsterdam) do not preclude national rules of a Member State

(see para. 46, operative part)