Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

18 October 2012*

(Approximation of laws — Directive 90/434/EEC — Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States — Article 11(1)(a) — National legislation under which authorisation must be obtained for the grant of tax advantages — Application for authorisation to be made at least 30 days before the proposed operation is effected)

In Case C-603/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Upravno sodišče Republike Slovenije (Slovenia), made by decision of 8 December 2010, received at the Court on 21 December 2010, in the proceedings

Pelati d.o.o.

v

Republika Slovenija,

THE COURT (Fifth Chamber),

composed of M. Safjan, acting as President of the Fifth Chamber, E. Levits and J-J. Kasel (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Pelati d.o.o., by A. Jarkovič, odvetnik,

— the Slovenian Government, by V. Klemenc, acting as Agent,

— the European Commission, by R. Lyal and M. Žebre, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Slovene.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1)(a) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).

2 The reference has been made in proceedings between Pelati d.o.o. ('Pelati') and Republika Slovenija (Republic of Slovenia) concerning the rejection by the Slovenian tax authorities of an application for the grant of tax advantages on the occasion of a division of an undertaking.

Legal context

European Union law

3 Article 11(1)(a) of Directive 90/434, which appears in Title V of the directive, 'Final provisions', reads as follows in the version applicable in the main proceedings:

'A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares:

(a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.'

National legislation

4 In accordance with Article 47 of the Law on the taxation of the income of legal persons (Zakon o davku od dohodkov pravnih oseb, *Uradni list RS*, No 17/05, 'the ZDDPO-1'), 'the transferring company, the receiving company and the shareholders of the transferring company are to be allowed tax advantages in accordance with Articles 41 to 47 of this law on the basis of authorisation issued by the tax authorities, if the conditions laid down in Articles 41 to 47 of this law have been satisfied'.

5 The taxation procedure in cases of the merger or division of companies is laid down by the Law on fiscal procedure (Zakon o davčnem postopku, *Uradni list RS*, No 25/05, 'the ZDavP-1').

6 Under Article 345(2) of the ZDavP-1, the taxpayer is to submit the tax declaration to the tax authorities within 60 days at the latest from the date of registration of the division in the competent court's register of commercial companies.

7 Article 363 of the ZDavP-1 provides:

'(1) The authorisation mentioned in Article 47 of the ZDDPO-1 shall be issued for each individual transaction.

(2) The request for authorisation shall be submitted by the transferring company or the receiving company … at least 30 days before the envisaged date of the transaction mentioned in Article 41 of the ZDDPO-1.

…

(5) The tax authorities shall decide on the request for authorisation within 30 days at the latest from receipt of the application …'

8 The requirement of prior authorisation by the tax authorities, as laid down in Article 47 of the ZDDPO-1 in conjunction with Article 363 of the ZDavP-1, was abolished on the entry into force on 1 January 2007 of new versions of the laws on the taxation of companies and on fiscal procedure (*Uradni list*, No 117/06), which introduced a simplified notification procedure in which the taxpayer's failure to comply with the procedural conditions does not automatically lead to the loss of the rights conferred by Directive 90/434.

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

9 By a notarial act of 30 June 2005, Pelati adopted a draft division under which part of its undertaking would be transferred to a new company. On 27 September 2005 Pelati filed with the competent court keeping the register of commercial companies an application for registration of the amendments to its statutes. Those amendments were registered by order of 12 October 2005. On 21 October 2005 Pelati submitted an application to be granted tax advantages on the occasion of the division that had thus taken place.

10 The tax authorities found that the transformation of the company had taken place when the amendments to its statutes were registered in the register of commercial companies. It therefore rejected Pelati's application because it had not been made within the period prescribed in Article 363 of the ZDavP-1, namely at least 30 days before the transformation envisaged is carried out.

11 Pelati lodged a complaint against that refusal, claiming that the tax authorities had not even examined whether the substantive conditions for receiving the tax advantages under the ZDDPO-1 were satisfied. The complaint was likewise rejected on the ground that the 30-day period was mandatory, so that Pelati's application was inadmissible as being out of time.

12 Pelati brought proceedings for the annulment of that decision in the Upravno sodišče Republike Slovenije (Administrative Court of the Republic of Slovenia). It argues that the rejection of its application as being time-barred, as a penalty for failure to observe the 30-day time-limit laid down by Article 363(2) of the ZDavP-1, is contrary to Directive 90/434. Furthermore, observance of that time-limit does not depend entirely on the taxpaying company, since it is the date of registration of the amended statutes in the register of commercial companies by the competent court which determines the date of expiry of the period.

13 The referring court observes, first, that the purpose of the ZDDPO-1 is to transpose Directive 90/434 into the Slovenian legal system. It points out, next, that while an application to be granted the tax advantages must, under Article 363(2) of the ZDavP-1, be submitted at least 30 days before the operation envisaged, that law does not, however, specify the time at which that operation is regarded as carried out. It notes that the tax authorities rely on Article 533 of the Law on commercial companies (Zakon o gospodarskih družbah, *Uradni list RS*, No 30/1993, in the version applicable at the time), under which the competent court is to enter the division and the constitution of the new company in the register of commercial companies simultaneously. It concludes that the date of the operation corresponds to that on which the amendment to the statutes is entered in the register. It considers, finally, that Directive 90/434 does not provide any basis for refusing tax advantages to a taxpaying company without an examination of whether that company satisfies the conditions for the grant of those advantages.

14 In that context, the Upravno sodišče Republike Slovenije decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 11 of [Directive 90/434] be interpreted as precluding national legislation by which the Republic of Slovenia, as a Member State, makes tax relief for a commercial company wishing to effect a division (splitting off of part of the company and formation of a new company) subject to the presentation within the time-limit of an application for the issuing of authorisation for the grant of the tax advantages which follow from the division if the conditions laid down are satisfied, and by which the person liable to pay the tax automatically loses the tax advantages provided for under national legislation once the time-limit is passed?'

Consideration of the question referred

Preliminary observations

15 It must be recalled, as a preliminary point, that the Court has jurisdiction under Article 267 TFEU to give preliminary rulings concerning inter alia the interpretation of the Treaties and of acts of the institutions of the European Union.

16 It is common ground that the dispute in the main proceedings concerns a provision of national law applicable within a purely internal context.

17 However, as may be seen from the order for reference, the Slovenian legislature decided, when transposing Directive 90/434 into the national legal system, to apply the tax treatment provided for by that directive also to purely internal situations, so that national and cross-border restructuring operations are subject to the same tax rules.

18 According to the Court's case-law, where, in regulating purely internal situations, national legislation adopts the same solutions as those adopted in European Union law in order, in particular, to avoid discrimination against its own nationals or any distortion of competition, it is clearly in the European Union's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 32; Case C-43/00 *Andersen og Jensen* [2002] ECR I-379, paragraph 18; and Case C-352/08 *Modehuis A. Zwijnenburg* [2010] ECR I-4303, paragraph 33).

19 It may be added that it is for the national court alone to assess the precise scope of that reference to European Union law, the jurisdiction of the Court being confined to considering provisions of European Union law only (see *Leur-Bloem*, paragraph 33, and *Modehuis A. Zwijnenburg*, paragraph 34).

20 It follows from the above considerations that the Court has jurisdiction to interpret the provisions of Directive 90/434, even though they do not directly govern the situation at issue in the main proceedings, and consequently to answer the question put by the referring court.

Substance

21 By its question the referring court essentially asks whether Article 11(1)(a) of Directive 90/434 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which the grant of the tax advantages applicable to a division is subject to the condition that the application relating to that operation is submitted within a specified period, the starting-point of

which is not known to the taxpayer, and on the expiry of which the taxpayer loses the right to those tax advantages without there having been an examination of whether he satisfies the conditions for their grant.

22 As noted by the applicant in the main proceedings, the Slovenian Government and the European Commission, who have submitted written observations to the Court, Directive 90/434 does not contain any provisions on the detailed procedures to be complied with by the Member States with a view to the grant of the tax advantages provided for by that directive.

23 In accordance with settled case-law of the Court, in the absence of relevant European Union rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under European Union law are a matter for the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see, inter alia, Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 57, and Case C-262/09 *Meilicke and Others* [2011] ECR I-5669, paragraph 55).

24 As regards the principle of equivalence, it should be noted that in the present case there is nothing before the Court that is capable of raising any doubts as to the consistency with that principle of legislation such as that at issue in the main proceedings.

25 It must, on the other hand, be ascertained whether such legislation meets the requirements of the principle of effectiveness, which must be considered to be infringed where the exercise of rights conferred by the legal order of the European Union proves to be impossible or excessively difficult.

26 With respect to the rights conferred by Directive 90/434, it must be recalled that the common system of taxation laid down by that directive, which comprehends various tax advantages, applies without distinction to all mergers, divisions, transfers of assets and exchanges of shares, irrespective of the reasons, whether financial, economic or simply fiscal, for those operations (see *Leur-Bloem*, paragraph 36, and *Modehuis A. Zwijnenburg*, paragraph 41).

27 It is only by way of exception and in specific cases that the Member States may, pursuant to Article 11(1)(a) of Directive 90/434, refuse to apply or withdraw the benefit of all or any part of the provisions of that directive (Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 37, and *Modehuis A. Zwijnenburg*, paragraph 45), namely when the restructuring envisaged has as its principal objective or as one of its principal objectives tax evasion or tax avoidance.

28 In the present case, according to the documents before the Court, the taxpayer must, in accordance with Article 47 of the ZDDPO-1 in conjunction with Article 363(2) of the ZDavP-1, submit his application to be granted the tax advantages provided for by Directive 90/434 at least 30 days before the proposed restructuring operation, failing which he forfeits the rights conferred by that directive.

29 It must therefore be ascertained whether that period of 30 days meets the requirements of the principle of effectiveness with respect both to its length and to its starting-point.

30 As regards the length of the period, the Court has previously held, in the context of analysing the principle of effective judicial protection of the rights conferred on individuals by European Union law, that it is compatible with that law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the administration concerned. Such time-limits do not make it impossible in practice or excessively difficult to exercise the rights conferred by the European Union legal order (Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28, and Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19). In this connection, the

Court has also held that a period of 60 days for bringing proceedings is not objectionable in itself (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 16, and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 43).

31 Moreover, the Court has held that that case-law also applies to the assessment of rules for the restitution of national taxes unduly levied (*Meilicke and Others*, paragraphs 55 to 58). The same must therefore apply to the assessment of compliance with the principle of effectiveness as regards the setting of a time-limit in connection with the submission of an application to be granted tax advantages.

32 Consequently, it does not appear that national legislation which grants the tax advantages provided for by Directive 90/434 only on condition that the relevant application is made at least 30 days before the proposed restructuring operation is liable to make it impossible in practice or excessively difficult to exercise the rights derived by the taxpayer from European Union law.

33 While an exclusionary time-limit such as that at issue in the main proceedings is not therefore contrary in itself to the principle of effectiveness, it cannot however be ruled out that, in the context of the particular circumstances of the case before the referring court, the application of that time-limit might entail a breach of that principle.

34 As regards the starting-point of the 30-day period laid down in Article 363(2) of the ZDavP-1, it appears from the order for reference that the period is calculated backwards from the date on which the restructuring operation is effected, the date on which the operation is regarded as taking place being the date of registration of that operation in the register of commercial companies by the competent court.

35 Consequently, in such a situation, the time during which the 30-day period runs does not depend on the taxpayer, since he is not in a position to know precisely either when it starts or when it ends, namely on the date of entry in the register of commercial companies of the proposed restructuring operation.

36 It should be recalled that the objectives pursued by Directive 90/434 must be achieved in national law in compliance with the requirements of legal certainty. To that end, the Member States have an obligation to establish a system of time-limits that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, by analogy, Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, paragraph 39 and the case-law cited). It is for the national court to establish whether those requirements are complied with.

37 In the light of the above considerations, the answer to the question is that Article 11(1)(a) of Directive 90/434 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the grant of the tax advantages applicable to a division in accordance with that directive is subject to the condition that the application relating to that operation is submitted within a specified period. However, it is for the national court to ascertain whether the details of the implementation of that period, and more particularly the determination of its starting-point of the period, are sufficiently precise, clear and foreseeable to enable taxpayers to ascertain their rights and to ensure that they are in a position to enjoy the tax advantages provided for by that directive.

Costs

38 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 (Fifth Chamber) hereby rules:

Article 11(1)(a) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the grant of the tax advantages applicable to a division in accordance with that directive is subject to the condition that the application relating to that operation is submitted within a specified period. However, it is for the national court to ascertain whether the details of the implementation of that period, and more particularly the determination of its starting-point of the period, are sufficiently precise, clear and foreseeable to enable taxpayers to ascertain their rights and to ensure that they are in a position to enjoy the tax advantages provided for by that directive.

[Signatures]