Reports of Cases

Case C-646/15

Trustees of the P Panayi Accumulation & Maintenance Settlements
v
Commissioners for Her Majesty's Revenue and Customs

(Request for a preliminary ruling from the
First-tier Tribunal (Tax Chamber)]

(Reference for a preliminary ruling — Direct taxation — Freedom of establishment — Freedom to provide services — Free movement of capital — Trust — Trustees — Other legal persons — Meaning — Tax on gains in value of assets held in trust by reason of the trustees' place of residence for tax purposes being transferred to another Member State– Determination of the amount of tax due at the time of that transfer — Tax payable immediately — Justification — Proportionality)

Summary — Judgment of the Court (First Chamber), 14 September 2017

1. *Freedom of movement for persons — Freedom of establishment — Provisions of the Treaty — Scope — Meaning — Other legal persons — Trust that possesses rights and obligations that enable it to act in its own right as a legal person and that actually carries on an economic activity — Included*

   (Art. 54 TFEU)

2. *Freedom of movement for persons — Freedom of establishment — Provisions of the Treaty — Scope — Transfers of the actual place of management of a company or firm under national law to another Member State — National tax legislation applicable on transfer — Included*

   (Arts 49 TFEU and 54 TFEU)

3. *Freedom of movement for persons — Freedom of establishment — Restrictions — Tax legislation –Transfer of place of residence of the majority of the trustees of a trust under national law to another Member State — National legislation imposing taxation of unrealised gains in the value of assets held in trust — No possibility of choosing to defer payment of the tax — Not permissible*

   (Art. 49 TFEU)

1. Article 49 TFEU requires the elimination of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Under the first paragraph of Article 54 TFEU, 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 Union are, for the purposes of the Treaty provisions relating to freedom of establishment, to be treated in the same way as natural persons who are nationals of Member States.

Under the second paragraph of Article 54 TFEU, 'companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

In that regard, it is clear that freedom of establishment, which is one of the fundamental provisions of EU law (judgment of 24 May 2011, *Commission* v *Belgium*, C-47/08, EU:C:2011:334, paragraph 77 and the case-law cited), which contributes to the objective of completing the internal market (see, to that effect, judgment of 13 December 2005, *SEVIC Systems*, C-411/03, EU:C:2005:762, paragraph 19), is a very broad concept.

In that regard, as the Advocate General stated, in essence, in points 33 and 34 of her Opinion, that concept of 'other legal persons' extends to an entity which, under national law, possesses rights and obligations that enable it to act in its own right within the legal order concerned, notwithstanding the absence of a particular legal form, and which is profit-making.

Accordingly, it appears that the legislation at issue in the main proceedings, for the purposes of that legislation, holds the trustees as a body, as a unit and not individually, to be liable to pay the tax due on the unrealised gains in value of assets of the trust when that trust is deemed to have transferred its place of management to a Member State other than the United Kingdom. Such a transfer occurs when a majority of the trustees are no longer resident in the United Kingdom. The activity of the trustees in relation to the trust property and the management of its assets are therefore inextricably linked to the trust itself and, therefore, the trust and its trustees constitute an indivisible whole. That being the case, such a trust should be considered to be an entity which, under national law, possesses rights and obligations that enable it to act as such within the legal order concerned.

As regards whether the trusts at issue in the main proceedings are profit-making, suffice it to state that it is clear from the documents submitted to the Court that those trusts have no charitable or social purpose and that they were created in order that the beneficiaries might enjoy the profits generated from the assets of those trusts.

It follows that an entity such as a trust which, under national law, possesses rights and obligations that enable it to act in its own right, and which actually carries on an economic activity, may rely on freedom of establishment.

(see paras 24-26, 29, 32-34)

2. See the text of the judgment.

(see paras 36-39)

3. The provisions of the FEU Treaty relating to freedom of establishment preclude, in circumstances, such as those in the main proceedings, where the trustees, under national law, are treated as a single and continuing body of persons, distinct from the persons who may from time to time be the trustees, legislation of a Member State, such as that at issue in the main proceedings, which provides for the taxation of unrealised gains in value of assets held in trust when the majority of the trustees transfer their residence to another Member State, but fails to permit payment of the tax payable to be deferred.

As regards, first, the issue of whether the situations concerned are comparable, suffice it to state that, with respect to the legislation of a Member State that is designed to tax capital gains accruing within its territory, the situation of a trust which transfers its place of management to another Member State is, in relation to the taxation of gains in the value of trust assets which accrued in the former Member

State prior to that transfer, comparable to that of a trust which retains its place of management in the former Member State (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 38).

However, the Court has made it clear that the objective of preserving the allocation of powers of taxation between the Member States can justify a national measure only where the Member State in whose territory income was generated is actually prevented from exercising its power of taxation in respect of such income (judgment of 23 January 2014, *DMC*, C-164/12, EU:C:2014:20, paragraph 56).

As stated by the Advocate General in point 50 of her Opinion, national legislation, such as that at issue in the main proceedings, in so far as it causes the powers of taxation retained by the Member State concerned to be entirely dependent on the discretion of the trustees and the beneficiaries, cannot be regarded as sufficient to preserve the powers of that Member State to tax capital gains accruing within its territory.

Consequently, it must be held that legislation of a Member State which provides, in a situation such as that at issue in the main proceedings, for the taxation of unrealised gains in the value of assets held in trust on the occasion of the transfer of the place of management of that trust to another Member State, notwithstanding the fact that the former Member State has the possibility of retaining some power to tax those capital gains, is a suitable means of ensuring the preservation of the allocation of powers of taxation between the Member States, since the former Member State loses its power to tax those capital gains following that transfer.

As regards, last, the proportionality of the measure at issue, it follows from the Court's case-law that the fact that the Member State of origin, for the purpose of safeguarding the exercise of its powers of taxation, determines the amount of tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of those capital gains ceases to exist, in this case at the time when the place of management of the trust is transferred to another Member State, is compatible with the principle of proportionality (judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 52). Further, legislation of a Member State which provides that a trust which transfers its place of management to another Member State may choose between immediate payment of the tax due on those capital gains or deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the immediate payment of the tax due (see, to that effect, judgment of 21 May 2015, *Verder LabTec*, C-657/13, EU:C:2015:331, paragraph 49 and the case-law cited).

Further, in that context, it must be made clear that deferred payment cannot result in the Member state of origin being obliged to take into account losses that occur after the transfer of the place of management of a trust to another Member State (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 61).

That finding cannot be called into question by the fact that, in the circumstances of the main proceedings, the gains were made after the establishment of the amount of the tax, but before that tax became payable, given that the disproportionality of the legislation at issue in the main proceedings is due to the fact that that legislation makes no provision for the taxpayer being able to defer the time when the tax payable is paid.

(see paras 49, 53, 55-58, 60, 61, operative part)