Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

10 November 2022*

(Reference for a preliminary ruling – Freedom of establishment – Article 49 and 54 TFEU – Transfer of a company's registered office to a Member State other than that in which it was incorporated – Recovery of write-downs recorded prior to the transfer – Exemption – Comparability of situations)

In Case C-414/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hof van Cassatie (Court of Cassation, Belgium), made by decision of 25 June 2021, received at the Court on 7 July 2021, in the proceedings

VP Capital NV

v

Belgische Staat,

THE COURT (Ninth Chamber),

composed of J.-C. Bonichot (Rapporteur), acting as President of the Chamber, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– VP Capital NV, by S. Gnedasj, advocaat, and M. Grégoire, avocat,

– PricewaterhouseCoopers Belastingadviseurs NV, by P. Hinnekens, advocaat,

– the Belgian Government, by S. Baeyens, J.-C. Halleux and C. Pochet, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and G.M. De Socio, avvocato dello Stato,

* Language of the case: Dutch.

– the European Commission, by W. Roels and V. Uher, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between VP Capital NV and the Belgian tax authorities concerning the tax treatment of transactions corresponding to the recovery, by that company, of write-downs recorded prior to the transfer of its registered office from Luxembourg to Belgium.

Legal context

3 Under point 2 of the first paragraph of Article 24 of the code des impôts sur les revenus 1992 (Income Tax Code; 'the ITC 92'), in the version applicable to the dispute in the main proceedings:

'The profits of any industrial, commercial or agricultural enterprise are those derived from:

…

(2) any increase in the value of assets allocated to the exercise of the trade or profession and any reduction in the value of the liabilities arising from that activity, where such capital gains or losses have been realised or expressed in the accounts or annual accounts'.

4 Article 44(1) of the ITC 92 states:

'By way of derogation from point 2 of the first paragraph of Article 24, point 3 of the second paragraph of Article 27 and point 1 of the first paragraph of Article 28 and the last paragraph of Article 28, and without prejudice to the provisions of point 3 of the first paragraph of Article 24, the following shall be exempt:

(1) expressed but unrealised capital gains, with the exception of capital gains in stocks in the course of implementation;

…'

5 The second subparagraph of Article 184*ter*(2) of the ITC 92 provides:

'In the event of the transfer to Belgium of its principal place of business or its effective place of management or administration, by a foreign company, in respect of assets attached to foreign establishments or the assets located abroad and held by that company, the capital gains and losses subsequently realised in respect of those assets shall be determined on the basis of the book value they have at the time of the transaction.'

6 The second paragraph of Article 190 of the ITC 92 is worded as follows:

‘With regard to the tax-free or provisionally untaxed capital gains referred to in of the first subparagraph of Article 44(1) and Articles 44(3), 44*bis*, 44*ter* and 47, this capital gains system shall apply only in so far as that proportion is extended and maintained in one or more separate liability accounts and in so far as it does not serve as a basis for calculating the annual allocation of the statutory reserve or any remuneration or allocation.’

7 Point 7 of Article 198 of the ITC 92 provides:

‘Business expenses shall not include:

…

(7) write-downs and losses in respect of shares, with the exception of losses applied on the basis of the total distribution of the assets of a company up to the amount of the loss of the paid-up capital represented by those shares’.

8 Article 206 of the ITC 92 is worded as follows:

‘1. Previous business losses are successively deducted from the business income for each of the following tax periods.

The offset of Belgian business losses against business profits incurred in a foreign establishment which the company owns and which is situated in a State with which Belgium has concluded a convention for the avoidance of double taxation is subject to the condition that the company shows that those business losses have not been deducted from the profits of that foreign establishment. In addition, the amount of those business losses offset by the company against its Belgian profits in respect of any taxable period, for the proportionate part of those losses for which the company no longer shows for the tax period that it has not been deducted from the profits of that foreign establishment, or if during the tax period the relevant foreign establishment is transferred in the context of a contribution, a merger, a division or an equivalent transaction, is added to the taxable income of that period.

…

3. In the event that a foreign company transfers its registered office, its principal place of business or its place of management or administration to Belgium, the provision in the first subparagraph of Article 190(1) shall apply in respect of the business losses incurred by that company in a Belgian establishment which that company owned before that transfer.’

9 Finally, Article 74 of the Royal Decree implementing the ITC 92, in the version applicable to the dispute in the main proceedings (the ‘RD/ITC 92’), provides:

‘For the purpose of determining profits liable to corporation tax, the profit from the tax period, from which write-downs, provisions or capital gains which are exempt under Articles 48, 190, 191 and 194 to 194*quater* of [the ITC 92] are excluded, is broken down, on the basis of its use, into:

(1) reserves;

(2) ineligible expenditure;

(3) dividends.

For the purposes of the first point:

(1) "reserves" means the reserved result, minus:

…

– capital gains on shares which are exempt under Articles 192 and 521 of the [ITC 92] and recoveries of write-downs on value of shares effected during the tax period, which were previously taxed under Article 198(7) of the [ITC 92] as non-deductible expenses, in so far as those write-downs are no longer justified at the end of that tax period;

…'

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

10 VP Capital, a company initially incorporated in Luxembourg and which has its registered office in that Member State, recorded write-downs relating to various shareholdings which it held in other companies. It deducted those write-downs from its taxable income in Luxembourg, which resulted in an increase in its losses which can be carried forward. On account of its loss-making situation, VP Capital was not in a position to use those losses which can be carried forward in Luxembourg.

11 Following those transactions, in May 2009, VP Capital transferred its registered office from Luxembourg to Belgium. It became a company incorporated under Belgian law.

12 Following that transfer, VP Capital recovered part of the write-downs which it had recorded when its registered office was still in Luxembourg. It relied on the Belgian exemption scheme for recovering write-downs on shares in companies provided for in Article 74 of the RD/ITC 92, which provides that those transactions are tax exempt, since the corresponding write-downs are not, in principle, deductible from taxable income as business expenses under Article 198(7) of the ITC 92.

13 However, under the combined provisions of the second subparagraph of Articles 184*ter*(2) of the ITC 92 and the second subparagraph Article 190 of that code, in the event of a transfer to Belgium of the registered office, principal place of business or place of management or administration of a foreign company, as regards the assets attached to foreign establishments or the assets located abroad and held by that company, the capital gains and losses corresponding to those assets which were realised after that transfer are determined on the basis of their book value at the time of that transfer. The capital gains expressed but not realised (the 'unrealised capital gains') are exempt provided that they are recorded in a separate liability account. Since the recovery of write-downs recorded by VP Capital after the transfer of its registered office to Belgium had not been recorded in a separate liability account, the Belgian tax authorities took the view that that recovery of write-downs was taxable.

14 In the context of the dispute between VP Capital and the Belgian tax authorities concerning the tax treatment of the transactions at issue, the Hof van Cassatie (Court of Cassation, Belgium) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Does freedom of establishment, as guaranteed by Article 49 TFEU, preclude national legislation, such as that at issue [in the main proceedings], where it results in a Luxembourg company which records write-downs on shares in Luxembourg and which, although deducting those write-downs in principle from its taxable income, cannot actually deduct them from its taxable income because of the existence of a tax loss position, being taxed on the write-back of those write-downs in Belgium following the transfer of its registered office to Belgium, unless the increases in value masked by that write-back are allocated to a liability account not available for distribution, whereas a Belgian company which has recorded write-downs on shares in Belgium is not taxed on the write-back of those write-downs, provided that the write-downs had not been previously deducted from its Belgian taxable income, without needing to allocate the increases in value masked by that write-back to a liability account not available for distribution?’

Consideration of the question referred

15 By its question, the referring court asks, in essence, whether Article 49 TFEU precludes national tax legislation under which increases in value of shares in companies recorded by a company in a Member State, after the transfer of its registered office in that Member State, are treated as being unrealised capital gains, without taking into account whether those shares gave rise to the recording of write-downs by that company on a date on which it was a taxable resident of another Member State.

16 It must be recalled that Article 49 TFEU, read in conjunction with Article 54 TFEU, extends the benefit of freedom of establishment to companies or firms formed in accordance with the legislation of a Member State and having their registered office, their central administration or principal place of business within the European Union (judgment of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020:127, paragraph 24). The benefit of that freedom includes the right, for such a company, to transfer its registered office, its central administration or principal place of business to another Member State.

17 It must also be recalled that the provisions of EU law on freedom of establishment are, inter alia, aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State (judgment of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020:127, paragraphs 27 and 31).

18 In that context, a company incorporated under the law of a Member State, which transfers its registered office to another Member State, may rely on Article 49 TFEU to contest the tax consequences of that transfer in the host Member State (see, to that effect, judgment of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020:127, paragraphs 26 and 28).

19 However, Article 49 TFEU does not guarantee that such a transfer will be neutral as regards taxation. Given the disparities existing between the relevant legislation of the Member States, such a transfer may be to the company’s advantage in terms of tax or not, according to the circumstances. Freedom of establishment does not mean that a Member State is required to change its tax rules to those of other Member States in order to ensure, in all circumstances,

taxation which removes any disparities arising from national tax rules (see, to that effect, judgment of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020:127, paragraph 32 and the case-law cited).

20 It is apparent from the documents before the Court that, under point 7 of Article 198 of the ITC 92, write-downs on shares in companies are not, in principle, deductible from taxable income as business expenses. Article 74 of the RD/ITC 92, exempts, by contrast, the subsequent recovery of those write-downs from corporation tax

21 It is also apparent from those documents, however, that under the second subparagraph of Article 184*ter*(2) of the ITC 92, capital gains and losses realised after the transfer of the registered office of a company to Belgium are determined on the basis of their book value on the date of that transfer. In that context, write-downs of shares in companies recorded by a company which transferred its registered office to Belgium, which are excluded from the benefit of the tax advantage that amounts to the exemption provided for in Article 74 of the AR/CIR 92, are considered unrealised capital gains, including where the recording of those increases corresponds to the recovery of write-downs recorded prior to that transfer and which did not give rise, in the Member State of origin, to a deduction of taxable profit as business expenses.

22 Legislation such as that at issue in the main proceedings establishes, to the detriment of companies formed under the law of a Member State and exercising their freedom of establishment, a difference in treatment liable to deter them from transferring their registered office to another Member State in order to carry on their economic activity there. That difference in treatment can be permissible only if it relates to cases which are not objectively comparable or if it is justified by an overriding reason in the public interest and is proportionate thereto (judgment of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020:127, paragraph 36 and the case-law cited).

23 It is apparent from the Court's case-law that the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national provisions at issue (judgment of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020:127, paragraph 37 and the case-law cited).

24 In the light of measures taken by a Member State to preserve the allocation of the power to impose taxes between the Member States, as is the case, subject to verification by the referring court, with the legislation at issue in the main proceedings, a company which has registered write-downs in shares in companies in a Member State and a company which has transferred its registered office to that Member State after having registered such write-downs in another Member State is not, in principle, in a comparable situation.

25 A company which effects such a transfer falls successively within the tax jurisdiction of two Member States, namely, first, the Member State of origin, in respect of the period during which write-downs were recorded, and, second, the host Member State, in respect of the period during which increases in value corresponding to the recovery of those write-downs are recorded.

26 Where the host Member State has no tax jurisdiction in respect of the period during which write-downs of shares in companies were recorded, a company which has transferred its registered office to that Member State and which subsequently calculates increases in value of

those shares in companies is not in a situation comparable to that of a company which already fell within the tax jurisdiction of that Member State in respect of the period during which those write-downs were recorded.

27 For the same reason, the situation of a company which has transferred its registered office to a Member State before recovering write-downs recorded prior to that transfer is also not comparable, contrary to what VP Capital submits, to that of a holding company established in that Member State which is in a tax loss position, a company which has taken recorded write-downs in that Member State while subject to tax on legal persons, or a company in the same Member State which closed a permanent establishment situated in another Member State, in which the write-downs were recorded.

28 In the present case, it should also be observed that, according to the information available to the Court, the applicant in the main proceedings claimed in Luxembourg, its Member State of origin, the write-downs which it had recorded prior to the transfer of its registered office, which, following its loss-making situation, had the effect of increasing its losses which can be carried forward. The fact that it was not actually able to deduct those losses from its taxable profits is the result of its subsequent choice to exercise its freedom of establishment by carrying out that transfer.

29 The foregoing considerations cannot be called into question by the judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424). The rule adopted in that judgment falls within the scope of the Court's case-law relating to account being taken, in the Member State of residence of the parent company, of definitive losses incurred by a subsidiary or by a permanent establishment situated, during the same tax period, in another Member State. It is not comparable to the situation of a company which transferred its registered office from one Member State to another Member State and requests that the second Member State take into account transactions recorded in the first Member State prior to that transfer (see that effect, judgment of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020:127, paragraphs 44 to 48).

30 It follows from the foregoing that the answer to the question referred is that Article 49 TFEU does not preclude national tax legislation under which increases in value of shares in companies recorded by a company in a Member State, after the transfer of its registered office in that Member State, are treated as being unrealised capital gains, without taking into account whether those shares gave rise to the recording of write-downs by that company on a date on which it was a taxable resident of another Member State.

Costs

31 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 (Ninth Chamber) hereby rules:

Article 49 TFEU does not preclude national tax legislation under which increases in value of shares in companies recorded by a company in a Member State, after the transfer of its registered office in that Member State, are treated as being expressed but unrealised capital gains, without taking into account whether those shares gave rise to the recording of

write-downs by that company on a date on which it was a taxable resident of another Member State.

[Signatures]