JUDGMENT OF THE COURT (First Chamber)

8 December 2011 *

In Case C-157/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decision of 25 January 2010, received at the Court on 2 April 2010, in the proceedings

Banco Bilbao Vizcaya Argentaria SA

v

Administración General del Estado,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, M. Ilešič, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

* Language of the case: Spanish.

Advocate General: P. Mengozzi,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the Czech Government, by M. Smolek and V. Štencel, acting as Agents,

— the Danish Government, by C. Vang, acting as Agent,

— the German Government, by T. Henze and C. Blaschke, acting as Agents,

— the Estonian Government, by M. Linntam, acting as Agent,

— the French Government, by G. de Bergues and J. Gstalter, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

— the Polish Government, by M. Szpunar, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes, acting as Agent,

— the Swedish Government, by A. Falk and S. Johannesson, acting as Agents,

— the United Kingdom Government, by H. Walker, acting as Agent,

— the European Commission, by R. Lyal and C. Urraca Caviedes, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 63 TFEU and 65 TFEU.

2 The reference has been made in proceedings between Banco Bilbao Vizcaya Argentaria SA ('BBVA') and the Administración General del Estado concerning the latter's refusal to authorise BBVA to deduct, from the corporation tax due from it for the 1991 tax year on its global income, the tax due in Belgium on interest obtained in that Member State but not paid by virtue of an exemption.

Legal context

Community law

3 Article 67 of the EEC Treaty (which became Article 67 of the EC Treaty, and has now been repealed by the Treaty of Amsterdam), in force at the time of the facts in the main proceedings, stated:

'1. During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish

between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.

…'

4 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), provides:

'Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.'

5 Article 6(2) of Directive 88/361 authorises, inter alia, the Kingdom of Spain temporarily to continue to apply restrictions to the capital movements listed in Annex IV to that directive, subject to the conditions and time limits laid down in that annex.

Spanish national law

6 Article 57(1) of General Law on taxation 230/1963 (Ley General Tributaria 230/1963) of 28 December 1963 (BOE No 313 of 31 December 1963, p. 18248) provided:

'Where it is appropriate to deduct, from the amount of a tax, amounts due or paid in respect of another tax or other taxes charged previously, those amounts

shall be deducted in full, even if they were the subject of an exemption or a credit'.

7 Article 24(4) of Law 61/1978 on corporation tax (Ley 61/1978 del Impuesto sobre Sociedades) of 27 December 1978 (BOE No 312 of 30 December 1978, p. 29429) provided:

'In the case of personal liability to tax, where the taxpayer's income includes earnings obtained and taxed abroad, the smaller of the following two amounts shall be deducted:

(a) The amount actually paid abroad in respect of a charge identical or similar in nature to this tax.

(b) The amount of tax that would have been payable on those earnings in Spain if they had been obtained in Spanish territory.'

Convention for the avoidance of double taxation

8 The convention between the Kingdom of Spain and the Kingdom of Belgium aimed at the avoidance of double taxation and the solving of certain issues related to taxes on income and capital, signed at Brussels on 24 September 1970, ratified by the Kingdom of Spain on 28 May 1971 (BOE No 258 of 27 October 1972, p. 19176) ('the convention

for the avoidance of double taxation'), applicable at the time of the facts in the main proceedings, states the following in Article 11:

'1. Interest originating in one Contracting State and allocated to a resident of the other Contracting State shall be taxable in that other State.

2. However, that interest may be taxed in the Contracting State in which it originates and in accordance with the legislation of that State, but the tax so payable may not exceed 15 % of the amount of that interest.

…'

9 Under Article 23 of that convention:

'1. Where a resident of a Contracting State receives income not referred to in paragraphs 3 and 4 below which, according to the Convention, may be taxed in the other Contracting State, the first State shall exempt the income from tax …

3. … Where a resident of a Contracting State receives income taxable in the other Contracting State in accordance with Article 10(2), Article 11(2) and (7), or Article 12(2) and (6), the first Contracting State shall grant a deduction from the tax due from the resident concerned on that income, calculated on the basis of the amount of income referred to above which is included in that resident's basis of assessment, and the rate for which shall be no lower than the rate of tax applied to such income in the other Contracting State …'

Facts at the origin of the dispute and the question referred for a preliminary ruling

10 BBVA is the dominant undertaking in Grupo Consolidado (consolidated group) 2/82. In Spanish law, a consolidated group is a unit formed for tax purposes by a collection of companies, one of which dominates the rest.

11 By decision of 24 October 1997, taken following audit and inspection measures carried out by in respect of corporation tax for the 1991 tax year, the Oficina Nacional de Inspección, considering that, in accordance with Article 24(4) of Law 61/1978, only the amount of tax 'actually' paid was deductible, increased the basis of assessment declared by BBVA by ESP 6 750 405 (EUR 40 570,75). That amount corresponded to the amount which BBVA had deducted from corporation tax as tax due in Belgium on the interest received in that Member State, although it had not paid that tax as it had been deemed exempt.

12 On 11 May 2001, the decision of the Oficina Nacional de Inspección was upheld by a decision of the Tribunal Económico-Administrativo Central (administrative review body). Since the action brought by BBVA against that decision before the Chamber for Contentious Administrative Proceedings of the Audiencia Nacional was dismissed by judgment of 26 June 2003, BBVA brought an appeal 'in cassation' before the Tribunal Supremo.

13 In its appeal, BBVA claims the right to deduct, from the corporation tax due in Spain on its global income, the tax due in Belgium on interest obtained in that Member State which it has not paid by virtue of an exemption.

14 The Tribunal Supremo states that Spanish national law, as interpreted by it in recent judgments, precludes BBVA from deducting from the corporation tax due in Spain the tax due in Belgium, where that tax has not been paid by virtue of an exemption. The same conclusion results from Article 23(3) of the convention for the avoidance of double taxation.

15 The Tribunal Supremo harbours doubts as to the compatibility of such a tax regime with the principle of the free movement of capital, in so far as companies established in Spain, which invest in Belgium and make a profit from such investments, thereby lose the tax advantage granted by the Belgian tax authorities, because they ultimately pay, in the Member State in which they are established, the tax due from them on profits, but in respect of which they have received an exemption in the country of their investment.

16 Accordingly, the Tribunal Supremo decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 63 [TFEU] and 65 [TFEU] be interpreted as meaning that they preclude national rules (enacted unilaterally or under a bilateral convention for the avoidance of double taxation) which, in the context of corporation tax and within the framework of provisions for the avoidance of such 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?'

The question referred for a preliminary ruling

Admissibility

17 The Portuguese Government considers that the reference for a preliminary ruling must be rejected as inadmissible, since the interpretation of Articles 63 TFEU and 65 TFEU requested by the national court is not relevant, in terms of the temporal application of the legal rule, to the determination of the dispute in the main proceedings, which concerns the 1991 tax year. Articles 73 B and 73 D of the EC Treaty (now Articles 56 EC and 58 EC respectively) to which Articles 63 TFEU ad 65 TFEU correspond were inserted into the Treaty establishing the European Community only by the Treaty on European Union, signed at Maastricht on 7 February 1992.

18 In that regard, the Court notes that it is settled case-law that, 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 (see, inter alia, Case C-286/05 *Haug* [2006] ECR I-4121, paragraph 17, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 46).

19 Similarly, it is also settled case-law that, 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 European Union law to which the national court did not refer in its questions (see, inter alia, Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 24; Case C-153/03 *Weide* [2005] ECR I-6017, paragraph 25; and Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 26).

20 Indeed, the Court has a duty to interpret all provisions of European Union law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (see Case C-304/00 *Strawson and Gagg & Sons* [2002] ECR I-10737, paragraph 58, and *Jager*, paragraph 47).

21 As the Court is required to respond to a question referred for a preliminary ruling by taking account of the legal provisions applicable to the facts at the origin of the dispute in the main proceedings, the plea of inadmissibility raised by the Portuguese Government must be dismissed.

Substance

Preliminary observations

22 The case in the main proceedings concerns the 1991 tax year, that is to say that the factual and legal circumstances predate the entry into force of the TFEU. The rules relating to the free movement of capital, applicable at the time of the facts in the main proceedings, were to be found in Article 67 of the EEC Treaty and Directive 88/361, which was adopted to implement that article.

23 Consequently, the Court is required to answer the national court's question in the light of those provisions.

24 In that regard, the Court notes that Directive 88/361 brought about complete liberalisation of capital movements and to that end Article 1(1) thereof, whose direct effect has been recognised by the Court, required the Member States to abolish all restrictions on such movements (see Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 57, and the case-law cited).

25 However, Article 6(2) of Directive 88/361 authorised the Kingdom of Spain to maintain, until 31 December 1992, restrictions on certain capital movements set out in lists III and IV of Annex IV to that directive.

26 Therefore, it is necessary to assess, in the first place, whether national rules such as those at issue in the main proceedings constitute a restriction on the free movement of capital for the purposes of Article 1(1) of Directive 88/361.

27 It is only if the national rules at issue in the main proceedings have the effect of restricting the free movement of capital that it will be necessary, in the second place, for the national court to establish whether the capital movements which gave rise to the payment of the interest at issue in the main proceedings fall within the exception provided for in Article 6(2) of Directive 88/361, the national court alone having jurisdiction to find the facts and to establish the nature and source of the interest obtained by BBVA in Belgium.

The existence of a restriction on the free movement of capital

28 It must be recalled that, while direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with European Union law (see Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; and *Barbier*, paragraph 56).

29 It is for each Member State to organise, in compliance with European Union law, its system for taxing income from investment capital and, in that context, to define the basis of assessment and the tax rate which apply to the shareholder receiving them (see, by analogy, Case C-128/08 *Damseaux* [2009] ECR I-6823, paragraph 25, and Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, paragraph 167, and the case-law cited).

30 It follows that interest paid by a company established in one Member State to a company established in another Member State is liable to be subject to juridical double taxation where the two Member States choose to exercise their fiscal competence and to tax that interest, one withholding tax on it at source, and the other including it as part of the beneficiary's taxable income.

31 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 (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; Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 17; and Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 32). 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 (see Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraph 23).

32 In the present case, it is apparent from the reference for a preliminary ruling that such measures to prevent the double taxation of interest were introduced into the Spanish legal system by the convention for the avoidance of double taxation and by Spanish legislation.

33 Accordingly, Article 23(3) of that convention provided that the Kingdom of Spain was to grant a deduction from the tax due from a resident of that Member State on interest originating in Belgium, calculated on the basis of the amount of that interest which was included in that resident's basis of assessment, and the rate for which was to be no lower than the rate of tax applied to income received in Belgium.

34 As regards income obtained and taxed abroad, Article 24(4) of Law 61/1978 provided for the deduction of the smallest of the following two amounts: (i) the amount actually paid abroad as a result of an identical or similar tax or (ii) the amount of tax which would have been paid in Spain on that income had it been obtained in Spanish territory.

35 In the case in the main proceedings, BBVA requests, none the less, that the tax due in Belgium on interest obtained in that Member State, but not paid by virtue of an exemption, be deducted from the corporation tax due in Spain.

36 The national court considers that an interpretation of the provisions of the convention for the avoidance of double taxation and of Spanish national law to the effect that only tax actually paid in another Member State may de deducted from the tax due in Spain could discourage companies established in Spain from investing their capital in another Member State.

37 Consequently, it must be noted that the alleged disadvantage suffered by BBVA, in the present case, is not double taxation of the interest received by BBVA, as that interest was taxed solely in Spain, but the fact that it was not possible to benefit, for the purposes of calculating the tax due in Spain, from the tax advantage in the form of the exemption granted under Belgian law.

38 However, the Court has already ruled that 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 on the freedom of movement (see, to that effect, *Kerckhaert and Morres*, paragraphs 19, 20 and 24; *Orange European Smallcap Fund*, paragraphs 41, 42 and 47; and *Damseaux*, paragraph 27).

39 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 (see, Case C-67/08 *Block* [2009] ECR I-883, paragraph 31), *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.

40 It thus needs to be assessed whether, in applying national rules such as those at issue in the case in the main proceedings, interest obtained in another Member State is treated in a discriminatory manner as compared with interest obtained in Spain.

41 In that regard, it is settled case-law that discrimination can arise not only through the application of different rules to comparable situations, but also through the application of the same rule to different situations (see *Schumacker*, paragraph 30; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 26; and *Kerckhaert and Morres*, paragraph 19).

42 However, in respect of the tax legislation of his State of residence, the position of a taxable person receiving interest is not necessarily altered merely by the fact that he receives that interest from a company established in another Member State, which, in

exercising its fiscal sovereignty, may tax that interest at source by way of income tax (see, to that effect, *Kerckhaert and Morres*, paragraph 19, and Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 42).

43 It is true that, in this case, it has not been alleged before the Court that interest received in another Member State has been treated in a discriminatory manner as compared with interest received from a Spanish source.

44 However, it is clear from the legal framework, as set out by the national court, that Article 57(1) of Law 230/1963 states that, where it is appropriate to deduct, from the amount of tax, amounts due or paid in respect of another tax or other taxes charged previously, those amounts are to be deducted in full, even if they were the subject of an exemption or a credit.

45 Consequently, it is for the national court, which alone has jurisdiction to interpret national law, to assess whether, in the light of the taxation framework for interest obtained in Spain, Article 57(1) of Law 230/1963 may be applied to that interest and whether, in such a case, the treatment of interest obtained in another Member State is discriminatory as compared with the treatment of interest obtained in Spain, in so far as concerns the possibility of deducting tax which is due but which has not been paid.

46 In the light of all of the above considerations, the answer to the question referred is that Article 67 of the EEC Treaty and Article 1 of Directive 88/361 do not preclude national rules of a Member State, such as those at issue in the main proceedings, 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, it being for the national court to establish whether that is the case.

Costs

47 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 (First Chamber) hereby rules:

Article 67 of the EEC Treaty and Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) do not preclude national rules of a Member State, such as those at issue in the main proceedings, 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, it being for the national court to establish whether that is the case.

[Signatures]