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Judgment of the Court of 13 July 1993. - The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG. - Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom. - Right of establishment - Corporation tax - Indirect discrimination on grounds of nationality. - Case C-330/91.

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Keywords

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Freedom of movement for persons ° Freedom of establishment ° Tax legislation ° Right to repayment supplement when tax paid but not due is refunded ° Refund only available to companies resident for tax purposes in national territory ° Not permissible ° Tax not due on the ground that residence for tax purposes is abroad ° Irrelevant

(EEC Treaty, Arts 52 and 58)

Summary

Articles 52 and 58 of the Treaty prevent the legislation of a Member State from granting repayment supplement on overpaid tax to companies which are resident for tax purposes in that State whilst refusing the supplement to companies resident for tax purposes in another Member State. The fact that the latter would not have been exempt from tax if they had been resident in that State is of no relevance in that regard.

Although it applies independently of a company' s seat and therefore of the factor connecting it with the legal system of a particular State, the use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having their seat in other Member States since it is most often those companies which are resident for tax purposes outside the territory of the

Member State in question.

Parties

In Case C-330/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Queen' s Bench Division of the High Court of Justice of England and Wales for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Inland Revenue Commissioners

ex parte: Commerzbank AG

on the interpretation of Articles 5, 7, 52 and 58 of the EEC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President of Chamber, acting for the President, M. Zuleeg, J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse and D.A.O. Edward, Judges,

Advocate General: M. Darmon,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Commerzbank, by Gerald Barling QC and David Anderson, Barrister,

° the United Kingdom Government, by John Collins, Assistant Treasury Solicitor, assisted by Alan Moses QC and Derrick Wyatt, Barrister,

° the Commission of the European Communities, by Thomas Cusack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Commerzbank AG, the United Kingdom Government and the Commission at the hearing on 20 January 1993,

after hearing the Opinion of the Advocate General at the sitting on 17 March 1993,

gives the following

Judgment

Grounds

1 By order of 12 April 1991, received at the Court on 18 December 1991, the Queen' s Bench Division of the High Court of Justice of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question relating to the interpretation of the provisions of the Treaty concerning right of establishment and prohibition of discrimination on grounds of nationality.

2 Those questions were raised in connection with a dispute between Commerzbank AG, a company incorporated under German law whose registered office is in Germany, and the Inland Revenue Commissioners (hereinafter "the tax authorities") concerning the conditions governing liability to tax under the Income and Corporation Taxes Act 1988.

3 The facts as set out in the order for reference are as follows.

4 Commerzbank has a branch in the United Kingdom through the intermediary of which it granted loans to a number of United States companies between 1973 and 1976. Commerzbank paid tax in the United Kingdom of 4 222 234 on the interest received from those companies.

5 Subsequently Commerzbank sought repayment of that sum from the tax authorities on the ground that the interest was exempt in the United Kingdom by virtue of Article 15 of the Convention of 2 August 1946 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (S.R. & O. 1946, No 1327), as amended by a Protocol of 20 September 1966 (S.I. 1966 No 1188). That article provides in substance that interest paid by a United States company is taxable in the United Kingdom only when it is paid to a United Kingdom company or a company resident for tax purposes in the United Kingdom. Since Commerzbank was not resident for tax purposes in the United Kingdom, it received a refund of the overpaid tax.

6 Commerzbank then made a claim in connection with that refund under Article 825 of the Income and Corporation Taxes Act 1988. That article provides:

"(1) This section applies to the following payments made to a company in connection with any accounting period for which the company was resident in the United Kingdom ... :

(a) a repayment of corporation tax paid by the company for that accounting period ... .

(2) Subject to the following provisions of this section, where a payment of not less than 100 to which this section applies is made by the Board or an inspector after the end of the 12 months beginning with the material date, the payment shall be increased under this section by an amount (' a repayment supplement') equal to interest on the amount paid at the rate of 8.25 per cent per annum ...".

7 Commerzbank claimed repayment supplement from the tax authorities, calculating the amount payable as 5 199 258.

8 The tax authorities rejected Commerzbank' s claim on the ground that the company was not resident in the United Kingdom. Commerzbank therefore applied to the High Court for judicial review of that decision, claiming that the refusal to grant repayment supplement to non-residents constituted a restriction of the right of establishment and indirect discrimination on grounds of nationality, since the companies affected were for the most part foreign.

9 The High Court considered it necessary to refer to the Court a question concerning the interpretation of Articles 5, 7, 52 and 58 of the Treaty.

10 That question is worded as follows:

"Where:

(i) a company which is formed in accordance with the law of, and has its principal place of business in, one Member State carries on business through a branch in a second Member State;

(ii) the company is subject to a demand for payment of tax in the second Member State on certain profits generated by the branch, and pays the tax;

(iii) the said tax is not in fact due if the company is entitled to benefit from an exemption under a double taxation agreement between the second Member State and a third country to companies which are neither nationals of, nor resident for tax purposes in, the second Member State;

(iv) the company successfully claims the benefit of the exemption and secures recovery of the tax paid but not due;

(v) the law of the second Member State provides for statutory compensation in the nature of interest (known as 'repayment supplement') where the company recovering the tax paid but not due was resident in that Member State at the material time;

(vi) the company claims the repayment supplement notwithstanding that it was not resident in that Member State at the material time;

(vii) the second Member State refuses on that ground to pay repayment supplement to the company;

is the refusal of the second Member State to pay the company any repayment supplement on the ground of its non-residence inconsistent with Community law and in particular Articles 5, 7 and 52 to 58 of the EEC Treaty, and in answering that question is it relevant that the company would not have been exempt from the tax (so that no question of recovery of the tax and therefore of repayment supplement would arise) if the company had been resident in that Member State?"

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant rules and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

12 The file shows that the national court' s question is designed to ascertain, first, whether Articles 52 and 58 and Articles 5 and 7 of the Treaty prevent the legislation of a Member State from granting repayment supplement on overpaid tax to companies resident for tax purposes in that State whilst refusing that supplement to companies which are resident for tax purposes in another Member State and, secondly, whether such a rule is still discriminatory where the exemption from tax which gave rise to the refund applies only to companies which are not resident for tax purposes in that Member State.

The right of establishment

13 As the Court held in its judgment in Case C-270/83 Commission v France [1986] ECR 273, at paragraph 18, the freedom of establishment which Article 52 grants to nationals of a Member State, and which entails the right for them to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, includes, pursuant to Article 58 of the EEC Treaty, the right of 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 Community to pursue their activities in the Member State concerned through a branch or agency. With regard to

companies, it should be noted in this context that it is their seat in the abovementioned sense that serves as the connecting factor within the legal system of a particular State, like nationality in the case of natural persons. In the same judgment the Court held that acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it different treatment solely by reason of the fact that its seat is situated in another Member State would deprive the provision of all meaning.

14 Moreover, it follows from the Court' s judgment in Case 152/73 Sotgiu v Deutsche Bundespost [1974] ECR 153 (at paragraph 11) that the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

15 Although it applies independently of a company' s seat, the use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having their seat in other Member States. Indeed, it is most often those companies which are resident for tax purposes outside the territory of the Member State in question.

16 In order to justify the national provision at issue in the main proceedings, the United Kingdom Government argues that, far from suffering discrimination under the United Kingdom tax rules, non-resident companies which are in Commerzbank' s situation enjoy privileged treatment. They are exempt from tax normally payable by resident companies. In those circumstances, there is no discrimination with respect to repayment supplement: resident companies and non-resident companies are treated differently because, for the purposes of corporation tax, they are in different situations.

17 That argument cannot be upheld.

18 A national provision such as the one in question entails unequal treatment. Where a non-resident company is deprived of the right to repayment supplement on overpaid tax to which resident companies are always entitled, it is placed at a disadvantage by comparison with the latter.

19 The fact that the exemption from tax which gave rise to the refund was available only to non-resident companies cannot justify a rule of a general nature withholding the benefit. That rule is therefore discriminatory.

20 It follows from those considerations that the reply to be given to the national court is that Articles 52 and 58 of the Treaty prevent the legislation of a Member State from granting repayment supplement on overpaid tax to companies which are resident for tax purposes in that State whilst refusing the supplement to companies which are resident for tax purposes in another Member State. The fact that the latter would not have been exempt from tax if they had been resident in that State is of no relevance in that regard.

21 Since legislation such as that at issue in the main proceedings is contrary to Articles 52 and 58 of the Treaty, it is unnecessary to consider its compatibility with Articles 5 and 7.

Decision on costs

Costs

22 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings

are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the question referred to it by the Queen' s Bench Division of the High Court of Justice of England and Wales, by order of 12 April 1991, hereby rules:

Articles 52 and 58 of the Treaty prevent the legislation of a Member State from granting repayment supplement on overpaid tax to companies which are resident for tax purposes in that State whilst refusing the supplement to companies resident for tax purposes in another Member State. The fact that the latter would not have been exempt from tax if they had been resident in that State is of no relevance in that regard.