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Case C-433/04

Commission of the European Communities

v

Kingdom of Belgium

(Failure of a Member State to fulfil obligations – Articles 49 EC and 50 EC – Freedom to provide services – Activities in the construction sector – Prevention of tax fraud in the construction sector – National legislation requiring the withholding of 15% on payments to contracting partners not registered in Belgium – National legislation imposing joint and several liability for the tax debts of contracting partners not registered in Belgium)

Summary of the Judgment

Freedom to provide services – Restrictions – Tax legislation

(Arts 49 EC and 50 EC)

A Member State which obliges principals and contractors who have recourse to foreign contracting partners not registered with the authorities in that Member State to withhold 15% of the sum payable for work carried out and imposes on those principals and contractors joint and several liability for the tax debts of such contracting partners fails to fulfil its obligations under Articles 49 EC and 50 EC.

The withholding and the joint and several liability obligations, even if applied to an unregistered service provider whether he is established in the Member State in question or in another Member State, constitute a restriction on the freedom to provide services since they are likely to deter providers who are not registered and not established in that Member State from having access to the market of that Member State in order to provide services there, or to deter principals and contractors from using the services of those providers.

The need to combat tax evasion is not sufficient to justify application of the withholding and joint and several liability obligations, generally and on a precautionary basis, to all service providers who are not established and not registered in the Member State in question, since some of those providers are in principle not liable for the taxes and deductions whose recovery those measures are designed to ensure, and less restrictive means exist of ensuring the recovery of the taxes and deductions for which such providers may be liable in certain cases.

(see paras 30-32, 36-37, 42, operative part 1)

JUDGMENT OF THE COURT (First Chamber)

9 November 2006(*)

(Failure of a Member State to fulfil obligations – Articles 49 EC and 50 EC – Freedom to provide services – Activities in the construction sector – Prevention of tax fraud in the construction sector – National legislation requiring the withholding of 15% on payments to contracting partners not registered in Belgium – National legislation imposing joint and several liability for the tax debts of contracting partners not registered in Belgium)

In Case C-433/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 October 2004,

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by E. Dominkovits, acting as Agent, and by B. van de Walle de Ghelcke, avocat,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues and E. Levits (Rapporteur), Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration by the Court that, by obliging principals and contractors who have recourse to foreign contracting partners not registered in Belgium to withhold 15% of the sum payable for work carried out (hereinafter 'the withholding obligation') and by imposing on those principals and contractors joint and several liability for the tax debts of such contracting partners (hereinafter 'joint liability'), the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 EC and 50 EC.

National legal framework

2 In Belgium, the Income Tax Code 1992, consolidated by the Royal Decree of 10 April 1992 (Supplement to the *Moniteur belge*, 30 July 1992), as amended by the Royal Decree of 26 December 1998 laying down measures adapting the legislation relating to joint and several liability for social security and tax debts under Article 43 of the Law of 26 July 1996 modernising the social

security system and ensuring the viability of statutory pension schemes (*Moniteur belge*, 31 December 1998, p. 42140, hereinafter 'the ITC 1992') contains, in Title VII, which relates to establishment and recovery of taxes, a Chapter VIII, entitled 'Recovery of Tax', Section II of which is entitled 'Activities for which registered contractors must be used'.

3 This section covers various activities in the construction sector, determined by Royal Decree in accordance with Article 400(1) of the ITC 1992.

4 Article 402 of the ITC 1992 states:

'1. A principal who, for work covered by Article 400(1), has recourse to a contractor who is not registered at the time the contract is concluded, shall be jointly and severally liable for the payment of that contractor's tax debts.

2. A contractor who, for work covered by Article 400(1), has recourse to a subcontractor who is not registered at the time the contract is concluded, shall be jointly and severally liable for the payment of that subcontractor's tax debts.

…

5. Joint and several liability shall be limited to 35% of the total price, excluding value added tax, of the work commissioned from an unregistered contractor or subcontractor.

It shall apply to the principal payment, and to any increases, costs and interest, regardless of the time at which they arise:

(1) of all debts consisting of direct taxes and charges equivalent to income taxes for the taxable periods during which the work in question has been carried out and for earlier taxable periods;

(2) of all debts consisting of deductions for the periods during which work was carried out as well as earlier periods;

(3) of tax debts of foreign origin in respect of which recovery is requested under an international convention.

…'

5 Article 403 of the ITC 1992 states:

'1. A principal who pays a contractor who is not registered at the time of payment for all or part of the cost of the works covered by Article 400(1) must, at the time of payment, withhold 15% of the sum invoiced, excluding value added tax, and pay that amount to the official appointed by the King, in accordance with the detailed rules laid down by the latter.

2. A contractor who pays a subcontractor for all or part of the cost of the works covered by Article 400(1) must, at the time of payment, withhold 15% of the sum invoiced, excluding value added tax, and pay that amount to the official appointed by the King, in accordance with the detailed rules laid down by the latter.

The contractor is, however, excused, in accordance with the conditions and detailed rules determined by the King, from the obligation to withhold and pay laid down in the first subparagraph, if, at the time of payment, the subcontractor is registered as a contractor.

3. Where necessary, the amounts paid in implementation of this article shall be deducted from

the sum for which the principal or contractor is made responsible under Article 402.’

6 Article 404 of the ITC 1992 states that, if the withholding provided for in Article 403 of that code has not taken place, an administrative fine amounting to twice the payable sum is to be levied on the principal, or, in the situation covered by Article 403(2) of that code, on the contractor.

7 Article 406(1) of the ITC 1992 states:

‘The sums paid under Article 403 shall first be allocated to the settlement of the tax debts referred to in Article 402, to the payment of fines, and, thereafter, to debts in respect of value added tax.’

8 Article 407 of the ITC 1992 excludes the application of Articles 402 and 403 to principals who are natural persons commissioning work for purely private purposes.

9 The activities covered by Article 400(1) of the ICT 1992 are laid down in Article 1 of the Royal Decree of 26 December 1998 implementing Articles 400, 401, 403, 404 and 406 of the ITC 1992 and of Article 30a of the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge*, 31 December 1998, p. 42147). According to Article 1(1) of that Royal Decree, the following activities are covered:

‘(1) The carrying out of construction work. “Construction work” is to be interpreted as meaning: all construction, conversion, finishing, fitting-out, repair, maintenance, cleaning and demolition work of all or part of a building, as well as any operation which involves the supply of movable property and its fitting in a building in a manner such as to make that property immovable by its intrinsic nature;

(2) Any operation, including operations not covered by (1), involving both the supply and fixing to the building:

(a) of all or part of the components of a central-heating or air-conditioning system, including burners, tanks, and devices for regulation and control linked to boilers or radiators;

(b) of all or part of the components of a sanitary system in a building, and, more generally, of all fixed appliances for sanitary or hygienic use which are connected to a water pipe or a sewer;

(c) of all or part of the components of an electrical system in a building, excluding lighting equipment and lamps;

(d) of all or part of the components of an electrical buzzer system, of a fire-detection and theft-prevention system, of an internal telephone system;

(e) of storage cupboards, sinks, cupboard-sink combinations and sink cabinets, cupboard-washbasin combinations and washbasin cabinets, extractor hoods, fans and ventilators equipping a kitchen or a bathroom;

(f) of blinds, shutters and awnings placed on the outside of the building;

(3) Any operation, including operations not covered by (1), involving both the supply and fitting in a building of flooring or wall-coverings, whether they are fixed or whether the fitting requires mere on-the-spot cutting to the dimensions of the surface to be covered;

4. Work to fix, place, repair, maintain or clean the items covered by (2) or (3);

5. Making staff available to carry out any of the activities covered by this Article.’

10 Article 23 of this Royal Decree, amending Article 209 of the Royal Decree of 27 August 1993 implementing the [ICT 1992] lays down the procedures pursuant to which the sums withheld under Article 403 of the ICT 1992 can be recovered. In accordance with Article 23, to the extent to which the sums withheld are not allocated to the payment of tax debts, they must be reimbursed to the requesting party as quickly as possible and at the latest in the six months following the submission of a request for reimbursement.

Pre-litigation procedure

11 By a letter of formal notice of 13 February 2001 and subsequently by a reasoned opinion of 23 October 2001, the Commission notified the Kingdom of Belgium that it considered the national legislation on the withholding obligation and joint liability to be incompatible with Articles 49 EC and 50 EC. That opinion called on the Member State in question to take the necessary compliance measures within two months of its notification. As it considered the Kingdom of Belgium’s response to that opinion to be unsatisfactory, the Commission brought the present action.

The action

The subject-matter of the action

12 At the outset, it should be stated that the Belgian Government has disputed the approach taken by the Commission and has submitted that examination of the withholding obligation and joint liability ought to have been preceded by a consideration of the registration obligation, inasmuch as the withholding obligation and joint liability are an integral part of a broader system for the prevention of tax fraud. The Belgian Government has submitted that if Community law does not preclude the registration obligation, the withholding obligation and joint liability must also be considered compatible with Community law.

13 In that regard, suffice it to state that the issue of the compatibility with Community law of the registration obligation does not necessarily prejudge the compatibility with Community law of the withholding obligation and joint liability.

14 Therefore, and contrary to the situation in issue that gave rise to the judgment in Case C?98/04 *Commission* v *United Kingdom* [2006] ECR I?4003, consideration of the withholding obligation and of joint liability can be separated from consideration of the registration obligation.

The alleged failure to fulfil obligations

Arguments of the parties

15 The Commission claims that the withholding obligation and joint liability are contrary to Articles 49 EC and 50 EC on the ground that they are liable to deter principals and contractors from having recourse to contracting partners who are not established and not registered in Belgium, thereby creating a genuine obstacle for service providers who are not established and not registered in Belgium but who wish to offer their services in that country.

16 The Commission takes the view that both the withholding obligation and joint liability are measures which are unjustified.

17 As regards the withholding obligation, the Commission maintains that, as long as tax debts, the recovery of which the Belgian authorities allege they wish to guarantee by means of that

obligation, do not exist, in the majority of cases, in respect of a service provider who is not established in Belgium and who carries out work there under the freedom to provide services, no overriding requirement linked to the prevention of tax fraud can justify this measure.

18 The Commission submits that, in any case, the general application of the withholding obligation goes further than the objective which it seeks to attain, and that, in the specific situations in which tax debts are to be paid or recovered in Belgium, other means, which are less restrictive and better suited to the objective pursued, can be used.

19 In respect of joint liability, the Commission submits that it is disproportionate, inasmuch as there are less restrictive means by which to guarantee the payment or recovery of any contracting partner's tax debts.

20 Furthermore, the Commission takes issue with the extension of joint liability to the principal or the contractor not only for the tax debts of contracting partners in relation to the work carried out for them, but also for all the contracting partner's tax debts relating to the period of the work, as well as for earlier periods, which implies liability for tax debts relating to work carried out for others.

21 The Commission also criticises the automatic application of joint liability, in the absence of any fault on the part of the principal or the contractor, and adds that the inability of the principal or the contractor to question the validity of the debts for which they are jointly liable constitutes an infringement of the right to a fair hearing.

22 The Belgian Government counters by stating that the withholding obligation and joint liability, as procedures for the recovery of tax debts in the construction sector, do not restrict either market access or the freedom to provide services. As the disputed measures apply equally to contracting partners that are undertakings established in Belgium and to undertakings established in another Member State, the Commission has failed to prove that Belgian operators are less inclined to have recourse to unregistered contracting partners established in another Member State than to unregistered Belgian contracting partners.

23 Furthermore, the Belgian Government argues that the disputed measures are justified by overriding requirements in the general interest linked to the prevention of tax fraud in the construction sector. According to the Belgian Government, the withholding obligation and joint liability form part of a generalised system to deter and prevent fraudulent schemes with the purpose of, first, encouraging the use of registered contracting partners and, second, guaranteeing the recovery of the tax debts of unregistered contracting partners.

24 The Belgian Government also challenges the Commission's argument that, as a general rule, foreign service providers are not liable for direct or indirect taxes in Belgium. The Belgian Government states, inter alia, that, when a construction project exceeds a certain length of time, the profits that it generates are subject to the tax on persons not resident in Belgium, just as the salaries paid by undertakings involved in such construction projects to staff employed in Belgium are subject to tax, which means that the foreign service provider can be liable for income tax deductions relating to those salaries. By the same token, a service provider can also be liable for those income tax deductions for salaries paid to foreign staff employed in Belgium for more than 183 days in a 12-month period or to staff resident in Belgium. The Belgian Government also cited several situations in which a service provider from another Member State is liable to pay value added tax, inter alia when that provider's contracting partner is not obliged to submit a value added tax return (hospitals and educational establishments, for example) or is a taxable person established abroad having neither a permanent establishment nor a responsible representative in Belgium.

25 Referring to the judgment in Case C?384/93 *Alpine Investments* [1995] ECR I?1141, the Belgian Government asserts that, in the absence of Community harmonisation, it is not disproportionate to put in place rules which are generally and indiscriminately applicable for the purpose of effectively combating tax fraud in the construction sector.

26 The Belgian Government further maintains that the recovery of tax debts by way of the usual methods (particularly by way of legal proceedings after the event) has proved to be ineffective in the specific case of the suppliers of labour.

27 With particular regard to joint liability, the Belgian Government submits that the Commission was wrong to focus on the situation of Belgian principals or contractors rather than examining the situation of unregistered contracting partners and assessing the proportionality of the disputed measure to the objective pursued.

Findings of the Court

28 As a preliminary point, it must be recalled that the Court has consistently held that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers who are established in another Member State, but also the abolition of any restriction on the freedom to provide services, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of service providers from other Member States who lawfully provide similar services in their Member State of origin (see, to that effect, Case C?76/90 *Säger* [1991] ECR I?4221, paragraph 12; Case C?279/00 *Commission* v *Italy* [2002] ECR I?1425, paragraph 31; Case C?131/01 *Commission* v *Italy* [2003] ECR I?1659, paragraph 26; Case C?244/04 *Commission* v *Germany* [2006] ECR I?885, paragraph 30; and Case C?255/04 *Commission* v *France* [2006] ECR I?0000, paragraph 37).

29 As the Advocate General has noted at point 25 of his Opinion, measures which are capable of deterring an operator from exercising his freedom to provide services are covered by the prohibition thus laid down in the EC Treaty (see, to that effect, Case C?17/00 *De Coster* [2001] ECR I?9445, paragraph 33; Case C?289/02 *AMOK* [2003] ECR I?15059, paragraph 36; and Case C?8/02 *Leichtle* [2004] ECR I?2641, paragraph 32).

30 In the present case, the fact that, under Article 403 of the ICT 1992, the principal or contractor must withhold for the Belgian authorities a sum equivalent to 15% of the price charged by an unregistered service provider effectively deprives that provider of the ability immediately to have at his disposal a part of his income, which he can recover only at the conclusion of a specific administrative procedure. The disadvantages that the withholding obligation represents for service providers who are not registered and not established in Belgium are, consequently, liable to deter them from accessing the Belgian market in order to provide services in the construction sector in that country.

31 By the same token, the fact that, under Article 402 of the ICT 1992, the principal or the contractor who contracts with a service provider not registered in Belgium is made jointly liable for all of that provider’s tax debts relating to earlier taxable periods at the rate of 35% of the price of the work to be carried out is liable to deter that principal or contractor from having recourse to the services of a provider who is not registered and not established in Belgium, yet who lawfully provides identical services in his Member State of establishment. Even if joint liability applies without distinction when an unregistered service provider is used, regardless of whether he is established in Belgium or in another Member State, it must nevertheless be stated that, while it does not deprive service providers who are not registered and not established in Belgium of the

ability to supply their services there, the disputed provision does make access to the Belgian market difficult for them.

32 Consequently, the withholding obligation and joint liability constitute a restriction on the freedom to provide services.

33 However, according to settled case-law of the Court, where national legislation falling within an area which has not been harmonised at Community level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets overriding requirements relating to the public interest in so far as that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see *Säger*, paragraph 15; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 34 and 35; Case C?164/99 *Portugaia Construções* [2002] ECR I?787, paragraph 19; Case C?279/00 *Commission* v *Italy*, paragraph 33; Case C?445/03 *Commission* v *Luxembourg* [2004] ECR I?10191, paragraph 21; and *Commission* v *Germany*, paragraph 31).

34 As the Belgian Government maintains that the disputed measures are justified by overriding requirements relating to the public interest in the prevention of tax fraud in the construction sector, it is necessary to determine whether such a justification can be accepted.

35 In that regard, although the Court has repeatedly held that the prevention of tax avoidance and the need for effective fiscal supervision may be relied upon to justify restrictions on the exercise of fundamental freedoms guaranteed by the Treaty (see Case C-254/97 *Baxter and Others* [1999] ECR I?4809, paragraph 18; Case C?478/98 *Commission* v *Belgium* [2000] ECR I?7587, paragraph 39; and Case C?334/02 *Commission* v *France* [2004] ECR I?2229, paragraph 27), it has also held that a general presumption of tax avoidance or fraud is not sufficient to justify a fiscal measure which compromises the objectives of the Treaty (see, to that effect, *Commission* v *Belgium*, paragraph 45, and Case C?334/02 *Commission* v *France*, paragraph 27).

36 In the present case, even though in some of the examples cited by the Belgian Government service providers who are not established and not registered in Belgium may be liable for taxes and deductions, the recovery of which the withholding obligation and joint liability are intended to guarantee, it is common ground that the application of these measures is not limited to such cases.

37 The need to combat tax fraud is not sufficient to justify application of the withholding obligation and joint liability, generally and on a precautionary basis, to all service providers who are not established and not registered in Belgium, while some of those providers are in principle not liable for the abovementioned taxes and deductions.

38 As they apply in an automatic and unconditional manner, the disputed measures do not allow any account to be taken of the individual circumstances of service providers who are not established and not registered in Belgium.

39 As regards the withholding obligation, a less restrictive means than that of depriving service providers of a not inconsiderable portion of their earnings would have been to put in place a system, based on an exchange of information between principals and contractors, their contracting partners and the Belgian tax authorities, allowing, for example, principals and contractors to find out about any tax debts of their contracting partners or introducing an obligation to inform the Belgian tax authorities of any contract concluded with unregistered contracting partners or any

payment made to them.

40 By the same token, as regards joint liability, in order to limit its deterrent effect on principals and contractors with regard to all unregistered service suppliers, whether they are in principle liable for the abovementioned taxes and deductions or not, and whether they are in compliance as regards their own tax obligations or not, a less restrictive means would have been to allow the service providers to prove the compliant status of their tax situation or to allow principals and contractors to avoid joint liability by taking certain steps in order to satisfy themselves as to the tax-compliant status of the service providers with whom they wished to contract.

41 Furthermore, as the Advocate General has noted at point 42 of his Opinion, the disproportionate nature of the disputed measures is compounded by their cumulative application.

42 It must therefore be held that, by obliging principals and contractors who have recourse to foreign contracting partners not registered in Belgium to withhold 15% of the sum payable for work carried out and by imposing on those principals and contractors joint and several liability for the tax debts of such contracting partners, the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 EC and 50 EC.

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by obliging principals and contractors who have recourse to foreign contracting partners not registered in Belgium to withhold 15% of the sum payable for work carried out and by imposing on those principals and contractors joint and several liability for the tax debts of such contracting partners, the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 EC and 50 EC;**

2. **Orders the Kingdom of Belgium to pay the costs.**

[Signatures]

* Language of the case: French.