JUDGMENT OF THE COURT (Third Chamber)

19 July 2012 (*)

(Direct taxation — Freedom of establishment — Free movement of capital — EEA Agreement — Articles 31 and 40 — Directive 2009/133/EC — Scope — Exchange of shares between a company established in a Member State and a company established in a third State party to the EEA Agreement — Refusal of a tax advantage — Agreement on mutual administrative assistance in the field of taxation)

In Case C-48/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 31 January 2011, received at the Court on 2 February 2011, in the proceedings

Veronsaajien oikeudenvalvontayksikkö

v

A Oy,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 29 February 2012,

after considering the observations submitted on behalf of:

– A Oy, by M. Ohtonen, asianajaja,

– the Finnish Government, by M. Pere, acting as Agent,

– the Portuguese Government, by L. Fernandes, acting as Agent,

– the Norwegian Government, by K. B. Moen and K. Moe Winther, acting as Agents,

– the European Commission, by R. Lyal and I. Koskinen, acting as Agents,

– the EFTA Surveillance Authority, by X. Lewis and F. Simonetti, 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 31 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement').

2 The reference has been made in proceedings between the Veronsaajien oikeudenvalvontayksikkö (the Finnish Tax Authorities), and A Oy ('A'), a Finnish company, concerning an exchange of shares.

Legal context

EEA Agreement

3 Article 6 of the EEA Agreement provides:

'Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.'

4 Article 31 of that agreement states:

'1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of a Member State of the [European Community] or a State of the [European Free Trade Association (EFTA)] in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any Member State [of the European Community] or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment.'

5 Article 40 of that agreement provides:

'Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in Member States [of the European Community] or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.'

European Union law

6 The exchange of shares is defined in the following manner by Article 2(e) of Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE

between Member States (OJ 2009 L 310, p. 34):

‘… an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value, in the absence of a nominal value, of the accounting par value of the securities issued in exchange’.

Finnish law

7 Paragraphs 52 and 52f(1) and (2) of Law 360/1968 on the taxation of business income (Laki elinkeinotulon verottamisesta (360/1968), ‘Law on the taxation of business income’) are worded as follows:

‘Paragraph 52

The provisions of Paragraphs 52a to 52f shall apply to the merging, division, transfer of assets and exchange of shares of domestic limited companies. Paragraphs 52a to 52f also apply mergers, divisions and transfers of business of other companies referred to in Paragraph 3 of the Law on income tax. The provisions on limited companies, shares, share capital and shareholders, shall apply for that purpose to other companies, their share capital corresponding to their capital and to their shareholders or members. The provisions relating to mergers shall also apply to mergers of domestic groups of companies. The provisions relating to limited companies, shares and shareholders shall apply for that purpose to the share capital of groups and to their shareholders and the groups themselves.

Paragraphs 52a to 52f shall apply subject to the limits set out below, when the merger, division, transfer of assets or exchange of shares concerns companies referred to in Article 3(a) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of a SE or SCE from one Member State to another, which are liable to corporation tax. A company is considered to be established in a Member State if it has a registered office there in accordance with the law of that State, and is not regarded as being established outside the European Union pursuant to an agreement concluded between a Member State and a third country with the aim of avoiding double taxation.

…

Paragraph 52f

“Exchange of shares” means an arrangement whereby a limited company obtains a portion of the shares of another limited company such that the shares which it owns give more than half the number of votes produced by all the shares of the other company, or, if the limited company already has more than half the number of votes of this company’s shares, obtains more of this company’s shares and, as consideration, gives new shares which it has issued, or its own shares that it holds, to the other company’s shareholders. Consideration may also take the form of cash, but may not be more than ten percent of the nominal value of the shares given as consideration, or (if there is no nominal value) of the share capital paid for the corresponding portion of shares.

In taxation, an exchange of shares is not regarded as a disposal. That part of the acquisition cost of the assigned shares not written off in the taxation is regarded as the acquisition cost of the shares received in the exchange. Insofar as cash is received as consideration, the exchange is

regarded as a disposal of shares.'

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

8 A owns 4 093 out of 20 743 shares in the capital of C Oy ('C'), a company incorporated under Finnish law, which is an ownership share of approximately 19.7%. The other owner of C, which has an ownership share of approximately 80.3% in the shares of that company, is B AS ('B'), a Norwegian company. The aim of the operation which is the subject-matter of the dispute in the main proceedings was an exchange of shares within the meaning of Paragraph 52f of the Law on the taxation of business income by which A transferred in shares in C's share capital to B and received in exchange shares newly issued by B corresponding to approximately 6% of its capital. As a result of that operation B will therefore own 100% of C's capital.

9 A had asked the keskusverolautakunta (Central Tax Board) if Paragraph 52f, pursuant to which an exchange of shares is not, under certain conditions, regarded as a taxable disposal applies to the exchange of shares at issue in the main proceedings.

10 The Central Tax Board held, in its preliminary decision No 55/2008 of 1 October 2008 that the principles set out in Paragraph 52f of the Law on the taxation of business income were applicable to the exchange of shares as envisaged between A and B. According to that decision, the principles deriving from Paragraph 52f of the Law on the taxation of business income are applicable in the present case, so that that exchange should not be regarded as a disposal of shares as regards the taxation of A.

11 In its action before the Korkein hallinto-oikeus (Supreme Administrative Court) the Finnish Tax Authorities seek the annulment of the preliminary decision of the Central Tax Board.

12 The Korkein hallinto-oikeus has decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is an exchange of shares in which a Finnish limited company transfers to a Norwegian company (in the corporate form of an aksjeselskap [public limited company]) shares of a company which it owns and receives as consideration shares issued by the Norwegian company to be treated in taxation (taking account of Articles 31 and 40 of the EEA Agreement) neutrally in the same way as if the exchange of shares were between domestic companies or companies with their seat in Member States of the European Union?'

Consideration of the question referred for a preliminary ruling

13 As a preliminary point, it must be observed that the referring court indicates that the Law on the taxation of business income transposes Directive 2009/133 into national law.

14 According to Article 1, that directive applies only to exchanges of shares involving companies from two or more Member States. Since one of the companies participating in the exchange of shares at issue in the main proceedings is not established in a Member State, namely B which is established in Norway, that exchange does not fall within the scope of Directive 2009/133. In those circumstances, the answer to the question referred by the national court requires the examination of the national tax law in the light of the provisions of the EEA Agreement.

15 As regards the EEA Agreement, it should be recalled that one of the principal aims of that agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area (EEA), so that the internal market

established within the European Union is extended to the EFTA States. From that angle, several provisions of the EEA Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA (see Opinion 1/92 [1992] ECR I-2821). It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the FEU Treaty are interpreted uniformly within the Member States (Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 65, and Case C-72/09 *Établissements Rimbaud* [2010] ECR I-10659, paragraph 20).

16 Furthermore, it is relevant to point out that, according to settled case-law, while direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with EU law (see, inter alia, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19; Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 19; Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 21; and Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 68). By the same token, that competence does not allow Member States to apply measures which are contrary to the freedoms of movement guaranteed by similar provisions of the EEA Agreement (*Établissements Rimbaud*, paragraph 23).

17 As to the freedom in the light of which the legislation at issue in the main proceedings must be examined, it is apparent from settled case-law that, in order to ascertain whether national legislation falls within one or the other of the freedoms of movement, the purpose of the legislation at issue must be taken into consideration (order of 10 May 2007 in Case C-492/04 *Lasertec* [2007] ECR I-3775, paragraph 19 and the case-law cited).

18 Thus, national provisions relating to holdings giving the holder a definite influence on the decisions of the company concerned and allowing him to determine its activities come within the material scope of the FEU Treaty provisions on freedom of establishment (see, *Lasertec*, paragraph 20 and the case-law cited).

19 It is clear from the wording of Paragraph 52f of the Law on taxation of business income that, in order for the exchange of shares concerned not to be regarded as a taxable disposal, the acquiring company must own or acquire shares in the other company entitling it to more than half of the voting rights in the latter company. Such national provisions, which are thus applicable to operations involving the ownership or taking control of a company, are covered by the freedom of establishment.

20 In those circumstances, the question referred by the national court must be answered in the light of Article 31 of the EEA Agreement alone.

21 In that connection, the Court has already held that the rules prohibiting restrictions on the freedom of establishment, set out in Article 31 of the EEA Agreement, are identical to those imposed by Article 49 TFEU (Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 49, and Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 24).

22 Furthermore, it should be observed that Article 6 of the EEA Agreement provides that, without prejudice to future developments of case-law, the provisions of that agreement, in so far as they are identical in substance to corresponding rules of the Treaties of the Union are, in their implementation and application, to be interpreted in conformity with the relevant rulings of the Court given prior to the date of signature of that agreement.

23 Freedom of establishment includes, for companies or firms formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community, the right to pursue their activities in the Member State or in non-

member States party to the EEA Agreement concerned through a subsidiary, a branch or an agency (see, to that effect, *Krankenheim Ruhesitz amWannsee-Seniorenheimstatt*, paragraph 28 and the case-law cited).

24 The Court also stated that the concept of establishment within the meaning of the FEU Treaty is a very broad one, implying that a European Union national may participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and profit therefrom, so contributing to economic and social interpenetration within the Union in the sphere of activities as a self-employed person (see, *ELISA*, paragraph 63). Freedom of establishment thus seeks to guarantee the benefit of national treatment in the host Member State, by prohibiting any discrimination, even minimal, based on the place in which companies have their seat (see Case C-170/05 *Denkavit International and Denkavit France* [2006] ECR I-11949, paragraph 22).

25 It is settled case-law that that all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as such restrictions (see *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 30).

26 In accordance with the national legislation at issue in the main proceedings, an exchange of shares between companies benefits from neutral tax treatment with respect to the transferring company which has its registered office in Finland only if the registered office of the acquiring company is also in Finland or in another Member State of the Union and the exchange of shares involves the acquisition by the acquiring company of a majority shareholding in the acquired company. If those conditions are not met, in particular where, as in the situation at issue in the main proceedings, the registered office of the acquiring company is in a third country that is a party to the EEA Agreement, the exchange of shares is treated as a taxable disposal of shares for tax purposes.

27 The difference in treatment thus noted is not explained by a difference in the objective situation. The tax treatment of an exchange of shares to which a domestic company is subject is, in a situation such as that at issue in the main proceedings, determined solely by the place where the acquiring company has its registered office. Article 31 of the EEA Agreement prohibits any discrimination based on the place in which companies have their registered office (see, to that effect Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 77 and the case-law cited).

28 It must also be stated that, contrary to the Finnish Government’s submissions, the application of Article 31 of the EEA Agreement to legislation such as that at issue in the main proceedings does not lead to an extension of the scope of Directive 2009/133 to companies established in a third country that is a party to the EEA Agreement. Pursuant to the principle of non-discrimination in Article 31 of the EEA Agreement a Member State is in fact required to apply the tax treatment reserved for exchanges of shares between domestic companies to exchanges of shares which also involve a company established in a third country that is a party to the EEA Agreement.

29 It must therefore be concluded that the tax system at issue in the main proceedings entails a restriction on the right contained in Article 31 of the EEA Agreement.

30 It is clear from the Court’s case-law that a restriction on the freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain it (see, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 40).

31 The referring court raises the question whether such a restriction is justified by the public interest related to the need to combat tax evasion and to safeguard the effectiveness of fiscal supervision.

32 However, the mere fact that, in an exchange of shares, the acquiring company has its place of management in a third country that is a party to the EEA Agreement cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the EEA Agreement (see, to that effect, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 62; Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 27; and Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 84).

33 As to the need to protect the effectiveness of fiscal supervision, the Court has held that the taxpayer should not be precluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes (Case C-101/05 *A* [2007] ECR I-11531, paragraph 59 and the case-law cited).

34 However, that case-law, concerning restrictions on the exercise of the freedoms of movement within the European Union, cannot be transposed in its entirety to the freedoms guaranteed by the EEA Agreement since the exercise of the latter take place in a different legal context (see, to that effect, *A*, paragraph 60, and *Établissements Rimbaud*, paragraph 40).

35 It must be observed, in that regard, that the framework for cooperation between the competent authorities of the Member States established by Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) and Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799 (OJ 2011 L 64, p. 1) does not exist between those authorities and the competent authorities of a non-member State where that State has not entered into any undertaking of mutual assistance (see, *Établissements Rimbaud*, paragraph 41).

36 In particular, as regards the States that are parties to the EEA Agreement, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country that is a party to the EEA Agreement, it is in principle legitimate for the Member State to refuse to grant that advantage if — in particular, because that third country is not bound under an agreement to provide information — it proves impossible to obtain such information from that country (see, *Établissements Rimbaud*, paragraph 44).

37 It must be observed that there is an agreement on mutual administrative assistance in the field of taxation, Agreement No 37/1991, signed in Copenhagen on 7 December 1989, between the Republic of Finland and the Kingdom of Norway. Even though it is for the referring court to ascertain whether that agreement contains information exchange mechanisms which are sufficient to enable the Finnish authorities to verify and check whether the conditions required by national legislation are met in order for the application of the system of tax neutrality to an exchange of shares such as that at issue in the main proceedings, it must be stated that, at the hearing, the Finnish Government itself explained that the provisions of that agreement provide for an exchange of information between the national authorities as effective as that provided for by the provisions of Directives 77/799 and 2011/16.

38 In those circumstances, the Member State concerned cannot base its arguments on the

need to preserve the effectiveness of tax supervision in order to justify the difference in treatment found in paragraph 27 of the present judgment (see, to that effect, *ELISA*, paragraphs 98 to 101).

39 On the basis of the foregoing, the answer to the question referred for a preliminary ruling is that Article 31 of the EEA Agreement precludes legislation of a Member State which treats an exchange of shares between a company established in that Member State and a company established in a third country that is a party to that agreement as a taxable disposal of shares whereas such an operation would be neutral for tax purposes if it concerned only domestic companies or companies established in other Member States, if there is, between that Member State and the third country, an agreement on mutual administrative assistance in the field of taxation which provides for an exchange of information between the national authorities which is as effective as that provided for in Directives 77/799 and 2011/16, which is for the referring court to ascertain.

Costs

40 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 (Third Chamber) hereby rules:

Article 31 of Agreement on the European Economic Area of 2 May 1992 precludes legislation of a Member State which treats an exchange of shares between a company established in that Member State and a company established in a third country that is a party to that agreement as a taxable disposal of shares whereas such an operation would be neutral for tax purposes if it concerned only domestic companies or companies established in other Member States, if there is, between that Member State and the third country, an agreement on mutual administrative assistance in the field of taxation which provides for an exchange of information between the national authorities which is as effective as that provided for in Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799, which is for the referring court to ascertain.

[Signatures]

* Language of the case: Finnish.