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Provisional text

JUDGMENT OF THE COURT (First Chamber)

4 July 2018 (*)

(Reference for a preliminary ruling — Article 49 TFEU — Corporation tax — National tax legislation making the transfer of the losses sustained by a permanent establishment, situated on national territory, of a company established in another Member State, to a resident company belonging to the same group, subject to a condition as to the impossibility of using such losses for the purpose of a foreign tax)

In Case C?28/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark), made by decision of 1 November 2016, received at the Court on 19 January 2017, in the proceedings

NN A/S

v

Skatteministeriet,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.?C. Bonichot (Rapporteur), A. Arabadjiev and S. Rodin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2017,

after considering the observations submitted on behalf of:

– NN A/S, by A. Ottosen, advokat,

– the Danish Government, by J. Nymann-Lindegren and C. Thorning, acting as Agents, and by S. Riisgaard, advokat,

– the German Government, by T. Henze, acting as Agent,

– the European Commission, by W. Roels and R. Lyal, acting as Agents, and by H. Peytz, advokat,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2018,

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 the context of proceedings between NN A/S, a company established under Danish law, and the Skatteministeriet (Tax Ministry, Denmark), concerning the latter's refusal to allow that company to deduct the losses sustained by the Danish branch of its Swedish subsidiary from its taxable income.

Legal context

International law

3 Article 7(1) of the Convention between the Nordic countries for the avoidance of double taxation with respect to taxes on income and capital, concluded in Helsinki on 23 September 1996 (BKI No 92 of 25.6.1997; 'the Nordic Convention') provides:

'The profits of an undertaking of a Contracting State shall be taxable only in that State unless the undertaking carries on business in the other Contracting State through a permanent establishment situated therein. If the undertaking carries on business as aforesaid, the profits of the undertaking may be taxed in the other State but only so much of them as is attributable to that permanent establishment.'

4 Under Article 25 of that convention, the Contracting States chose to neutralise the double taxation of permanent establishments by means of the 'credit' method. For that purpose, the State in which the undertaking is resident grants a deduction in an amount equal to the income tax paid in the source State.

Danish law

5 Under Paragraph 31(1) of the Selskabsskattelov (Law on corporation tax), Danish companies belonging to a group are subject to compulsory national group taxation. The group tax is paid by the ultimate parent company (or group parent company) if it is subject to tax in Denmark or, otherwise, by a resident company belonging to the group, known as an 'administration company'.

6 National group taxation is based on the principle of territoriality of taxation in Denmark. Pursuant to that principle, the profits of the group's subsidiaries and permanent establishments established outside Denmark are not included in the group's profits taxed in Denmark, unless the group has opted for international group taxation, pursuant to Paragraph 31 A of the Law on corporation tax. By contrast, the scope of the group taxation includes all of the companies and permanent establishments belonging to the group and established in Denmark.

7 That scope also includes permanent establishments, established in Denmark, of companies belonging to the group but registered abroad. However, in that case, the setting-off of the losses sustained by the Danish branch of a company with its registered office in another Member State against the group's combined taxable profits is subject to special rules, laid down in Paragraph 31(2)(2) of the Law on corporation tax, under which:

‘A loss in a permanent establishment may be set off against the income of other companies only if the rules in the foreign State ... in which the company is resident provide that a loss cannot be set off in the calculation of the company’s income in the foreign State ... or if group taxation has been chosen pursuant to Paragraph 31 A ...’

8 It is apparent from the explanatory memorandum to the Law on corporation tax, cited by the referring court, that the purpose of that provision is to prevent tax losses from being deducted more than once in cross-border situations.

9 Paragraph 5 G of the Ligningslov (Law on assessment) states:

‘Taxable persons covered by Paragraph 1 of the Kildeskatteloven [(Law on tax at source)], Paragraph 1 of the Law on corporation tax or Paragraph 1 of the Fondsbeskatningsloven [(Law on taxation of investment funds)] cannot claim a deduction for expenditure which under foreign tax rules can be deducted from income that is not included in the calculation of Danish taxable income. The same applies if the deduction for expenditure can be transferred under foreign tax rules to a deduction from the income calculated by companies etc. in the group [see Paragraph 3B of the Skattekontrolloven (Law on tax supervision)] if the income is not included in the calculation of Danish taxable income.’

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

10 NN is the group parent company of a Danish group which includes, inter alia, two Swedish subsidiaries, Sverige 1 AB and Sverige 2 AB, each in turn the proprietors of a branch in Denmark, C and B respectively. Those two branches merged into one single Branch A by the transfer of Branch B to the company Sverige 1 AB.

11 In Sweden, the group opted for the transaction to be treated for tax purposes as a restructuring of activities, an operation which, according to the referring court, is not subject to tax in that Member State. Consequently, the transfer to Branch A of the goodwill built up by Branch B could not be written off in Sweden.

12 In Denmark, by contrast, the merger was taxed as a transfer of assets at market value, which allowed Branch A to write off the acquisition cost of the goodwill built up by B and, consequently, to show a negative result for the tax year 2008.

13 However, the Danish tax authority refused, for that tax year, the setting-off of Branch A’s losses against the overall group taxation income, for which NN had applied. That authority based its decision on the fact that Paragraph 31(2)(2) of the Law on corporation tax precluded this, since those losses could be set off against the taxable income in Sweden of the Swedish company which owned the branch.

14 That refusal, upheld by the Landsskatteretten (National Tax Tribunal, Denmark), was the subject of an appeal brought by NN before the Østre Landsret (High Court of Eastern Denmark).

15 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) What factors are to be taken into account in assessing whether resident companies in a situation such as the present one are subject to an “equivalent condition” within the meaning of paragraph 20 of the judgment of 6 September 2012, *Philips Electronics UK* (C?18/11, EU:C:2012:532), with respect to the setting off of losses, to that applicable to branches of non-resident companies?

(2) If it is presumed that the Danish tax rules do not contain a difference of treatment as dealt with in the judgment of 6 September 2012, *Philips Electronics UK* (C?18/11, EU:C:2012:532), does a prohibition of setting off similar to that described — in a case in which the loss in the non-resident company’s permanent establishment is also subject to the host country’s power of taxation — in itself constitute a restriction of the right of freedom of establishment under Article 49 TFEU, which has to be justified by reference to overriding reasons of the public interest?

(3) If so, can such a restriction then be justified by the interest in preventing the double use of losses, the objective of ensuring a balanced distribution of powers of taxation between the Member States, or a combination of both?

(4) If so, is such a restriction proportionate?’

Consideration of the questions referred

16 By its questions, the referring court is asking, in essence, whether Article 49 TFEU must be interpreted as precluding national legislation concerning group taxation, pursuant to which resident companies in a group are permitted to deduct, from their overall profits, the losses of a resident permanent establishment of a non-resident subsidiary of the group only in the case where the rules applicable in the Member State in which the subsidiary has its registered office do not permit those losses to be deducted from the subsidiary’s taxable profits.

Preliminary observations

17 Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes, in accordance with Article 54 TFEU, for companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency.

18 In order for the law of a Member State to constitute a barrier to the freedom of establishment of companies, it must result in a difference in treatment to the detriment of the companies exercising that freedom; that difference in treatment must relate to objectively comparable situations and must not be justified by an overriding reason in the public interest or proportionate to that objective (see, to that effect, judgment of 25 February 2010, *X Holding*, C?337/08, EU:C:2010:89, paragraph 20).

Difference in treatment

19 Pursuant to Paragraph 31(1) of the Law on corporation tax, resident companies in the same group are subject to group taxation. According to the explanations of the referring court, that national group taxation also applies, in principle, to Danish permanent establishments of foreign companies belonging to the group.

20 Nevertheless, in application of Paragraph 31(2)(2) of the Law on corporation tax, a loss sustained by a permanent establishment, situated in Denmark, of a non-resident company belonging to the group can be set off against the group income, taxable in Denmark, only in the

case where that loss cannot be taken into account for the calculation of the taxable income of the non-resident company pursuant to the legislation of the State in which it is established. That provision also states that that condition is not enforceable in situations — not covered by the questions referred for a preliminary ruling — in which the group has opted for international group taxation.

21 The question of whether the rule laid down in Paragraph 31(2)(2) of the Law on corporation tax establishes a difference in treatment that is unfavourable to the exercise of the freedom of establishment is the subject of diverging assessments by the parties to the case in the main proceedings.

22 According to the Danish Government, such a question must be answered in the negative, as is apparent from an *a contrario* reading of the judgment of 6 September 2012, *Philips Electronics UK* (C?18/11, EU:C:2012:532).

23 In that regard, in the case giving rise to that judgment, the referring court was uncertain as to the compatibility with freedom of establishment of provisions of UK legislation making the possibility of transferring, by means of group relief and to a resident company, losses sustained by the permanent establishment in that Member State of a non-resident company subject to a condition comparable to that laid down in Paragraph 31(2)(2) of the Danish Law on corporation tax.

24 In that judgment, the Court ruled that such a condition was contrary to the freedom of establishment, since the transfer of losses sustained by a resident company to another resident company in the same group was not subject to any equivalent condition.

25 The Danish Government points out that, quite to the contrary, Danish legislation sets down an equivalent condition for resident companies. Paragraph 5 G of the Law on assessment provides that companies may not deduct charges which, pursuant to the tax legislation of another State, are already deductible from taxable income in that State. That paragraph thus precludes the setting off, against the profits of a group taxed in Denmark, of the losses of the resident subsidiary of a non-resident company in the group, in the case where the setting-off of those losses is possible pursuant to the law of the Member State in which the non-resident company is established.

26 Consequently, the Danish Government takes the view that national law does not establish a difference in treatment, between permanent establishment and subsidiary, akin to that which the Court held to be contrary to freedom of establishment in the judgment of 6 September 2012, *Philips Electronics UK* (C?18/11, EU:C:2012:532).

27 The applicant in the main proceedings points out, however, that Paragraph 31(2)(2) of the Law on corporation tax does establish a difference in treatment of another nature.

28 NN explains that the losses of a permanent establishment, situated in Denmark, of a resident company in the group are deductible without restriction from the group’s taxable profits in Denmark. In the case in the main proceedings, NN points out that, if the Danish permanent establishment had been owned by one of its Danish subsidiaries, its losses could, in any event, have been set off against the group’s profits.

29 In that regard, it should be noted that the tax legislation at issue in the main proceedings does indeed establish such a difference in treatment. The tax treatment of a Danish group which owns a permanent establishment in Denmark through a non-resident subsidiary is, under Paragraph 31(2)(2) of the Law on corporation tax, less favourable than that of a group in which all of the companies have their registered offices in Denmark.

30 That difference in treatment is liable to render less attractive the exercise of freedom of establishment through the creation of subsidiaries in other Member States. It is, however, incompatible with the provisions of the Treaty only if it concerns situations which are objectively comparable.

The comparability of the situations

31 It should be recalled that, according to the case-law of the Court, the comparability of a cross-border situation with an internal situation must be examined having regard to the objective pursued by the national provisions at issue (judgments of 25 February 2010, *X Holding*, C?337/08, EU:C:2010:89, paragraph 22; of 12 June 2014, *SCA Group Holding and Others*, C?39/13 to C?41/13, EU:C:2014:1758, paragraph 28; of 22 June 2017, *Bechtel*, C?20/16, EU:C:2017:488, paragraph 53; and of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 32).

32 In the present case, it is apparent both from the terms of Paragraph 31(2)(2) of the Law on corporation tax and from the explanations provided by the Danish Government relating to that provision that the objective of the provision is to prevent the double deduction of losses.

33 The Court has held that, with regard to measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company’s profits, companies which have a permanent establishment in another Member State are not, in principle, in a situation comparable to that of companies which have a resident permanent establishment (judgment of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 37).

34 By analogy, the view must therefore be taken, as regards the measures intended to prevent the double deduction of losses, that a group whose non-resident subsidiary has a resident establishment is also not in a situation comparable to that of a group whose subsidiary, and the latter’s permanent establishment, are also resident.

35 It is nevertheless important to make an exception for the situation in which there is no other possibility of deducting the losses of the non-resident subsidiary attributable to the permanent establishment which is resident in the Member State in which the subsidiary is established. In that situation, the group whose subsidiary is situated in another Member State is not in a different situation to that of the purely national group, in the light of the objective of preventing the double deduction of its losses. The tax-paying capacity of the two groups is then affected in the same way by the losses of their resident permanent establishment (see, to that effect, judgment of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 38).

36 Admittedly, Paragraph 31(2)(2) of the Law on corporation tax removes the difference in treatment ‘if the rules in the foreign State … in which the company is resident provide that a loss cannot be set off’, by accepting, in that case, that the losses of the resident permanent establishment of the non-resident subsidiary may be set off against the group’s income.

37 However, it cannot be excluded that such a deduction, even when permitted by the legislation of the foreign State, may not be possible in practice, particularly in the case where the

non-resident subsidiary has definitively ceased all activity.

38 Thus the difference in treatment mentioned in paragraph 29 of the present judgment may, at least in that case, concern objectively comparable situations.

Justification and proportionality

39 The referring court asks whether that difference in treatment could be justified by the objective of ensuring a balanced distribution of powers of taxation between the Member States or by that of preventing the double deduction of losses.

40 In that regard, it should be noted that the former ground does not constitute a relevant justification. If the loss attributable to the permanent establishment could be deducted both from the group's taxable profits in the Member State in which that establishment is situated, and from the profits, taxable in the other Member State, of the group's non-resident subsidiary, that possibility of double deduction would favour neither of the two Member States concerned to the detriment of the other. Thus, the balanced distribution of powers of taxation between them would not be affected. The absence of a rule such as that laid down in Paragraph 31(2)(2) of the Law on corporation tax would simply entail a loss of tax revenue for one of the two States.

41 The second justification, based on preventing the double deduction of losses, is the one which is highlighted by the Danish Government.

42 In that respect, the Court has already ruled that Member States must be able to prevent the risk of losses being taken into account twice (judgments of 13 December 2005, *Marks & Spencer*, C?446/03, EU:C:2005:763, paragraph 47, and of 15 May 2008, *Lidl Belgium*, C?414/06, EU:C:2008:278, paragraph 35).

43 It is true that, in a situation in which a permanent establishment's income is taxed by two Member States, it appears justified that the charges borne by that establishment should be capable of being deducted from that income in one and the other tax systems, in accordance with national rules.

44 However, the existence of such a situation cannot simply be inferred from the fact that two Member States concurrently exercise their power of taxation over the profits of the same permanent establishment, as is the case, in the dispute in the main proceedings, with regard to the Kingdom of Denmark and the Kingdom of Sweden.

45 The tax agreements between Member States specifically designed to prevent double taxation cannot be disregarded. In that regard, as is apparent from the European Commission's written observations and the answers given by NN's representative during the hearing, relations between the Kingdom of Denmark and the Kingdom of Sweden are regulated by the Nordic Convention.

46 Under Article 25 of that convention, if a person residing in Sweden receives income that is taxable in another contracting State, the Kingdom of Sweden allows the deduction from income tax of a sum corresponding to the income tax paid in the other State.

47 In the light of that mechanism, the parallel exercise of the powers of taxation of the Kingdom of Denmark and the Kingdom of Sweden does not entail an obligation for the Swedish company which has a permanent establishment in Denmark to pay income tax twice. In those circumstances, the ability, claimed by the Danish group to which the Swedish company belongs, to deduct the losses of such an establishment twice, that is to say, in one and the other national tax

systems, does not appear to be justified.

48 Paragraph 31(2)(2) of the Law on corporation tax is specifically intended to prevent the group concerned from exploiting the same loss twice. In the absence of such a provision, as noted by the Advocate General in point 75 of his Opinion, cross-border situations would confer an unjustified advantage over comparable national situations, in which a double deduction is not possible. The difference in treatment established by national legislation thus appears to be justified.

49 That difference in treatment must still be proportionate to its objective, as recalled in paragraph 18 of the present judgment.

50 A rule such as that laid down in Paragraph 31(2)(2) of the Law on corporation tax would go beyond what is necessary to prevent the double deduction of a loss in the case where the effect thereof would be to deprive a group of any possibility of deducting the loss of a resident subsidiary in a cross-border situation such at that at issue in the main proceedings.

51 That might be the case, according to the referring court, in the dispute in the main proceedings.

52 Since the loss sustained by the permanent establishment in Denmark of NN's Swedish subsidiary is, in principle, deductible from that subsidiary's profits, which are taxable in Sweden, it cannot be deducted from the taxable group profits in Denmark, pursuant to the rule laid down in Paragraph 31(2)(2) of the Law on corporation tax.

53 However, in the case in the main proceedings, the loss is the result of the merger of two Danish branches in the group and the choice made by the group — as permitted by Swedish law — that that merger be treated for tax purposes as a restructuring of activities, and, as such, not subject to tax in Sweden. Consequently, it would not be possible, in practice, to set those losses off against the Swedish subsidiary's profits.

54 In a similar case, the national provisions at issue in the main proceedings — the consequence of which, according to the referring court, is to deprive the Danish group of any effective possibility of deducting the losses of the resident permanent establishment of its non-resident subsidiary — fail to have regard for the principle of proportionality.

55 That principle would, by contrast, be respected if the setting off, against the Danish group's profits, of the loss sustained by the resident permanent establishment of its non-resident subsidiary were accepted, by derogation from the rule laid down in Paragraph 31(2)(2) of the Law on corporation tax, since the group would have demonstrated that the setting off of the abovementioned losses against the subsidiary's profits is actually impossible in the other Member State.

56 It is for the referring court to determine whether that is the case in the dispute in the main proceedings, with regard to the Danish branch of NN's Swedish subsidiary.

57 Consequently, the answer to be given to the referring court is that Article 49 TFEU must be interpreted as not precluding, in principle, national legislation, such as that at issue in the main proceedings, pursuant to which the resident companies in a group are permitted to deduct, from their group profits, the losses sustained by a resident permanent establishment of a non-resident subsidiary of that group only in the case where the rules applicable in the Member State in which that subsidiary has its registered office do not permit those losses to be deducted from the latter's profits, when the application of that legislation is combined with that of a convention preventing double taxation allowing, in the latter Member State, the deduction from the income tax payable by

the subsidiary of a sum corresponding to the income tax paid, in the Member State on the territory of which that permanent establishment is situated, in respect of the latter's activity. However, Article 49 TFEU must be interpreted as precluding such legislation in the case where the effect of its application is to deprive that group of any effective possibility of deducting those losses from the group's overall profits, where it is not possible to set off those losses against that subsidiary's profits in the Member State on the territory of which that subsidiary is established, these being matters for the referring court to verify.

Costs

58 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 49 TFEU must be interpreted as not precluding, in principle, national legislation, such as that at issue in the main proceedings, pursuant to which the resident companies in a group are permitted to deduct, from their group profits, the losses sustained by a resident permanent establishment of a non-resident subsidiary of that group only in the case where the rules applicable in the Member State in which that subsidiary has its registered office do not permit those losses to be deducted from the latter's profits, when the application of that legislation is combined with that of a convention preventing double taxation allowing, in the latter Member State, the deduction from the income tax payable by the subsidiary of a sum corresponding to the income tax paid, in the Member State on the territory of which that permanent establishment is situated, in respect of the latter's activity. However, Article 49 TFEU must be interpreted as precluding such legislation in the case where the effect of its application is to deprive that group of any effective possibility of deducting those losses from the group's overall profits, where it is not possible to set off those losses against that subsidiary's profits in the Member State on the territory of which that subsidiary is established, these being matters for the referring court to verify.

[Signatures]

* Language of the case: Danish.