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62019CJ0558
JUDGMENT OF THE COURT (Sixth Chamber)

8 October 2020 (*1)

(Reference for a preliminary ruling – Articles 49 and 63 TFEU – Freedom of establishment – Free movement of capital – Calculation of the taxable income of companies – Persons having a relationship of interdependence – Unusual advantage granted by a resident branch to a non-resident company – Correction of the taxable income of the branch of a non-resident company – No correction of taxable income in the event of an identical advantage granted by a branch to a resident company – Principle of free competition – Restriction on freedom of establishment – Justification – Balanced allocation of the power to tax between Member States – Proportionality)

In Case C?558/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Cluj (Regional Court, Cluj, Romania), made by decision of 3 July 2019, received at the Court on 23 July 2019, in the proceedings

Impresa Pizzarotti & C SPA Italia Sucursala Cluj

v

Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Administrare a Marilor Contribuabili,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan and N. Jääskinen (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–

Impresa Pizzarotti & C SPA Italia Sucursala Cluj, by L.I. Budu?an, avocat?,

–

the Romanian Government, initially by C.-R. Can??r, E. Gane and A. Rot?reanu, and subsequently by E. Gane and A. Rot?reanu, acting as Agents,

–

the Czech Government, by M. Smolek, J. Vlá?il and J. O?ková, acting as Agents,

–

the German Government, by J. Möller and R. Kanitz, acting as Agents,

–

the Greek Government, by M. Tassopoulou and A. Magrippi, acting as Agents,

–

the Italian Government, by G. Palmieri, acting as Agent, and E. De Bonis, avvocato dello Stato,

–

the Polish Government, by B. Majczyna, acting as Agent,

–

the European Commission, by W. Roels and A. Armenia, acting as Agents,

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

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Articles 49 and 63 TFEU.

2

The request has been made in proceedings between Impresa Pizzarotti & C SPA Italia Sucursala Cluj ('Impresa Pizzarotti') and the Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Administrare a Marilor Contribuabili (National Tax Administration Office – Directorate-General for the Administration of Large-scale Taxpayers, Romania; 'the tax office') regarding the annulment of a fiscal administrative act issued by that office and the tax assessment based on that act.

Romanian law

3

Article 7 of Legea nr. 571 privind Codul fiscal (Law No 571 establishing the Tax Code) of 22 December 2003 (Monitorul Oficial al României, Part I, No 927 of 23 December 2003), in the version applicable to the main proceedings ('the Tax Code'), provides:

'For the purposes of this Code, with the exception of Title VI, the terms listed below shall have the following meanings:

…

20. "person": any natural or legal person;

21. "related person": a person is related to another person where the relationship between them

falls within at least one of the following situations:

…

(c)

a legal person is related to another legal person if, at least:

(i)

the first legal person directly or indirectly holds, including the holdings of related persons, at least 25% of the value or number of the equity securities or voting rights of the other legal person, or controls that other legal person;

(ii)

the second legal person directly or indirectly holds, including the holdings of related persons, at least 25% of the value or number of the equity securities or voting rights of the first legal person;

(iii)

a third legal person directly or indirectly holds, including the holdings of related persons, at least 25% of the value or number of the equity securities or voting rights of both the first and second legal person.

…

32. “transfer”: any sale, assignment or disposal of an ownership right, the exchange of an ownership right for services or for another ownership right, or the transfer of fiduciary assets in a trust transaction in accordance with the Civil Code.’

4

Article 11(2) of that code provides:

‘In a transaction between Romanian persons and non-resident persons who are related, and between Romanian persons who are related, the tax authorities may adjust the income or expenditure of each person, as necessary, to reflect the market price of the goods or services supplied under the transaction. To determine the market price of transactions between related persons, the most appropriate of the following methods shall be used: …’

5

Article 29(3) of that code reads as follows:

‘The taxable profit of a permanent establishment shall be calculated by treating that establishment as a separate person and in accordance with the rules on transfer pricing used to determine the market price of a transfer between a foreign legal person and its permanent establishment. Where the permanent establishment is not in possession of invoices for the expenditure apportioned to it by its principal place of business, the other supporting documents must contain evidence that the costs were actually incurred and were reasonably apportioned to the permanent establishment, in accordance with the rules on transfer pricing.’

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

6

Impresa Pizzarotti is the Romanian branch of SC Impresa Pizzarotti & C SPA Italia ('Pizzarotti Italia'), established in Italy.

7

Between 29 July 2016 and 11 September 2017, the audit unit of the tax office carried out an inspection at Impresa Pizzarotti, as a person liable to corporation tax, which revealed that that branch had concluded, as lender, two loan agreements with its parent company, Pizzarotti Italia: one dated 6 February 2012 for EUR 11400000 and another dated 9 March 2012 for EUR 2300000.

8

It follows from the order for reference that those sums had been borrowed for an initial period of one year, which could be extended by way of addendum, that the loan agreements did not contain any clause concerning the charging of interest by Impresa Pizzarotti, and that although the outstanding amount as of 1 January 2013 was EUR 11250000, both loans had been repaid in full by 9 April 2014.

9

Thus, having regard to Article 11(2) of the Tax Code, which provides that transactions between Romanian persons and non-resident persons who are related are subject to the rules on transfer pricing, and to Article 29(3) of that code, according to which the concept of 'Romanian persons' covers a branch which is the permanent establishment of a non-resident person, the tax office took the view that Impresa Pizzarotti, the applicant company in the main proceedings, was to be treated as a person related to Pizzarotti Italia and that the interest rate on those loans should have been set at market price, in accordance with the rules on transfer pricing, as if they had been made under normal conditions of competition.

10

Consequently, on 20 September 2017, the tax office issued a tax assessment based on the tax audit report of the same date imposing on Impresa Pizzarotti a tax increase of 297 141.92 Romanian lei (RON) (approximately EUR 72400) and an additional taxable amount of RON 1857137 (approximately EUR 452595).

11

By decision of 23 November 2017, the tax office rejected Impresa Pizzarotti's complaint against that tax assessment as unfounded.

12

Impresa Pizzarotti subsequently brought an action before the national court, the Tribunalul Cluj (Regional Court, Cluj, Romania), seeking annulment of the decision of 23 November 2017 and the tax assessment of 20 September 2017.

13

In the main proceedings, Impresa Pizzarotti argues, in essence, that the national provisions relied on by the tax office infringe Articles 49 and 63 TFEU, in so far as they provide that transfers of

money between a branch established in one Member State and its parent company established in another Member State constitute transactions which may be subject to the rules on transfer pricing, whereas those rules do not apply where the branch and its parent company are established in the territory of the same Member State.

14

In those circumstances, the Tribunalul Cluj (Regional Court, Cluj) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do Articles 49 and 63 [TFEU] preclude national legislation such as [Articles 11(2) and 29(3) of the Tax Code], which provides that a bank transfer of money from a company branch resident in one Member State to the parent company resident in another Member State may be reclassified as a revenue-generating transaction, with the consequent obligation to apply the rules on transfer pricing, whereas, if the same transaction had been effected between a company branch and a parent company, both of which were resident in the same Member State, that transaction could not have been reclassified in the same way and the rules on transfer pricing would not have been applied?’

Consideration of the question referred

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By its question, the national court asks, in essence, whether Articles 49 and 63 TFEU are to be interpreted as precluding legislation of a Member State under which a transfer of money from a resident branch to its parent company established in another Member State may be classified as a ‘revenue-generating transaction’, with the consequent obligation to apply the rules on transfer pricing, whereas, if the same transaction had been effected between a company branch and a parent company, both of which were established in the same Member State, that transaction would not have been classified in the same way and the rules on transfer pricing would not have been applied.

16

In that connection, it is apparent from the documents before the Court that the Tax Code lays down rules for correcting the taxable amount, relating to ‘transfer pricing’, designed to prevent resident companies from providing goods or services to non-resident companies at an undervalue or free of charge, thus reducing their taxable income in Romania.

17

Since the national court refers, in the question submitted for a preliminary ruling, to both freedom of establishment and free movement of capital, enshrined in Articles 49 and 63 TFEU respectively, it should be noted, as a preliminary point, that the creation and the outright ownership by a natural or legal person established in a Member State of a permanent establishment, such as a branch, situated in another Member State, fall within the scope of Article 49 TFEU (see, to that effect, judgments of 15 May 2008, Lidl Belgium, C?414/06, EU:C:2008:278, paragraph 15, and of 15 September 2011, Dickinger and Ömer, C?347/09, EU:C:2011:582, paragraph 35).

18

In this case, the main proceedings concern the impact of national legislation on the tax treatment of a transfer of money between a branch established in Romania and its parent company established in another Member State.

19

Even if it were to be accepted that the tax regime at issue in the main proceedings has restrictive effects on the free movement of capital, such effects would have to be seen as an unavoidable consequence of any restriction on freedom of establishment and they do not justify an examination of that regime in the light of Article 63 TFEU (see, by analogy, judgment of 15 May 2008, Lidl Belgium, C?414/06, EU:C:2008:278, paragraph 16 and the case-law cited).

20

In those circumstances, the national legislation at issue in the main proceedings must be examined solely in the light of the provisions of the TFEU concerning freedom of establishment.

21

Thus, it should be noted that freedom of establishment, conferred on EU nationals by Article 49 TFEU, entails, according to Article 54 TFEU, for 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 European Union, the right to exercise their activity in another Member State through a subsidiary, branch or agency (judgments of 14 December 2006, Denkavit Internationaal and Denkavit France, C?170/05, EU:C:2006:783, paragraph 20, and of 21 December 2016, Masco Denmark and Damixa, C?593/14, EU:C:2016:984, paragraph 23 and the case-law cited).

22

The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State (judgment of 14 December 2006, Denkavit Internationaal and Denkavit France, C?170/05, EU:C:2006:783, paragraph 21).

23

In the case of companies, it should moreover be noted that their registered office for the purposes of Article 54 TFEU serves, in the same way as nationality in the case of individuals, as the connecting factor with the legal system of a Member State. Acceptance of the proposition that the Member State in which a resident branch is established may freely apply different treatment merely by reason of the fact that the registered office of the parent company is situated in another Member State would deprive Article 49 TFEU of all meaning. Freedom of establishment thus seeks to guarantee the benefit of national treatment in the branch’s host Member State, by prohibiting any discrimination, even minimal, based on the place in which companies have their seat (see, to that effect, judgment of 14 December 2006, Denkavit Internationaal and Denkavit France, C?170/05, EU:C:2006:783, paragraph 22 and the case-law cited).

24

Against that background, it should also be pointed out that the Court has previously held that a restriction on freedom of establishment arises in the case of national legislation under which unusual or gratuitous advantages granted by a resident company to a company with which it has a relationship of interdependence are added to the former company’s own profits only if the recipient

company is established in another Member State (see, to that effect, judgment of 21 January 2010, SGI, C?311/08, EU:C:2010:26, paragraphs 42 to 45).

25

In the instant case, as the national court has stated, the Tax Code does not treat branches as separate persons unless they are a permanent establishment of a non-resident legal person, so that the income of a branch is corrected, in accordance with the rules on transfer pricing, only if the parent company is established in another Member State. If, on the other hand, the branch and the parent company are established in Romania, no correction of the income is made.

26

It follows that a branch of a non-resident company such as Impresa Pizzarotti enjoys less favourable treatment than that enjoyed by a branch of a resident company carrying out similar transactions with its parent company.

27

In those circumstances, such a difference in the tax treatment of branches based on the place where their parent companies with which transactions on non-arm's-length terms have been entered into have their registered office is liable to constitute a restriction on freedom of establishment, within the meaning of Article 49 TFEU. The parent company might thereby be deterred from acquiring, creating or maintaining a branch in a Member State other than its Member State of residence because of the tax burden imposed, in a cross-border situation, on transactions entered into on non-arm's-length terms (see, to that effect, judgment of 31 May 2018, Hornbach-Baumarkt, C?382/16, EU:C:2018:366, paragraph 35).

28

In the second place, according to the Court's settled case-law, a tax measure which is liable to hinder the freedom of establishment enshrined in Article 49 TFEU is permissible only if it relates to situations which are not objectively comparable or if it can be justified by overriding reasons in the public interest recognised by EU law. It is further necessary, in such a case, that it is appropriate for ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective (judgment of 31 May 2018, Hornbach-Baumarkt, C?382/16, EU:C:2018:366, paragraph 36).

29

It is apparent from the documents before the Court that the rules on transfer pricing laid down in the Tax Code are intended to prevent the taxable amount in the State of residence of a non-resident company's permanent establishment from being reduced on account of transactions carried out by that permanent establishment with its parent company which are not in line with market conditions.

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In that regard, the Court has held that the need to maintain the balanced allocation of the power to tax between Member States may be capable of justifying a difference in treatment where the system in question is designed to prevent conduct liable to jeopardise the right of a Member State to exercise its power to tax in relation to activities carried out in its territory (judgment of 31 May 2018, Hornbach-Baumarkt, C?382/16, EU:C:2018:366, paragraph 43).

31

In the instant case, all the parties that submitted observations to the Court, except Impresa Pizzarotti, took the view that the restriction on freedom of establishment introduced by the Romanian legislation at issue in the main proceedings is justified by the need to ensure the balanced allocation of the power to tax between Member States, which constitutes, as is apparent from the preceding paragraph, an overriding reason in the public interest.

32

It must be held that to permit the branches of non-resident companies to transfer their profits in the form of unusual or gratuitous advantages to their parent companies may well undermine the balanced allocation of the power to tax between Member States. It would be liable to undermine the very system of the allocation of the power to tax between Member States because the Member State of the branch granting unusual or gratuitous advantages would be forced to renounce its right, in its capacity as the State of residence of that permanent establishment, to tax the branch's income in favour, possibly, of the Member State in which the recipient parent company has its registered office (see, to that effect, judgment of 21 January 2010, SGI, C?311/08, EU:C:2010:26, paragraph 63).

33

By taxing the permanent establishment on the basis of the presumed amount of the remuneration for the advantage granted gratuitously to the parent company, in order to take account of the amount which that permanent establishment would have had to declare in respect of its profits if the transaction had been concluded in accordance with market conditions, the legislation at issue in the main proceedings thus allows Romania to exercise its power to tax in relation to activities carried out in its territory.

34

It must therefore be held that national legislation such as that at issue in the main proceedings, which seeks to prevent profits generated in the Member State concerned from being transferred outside the tax jurisdiction of that Member State via transactions that are not in accordance with market conditions, without being taxed, is appropriate for ensuring the preservation of the allocation of the power to tax between Member States.

35

In those circumstances, in the third place, it is necessary to examine whether legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objective pursued.

36

In that connection, it must be stated that national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents an artificial arrangement, entered into for tax reasons, is to be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of the power to tax between Member States and to prevent tax avoidance where, first, on each occasion on which there is a suspicion that a transaction goes beyond what the companies concerned would have agreed under fully competitive conditions, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial

justification that there may have been for that transaction. Second, where the consideration of such elements leads to the conclusion that the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must be confined to the part which exceeds what would have been agreed if the companies did not have a relationship of interdependence (judgment of 21 January 2010, SGI, C?311/08, EU:C:2010:26, paragraphs 71 and 72).

37

In this case, it appears from the documents before the Court that, in accordance with the national provisions applicable to the main proceedings, the income adjustment imposed by Article 29(3) of the Tax Code concerns only the difference between the market price of the transaction at issue, which would have been charged under fully competitive conditions, and the price actually applied by the parties. Similarly, it would always be open to the taxpayer to demonstrate that there were objective reasons for concluding the transaction at a price which did not reflect the market price.

38

Thus, subject to verification by the national court, it appears that the Romanian legislation at issue in the main proceedings does not go beyond what is necessary to attain the legitimate objective underlying that legislation.

39

In the light of all the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding, in principle, legislation of a Member State under which a transfer of money from a resident branch to its parent company established in another Member State may be reclassified as a ‘revenue-generating transaction’, with the consequent obligation to apply the rules on transfer pricing, whereas, if the same transaction had been effected between a company branch and a parent company, both of which were established in the same Member State, that transaction would not have been classified in the same way and the rules on transfer pricing would not have been applied.

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 (Sixth Chamber) hereby rules:

Article 49 TFEU must be interpreted as not precluding, in principle, legislation of a Member State under which a transfer of money from a resident branch to its parent company established in another Member State may be reclassified as a ‘revenue-generating transaction’, with the consequent obligation to apply the rules on transfer pricing, whereas, if the same transaction had been effected between a company branch and a parent company, both of which were established in the same Member State, that transaction would not have been classified in the same way and the rules on transfer pricing would not have been applied.

[Signatures]

(*1) Language of the case: Romanian.