ORDER OF THE COURT (Second Chamber)
8 June 2004

(Article 104(3) of the Rules of Procedure – Fiscal legislation – Taxation on income of natural persons – Assignment of a major holding in the capital of a resident company – Detailed rules governing charge to tax of resultant gain)

In Case C-268/03,
REFERENCE to the Court under Article 234 EC by the Rechtbank van eerste aanleg te Antwerpen (Belgium) for a preliminary ruling in the proceedings pending before that court between
Jean-Claude De Baeck

and

Belgische Staat,
on the interpretation of Articles 43 EC, 46 EC, 48 EC, 56 EC and 58 CE,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans (Rapporteur), President of the Chamber, C. Gulmann, J.-P. Puissochet, J.N. Cunha Rodrigues and N. Colneric, Judges,
Advocate General: F.G. Jacobs,
Registrar: R. Grass,
after the referring court had been informed that the Court proposed to give its decision by reasoned order in accordance with Article 104(3) of its Rules of Procedure,
after requesting the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations in that connection,
after hearing the views of the Advocate General,

makes the following

Order

1
By a judgment of 13 June 2003, which was received at the Court on 19 June 2003, the Rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp), referred to the Court for a preliminary ruling under Article 234 EC a question concerning the interpretation of Articles 43 EC, 46 EC, 48 EC, 56 EC and 58 EC.
2
That question was raised in the context of proceedings between Mr De Baeck and the Belgische Staat (Belgian State) concerning the charge to tax imposed on the gain in value secured on the sale by Mr De Baeck to a French company of shares in Belgian companies.

National legislation

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In the version in force at the material time for the purposes of the main proceedings, Article 67(8) of the Belgian Code on income tax of 26 February 1964, provided:

'Miscellaneous income … is … the gain in value secured on the transfer for valuable consideration, otherwise than in the context of the exercise of a business activity referred to in Article 30, of shares or stock in companies, associations, establishments or bodies having their company seat, their main establishment or their centre of management or operations in Belgium, where the transferor or, if the shares were not obtained for valuable consideration, his predecessor in title, at any time in the period of five years preceding the transfer alone or together with his spouse, descendants, ascendants, relatives in the second degree and those of his spouse, directly or indirectly held more than 25% of the rights in the company in which the shares or stock were transferred.'

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Under Article 67ter of the Code:

'The gains in value referred to in Article 67(8) shall not be chargeable to tax if they are secured on distribution of the assets of the company incorporating those holdings, or on the purchase by that company of its own shares, or on the transfer of shares or stock to a resident liable to personal tax or to a non-resident liable to tax as a person without a residence permit or to a taxpayer as mentioned in Articles 94(1) and 136.'

Dispute in the main proceedings and the question referred for a preliminary ruling

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The referring court states that, according to the tax authorities, Mr De Baeck, acting on his own behalf and for others, in 1989 sold to a French company shares in Belgian companies belonging to the Antverpia group for an amount of BEF 1 705 000 000.

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Since the shares were sold to a foreign undertaking and Mr De Baeck's family held a major shareholding in the Belgian companies belonging to the Antverpia group, the tax authorities were of the view that the gain in value secured was chargeable to tax.

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According to the referring court, under national legislation gains in value are not chargeable to tax if the shares or stock are assigned to Belgian companies, associations, establishments or bodies, although they are so chargeable if the shares or stock are assigned to foreign companies, associations, establishments or bodies.

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That legislation thus provides for different treatment of gains in values of shares or stock depending on the place of establishment of the assigning company, association, establishment or body.

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Since it had doubts as to the conformity with Community law of that legislation, the Rechtbank van eerste aanleg te Antwerpen decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 43 EC, 46 EC, 48 EC, 56 EC and 58 EC preclude Belgian legislation, namely Articles 67(8) and 67ter of the income tax code, in its 1964 version, pursuant to which gains in value secured on the transfer for valuable consideration, otherwise than in the context of the exercise of a business activity, of shares or stock in Belgian companies, associations, establishments or institutions, are liable to tax where the transfer is to a foreign company, association, establishment or institution, even though in the same circumstances those gains in

value are not liable to tax where the transfer is to a Belgian company, association, establishment or institution?

The question referred

Observations submitted to the Court

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Mr De Baeck proposes that the reply to the question referred should be in the affirmative. Referring, in particular, to the judgment of 21 November 2002 in Case C-436/00 *X and Y* [2002] ECR I-10829, he is of the view that a rule such as that at issue in the main proceedings constitutes a restriction on both freedom of establishment and the free movement of capital.

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In fact such a rule would be likely to impede the taxpayer in the exercise of the right conferred on him by Article 43 EC to conduct his activities by means of a company in another Member State or to assign shares or stock to such a company and to deter residents of one Member State from contracting loans or making investments in other Member States. Mr De Baeck takes the view that those restrictions are unwarranted.

12

The Commission is also of the view that national legislation such as that at issue in the main proceedings is incompatible with Community law. Referring to the judgments in Case C-251/98 *Baars* [2000] ECR I-2787 and *X and Y*, cited above, it states that it is appropriate to distinguish between freedom of establishment and free movement of capital.

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In its view, if Mr De Baeck's holding confers on him definite influence over the company's decisions and enables him to determine its activities, the question referred for a preliminary ruling must be analysed from the standpoint of freedom of establishment. If the converse is true, it must be analysed from the standpoint of the free movement of capital. It would be for the referring court to ascertain which of the two situations is actually applicable.

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In regard to freedom of establishment, the Commission, referring to the *X and Y* judgment submits that the charge to tax at issue in the main proceedings is likely to have a dissuasive effect on the exercise by a company established in another Member State of the right conferred on it by Article 43 EC to conduct its activities in Belgium through the intermediary of a company. In fact it would be more advantageous to Mr De Baeck to sell his holding to a Belgian company because in that case he would not be liable to tax. Such unequal treatment constitutes a restriction on freedom of establishment.

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In regard to free movement of capital the Commission, again referring to the *X and Y* judgment, observes that the national legislation at issue in the main proceedings is such as to deter persons liable to Belgian income tax from assigning shares to assignee companies established in other Member States. Moreover, that legislation also restricts the freedom of residents of other Member States from investing their capital in certain Belgian undertakings since those residents would have to persuade the Belgian vendor to choose them as purchasers, notwithstanding the charge to tax at issue. It thus constitutes a restriction on the free movement of capital within the meaning of Article 56 EC.

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The Commission observes that the referring court mentions no matter capable of justifying the restrictions identified by it. Nor does it see what justification there could be for them.

Court's reply

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Considering that the reply to the question referred may be clearly deduced from the case-law, the Court, in accordance with Article 104(3) of its Rules of Procedure, informed the referring court of its intention to give its decision by reasoned order and requested the persons referred to in Article 23 of the Statute of the Court of Justice to submit any observations in that connection.

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Only Mr De Baeck responded to the Court's request, stating that the *X and Y* case was not in his view identical but in some ways similar to the present case. However, he is relying on the assessment by the Court in order to determine whether in this case the reply may be deduced from that judgment. He believes that to be the case.

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It has been consistently held that although direct taxation is a matter for the competence of the Member States, the latter must none the less exercise that competence in conformity with Community law (see, in particular, Case C-364/01 *Barbier* [2003] ECR I-0000, paragraph 56, and case-law cited).

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At paragraph 36 of the judgment in *X and Y* the Court held that the refusal of a tax advantage, namely the refusal to grant the transferor the benefit of a deferral of a charge to tax on gains made on shares transferred at undervalue, on the ground that the transferee company in which the taxpayer has a holding is established in another Member State, is likely to have a deterrent effect on the exercise by that taxpayer of the right conferred on him by Article 43 EC to pursue his activities in that other Member State through the intermediary of a company.

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The Court considered that such inequality of treatment constitutes a restriction on the freedom of establishment of nationals of the Member State concerned (and, moreover, on that of nationals of other Member States resident in that Member State), who have a holding in the capital of a company established in another Member State, provided that that holding gives them definite influence over the company's decisions and allows them to determine its activities. It was for the referring court to ascertain whether that condition was fulfilled in the case in the main proceedings (*X and Y*, paragraph 37, and case-law cited).

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Moreover, if, on the basis of the matters established by the referring court, Article 43 EC does not apply in light of the inadequate degree of participation by the transferor in the transferee company having its establishment in another Member State, refusal of a tax advantage is liable to dissuade those liable to tax on gains from transferring shares at undervalue to transferee companies established in other Member States in which they directly or indirectly have a holding and, therefore, constitutes, for those taxpayers, a restriction on the free movement of capital within the meaning of Article 56 EC (*X and Y*, paragraph 70, and case-law cited).

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It is common ground, in the main proceedings, that the gains are not chargeable to tax if the shares or stock are assigned to Belgian companies, associations, establishments or bodies, although they are so chargeable if the shares or stock are assigned to companies, associations, establishments or bodies established in another Member State.

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However, the refusal of the tax advantage is in this case yet more pronounced than in the *X and Y* case in which that refusal was constituted by the withholding from the transferor of the benefit of a deferral of tax, with a consequential cash flow disadvantage for him (*X and Y*, paragraph 36). The effect of the national legislation at issue in the main proceedings is that the transferor who assigns his shares in a company established in another Member State suffers a

charge to tax on the gains made which is not the case where the transferor assigns his shares to a Belgian company.

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Thus it may clearly be deduced from the judgment in *X and Y* that the difference in treatment created by the national legislation at issue in the main proceedings to the detriment of the taxpayer who assigns his shares or stock to companies, associations, establishments or bodies established in another Member State constitutes a restriction on freedom of establishment. In fact, by making the assignment of the shares or stock at issue to assignees established in another Member State less attractive, the exercise by the latter of their right of establishment is liable to be restricted, provided that the shareholding transferred gives its holder definite influence over the company's decisions and allows him to determine its activities. It is for the referring court to ascertain whether that condition is satisfied in the main proceedings.

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If that is not the case, the difference of treatment created by the national legislation at issue in the main proceedings must be regarded as constituting a restriction on the freedom of movement of capital for the purposes of Article 56 EC, inasmuch as the transfer of the shares or stock at issue to an assignee established in another Member State is rendered less attractive.

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Since the Court has been apprised of no factor capable of justifying the abovementioned restrictions, there is no need to examine whether they pursue a legitimate objective compatible with the EC Treaty and are justified on overriding general-interest grounds.

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The reply to the question referred must therefore be that:

– Articles 43 EC and 48 EC preclude national legislation, such as Articles 67(8) and 67 ter of the Belgian income tax code, in the version in force at the material time for the purposes of the main proceedings, pursuant to which gains secured on the assignment for valuable consideration, otherwise than in the exercise of a business activity, of shares or stock in companies, associations, establishments or bodies, attract a charge to tax where the transfer is made to companies, associations, establishments or bodies established in another Member State, whereas, in the same circumstances, those gains are not chargeable to tax where that transfer is made to Belgian companies, associations, establishments or bodies, provided that the shareholding transferred gives its holder definite influence over the company's decisions and allows him to determine its activities;

– Article 56 EC precludes national legislation, such as that mentioned above, where the shareholding transferred does not give its holder definite influence over the company's decisions or allow him to determine its activities.

Costs

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The costs incurred by the Commission, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings before the referring court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question submitted to it by the Rechtbank van eerste aanleg te Antwerpen by judgment of 13 June 2003, hereby rules:

1. **Articles 43 EC and 48 EC preclude national legislation, such as Articles 67(8) and 67 ter of the Belgian income tax code, in the version in force at the material time for the purposes of the main proceedings, pursuant to which gains secured on the assignment for valuable consideration, otherwise than in the exercise of a business activity, of shares or stock in companies, associations, establishments or bodies, attract a charge to tax where the transfer is made to companies, associations, establishments or bodies established in another Member State, whereas, in the same circumstances, those gains are not chargeable to tax where that transfer is made to Belgian companies, associations, establishments or bodies, provided that the shareholding transferred gives its holder definite influence over the company's decisions and allows him to determine its activities.**

2. **Article 56 EC precludes national legislation, such as that mentioned above, where the shareholding transferred does not give its holder definite influence over the company's decisions or allow him to determine its activities.**

Done in Luxembourg, 8 June 2004.

R. Grass — Registrar

C.W.A. Timmermans — President of the Second Chamber