

JUDGMENT OF THE COURT (Fourth Chamber)

25 October 2007

(Articles 43 EC and 56 EC – National tax legislation – Inheritance tax – Family company – Exemption – Conditions – Employment of a certain number of workers in a region of a Member State)

In Case C-464/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the rechtbank van eerste aanleg te Hasselt (Belgium), made by decision of 21 December 2005, received at the Court on 27 December 2005, in the proceedings

**Maria Geurts,**

**Dennis Vogten**

v

**Administratie van de BTW, registratie en domeinen,**

**Belgische Staat,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 December 2006,

after considering the observations submitted on behalf of:

- M. Geurts and D. Vogten, by A. van Zantbeek, A. Nijs and A. Verbeke, advocaten,
- the Belgian Government, by M. Wimmer and L. Van den Broeck, acting as Agents, assisted by R. Deblauwe, C. Docclo and N. Labeeuw, advocaten,
- the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

## Judgment

- 1 This reference for a preliminary ruling relates to the interpretation of Articles 43 EC and 56 EC on freedom of establishment and the free movement of capital respectively.
- 2 This reference was made in proceedings between Mrs M. Geurts and Mr D. Vogten, in their capacity as statutory heirs of Mr J. Vogten, on the one hand, and the Administratie van de BTW, registratie en domeinen (VAT, Registration and Public Lands Administration; 'the Belgian tax authorities'), on the other, concerning the refusal of the authorities to grant them an inheritance tax exemption.

### Legal context

#### *National legislation*

- 3 Under Article 3 of the Belgian Constitution, Belgium comprises three regions: the Walloon Region, the Flemish Region and the Brussels Region.
- 4 Under Article 3, first paragraph, point 4, of the Special Law of 16 January 1989 concerning the financing of the Communities and Regions (*Belgisch Staatsblad* 17 January 1989, p. 850), as amended by the Special Law of 13 July 2001 concerning the refinancing of the Communities and extension of the tax powers of the Regions (*Belgisch Staatsblad* 3 August 2001, p. 26646), the inheritance taxes of inhabitants of the Kingdom of Belgium are regional taxes. Article 4(2) of the Special Law of 16 January 1989 provides that the Regions have powers to determine the rate of and exemptions from inheritance tax.
- 5 Article 1(1) of the Inheritance Tax Code laid down by Royal Decree No 308 of 31 March 1936 (*Belgisch Staatsblad* 7 April 1936, p. 2403), confirmed by the Law of 4 May 1936 (*Belgisch Staatsblad* 7 May 1936, p. 3426) ('the Inheritance Tax Code'), provides that inheritance tax is payable on the value of all of the deceased's estate inherited by his heirs, minus debts.
- 6 Article 60a of that code, as it applies to the estates of deceased persons in the Flemish Region, inserted by the decree of the Flemish Parliament containing various measures accompanying the 1997 budget (decreet houdende bepalingen tot begeleiding van de begroting 1997) of 20 December 1996 (*Belgisch Staatsblad* 31 December 1996, p. 32555), as amended by the decree of the Flemish Parliament containing various measures accompanying the 2000 budget (decreet houdende bepalingen tot begeleiding van de begroting 2000) of 22 December 1999 (*Belgisch Staatsblad* 30 December 1999, p. 50232), provides:  
  
'1. In derogation from Articles 48 and 48<sup>2</sup> the net value of the following shall be exempted from inheritance tax:  
  
(a) assets invested by the deceased or his or her spouse in a family undertaking in the course of business; and

(b) shares in a family company or claims against such a company, on condition that in the three years preceding the death of the deceased at least 50% of the undertaking or the shares in the company belonged continuously to the deceased and/or his or her spouse, and that they are mentioned voluntarily in the declaration of estate.

...

2. “Family undertaking” means an industrial, commercial, traditional or agricultural undertaking or a profession operated or carried on personally by the deceased and/or his or her spouse, with or without the collaboration of other persons.

3. “Family company” means a company of which the actual seat of management is situated in one of the Member States of the European Union and which:

- either itself complies with the conditions laid down in paragraphs 1, 5 and 8;
- or holds shares and, if appropriate, claims of subsidiaries which comply with those conditions.

...

5. The exemption shall be granted only on condition that the undertaking or company employed at least five full-time workers in the Flemish Region in the three years preceding the death of the deceased.

In derogation from the first subparagraph, the exemption shall apply to 20%, 40%, 60% or 80% respectively of the net value defined in paragraph 9, where the undertaking or the company employed one, two, three or four full-time workers in the Flemish Region in the three years preceding the death of the deceased. The exemption may be granted and maintained only if the shares or claims belong for five years following the death of the deceased to the heirs benefiting from the reduction. ...

The number of workers employed shall be determined on the basis of the declarations required under social legislation. ...

The exemption shall be maintained only if the number of full-time members of staff employed in the Flemish Region is kept at the same level each year in the first five years following the death of the deceased. ...

...

8. The undertaking or company may claim the exemption only if, in the period from three years before to five years after the death of the deceased and in accordance with the provisions of the Royal Decree of 8 October 1976 on the annual accounts of undertakings, it draws up annual accounts which are also used in support of the income or corporation tax declaration.

Undertakings or companies which do not have their seat in the territory of the Flemish Region must draw up annual accounts in accordance with the relevant legislation applicable in the place in which they are established.

...

10. Under penalty of withdrawal, Article 60a shall be applicable only if the following conditions are satisfied:

1. the declaration explicitly requests the application of Article 60a;
2. the certificate issued by the Flemish Region showing that the conditions relating to employment and capital laid down in this article have been satisfied is attached to the declaration.

...

11. Heirs who wish to use the provisions of Article 60a shall send an application by registered post to the Flemish Government in order to obtain the certificate referred to in paragraph 10.

...'

### **The main proceedings and the question referred for a preliminary ruling**

- 7 According to the decision making the reference, Mrs M. Geurts and Mr D. Vogten are the widow and son respectively of Mr J. Vogten, a Netherlands national who was born on 25 June 1959 in the Netherlands and died on 6 January 2003. At the time of his death and for at least the preceding five years, Mr J. Vogten was resident in the Flemish Region. It is not in dispute that his tax domicile was in the territory of that region and that Article 60a of the Inheritance Tax Code therefore applies to his estate.
- 8 The joint property of the late Mr J. Vogten and his spouse included, inter alia, 100% of the shares in Jos Vogten Beheer BV and Vogten Stall BV, companies incorporated under Netherlands law with their seats in Maastricht (Netherlands). It is not disputed that those two undertakings were family companies within the meaning of Article 60a(3) of the Inheritance Tax Code. The joint assets also included a claim, within the meaning of Article 60a(1)(b) of that code, for EUR 1 110 568 against the company Jos Vogten Beheer.
- 9 It is also common ground that, for more than three years before the death of Mr J. Vogten, each of the two companies in question had employed more than five workers on a continuous basis in the Netherlands. More specifically, according to the case-file submitted to the Court, Vogten Staal BV employed nine workers and Jos Vogten Beheer BV employed eighteen workers.
- 10 The Belgian tax authorities refused to grant Mr J. Vogten's heirs the benefit of the exemption provided for in Article 60a of the Inheritance Tax Code on the ground that one of the conditions laid down in that provision was not satisfied, namely that the workers of Vogten Staal and Jos Vogten Beheer were not employed in the Flemish Region. The amount of inheritance tax payable in this case was EUR 839 485.60.
- 11 Mr J. Vogten's heirs brought an action against that refusal before the rechtbank van eerste aanleg te Hasselt which, being uncertain as to whether the condition in the first subparagraph of Article 60a(5) of the Inheritance Tax Code was compatible with the provisions of the EC Treaty on the right of establishment and free movement of capital,

and taking the view that the answer to the question raised did not follow from the case-law of the Court, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Community law, and in particular Articles 43 EC and 56 EC, be interpreted as meaning that a restriction arising from a provision in the legislation of a region of a Member State concerning inheritance, in this case Article 60a [of the Inheritance Tax Code], which exempts the shares in a family company or the claims of the legal successor of the deceased, his heir, against such a company from inheritance tax if the company has employed at least five workers in the three years prior to the death of the deceased, but restricts that exemption to cases in which [those] workers have been employed in a particular region of that Member State (in casu, the Flemish Region), is incompatible with those articles?’

### **The question referred for a preliminary ruling**

- 12 By its question the national court asks, essentially, whether Articles 43 EC and 56 EC preclude inheritance tax legislation of a Member State which excludes from the exemption from that tax available for family undertakings those undertakings which employ in the three years preceding the date of death of the deceased at least five workers in another Member State, whereas it grants such an exemption where that employment is located in a region of the first Member State.
- 13 First of all, the exemption in question in the main proceedings applies to family companies, namely those in which at least 50% of the share capital was held, in the three years preceding the death, by the deceased, perhaps jointly with members of his close family, which gave those persons influence over the decisions of the company concerned and made it possible for them to decide upon its activities.
- 14 In order to assess the legislation at issue in the main proceedings from the point of view of fundamental freedoms, it must be noted that the situation of a Community national who, since the transfer of his residence, has been living in one Member State and holding the majority of the shares in companies established in another Member State, has fallen within the scope of Article 43 EC since that transfer (see, to that effect, Case C-470/04 *N* [2006] ECR I-7409, paragraph 28).
- 15 In accordance with settled case-law, even though Article 43 EC is, according to its terms, aimed particularly at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, it also prohibits the Member State of origin from hindering the establishment in another Member State of one of its own nationals as well as of nationals of other Member States residing in its territory (see, to that effect, C-251/98 *Baars* [2000] ECR I-2787, paragraphs 28 and 29 and the case-law cited).
- 16 The legislation at issue in the main proceedings primarily affects freedom of establishment and falls, in accordance with the case-law of the Court, within the scope only of the Treaty provisions concerning that freedom. If, as submitted by the applicants in the main proceedings, it were to be accepted that such a national measure 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 do not

justify an independent examination of that measure in the light of Articles 56 EC to 58 EC (see, to that effect, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-0000, paragraphs 33 and 34, and Order in Case C-102/05 *A and B* [2007] ECR I-0000, paragraphs 26 and 27).

- 17 As the Court has already held, the tax consequences in respect of inheritance rights are among the considerations which a national of a Member State could reasonably take into account when deciding whether or not to make use of the freedom of movement provided for in the Treaty (Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 75).
- 18 By laying down as a condition for the exemption from inheritance tax available for family undertakings the employment of a set number of workers in a region of the Member State concerned in the three years preceding the date of death of the deceased, the legislation at issue in the main proceedings treats the owner of such an undertaking and, after his death, his heirs, in a different way according to whether that undertaking employs workers in that Member State or in another Member State.
- 19 According to the case-law of the Court, legislation of a Member State which provides for a difference in treatment between taxpayers on the basis of the place where the company of which those taxpayers are shareholders has its seat is in principle contrary to Article 43 EC (see, to that effect, *Baars*, paragraphs 30 and 31). The same is true of legislation of a Member State which provides for a difference in treatment between taxpayers on the basis of the place where the company owned by those taxpayers employs a certain number of workers for a certain period of time.
- 20 It follows from the case-law of the Court that, as far as concerns freedom of establishment, the rules regarding equal treatment prohibit not only overt discrimination by reason of nationality or, in the case of companies, their seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 83 and the case-law cited).
- 21 The legislation in question in the main proceedings lays down as a condition for the grant of the benefit for which it provides the employment for a certain period of a certain number of workers in the territory of a region of the Member State concerned, a condition which unquestionably can be fulfilled more easily by a company already established in that Member State.
- 22 Consequently that legislation introduces, for the purpose of granting a tax benefit, indirect discrimination between taxpayers on the basis of the place of employment of a certain number of workers in a certain period, discrimination which is liable to hinder the exercise of freedom of establishment by those taxpayers.
- 23 Contrary to what the Belgian Government submits, such discriminatory treatment cannot be ruled out solely because the legislation in question does not refer to the establishment of an undertaking in the territory of the Member State in question, but only to the employment of a certain number of workers in that State, while allowing undertakings having their seats in another Member State to obtain the tax benefit concerned when they employ the necessary number of workers in the first Member State.

- 24 Such treatment is permissible only if it pursues a legitimate objective compatible with the Treaty or 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 thus pursued and not go beyond what is necessary to attain it (see, in particular, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 35; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 47; and Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-0000, paragraph 37).
- 25 In order to justify the legislation at issue in the main proceedings, the Belgian Government puts forward considerations connected with the survival of small and medium-sized undertakings and the maintenance of employment in them in the event of succession in that Member State, as well as with the requirements in respect of the effectiveness of fiscal supervision.
- 26 It is conceivable that such considerations, in particular those connected with the survival of small and medium-sized undertakings and the maintenance of employment in them, may, under certain circumstances and conditions, be acceptable justifications for national legislation providing for a tax benefit for natural or legal persons.
- 27 As regards the considerations put forward by the Belgian Government, it should be noted that the latter has not been able to show the need to limit the exemption at issue to ‘family’ undertakings which maintain a given number of jobs in the territory of the Member State concerned. In the present case, in relation to the objective of preventing inheritance tax from jeopardising the continuation of family undertakings, and therefore the jobs which they bring, undertakings having their seat in another Member State are in a situation comparable to that of undertakings established in the first Member State.
- 28 Further, as for the Belgian Government’s argument regarding the need to maintain the effectiveness of fiscal supervision on account of the fact that 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) does not apply to inheritance tax, it suffices to point out that that difficulty cannot justify the categorical refusal to grant the tax benefits in question since the tax authorities could request the taxpayers concerned to provide themselves the evidence which the authorities consider necessary to be fully satisfied that those benefits are granted only where the jobs in question fulfil the criteria set out under national law (see, to that effect, Case C-451/05 *Elisa* [2007] ECR I-0000, paragraph 98).
- 29 The answer to the question referred must therefore be that, in the absence of valid justification, Article 43 EC precludes inheritance tax legislation of a Member State which excludes from the exemption from that tax available for family undertakings those undertakings which employ in the three years preceding the date of death of the deceased at least five workers in another Member State, whereas it grants such an exemption where the workers are employed in a region of the first Member State.

## **Costs**

30 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 (Fourth Chamber) hereby rules:

**In the absence of valid justification, Article 43 EC precludes inheritance tax legislation of a Member State which excludes from the exemption from that tax available for family undertakings those undertakings which employ in the three years preceding the date of death of the deceased at least five workers in another Member State, whereas it grants such an exemption where the workers are employed in a region of the first Member State.**

[Signatures]