Court of Justice of the European Union
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Press and Information

Judgment in Joined Cases C-471/09 P to C-473/09 P
and C-474/09 P to C-476/09 P
Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya and Others v Commission

The Court confirms that two Basque tax relief measures – a reduction in the basis of assessment for corporation tax for newly established firms and tax credit amounting to 45% of certain investments – are State aid incompatible with the common market

The conduct of the Commission in relation to earlier Basque tax schemes could not justify a legitimate expectation on the part of the regional authorities concerned

In Spain, the Territorios Históricos of Álava, Vizcaya and Guipúzcoa (Spain) may, under certain conditions, organise the tax systems within their respective territories.

In that context, from 1988 onward the three territories adopted tax schemes to encourage investment.

In 1993, in relation to corporation tax, the three territories introduced new tax measures, involving in particular a tax exemption for some newly established firms. By decisions adopted in 2001, the Commission found that those measures were incompatible with the common market, and that was upheld by the Court on 9 June 2011[1].

In December in the years 1994, 1996 and 1997, the provinces of Álava, Vizcaya and Guipúzcoa respectively adopted measures providing that certain investments[2] exceeding €15 025 303 were to receive a 45% tax credit in relation to corporation tax. Those schemes were applied in the province of Álava for the tax years 1995 to 1999 and in the provinces of Vizcaya and Guipúzcoa for the tax years 1997 to 1999.

Further, in 1996, the three territories approved a reduction in the basis of assessment to corporation tax for newly established firms. Specifically, firms starting their business activity were to be entitled to reductions of 99, 75, 50 and 25% respectively on their positive tax base, for four consecutive tax years starting from the first one in which, within four years from start-up, they obtained a positive tax base. However, only firms satisfying certain conditions (inter alia, making investments of at least €480 810, having paid-up capital exceeding €120 202 and creating at least 10 jobs) could benefit from the reductions in the tax base at issue. Those measures were abolished in 2000.

However, neither the measures for 45% tax credits on investments nor the measures for reduction in the basis of assessment to corporation tax for newly established firms were notified to the Commission when adopted, although any new State aid should be notified in advance to the Commission and as a general rule cannot be implemented until the Commission has declared it to be compatible with the EC Treaty.

Following complaints filed in 1996 and 1997 in relation to the application of those two tax measures to the advantage of Daewoo Electronics Manufacturing España SA (Demesa) and the firm Ramondín, the Commission became aware of the existence in the province of Álava of those two

[1] Joined Cases C-465/09 P to C-470/09 P *Diputacion Foral de Vizcaya and Others* v *Commission* (see also Press Release 56/11).
[2] In particular, investments in new tangible fixed assets.

tax schemes. The Commission was also informally made aware of the fact that similar measures existed in the provinces of Vizcaya and Guipúzcoa. Accordingly, after the Commission had requested information on the 45% tax credits adopted in the provinces of Vizcaya and Guipúzcoa, in June 1999 the Spanish authorities sent to the Commission information on those tax measures.

In August and September 1999 respectively, the Commission initiated a formal investigation procedure in relation to the 45% tax credits and reductions in the tax base applied in the three territories.

By six decisions of 11 July 2001, the Commission found that the measures providing 45% tax credits[3] and reductions in the tax base[4] constituted State aid incompatible with the common market. The Commission thus ordered Spain to recover the aid from the beneficiaries.

Further to actions brought by the historic territories of Álava, Guipúzcoa and Vizcaya, the General Court (then the Court of First Instance) held that the Commission had correctly categorised those two measures as State aid prohibited by the EC Treaty. It therefore upheld the six Commission decisions[5].

Consequently, the historic territories of Álava, Guipúzcoa and Vizcaya brought appeals before the Court of Justice in order to have the judgments of the General Court set aside. The Official Chamber of commerce, industry and navigation of Vizcaya and Guipúzcoa and the Official Chamber of commerce and industry of Álava intervened in support of those appeals.

By its judgment delivered today, the Court dismisses the appeals.

First, the Court considers that the conduct of the Commission in relation to the 1988 and 1993 tax schemes could not enable the appellants to have a legitimate expectation that the measures at issue providing for 45% tax credits and reductions in the tax base were lawful.

The Court recalls the principle that a Member State which, as in the present case, failed to notify an aid scheme to the Commission contrary to the requirements of the EC Treaty may not plead the legitimate expectations of beneficiaries in order to justify a failure to comply with the obligation to recover aid from them. To accept such a possibility would enable national authorities to render decisions taken by the Commission in relation to State aid ineffectual, whilst relying on their own unlawful conduct.

Further, in any event, the Court states that in 1993 the Commission had declared that the 1988 tax schemes were incompatible with the common market. Moreover, with regard to the exemption from corporation tax adopted in the three territories in 1993 for certain newly established firms, the Court refers to its judgment of 9 June 2011. The Court thus recalls that the Commission's inaction between 1996 and 2000 could not constitute implied approval of the aid, in the light of the failure by the Spanish authorities to notify the aid schemes to the Commission and their lack of cooperation.

Secondly, the Court considers that the General Court did not disregard the right to a fair hearing and the procedural rules relating to the taking of evidence.

Thirdly, with regard to the 45% tax credits on investments, the Court confirms, as did the General Court, that the Commission did not infringe the principle of proportionality when it found, in its decision, that the Spanish authorities' obligation of recovery was to apply to the entirety of the aid granted and was not to be restricted to amounts exceeding the ceilings fixed for regional aid. On this point, the Court observes that the appellants did not provide the Commission

[3] Commission Decisions 2002/820/EC, 2003/27/EC and 2002/894/EC of 11 July 2001 on State aid schemes implemented by Spain for firms respectively in the provinces of Álava, Vizcaya and Guipúzcoa in the form of a tax credit amounting to 45% of investments (respectively OJ 2002 L 296, p. 1; OJ 2003 L 17, p. 1, and OJ 2002 L 314, p. 26).
[4] Decisions 2003/28/EC, 2003/86/EC and 2003/192/EC on State aid schemes implemented by Spain in 1993 for certain newly established firms respectively in the provinces of Álava, Vizcaya and Guipúzcoa in the form of exemption from corporation tax (respectively, OJ 2003 L 17, p. 20; OJ 2003 L 40 p. 11 and OJ 2003 L 77, p. 1).
[5] Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 and Joined Cases T-230/01 to T-232/01 and T-267/01 to T-269/01 *Diputación Foral de Álava and Others* v Commission (see also Press Release 73/09).

with information such as to demonstrate that, in individual cases, some of the measures concerned were compatible with the common market, inter alia because the aid had been granted in such a way as to comply with the regional ceilings applicable to the Basque country and that it fully satisfied all the conditions for entitlement to the derogation in relation to regional aid. Further, the Court recalls that where the Commission adopts a decision on the lawfulness of a State aid scheme as a whole, the Commission is not obliged to analyse the aid granted in each individual case on the basis of that scheme. Only at the stage of recovery of aid is it necessary to check the individual situation of each firm concerned.

Lastly, as regards the length of the preliminary investigation procedures followed in relation to the two types of tax measures at issue, the Court rejects the argument that the length of the procedure was excessive because it continued for 38 months in respect of the 45% tax credits and 39 months in respect of the reduction in the basis of assessment for corporation tax. Even though the Commission received complaints concerning the individual aid granted to Demesa and Ramondin in 1996 and 1997, the parties have failed to establish that on those dates the Commission was in possession of the information necessary to initiate the formal investigation procedure in relation to the schemes at issue. It was only gradually, by the examination of individual aid and the schemes at issue, that the Commission obtained all that information, respectively in August and September 1999. Consequently, the Court holds that the length of the procedures is not contrary to the principles of legal certainty and sound administration.
