Court of Justice of the European Union

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Press and Information

Judgment in Joined Cases C-106/09 and C-107/09
Commission and Spain v Government of Gibraltar and United Kingdom

A tax system designed in such a way that offshore companies avoid taxation constitutes a State aid scheme that is incompatible with the internal market

The Court has therefore set aside the judgment of the General Court and upheld the Commission's decision not to authorise the United Kingdom to implement the reform of Gibraltar corporate tax proposed in 2002

In August 2002 the United Kingdom notified the Commission of the Government of Gibraltar's proposed reform of corporate tax[1]. That reform included in particular the repeal of the former tax system and the imposition of three taxes applicable to all Gibraltar companies, namely a companies registration fee, a payroll tax and a business property occupation tax ('BPOT'), with a cap on liability to payroll tax and BPOT of 15% of profits.

In 2004, the Commission decided[2] that the proposals notified for the reform of the system of corporate taxation in Gibraltar constituted a scheme of State aid that was incompatible with the internal market and accordingly that those proposals could not be implemented. The Commission found that three aspects of the tax reform were materially selective: (1) the requirement that a company must make a profit before it becomes liable to payroll tax and BPOT, since that requirement would favour companies which make no profit; (2) the cap limiting liability to payroll tax and BPOT to 15% of profits, since that cap would favour companies which, for the tax year in question, have profits that are low in relation to their number of employees and their occupation of business property; and (3) the payroll tax and BPOT, since those two taxes would inherently favour offshore companies which have no real physical presence in Gibraltar and which as a consequence do not incur corporate tax. It also found that the proposed reform was regionally selective since it provided for a system under which companies in Gibraltar would be taxed, in general, at a lower rate than those in the United Kingdom.

On 18 December 2008, ruling upon actions brought by the Government of Gibraltar and the United Kingdom, the Court of First Instance (now 'the General Court') annulled the Commission decision[3]. In its judgment, the General Court held inter alia that the Commission had not followed a correct method of analysis as regards the material selectivity of the proposed reform. According to the General Court, in order to prove that the tax system at issue was selective the Commission should have demonstrated that certain of its elements constituted derogations from Gibraltar's common or 'normal' tax regime. When doing so the Commission was not entitled to regard general tax measures as being selective in the light of their effects, as it had done in its decision. Moreover, the General Court held that the reference framework for assessing the reform's regional selectivity corresponded exclusively to Gibraltar's, and not the United Kingdom's, territorial limits.

The Commission and Spain accordingly brought the present appeals before the Court of Justice in order to have the General Court's judgment set aside.

[1] However, the reform at issue in the present cases did not enter into force.

[2] Commission Decision 2005/261/EC of 30 March 2004 on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform (OJ 2005 L 85, p. 1).

[3] Judgment in Joined Cases T-211/04 and T-215/04 *Government of Gibraltar and United Kingdom* v *Commission* (see Press Release 99/08).

In its judgment delivered today, **the Court of Justice holds that the General Court erred in law in finding that the proposed tax reform does not confer selective advantages on offshore companies**.

The Court considers that a different tax burden resulting from the application of a ‘general’ tax regime is not sufficient on its own to establish the selectivity of taxation. None the less, it holds that **such selectivity exists where, as in the present case, the criteria for assessment which are adopted by a tax system are such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category of undertakings**.

In doing so, the Court finds that a particular feature of Gibraltar’s tax regime is a combination of the payroll tax and BPOT as the sole bases of assessment, resulting in taxation according to the number of employees and the size of the business premises occupied. However, **due to the absence of other bases of assessment, combining those two bases of assessment** (which are founded on criteria that are in themselves of a general nature) **excludes from the outset any taxation of offshore companies, since they have no employees and also do not occupy business property**. Those criteria therefore discriminate between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar.

Consequently, the Court concludes that **the fact that offshore companies are not taxed in Gibraltar is not a random consequence of the regime at issue, but the inevitable consequence of the fact that both corporate taxes (in particular, their bases of assessment) are specifically designed so that offshore companies**, which by their nature have no employees and do not occupy business premises, **avoid taxation**. Thus, the fact that offshore companies avoid taxation precisely on account of the specific features characteristic of that group of companies gives reason to conclude that they enjoy selective advantages.

The Court notes in particular that, contrary to the General Court’s reasoning, **the classification of a tax system as ‘selective’ is not conditional upon that system being designed in such a way that all undertakings are liable to the same tax burden but some benefit from derogating provisions that give them a selective advantage. Such an interpretation of the selectivity criterion would require that, in order for a tax system to be classifiable as ‘selective’, it must be designed in accordance with a certain regulatory technique. The consequence of that approach would be that national tax rules would fall, from the outset, outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects.**

Since the proposed tax reform is materially selective in that it grants selective advantages to offshore companies, the Court considers that it is not relevant to examine whether the proposed reform is territorially selective.

Accordingly, the Court of Justice has decided to set aside the judgment of the General Court and to uphold the decision of the Commission, which considers that the proposed tax reform constitutes a scheme of State aid which the United Kingdom is not authorised to implement.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The full text of the judgment is published on the CURIA website on the day of delivery.

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