Case C-478/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

19 June 2019

Referring court:

Corte suprema di cassazione (Italy)

Date of the decision to refer:

21 December 2018

Appellant:

UBS Real Estate Kapitalanlagegesellschaft mbH

Respondent:

Agenzia delle Entrate

Subject matter of the main proceedings

Action brought by a company established under German law following failure by the financial authorities to refund an overpayment of the mortgage registration tax and Land Registry fee.

Subject matter and legal basis of the reference

The purpose of this reference for a preliminary ruling, made pursuant to Article 267 TFEU, is to verify, in the light of EU law, whether the notable differences between closed-end and open-end real estate funds are relevant for tax purposes to such an extent as to justify a difference in treatment between Italian funds and funds in other EU States.

Question referred

Does EU law — in particular the provisions of the Treaty concerning freedom of establishment and free movement of capital, as interpreted by the Court —

preclude the application of a provision of national law, such as Article 35(10-ter) of Decree Law No 223/2006 (in so far as it grants relief on mortgage registration tax and the Land Registry fee only in respect of closed-end real estate investment funds)?

Provisions of EU law relied upon

The first paragraph of Article 18 TFEU; the first sentence of the first paragraph of Article 49 TFEU; Article 63(1) TFEU

Article 25(1) of the Convention (Concluded in Bonn on 18 October 1989 and rendered enforceable in Italy by Ratifying Law No 459 of 24 November 1992) between the Italian Republic and the Federal Republic of Germany for the avoidance of double taxation with respect to taxes on income and capital and to prevent tax avoidance ('the Convention')

Provisions of national law relied on

Decreto-legge n. 223/2006 (Decree Law No 223/2006) (converted, with amendments, into legge 4 agosto 2006, n. 248, 'Conversione in legge, con modificazioni, del decreto-legge 4 luglio 2006, n. 223, recante disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale' (Law No 248 of 4 August 2006 'converting into law, with amendments, Decree-Law No 223 of 4 July 2006 laying down urgent measures for social and economic recovery, for the containment and rationalisation of public expenditure and introducing measures relating to tax revenue and combating tax evasion)) ('Decree Law No 223/2006') provides in paragraph 10-ter of Article 35, entitled 'Measures to combat tax evasion and tax avoidance' as follows:

'In respect of changes to the land register and entries relating to transfers of immovable property used for commercial purposes under the first subparagraph of Article 10(8-ter) of decreto del Presidente della Repubblica 26 ottobre 1972, n. 633 (Presidential Decree No 633 of 26 October 1972), even if subject to value added tax, involving closed-end real estate funds governed by Article 37 of the testo unico delle disposizioni in materia di intermediazione finanziaria [Consolidated Law laying down provisions on financial mediation], contained in decreto legislativo 24 febbraio 1998, n. 58 (Legislative Decree No 58 of 24 February 1998), as subsequently amended, and by Article 14-bis of legge 25 gennaio 1994, n. 86 (Law No 86 of 25 January 1994), or financial leasing companies, or banks and financial intermediaries as referred to in Articles 106 and 107 of the testo unico di cui al decreto legislativo 1° settembre 1993, n. 385 (Consolidated Law No 385 of 1 September 1993), in respect of the purchase and lease with a purchase option of assets leased or to be leased only, the rates of mortgage registration tax and the land registry fee, as amended by paragraph 10-

bis of the present Article, shall be reduced by one half. The provision set out above shall apply from 1 October 2006.'

With regard to mutual investment funds, as regards **closed-end funds**, Italian law provides for the reimbursement of subscribed shares by the società di gestione del risparmio (asset management company) (SGR) that created the fund only at specific times: for that reason they have a pre-established number of shares which does not vary over time and have a fixed amount of capital which is set at the time it is established. These collective investment instruments may, therefore, be subscribed to only during a given period and the capital may be redeemed only on termination of the fund or after a certain number of years. Outside those periods, the shares of a closed-end fund may be bought and sold only on the stock market. Their minimum duration is ten years and their maximum duration is thirty years. Upon termination, the assets of the fund are divided up or, if sold, the proceeds are distributed.

Open-end funds, by contrast, have a variable amount of capital (which may increase or decrease each day depending on whether there are new subscriptions or requests to redeem shares in circulation). They may be subscribed to at any time, and it is possible to redeem the injected capital, in whole or in part, at any time.

In the case of 'open-end' funds, market crises may cause many institutional investors to request early repayment of part of the amount invested; such an event could absorb the liquidity reserves of the funds, which may force the fund to sell some immovable property below its book value, where necessary, in order to meet the requests to redeem shares. With this in mind, it could be argued that the objective of the legislature was to protect and favour the setting up of investment funds which are not characterised by highly speculative and uncertain aims. However, this approach may lead to the conclusion that, if that line of reasoning is followed, a barrier to investment from abroad will be created, discouraging in particular foreign open-end funds from buying capital goods in Italy.

Succinct presentation of the facts and the main proceedings

1 The Commissione Tributaria Provinciale di Milano (Provincial Tax Court, Milan, Italy) dismissed the action brought by UBS Real Estate Kapitalanlagegesellschaft mbh ('the appellant') — a company, established in Munich, managing the real estate fund governed by German law UBS (D) 3 Kontinente — against the implied decision rejecting the application for reimbursement of the overpayment of the mortgage registration tax and land registry fee in the amount of EUR 802 400.00, that being the amount paid in respect of the registration of the purchase, on behalf of the fund, of a property that is 'by nature intended only for commercial purposes' (Torre Beta in San Donato Milanese). In support of that rejection, the tax authority relied on the fact that Decree Law No 223/2006 provides for the application of reduced mortgage registration tax in respect of the

purchase of real estate to be used only for commercial purposes by professional operators, only as regards closed-end real estate funds and not open-end real estate funds, such as the fund managed by the appellant, recognised in Germany.

2 The appellant appealed against the decision of the Provincial Tax Court, Milan, claiming that the reasoning in the judgment was contradictory on account of the fact that, despite finding a difference in treatment between the two funds, it neither disapplied the national provisions in Decree Law No 223/2006 which conflict with the TFEU and Article 25 of the Convention, nor, at the very least, stayed the proceedings in order to refer a question to the Court of Justice of the European Union for a preliminary ruling.

3 The Agenzia delle Entrate (the Italian tax authority) highlighted the differences between the two types of fund in that the legislature, in view of the different features of real estate funds, made provision, by means of Decree Law No 223/2006, for the tax benefit solely for closed-end funds, as well as the fact that, as a result of the differences between the situations under consideration, as there was neither infringement of the TFEU nor of the Convention.

4 By judgment of 3 April 2012 the Commissione Tributaria Regionale del Lazio (Regional Tax Court, Lazio, Italy; 'the CTR') dismissed the tax payer's appeal in the light of the following considerations:

(1) there are many differences between the two types of real estate fund (the closed-end fund operating and recognised in Italy, and the open-end fund operating and recognised in Germany);

(2) on account of those differences, there is neither infringement of the TFEU on the basis of different treatment (as different tax rules can be applied to different circumstances) nor infringement of Article 25 of the Convention (since there is no discernible discrimination based on nationality);

(3) rules providing for tax relief are to be interpreted restrictively.

5 The appellant appealed against that decision on a point of law, relying on seven grounds of appeal. The Italian tax authority opposed that appeal, lodging a counter-appeal.

The essential arguments of the parties to the main proceedings

6 The referring court has found that the first ground of appeal is unfounded.

7 By the second ground of appeal, the **appellant** claims that the CTR did not state reasons for failing to take into account the rationale underlying Article 35(10-ter) of Decree Law No 223/2006.

8 By the third ground of appeal, the appellant claims insufficient and/or contradictory reasoning as regards the fact that the CTR did not assess the difference between closed-end funds under Italian law and open-end funds under German law in connection with the taxes and fees at issue, except in general terms, and did not take into consideration the fact that the different criteria for determining liability to tax established by the Member States must be relevant.

9 By the fourth ground of appeal, the appellant alleges infringement or misapplication of Article 56 EC (now Article 63 TFEU) on 'free movement of capital', in that the CTR found that the difference in tax treatment between closed-end funds and open-end funds is justified on the basis of the differences between the situations, when it should have disapplied the discriminatory national rule.

10 By the fifth ground of appeal, the appellant alleges infringement or misapplication of Article 43 EC (now Article 49 TFEU) on 'freedom of establishment', in that the CTR found that the difference in tax treatment between closed-end investment funds and open-end investment funds is justified on the basis of the differences between the situations, despite the fact that the differences identified are irrelevant for the purposes of assessing compatibility as regards the application of the tax relief.

11 By the sixth ground of appeal, the appellant alleges infringement or misapplication of Article 12 EC (now Article 18 TFEU) on the 'prohibition of discrimination on grounds of nationality', since it did not accept the CTR's assertion that the difference in tax treatment between closed-end investment funds and open-end funds is justified on the basis of the differences between the situations.

12 By the seventh ground of appeal, the appellant claims infringement or misapplication of Article 25(1) of the Convention, in that the CTR did not take the view that denying tax relief in respect of open-end funds in Germany gave rise to discrimination on grounds of nationality.

Succinct presentation of the reasons for the reference

13 The **Corte di Cassazione** (Court of Cassation, Italy) notes that thus far there has been no judgment by itself or the Court of Justice of the European Union on the question at issue and that this gap in interpretation makes a preliminary ruling necessary. However, that court also notes that, on the subject of freedom of establishment, the Court of Justice, by judgment of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230), pointed out that, pursuant to Article 49 TFEU, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment are restrictions on that freedom (also see judgment of 18 July 2013, *Commission* v *Denmark*, C-261/11, not published, EU:C:2013:480, paragraphs 26 and 27, a case in which the difference in treatment — which was not based on an objective difference in situation — regarding the postponement of the recovery of tax due was found liable to dissuade a taxable person established

in Germany from carrying out his activities by means of a fixed establishment in a Member State other than the Federal Republic of Germany).

14 The Court of Justice has also ruled, in relation to such circumstances, by judgment of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377), that a difference in tax treatment resulting in a restriction of freedom of establishment, prohibited, in principle, by Articles 43 EC and 28 EC, occurs when the exercise of that freedom is made less attractive for companies established in other Member States. In that case the Court set out the principle that the fact that in national law there is no type of company with a legal form identical to that of a SICAV resident in another Member State cannot in itself justify a difference in treatment, since, as the company law of the Member States has not been fully harmonised at Community level, that would deprive freedom of establishment of all effectiveness (see also, by analogy, judgment of 12 April 1994, *Halliburton Services*, C-1/93, EU:C:1994:127).

15 In addition, with regard to the free movement of capital, the Court of Justice, by judgment of 17 September 2015, *Miljoen and Others* (joined cases C-10/14, C-14/14 and C-17/14, EU:C:2015:608), stated that the measures prohibited by Article 63(1) TFEU include those liable to dissuade non-residents (that case concerned a final tax burden that was greater for tax payers not resident in the Netherlands) from making investments in a Member State or liable to dissuade residents of that Member State from making investments in other States (see also judgments of 25 January 2007, *Festersen*, C-370/05, EU:C:2007:59, paragraph 24; of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 40, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61). In its judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 15 and the case-law cited), the Court reiterated the conclusions set out above and, in paragraph 28, stated that for the purposes of assessing whether a national law is discriminatory, only the relevant distinguishing criteria established by the legislation in question must be taken into account, in order to determine whether the resulting difference in treatment reflects situations which are objectively different.

16 Equally, as regards the free movement of capital, the referring court refers to the judgments of the Court of 9 October 2014, *van Caster* (C-326/12, EU:C:2014:2269) and of 18 December 2014, *Q* (C-133/13, EU:C:2014:2460). In particular, by the second judgment the Court held, in relation to inheritance tax and gifts of property, that the fact that the grant of tax advantages is made subject to the condition that the asset transferred be situated in national territory constitutes a restriction on the free movement of capital, prohibited, in principle, by Article 63(1) TFEU (see also judgments of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraphs 28 to 35, and of 22 April 2010, *Mattner*, C-510/08, EU:C:2010:216, paragraph 26).

17 The referring court refers, on this subject, also taking into account legislation for the avoidance of double taxation, the principles set out in the judgment of the Court of 11 September 2014, *Verest and Gerards* (C-489/13, EU:C:2014:2210). That judgment first and foremost made the point that, in the absence of unifying or harmonising measures adopted by the European Union, the Member States retain competence for determining the criteria for taxation of income and capital with a view to eliminating double taxation by means, inter alia, of international conventions. In that context, the Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation (judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 41 and the case-law cited). However, such allocation of fiscal jurisdiction does not allow Member States to apply measures that are at odds with the freedoms of movement guaranteed by the FEU Treaty. As far as concerns the exercise of the power of taxation thus allocated by bilateral conventions for the avoidance of double taxation, the Member States must comply with EU rules (judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 42), including those which prohibit measures liable to discourage residents of one Member State from investing in immovable property in other Member States (judgment of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 44).