Case C-52/21

Request for a preliminary ruling

Date lodged:

28 January 2021

Referring court:

Cour d'appel de Liège (Belgium)

Date of the decision to refer:

4 December 2020

Appellant:

Pharmacie populaire – La Sauvegarde SCRL

Respondent:

État belge

[…]

[…] **[Or. 2]**

[…]

[…] **[Or. 3]**

[…]

[…] [Procedural matters]

Facts and subject matter of the dispute

1 The dispute concerns … corporation tax levies … payable by PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL, … [1]

2 PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL operates in the pharmaceutical market.

[1] […]

It is not disputed that it contractually entrusted LAD SARL, a Luxembourg company, with the task of carrying out transport schedules for medicinal products. [2]

3 […] [3]

The LAD SARL invoiced PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL, during 2010, 2011 and 2012, for scheduling costs of EUR 20 846,20, EUR 2 788,88 and EUR 16 723,44 respectively.

[…]

[…] [4] **[Or. 4]**

4 […] the expenses at issue are referred to in Article 57 of the Code des impôts sur les revenus (Income Tax Code, 'the CIR 92') which requires the person paying them to complete and submit to the tax authorities individual fee forms [281.50] and a summary statement, failing which they are not regarded as deductible expenses and may give rise to […] a separate corporation tax levy, in accordance with Article 219 of the CIR 92.

Since the PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL had not completed individual fee forms 281.50 or summary statements relating to those expenses, the tax authorities sent the company a correction notice on 20 August 2015 informing it that it intended to make the sums in question subject to the separate levy. [5]

[…]

By tax decision of 23 November 2015, the authorities maintained their position stating that *the reason for the planned corrections is not based on the fact that the transactions were not carried out in good faith or that the corresponding services were not actually provided but on the fact that PHARMACIE POPULAIRE – LA SAUVEGARDE has not completed individual fee forms 281.50 relating to the sums paid to the LAD SARL. and that it also has not established that the amount of the expenses, covered by Article 57, is included in a tax return filed by the recipient in accordance with Article 305 or in a similar return filed abroad by the recipient.* [6]

2 […]

3 […]

4 […]

5 […]

6 […]

The levies [at issue] were therefore [claimed in that respect […] on 24 November 2015.

5 PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL lodged a complaint […] which was declared […] unfounded **[Or. 5]** […].

6 It then brought the dispute before the Liège Court of First Instance […].

By judgment of 25 October 2018, that court declared the action […] unfounded […].

7 PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL filed an appeal on 7 May 2019.

It requests the Court to cancel […] the levies at issue.

It asks that, if appropriate, a question be referred to the Court of Justice of the European Union for a preliminary ruling.

[…]

8 The ÉTAT BELGE (the Belgian State) claims […] that the Court should confirm the levies and the judgment under appeal […].

Discussion

Applicable national legislation and administrative tolerance

9 Under Article 57(1) of the CIR 92, *the following expenses will only be regarded as professional costs if they are evidenced by the production of individual fee forms and a summary statement drawn up in the form and within the time limits determined by the King: 1 commissions,* […] *fees* […] *that constitute for the recipients professional income* **[Or. 6]** *whether or not taxable in Belgium,* […] (…).

10 Article 219 of the CIR 92 […] provides:

'A separate levy is provided for in respect of the expenses referred to in Article 57 […] *which are not evidenced by the production of individual fee forms and a summary statement* […].

That levy is equal to 100% of those expenses, […] *unless it can be shown that the recipient of those expenses,* […] *is a legal person* […], *in which case the rate is set at 50%.*

(...)

That levy is not applicable if the taxpayer shows that the amount of the expenses, referred to in Article 57, […] *is included in a tax return filed in accordance with Article 305 or in a similar tax return filed abroad by the recipient.*

Where the amount of the expenses referred to in Article 57 […]*, is not included in a tax return filed in accordance with Article 305 or in a similar tax return filed abroad by the recipient, the separate levy is not applicable to the taxpayer if the recipient has been clearly identified at the latest within 2 years and 6 months of 1 January in the tax year concerned.'*

11 However, it is a fact that that provision is not applied in certain cases by the tax authorities. **[Or. 7]**

That tolerance is evident from the *travaux préparatoires* for the Law, the replies of the Minister for Finance to parliamentary questions and from circulars and the Administrative commentary.

Thus, in reply to a parliamentary question, the Minister stated:

'[…] *the obligation to complete individual fee forms concerns only sums paid:*

– either to persons who are not subject to the Law of 17 July 1975 on business accounting;

– or to persons to whom that law applies but who, under the VAT Code, are exempt from issuing invoices for the services they provide.

It follows that fees paid to companies subject to the aforementioned Law of 17 July 1975 which are not exempt from issuing invoices do not have to be the subject of individual fee forms 281.50I.' [7]

That view is confirmed by number 57/62 of Administrative comment […]

[…] [8]

12 On the other hand, that tolerance does not apply in the case of payment made to a non-resident of the Kingdom without a permanent establishment there. **[Or. 8]**

Accordingly, to the following parliamentary question of 22 October 2014:

'The obligation to complete individual fee forms for the amounts paid to natural and legal persons subject to the Law of 17 July 1975 on business accounting which, under the VAT Code, are required to issue invoices for the services provided, is the subject of administrative tolerance.

[7] […]

[8] […]

According to a judgment of 1 April 2011 of the Antwerp Court of First Instance and a judgment of 23 October 2012 of the Antwerp Court of Appeal, commissions, […] *or fees* […] *that constitute professional income, whether or not taxable in Belgium, for their recipients established abroad must be evidenced by individual fee forms and a summary statement.*

1. Do you share the opinion that, since non-residents without an establishment in Belgium are not subject to the Belgian law on accounting, they cannot benefit from that administrative tolerance for the commissions, brokerages, etc. assigned to them?

2. Is the additional administrative burden under Article 57(1) of the CIR 92 not a disincentive to acquiring services from recipients established abroad?

3. Since the aforementioned 'administrative' obligation does not extend to contractual commitments to service providers established in Belgium, is the restriction of that administrative tolerance to recipients established in Belgium not contrary to the freedom to provide services within the European Union?

4 Since accounting law and VAT legislation has been harmonised at European Union level, is the restriction of administrative tolerance to recipients established in Belgium justifiable from the point of view of EU law?

5. Is it possible to defend the restriction of administrative tolerance if the recipient established in another Member State of the European Union is required to keep accounts and to issue an invoice in accordance with the relevant VAT provisions and to refer to most of the services in an intra-Community transactions declaration? **[Or. 9]**

6. In view of the freedom to provide services and of Directive [2011/61/EU on administrative cooperation in the field of taxation], is that difference of treatment justifiable?

7. What measures do you intend to take to abolish that restriction on the freedom to provide services?';

the Minister for Finance replied:

'1. In view of the importance of completing fee forms 281.50 within the framework of the exchange of information on the basis of conventions on the avoidance of double taxation and in connection with the fight against international tax evasion, I endorse […] *what is laid down in No 5 of Administrative circular* […], *namely that taxpayers who allocate commissions, brokerages, fees, etc. to non-residents without an establishment in Belgium, must in principle always mention the amount on individual fee forms 281. 50 and a summary statement 325.50.*

2. The provisions of Article 57 of the Income Tax Code 1992 have already existed for a long time and have not hitherto given rise to complaints with regard to the additional administrative burdens.

3 to 7. My administration is currently examining to what extent administrative tolerance should be reviewed in the context of a possible barrier to the freedom to provide services and to the EU directive on exchange of information. [9]'

The question referred to the Court of Justice of the European Union for a preliminary ruling

13 The sums paid by PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL to the LAD SARL did not lead to the completion of individual forms and summary statements, so that the aforementioned Article 219 of the CIR 92 is in principle applicable.

14 In line with the administrative tolerance explained above, it is nevertheless not disputed that if LAD SARL had been a resident company, or had had an establishment in Belgium rendering it **[Or. 10]** subject to Belgian accounting legislation, the payment of its invoices by the PHARMACIE POPULAIRE – LA SAUVEGARDE SCRL would not have required the latter to complete the individual fee forms and summary statements needed to avoid the application of the separate levy provided for in Article 219 of the CIR 92.

15 Article 56 TFEU provides that restrictions on freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

16 Consequently, in accordance with the case-law of the Court of Justice, Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing the service is established in a Member State other than that in which the service is provided. [10]

17 Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom. [11]

9 […]

10 See judgments of 4 December 1986, *Commission* v *Germany*, 205/84, EU:C:1986:463 paragraph 25; of 26 February 1991, *Commission* v *Italy*, C-180/89, EU:C:1991:78, paragraph 15; of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 31, and of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 21.

11 See judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 22 and the case-law cited.

18 Furthermore, according to settled case-law, Article 56 TFEU confers rights not only on the provider of services but also on the recipient of those services. [12]

19 It seems in the present case that, by the combination of Article 219 of the CIR 92 and of the tolerance referred to above, the obligation to complete individual fee forms and a summary statement in order to avoid the application of the levy provided for by that provision is imposed on the recipients of the services provided by non-resident companies, and means that they are required to bear an additional administrative burden which it is not required from recipients of the same services provided by a resident service provider subject to the legislation on accounting.

Consequently, such an obligation is liable to render cross-border services less attractive for their recipients than services provided by resident service providers and thus to deter those recipients from having recourse to service providers resident in other Member States. [13]

That situation may therefore be classified as a restriction on the freedom to provide services, in principle prohibited by Article 56 TFEU, particularly since, according to the settled case-of the Court of Justice, a restriction on a fundamental freedom is prohibited by the Treaty even if it is of limited scope or minor importance. [14]

20 In order to determine whether there is a restriction on the freedom to provide services, and whether in some circumstances that may be justified by a reason relating to the public interest, it is necessary to submit to the Court of Justice of the European Union, pursuant to Article 267 TFEU, the question contained in the operative part of this decision concerning the interpretation of Article 56 of the Treaty.

ON THOSE GROUNDS

[…]

[…], refers the following question to the Court of Justice of the European Union for a preliminary ruling:

12 See, inter alia, judgments of 31 January 1984, *Luisi and Carbone*, 286/82 and 26/83, EU:C:1984:35, paragraph 10; of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 32, and of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 23.

13 See, to that effect, judgments of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 33; of 9 November 2006, *Commission* v *Belgium*, C-433/04, EU:C:2006:702, paragraphs 30 to 32, and of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 28.

14 Judgments of 15 February 2000, *Commission* v *France*, C-34/98, EU:C:2000:84, paragraph 49; of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 30, and of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 42.

Is Article 56 of the Treaty on the Functioning of the European Union to be interpreted as precluding legislation, or a national practice, under which companies established in one Member State which use services of companies established in another Member State are required, in order to avoid a corporation tax levy of 100% or 50% of the sums invoiced by the latter, to complete and submit to the tax authorities individual fee forms and summary statements relating to those expenses whereas, if they use the services of resident companies, they are under no such obligation in order to avoid that levy? **[Or. 12]**

[Signatures]

[…]