Case C-414/21

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:

7 July 2021

Referring court:

Hof van Cassatie (Belgium)

Date of the decision to refer:

25 June 2021

Appellant:

VP CAPITAL NV

Respondent:

Belgische Staat

Subject matter of the main proceedings

The subject matter of the main proceedings is a dispute between the Belgische staat (Belgian State; 'the tax authorities') and VP CAPITAL NV concerning the valuation of the write-back of write-downs on shares recorded in Luxembourg before that company's transfer of its registered office to Belgium.

Subject matter and legal basis of the request

In this reference for a preliminary ruling under Article 267 TFEU, the referring court asks the Court of Justice, in essence, whether Article 49 TFEU precludes a Luxembourg company, in principle, from being taxed in Belgium on the write-back of write-downs unless a certain condition is met, whereas a Belgian company is not taxed thereon – subject to a certain exception – without that condition having to be met.

Question referred for a preliminary ruling

Does freedom of establishment, as guaranteed by Article 49 TFEU, preclude national legislation, such as that at issue here, where it results in a Luxembourg company which records write-downs on shares in Luxembourg and which, although deducting those write-downs in principle from its taxable income, cannot actually deduct them from its taxable income because of the existence of a tax loss position, being taxed on the write-back of those write-downs in Belgium following the transfer of its registered office to Belgium, unless the increases in value masked by that write-back are allocated to a liability account not available for distribution, whereas a Belgian company which has recorded write-downs on shares in Belgium is not taxed on the write-back of those write-downs, provided that the write-downs had not been previously deducted from its Belgian taxable income, without needing to allocate the increases in value masked by that write-back to a liability account not available for distribution?

Provisions of European Law relied on

TFEU, Articles 49 and 54.

Provisions of national law relied on

Wetboek van de inkomstenbelastingen 1992 (Income Tax Code of 1992; 'WIB 92'), Articles 24(1)(2), 44(1)(1), 182, 184ter(2)(2), 190(2), 198(7), 206(3), 521.

Koninklijk Besluit tot uitvoering van het WIB 92 (Royal Decree implementing the WIB 92; 'KB/WIB 1992'), Article 74.

Succinct presentation of the facts and procedure in the main proceedings

1 VP CAPITAL NV is a company established in Luxembourg which also had its registered office there. It recorded a series of write-downs on shares and deducted these there from its taxable income. On 30 April 2009, it recorded a tax loss carryforward in Luxembourg of EUR 89 587 962.96.

2 On 1 May 2009, it transferred its registered office to Belgium without maintaining a permanent establishment in Luxembourg, thereby being converted into a company governed by Belgian law.

3 Under Article 206(3) of the WIB 1992, the deduction of a tax loss carryforward incurred in Luxembourg was not allowed in Belgium.

4 After the transfer of the registered office to Belgium, the company effected a write-back of certain write-downs.

5 In 2011, the tax authorities sent VP Capital NV an adjustment notice relating to its corporation tax return for the 2010 assessment year, notifying them that the increase in the opening balance of the reserves due to the write-backs would be cancelled and the write-backs would be taxed.

6 In 2012, the tax authorities issued a supplementary corporation tax assessment for the 2010 assessment year in the amount of EUR 15 965 680.75.

7 VP CAPITAL NV then submitted a notice of objection and a supplementary notice of objection. It also lodged a tax appeal before the rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp), seeking the annulment of the corporation tax assessment for the 2010 assessment year, or at least an exemption therefrom.

8 By judgment of the Court of First Instance, Antwerp, of 6 January 2016, the contested assessment was confirmed.

9 VP CAPITAL NV lodged an appeal against that judgment.

10 In its judgment of 4 September 2018, the hof van beroep te Antwerpen (Court of Appeal, Antwerp) confirmed the judgment against which the appeal had been lodged.

11 VP CAPITAL NV lodged an appeal in cassation against that judgment.

Essential arguments of the parties in the main proceedings

12 According to the tax authorities, the write-back by VP CAPITAL NV in Belgium of the write-downs that had been previously recorded in Luxembourg should not be considered as a write-back of the write-downs, but rather, as an expressed but unrealised capital gain. Under the WIB 1992, where a foreign company transfers its registered office, its principal place of business or its effective place of management to Belgium, the gains and losses subsequently realised in respect of the assets attached to a foreign establishment or the assets located abroad and held by that company, must be determined on the basis of their book value at the time of the transaction. An expressed but unrealised capital gain is exempt from tax provided that the intangibility condition of Article 190(2) of the WIB 1992 is fulfilled, which means that the capital gain must be allocated to a liability account not available for distribution. Since VP CAPITAL NV had not allocated to a separate liability account what was considered, from a tax point of view, to be the capital gain it had made, or, from an accounting point of view, the write-back it had effected, the tax authorities concluded that the write-back was taxable.

13 VP CAPITAL NV argues that the rule in question infringes freedom of establishment.

14 The intangibility condition of Article 190(2) of WIB 1992 – which must be complied with by a company which has recorded write-downs on shares abroad and which, after transferring its registered office to Belgium, effects a write-back in respect of those shares, in order for that write-back to be tax-free – has the effect that the funds in question may not be distributed in any form whatsoever or even allocated to the statutory capital reserve, nor may they serve as the basis or as a component for the calculation of any remuneration or attribution.

15 Such a restriction on a company which recorded write-downs on shares outside Belgium but which ultimately could not actually deduct them from its taxable income either in Belgium or in the State of departure because of the loss position it was in and because of the impossibility of transferring the losses to Belgium, constitutes an obstacle to freedom of establishment, in comparison with Belgian companies which are able to record write-downs under the Belgian corporation tax system and which, without facing any such obstacle, can subsequently effect write-backs which are tax free provided that the write-downs had not been previously deducted from its taxable income.

16 Such an obstacle can be justified only if the situations are not objectively comparable, or if it is justified by overriding reasons in the public interest, which, moreover, must be addressed effectively and proportionately, which has not been demonstrated here.

Succinct presentation of the reasoning in the request for a preliminary ruling

17 The referring court is uncertain as to whether the judgment of 27 February 2020 in Case C-405/18, *Aures Holdings*, ECLI:EU:C:2020:127, which concerns a rule of national law under which the tax losses which a company has incurred in one Member State cannot, after it has transferred its tax residency to another Member State, be claimed in the latter Member State, can also be applied to national legislation, such as that at issue here, under which the write-downs on shares which a company has recorded in a Member State and which it has in principle deducted from its taxable income there but which it could not actually deduct from its taxable income because of the existence of a tax loss position, cannot be claimed in another Member State to which it has transferred its registered office, unless the increases in value masked by that write-back are allocated to a liability account not available for distribution.

18 Furthermore, the question arises whether the *Aures Holdings* judgment is not in conflict with the case-law of the *Bevola and Jens W. Trock* judgment, C-650/16, ECLI:EU:C:2018:424, as argued by VP CAPITAL NV. According to the *Aures Holdings* judgment, the doctrine of definitive losses as developed in the *Bevola and Jens W. Trock* judgment – according to which, as regards the losses attributable to a non-resident permanent establishment which has ceased activity and whose losses could not, and no longer can, be deducted from its taxable profits in the Member State in which it carried on its activity, the situation of a

resident company possessing such a permanent establishment is not different from that of a resident company possessing a resident permanent establishment, from the point of view of the objective of preventing double deduction of the losses, even though the situations of those two companies are not, in principle, comparable – cannot be applied in the situation of a company which, after transferring its effective place of management and, therefore, its tax residency from the Member State in which it has its registered office to another Member State, wishes to deduct in that other Member State losses which it incurred in the first Member State during a tax period in which that first Member State had sole jurisdiction to tax that company.