

COMMISSION

COMMISSION DECISION

of 31 October 2000

on Spain's corporation tax laws

(notified under document number C(2000) 3269)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2001/168/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry ⁽¹⁾, and in particular Article 6(5) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽²⁾, and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 16 April 1996 the Commission, having been alerted by competitors of Spanish steel firms, requested the Spanish authorities to supply information enabling it to assess the scope and effects of Article 34 of Act 43/1995 of 27 December 1995 on corporation tax ⁽³⁾.
- (2) By letter dated 7 August 1997 the Commission informed the Spanish Government that it had decided to initiate the procedure laid down in Article 6(5) of Commission Decision No 2496/96/ECSC ('the Steel Aid Code') in respect of that measure. Since the provisions of Article 34 of Act 43/1995 were applied in the same terms by the Provincial Council of Vizcaya (Article 43 of Provincial Act 3/96 of 26 June 1996 ⁽⁴⁾), the Provincial Council of Guipúzcoa (Article 43 of Provincial Act 7/1996 of 4 July 1996 ⁽⁵⁾) and the Provincial Council of Álava (Article 43 of Provincial Act 24/1996 of 5 July 1996 ⁽⁶⁾), those bodies enjoying autonomous taxation

powers, the Spanish authorities were informed that the Commission decision to initiate the procedure laid down in Article 6(5) of the Steel Aid Code also covered those three Articles.

- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁷⁾. The Commission invited other Member States and interested parties to submit their comments on the matter.
- (4) The Spanish Government responded by letter of 13 October 1997. Unesid (Unión de Empresas Siderúrgicas), Wirtschaftsvereinigung Stahl and CEOE (Confederación Española de Organizaciones Empresariales) submitted observations to the Commission by letters dated 27 November 1997, 1 December 1997 and 27 November 1997 respectively. Spain replied to the comments received from third parties by letter dated 16 March 1998.

II. DETAILED DESCRIPTION OF THE AID

- (5) Article 34 of Act 43/1995, entitled 'Deduction for export activities', provides that businesses engaged in export activities are entitled to tax credits amounting to 25 % of:
 - (a) investments made in the creation of branches or permanent establishments abroad as well as the acquisition of shares in foreign companies or the setting-up of subsidiaries directly associated with the export of goods or services or the sale of tourism services in Spain;

⁽¹⁾ OJ L 338, 28.12.1996, p. 42.

⁽²⁾ OJ C 329, 31.10.1997.

⁽³⁾ BOE No 310, 28.12.1995.

⁽⁴⁾ BOB No 135, 11.7.1996.

⁽⁵⁾ BOG No 133, 10.7.1996 and No 138, 17.7.1996 (corrected text).

⁽⁶⁾ BOTHA No 90, 9.8.1996.

⁽⁷⁾ See footnote 2.

- (b) the costs of multiannual advertising and publicity campaigns for product launches;
- (c) the costs of market penetration and market research abroad;
- (d) the costs of taking part in fairs, exhibitions and other similar events, including those of an international character held in Spain.

the ECSC Treaty and Decision No 2496/96/ECSC, on the ground that Spanish tax law did not provide for any tax benefit relating primarily or exclusively to exports by steel firms.

- (10) Moreover, although exporting was chosen as the feature indicating the presence of Spanish firms abroad, it was not in itself the purpose of the tax credit. It was for that reason that the amount of the credit did not depend on the extent of export activity and was not linked to the volume of exports.

III. COMMENTS BY INTERESTED PARTIES

- (6) In their comments, both CEOE and Unesid opposed the Commission decision to initiate proceedings, mainly on the same grounds as those put forward by the Spanish authorities (see recitals 8 to 12). They emphasised in particular that, contrary to what was stated in the decision initiating proceedings, the provisions being challenged were not intended to promote the establishment of production branches abroad. CEOE added that similar measures were in force in other Member States.
- (7) Unlike the other two interested parties, Wirtschaftsvereinigung Stahl supported the Commission's decision to initiate the procedure, sharing its assessment that the measure constituted State aid. Wirtschaftsvereinigung Stahl also contended that:
- the deliberate promotion of exports in favour of Spanish companies distorted competition to the detriment of undertakings in other Member States, thus infringing the principles of the common market,
 - the ECSC Treaty assumed that any national aid distorted competition; Article 4(c) prohibited tax aid, especially if it was aimed at facilitating sales in other Member States.

- (11) According to the Spanish Government, Article 34 of Act 43/1995 should be regarded as a general measure and cannot be classed as State aid. The general nature of the rule in Article 34 should be clear from the following features:

- (i) the Article applied to all taxable persons, whether resident in Spain or abroad, provided that they operated through a permanent establishment. Thus, Article 34 afforded equal treatment to firms residing and not residing in Spanish territory;
- (ii) it applied to all taxable persons regardless of the economic sector in which they operated;
- (iii) it was applied in a non-discretionary manner. The tax authorities did not supervise the grant of the credit provided for by Article 34. It was taxable persons who applied the credit themselves, the tax authorities having no other function than to check, as appropriate, that the requirements laid down by the rule had been met. Moreover, such checks were not carried out specifically with regard to Article 34 but, on the contrary, were part of the general monitoring of corporation tax;
- (iv) it traditionally formed part of the philosophy of the tax system in Spain.

IV. COMMENTS BY SPAIN

- (8) In its answer to the decision initiating the procedure the Spanish Government replied that the rule which was the focus of the Commission's investigation had a long tradition in Spanish law, as it had been applied since corporation tax came into force in 1978, thus preceding Spain's accession to the European Communities.
- (9) The Spanish Government rejected the analysis that the general measures in Article 34 of Act 43/1995 possibly constituted export aid, in the form of tax credits, for investment carried out by steel firms, and contested the initiation of the procedure on the basis of Article 4 of

- (12) Lastly, the Spanish Government pointed out that the same tax credits had applied under Spanish law since Act 61/1978 of 27 December 1978 on corporation tax⁽⁸⁾ was adopted. Article 26 of that Act, relating to tax deductions for investments, laid down in paragraph 3 the deductions available to exporting firms, in virtually the same terms as Article 34 of Act 43/1995. As the Court of Justice had consistently held, existing measures were deemed to be those which existed before the entry into force of the Treaty, in other words, in Spain's case, before the entry into force of the Act of Accession. In this respect, and given that they were laid down by law prior to Spain's entry into the Community, the tax credits in question constituted in any event existing measures.

⁽⁸⁾ BOE No 312, 30.12.1978.

V. ASSESSMENT OF THE AID

- (13) Article 4(c) of the ECSC Treaty provides that subsidies or aids granted by Member States are recognised as incompatible with the common market and shall accordingly be abolished and prohibited within the Community. The Steel Aid Code lays down the only exemptions from this general prohibition which can be granted under certain circumstances:
- (a) aid for research and development;
 - (b) aid for environmental protection;
 - (c) aid for closures.
- (14) It should be noted that none of these exemptions is invoked by Spain in the present case.
- (15) As to the argument, adduced both by Spain and by the two Spanish interested parties which submitted comments, that Act 43/1995 should have been regarded as existing aid as it consolidated legislation which had been in force since 1978, i.e. before Spain joined the Communities, and that the Commission therefore wrongly decided to initiate the procedure in the present case, the Commission must recall that the scope of its decision was the assessment of the measures under examination only under the ECSC Treaty rules, where the notion of existing aid does not exist. Article 4(c) of that Treaty provides, unlike Article 87 of the EC Treaty, that subsidies or aids granted by States are recognised as incompatible with the common market and shall accordingly be abolished and prohibited within the Community. In the light of these provisions, the Commission takes the view that when joining the European Coal and Steel Community each new Member State must stop granting any kind of aid previously awarded to the undertakings covered by that Treaty. If it failed to do so, any aid granted by the new Member State from the date of its accession to the European Coal and Steel Community would have to be regarded as incompatible with the common market in the light of Article 4(c) of the ECSC Treaty.
- (16) Consequently, Spain's argument could be taken into account only in relation to the State aid provisions of the EC Treaty. However, the Commission's decision to initiate proceedings did not deal with aid given to Community companies, and so the argument that, from a legal point of view, the measure constitutes existing aid cannot be shared by the Commission.
- (17) In determining whether in the present case the tax credit scheme has to be regarded as State aid, the Spanish authorities attach decisive importance — in maintaining that the scheme does not constitute State aid — to the fact that the tax reduction is, on the one hand, general and, on the other hand, directly applied by the recipient companies themselves without intervention by the public authorities; in other words, they claim that the practical application of this provision is not at the discretion of any public body.
- (18) On this aspect, in line with the case-law of the Court of Justice (see its judgment of 23 February 1961 in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ⁽⁹⁾) and the approach taken by the Commission ⁽¹⁰⁾, it is recalled that under Community law the notion of aid covers not only positive assistance from the State but also any measure that relieves an undertaking of a burden which it would otherwise have to bear, regardless of whether or not it is directly applied by the recipient companies. In this light, non-repayable grants, preferential loans from the State and credits against income or corporation tax are all measures which have to be regarded as State aid.
- (19) In particular, and by analogy with the judgment of the Court of 15 March 1994 in Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* ⁽¹¹⁾, the Commission considers that a tax credit granted to certain undertakings constitutes State aid since it places the recipients in a more favourable financial position than other taxpayers ⁽¹²⁾.
- (20) As to the specificity of the measure, it is worth noting that according to both the Commission's approach ⁽¹³⁾ and the case-law of the Court of Justice (see the judgments of 10 December 1969 in joined Cases 6 and 11/69 *Commission v France* ⁽¹⁴⁾ and 7 June 1988 in Case 57/86 *Greece v Commission* ⁽¹⁵⁾), a measure is specific and therefore must be regarded as State aid instead of a general measure where, although prima facie it might be seen as general in form, in practice it supports only a particular group of companies. In the present case, firstly, the tax measures under examination support those companies carrying out certain export activities and exclude companies that do not export as well as exporters that carry out export activities not covered by the provision and even exporters that carry out in Spain the type of investments covered by the provision. Secondly, apart from the fact that it has existed since

⁽⁹⁾ [1961] ECR 3.

⁽¹⁰⁾ Point 10 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/03) (OJ C 384, 10.12.1998, p. 3).

⁽¹¹⁾ [1994] ECR I-877, paragraph 14.

⁽¹²⁾ Point 9 of Commission notice 98/C 384/03 (see footnote 10).

⁽¹³⁾ Points 13, 16 and 18 of Commission notice 98/C 384/03 (see footnote 10).

⁽¹⁴⁾ [1969] ECR 523.

⁽¹⁵⁾ [1988] ECR 2865.

1978, neither the Spanish Government nor the interested parties which submitted comments have given any reasons why the tax measures in question are necessary to the functioning and effectiveness of the Spanish tax system⁽¹⁶⁾. Thirdly, although it is true that the discretion of a public body in the application of a measure contributes to the classification of that measure as specific, the mere lack of discretion does not make the measure general.

- (21) As to the argument that comparable measures exist in other Member States, the question is of no consequence since any such measures could themselves be the subject of the procedures laid down in the ECSC Treaty (see the judgment of the Court of Justice of 22 March 1977 in Case 78/76 *Steinike & Weinlig v Germany*)⁽¹⁷⁾.
- (22) Finally, the Spanish interested parties which submitted comments as well the Spanish Government drew the Commission's attention to the fact that, contrary to what was stated in the decision initiating proceedings, the provisions in question are not intended to promote the establishment of production branches abroad. After having assessed the wording of Article 34 of Act 43/1995, namely its title and first paragraph, the Commission comes to the conclusion that the creation of production branches is not specifically envisaged in the Spanish provisions under examination except where those production branches are related to the exporting activity of the recipient company.

VI. CONCLUSIONS

- (23) It emerges from the wording of Act 43/1995 that the provisions under examination are applicable, among other things, to steel undertakings which are taxable in Spain, are engaged in export activities and carry out certain investments or incur certain expenses abroad. Thus, such export undertakings receive a clear advantage over (i) steel undertakings which are taxable in Spain but do not export, (ii) steel undertakings which are taxable in Spain and export but do not carry out such investments abroad (because for instance, they decide to make the same type of investments in Spain) and (iii) steel undertakings which are not taxable in Spain. The Commission therefore concludes that the tax credit scheme under examination, contrary to what is claimed by the Spanish authorities and by the Spanish interested parties which submitted comments, is not general in its application and, indeed, is in itself capable of giving rise

to the grant of State aid to certain undertakings. It therefore constitutes State aid under the Community rules and, in so far as it benefits ECSC steel undertakings, is contrary to Article 4(c) of the ECSC Treaty. Neither do any of the exemptions laid down in the Steel Aid Code apply in the present case.

- (24) As to the recovery of the aid, if the Commission finds that State aid which is incompatible with the common market has been granted, it usually requires the Member State to recover it. However, the Commission will not require recovery of the aid if this would be contrary to a general principle of Community law.
- (25) In the present case, the Commission notes that on 30 September 1992 it adopted a decision on the changes made by France to the tax arrangements applicable to commercial or service establishments abroad⁽¹⁸⁾. Those changes involved the extension of the then current arrangements for commercial or service investments within the Community to those made outside the Community and the abolition of the specific arrangements for the latter. The Commission found that the arrangements did not constitute aid within the meaning of Article 92(1) of the EEC Treaty (now Article 87 EC) and that they facilitated the completion of the common market. The French scheme prior to 1992 enabled French undertakings investing abroad with a view to setting up sales subsidiaries or research departments there to receive temporary tax relief equivalent to the losses incurred by the foreign establishment (if it was located within the Community) or the amount of the investment in the foreign establishment (if it was located outside the Community). For industrial investments outside the Community agreement with the Ministry was required and the tax exemption could amount to 50 % of the investment. In Decision 73/263/EEC⁽¹⁹⁾ the Commission had concluded that this tax scheme was neutral as regards competition and compatible with the rules on the right of establishment. The scheme is similar in substance to the Spanish one and was in force when Spain joined the ECSC in 1986.
- (26) The Commission also notes that in June 1996 the then Member of the Commission with special responsibility for competition, replying on behalf of the Commission to a written question by Member of the European Parliament Mr Raul Rosado Fernandes concerning the Spanish tax deduction scheme under examination, recalled that the measures had been notified by the Spanish Government on Spain's accession and that the Commission had never raised any objections to their implementation⁽²⁰⁾.
- (27) Finally, the Commission considers that the decision to initiate the formal investigation procedure includes only a preliminary assessment as to whether the proposed measure is to be regarded as aid. The preliminary nature of the assessment was underlined by the Commission in its decision to initiate proceedings in the present case by

⁽¹⁶⁾ Point 23 of Commission notice 98/C 384/03 (see footnote 10).

⁽¹⁷⁾ [1977] ECR 595, paragraph 24.

⁽¹⁸⁾ Commission press release dated 30 September 1992 (IP/92/770); OJ C 3, 7.1.1993, p. 2 (aid NN 96/92, p. 5).

⁽¹⁹⁾ Decision of 25 July 1973 on the tax concessions granted, pursuant to Article 34 of French Law No 65-566 of 12 July 1965 and to the circular of 24 March 1967, to French undertakings setting up businesses abroad (OJ L 253, 10.9.1973, p. 10).

⁽²⁰⁾ OJ C 297, 8.10.1996, p. 2.

referring only to the likelihood of the measures in question constituting State aid. This is also evident in the present case from the length of time that the Commission took to investigate and examine these measures. It should be noted that Spain was not in any way responsible for delays in the proceedings.

- (28) In this context, and in view of the foregoing, the Commission considers that even the most cautious and well informed steel firms could not have foreseen the tax provisions under examination being classed as State aid contrary to Article 4 of the ECSC Treaty, and that they could rightly claim legitimate expectations. The Commission therefore deems it appropriate not to order the recovery of the aid in question granted prior to the adoption of the present Decision,

HAS ADOPTED THIS DECISION:

Article 1

Any aid granted by Spain under:

- (a) Article 34 of Act 43/1995 of 27 December 1995 on corporation tax;
- (b) Article 43 of Provincial Act 3/96 of 26 June 1996 on corporation tax adopted by the Provincial Council of Vizcaya;

(c) Article 43 of Provincial Act 7/1996 of 4 July 1996 on corporation tax adopted by the Provincial Council of Guipúzcoa; or

(d) Article 43 of Provincial Act 24/1996 of 5 July 1996 on corporation tax adopted by the Provincial Council of Álava, to ECSC steel undertakings established in Spain is incompatible with the common market in coal and steel.

Article 2

Spain shall forthwith take appropriate measures to ensure that ECSC steel undertakings established in Spain do not receive the aid referred to in Article 1.

Article 3

Spain shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 31 October 2000.

For the Commission

Mario MONTI

Member of the Commission
