JUDGMENT OF THE COURT (Fourth Chamber)

24 June 2010 *

In Joined Cases C-338/08 and C-339/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Commissione tributaria regionale di Torino (Italy), made by decisions of 17 September and 17 December 2007, respectively, received at the Court on 22 July 2008, in the proceedings

P. Ferrero e C. SpA

v

Agenzia delle Entrate – Ufficio di Alba (C-338/08),

and

General Beverage Europe BV

v

Agenzia delle Entrate - Ufficio di Torino 1 (C-339/08),

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, C. Toader, K. Schiemann, P. Kūris and L. Bay Larsen, Judges,

Advocate General: P. Cruz Villalón,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 December 2009,

after considering the observations submitted on behalf of:

— P. Ferrero e C. SpA, by M. Cerrato and G. Maisto, avvocati,

— General Beverage Europe BV, by G. Maisto, avvocato,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the European Commission, by A. Aresu and R. Lyal, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 5(1) and 7(2) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, in the version thereof in force at the material time (OJ 1990 L 225, p. 6) ('the Directive').

2 The references were made in two sets of proceedings, the first between P. Ferrero e C. SpA ('Ferrero') and the Italian tax authorities and the second between General Beverage Europe BV ('GBE') and those authorities, concerning withholding taxes levied by those authorities on financial transfers considered to be dividend distributions. The first set of proceedings concerns withholding taxes levied on dividend distributions and the refund of the 'adjustment surtax' by Ferrero to its Netherlands parent company Ferrero International BV ('Ferrero International'). The second set of proceedings relates to withholding taxes levied on dividend distributions and the refund of the 'adjustment surtax' to GBE by its Italian subsidiary Martini e Rossi SpA ('Martini').

Legal context

European Union law

3 The third recital in the preamble to the Directive states:

'[w]hereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies'.

4 Article 1(1) of the Directive defines the scope of the Directive as follows:

'Each Member State shall apply this Directive:

— to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

— to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.'

5 Article 3(1) of the Directive defines the concepts of parent company and subsidiary as follows:

'For the purposes of applying this Directive,

(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 25% in the capital of a company of another Member State fulfilling the same conditions;

(b) "subsidiary" shall mean that company the capital of which includes the holding referred to in (a).'

6 Article 5(1) of the Directive lays down the general prohibition on withholding taxes as follows:

'Profits which a subsidiary distributed to its parent company shall, at least where the latter holds a minimum of 25% of the capital of the subsidiary, be exempt from withholding tax.'

7 Article 7(2) of the Directive states however:

'This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.'

National law

8 The Italian law in force at the material time provided that an Italian company which received dividends was entitled to a tax credit equal to 9/16ths of the dividends distributed. As the tax rate on Italian companies was 36%, the recipient undertaking thus obtained a tax credit equivalent to the amount of tax charged to the company which distributed the dividends.

9 The Italian legislature had also provided, in certain circumstances, for the levying of an 'adjustment surtax' ['*maggiorazione di conguaglio*'] ('the adjustment surtax') on the tax charged to undertakings which distributed dividends. Article 105(1) of the sole income tax legislation, approved by Presidential Decree No 917 of 22 December 1986 (GURI No 302, 31 December 1986), in the version thereof in force at the material time, provided that that adjustment surtax applied when the amount of the dividends distributed was higher than 64% of the subsidiary's declared income and that its amount was equal to 9/16ths of the difference.

The bilateral convention between the Italian Republic and the Kingdom of the Netherlands

10 The Convention between the Italian Republic and the Kingdom of the Netherlands for the avoidance of double taxation with respect to taxes on income and on capital and for prevention of fiscal evasion (with protocol), signed at The Hague on 8 May 1990 ('the bilateral convention'), lays down, in Article 10(1), the general rule that dividends are taxable in the State of the company receiving them.

11 By way of derogation from that general rule, Article 10(2)(a)(i) of the bilateral convention allows dividends to be taxed in the State of the distributing company, subject to the following conditions:

'However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:

(a) (i) 5[%]of the gross amount of the dividends if the beneficial owner is a company which has held, for a period of 12 months preceding the date on which the dividends were declared, more than 50[%] of the voting stock of the company paying the dividends, ...'

12 Article 10(3) of the bilateral convention provides for the possibility for a Netherlands company to obtain a refund of the adjustment surtax referred to in paragraph 9 of this judgment in the following terms:

'A person who is a resident of the Netherlands and receives dividends distributed by a company which is a resident of Italy shall be entitled to a refund of an amount equal to the adjustment surtax (maggiorazione di conguaglio) pertaining to such dividends, if the company is liable to payment of the surtax, subject to deduction of the tax provided for in paragraph 2. The refund must be requested, within the time-limits specified in Italian law, through that company, which, in that instance, is acting in the name and on behalf of the said resident of the Netherlands.

This provision shall apply to dividends declared with effect from the entry into force of this Convention.

The company making the distribution may pay a resident of the Netherlands the aforesaid amount at the same time as it pays the dividends due and may deduct that amount in the first tax return it files after the payment. …'

13 Article 10(5)(a) and (b) of the bilateral convention provides:

'(a) The term "dividends" as used in this article means income from shares …

(b) Also regarded as dividends paid by a company which is a resident of Italy are the gross amounts refunded in respect of the adjustment surtax referred to in paragraph 3, pertaining to dividends paid by that company.'

14 Article 24(3) of the bilateral convention further provides:

'Moreover, the Netherlands shall allow a deduction from the Netherlands tax thus computed in respect of the items of income which, in accordance with [Article 10(2)] of this Convention, may be taxed in Italy to the extent that such items are included in the taxable base referred to in paragraph 1. The amount of such deduction shall be equal to the tax paid in Italy on those items of income, but shall not exceed the amount of the reduction which would be allowed if the items of income thus included in the taxable base were the sole items of income exempted from Netherlands tax under the provisions of Netherlands law for the avoidance of double taxation.'

The actions in the main proceedings and the questions referred for a preliminary ruling

15 Ferrero and Martini, which are wholly-owned subsidiaries of Ferrero International and GBE, distributed dividends to their parent companies and 'refunded' the adjustment surtax to them, Ferrero in 1997 and Martini in 1998, pursuant to Article 10(3) of the bilateral convention.

16 The Italian tax authorities levied a withholding tax of 5% on those four transfers pursuant to Article 10(2)(a)(i) of the bilateral convention. Ferrero International and GBE then each applied for a refund of the tax thus levied. Following the refusal decisions issued by the tax authorities, the applicants in the main proceedings brought proceedings before the Commissione tributaria regionale di Cuneo (Regional Tax Court, Cuneo) and the Commissione tributaria regionale di Torino, (Regional Tax Court, Turin) respectively. As the last instance hearing the cases in the main proceedings, the Corte suprema di cassazione (Supreme Court of Cassation) held, first, that such a withholding tax on dividends was compatible with the Directive and, secondly and conversely, that the same could not be said of the application of such a withholding tax to the refund of the adjustment surtax. That court then referred both cases back to the Commissione tributaria regionale di Torino.

17 In that context, the Commissione tributaria regionale di Torino decided, in Case C-338/08, to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the withholding tax applicable to the [adjustment surtax] constitute withholding tax on profits prohibited by Article 5(1) of [the Directive] (in the case in point the subsidiary had opted for the agreement-based regime)?

2. As a subordinate point, in the case of an affirmative answer to the first question, does the safeguard clause referred to in Article 7(2) of the Directive apply?'

18 The Commissione tributaria regionale di Torino also decided, in Case C-339/08, to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the withholding tax levied on the [adjustment surtax] constitute withholding tax on profits prohibited under Article 5(1) of [the Directive]?

2. Does the safeguard clause referred to in Article 7(2) of [that] Directive apply? In particular must Article 7(2) of [the Directive] be interpreted as meaning that a Member State may decide not to apply the exemption referred to in Article 5(1) of the Directive where the State of residence of the parent company grants the latter a tax credit by virtue of a bilateral convention?'

19 By order of the President of the Court of 16 September 2008, Cases C-338/08 and C-339/08 were joined for the purposes of the written and oral procedure and judgment.

The questions referred for a preliminary ruling

20 It should be noted, as a preliminary point, that the wording of the questions referred for a preliminary ruling states explicitly that they concern solely the compatibility with European Union law of the 5% withholding tax levied by the Italian authorities, pursuant to the bilateral convention, on the refund of the adjustment surtax made by the Italian companies to their Netherlands parent companies.

21 The questions accordingly do not concern the compatibility with European Union law of the withholding tax levied on the dividends paid by the Italian companies to their Netherlands parent companies, nor, *a fortiori*, the compatibility with European Union law of the tax scheme applied to those dividends as provided for by the national law at issue in the main proceedings.

The first question

22 By its first question, the referring court essentially asks the Court to state whether the 5% withholding tax levied by the Italian tax authorities, pursuant to Article 10(2)(a)(i) of the bilateral convention, on the refund of the adjustment surtax made by the Italian companies to their Netherlands parent companies, pursuant to Article 10(3) of that convention, is a withholding tax prohibited by Article 5(1) of the Directive.

23 It should be borne in mind at the outset that it is clear from, inter alia, the third recital in the preamble to the Directive that the aim of the latter is to eliminate, through the introduction of a common tax system, any disadvantage to cooperation between companies in different Member States as compared with cooperation between companies within the same Member State and thereby facilitate the grouping together of companies at Community level. Thus, in order to avoid double taxation, Article 5(1) of the Directive provides for exemption from withholding tax in the Member State of the subsidiary when profits are distributed to the parent company, where the parent company holds a minimum of 25% of the capital of the subsidiary (see, to that effect, Case C-58/01 *Océ van der Grinten* [2003] ECR I-9809, paragraph 45 and case-law cited).

24 In the cases in the main proceedings, it is not disputed that the Netherlands companies in question, that is, Ferrero International and GBE, have the status of parent companies of Ferrero and Martini, respectively, within the meaning of Article 3(1) of the Directive.

25 The term 'withholding tax' in Article 5(1) of the Directive is not limited to certain specific types of national taxation (see *Océ van der Grinten*, paragraph 46). Moreover, the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law (see *Océ van der Grinten*, paragraph 46).

26 In that regard, it is settled case-law that any tax on income received in the State in which dividends are distributed is a withholding tax on distributed profits for the purposes of Article 5(1) of the Directive where the chargeable event for the tax is the payment of dividends or of any other income from shares, the taxable amount is the income from those shares and the taxable person is the holder of the shares (see, inter alia, *Océ van der Grinten*, paragraph 47, and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 52).

27 In order to ascertain whether the second condition laid down in the case-law, relating to the taxable amount in question, is fulfilled, it is necessary to determine whether the basis for taxation in the main proceedings, that is, the refund of the adjustment surtax which gave rise to the application of a rate of 5%, may be regarded as a distribution of profits. In that regard, the fact that the bilateral convention specifically categorises the refund of the adjustment surtax as 'dividends' in Article 10(5) is not decisive for how it is to be classified under European Union law.

28 That question does, however, prompt some preliminary consideration of how the adjustment surtax itself is to be categorised.

29 On that point, the evidence in the file, including in particular the responses lodged with the Court by the Italian Republic to questions put to it, suggests that the adjustment surtax was introduced by the Italian legislature in order to avoid a situation in which the company receiving a dividend distribution obtains, at the time of that distribution, a tax credit for a tax which, for whatever reason, was not paid by the company making the distribution.

30 That mechanism thus results in the taxation of those profits of the company making the distribution which have not been previously taxed or on which that company has paid only limited tax.

31 Subject to the national court's scrutiny of those different aspects, the adjustment surtax thus amounts to an additional tax charged to the company making the distribution, intended to avoid, at the time dividends are distributed to an Italian company, a situation in which the recipient company can benefit from a tax credit for tax which the company making the distribution has not paid.

32 It should be noted that that tax is charged without distinction, whether the profits distributed are paid to companies resident in Italy or to non-resident companies, such as a Netherlands company, which do not benefit from the tax credit under Italian law.

33 In that regard, the Court has held that a system under which the taxation of profits distributed by a subsidiary resident in a Member State to its parent company is subject to the same corrective tax mechanism (intended to prevent a tax credit from being granted for tax which has not been paid) regardless of whether the parent company is resident in the same Member State or in another Member State, although – unlike a resident parent company – a non-resident parent company is not granted a tax credit by the Member State in which its subsidiary is resident, is not contrary to freedom of establishment (see, to that effect, *Burda*, paragraph 96).

34 Moreover, the adjustment surtax itself cannot be regarded as a withholding tax prohibited under Article 5(1) of the Directive, since the taxable person is not the holder of the shares but the company making the distribution (see, to that effect, *Burda*, paragraphs 55 and 56).

35 Accordingly, subject to an examination of that point to be carried out by the referring court, it is appropriate to start from the premiss that the adjustment surtax is an additional tax on corporate profits borne by the company making the distribution, which the Directive does not preclude.

36 It follows that the 'refund' of the 'amount' of that adjustment to which the Netherlands companies are entitled under Article 10(3) of the bilateral convention must be regarded as the transfer of a portion of tax revenue resulting from the waiver, by the Italian State, of definitive collection of that revenue in order to limit the economic double taxation of dividends distributed to a Netherlands company by its Italian subsidiary, as agreed by the two States party to the convention.

37 Article 10(3) of the bilateral convention, which provides that, when that financial transfer is made directly by the company making the distribution, that company may then deduct the tax amount owing to the Italian tax authorities, also supports that view. The setting off by the company making the distribution of the amount transferred to its parent company against the tax owing to the Italian tax authorities can, in the light of the very scheme of the adjustment surtax, be explained only by the fiscal nature of that surtax and therefore of the entitlement to the refund attached to it by the bilateral convention.

38 It is nevertheless for the referring court to assess those different aspects and to ascertain, in particular, whether the Italian tax authorities in practice waive, as a matter of course, the tax revenue from the adjustment surtax in the event of a dividend distribution by an Italian company to a Netherlands company, including where the adjustment surtax is not collected by those tax authorities but the amounts corresponding to that surtax are transferred directly by the Italian company to the Netherlands

company. If there were found to be such a waiver, that transfer, when carried out, could be regarded as a distribution of profits.

39 In that case, the condition relating to the taxable amount, referred to in paragraph 26 of this judgment and examined in relation to the categorisation of a withholding tax on distributed profits within the meaning of Article 5(1) of the Directive, would then have to be regarded as fulfilled. Since the two other conditions for classification of a tax measure as a withholding tax, also referred to in that paragraph, relating to the chargeable event for the tax being examined and to the determination of the taxable person, are also fulfilled in respect of a withholding tax such as that at issue in the main proceedings, the conclusion would be that such a withholding tax is a withholding tax on profits within the meaning of Article 5(1) of the Directive.

40 Subject to those various reservations, it is found that the refund of the adjustment surtax at issue in the cases in the main proceedings is equivalent to a transfer of tax revenue from the Italian authorities to a Netherlands company and that, consequently, it cannot be considered to be income from shares (see, by analogy, *Océ van der Grinten*, paragraph 56).

41 In that case, the taxable amount for a withholding tax such as that at issue in the cases in the main proceedings does not consist in income from shares and that finding is sufficient for the Court to hold that, in so far as it applies to the refund of the adjustment surtax, that withholding tax is not a withholding tax on distributed profits as generally prohibited under Article 5(1) of the Directive.

42 In the light of the foregoing, the answer to the first question is that, subject, inter alia, to determination by the referring court, as specified in paragraph 38 of this judgment, of the nature of the 'refund' of the 'adjustment surtax' at issue in the cases before it, made by an Italian company to a Netherlands company, pursuant to Article 10(3) of the bilateral convention, in so far as it applies to that refund, a withholding tax such as that at issue in the cases in the main proceedings is not a withholding tax on distributed profits generally prohibited by Article 5(1) of the Directive. However, if the referring court were to find that the 'refund' of the 'adjustment surtax' is not fiscal in nature, a withholding tax such as that at issue in the cases before it would be a withholding tax on distributed profits which is, as a rule, prohibited by Article 5(1) of the Directive.

The second question

43 By its second question, the referring court asks the Court to state whether, in the event that a withholding tax such as that at issue in the main proceedings is a withholding tax on distributed profits within the meaning of Article 5(1) of the Directive, it could nevertheless come within the scope of Article 7(2) of that directive.

44 Should the referring court, in its assessment of the nature of the refund of the adjustment surtax carried out, inter alia, as specified in paragraph 38 of this judgment, reach the conclusion that the withholding tax at issue is a withholding tax on distributed

profits within the meaning of Article 5(1) of the Directive, it must then be determined whether it comes within the scope of Article 7(2) of that directive.

45 In that regard, it should first be borne in mind that, since it is a derogation from the general principle prohibiting withholding taxes on distributed profits laid down in Article 5(1) of Directive 90/435, Article 7(2) of that directive is to be interpreted strictly (see *Océ van der Grinten*, paragraph 86).

46 Next, although, as can be seen from its title, the bilateral convention pursues the objective of preventing double taxation in the area of tax charged on income and capital, the withholding tax at issue in the cases in the main proceedings could be regarded as within the scope of Article 7(2) of the Directive only if, first, the bilateral convention contained provisions intended to eliminate or mitigate the economic double taxation of dividends and, secondly, the charging of that withholding tax was not such as to cancel out the effects thereof (see, inter alia, on the latter condition, *Océ van der Grinten*, paragraph 87), a matter which it would be for the referring court to assess.

47 In those circumstances, the answer to the second question is that, if the referring court were to regard the withholding tax at issue in the cases before it as a withholding tax on distributed profits within the meaning of Article 5(1) of the Directive, that withholding tax could be held to come within the scope of Article 7(2) of the Directive only if, first, that convention contained provisions intended to eliminate or mitigate the economic double taxation of dividends and, secondly, the charging of that withholding tax did not cancel out the effects thereof, a matter which it would be for the referring court to assess.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. Subject, inter alia, to determination by the referring court, as specified in paragraph 38 of this judgment, of the nature of the 'refund' of the 'adjustment surtax' at issue in the cases before it, made by an Italian company to a Netherlands company, pursuant to Article 10(3) of the Convention for the avoidance of double taxation with respect to taxes on income and on capital and for prevention of fiscal evasion (with protocol), signed at The Hague on 8 May 1990, in so far as it applies to that refund, a withholding tax such as that at issue in the cases in the main proceedings is not a withholding tax on distributed profits generally prohibited by Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, in the version thereof in force at the material time. However, if the referring court were to find that the 'refund' of the 'adjustment surtax' is not fiscal in nature, a withholding tax such as that at issue in the cases before it would be a withholding tax on distributed profits which is, as a rule, prohibited by Article 5(1) of Directive 90/435.

2. If the referring court were to regard the withholding tax at issue in the cases before it as a withholding tax on distributed profits within the meaning of Article 5(1) of Directive 90/435, that withholding tax could be held to come within the scope of Article 7(2) of that directive only if, first, that convention contained provisions intended to eliminate or mitigate the economic double taxation of dividends and, secondly, the charging of that withholding tax did not cancel out the effects thereof, a matter which it would be for the referring court to assess.

[Signatures]