Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

2 April 2020*

(Reference for a preliminary ruling – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Directive 2011/96/EU – Article 2(a)(i) and (iii) and Annex I, Part A (ab), and Part B, last indent – Definition of 'Companies incorporated under the law of the United Kingdom' and 'corporation tax in the United Kingdom' – Companies registered in Gibraltar and subject to corporation tax there)

In Case C-458/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria), made by decision of 5 July 2018, received at the Court on 12 July 2018, in the proceedings

GVC Services (Bulgaria) EOOD

v

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič (Rapporteur) and C. Lycourgos, Judges,

Advocate General: G. Hogan,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 September 2019,

after considering the observations submitted on behalf of:

– GVC Services (Bulgaria) EOOD, by D. Yordanov, advokat, and D. Tench, V. Nagrani, P. Montegriffo, G. Jackson and E. Sheard, Solicitors,

– the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia, by N. Kalistratov and S. Atanasova, acting as Agents,

– the Bulgarian Government, by L. Zaharieva and E. Petranova, acting as Agents,

– the Danish Government, by J. Nymann-Lindegren, M. S. Wolff and P. Z. L. Ngo, acting as Agents,

* Language of the case: Bulgarian.

– the United Kingdom Government, by F. Shibli, acting as Agent, and D. Yates and L. Ruxandu, Barristers,

– the European Commission, by A. Armenia and Y. Marinover, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 October 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(a)(i) and (iii) of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8), and Part A(ab), and the last indent of Part B, of Annex I thereto.

2 The request has been made in proceedings between GVC Services (Bulgaria) EOOD, a company established in Bulgaria ('GVC') and the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia (Director of the 'Tax and Social Security Appeals and Practice' Directorate of Sofia, Bulgaria) ('the director'), concerning a tax adjustment notice recording tax debts in respect of dividends distributed and paid by GVC to its parent company PGB Limited – Gibraltar, established in Gibraltar, for the period from 13 July 2011 to 21 April 2016.

Legal background

European Union law

The status of Gibraltar

3 It should be noted by way of a preliminary remark that, as the proceedings before the referring court relate to tax debts due in respect of a period prior to 1 February 2020, it is not necessary to have regard, for the purposes of the present case, to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7).

4 Gibraltar is a European territory for whose external relations a Member State, namely the United Kingdom of Great Britain and Northern Ireland, is responsible within the meaning of Article 355(3) TFEU, and to which the provisions of the Treaties apply.

5 The Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14) ('the 1972 Act of Accession') provides, however, that certain parts of the Treaty are not to apply to Gibraltar.

6 Article 28 of the 1972 Act of Accession provides as follows:

'Acts of the institutions of the [European Union] relating to the products in Annex [I to the Treaty on the Functioning of the European Union] and the products subject, on importation into the [European Union], to specific rules as a result of the implementation of the common agricultural policy, as well as

the acts on the harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar unless the [Council of the European Union], acting unanimously on a proposal from the [European Commission], provides otherwise.'

7 Under Article 29 of the 1972 Act of Accession, in conjunction with Annex I, Section I, point 4, thereto, Gibraltar does not form part of EU customs territory.

Directive 2011/96

8 Recitals 3 to 6 and 8 of Directive 2011/96 state:

'(3) The objective of this Directive is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.

(4) The grouping together of companies of different Member States may be necessary in order to create within the Union conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market. Such operations should not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is therefore necessary, with respect to such grouping together of companies of different Member States, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.

(5) Such grouping together may result in the formation of groups of parent companies and subsidiaries.

(6) Before the entry into force 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 (OJ 1990 L 225, p. 6)], the tax provisions governing the relations between parent companies and subsidiaries of different Member States varied appreciably from one Member State to another and were generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State. Cooperation between companies of different Member States was thereby disadvantaged in comparison with cooperation between companies of the same Member State. It was necessary to eliminate that disadvantage by the introduction of a common system in order to facilitate the grouping together of companies at Union level.

…

(8) It is furthermore necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax.'

9 Article 1(1) of Directive 2011/96 provides:

'Each Member State shall apply this Directive:

(a) to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;

(b) to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries;

…’

10 Article 2(a) of the directive provides that:

‘For the purposes of this Directive the following definitions shall apply:

(a) “company of a Member State” means any company which:
(i) takes one of the forms listed in Annex I, Part A;
(ii) according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Union;
(iii) moreover, is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes.’

11 Article 5 the directive provides that ‘profits which a subsidiary distributes to its parent company shall be exempt from withholding tax’.

12 Part A of Annex I to the directive contains the list of companies referred to in Article 2(a)(i) of the directive, which includes, in paragraph (ab), ‘companies incorporated under the law of the United Kingdom’.

13 Part B of Annex I contains the list of taxes referred to in Article 2(a)(iii) of the directive, which includes, in the last indent, ‘corporation tax in the United Kingdom’.

Bulgarian law

14 Under Article 194(1) and (3) of the Zakon za korporativnoto podohodno oblagane (Law on corporation tax) (DV No 105 of 22 December 2006),

‘(1) Dividends and liquidation proceeds which are distributed (personified) by domestic legal persons to the following persons shall be subject to withholding tax:

1. foreign legal persons …

…

(3) Paragraph (1) shall not apply where the dividends and liquidation proceeds are distributed to the following persons or institutions:

…

3. … a foreign legal person which is resident for tax purposes in a Member State of [the European Union] or in another Contracting State of the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3)], with the exception of cases of hidden distribution of profits.’

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

15 GVC is a single-member limited company governed by Bulgarian law, which supplies information technology services. Until 1 February 2016, its share capital was wholly owned by PGB Limited – Gibraltar, a company incorporated in Gibraltar.

16 During the period from 13 July 2011 to 21 April 2016, GVC allotted dividends to its parent company, PGB Limited – Gibraltar, and paid them out without withholding or paying over tax in Bulgaria because it was of the opinion that the parent company could be regarded as a foreign legal person which was resident for tax purposes in a Member State of the European Union in accordance with Article 194(3) of the Law on corporation tax.

17 However, the competent Bulgarian tax authority took the view that withholding tax should have been applied to the dividends distributed and issued a tax assessment notice on 1 December 2017, seeking to recover a total of 930 529.54 Bulgarian lev (BGN) (approximately EUR 476 000), of which BGN 669 690.32 (approximately EUR 342 000) was for the principal amount and BGN 260 839.22 (approximately EUR 134 000) for default interest. GVC challenged the notice by bringing an administrative appeal before the director, who confirmed the assessment. GVC brought the matter before the referring court by way of an action for annulment of the notice.

18 GVC maintains that EU law is applicable to Gibraltar, which is a European territory for whose external relations a Member State is responsible within the meaning of Article 355(3) TFEU, and that the distribution of dividends falls outside the exclusion provisions laid down in Articles 28 to 30 of the 1972 Act of Accession. In that regard, the applicant takes the view that its parent company satisfies the requirements of Article 2 of Directive 2011/96, in that it can be equated with a company incorporated in the United Kingdom, and is subject to corporation tax in Gibraltar – which, it argues, can be equated with 'corporation tax in the United Kingdom', as referred to in the last indent of Part B of Annex I to the directive.

19 On the other hand, the director submits that Annex I to Directive 2011/96 contains an explicit and exhaustive list both of the companies (Part A) and of the taxes (Part B) within its scope. The director submits that the directive contains an exhaustive definition of its scope, and hence that this cannot be extended so as to include companies incorporated in Gibraltar and subject to corporation tax there, bearing in mind that tax rules are not to be interpreted loosely.

20 The Administrativen sad Sofia-grad (Administrative Court, Sofia, Bulgaria), considering that there is some doubt as to whether GVC, as a subsidiary of a parent company registered and subject to corporation tax in Gibraltar, fell within the scope of Directive 2011/96, and whether it is consequently to be exempted from Bulgarian withholding tax, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 2(a)(i) of, in conjunction with Part A(ab) of Annex I to, Directive [2011/96] be interpreted as meaning that the expression "companies incorporated under the law of the United Kingdom" also covers companies incorporated in Gibraltar?

(2) Should Article 2(a)(iii) of [Directive 2011/96], in conjunction with [the last indent of] Part B of Annex I to [that directive,] be interpreted as meaning that the expression "corporation tax in the United Kingdom" also covers the corporation tax that has to be paid in Gibraltar?'

Admissibility of the request for a preliminary ruling

21 While it does not raise a formal objection of inadmissibility, the Government of the United Kingdom states in its written observations that it does not appear to be necessary to answer the questions referred in order to resolve the dispute in the main proceedings.

22 As regards the status of Gibraltar in EU law, as confirmed by the Court, it submits that PGB Limited – Gibraltar, being a company established in Gibraltar, meets the requirement in Article 194(3) of the Law on corporation tax, namely that of being a foreign legal person which is resident for tax purposes in a Member State of the European Union. The Government of the United Kingdom therefore submits that there is no need for a ruling on the interpretation of Directive 2011/96.

23 In that regard, it should be noted that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 30 January 2020, *I.G.I.*, C-394/18, EU:C:2020:56, paragraph 56 and the case-law cited).

24 In the present case, as the Government of the United Kingdom has itself expressly stated, the provisions of national law at issue in the main proceedings are measures transposing Directive 2011/96.

25 Furthermore, as is apparent from the order for reference, in order to resolve the dispute in the main proceedings, the referring court must establish whether PGB Limited – Gibraltar, as a company incorporated in Gibraltar, falls within the scope of Directive 2011/96, so as to justify GVC, as a subsidiary of that company, being exempt from Bulgarian withholding tax under Article 5 of that directive.

26 In those circumstances, there is no room for the view that the interpretation of Directive 2011/96 requested by the referring court in this case bears no relation to the actual facts of the main action or its purpose, or that problem is hypothetical, as the interpretation sought is necessary for the purposes of resolving the dispute.

27 The request for a preliminary ruling is therefore admissible.

Consideration of the questions referred

28 By its questions, which it is appropriate to consider together, the referring court essentially asks whether Article 2(a)(i) and (iii) of Directive 2011/96, read in conjunction with paragraph (ab) of Part A, and the last indent of Part B, of Annex I to that directive, are to be interpreted as meaning that the expressions ‘companies incorporated under the law of the United Kingdom’ and ‘corporation tax in the United Kingdom’, which appear in those provisions, include companies incorporated in Gibraltar and subject to corporation tax there.

29 As a preliminary point, it should be noted that the period relevant to the main proceedings is covered by both Directive 90/435, as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) (‘Directive 90/435’) and by Directive 2011/96, which repealed and replaced the former directive. As the relevant provisions remained unchanged, however, it suffices for the purposes of the present case to answer the national court’s questions by reference to the relevant provisions of Directive 2011/96 alone.

30 Since, during the period relevant to the main proceedings, Gibraltar was a European territory for whose external relations a Member State, namely the United Kingdom, was responsible, EU law was, in principle, applicable in that territory pursuant to Article 355(3) TFEU, subject to the express exemptions set out in the 1972 Act of Accession (judgment of 23 September 2003, *Commission* v

United Kingdom, C-30/01, EU:C:2003:489, paragraph 47; order of 12 October 2017, *Fisher*, C-192/16, EU:C:2017:762, paragraph 29; and judgment of 23 January 2018, *Buhagiar and Others*, C-267/16, EU:C:2018:26, paragraph 31 and the case-law cited).

31 As regards Directive 2011/96, it should be noted that that directive was adopted on the basis of Article 115 TFEU, under which the Council has power to issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. In accordance with recitals 3 to 6 of that directive, its objective is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company, in order to facilitate the grouping together of companies at EU level (see, to that effect, in relation to Directive 90/435, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraphs 35 and 36 and the case-law cited).

32 As the Advocate General has observed in point 30 of his Opinion, it is common ground that Directive 2011/96 does not fall under any of the exemptions provided for in Articles 28 and 29 of the 1972 Act of Accession.

33 That being so, in order to determine whether parent companies incorporated in Gibraltar, and subject to corporation tax in Gibraltar, can claim the exemption from withholding tax on profits distributed by their subsidiaries established in Member States provided for in Article 5 of Directive 2011/96, it is necessary to have regard to those provisions of that directive which delineate its substantive scope, namely the cumulative conditions laid down in Article 2(a) of Directive 2011/96, read in conjunction with paragraph (ab) of Part A, and the last indent of Part B, of Annex I to that directive.

34 In that regard, it should be observed, first, that since – as stated in paragraph 29 above – those provisions have essentially the same effect as those of Directive 90/435, the Court's case-law on the second of those directives is equally applicable to the first (order of 14 June 2018, *GS*, C-440/17, not published, EU:C:2018:437, paragraph 30). The Court has held that Directive 90/435 does not seek to introduce a common system for all companies of the Member States nor for all types of holdings (judgments of 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 49, and 1 October 2009, *Gaz de France – Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 36).

35 It follows, as the Advocate General observed in point 36 of his Opinion, that for reasons of legal certainty there is no possibility of extending the scope of Directive 2011/96 by analogy to other forms of companies other than those listed in Part A of Annex I to the directive, given that the substantive scope of that directive is defined by an exhaustive list of companies.

36 Secondly, it should be emphasised that it is apparent from the wording of Article 2(a) of Directive 2011/96, read in conjunction with paragraph (ab) of Part A, and the last indent of Part B, of Annex I to the directive, that, as regards the United Kingdom, Directive 2011/96 applies only to 'companies incorporated under the law of the United Kingdom' and subject to 'corporation tax in the United Kingdom'.

37 Those provisions contain an express reference to the law of the United Kingdom. They must therefore be interpreted in accordance with the national law designated as applicable (see, to that effect, judgment of 22 November 2012, *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 50).

38 It should be noted that, in its written observations, the Government of the United Kingdom has stated that, under the domestic law of that Member State, companies incorporated under its national law can only be companies which are regarded as incorporated in the United Kingdom, and that these do not include companies incorporated in Gibraltar. This has not been formally disputed by the other parties to the proceedings before the Court.

39 The Government of the United Kingdom also stated, and again this has not been disputed, that under the domestic law of the United Kingdom, the tax paid in Gibraltar does not constitute 'corporation tax in the United Kingdom'.

40 It follows, in the light of the documents before the Court, that companies incorporated in Gibraltar do not meet the applicability condition laid down in Article 2(a)(i) of Directive 2011/96, read in conjunction with paragraph (ab) of Part A of Annex I to that directive, and that the tax regime established by Gibraltar does not meet the applicability condition laid down in Article 2(a)(iii) of that directive, read in conjunction with the last indent of Part B of Annex I thereto.

41 The foregoing considerations are without prejudice to the obligation to have due regard for Articles 49 and 63 TFEU, as at the date of the facts of the main proceedings, and to determine, if necessary, whether the taxation of profits distributed by a Bulgarian subsidiary to a parent company established in Gibraltar constitutes a restriction on freedom of establishment or on the right to free movement of capital enjoyed by a company incorporated in Gibraltar (order of 12 October 2017, *Fisher*, C-192/16, EU:C:2017:762, paragraphs 26 and 27), and if so, whether such a restriction is justified.

42 In the light of all the foregoing, the answer to the questions referred is that Article 2(a)(i) and (iii) of Directive 2011/96, read in conjunction with paragraph (ab) of Part A, and the last indent of Part B, of Annex I to that directive, are to be interpreted as meaning that the expressions 'companies incorporated under the law of the United Kingdom' and 'corporation tax in the United Kingdom', which appear in those provisions, do not include companies incorporated in Gibraltar and subject to corporation tax there.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules that:

Article 2(a)(i) and (iii) of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, read in conjunction with paragraph (ab) of Part A, and the last indent of Part B, of Annex I to that directive are to be interpreted as meaning that the expressions 'companies incorporated under the law of the United Kingdom' and 'corporation tax in the United Kingdom', which appear in those provisions, do not include companies incorporated in Gibraltar and subject to corporation tax there.

[Signatures]