JUDGMENT OF THE COURT (Third Chamber)

21 July 2011 *

In Case C-397/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 27 May 2009, received at the Court on 14 October 2009, in the proceedings

Scheuten Solar Technology GmbH

v

Finanzamt Gelsenkirchen-Süd,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta (Rapporteur), E. Juhász and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: E. Sharpston,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 16 September 2010,

after considering the observations submitted on behalf of:

— Scheuten Solar Technology GmbH, by K. von Brocke, Rechtsanwalt, and A. Küntscher, Steuerberaterin,

— Finanzamt Gelsenkirchen-Süd, by R. Rasche, acting as Agent,

— the German Government, by J. Möller and C. Blaschke, acting as Agents,

— the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

— the Danish Government, by V. Pasternak Jørgensen and C. Vang, acting as Agents,

— the Estonian Government, by M. Linntam, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes, acting as Agent,

— the Swedish Government, by A. Falk and S. Johannesson, acting as Agents,

— the United Kingdom Government, by L. Seeboruth, acting as Agent,

— the European Commission, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1 of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

2 The reference has been made in proceedings between Scheuten Solar Technology GmbH ('SST') and Finanzamt Gelsenkirchen-Süd (Gelsenkirchen-Süd Tax Office, 'the Finanzamt') concerning the determination of the basis of calculation of business tax.

Legal context

European Union law

3 Article 1 of Directive 2003/49 provides:

'1. Interest or royalty payments arising in a Member State shall be exempt from any taxes imposed on those payments in that State, whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State.

2. A payment made by a company of a Member State or by a permanent establishment situated in another Member State shall be deemed to arise in that Member State, hereafter referred to as the "source State".

…

4. A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

…

7. This Article shall apply only if the company which is the payer, or the company whose permanent establishment is treated as the payer, of interest or royalties is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties.

…

10. A Member State shall have the option of not applying this Directive to a company of another Member State or to a permanent establishment of a company of another Member State in circumstances where the conditions set out in Article 3(b) have not been maintained for an uninterrupted period of at least two years.

…'

4 Article 2 of that directive provides:

'For the purposes of this Directive:

(a) the term "interest" means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;

…'

5 Article 3(b) of that directive provides:

‘For the purposes of this Directive:

…

(b) a company is an “associated company” of a second company if, at least:

(i) the first company has a direct minimum holding of 25 % in the capital of the second company, or

(ii) the second company has a direct minimum holding of 25 % in the capital of the first company, or

(iii) a third company has a direct minimum holding of 25 % both in the capital of the first company and in the capital of the second company.

Holdings must involve only companies resident in Community territory.

…’

6 Article 4 of the directive reads as follows:

‘1. The source State shall not be obliged to ensure the benefits of this Directive in the following cases:

(a) payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State;

…

2. Where, by reason of a special relationship between the payer and the beneficial owner of interest or royalties, or between one of them and some other person, the amount of the interest or royalties exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Directive shall apply only to the latter amount, if any.’

National law

7 Under Paragraph 2 of the Law on business tax of 2002 (Gewerbesteuergesetz 2002, BGBl. 2002 I, p. 4167), in the material version for the main proceedings (‘the Law on business tax’), all business operations, in addition to income or corporation tax, are subject to business tax if they are carried on in national territory.

8 Paragraph 2(1) and (2) read as follows:

'1. Every fixed business operation is subject to business tax if it is operated in Germany. Business operation means a commercial undertaking within the meaning of the Law on income tax. A business operation is operated in Germany if a place of business is maintained for it in Germany or on board a merchant ship registered in a German register of shipping.

2. The activity of capital companies (in particular share companies, partnerships limited by shares, limited liability companies) … is always regarded in its entirety as a business operation. …'

9 Under Paragraph 6 of that law, the basis of assessment of business tax is the business profit of the taxpayer.

10 Business profit is defined as follows in Paragraph 7(1) of the law:

'Business profit is the profit, to be ascertained in accordance with the provisions of the Law on income tax or the Law on corporation tax, from the business operation … increased and reduced by the amounts indicated in Paragraphs 8 and 9.'

11 Paragraph 8 of the law, 'Additions', states:

'The following amounts are added back to the profit from the business operation (Paragraph 7) if they have been deducted when ascertaining the profit:

1. Half of the payments for debts which are connected economically with the foundation or acquisition of the operation (or part operation) or a share in the operation or with the expansion or improvement of the operation or serve the non-temporary increase of operating capital.'

12 Paragraph 10a of the law provides that, to determine the basis of assessment of business tax, losses are to be deducted from the profit calculated in accordance with Paragraph 8 of the law.

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

13 SST is a limited liability company incorporated under German law and established in Gelsenkirchen. It is wholly owned by Scheuten Solar Systems BV, a Netherlands limited liability company established in Venlo (Netherlands).

14 From 27 August 2003 to 1 December 2004, under a number of successive contracts, SST obtained loans from its parent company amounting in total to EUR 5 180 000. For those loans SST in 2004 paid its parent company EUR 154 584 as interest. That amount was deducted by SST from its profit, as operating expenditure.

15 The Finanzamt, in its decision assessing the basis of calculation of business tax for 2004, taken pursuant to Paragraph 8(1) of the Law on business tax, found, however, that SST was entitled to deduct from its profit only 50 % of that interest, so that half of the sum of EUR 154 584 was added to SST's business profit.

16 SST brought proceedings against the Finanzamt's decision, arguing that the addition of half the interest constituted taxation contrary to Article 1(1) of Directive 2003/49.

17 By judgment of 22 February 2008, the Finanzgericht Münster (Finance Court, Münster) dismissed the action.

18 SST thereupon appealed on a point of law to the Bundesfinanzhof (Federal Finance Court).

19 The Bundesfinanzhof, raising the question of the compatibility of the relevant provisions of national law with Directive 2003/49, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 1(1) of [Directive 2003/49] preclude a provision under which loan interest paid by a company of one Member State to an associated company of another Member State is added to the basis of assessment to business tax for the first company?

(2) If so, is Article 1(10) of Directive 2003/49 to be interpreted as meaning that a Member State has the option of not applying the directive where the conditions set out in Article 3(b) in relation to the existence of an associated company have not yet been maintained for an uninterrupted period of at least two years at the time of payment of the interest?

Can the Member States rely, in respect of the paying company, directly on Article 1(10) of Directive 2003/49 in those circumstances?'

Consideration of the questions referred

Question 1

20 By this question the referring court asks essentially whether Article 1(1) of Directive 2003/49 must be interpreted as precluding a provision of national tax law under which loan interest paid by a company established in one Member State to an associated company in another Member State is incorporated into the basis of assessment of the business tax payable by the former company.

21 The Court begins by noting that, in the case at issue in the main proceedings, SST was charged business tax on its business profit. In determining the basis of assessment of that tax, the Finanzamt, in accordance with the national legislation at issue in the

main proceedings, added to SST's profit half the interest paid by that company to its parent company in the Netherlands.

22 According to SST, that effectively constitutes an imposition of tax, so that the national legislation at issue in the main proceedings leads to economic double taxation of the interest that is not compatible with Article 1(1) of Directive 2003/49. By contrast, the other parties which have submitted observations to the Court all consider that that legislation does not fall within the scope of that provision, and consequently propose that the question should be answered in the negative.

23 In those circumstances, the Court must determine the scope of that provision.

24 Recitals 2 to 4 in the preamble to Directive 2003/49 state that the aim of the directive is that double taxation should be eliminated with respect to interest and royalty payments between associated companies of different Member States, and that such payments should be subject to tax once in a single Member State. According to those recitals, the abolition of all taxation of those payments in the Member State where they arise is the most appropriate means of ensuring equality of tax treatment as between national and cross-border transactions.

25 The scope of Directive 2003/49, as defined in Article 1(1) of the directive, thus concerns the exemption of interest and royalty payments arising in their source Member State, provided that the beneficial owner is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State.

26 The rule laid down in that provision seeks to ensure that the beneficial owner of the interest and royalties arising in a Member State other than that in which it is established is exempted from all taxation in the source State of those payments. The wording of Article 1(1) of Directive 2003/49, with its use of the subordinate conjunction 'provided that', sets up a link between the payment of such interest and royalties in one Member State and the receipt of those payments by the beneficial owner in another Member State.

27 In this respect, Article 2(a) of Directive 2003/49 defines that interest as 'income from debt-claims of every kind'. Only the actual beneficial owner can receive interest which constitutes income from such claims.

28 It follows that Article 1(1) of Directive 2003/49, read in the light of recitals 2 to 4 in the preamble to the directive, aims to avoid legal double taxation of cross-border payments of interest by prohibiting the taxation of interest in the source Member State to the detriment of the actual beneficial owner. That provision thus concerns solely the tax position of the interest creditor.

29 It should be added that that interpretation of Article 1(1) of Directive 2003/49 is borne out by Article 1(10), which authorises the Member States, on certain conditions, not to grant the exemption provided for in Article 1(1). The entities to which Article 1(10) of the directive is capable of applying are identified there as a 'company of another Member State or … a permanent establishment of a company of another Member State'. There is no reference in that provision to the payer of the interest. It therefore follows from that derogation that it is the beneficial owner of the interest or royalties in another Member State which is concerned by the derogation, not the entity which owes the interest or royalties.

30 National legislation such as that at issue in the main proceedings does not lead to a reduction of the creditor's income. It does not subject the interest paid to any taxation in the hands of the beneficial owner of the interest. The legislation at issue relates only to the determination of the basis of assessment of the business tax to be paid in this case by the debtor of the interest.

31 It must be pointed out here that the method of calculating the basis of assessment of the payer of the interest and the elements to be taken into account for that purpose, such as the taking of certain expenditure into consideration when performing that calculation, are not the subject of Article 1(1) of Directive 2003/49.

32 As regards the national legislation at issue in the main proceedings, the particular features of the business tax at issue are that the business profit is first determined in accordance with the Law on income tax and the Law on corporation tax, and that certain amounts are then added or deducted. The additions relate only to amounts which were deducted in the first stage of the calculation.

33 The provisions of national law on the basis of assessment of the payer of the interest, such as the rules on the deductibility of certain expenditure and the nature of that expenditure, follow particular legislative policies which form part of the fiscal policy of each Member State.

34 So, in the absence of a provision governing the rules for calculating the basis of assessment of the payer of interest, the scope of Article 1(1) of Directive 2003/49 cannot extend beyond the exemption it lays down.

35 Finally, as to the possible relevance of the Court's case-law on 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), it suffices to note that, as the Advocate General observes in points 45 to 49 of her Opinion, there is nothing in the judgments in Case C-294/99 *Athinaiki Zithopiia* [2001] ECR I-6797 and Case C-284/06 *Burda* [2008] ECR I-4571 that could be of assistance in the interpretation of Article 1(1) of Directive 2003/49 in relation to national legislation such as that at issue in the main proceedings. In those cases, it was the distribution of profits by a subsidiary to its parent company that was the event that gave rise to the tax in question. By contrast, the payments of interest at issue in the main proceedings do not constitute chargeable events for tax. The provisions of national law at issue in the main proceedings concern only the deductibility of such payments as expenditure for the purpose of calculating the basis of assessment of business tax.

36 It follows from all the foregoing that the answer to Question 1 is that Article 1(1) of Directive 2003/49 must be interpreted as not precluding a provision of national tax law under which loan interest paid by a company established in one Member State to an associated company in another Member State is incorporated into the basis of assessment of the business tax payable by the former company.

Question 2

37 In view of the answer to Question 1, there is no need to answer Question 2.

Costs

38 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 (Third Chamber) hereby rules:

Article 1(1) of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States must be interpreted as not precluding a provision of national tax law under which loan interest paid by a company established in one Member State to an associated company in another Member State is incorporated into the basis of assessment of the business tax payable by the former company.

[Signatures]