Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 May 2017*

(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 — Prevention of double taxation — Contribution of 3% in addition to corporation tax)

In Case C-365/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 27 June 2016, received at the Court on 4 July 2016, in the proceedings

Association française des entreprises privées (AFEP),

Axa SA,

Compagnie générale des établissements Michelin SCA,

Danone SA,

ENGIE SA, formerly GDF Suez,

Eutelsat Communications SA,

LVMH Moët Hennessy-Louis Vuitton SE,

Orange SA,

Sanofi SA,

Suez Environnement Company SA,

Technip SA,

Total SA,

Vivendi SA,

Eurazeo SA,

Safran SA,

Scor SE,

* Language of the case: French.

Unibail-Rodamco SE,

Zodiac Aerospace SA

v

Ministre des Finances et des Comptes publics,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot, A. Arabadjiev and C.G. Fernlund (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Association française des entreprises privées (AFEP), Axa SA, Compagnie générale des établissements Michelin SCA, Danone SA, ENGIE SA, formerly GDF Suez, Eutelsat Communications SA, LVMH Moët Hennessy-Louis Vuitton SE, Orange SA, Sanofi SA, Suez Environnement Company SA, Technip SA, Total SA, Vivendi SA, Eurazeo SA, Safran SA, Scor SE, Unibail-Rodamco SE and Zodiac Aerospace SA, by G. Blanluet, N. de Boynes and S. Austry, avocats,

— the French Government, by M.D. Colas and S. Ghiandoni, acting as Agents,

— the Belgian Government, by C. Pochet and M. Jacobs, acting as Agents,

— the European Commission, by N. Gossement and M.W. Roels, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1)(a) and Article 5 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), as amended by Council Directive 2014/86/EU of 8 July 2014 (OJ 2014 L 219, p. 40; 'Directive 2011/96').

2 The request has been made in proceedings between the Association française des entreprises privées (AFEP) and 17 undertakings ('AFEP and Others ') and the ministre des Finances et des Comptes publics (Minister for Finance and Public Accounts, France; 'the Minister') concerning an action for annulment of an administrative doctrine concerning the contribution in addition to corporation tax to which a resident parent company is subject on the distribution of profits, including those made by its non-resident subsidiaries.

Legal context

EU law

3 According to recital 3 of Directive 2011/96, the objective of that 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 Recitals 7 and 9 of that directive state:

'(7) Where a parent company by virtue of its association with its subsidiary receives distributed profits, the Member State of the parent company must either refrain from taxing such profits, or tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits.

…

(9) The payment of profit distributions to, and their receipt by, a permanent establishment of a parent company should give rise to the same treatment as that applying between a subsidiary and its parent. This should include the situation where a parent company and its subsidiary are in the same Member State and the permanent establishment is in another Member State. On the other hand, it appears that situations where the permanent establishment and the subsidiary are situated in the same Member State can, without prejudice to the application of the Treaty principles, be dealt with on the basis of national legislation by the Member State concerned.'

5 Article 4(1) and (3) of the directive provides:

'1. Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the Member State of the parent company and the Member State of its permanent establishment shall, except when the subsidiary is liquidated, either:

(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary; or

(b) tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.

…

3. Each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company.

Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.'

6 Article 5 of Directive 2011/96 provides as follows:

'Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.'

French law

7 It is apparent from the file produced to the Court that, as regards the tax treatment of profits covered by Directive 2011/96, the French Republic has opted for a system of exemption thereof, subject to the imposition of a proportion of the costs and fees, fixed at the flat rate of 5%, representing the costs and fees borne by the parent company relating to its share-holding in the subsidiary which distributed those profits. Thus, those profits are therefore exempt up to 95%.

8 Article 235 ter ZCA of the Code général des impôts (General Tax Code) ('the CGI') states that:

> '1. French or foreign companies and bodies that are liable to corporation tax in France, not including collective investment undertakings referred to in II of Article L. 214-1 of the code monétaire et financier (Monetary and Financial Code) and those which correspond to the definition of micro, small and medium-sized undertakings given in Annex I to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty shall be liable to pay a contribution in addition to corporation tax in respect of sums which they distribute, within the meaning of Articles 109 to 117 of this code.
>
> The contribution shall be equal to 3% of the sums distributed. …
>
> …'

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

9 AFEP and Others brought an action before the Conseil d'État (Council of State, France) seeking the annulment of the administrative doctrine, in particular Paragraph 70 of Instruction BOI-IS-AUT-30-20160302 (*Bulletin officiel des finances publiques-impôts*, 2 March 2016), on the contribution in addition to corporation tax in respect of the amounts distributed ('the additional contribution') provided for in Article 235 ter ZCA of the CGI.

10 In support of that action, AFEP and Others raised a priority question on constitutionality on the basis of Article 61-1 of the Constitution. They also submit, principally, that the additional contribution runs counter, principally, to Article 4(1) of Directive 2011/96 and, in the alternative, to Article 5 of that directive.

11 The Minister argues that the pleas raised by AFEP and Others are unfounded.

12 The referring court is of the view that the interpretation of the provisions of EU law at issue is decisive for its ruling on the referral of the priority question on constitutionality to the Conseil constitutionnel (Constitutional Council (France)). First, it states that companies or bodies which have received income from holdings in subsidiaries are subject to the contribution in addition to corporation tax when they redistribute that income. Furthermore, the procedures for recovery and claims relating to the additional contribution are exactly the same as for corporation tax.

13 Nevertheless, the taxable event in relation to the additional contribution is different from that for corporation tax: the contribution applies not on the receipt of dividends but on the redistribution of those dividends by the company that has received them.

14 It also explains that the basis of assessment of the additional contribution, which includes, in particular, distributed profits derived from accrued profits, is different from that for corporation tax. In those circumstances, the question of whether the additional contribution constitutes a tax on profits contrary to Article 4(1)(a) of Directive 2011/96 presents, in the view of that court, serious difficulty.

15 Secondly, that court states that, having regard to the fact that the taxable event in relation to the additional contribution is the payment of dividends, that its basis of assessment comprises the amount of the dividends paid, that the taxpayer is the company which distributes the dividends and that there is no tax credit in favour of the shareholder, that additional contribution does not appear, in the light of the criteria set out by the Court in its judgment of 26 June 2008, *Burda* (C-284/06, EU:C:2008:365), to have the characteristics of a withholding tax. However, having regard to the judgment of 4 October 2001, *Athinaïki Zythopoiïa* (C-294/99, EU:C:2001:505), the referring court asks whether, if the additional contribution does not constitute a tax prohibited by Article 4(1)(a) of Directive 2011/96, it could be regarded as being a 'withholding tax', from which the profits distributed must be exempt under Article 5 of that directive.

16 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 4 of [Directive 2011/96], and in particular paragraph 1(a) thereof, preclude a levy such as that provided for in Article 235 ter ZCA of the CGI, which is payable on the distribution of profits by parent companies that are liable to corporation tax in France and is assessed on the basis of the sums distributed?

(2) In the event that the first question is answered in the negative, is a levy such as that provided for in Article 235 ter ZCA of the CGI to be regarded as a "withholding tax" from which, pursuant to Article 5 of the directive, profits distributed by a subsidiary must be exempt?'

The request to open the oral procedure

17 By a letter of 31 March 2017, the French Government requested that the oral procedure be opened on the ground, in essence, that there was no debate on the application to the main proceedings of the solutions proposed by Advocate General Kokott in her Opinion in the case of *X* (C-68/15, EU:C:2016:886).

18 In that regard, Article 83 of the Rules of Procedure of the Court provides that the Court may at any time, after hearing the Advocate General, order the oral part of the procedure to be reopened, in particular if it considers that it lacks sufficient information, or where a party, after the close of that part of the procedure, has submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties.

19 In the present case, the Court considers that, after hearing the Advocate General, it has all the information necessary to make a ruling. Accordingly, there is no need to reopen the oral part of the procedure.

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether Article 4(1)(a) of Directive 2011/96 must be interpreted as precluding a tax measure laid down by the Member State of a parent company, such as that at issue in the main proceedings, providing for the levy of a tax when the parent company distributes dividends and the basis of assessment of which tax is the amounts of the dividends distributed, including those coming from that company's non-resident subsidiaries.

21 It is apparent from recital 3 of Directive 2011/96 that that directive pursues the objective of eliminating double taxation of profits distributed by a subsidiary to its parent company at the level of that parent company.

22 To that effect, Article 4(1) of Directive 2011/96 leaves the Member States a choice between two systems, namely between a system of exemption and one of deduction. In fact, in accordance with recitals 7 and 9 of that directive, where a parent company by virtue of its association with its subsidiary receives profits distributed otherwise than on the liquidation of that subsidiary, the Member State of the parent company and the Member State of its permanent establishment must either refrain from taxing such profits in so far as they cannot be deducted by the subsidiary and tax them in so far as the subsidiary can deduct them, or tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary and any lower-tier subsidiary which relates to those profits (judgment of 17 May 2017, *X*, C-68/15, paragraph 71 and the case-law cited).

23 However, Article 4(3) thereof provides that each Member State is to retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. It is also clear from that provision that where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.

24 Thus, Article 4 of that directive seeks, in respect of profits distributed to a resident parent company by a non-resident subsidiary, to avoid that subsidiary being taxed thereon in its State of establishment first and the parent company then being taxed on the same profits in its State of establishment.

25 In the present case, it must be stated, first, that, as noted in paragraph 7 of this judgment, the French Republic opted for exemption up to 95% of the profits produced by a non-resident subsidiary of a resident parent company.

26 Secondly, it must be noted that, in so far as the basis of assessment of the contribution in addition to corporation tax comprises the dividends distributed by a parent company, that basis of assessment may also include the profits produced by the subsidiaries of that parent company which are established in other Member States, which results in the taxation of those profits at a rate above the 5% ceiling provided for in Article 4(3) of Directive 2011/96.

27 The question therefore arises whether such taxation of those profits runs counter to Directive 2011/96.

28 According to the French and Belgian Governments, the profits redistributed by a parent company to its shareholders are not covered by Article 4(1)(a) of Directive 2011/96, since that provision is applicable only where a parent company receives profits distributed by its subsidiary.

29 That interpretation cannot be accepted.

30 As is apparent from the judgment of 17 May 2017, *X* (C-68/15, paragraph 78), it must be noted that that interpretation does not follow either from the wording of that provision or from the context or aims thereof.

31 The Court has stated in paragraphs 79 and 80 of the judgment in *X*, first, that, by providing that the Member State of the parent company and the Member State of the permanent establishment are to 'refrain from taxing such profits', that provision prohibits the Member States from taxing the parent company or the permanent establishment in respect of profits distributed by the subsidiary to its parent company, without distinction as to whether the taxable event of the taxation of the parent company is the receipt of those profits or their redistribution.

32 Secondly, since Directive 2011/96 pursues, in accordance with recital 3 thereof, the objective of eliminating double taxation of profits distributed by a subsidiary to its parent company at the level of the parent company, taxation of that parent company by its Member State in respect of those profits, which would have the effect of making the profits subject to taxation exceeding the ceiling of 5% laid down in Article 4(3) of that directive, would lead to a double taxation at the level of the parent company contrary to that directive.

33 Furthermore, it must be noted, in that context, that it is irrelevant whether or not the tax measure is classified as corporation tax. In that regard, it suffices to note that Article 4(1)(a) of Directive 2011/96 does not make its application subject to a tax in particular. That provision provides that the Member State of the parent company is to refrain from taxing the profits distributed by the non-resident subsidiary thereof. That provision thus seeks to avoid Member States adopting tax measures which lead to double taxation of parent companies in respect of those profits.

34 That finding is not called into question by paragraph 105 of the judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774), since, in that paragraph, the Court merely commented on the conformity with Directive 2011/96 of certain methods of calculation of the amount of the advance payment of corporation tax when a resident parent company redistributes dividends received from a non-resident subsidiary and not on the conformity with that directive of the levying of that tax in such a situation.

35 In the light of the foregoing, the answer to the first question is that Article 4(1)(a) of Directive 2011/96 must be interpreted as precluding a tax measure of the Member State of a parent company, such as that at issue in the main proceedings, providing for the levy of a tax when the parent company distributes dividends and the basis of assessment of which tax is the amounts of the dividends distributed, including those coming from that company's non-resident subsidiaries.

The second question

36 In the light of the answer given to the first question, there is no need to reply to the second question.

Costs

37 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 (First Chamber) hereby rules:

Article 4(1)(a) 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, as amended by Council Directive 2014/86/EU of 8 July 2014, must be interpreted as precluding a tax measure laid down by the Member State of a parent company, such as that at issue in the main proceedings, providing for the levy of a tax when the parent company distributes dividends and the basis of assessment of which tax is the amounts of the dividends distributed, including those coming from that company's non-resident subsidiaries.

[Signatures]