JUDGMENT OF THE COURT (First Chamber)

16 July 2009 *

In Case C-128/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de première instance de Liège (Belgium), made by decision of 20 March 2008, received at the Court on 28 March 2008, in the proceedings

Jacques Damseaux

v

État belge,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Borg Barthet, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

* Language of the case: French.

Advocate General: P. Mengozzi,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 5 February 2009,

after considering the observations submitted on behalf of:

— Mr Damseaux, by E. Traversa, avocat,

— the Belgian Government, by J.-C. Halleux, acting as Agent,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the French Government, by G. de Bergues and J.-C. Gracia, acting as Agents,

— the Italian Government, by I. Bruni, acting as Agent, and P. Gentili, avvocato dello Stato,

— the Netherlands Government, by M. Noort, C. Wissels and Y. de Vries, acting as Agents,

— the United Kingdom Government, by L. Seeboruth and S. Ford, acting as Agents,

— the Commission of the European Communities, by R. Lyal and J.-P. Keppenne, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 56 EC and 293 EC.

2 The reference was made in the course of proceedings between Mr Damseaux and the Belgian tax authorities concerning the taxation in Belgium of dividends which Mr Damseaux received from a company established in France and on which he had already been taxed in France.

Legal context

3 The Convention of 10 March 1964 between Belgium and France seeking to avoid double taxation and to establish mutual administrative and legal rules of assistance in the field of income tax, as amended by the supplementary agreement signed at Brussels on 8 February 1999 ('the France-Belgium Convention'), provides in Article 15:

'1. Dividends originating in a Contracting State which are paid to a resident of the other Contracting State are taxable in that other State.

2. However, subject to the provisions of paragraph 3, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, in accordance with the law of that State, but the tax so charged shall not exceed:

…

(b) 15% of the gross amount of the dividends …

This paragraph shall not concern the taxation of the company in respect of the profits out of which the dividends are paid.

…

4. Unless he receives the tax credit provided for in paragraph 3, a Belgian resident who receives dividends from a company resident in France shall be entitled to a refund of the withholding tax in respect of those dividends paid, as the case may be, by the distributing company. France may deduct from the sums refunded the withholding tax provided for in paragraph 2 of this article according to the rate applicable to the dividends to which the refunded sums relate.

… ’

4 Article 19A of the France-Belgium Convention provides:

‘Double taxation shall be avoided as follows:

A. As regards Belgium:

1. Income and proceeds from investment capital which fall within the set of rules in paragraphs 2 to 4 of Article 15, which have actually been taxed at source in France and which are received by Belgian resident companies liable for corporation tax, shall, in return for payment of withholding tax at the normal rate on their amount of French tax, be exempt from corporation tax and distribution tax under the conditions laid down by Belgian domestic law.

In respect of the income and proceeds referred to in the previous subparagraph which are received by other Belgian residents …, which have actually been taxed at source in France, the tax due in Belgium on the amount net of the French tax at source shall be

reduced by, first, the withholding tax imposed at the normal rate, and, second, a fixed percentage of foreign tax that is deductible under conditions fixed by Belgian law, provided that such percentage may not be lower than 15% of that net amount.

As regards dividends which fall within the set of rules established in paragraphs 2 and 3 of Article 15 and which are paid to natural persons resident in Belgium, those persons may, instead of setting off the fixed percentage of foreign tax referred to above, obtain in relation to that income a tax credit at the rate and in accordance with the detailed rules set out in the Belgian legislation for dividends distributed by companies resident in Belgium, on condition that they make the request in writing at the latest by the deadline for submission of their annual tax return.

… ’

5 The Code des impôts sur les revenues (Income Tax Code), coordinated by the Royal Decree of 10 April 1992 and confirmed by the Law of 12 June 1992 (Supplement to the *Moniteur belge*, 30 July 1992) (‘the CIR 1992’), provides in Article 171:

‘By way of derogation from Articles 130 to 168, the following are taxable separately, unless the tax so calculated, increased by the tax in respect of the other income, is higher than that which the application of those articles to all the taxable income would give rise:

…

2a. at the rate of 15%:

…

(b) the dividends referred to in Article 269(2), point 2, (3) and (11).'

The main proceedings and the questions referred for a preliminary ruling

6 Mr Damseaux, a Belgian resident, received dividends from 2005 to 2007 from Total, a share company established in France, in which he held 5 463 shares.

7 Those dividends were subject first to a 25% withholding tax in France. Under Article 15(2) of the France-Belgium Convention, Mr Damseaux was able to request the reimbursement of part of that withholding tax, so that those dividends were subject, in France, to only a 15% withholding tax.

8 The amount remaining after that taxation was subject to a 15% withholding tax in Belgium.

9 As he considered that his French dividends were taxed at a higher rate than Belgian dividends and that, as the Kingdom of Belgium had accepted that the French Republic would impose a withholding tax, it should, as the Member State of residence, allow the

French tax to be credited against the Belgian withholding tax or waive the withholding tax so as to avoid the double taxation, Mr Damseaux lodged objections against the assessments issued by the Belgian tax authorities concerning the dividends received.

10 As the Belgian tax authorities rejected those objections on the ground that Article 15 of the France-Belgium Convention provides for the taxation of dividends both in France and in Belgium, Mr Damseaux brought an action before the Tribunal de première instance de Liège (Court of first instance of Liège).

11 That court took the view that, although their situations were objectively comparable, Belgian residents were subject to different tax systems depending on whether they received dividends from a company established in Belgium or from a company established in another Member State. While dividends paid by a foreign company to a Belgian resident were subject to international judicial double taxation, dividends paid by Belgian companies to a Belgian resident were solely taxed at the rate of 15% under Article 171(2a)(b) of the CIR 1992 and were not subject to double taxation.

12 Having observed that the France-Belgium Convention was not the subject of the reference for a preliminary ruling in Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, the Tribunal de première instance de Liège stated that that convention is part of Belgian tax law and must, therefore, conform to Community law. That court also noted that the Kingdom of Belgium had taken no measures to eliminate the double taxation of the dividends concerned.

13 In those circumstances, the Tribunal de première instance de Liège decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Must Article 56 [EC] be interpreted as prohibiting a restriction, arising from the [France-Belgium Convention], which allows partial double taxation of dividends from shares of companies established in France to subsist and which renders the taxation of those dividends more onerous than Belgian withholding tax alone applied to dividends distributed by a Belgian company to a Belgian resident shareholder?

2. Must Article 293 [EC] be interpreted as rendering wrongful [the Kingdom of] Belgium’s inaction in not renegotiating with [the French Republic] a new way of abolishing double taxation of dividends from shares of companies established in France?’

The questions referred for a preliminary ruling

The first question

14 By its first question, the referring court asks whether Article 56 EC precludes a bilateral tax convention under which dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be taxed in both Member States, without the Member State in which the shareholder resides preventing the resulting double taxation.

15 In this case, under Article 15 of the France-Belgium Convention, dividends originating in one contracting State which are paid to a resident of the other contracting State are

taxable in that other State, but can be subject, in the contracting State in which the company which pays the dividends is resident, to a tax not exceeding 15% of the gross amount of the dividends.

16 Although the dividends distributed by a company established in France to a shareholder residing in Belgium are thus liable to be taxed in both Member States, it appears from the France-Belgium Convention, as is besides stated by the referring court, that that convention also includes provisions relating to the prevention of double taxation.

17 Under the second subparagraph of Article 19A(1) of the France-Belgium Convention, in the case of dividends received by shareholders residing in Belgium which have been taxed at source in France, the tax due in Belgium on the amount net of the French withholding tax is reduced by, first, the withholding tax imposed at the normal rate and, second, a fixed percentage of foreign tax that is deductible under conditions fixed by Belgian law, provided that such percentage may not be less than 15% of that net amount. Under the third subparagraph of Article 19A(1), as regards dividends which fall within the set of rules established in paragraphs 2 and 3 of Article 15 of that convention and which are paid to natural persons resident in Belgium, those persons may, instead of setting off the fixed percentage of foreign tax referred to above, obtain in relation to that income a tax credit at the rate and in accordance with the detailed rules set out in the Belgian legislation for dividends distributed by companies resident in Belgium, on condition that they make the request in writing at the latest by the deadline for submission of their annual tax return.

18 In that respect, the French Government submitted that, in so far as the purpose and effect of the France-Belgium Convention are to eliminate double taxation of dividends paid by a company established in France to a shareholder residing in Belgium, there is no need to answer the first question.

19 The applicant in the main proceedings considers also that the correct implementation by the Kingdom of Belgium of Article 19A of the France-Belgium Convention would have the effect of preventing the double taxation of French dividends received by a shareholder residing in Belgium. However, the Kingdom of Belgium does not implement Article 19A, in so far as the Belgian legislation no longer provides for the procedure for setting off the fixed percentage, which constitutes not only an infringement of the France-Belgium Convention, but also discrimination prohibited by Article 56 EC.

20 In proceedings under Article 234 EC, it is not for the Court to interpret Article 19A of the France-Belgium Convention and to establish the obligations which arise under it, as such an interpretation is within the jurisdiction of the national courts.

21 If, in the context of that interpretation, that national court holds that Article 19A of the France-Belgium Convention obliges the Kingdom of Belgium to prevent double taxation by means of the fixed percentage or a tax credit, it will also be for that court to draw, in compliance with its national law, the conclusions arising from the absence of implementation of that Article 19A.

22 It follows from the case-law that the Court does not have jurisdiction, under Article 234 EC, to rule on a possible infringement, by a contracting Member State, of provisions of bilateral conventions entered into by the Member States designed to eliminate or to mitigate the negative effects of the coexistence of national tax regimes (see, to that effect, Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 46). Nor may the Court examine the relationship between a national measure and the provisions of a double taxation convention, such as the bilateral tax convention at issue in the main proceedings, since that question does not fall within the scope of the interpretation of Community law (see, to that effect, Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 18, and *Columbus Container Services*, paragraph 47).

23 It follows nevertheless from the wording of the first question that the referring court proceeds from the assumption that the France-Belgium Convention allows a judicial double taxation of dividends distributed by a company established in France to a shareholder residing in Belgium to subsist. The referring court's first question should, therefore, be understood as seeking to know whether Article 56 EC precludes a bilateral tax convention, such as that at issue in the main proceedings, under which the dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be taxed in both Member States, and which does not provide that the Member State in which the shareholder resides be unconditionally obliged to prevent the resulting double taxation.

24 In that regard, it must be borne in mind that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (see, in particular, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 40; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16).

25 It is, in particular, for each Member State to organise, in compliance with Community law, its system for taxing distributed profits and, in that context, to define the tax base and the tax rate which apply to the shareholder receiving them (see, in particular, *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 50; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 47; and Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 30).

26 It follows, first, that the dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be subject to judicial double taxation where the two Member States choose to exercise their tax competence and to subject those dividends to taxation in the hands of the shareholder.

27 Second, the Court has already ruled that the disadavantages which could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions prohibited by the EC Treaty (see, to that effect, *Kerckhaert and Morres*, paragraphs 19, 20 and 24, and *Orange European Smallcap Fund*, paragraphs 41, 42 and 47).

28 Whilst abolition of double taxation within the European Community is one of the objectives of the Treaty, it must none the less be noted that, apart from the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10), the Member States have not concluded any multilateral convention to that effect under Article 293 EC (see Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 23).

29 Likewise, with the exception 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) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), no unifying or harmonising measure designed to eliminate cases of double taxation has as yet been adopted at Community-law level (see, in particular, *Orange European Smallcap Fund*, paragraph 32).

30 In the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (see *Gilly*, paragraphs 24 and 30; Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57; *Amurta*, paragraph 17; and *Orange European Smallcap Fund*, paragraph 32). It is for the Member States to take the measures necessary to prevent situations of double taxation by applying, in particular, the criteria followed in international tax practice (see *Kerckhaert and Morres*, paragraph 23).

31 As stated in paragraph 15 above, in the present case, in accordance with the attribution of powers of taxation agreed on by the French Republic and the Kingdom of Belgium, dividends distributed by a company established in France to a Belgian resident are liable to be taxed in both Member States.

32 In a situation where both the Member State in which the dividends are paid and the Member State in which the shareholder resides are liable to tax those dividends, to consider that it is necessarily for the Member State of residence to prevent that double taxation would amount to granting a priority with respect to the taxation of that type of income to the Member State in which the dividends are paid.

33 Although such an attribution of powers would comply, in particular, with the rules of international legal practice as reflected in the model tax convention on income and on capital drawn up by the Organisation for Economic Cooperation and Development (OECD), in particular Article 23B thereof, it is not in dispute that Community law, in its current state and in a situation such as that at issue in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community (see *Kerckhaert and Morres*, paragraph 22, and *Columbus Container Services*, paragraph 45).

34 Consequently, if a Member State cannot rely on a bilateral convention in order to avoid the obligations imposed on it by the Treaty (see Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 53, and *Amurta*, paragraph 55), the fact that both the Member State in which the dividends are paid and the Member State in which the shareholder resides are liable to tax those dividends does not mean that the Member State of residence is obliged, under Community law, to prevent the disadvantages which could arise from the exercise of competence thus attributed by the two Member States.

35 In those circumstances and to the extent that solely the France-Belgium Convention is the subject of the first question of the referring court, the answer to that question is that, in so far as Community law, in its current state and in a situation such as that at issue in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community, Article 56 EC does not preclude a bilateral tax convention, such as that at issue in the main proceedings, under which dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be taxed in both Member States, and which does not provide that the Member State in which the shareholder resides is unconditionally obliged to prevent the resulting juridical double taxation.

The second question

36 In light of the answer given to the first question, there is no need to answer 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:

In so far as Community law, in its current state and in a situation such as that at issue in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community, Article 56 EC does not preclude a bilateral tax convention, such as that at issue in the main proceedings, under which dividends distributed by a company established in one Member State to a shareholder residing in another Member State are liable to be taxed in both Member States, and which does not provide that the Member State in which the shareholder resides is unconditionally obliged to prevent the resulting juridical double taxation.

[Signatures]