

Anonymised version

Translation

C-458/18 — 1

Case C-458/18

Request for a preliminary ruling

Date lodged:

12 July 2018

Referring court:

Administrativen sad Sofia-grad (Bulgaria)

Date of the decision to refer:

5 July 2018

Applicant:

GVC Services (Bulgaria) EOOD

Defendant:

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

ORDER

No 4210

5 July 2018

ADMINISTRATIVEN SAD (Administrative Court)

Sofia-grad (City of Sofia)

[...]

5 July 2018

[...].

The proceedings are governed by Articles 156 to 161, in conjunction with Article 83(4), of the Danachno-osiguriteln protsesualen kodex (DOPK) (Tax and Social Security Procedural Code).

The proceedings were commenced by way of an action brought by GVC Services (Bulgaria) EOOD against tax assessment notice No R-29002917004916-091-001/01.12.2017, rectified by rectification notices No P-29002917210282-003-001/07.12.2017 and No P-29002917224182-003-002/22.12.2017, of the revenue authorities of the Teritorialna direktsia Sofia na Natsionalnata agentsia za prihodite (Sofia Regional Directorate of the National Revenue Agency).

In the opinion of the Administrative Court, City of Sofia, in order to resolve the case there is a need for an interpretation of EU law, specifically of Article 2 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. The Administrative Court, City of Sofia, therefore considers it appropriate to refer to the Court of Justice of the European Union a request for a preliminary ruling in relation to the interpretation of the provision of law which is applicable to the dispute.

... [...]

Parties

- 1 Applicant: GVC Services (Bulgaria) EOOD ... [...] [**Or. 2**]
- 2 Defendant: Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia pri Tsentralnoto upravlenie na Natsionalnata agentsia za prihodite (Director of the Directorate 'Appeals and Tax and Social Security Practice', Sofia, within the Central Administration of the National Revenue Agency).

Subject matter of the proceedings

- 3 The subject of the action is a tax assessment notice, in so far as tax liabilities in respect of dividends and proceeds from a liquidation paid to a foreign legal person are determined therein.

Facts

- 4 The facts of the dispute, as determined, are common ground between the parties and are as set out below:

- 5 The applicant is a single-member limited-liability company with the company name GVC Services (Bulgaria) EOOD. It was incorporated under the Targovski zakon (Commercial Law) of the Republic of Bulgaria. Until 1 February 2016, the share capital of this Bulgarian company was wholly owned by the

company PGB Limited, Gibraltar, incorporated in Gibraltar. The Bulgarian company provides services in connection with Information Technology (IT services), including the development of software solutions for predefined tasks and the associated development of concepts, designs, tests, software support and other services in the form of the programming and testing of a program code for tasks which it is given by the heads of the IT department at the headquarters of the parent company.

6 In the period from 13 July 2011 to 21 April 2016, the applicant allotted dividends to the parent company PGB Limited, Gibraltar, and paid them out without withholding and paying over tax in Bulgaria because it was of the opinion that the company PGB Limited, Gibraltar could be considered to be a foreign legal person which was resident for tax purposes in a Member State of the European Union.

7 The contested tax assessment notice identified withholding tax liabilities totalling BGN 930 529.54 in respect of the dividends and liquidation proceeds paid to the parent company: of this, BGN 669 690.32 related to the principal amount and BGN 260 839.22 to the default interest.

8 The tax assessment notice was the subject of an administrative challenge lodged with the defendant, which confirmed the notice by way of Decision No 264/19.02.2018. An action was brought against the notice after it had been upheld by decision of the authority under Article 152(2) of the DOPK, whereby court proceedings were instigated before the Administrative Court, City of Sofia.

Observations of the parties

9 The applicant argues that EU law is also applicable to Gibraltar, which has the status of a European [Or. 3] territory for whose external relations the United Kingdom is responsible. The applicant relies on Article 355(3) TFEU and contends that the payment of dividends does not come within the exceptions in Articles 28 to 30 of 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; hereinafter: Accession Act of 1972). In this connection, the applicant takes the view that the parent company satisfies the requirements of Article 2 of Directive 2011/96; it could be equated with a company incorporated in the United Kingdom and was subject to corporation tax in Gibraltar, which was able to be equated with corporation tax in the United Kingdom, as referred to in Annex I, Part B, to Directive 2011/96.

10 The defendant contends that Directive 2011/96 contains an express and exhaustive list both of the companies (Annex I, Part A) and of the taxes (Annex I, Part B) to which it applies. The scope of the Directive, it submits, was exhaustively determined therein and cannot be extended to companies

incorporated in Gibraltar and liable to tax there, because it is not permissible to give an extensive interpretation to provisions of law relating to the tax burden.

Applicable national legislation

11 Zakon za korporativnoto podohodno oblagane (Law on Corporation Tax) (DV No 105 of 22 December 2006 ... [...])

Article 194

(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 except for the cases in which the dividends are achieved by a foreign legal person by virtue of a domestic permanent establishment;

2. domestic legal persons which are not traders, including municipalities.

(2) The tax referred to in paragraph (1) shall be final and shall be withheld by the domestic legal persons which distribute the dividends or liquidation proceeds.

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

1. a domestic legal person which has a shareholding in a company as a representative of the State;

2. an investment fund;

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, with the exception of cases of hidden distribution of profits. **[Or. 4]**

Applicable EU legislation

12 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

Article 2

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;
- (b) ‘permanent establishment’ means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law.

13. Treaty on the Functioning of the European Union

Article 355

...

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

14 Accession Act of 1972

Article 28

Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, 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 **[Or. 5]** not apply to Gibraltar unless the Council, acting unanimously on a proposal from the Commission, provides otherwise.

Case-law of the national courts

15 The question of whether Directive 2011/96 is applicable to companies which were incorporated in Gibraltar has not yet been decided by the national courts.

Case-law of the Court of Justice of the European Union

16 The Court of Justice has already repeatedly held that EU law applies to Gibraltar on the basis of Article 355(3) TFEU. In order to ensure that EU law is applied consistently, the Court of Justice has held to be admissible requests for

preliminary rulings which related to the interpretation of Article 29 of the Accession Act for the purposes of clarifying the scope of Gibraltar's exclusion from the customs territory of the European Union (Case C-276/16, *Albert Buhagiar*) and to the provision of services by economic operators established in Gibraltar to persons in other Member States of the European Union (Case C-591/15, *The Gibraltar Betting and Gaming Association*).

There is case-law of the Court of Justice which, in the referring court's view, provides arguments in support of the proposition that the submission of questions on the interpretation by the Court of Justice of a provision of the Bulgarian Law on Value Added Tax is admissible.

Reasons for the submission of the request for a preliminary ruling

The admissibility of the request:

17 Pursuant to Article 267 TFEU, the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties, (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

Directive 2011/96 comes within the Court of Justice's jurisdiction to give preliminary rulings.

The specific questions to be referred

18 The objective of Directive 2011/96 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.

19 The relations between the parent company and subsidiary companies of different Member States must be regulated in such a way that the competition rules of the internal market are not infringed and a grouping together of companies of different Member States is not disadvantaged in comparison with a grouping together of companies of the same Member State.

20 It is necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax.
[Or. 6]

21 In order to achieve the objectives of the Directive, lists of the companies and taxes which come within the scope of the Directive have been adopted in which the European territories and the taxes to be paid there are not specified.

22 In the context as described above, it is necessary to clarify whether Gibraltar is excluded from the scope of the Directive or whether the taxation to which the

parent company is subject in Gibraltar justifies the subsidiary company being exempted from withholding tax in Bulgaria.

For these reasons, the Administrative Court, City of Sofia, has made the following

order:

Pursuant to Article 267, first paragraph, (b), of the Treaty on the Functioning of the European Union, the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Should Article 2(a)(i) of, in conjunction with Annex I, Part A(ab), to, Directive 2011/96/EU 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, in conjunction with Annex I, Part B, to, Directive 2011/96/EU 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?

WORKING DOCUMENT