Joined Cases C-283/94, C-291/94 and C-292/94

Denkavit Internationaal BV and Others
v
Bundesamt für Finanzen

(References for preliminary rulings
from the Finanzgericht Köln)

(Harmonization of tax legislation — Taxation of company profits —
Parent companies and subsidiaries)

Summary of the Judgment

1. *Approximation of laws — Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States — Directive 90/435 — Exemption, in the Member State of the subsidiary, from withholding tax on the profits distributed to the parent company — Conditions for granting — Minimum holding in the capital of the subsidiary — Option for Member States to make the exemption subject to a holding for a minimum period — Strict interpretation — National legislation recognizing a right to exemption, and solely prospectively, only once the minimum period laid down has been completed — Not permissible — Incorrect transposition by a Member State — Whether obligation on the Member State to compensate a parent company for damage incurred — No obligation*
(Council Directive 90/435, Arts 3(2) and 5(1))

2. *Approximation of laws — Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States — Directive 90/435 — Article 5(1) and (3) — Exemption, in the Member State of the subsidiary, from withholding tax on the profits distributed to the parent company — Clear nature — Capable of being relied on by a parent company which has complied with the obligation to maintain its holding in the capital of its subsidiary for the period laid down by the Member State concerned*

(Council Directive 90/435, Arts 3(2) and 5(1) and (3))

3. *Community law — Breach by a Member State — Implementation of a directive — Obligation to compensate individuals for damage incurred — Conditions — Sufficiently serious breach — Concept*

1. By authorizing Member States to grant exemption from withholding tax upon distribution of profits by a subsidiary to its parent company holding at least 25% of the subsidiary's capital, provided for by Article 5(1) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, only in so far as the parent company maintains that minimum holding for a period which Member States are free to lay down but which cannot exceed two years, Article 3(2) of Directive 90/435 introduces an option to derogate from the obligation to grant the exemption which, as such, must be strictly interpreted. It cannot therefore be interpreted as authorizing a Member State to make that exemption subject to the condition that, at the moment when the profits are distributed, the parent company should have had the required holding in the capital of its subsidiary for a period at least equal to that which the Member State has laid down pursuant to the option which it is recognized as having.

It is for Member States to draw up rules for ensuring compliance with this minimum period, in accordance with the procedures laid down in their domestic law. On no view are those States obliged under the directive to grant the advantage immediately on the basis of a unilateral undertaking by the parent company to observe the minimum holding period.

That being so, Community law does not require a Member State which, when transposing that directive into its national law, stipulated that the minimum holding period set pursuant to Article 3(2) must be completed at the time when the profits that are the subject of the tax advantage afforded by Article 5 are distributed, to compensate the parent company for damage which it may have incurred by reason of the error thus made.

The conditions required for a breach of Community law by a Member State, on the occasion of the legislative activity

involving a margin of discretion consisting in the transposition of a directive, to give rise to an obligation on that Member State to compensate individuals for damage which they have incurred are not satisfied in this case. There is, in any event, no sufficiently serious breach of Community law if it appears, *inter alia*, that the Member State's interpretation of the directive corresponds to that of almost all the other Member States which have exercised the option to derogate.

2. Article 5(1) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States clearly and unambiguously provides that a parent company holding a minimum of 25% of the capital of its subsidiary is to be exempt from withholding tax.

While it is true that Article 3(2) of the directive gives Member States the option of derogating from that principle where the parent company does not maintain its holding in the subsidiary for a minimum period and gives those States latitude as regards both the duration of that period, which may not exceed two years, and the administrative procedures applicable, this does not make it impossible to determine minimum rights on the basis of the provisions of principle contained in Article 5 of the directive. It follows that, where a Member State has exercised the option provided for in Article 3(2) of the directive, parent companies may, provided that they comply with the obligation to maintain their holding for the period set by that Member State, rely directly on the rights conferred by Article 5(1) and (3) of that directive before national courts.

3. Individuals injured by a breach of Community law attributable to a Member State are recognized as having a right to reparation when three conditions are met: the rule infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage suffered by the injured parties. Those conditions apply where a Member State incorrectly transposes a Community directive into national law. In this regard, a breach is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers. One of the factors that may be taken into consideration is the clarity and precision of the rule breached.