Case C-403/19

Request for a preliminary ruling

Date lodged:

24 May 2019

Referring court:

Conseil d'État (France)

Date of the decision to refer:

24 April 2019

Appellant:

Société Générale SA

Respondent:

Ministre de l'Action et des Comptes publics

CONSEIL D'ETAT

acting

in a judicial capacity

[...] **FRENCH REPUBLIC**

IN THE NAME OF THE FRENCH PEOPLE

[...] [...]

[...]

[...]

[...] [administrative data] [...] Having regard to the following procedure:

The public limited company Société Générale requested the tribunal administratif de Montreuil (Administrative Court, Montreuil, France) to order the discharge of additional contributions related to corporation tax for which it was liable in respect of the fiscal years ending 2004 and 2005, and related penalties, in its capacity as parent company of the integrated tax group which includes Société Générale Asset Management (SGAM) Banque. By judgment [...] of 3 February 2011, the tribunal administratif de Montreuil (Administrative Court, Montreuil) granted that request.

By judgment [...] of 17 March 2016, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France), upholding the appeal brought by the ministre du budget, des comptes publics, de la fonction publique et de la réforme de l'Etat (Minister for the Budget, Public Accounts, the Civil Service and State Reform), set aside that judgment and ordered the company to bear the additional contributions the discharge of which was ordered by the tribunal (Administrative Court).

[...] Société Générale requests that the Conseil d'Etat:

1. set aside that judgment;

2. ruling on the substance of the case, dismiss the appeal brought by the Minister;

3. in the alternative, make a reference to the Court of Justice of the European Union for a preliminary ruling; **[Or. 2]**

4. hold the State liable in the amount of EUR 5 000 pursuant to Article L. 761-1 of the code de justice administrative (Administrative Justice Code).

It claims that the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles):

- having set aside the judgment of the tribunal administratif (Administrative Court), failed to respond to the plea which Société Générale had raised before that court, alleging the enforceability of the formal interpretation set out in the basic administrative documentation with the reference 5 I-3226 and infringed the provisions of Article L. 80 A of the livre des procédures fiscales (Tax Procedure Code);

- made an error in the legal characterisation of the facts and disregarded the combined provisions of the code général des impôts (General Tax Code) and Article 24 of the tax treaties concluded, respectively, between France and Italy, France and the United Kingdom, and France and the Netherlands, by finding that the sums repaid by SGAM Banque to its customers in respect of the securities received as collateral for the loans granted to them or held in connection with the structuring of funds amounted, for the purposes of calculating the ceiling of tax credits to which that company is entitled under the tax treaties, to deductible charges that may be set off against the foreign-source dividends received in connection with those securities;

- failed to give adequate reasons for its judgment and distorted the documents in the file before it by stating that Société Générale had merely contested the existence of a direct link between the sums repaid to the parties contracting with SGAM Banque and the acquisition, retention and disposal of those securities;

- failed to give adequate reasons for its judgment and erred in law by finding that the deduction of the sums repaid pursuant to the securities lending agreements or in connection with the structuring of funds for the purposes of calculating the ceiling of tax credits did not undermine the free movement of capital protected in EU law.

[...] the ministre de l'action et des comptes publics (Minister of Public Action and Accounts) contends that the appeal should be dismissed. He submits that the grounds of appeal raised by Société Générale are unfounded.

Having regard to the other documents in the file;

Having regard to:

- the Treaty establishing the European Community;

- the Treaty on the Functioning of the European Union;

- the Convention between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed in London on 22 May 1968; **[Or. 3]**

- the Convention between the Government of the French Republic and the Government of the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and fortune signed on 16 March 1973;

- the Convention for the avoidance of double taxation of income and capital and for the prevention of fiscal evasion and fraud between the Government of the French Republic and the Government of the Italian Republic signed on 5 October 1989;

- the General Tax Code and the Tax Procedure Code;

- the judgment of the Court of Justice of the [European Union] of 12 December 2002 in Case C-385/00 (ECLI:EU:C:2002:750);

- the judgment of the Court of Justice of the [European Union] of 14 November 2006 in Case C-513/04 (ECLI:EU:C:2006:713);

- the judgment of the Court of Justice of the [European Union] of 20 May 2008 in Case C-l94/06 (ECLI:EU:C:2008:289);

- the judgment of the Court of Justice of the European Union of 10 February 2011 in Joined Cases C-436/08 and C-437/08 (ECLI:EU:C:2011:61);

- the judgment of the Court of Justice of the European Union of 28 February 2013 in Case C-168/11 (ECLI:EU:C:2013:117);

- the judgment of the Court of Justice of the European Union of 17 September 2015 in Joined Cases C-10/14, C-l4/14 and C-17/14 (ECLI:EU:C:2015:608);

- the judgment of the Court of Justice of the European Union of 24 October 2018 in Case C-602/17 (ECLI:EU:C:2018:856);

- the judgment of the Court of Justice of the European Union of 14 March 2019 in Case C-l74/18 (ECLI:EU:C:2019:205);

- decision No 357189 of the Conseil d'Etat, acting in a judicial capacity, of 7 December 2015 (ECLI:FR:CESSR:2015:357189.20151207);

- the Administrative Justice Code;

[...] [procedural considerations]

Whereas:

1. Under Article 39 of the General Tax Code: '*1. The net profit is established after deduction of all charges ...*'. Pursuant to Article 209(1) of that code, in the version applicable to the tax years at issue: '*Subject to the provisions of this section, corporation tax liabilities* **[Or. 4]** *shall be determined in accordance with the rules laid down in Articles 34 to 45 ... and with regard only to the profit derived through undertakings operating in France and those whose taxable income may be attributable to France pursuant to an international convention on double taxation ...*'. In accordance with Article 220(1) of that code, in the version applicable to the tax years at issue: '*(a) On production of supporting evidence, the withholding tax creating an entitlement to investment income (income from movable property), as referred to in Articles 108 to 119, 238f B and 1678a, received by the company or individual shall be set off against the amount of tax for which that company or individual is liable in accordance with this chapter. However, the amount of the deduction shall not exceed the fraction of that tax corresponding to the amount of that income. (b) In the case of foreign-source income, as referred to in Articles 120 to 123, the offset shall be limited to the amount of credit corresponding to the tax withheld at source in the foreign country or to tax relief in lieu thereof, as provided for by international conventions ...*'.

2. Under Article 10 of the Convention of 5 October 1989 for the avoidance of double taxation of income and capital and for the prevention of fiscal evasion and fraud between France and Italy: '*1. Dividends paid by a company which is a resident of a State to a resident of the other State may be taxed in that other State. 2. However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State ...*'. In accordance with Article 24 of that convention: '*Double taxation shall be avoided*

as follows: 1. In the case of France: (a) Profits and other positive income which arise in Italy and which are taxable there in accordance with the provisions of the Convention shall also be taxable in France if derived by a resident of France. The Italian tax is not deductible in calculating taxable income in France. The recipient is, however, entitled to a tax credit against the French tax in the base of which such income is included. Such tax credit shall be equal to: — for income referred to in Articles 10, 11, 12, 16 and 17 ... the amount of tax paid in Italy in accordance with the provisions of those articles. It may not, however, exceed the amount of French tax attributable to such income ...'.

3. Under Article 9 of the Convention of 22 May 1968 between France and the United Kingdom for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, in the version applicable to the tax years at issue: '*1. (a) Dividends paid by a company which is a resident of the United Kingdom to a resident of France may be taxed in France. (b) Where a resident of France is entitled to a tax credit in respect of such a dividend under paragraph 2 of this Article tax may also be charged in the United Kingdom ... 2. A resident of France who receives dividends from a company which is a resident of the United Kingdom shall, subject to the provisions of paragraphs 3, 4 and 5 of this Article and provided that he is the beneficial owner of those dividends, and subject to tax in France in respect of those dividends, be entitled to the tax credit in respect thereof to which an individual resident in the United Kingdom would have been entitled had he received those dividends, and to the payment of any excess of that tax credit over his liability to United Kingdom tax*'. In accordance with Article 24 of that convention, in the version applicable to the tax years at issue: '*Double taxation of income shall be avoided as follows: ... (b) In the case of France: ... (ii) as regards income mentioned in Articles 9 and 17 which has borne United Kingdom tax in accordance with the provisions of these articles, France shall allow to a resident of France receiving such income from the United Kingdom a tax credit corresponding to the amount of tax levied in the United Kingdom. Such tax credit, not exceeding the amount of French tax levied on such income, shall be allowed against taxes mentioned in sub-paragraph 1(b) of Article 1 of this Convention, in the bases of which such income is included ...*'. **[Or. 5]**

4. Under Article 10 of the Convention of 16 March 1973 between France and the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and fortune: '*1. Dividends paid by a company which is a resident of one of the States to a resident of the other State may be taxed in that other State. 2. However, such dividends may be taxed in the State of which the company paying the dividends is a resident, and according to the law of that State ...*'. In accordance with Article 24 of that convention: '*Double taxation shall be avoided in the following manner: ... B. In the case of France: ... (b) As regards income referred to in articles 8, 10, 11, 16 and 17 which has borne Netherlands tax in accordance with the provisions of those articles, France shall allow to persons who are residents of France receiving such income a tax credit corresponding to the amount of Netherlands tax. Such tax credit, not exceeding the amount of tax levied in France on such income, shall be allowed against taxes*

referred to in article 2, paragraph 3(b), in the bases of which such income in included ...'.

5. It is apparent from Article 220(1)(b) of the General Tax Code set out in paragraph 1 above that the deduction from the amount of tax due in France of the withholding tax levied abroad in respect of foreign-source income to which that provision refers is limited to the amount of tax credit corresponding to that withholding tax as provided for in international tax agreements. In the event that an agreement concluded between France and another State for the avoidance of double taxation provides, as is the case with the conventions referred to in paragraphs 2 to 4 above, that, where a company subject to corporation tax in France receives dividends from a company which is a resident of another State and liable for withholding tax in that State, France has the power to require the first company to pay tax on those dividends, but that that company is entitled to a tax credit to be set off against the corporation tax and that the tax credit may not exceed the amount of tax due in France corresponding to that income, with the maximum amount being determined, in the absence of any provision to the contrary set out in the tax agreement, by applying all the provisions of the General Tax Code relating to corporation tax, including Article 39, applicable in matters relating to corporation tax pursuant to Article 209, that is to say by deducting from the amount of dividends distributed, before any withholding tax, except where excluded by specific provisions, charges which are not justified on the basis of the acquisition, retention or disposal of securities out of which the dividends were received, which are directly linked to the dividends received and which are not paid in return for an increase in the assets.

6. It is apparent from the documents in the file submitted to the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) that, in 2004 and 2005, Société Générale Asset Management (SGAM) Banque carried out, on the one hand, security lending transactions and, on the other, fund structuring operations. The security lending transactions included the transfer, by the borrower, of securities intended to guarantee those lent by SGAM Banque, of which it thus became the temporary owner. Article 6(G)(i) of the standard agreement known as the Overseas Lender's Agreement (OSLA) signed between SGAM Banque and its contractual partners provided that SGAM Banque was required, in principle, to return to them securities equivalent to those used as collateral in order to receive payment of the dividends attached to those securities. Article 6(G)(ii) also stipulated that, in the absence of restitution of securities allowing the borrower to receive the dividends, SGAM Banque had to pay the borrower a sum of money or transfer property of a value equal to the amount of those dividends. The fund structuring operations consisted, in particular, of SGAM Banque's management of **[Or. 6]** equity baskets corresponding to management profiles set by its contractual partners. In that context, SGAM Banque received the dividends attached to securities included in the equity baskets, which it had acquired, but was required, in respect of the performance sold to its contractual partners, to repay a sum corresponding to the amount of dividends received and any increase in the value of the securities. In return, its

contractual partners paid a fixed remuneration to SGAM Banque for the management of its equity basket.

7. In the context of those two types of transactions, SGAM Banque received, in the case of securities held by companies resident in Italy, the United Kingdom and the Netherlands, dividends less withholding tax paid on the dividends in those three countries respectively. Following an audit of SGAM Banque's accounts, the tax authorities queried the deduction from the amount of corporation tax due in respect of the financial years ending 2004 and 2005 of a fraction of tax credits corresponding to that withholding tax which the company had set off against the corporation tax for which it was liable in France. [...] [repetition of the outline of the general procedure set out on page 1]

8. Société Générale submits that the court erred in law by rejecting the ground of appeal alleging that the application of the rules referred to in paragraph 5 above infringed the free movement of capital enshrined in EU law. It submits that the transactions involving the securities of foreign companies carried out by companies liable for corporation tax in France would be placed at a disadvantage in comparison to those involving the securities of French companies on the ground that the method of calculating the ceiling of tax credits the entitlement to which is governed by the tax agreements concluded by France for the avoidance of double taxation of dividends resulting from their taxation, on the one hand, by the State in which the dividends are paid and, on the other, by France, allow only for an insufficient amount of the tax levied by the withholding State to be deducted from the corporation tax paid in France. It relies, in that regard, on the judgments of the Court of Justice of 17 September 2015 in Joined Cases C-10/14, C-14/14 and C-17/14 *Miljoen, X and Société Générale*, and of 28 February 2013 in Case C-168/11 *Beker*.

9. The Conseil d'Etat observes that the rules set out in paragraph 5 above are intended to compensate for the disadvantage that may arise from the parallel exercise of the taxation powers enjoyed by the various Member States and that, in order to proceed with the offsetting procedure, the maximum amount of foreign withholding tax which can be offset against the amount of tax due is calculated by applying to foreign-source dividends subject to withholding tax under the provisions of ordinary law of the General Tax Code, the charges deducted from the dividends before withholding tax being also deducted for the purpose of determining the basis of assessment for corporation tax due in France. Those rules reflect France's commitment to forgo, if appropriate in its entirety, the tax revenue which it would derive from the taxation of foreign-source dividends of companies. The Conseil d'Etat notes that granting tax credits which are higher than those resulting from the application of those rules would lead not only to such a waiver but also to France having to bear all or part of the tax burdens for which those dividends are made liable by the State in which the dividends are paid.**[Or. 7]**

10. It is apparent from the case-law of the Court of Justice of the European Union that, in the absence of any unifying or harmonising measures of the European

Union, the 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, and that preservation of that allocation is a legitimate objective recognised by the Court (judgment of 17 September 2015, *Miljoen, X and Société Générale* C-10/14, C-14/14 and C-17/14, paragraph 76). In particular, EU law, as it currently stands, 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 Union. The fact that both the Member State in which the dividends are paid and the Member State in which the shareholder who is the beneficiary is resident are liable to tax those dividends does not therefore mean that the Member State of residence is obliged, under EU law, to prevent the disadvantages which could arise from the exercise of competence thus attributed by the two Member States (judgment of 14 November 2006, *Kerckhaert and Morres*, C-513/04, paragraph 22; judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, paragraph 170). However, as far as concerns the exercise of the power of taxation so allocated by bilateral conventions to prevent double taxation, the Member States must comply with EU rules (judgments of du 12 December 2002, *de Groot*, C-385/00, paragraph 94; of 28 February 2013, *Beker*, C-168/11, paragraph 34; and of 14 March 2019, *Jacob and Lennertz*, C-174/18, paragraph 25). In particular, while EU law does not require a Member State to grant a concession in response to offset the disadvantage resulting from a series of charges to tax that is exclusively due to the parallel exercise of the various Member States' fiscal sovereignty, where that Member State has decided to grant such a concession, that power must be exercised in accordance with EU law (judgment of 20 May 2008, *Orange European Smallcap Fund*, C-194/06, paragraph 47). However, in so far as the objective of a convention for the avoidance of double taxation is to prevent the same income from being taxed in each of the contracting parties to that convention; it is not to ensure that the tax to which the taxpayer is subject in one contracting State is no higher than that to which he or she would be subject in the other contracting State, a less favourable tax treatment, which stems from the allocation of powers of taxation between two Member States, one as the State of residence of the taxpayer, the other as the State of the source of the employment income concerned, and from the differences existing between the tax schemes of those two States, cannot be regarded as constituting discrimination or a difference in treatment (judgment of 24 October 2018, *Sauvage and Lejeune*, C-602/17, paragraph 28).

11. In the absence of any case-law of the Court of Justice of the European Union on the discretion enjoyed by Member States when adopting a mechanism for eliminating double taxation applicable where dividends originating in one Member State are distributed to a company resident in another Member State, based on the grant to that company of a tax credit, up to the limit of the amount of the corresponding tax, to be set off, in the Member State of residence, against those dividends, the response to the ground of appeal raised by Société Générale depends on the answer to the question whether, in the light of Article 56 of the Treaty establishing the European Community, now Article 63 of the Treaty on the

Functioning of the European Union, the fact that the application of the rules set out in paragraph 5 above, in order to compensate for the double taxation of dividends paid to a company liable for corporation tax in the Member State of residence by a company resident in another Member State and subject, by virtue of the exercise by that Member States of the power of taxation, to withholding tax, is liable to create a disadvantage to the detriment of transactions involving the securities of foreign companies carried out by companies liable for corporation tax in the **[Or. 8]** first Member State, means that that State, where it has been decided to grant a concession in response to the double taxation, goes beyond waiving its right to receive the tax revenue that it would derive from the imposition of corporation tax on the dividends in question?

12. That question is decisive to the outcome of the case upon which the Conseil d'Etat must give judgment and raises a serious issue of interpretation. It is, accordingly, appropriate to refer that question to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union and, pending the ruling of that Court, to stay the appeal proceedings brought by Société Générale.

DECIDES:

Article 1: The appeal proceedings brought by Société Générale are stayed, pending a judgment from the Court of Justice of the European Union on the following question: in the light of Article 56 of the Treaty establishing the European Community, now Article 63 of the Treaty on the Functioning of the European Union, does the fact that the application of the rules set out in paragraph 5 of this decision, in order to compensate for the double taxation of dividends paid to a company liable for corporation tax in the Member State of residence by a company resident in another Member State and subject, by virtue of the exercise by that Member States of the power of taxation, to withholding tax, is liable to create a disadvantage to the detriment of transactions involving the securities of foreign companies carried out by companies liable for corporation tax in the first Member State, mean that that State, where it has been decided to grant a concession in response to the double taxation, goes beyond waiving its right to receive the tax revenue that it would derive from the imposition of corporation tax on the dividends in question?

Article 2: The present decision shall be notified to Société Générale, the Minister of Public Action and Accounts and the Registrar of the Court of Justice of the European Union.

A copy shall be sent to the Prime Minister and the Secretary-General of the Organisation for Economic Cooperation and Development. **[Or. 9]**

[...] [information relating to the deliberation]

[...] 24 April 2019.

[...]

[...] [signatures] [...] [enforcement order]

[...]