Case C-545/19

Request for a preliminary ruling:

Date lodged:

17 July 2019

Referring court:

Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal)

Date of the decision to refer:

9 July 2019

Applicant:

ALLIANZGI-FONDS AEVN

Defendant:

Autoridade Tributária e Aduaneira (Tax and Customs Authority)

CENTRE FOR ADMINISTRATIVE ARBITRATION

Centre for Administrative Arbitration: Tax arbitration

[omissis]

Subject matter: Corporation Tax — Taxation of dividends paid to collective investment undertakings whose seat is in another Member State of the European Union (Germany) — Article 22 of the Estatuto dos Benefícios Fiscais (Statute of Tax Benefits, 'EBF').

ARBITRATION AWARD

[Request for a preliminary ruling — Article 267(a) TFEU]

The purpose of these arbitration proceedings is to determine whether national legislation which, pursuant to Article 22 [omissis] of the EBF, exempts from corporation tax dividends distributed by undertakings established in Portugal to collective investment undertakings which (i) have their seat in Portugal and (ii) are formed and operate under Portuguese law whereas — under Article 3(1)(d),

Article 4 [omissis] (2), Article 4 [omissis] (3)(c), Article 87(4), Article 94(1)(c), Article 94(3)(b) and Article 94(5) and (6) of the Código do Imposto sobre o Rendimento das Pessoas Coletivas (Corporation Tax Code) — dividends distributed by resident undertakings to collective investment undertakings which have their seat in another Member State [omissis] of the European Union [omissis] (EU) — in this case, Germany — and therefore not incorporated under national law, are subject to tax at 25% which is withheld at source in full discharge of liability, is compatible with the provisions of the Treaty on the Functioning of the European Union (TFEU).

The applicant, **ALLIANZGI-FONDS AEVN**, a collective investment undertaking formed under German law, with Portuguese tax identification number 712 171 860, whose seat is [omissis] [in] Germany, represented by the management company ALLIANZ GLOBAL INVESTORS GMBH, whose registered office is at the same location, brought [omissis] [arbitration] proceedings against the Autoridade Tributária e Aduaneira (Tax and Customs Authority or 'the Tax Authority') in which it sought to have the withholding at source of corporation tax for 2015 and 2016 declared unlawful and annulled on the ground that it was an infringement of the law because, in its view, the applicable provisions of national law are [completely] [omissis] contrary to Article 63 [omissis] TFEU and infringe the principle of non-discrimination on grounds of nationality enshrined in Article 18 [omissis] TFEU.

Arguments of the parties:

In summary, the applicant's arguments are as follows.

[**Or. 2**] Under Article 20(1)(c) of the Corporation Tax Code, dividends are classed as income from financial returns.

Under national law, all dividends distributed by a resident company to a taxable person who is also resident in Portugal are subject to a 25% withholding tax at source.

However, at the time the taxable events occurred, collective investment undertakings formed under national law were exempt from paying corporation tax on the dividends received, under Article 22(3) of the EBF as amended by Decree-Law No 7 of 13 January 2015, which applied to income received from 1 July 2015.

In order to be formed as an investment undertaking under national law (the Regime Geral dos OIC (General Provisions governing Collective Investment Undertakings)) approved by Law No 16/2015, amended by Decree-Law No 124 of 7 July 2015), an investment fund must be resident in Portugal. This means that a collective investment undertaking resident in another [omissis] EU Member State cannot be formed under national law and benefit from the exemption in Article 22 of the EBF.

While the formation of a collective investment undertaking in Portugal does not require prior authorisation from the Comissão do Mercado de Valores Mobiliários (Securities Market Commission, 'CMVM') under Article 19(1) of the General Provisions governing Collective Investment Undertakings, a collective investment undertaking must comply with numerous requirements, under the supervision of the CMVM. The same does not apply to collective investment undertakings formed under the law of [omissis] other [Member States of the European Union] [omissis], which come under the supervisory powers of the relevant regulatory authority in their own country.

In 2015 (from July) and 2016, a collective investment undertaking formed under the General Provisions on Collective Investment Undertakings, which received dividends paid by companies which have their seat in Portugal was subject to more favourable tax rules than those that applied to a collective investment undertaking formed under the law of any other [omissis] EU [Member State] which received Portuguese dividends.

This fact is all the more important when it comes to the applicant, which cannot obtain a refund in its State of residence (Germany) of the tax withheld at source (in Portugal), because it has tax-exempt status.

As the Court of Justice held in [omissis] *Verkooijen*, C-35/98, dividends paid to the applicant by companies resident in Portugal can be classed as a movement of capital within the meaning of Article 63 TFEU and Directive 88/361/EEC of 24 June 1988.

According to the case-law of the Court of Justice, under EU law the following criteria are relevant for the purposes of determining the existence of discrimination: (i) comparable situations may not be **[Or. 3]** treated differently unless such treatment is objectively justified and is proportionate to the objective pursued by the national legislation ([omissis] *Ruckdeschel*, [omissis] 16/77, [omissis]; [omissis] *Bachmann*, [omissis] C-204/90); (ii) an appearance of discrimination in form may correspond in fact to an absence of discrimination in substance ([omissis] 13/63, [*Commission* v *Italy*] [omissis]); (iii) all discrimination on grounds of nationality is prohibited, because it restricts the fundamental freedoms established in the TFEU, and the prohibition therefore applies to any form of discrimination and any other criteria of differentiation which may lead to the same result (*Commerzbank*, [omissis] C-330/91); and (iv) in order to determine whether a provision of national law is discriminatory it is not necessary for the provision in question to affect a significant proportion of nationals from other Member States ([omissis] *O'Flynn*, [omissis] C-237/94, 1996, [omissis]).

It can be seen from EU case-law that the general prohibition established in Article 63 TFEU covers both direct and indirect restrictions, including administrative measures and practices regarding any type of investment.

According to the applicant, in this particular case one might think that, as it is not an undertaking formed in Portugal, the applicant is not in a comparable situation to that of a national collective investment undertaking. However, the applicant argues that it is a case of discriminatory treatment solely on grounds of nationality in respect of the free movement of capital and access to the capital market and that, therefore, for these purposes, the applicant and collective investment undertakings established in Portugal are indeed in comparable situations.

Although the national legislation is not intended to introduce anti-abuse measures, the applicant considers that the legislation prevents it from benefiting from the exemption from corporation tax, because by law it cannot form an investment fund in Portugal because its management company does not have its seat in that country.

It can be seen from the above that the treatment is discriminatory and a clear restriction on the free movement of capital, which is prohibited by Article 63 TFEU and by Article 1 of Directive 88/361, because the applicant in these proceedings pays tax in Portugal on dividends received in that country, whereas collective investment undertakings formed under Portuguese law are exempt from paying tax on the same income (see the judgments of the Court of Justice in Cases C-338/11 to C-347/11 — [omissis] *Santander Asset Management SGIIC, S.A.* and C-480/16 — [omissis] *Fidelity Funds*).

In that regard, the applicant considers that the provision in Article 22 of the EBF [omissis] is contrary to EU law, since it conflicts with the provisions in the TFEU [**Or. 4**] on the principle of non-discrimination on grounds of nationality and with the provisions on the free movement of capital in Article 63 TFEU.

For its part, the Tax and Customs Authority argues as follows.

The applicant has omitted two key aspects required for a comprehensive definition of the tax framework governing collective investment undertakings:

– The first aspect relates to the decision by the legislature to ‘lighten’ the corporation tax burden on the taxable persons in question by deducting from the taxable amount the types of income generally received by collective investment undertakings, namely income from capital (Article 5 of the Corporation Tax Code), income from property (Article 8 of the Code) and capital gains (Article 10 of the Code), under Article 22(3) of the EBF, and also by providing an exemption from the municipal component of corporation tax and the national surcharge, under Article 22(6) of the EBF, with taxation being transferred onto stamp duty. (The general scale of stamp duty rates includes item 29, which establishes a quarterly tax at a rate of 0.0025% of the net book value of collective investment undertakings that invest in money-market instruments and deposits, and at a rate of 0.0125% of the net book value of other collective investment undertakings. In this case, the taxable amount may therefore include dividends and it only applies

to collective investment undertakings that come within the scope of Article 22 of the EBF; collective investment undertakings formed and operating under foreign law are excluded.)

– The other omission concerns the specific tax which, pursuant to Article 88(11) [omissis] of the Corporation Tax Code and Article 22(8) [omissis] of the EBF, is payable at a rate of 23% on dividends paid to collective investment undertakings which have their seat in Portugal where the shares on which the dividend was paid have not been held by the same taxable person for a continuous period of one year prior to the date on which the dividends become available and are not retained long enough to complete that period.

With regard to the tax rules that applied until 31 December 2017 to investment funds formed in Germany, based on information taken from the Deloitte tax@hand website, available at www.taxathand.com/article/9698/Germany/2018/Taxation-of-investment-fund-income-revised, the defendant tax authority argues as follows:

(a) Until the above date, investment funds formed under German law were treated as tax-transparent investment vehicles. Consequently, investors in the investment fund in Germany were liable for tax on the income generated, regardless of whether the income was distributed.

[**Or. 5**] (b) Distributed income and deemed distributed income (and also interim earnings) were generally classed as income from capital and taxed at a flat rate of 25%, plus a solidarity surcharge and, where applicable, church tax, which produced a maximum tax rate of 28.625%. The investment fund was required to publish daily and annual reports containing relevant information for tax purposes.

Consequently, in the view of the Tax Authority, the tax rules applicable to collective investment undertakings formed under Portuguese law and those formed and established in Germany are not generally comparable, given that [omissis] the former are taxed under the corporation tax framework on taxable profits that include marginal returns, and are taxed primarily through the provisions on stamp duty, whereas the latter were exempt from tax on income and also, it would seem, from other taxes.

Moreover, [omissis] although, because of its tax-exempt status, the applicant cannot obtain a refund in its State of residence (Germany) of the tax withheld at source (in Portugal), it has not been demonstrated that the part of the tax that was not refunded to the investment fund cannot be reclaimed by the fund’s investors.

The purpose of Article 63 [omissis] TFEU [omissis] is to ensure the free movement of capital both within the European internal market and between that market and third countries, and there is a prohibition on any restrictions or discrimination that are the result of national legislation that treats institutions from

[other Member States] [omissis] or third countries differently for tax purposes and creates economic conditions that are more disadvantageous for such institutions and could dissuade them from investing in Portugal.

The Tax Authority goes on to argue that, in the present case, the situations cannot be said to be objectively comparable, because the taxation of dividends is governed by different mechanisms, and there is nothing to indicate that the tax burden on the dividends received by collective investment undertakings to which Article 22 [omissis] of the EBF [omissis] applies is lower than the tax burden on dividends received by the applicant in Portugal.

There is indeed an appearance of discrimination in the form in which dividends distributed by resident companies to non-resident collective investment undertakings are taxed, but this does not correspond to discrimination in substance.

In conclusion, the Tax Authority maintains that, although the tax rules that apply to collective investment undertakings formed under national law establish an exemption for dividends distributed by resident companies, that does not mean that the income in question is not taxed, whether specifically (through corporation tax) or under the stamp duty framework, when the income in question constitutes part of the net book value of the collective investment undertakings in question. Therefore, in essence, the situation of those collective investment undertakings and the situation of investment [**Or. 6**] funds formed and established in other [Member States] [omissis] which receive Portuguese dividends cannot be said to be objectively comparable.

Facts

Following an examination of the documentary evidence submitted in the proceedings, with the agreement of the parties, the following facts are judged to be proven.

1. The applicant is a collective investment undertaking formed under a contract made under German law. It has its seat in Germany and is managed by an investment fund management company, which also has its seat in Germany. It is liable for corporation tax in Portugal as a non-resident with no permanent establishment in that country.

2. The undertaking is an independent open-ended investment fund, based on a contract between the management company, the investors and the bank responsible for holding the securities, the sole purpose of which is to administer, manage and invest its assets.

3. As the applicant investment fund is not constituted as a company there is no requirement for it to register with the German companies registry, as it cannot hold rights and obligations.

4. Under the provisions of German law by which they are governed, the investment fund's assets are jointly owned with the investors; the management company invests the fund's capital in its own name.

5. The shares or units acquired by investors do not give them voting rights or power to dispose of the assets of the applicant collective investment undertaking: that power belongs solely to the management company, and the investors' only rights are to receive dividends and to request repayment of the value of their shares or units at any time.

6. Both the applicant investment fund and its management company come under the supervision of the *Bundesanstalt fur Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority, 'BaFin').

7. The applicant is a collective investment undertaking that is resident in Germany for tax purposes and subject to corporation tax in that country, although it is exempt from payment of the tax under Paragraph 1(1) of the German Corporate Income Tax Code and Paragraph 11(1),(2) of the German Investment Tax Act. This means that it cannot reclaim tax paid abroad in the form of a tax credit on grounds of international double taxation or apply for a refund of the tax payments.

[Or. 7] 8. During 2015 and 2016, the applicant held shares in various companies resident in Portugal. The shares were deposited with BNP Paribas Securities Services, which was the custodian of the securities held in Portugal.

9. The dividends received by the applicant in 2015 and 2016 were taxed at source in full discharge of its liability at a rate of 25% under Article 87 [omissis] (4)(c) of the Corporation Tax Code. The total amount of tax was EUR 39 371.29, which was paid to the Government under tax returns No 80447153102 (December 2015) and No 80460582763 (May 2016).

10. For 2015, the applicant obtained a refund of EUR 5 065.98 under the Convention for the Avoidance of Double Taxation between Portugal and Germany, which establishes a tax rate of 15% for dividends.

11. On 29 December 2017, the applicant lodged an administrative appeal against the acts withholding corporation tax at source in 2015 and 2016. In its appeal, it sought to have those acts overturned on the ground that they were in direct breach of Community law; it also sought a ruling that it was entitled to a refund of the tax incorrectly paid in Portugal.

12. The applicant was notified on 13 November 2018 that its administrative appeal had been rejected.

13. The application [omissis] [for arbitration] was received by the Centre for Administrative Arbitration on 12 February 2019.

14. The applicant is seeking to have the withholding at source of the remaining amount, namely EUR 34 305.31, declared void.

Portuguese tax legislation in force at the time the events took place that is relevant to a decision in the proceedings

– Statute of Tax Benefits

‘*Article 22 — Collective Investment Undertakings*

1 — The following shall be liable for corporation tax in accordance with the terms of this article: funds investing in transferable securities, property investment funds, transferable securities investment companies and property investment companies that are formed and operate under national law.

[omissis]

*3 — For the purposes of determining taxable profits, the following shall be disregarded: the income referred to in Articles 5, 8 and 10 of the Corporation Tax Code, unless it comes from undertakings whose residence or seat is in a country, territory or region where significantly more favourable tax rules apply and which is included on the list approved by Order of the Government Minister [**Or. 8**] responsible for finance and revenue; any costs in connection with such income or provided for in Article 23A of the Corporation Tax Code; and income — including discounts — and costs in respect of management fees or other fees paid to the undertakings referred to in paragraph 1.*

[omissis]

6 — The undertakings referred to in paragraph 1 shall be exempt from payment of the municipal component and national surcharge [on corporation tax].

7 — In the case of mergers, demergers and subscriptions in kind involving any undertakings referred to in paragraph 1, including those lacking legal personality, Articles 73, 74, 76 and 78 of the Corporation Tax Code shall apply, mutatis mutandis*; the rules on contributions of assets in Article 73(3) of the Corporation Tax Code shall apply to subscriptions in kind.*

8 — The specific tax rates established in Article 88 of the Corporation Tax Code shall apply, mutatis mutandis, *to these arrangements.*

[omissis]

10 — There shall be no requirement to withhold corporation tax at source in respect of income obtained by the taxable persons referred to in paragraph 1.

[omissis]

14 — The provisions in paragraph 7 shall apply to the transactions referred to in that paragraph which involve undertakings whose seat, effective management or registered office is in Portuguese territory or in another Member State of the European Union or in the European Economic Area and, in the latter case, provided that there is an administrative cooperation obligation over the exchange of information and assistance in the recovery of taxes equivalent to that which exists within the European Union.

15 — The undertakings that manage the investment companies or funds referred to in paragraph 1 shall be jointly and severally liable for the tax debts of the investment companies or funds they manage.

[omissis].'

– Corporation Tax Code

'*Article 3 — Taxable amount*

1 — Corporation tax shall be payable on:

[omissis]

(d) income in the categories to which personal income tax applies, and capital gains obtained by the undertakings listed in paragraph 1(c) of the previous article which do not have a permanent establishment or which have a permanent establishment but cannot attribute the said gains to that establishment .

[omissis]'

'*Article 4 — Scope of the tax liability*

[omissis]

*[**Or. 9**] 2 — Legal persons and other undertakings that do not have either their seat or their centre of effective management in Portuguese territory shall be liable for corporation tax only in respect of the income they obtain in the said territory.*

3 — For the purposes of the previous paragraph, income obtained in Portuguese territory shall mean income attributable to a permanent establishment situated in Portuguese territory and income which does not satisfy this requirement but which is listed below:

[omissis]

(c) the categories of income listed below where the person making the payment has his residence, seat or centre of effective management in Portuguese territory or where payment of the income is attributable to a permanent establishment situated in Portuguese territory:

[omissis]

(3) other income from capital;

[omissis]'

'*Article 87 — Tax rates*

[omissis]

4 — The rate of corporation tax applicable to income obtained by undertakings which do not have their seat or their centre of effective management in Portuguese territory and which do not have a permanent establishment in Portuguese territory to which they can attribute such income shall be 25% ...'

'*Article 88 — Specific tax rates*

…

11 — A specific tax rate of 23% shall apply to income distributed by undertakings liable for corporation tax that is received by taxable persons who benefit from a total or partial exemption; in this case, this includes income from capital where the shares in respect of which the income was received have not been held by the same taxable person for a continuous period of one year before payment became available and are not retained long enough to complete that period.

[omissis]'

'Article 94 — Withholding at source

1 — Corporation tax shall be withheld at source in respect of the following types of income obtained in Portuguese territory:

…

(c) income on capital not included within the previous sub-paragraphs and income from property, in accordance with the definitions of these concepts established for personal income tax purposes, where the person liable for payment of the said income is liable for corporation tax or where the income constitutes an expense in connection with the business or professional activities of persons liable for personal income tax who maintain accounts or are required to maintain accounts;

[omissis]

3 — Sums withheld at source are classed as payments on account of the tax, except in the circumstances set out below, where they constitute full discharge of liability:

[omissis]

*[**Or. 10**] (b) where the owner of the income, with the exception of property income, is a non-resident undertaking which does not have a permanent establishment in Portuguese territory or which has a permanent establishment there but cannot attribute the income to that establishment.*

[omissis]

5 — The previous paragraph shall not apply to sums withheld which, under paragraph 3, constitute [omissis] full discharge of liability, to which the tax rates established in Article 87 shall apply.

6 — The requirement to withhold corporation tax at source arises on the date on which the same requirement arises under the Code governing personal income tax or, failing that, on the date on which the income is made available to the beneficiary. The sums withheld must be paid to the Government before the 20th day of the month following that in which the withholding was made, in accordance with the terms laid down in the Code governing personal income tax or its implementing regulations.

[omissis]'

– Code on stamp duty — General rate

'*29 — Net book value of collective investment undertakings that come within Article 22 of the EBF:*

29(1) — collective investment undertakings that invest solely in money-market instruments and deposits: 0.0025% of the net book value for each quarter;

29(2) — other collective investment undertakings: 0.0125% of the net book value for each quarter.'

In the light of all the foregoing, this single-person court [omissis] [of arbitration] asks [omissis] the Court of Justice of the European Union to reply to the following questions referred for a preliminary ruling under Article 267(a) [omissis] TFEU:

(1) Does either Article 56 [EC] (now Article 63 TFEU) on the free movement of capital or Article 49 [EC] (now Article 56 TFEU) on freedom to provide services preclude tax rules such as those at issue in the main proceedings, contained in Article 22 of the Estatuto dos Benefícios Fiscais (Statute of Tax Benefits), which provide for a withholding to be made, in full discharge of liability, from dividends distributed by Portuguese companies and received by collective investment undertakings not resident in Portugal and established in other EU [omissis] [Member States], whereas collective investment undertakings formed under Portuguese tax law and resident for

tax purposes in Portugal can benefit from an exemption from the withholding at source made on the said income?

(2) In providing for a withholding to be made at source in respect of dividends paid to non-resident collective investment undertakings and in making the possibility of obtaining an exemption from such a withholding at source available only to resident collective investment undertakings, does the national legislation at issue in the main proceedings treat dividends paid to non-resident collective investment undertakings **[Or. 11]** less favourably, in that such undertakings are wholly unable to take advantage of the aforesaid exemption?

(3) For the purposes of assessing whether the Portuguese legislation that establishes specific and different tax treatment for (i) (resident) collective investment undertakings and for (ii) the shareholders or unitholders in collective investment undertakings is discriminatory, are the tax rules that apply to the shareholders or unitholders in the collective investment undertaking relevant? Or, bearing in mind that the tax rules for resident collective investment undertakings are not affected or altered in any way by whether or not their shareholders or unitholders are resident in Portugal, in order to determine whether situations are comparable for the purposes of assessing whether the said legislation is discriminatory, should regard be had only to tax treatment at the level of the investment vehicle?

(4) Is the difference in treatment between collective investment undertakings resident in Portugal and not resident in Portugal permissible, having regard to the fact that natural or legal persons resident in Portugal who hold shares or units in collective investment undertakings (whether resident or non-resident) are, in both cases, subject in the same way to tax on income distributed by collective investment undertakings (and are generally not exempt), even if non-resident shareholders or unitholders are liable to a higher level of tax?

(5) Having regard to the fact that the discrimination at issue in these proceedings concerns a difference in the taxation of dividend income distributed by resident collective investment undertakings to their shareholders or unitholders, when it comes to assessing whether the taxation of the income is comparable, is it lawful to take account of other taxes, levies or charges payable in respect of the investments made by collective investment undertakings? In particular, in order to analyse whether the situations are comparable, is it lawful and permissible to take account of the impact of taxes on assets or costs, or of other types of tax, rather than limiting the examination strictly to the tax on the income of collective investment undertakings, including any specific taxes?

In view of this request for a preliminary ruling, to which are to be appended copies of the application [omissis] [for arbitration] and the reply by the Tax

Authority, these proceedings are stayed pursuant to Article 269(1)(c) and Article 272(1) of the Código de Processo Civil (Portuguese Code on Civil Procedure).

Lisbon, 9 July 2019

The arbitrator,

(Mariana Vargas)