Case C-572/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 November 2020

Referring court:

Finanzgericht Köln (Germany)

Date of the decision to refer:

20 May 2020

Applicant:

ACC Silicones Ltd.

Defendant:

Bundeszentralamt für Steuern

Subject matter of the main proceedings

Tax law – Tax on income from capital – Application for the reimbursement of tax on income from capital made by a foreign company to which dividends from its free-float holdings in domestic companies are distributed

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law; Article 267 TFEU

Questions referred

I. Does Article 63 TFEU (ex Article 56 EC) preclude a national tax provision, such as that at issue in the main proceedings, which, for the purposes of the reimbursement of tax on income from capital, requires a company resident abroad which receives dividends from equity holdings and does not meet the minimum equity holding threshold laid down in Article 3(1)(a) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and

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subsidiaries of different Member States (as amended by Directive 2003/123) to prove, by means of a certificate from the foreign tax administration, not only that neither that company nor a shareholder with a direct or indirect equity holding in that company can offset the tax on income from capital or deduct it as an operating cost or as work-related outgoings, but also that no offset, deduction or carry-forward has actually taken place either, in the case where such proof is not required, for the purposes of the reimbursement of tax on income from capital, from a company with the same level of equity holding which is resident in national territory?

II. In the event that the answer to the first question is in the negative:

Do the principles of proportionality and effectiveness preclude the requirement of a certificate as referred to in the first question in the case where it is effectively impossible for a company in receipt of dividends from so-called 'free-float' shares which is resident abroad to provide such a certificate?

Provisions of EU law cited

The Treaty on the Functioning of the European Union (TFEU), specifically Articles 49, 54, 63, 65 and 267 thereof.

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 (as amended by Directive 2003/123, 'Directive 90/435'), specifically Article 3 thereof.

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 parent-subsidiary directive').

Provisions of national law cited

The Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, 'the GG'), specifically Article 23 thereof.

The Körperschaftsteuergesetz (Law on corporation tax, 'the KStG'), specifically Paragraphs 2, 8b, 31, 32 and 34 thereof (as amended by the Law implementing the judgment of the Court of Justice of 20 October 2011 in Case C-284/09, 'the EuGHUmsG').

The Einkommensteuergesetz (Law on income tax, 'the EStG'), specifically Paragraphs 20, 36, 43, 43b, 44a, 45a, 49 and 50d thereof.

The Abgabenordnung (German Tax Code, 'the AO'), specifically Paragraphs 10, 11, 90 and 155 thereof.

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The Germany-UK Double Taxation Convention ('the DBA-GB'), specifically Article 4(1) thereof.

Brief summary of the facts and procedure

The parties are in dispute as to whether the applicant is entitled to a reimbursement of tax on income from capital, under Paragraph 32(5) of the KStG, in respect of dividends from free-float shares in the years at issue, 2006 to 2008. The applicant is a company limited by shares, resident in the United Kingdom, which, in the years at issue, 2006, 2007 and 2008, had a 5.26% equity holding in the nominal capital of Ambratec GmbH, Mainz. The applicant is wholly owned by The Amber Chemical Co. Ltd, a publicly listed company. In the years at issue, the applicant received distributed profits from Ambratec GmbH. Ambratec GmbH withheld and paid tax on income from capital, at a rate of 20%, plus the German solidarity surcharge, at a rate of 5.5%, on those distributed profits.

By application of 29 December 2009, received by the defendant on 31 December 2009, the applicant requested reimbursement of the tax on income from capital and the solidarity surcharge relating to the years at issue, 2006 to 2008, which had been withheld and paid. In each case, the applicant based one part of the application on Paragraph 50d(1) of the EStG in conjunction with Article 6(1) of the DBA-GB, since the DBA-GB limits the withholding tax chargeable to 15% [of the dividends paid]. With respect to the reimbursement of the remaining tax on income from capital, it based the other part of the application on the fundamental freedoms of the EC Treaty and the TFEU. By decision of 7 October 2010, the defendant adjudicated on the applications made on the basis of Paragraph 50d(1) of the EStG in conjunction with Article 6(1) of the DBA-GB and, in so doing, granted a reimbursement of the tax on income from capital plus the solidarity surcharge, as requested. Moreover, by decisions of 8 June 2015, the defendant, with reference to the application of 31 December 2009, refused to grant an exemption and reimbursement, under Paragraph 32(5) of the KStG, in respect of the German withholding taxes levied on income from capital in the years at issue. The applicant raised an objection to those decisions within the prescribed time limit. By decisions of 22 January 2016, those objections were dismissed as unfounded. The applicant thereafter brought a judicial action within the prescribed time limit.

Submissions of the applicant

In support of its action, the applicant claims that proof for the purposes of point 1(b) and (c) of the first sentence of Paragraph 32(5) of the KStG has been provided. The purpose of Paragraph 32(5) of the KStG is to avoid, by means of a right to reimbursement exercisable by a foreign creditor of income from capital in the cases specified by the Court of Justice, the definitive taxation of foreign limited companies (parent companies) which have received dividends from their domestic (German) subsidiaries. The applicant, which is resident in England,

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submits that board meetings in the years at issue took place in England. Moreover, its directors are predominantly resident in England. It has submitted a certificate from the United Kingdom tax authorities dated 12 August 2014. It claims that it has also proved that it cannot offset, deduct or carry forward German tax on income from capital and that that tax has not actually been offset, deducted or carried forward either.

In so far as the defendant requires the submission of a certificate from the State of residence to show that neither it, the applicant, nor shareholders with a direct or indirect equity holding in it can offset the withheld tax on income from capital or take it into account for tax-reduction purposes, it provided that proof in the form of tax calculations. It is clear from these that, at the level of The Amber Chemical Co. Ltd., the parent company, no German withholding taxes were offset (not even in respect of that part of the dividend that was received directly), and that, in that regard, all of the information on the dividends received at the level of the subsidiary – that is to say, the applicant – and on the related German withholding taxes has been lost. The submission of a certificate from HMRC cannot be required at that level. The requirement to furnish such proof must be regarded as disproportionate and is not covered either by Paragraph 32(5) of the KStG or by Paragraph 90(1) and (2) of the AO, since it goes beyond what is necessary in order to examine, and issue a positive decision on, a claim to reimbursement under Paragraph 32(5) of the KStG.

The fact that it is not possible for shareholders with a direct or indirect equity holding in the applicant to offset tax requires no further proof, since no corresponding income is attributed to those persons. The requirement to submit a model certificate in respect of the direct and indirect shareholders of an indirectly listed company would quite clearly go beyond the bounds of all proportionality. In that regard, the provision of proof is likely to be precluded not least by the fact that those with shareholdings in the parent company during the period of distribution are no longer identifiable. In the course of the judicial proceedings, the applicant submitted global non-offset certificates from HMRC dated 24 May 2016. It is clear from these that offsetting is generally not possible in the case of only indirect shareholders (that is to say extending back from the applicant's direct shareholders). The applicant submits that the requirement to submit such a global certificate infringes EU and constitutional law.

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Submissions of the defendant

The defendant submits that there is no right to reimbursement under Paragraph 32(5) of the KStG, since the applicant has not proved that the conditions of reimbursement are met. The applicant has not provided the proof required by law under point 1(b) and (c) of the first sentence of Paragraph 32(5) of the KStG in respect of its centre of effective management. Moreover, point 5 of the second sentence of Paragraph 32(5) of the KStG lays down the condition that neither the applicant nor a shareholder with a direct or indirect equity holding in

the applicant must have been able to offset, deduct or carry forward the withheld tax. That provision is expanded upon by the obligation to provide proof laid down in the fifth sentence of Paragraph 32(5) of the KStG. This provides that proof must be furnished to show not only that there is in principle no possibility of an advantage, but also that no advantage has actually materialised either. Implicit in the requirement of proof is the further obligation to provide detailed information on the precise group of persons forming the direct and indirect shareholders, irrespective of their legal form. One way of discharging that obligation is to submit an organisational chart detailing the entire chain of equity participation down to the last indirect person. The applicant did not meet that condition either. The applicant has not proved that it is not possible for one of its direct or indirect shareholders to take the contested deduction at source into account for tax purposes in the country in which the shareholder concerned is resident (point 5 of the second sentence of Paragraph 32(5) in conjunction with the fifth sentence of Paragraph 32(5) of the KStG). The requirement of proof contained in the third sentence of Paragraph 32(5) of the KStG does not lead to unjustified discrimination.

Any restriction on the exercise of the fundamental freedoms guaranteed by the EU Treaty is justified where it serves the need to maintain the cohesion of a tax system. This presupposes the existence of a direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (judgments of 13 March 2007, C-524/04, *Test Claimants*, paragraph 68, and of 8 November 2007, C-379/05, *Amurta*, paragraph 46). Thus, the Federal Republic of Germany is not required to provide any tax relief where an exemption from the deduction of tax on income from capital [at source] in respect of dividends which have been distributed by limited companies resident in Germany has in fact already been achieved, or could have been achieved, through relief afforded to a foreign direct or indirect recipient of the dividends in a State of residence. It is for this reason that tax authorities of a Member State of the European Union are entitled to require the taxpayer to provide such proof as is necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue, including the reality and nature of tax deductions made in other Member States, have been met (judgments of 30 June 2011, C-262/09, *Meilicke II*, and of 10 February 2011, C-436/08, *Haribo*).

Assessment of the dispute under national law

In the case of distributed profits, a shareholder resident abroad receives income from capital, within the meaning of Paragraph 20(1), point 1, of the EStG, which is subject to a limited liability to tax in accordance with Paragraph 49(1)(5)(a) EStG. In that connection, income tax is levied, in accordance with the first sentence of point 1 of Paragraph 43(1) of the EStG (in conjunction, in the case of a limited company, with the first sentence of Paragraph 31(1) of the KStG), by means of a deduction [at source] from the income from capital (tax on income from capital). Tax on income from capital which has been withheld and paid may be reimbursed. The conditions governing reimbursement differ depending on

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whether the free-float equity participation, that is to say an equity participation of less than 15% or 10%, is held by a corporation resident in national territory or abroad. If the free-float equity participation is held by a corporation resident in national territory, dividends distributed to that corporation by a domestic company in the years at issue and until the entry into force of the Law of 21 March 2013 implementing the judgment of the Court of Justice of 20 October 2011 in Case C-284/09 are tax-free, in accordance with Paragraph 8b(1) of the KStG. In accordance with Paragraph 31(1) of the KStG in conjunction with Paragraph 36(2)(2) of the EStG, tax on income from capital which has been withheld in the period at issue is offset against the tax liability of the domestic corporation and may also be reimbursed. The offsetting (and reimbursement, if any,) of the tax on income from capital presupposes that that tax has been withheld and paid. This must be proved by the submission of a certificate, in accordance with Paragraph 45a(2) or (3) of the EStG. In the case of dividends distributed to corporations resident abroad which hold a free-float equity participation, the law provides for the possibility of reimbursement of tax on income from capital in Paragraph 32(5) of the KStG. However, the conditions [governing such reimbursement] are different from those that apply to the offsetting or reimbursement of tax on income from capital in the case of domestic companies.

aa. Legislative history of Paragraph 32(5) of the KStG

Paragraph 32(5) of the KStG was introduced by the legislature following the judgment of the Court of Justice of 20 October 2011, C-284/09. In that judgment, the Court ruled that the discharging effect of the withholding tax levied, in accordance with Paragraph 32(1) of the KStG, on dividends to foreign corporations that do not reach the minimum holding threshold laid down in the parent-subsidiary directive infringes the free movement of capital provided for in the TFEU and the EEA Agreement.

bb. Prescriptive content of Paragraph 32(5) of the KStG

Paragraph 32(5) of the KStG lays down a number of conditions governing the reimbursement of tax on income from capital, including certain obligations to provide proof and certificates. It reads:

> (5) Where the corporation tax owed by the creditor on income from capital within the meaning of Paragraph 20(1)(1) of the EStG has been definitively disposed of in accordance with subparagraph 1 [hereof], the tax on income from capital which has been withheld and paid shall, on application, be reimbursed to the creditor of the income from capital in accordance with Paragraph 36(2)(2) of the EStG, where
>
> 1. the creditor of the income from capital is a company subject to limited tax liability as provided for in Paragraph 2(1), which

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a) is also a company within the meaning of Article 54 of the Treaty on the Functioning of the European Union or Article 34 of the Agreement on the European Economic Area,

b) has its registered office and centre of effective management within the territory of a Member State of the European Union or a State to which the Agreement on the European Economic Area is applicable,

c) is subject, in the State of its centre of effective management, to non-optional, unlimited tax liability comparable to that referred to in Paragraph 1, and is not exempt therefrom,

2. the creditor has a direct holding in the share capital of the debtor of the income from capital and does not meet the minimum participation threshold laid down in Paragraph 43b(2) of the EStG.

Sentence 1 shall apply only in so far as

1. reimbursement of the tax on income from capital in question is not available under any other provision,

2. the income from capital would be left out of account in the calculation of income, in accordance with Paragraph 8b(1),

3. the income from capital is not attributed, under provisions in another country, to any person who would not be entitled to reimbursement pursuant to this subparagraph if he were to receive the income from capital directly,

4. a right to full or partial reimbursement of the tax on income from capital would not be excluded if Paragraph 50d(3) of the EStG were applied *mutatis mutandis*, and

5. the creditor or a shareholder having a direct or indirect equity holding in the creditor cannot offset the tax on income from capital or deduct it as an operating cost or as work-related outgoings; the possibility of carrying forward a set-off shall be treated as a set-off.

The creditor of the income from capital shall provide proof of compliance with the conditions of reimbursement. In particular, he shall prove, by way of a certificate from the tax authorities of his country of residence, that he is regarded as being resident for tax purposes in that country, is subject to unlimited corporation tax liability there, is not exempt from corporation tax and is the actual recipient of the income from capital. The certificate from the foreign tax administration shall show that the German tax on income from capital cannot be offset, deducted or carried forward and that no set-off, deduction or carry-forward has actually taken place either. The tax on income from capital within the meaning of the first

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sentence shall be reimbursed in relation to all income from capital received in a calendar year on the basis of an exemption notice as provided for in the third sentence of Paragraph 155(1) of the AO.

Summary of the grounds for reference

A reference to the Court of Justice of the European Union is required in accordance with Article 267 TFEU because there is some uncertainty as to how the free movement of capital provided for in Article 63 TFEU (ex Article 56 EC) is to be construed. The question crucial to the outcome of the proceedings is whether the conditions laid down by the German legislature in Paragraph 32(5) of the KStG as governing the reimbursement of tax on income from capital in the form of dividends from free-float shares – that is to say dividends from equity holdings of less than 15% (in the case of distributions up to 31 December 2008) or 10% (in the case of distributions after 31 December 2008) – are compatible with EU law and, therefore, applicable. The questions referred for a preliminary ruling are material to the judgment to be given. With the exception of the condition forming the subject of the uncertainty expressed in the question referred for a preliminary ruling, all the conditions of reimbursement laid down in Paragraph 32(5) of the KStG are met. Paragraph 32(5) of the KStG is applicable in the years at issue pursuant to Paragraph 34(13b) of the KStG. The dividends in respect of which the disputed tax on income from capital was withheld and paid objectively constitute income from capital within the meaning of Paragraph 20(1)(1) of the EStG (the first sentence of Paragraph 32(5) of the KStG).

The right to reimbursement requires that the creditor should be a company subject to limited tax liability under Paragraph 2(1) of the KStG that meets the definition of a company or firm given in Article 54 TFEU (Paragraph 32(5), point 1(a), of the KStG), has its registered office (Paragraph 10 of the AO) and centre of effective management (Paragraph 11 of the AO) within the territory of an EU Member State or an EEA State (point 1(b) of the first sentence of Paragraph 32(5) of the KStG) and is subject, in the State of its centre of effective management, to non-optional, unlimited tax liability comparable to that referred to in Paragraph 1 of the KStG, without being exempt therefrom (point 1(c) of the first sentence of Paragraph 32(5) of the KStG). Those conditions are satisfied. The applicant, as a recipient of dividends distributed by a company resident in Germany, is a company subject to limited tax liability in accordance with Paragraph 2(1) of the KStG. It is also a company or firm within the meaning of Article 54 TFEU (Paragraph 32(5), point 1(a), of the KStG). The condition laid down in point 1(b) of the first sentence of Paragraph 32(5) of the KStG is also satisfied. Both the applicant’s registered office within the meaning of Paragraph 10 of the AO and its centre of effective management within the meaning of Paragraph 11 of the AO are located in the United Kingdom.

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With regard, in particular, to its centre of effective management, the applicant has argued to the satisfaction of this Chamber, and, through the submission of appropriate documentation, substantiated, that its directors are predominantly resident in the United Kingdom and that its board meetings took place at the undertaking's registered office in the United Kingdom. In that connection, the applicant submitted an extract from the United Kingdom commercial register containing a list of its company officers, who were predominantly resident in the United Kingdom. The applicant has also submitted the minutes of two documented director meetings held at the undertaking's registered office on 31 January 2007. In addition, the applicant has submitted the Directors' Report and Financial Statements as of 31 March 2009, which expressly refers to 'UK-based directors' as key management personnel.

The foregoing notwithstanding, this Chamber is satisfied that the requirement that the registered office (Paragraph 10 of the AO) and the centre of effective management (Paragraph 11 of the AO) must be located within the territory of an EU Member State or an EEA State (point 1(b) of the first sentence of Paragraph 32(5) of the KStG) infringes EU primary law and is therefore inapplicable in any event. This is because the amendment of the rules was triggered by an infringement of the free movement of capital, the scope of which extends in principle to third countries. So it was that the Court of Justice based its judgment of 20 October 2011 (C-284/09), which was the reason for the introduction of Paragraph 32(5) of the KStG, on the free movement of capital (Article 63 TFEU) and, in particular, not on the freedom of establishment (Article 49 TFEU). In that judgment, the Court stated that, by subjecting dividends distributed to companies having their registered office in another Member State to higher taxation, economically, than dividends distributed to companies with their registered office in its territory, in cases where the minimum threshold for equity participation by a parent company in the capital of its subsidiary, laid down in Article 3(1)(a) of Directive 90/435, is not reached, a Member State fails to fulfil its obligations under Article 56(1) EC, that is to say its obligation to ensure the free movement of capital. The fact that the foregoing is to be regarded as an infringement of the free movement of capital means that even parent companies having their registered office in third countries that do not reach the minimum equity holding threshold can invoke an infringement of EU primary law. This is because the free movement of capital is the only fundamental freedom that is applicable to third countries too (see the judgment of 18 December 2007, C-101/05). Article 63(1) TFEU (ex Article 56 EC) thus provides that all restrictions on the movement of capital between Member States and between Member States and third countries are to be prohibited.

The foregoing is confirmed by the judgment of the Court of Justice of 13 November 2019 (C-641/17, *College Pension Plan of British Columbia* v *Finanzamt München*). According to that judgment, the taxation of free-float dividends distributed to foreign pension funds infringes the free movement of capital. This is because resident pension funds are entitled to receive dividends free of tax, as they are able, in the context of the tax assessment procedure, to

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offset any withheld tax on income from capital against corporation tax or to obtain a refund of almost all of the former tax. Conversely, non- resident pension funds – in the circumstances of that case, a pension fund with a registered office in Canada, that is to say a third country – cannot effect such set-offs or obtain such refunds, since, for such pension funds, the corporation tax paid by way of withholding tax has a discharging effect, in accordance with Paragraph 32(1)(2) of the KStG, and constitutes a definitive tax burden in relation to them. The Court of Justice regarded this as constituting an infringement of the free movement of capital. Consequently, that judgment too indicates that, by virtue of the free movement of capital, even undertakings having their registered office in third countries must not be placed in a worse position in relation to the receipt of dividends from free-float shares than undertakings having their registered office in national territory or in the Community.

Since the applicant, with a holding of 5.26% in the years at issue, does not have a controlling interest in Ambratec GmbH, a decision on the relationship between the free movement of capital and the freedom of establishment, in particular in circumstances involving third countries, is unnecessary in any event. With regard to the infringement of the free movement of capital, point 1 of the first sentence of Paragraph 32(5) of the KStG must be restricted in such a way that that rule also applies to undertakings having their registered office and/or centre of effective management in third countries. In accordance with Article 23 of the GG (German Basic Law)/Article 267 TFEU, the law of the European Union is part of German federal law and its application takes precedence over national law. For that reason, the courts are not permitted to apply German provisions if they infringe EU law.

However, a national provision which infringes EU primary law is not, as a rule, inapplicable *in toto*. After all, the principle that Community law takes precedence does not mean that the provision contrary to EU law must in principle be disapplied in its entirety. Rather, the requirements of Community law which the Court of Justice has formulated as being binding must, in suitable cases, be read into the provisions concerned through the ‘reduction of infringing provisions to preserve validity’. The development of case-law thus makes it possible to create a situation which is in conformity with EU law. Accordingly, point 1 of the first sentence of Paragraph 32(5) of the KStG must, in order to remain valid, be interpreted as meaning that it also applies to companies having their registered office and/or centre of effective management in third countries. So far as concerns the case at issue, this means that the rule contained in Paragraph 32(5) of the EStG would be relevant even if the applicant’s centre of effective management were not in the United Kingdom. For, if the infringing provision is reduced in such a way as to preserve its validity, the question of whether its centre of effective management is in an EU Member State or an EEA State is immaterial.

Point 1(c) of the first sentence of Paragraph 32(5) of the KStG is also satisfied. The applicant is subject, in the State of its centre of effective management, to non-optional, unlimited tax liability comparable to that referred to in Paragraph 1 of the KStG, and is not exempt therefrom. The applicant’s centre of effective

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management is in the United Kingdom. The applicant is also subject to unlimited tax liability there. Its tax liability is non-optional and it is not exempt therefrom. Moreover, the requirement in point 2 of the first sentence of Paragraph 32(5) of the KStG is also met. According to this, the foreign parent company must have a direct holding in the share capital of the debtor of the income from capital which must fall below the minimum equity participation threshold laid down in Paragraph 43b(2) of the EStG. The level of equity participation must therefore be below 10%. The applicant's holding in the nominal capital of the German undertaking Ambratec GmbH s 5.26% and, thus, less than 10%. The certificate from the United Kingdom tax authorities (HM Revenue & Customs) dated 12 August 2014 meets the evidential requirements laid down in the fourth sentence of Paragraph 32(5) of the KStG.

Point 1 of the second sentence of Paragraph 32(5) of the KStG requires that the creditor of the income from capital must not be eligible for reimbursement under any other provision. That condition is satisfied. In particular, in the case at issue, reimbursement is indeed not available under Paragraph 44a(9) or the second sentence of Paragraph 50d(1) of the EStG. Point 2 of the second sentence of Paragraph 32(5) of the KStG is also satisfied. In accordance with point 2 of the second sentence of Paragraph 32(5) of the KStG, the right to reimbursement within the meaning of the first sentence of Paragraph 32(5) of the KStG is applicable only to income from capital that would be excluded from consideration in the calculation of income pursuant to Paragraph 8b(1) of the KStG. The legislation thus ensures, first, that the right to reimbursement is not reduced, within the meaning of Paragraph 8b(5), by flat-rate, non-deductible operating costs. Secondly, and above all, the cross-reference to Paragraph 8b(1) of the KStG prevents tax on income from capital from being reimbursed in the cases provided for in Paragraph 8b(4), as amended, that is to say in cases involving the taxable holding of free-float shares. Henceforth, therefore, the reimbursement procedure provided for in Paragraph 32(5) of the KStG extends without restriction – to include both block and free-float shareholdings – only to earnings accrued up to 28 February 2013; see the second sentence of Paragraph 34(7a) in the version of the EuGHUmsG of 21 March 2013. That condition is satisfied in the case of the dividend payments in the years at issue.

Point 3 of the second sentence of Paragraph 32(5) of the KStG, according to which the income from capital must not be attributed, under the law of another country, to any person who would not be entitled to reimbursement under subparagraph (5) if he were in direct receipt of the income from capital in question, is satisfied in the case at issue. In particular, the dividends at issue are not attributed under the law of the other country, for the purposes of group taxation for example, to any person who would not himself qualify for reimbursement within the meaning of Paragraph 32(5) of the KStG. Finally, an entitlement on the part of the applicant to full or partial reimbursement of the tax on income from capital is not excluded on the basis of the application *mutatis mutandis* of Paragraph 50d(3) of the EStG, since the conditions laid down there

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are not met. Accordingly, the question of whether this condition [under Paragraph 32(5)] is lawful can be left open.

The requirement contained in point 5 of the second sentence of Paragraph 32(5) of the KStG, however, appears to be problematic. Under that provision, there is no right to reimbursement where the creditor or a shareholder having a direct equity holding in the creditor can offset the withheld income from capital or deduct it as an operating cost or as work-related outgoings; even the possibility of carrying forward the set-off is sufficient in this regard. Reimbursement under Paragraph 32(5) of the KStG is thus granted only where the disadvantage to foreign dividend recipients as compared with domestic dividend recipients cannot be equalised by set-off, deduction from the basis of assessment or carry-forward of the set-off in the other country.

In addition, the fifth sentence of Paragraph 32(5) of the KStG requires the applicant to prove that that condition is met by submitting a certificate from the foreign tax administration stating that the German tax on income from capital cannot be offset, deducted or carried forward and that no set-off, deduction or carry-forward hast actually taken place either. In that connection, this Chamber understands that legislative provision to mean that the certificate is to be submitted in respect of both the creditor of the income from capital, that is to say the applicant, and all shareholders with a direct or indirect equity holding in the creditor. This is because the provision in question is formulated in a general way and must therefore be understood generally and, thus, as applying at all levels. This is confirmed by its schematic connection with point 5 of the second sentence of Paragraph 32(5) of the KStG, which requires that the creditor, or a shareholder with a direct or indirect equity holding in the creditor, must not be able to offset the tax on income from capital or deduct it as an operating cost or as work-related outgoings. In the light of that condition, the requirement of a certificate, which clearly relates to point 5 of the second sentence of Paragraph 32(5) of the KStG, must for schematic reasons be extended to all levels of equity participation too.

In the case at issue, however, it is not possible to determine whether the condition laid down in point 5 of the second sentence of Paragraph 32(5) of the KStG has been met. The applicant is wholly owned by The Amber Chemical Co. Ltd.. The latter is a listed company. Exactly how tax on income from capital received by The Amber Chemical Co. Ltd. or, in particular, by its shareholders is treated is not readily apparent. With regard to the applicant itself, it submitted a certificate from HMRC, the United Kingdom tax authority, dated 12 August 2014. That certificate confirms, both for the 2006/2007 financial year (dividend receipts in 2006 and 2007) and for the 2008/2009 financial year (dividend receipts in 2008), that no relief on the German tax on income from capital has occurred and cannot occur in the future either. Whether, from the point of view of the legally relevant facts, this is due to a dividend exemption or the absence of any income to carry forward because of a loss-making position is – contrary to the defendant’s view – immaterial in this regard. In a domestic situation, after all, tax on income from capital is offset and reimbursed even in a loss-making year.

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As regards the requirement that neither the applicant nor any shareholders with a direct or indirect shareholding in it should have offset the withheld tax on income from capital or taken it into account for tax reduction purposes, it is not possible to adduce proof to show that this was the case. It is true that the applicant has submitted tax calculations for The Amber Chemical Co. Ltd., its parent company. Even if it were to be assumed on that basis, as the applicant does, that no German withholding taxes have been offset at the level of The Amber Chemical Co. Ltd., there are no such conclusions in relation to the shareholders of The Amber Chemical Co. Ltd. in their capacity as indirect shareholders in the applicant. In addition, the aforementioned calculations do not constitute a foreign certificate within the meaning of the fifth sentence of Paragraph 32(5) of the KStG.

It is clear from the global non-offset certificates from HMRC dated 24 May 2016 submitted by the applicant that offsetting is generally not possible in the case of shareholders with only an indirect shareholders (that is to say extending back from the applicant's direct shareholders). This, however, is a general explanation by the UK tax authorities that bears no specific relation to the case at issue or, in particular, to the applicant's indirect shareholders. In addition, it is not known, and, moreover, cannot be ascertained, in which countries the indirect shareholders – that is to say the direct shareholders of the listed company The Amber Chemical Co. Ltd. – were resident in the years at issue. As a result, the global non-offset certificates also suffer from the fact that they were not recognisably issued by the competent tax administration concerned. Against that background, the applicant's application for reimbursement under Paragraph 32(5) of the KStG would have to be rejected. The position would be different, however, if the requirement contained in point 5 of the second sentence and the fifth sentence of Paragraph 32(5) of the KStG infringed the free movement of capital and, for that reason, were not to be applied. In that event, the applicant's application for reimbursement would have to be granted. Accordingly, the question as to whether the free movement of capital precludes the rule contained in point 5 of the second sentence and the fifth sentence of Paragraph 32(5) of the KStG is material to the judgment to be given.

This Chamber's concerns from the point of view of EU laws relate to infringement of the free movement of capital (Articles 63(1) and 65 TFEU), as a matter of primary Community law, and infringement of the principles of proportionality and effectiveness.

1. First question: Infringement of the free movement of capital (Articles 63(1) and 65 TFEU)

As a foreign company subject to limited tax liability, the applicant is charged tax on income from capital at 15% on the dividends which it receives, and is not able to offset that tax or have it refunded, in accordance with point 5 of the second sentence and the fifth sentence of Paragraph 32(5) of the KStG. In the case of German companies subject to unlimited tax liability, on the other hand, tax on income from capital is offset in full against their corporation tax liability and,

WORKING DOCUMENT

where appropriate, reimbursed. That unequal treatment prompts concerns on the part of this Chamber as to whether this constitutes an infringement of the free movement of capital under Articles 63(1) and 65 TFEU.

It follows from the Court's settled case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see, inter alia, the judgments of 13 November 2019, *College Pension Plan of British Columbia* v *Finanzamt München*, C-641/17, paragraph 48, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, paragraph 39). Specifically, the less favourable treatment by a Member State of dividends paid to foreign companies, compared to the treatment of dividends paid to domestic companies, is liable to deter companies established abroad from pursuing domestic investments and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU (see, on the taxation of non-resident pension funds that receive dividends from the Community area, the judgments of 13 November 2019, *College Pension Plan of British Columbia* v *Finanzamt München*, C-641/17, paragraph 49; of 20 October 2011, *Commission* v *Germany*, C-284/09, paragraphs 72 and 73; and of 22 November 2012, *Commission* v *Germany*, C-600/10, paragraph 15).

The application to dividends which are paid to companies established abroad of a tax burden heavier than that applied to dividends of the same kind which are paid to companies established in national territory constitutes such less favourable treatment (see, on the taxation of non-resident pension funds in receipt of dividends from the Community area, the judgments of 13 November 2019, *College Pension Plan of British Columbia* v *Finanzamt München*, C-641/17, paragraph 49, and of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, paragraph 48). The same is true of the situation in which dividends paid to a domestic company benefit from a full or substantial exemption from tax, while dividends paid to a foreign company are subject to final withholding tax (see the judgment of 8 November 2012, *Commission* v *Finland*, C-342/10, paragraphs 32 and 33).

The foregoing constitutes an interference with the free movement of capital provided for in Article 63 TFEU, which must be protected. This is because Paragraph 32(5) of the KStG makes the reimbursement of tax on income from capital to companies resident abroad that have an equity holding of less than 10% or 15% in a company resident in national territory subject to stricter conditions than the reimbursement of tax on income from capital to companies resident in Germany that have an equity holding of less than 10% or 15% in a company resident in national territory. The reason for this is that tax on income from capital is reimbursed to foreign companies only if the creditor, or a shareholder with a direct or indirect equity holding in the creditor, cannot offset the withheld tax on income from capital or deduct it as an operating cost or as work-related outgoings. The fifth sentence of Paragraph 32(5) of the KStG also requires that proof of the

WORKING DOCUMENT

foregoing be furnished in the form of the submission of a certificate from the foreign tax administration. That requirement does not apply, however, to the reimbursement of tax on income from capital to domestic companies.

This Chamber is uncertain whether that interference is justified. It is unclear whether the rule contained in point 5 of the second sentence and in the fifth sentence of Paragraph 32(5) of the KStG is justified in the light of Article 65(1)(a) TFEU. In accordance with Article 65 TFEU, the provisions of Article 63 are to be without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. In so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. Accordingly, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the FEU Treaty (see the judgment of 13 November 2019, *College Pension Plan of British Columbia* v *Finanzamt München*, C-641/17, paragraph 63). Indeed, the derogation in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (see the judgments of 13 November 2019, *College Pension Plan of British Columbia* v *Finanzamt München*, C-641/17, paragraph 63, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, paragraphs 55 and 56).

A distinction must, therefore, be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. In that regard, for national tax legislation to be capable of being regarded as compatible with the provisions of the Treaty concerning the free movement of capital, the difference in treatment must concern situations that are not objectively comparable or must be justified by an overriding reason in the public interest (see the judgments of 13 November 2019, *College Pension Plan of British Columbia* v *Finanzamt München*, C-641/17, paragraph 64, and of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-47/11, paragraph 23). In that connection, the comparability of a cross- border situation with an internal one must be examined having regard to the aim pursued by the national provisions at issue as well as their purpose and content (see the judgment of 13 November 2019, *College Pension Plan of British Columbia* v *Finanzamt München*, C-641/17, paragraph 65).

Moreover, the position of non-resident shareholders becomes comparable to that of resident taxable persons as soon as a State, either unilaterally or by way of a convention, imposes a charge to income tax not only on resident taxable persons but also on non-resident taxable persons in respect of the dividends which they receive from a resident company (see the judgments of 8 November 2007,

WORKING DOCUMENT

Amurta, C-379/05, paragraph 38, and of 20 October 2011, *Commission* v *Germany*, C-284/09, paragraph 56). In fact, it is solely because of the exercise by that State of its taxing powers that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident recipient companies not to be subject to a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU (ex Article 56 EC), the State in which the company making the payment has its registered office is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax, non-resident recipient companies are subject to the same treatment as resident recipient companies (see the judgments of 8 November 2007, *Amurta*, C-379/05, paragraph 39, and of 20 October 2011, *Commission* v *Germany*, C-284/09, paragraph 56).

In the case at issue, the Federal Republic of Germany has chosen, in the case of free-float dividends paid to companies resident in Germany, to exercise its tax sovereignty by levying a tax on income from capital with an option to offset at a later date. The Federal Republic of Germany has also opted, however, to impose on free-float dividends paid to foreign companies a tax levy in the form of a tax on income from capital. From the point of view of avoiding a series of liabilities to tax, they are in a comparable position. There is nothing to indicate that companies resident in national territory which are in receipt of free-float dividends are not comparable with companies resident abroad which are in receipt of free-float dividends. To this extent, there would appear to be no justification for attaching different conditions to the acquisition of a reimbursement or set-off of tax on income from capital.

This Chamber is also uncertain whether the unequal treatment is justified under the rule in *Amurta*. Thus, in accordance with the rule in *Amurta*, the definitive collection of tax on income from capital in the source State may be justified if the State of residence offsets it in full against the tax applied and, where appropriate, reimburses it (see, in that regard, the judgment of 8 November 2007, *Amurta*, C-379/05, paragraph 79 et seq.); the provision in point 5 of the second sentence of Paragraph 32(5) of the KStG, which is the source of the uncertainty here, might take this into account (paragraph 61). In the case at issue, the option to effect such a set-off in the applicant's country of residence might result from Article 23(2)(a) of the DBA-GB. Under that provision, German tax payable under the laws of Germany, whether directly or by deduction, on profits or income from sources within Germany are to be allowed as a credit against any United Kingdom tax computed by reference to the same profits or income by reference to which the German tax is computed. Consequently, although the agreement provides for a set-off, that set-off is confined to the United Kingdom tax payable on dividends distributed by a German corporation. This does not therefore guarantee that the German tax on income from capital will be offset at the full rate of 15% [of the dividends paid].

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As regards the indirect shareholders, since it is effectively impossible to identify who these are, it cannot be determined whether there are any bilateral set-off options allowing tax on income from capital to be offset in the country of residence. In addition, the extension of point 5 of the second sentence of Paragraph 32(5) of the KStG to, in particular, all indirect shareholders too necessitates investigations which a domestic company in receipt of dividends is not required to carry out.

2. Second question: infringement of the principle of [proportionality] and the principle of effectiveness

In the event that the first question is answered in the negative and it is therefore compatible with the free movement of capital for an undertaking resident abroad which receives dividends from free-float shares to be required, for the purposes of the reimbursement of tax on income from capital, to provide proof, in the form of a certificate from the foreign tax administration, that neither it nor a shareholder with a direct or indirect equity holding in it can offset the tax on income from capital or deduct it as an operating cost or as work-related outgoings, the Chamber is uncertain as to whether the principle of proportionality and the principle of effectiveness preclude the requirement of a certificate to that effect in the case where it is effectively impossible for a recipient of dividends from free-float shares which is resident abroad to provide that certificate.

In accordance with the principle of effectiveness, the Member States must take all measures necessary to give the fullest possible effect to Community law. The principle of effectiveness states that the exercise of the rights conferred by Community law must not be rendered practically impossible or excessively difficult (see the judgments of 8 March 2001, *Metallgesellschaft*, C-397/98 and C-410/98, paragraph 85, and of 2 October 2003, *Weber's Wineworld*, C-147/01, paragraph 38). The principle of proportionality means that the measures must be appropriate for attaining those objectives and must not go beyond what is necessary in order to attain them (see the judgment of 26 February 2019, *Wächtler*, C-581/17, paragraph 63).

Even if the condition laid down in point 5 of the second sentence of Paragraph 32(5) of the KStG is compatible with the free movement of capital, the requirement to prove that that condition is met in relation to all direct and indirect shareholders by submitting certificates to this effect from the foreign tax authorities, in accordance with the fifth sentence of Paragraph 32(5) of the KStG, poses considerable difficulties for a taxable person seeking reimbursement of tax on income from capital – in the present case, the applicant. The production of those certificates sometimes necessitates a disproportionate amount of investigative effort or – as in the case at issue – can even be practically impossible. In those circumstances, the exercise of the free movement of capital is made practically impossible for a taxable person seeking reimbursement of tax on income from capital – in the present case, the applicant. In laying down that requirement, therefore, the Federal Republic of Germany has not taken a measure

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that gives the fullest possible effect to Community law, but one which would even have the effect of thwarting its implementation.

Moreover, the law does not provide for any exceptions to the requirement of proof laid down in the fifth sentence of Paragraph 32(5) of the KStG. Under that statutory provision, it is immaterial whether it is effectively impossible for the creditor to provide proof or certificates from the foreign tax authorities, or whether it is unreasonable to require him to do so. This Chamber is uncertain whether this is compatible with the demands of proportionality applicable in a State governed by the rule of law and, in particular, with the principle of effectiveness recognised in EU law. Even though the Court of Justice generally grants Member States a broad discretion with respect to the procedure for transposing the substantive law required under EU law, there are limits. Those limits are exceeded, however, where the provision of proof is effectively rendered impossible.

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