Case C-407/22

Request for a preliminary ruling

Date lodged:

20 June 2022

Referring court:

Conseil d'État (France)

Date of the decision to refer:

14 June 2022

Appellant:

Ministre de l'Economie, des Finances et de la Relance

Respondent:

Manitou BF SA

CONSEIL D'ETAT …

…

…

… **…**

…

MINISTRE DE L'ECONOMIE, DES FINANCES ET DE LA RELANCE
v SA Manitou BF

The Conseil d'État (Council of State, France) …
(Judicial Section, Combined 8th and 3rd Chambers)

…

Sitting of 1 June 2022

Decision of 14 June 2022

Having regard to the following proceedings:

The *société anonyme* (public limited company) (SA) Manitou BF applied to the tribunal administratif, Nantes (Administrative Court, Nantes, France), for reimbursement of part of the initial amount of corporation tax for which it was liable for the financial year ending in 2011, corresponding to the add-back to its taxable revenue of a proportion of the costs and expenses of the revenue, derived from holdings, which was paid to it by subsidiaries established in Member States of the European Union other than France.

By an order … of 26 September 2017, the President of the Administrative Court, Nantes forwarded … the application by Manitou BF to the tribunal administratif de Montreuil (Administrative Court, Montreuil, France), which dismissed it by judgment No 1708681 of 16 July 2018.

By judgment No 18VE02710 of 27 May 2021, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France) set aside that judgment and upheld Manitou BF's claim.

By an appeal and a reply, registered on 30 June 2021 and 31 March 2022 at the Secretariat of the Judicial Section of the Council of State, the ministre de l'économie, des finances et de la relance (Minister for the Economy, Finance and Recovery) asks the Council of State to set aside that judgment.

He claims that the Administrative Court of Appeal, Versailles erred in law and incorrectly classified the facts of the case by ruling that the fact that a parent company has or has not chosen to form a tax-integrated group with its French subsidiaries had no bearing on the merits of its claim for the reimbursement of the part of corporation tax corresponding to the add-back to its taxable revenue of a proportion of the costs and expenses of the revenue, derived from holdings, which was paid to it by its subsidiaries established in Member States of the European Union other than France on the ground that the provisions of Article 223 B of the code général des impôts (General Tax Code) are contrary to the freedom of establishment,.

By its defence, registered on 28 March 2022, Manitou BF contends that the appeal should be dismissed …. It submits that the pleas raised by the Minister for the Economy, Finance and Recovery are unfounded.

…

Having regard to:

– the Treaty on the Functioning of the European Union;

– the General Tax Code and the livre des procédures fiscales (Tax Procedure Handbook);

– the judgment of 2 September 2015 in *Groupe Steria SCA* (C-386/14) of the Court of Justice of the European Union;

– the code de justice administrative (Code of Administrative Justice);

… In the light of the following:

1 It is apparent from the documents in the file before the court having jurisdiction as to the substance of the matter that Manitou BF received, in 2011, dividends from subsidiaries established in Member States of the European Union other than France. It placed them under the scheme for parent companies provided for in Articles 145 and 216 of the General Tax Code. In accordance with Article 216(I), it deducted the amount of those dividends from its net profit, with the exception of a proportion of the costs and expenses of 5% of their total amount. By a complaint of 24 December 2014, it sought reimbursement of part of the amount of corporation tax for which it was liable for the financial year ending in 2011, corresponding to the add-back of that proportion, on the ground that that add-back had been made pursuant to legislative provisions which undermine the freedom of establishment protected by Article 49 of the Treaty on the Functioning of the European Union. Following the rejection of that complaint, it brought the dispute before the Administrative Court, Nantes, which forwarded its application to the Administrative Court, Montreuil, which dismissed its application by a judgment of 26 September 2017. The Minister for the Economy, Finance and Recovery lodged an appeal on a point of law against the judgment of 27 May 2021 by which the Administrative Court of Appeal, Versailles, on appeal by Manitou BF, set aside that judgment and granted the latter reimbursement of the amounts claimed.

2 Article 216(I) of the General Tax Code provides, in the version applicable to the dispute, that a parent company may deduct from its total net profit the net revenues from holdings giving entitlement to application of the tax scheme for parent companies which are received in the course of a financial year, after deduction of a proportion of costs and expenses fixed in every case at 5% of the total revenue from the holdings, including tax credits. Under Article 223 A of that code, in the version in force at that time, relating to the conditions for access to the tax integration scheme: ‘*A company may render itself the sole party liable for corporation tax due on the overall profits of the group formed by the company itself and the companies of which it is the holder, continuously throughout the financial year, directly or indirectly through companies or permanent establishments in the group, of at least 95% of the capital …. / Only those companies or permanent establishments which have given their consent and whose results are subject to corporation tax under the conditions of the general law or the rules laid down in Article 214 may be members of the group. …*’. Under Article 223 B thereof, in the applicable version, which defines the tax integration scheme: ‘*The overall profit shall be determined by the parent company through the algebraic sum of the results of each of the companies in the group, determined under the conditions of the general law or the rules laid down in Article 214. / The overall profit shall be reduced by the proportion of costs and expenses relating to*

revenue from holdings received by a group company from a company belonging to the group for more than one financial year and to revenue, derived from holdings, received by a group company from an intermediate company in respect of which the parent company provides evidence that it derives from revenue from holdings paid by a company which has been a member of the group for more than one financial year and which has not already justified corrections made pursuant to this paragraph or the third paragraph. …'.

3 Article 49 of the Treaty on the Functioning of the European Union provides: '*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State …*'.

4 By a judgment of 2 September 2015, *Groupe Steria SCA* (C-386/14), the Court of Justice of the European Union ruled that Article 49 of the Treaty on the Functioning of the European Union must be interpreted as precluding rules of a Member State that govern a tax integration regime under which a tax-integrated parent company is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from tax-integrated resident companies, when such neutralisation is refused to it under those rules as regards the dividends distributed to it from subsidiaries located in another Member State, which, had they been resident, would have been eligible in practice, if they so elected.

5 The Minister submits that the Administrative Court of Appeal erred in law in holding that Manitou BF was justified in arguing, in support of its claim for a reduction in the amount of corporation tax for which it was liable for the financial year ending in 2011, that Article 223 B of the General Tax Code was contrary to the freedom of establishment in so far as it did not provide for the possibility, for a parent company, of neutralising the proportion of the costs and expenses added back in respect of revenue, derived from holdings, paid to it by subsidiaries established in a Member State of the European Union other than France that meet the eligibility criteria of the tax integration scheme by dismissing as irrelevant in that regard the fact that that parent company, although holding eligible subsidiaries in France, had not formed a tax-integrated group there.

6 A serious difficulty in interpreting EU law arises from the question as to whether Article 49 of the Treaty on the Functioning of the European Union precludes legislation of a Member State relating to a tax integration scheme under which a tax-integrated parent company benefits from the neutralisation of the proportion of costs and expenses added back in respect of dividends received by it from resident companies which are parties to the integration and, for the purpose of taking account of the judgment of the Court of Justice of the European Union referred to in paragraph 4, in respect of dividends received from subsidiaries established in another Member State which, had they been resident, would objectively have been

eligible, if they so elected, for the tax integration scheme but which refuse the benefit of that neutralisation to a resident parent company which, despite the existence of capital links with other resident entities allowing for the constitution of a tax-integrated group, has not opted to belong to such a group, both in respect of the dividends distributed to it by its resident subsidiaries and in respect of those from subsidiaries established in other Member States which meet the eligibility criteria other than residence.

7 It is therefore appropriate to refer that question to the Court of Justice of the European Union pursuant to subparagraph (b) of the first paragraph of Article 267 of the Treaty on the Functioning of the European Union and, until that court has given a ruling, to stay the appeal of the Minister for the Economy, Finance and Recovery.

H E R E B Y O R D E R S:

Article 1: The appeal of the Minister for the Economy, Finance and Recovery is stayed until the Court of Justice of the European Union has ruled on the question as to whether Article 49 of the Treaty on the Functioning of the European Union precludes legislation of a Member State relating to a tax integration scheme under which a tax-integrated parent company benefits from the neutralisation of the proportion of costs and expenses added back in respect of dividends received by it from resident companies which are parties to the integration and, for the purpose of taking account of the judgment of 2 September 2015, *Groupe Steria SCA* (C-386/14), in respect of dividends received from subsidiaries established in another Member State which, had they been resident, would objectively have been eligible, if they so elected, for the tax integration scheme but which refuses the benefit of that neutralisation to a resident parent company which, despite the existence of capital links with other resident entities allowing for the constitution of a tax-integrated group, has not opted to belong to such a group, both in respect of the dividends distributed to it by its resident subsidiaries and in respect of those from subsidiaries established in other Member States which meet the eligibility criteria other than residence.

… Delivered on 14 June 2022.

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