Case C-408/22

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:

Bricolage Investissement France SA

CONSEIL D'ÉTAT …

…

… …

MINISTRE DE L'ECONOMIE, DES FINANCES ET DE LA RELANCE
v SA Bricolage Investissement France

The Conseil d'État (Council of State, France) …

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…
Sitting of 1 June 2022
Decision of 14 June 2022
Having regard to the following proceedings:

The *société anonyme* (public limited company) (SA) Bricolage Investissement France applied to the tribunal administratif de Montreuil (Administrative Court, Montreuil, France) for an order, in the amount of EUR 633 352, for the discharge of the corporation tax contributions and additional contributions to that tax that it paid for the financial year ending in 2012.

By judgment No 1806737 of 10 October 2019, that court dismissed its application.

By judgment No 19VE04061 of 19 October 2021, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France) set aside that judgment and upheld Bricolage Investissement France's claim.

By an appeal and a reply, registered on 19 November 2021 and 10 May 2022, … 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 failed to observe the provisions of Article 223 B of the code général des impôts (General Tax Code) and the scope of the judgment in Case C-386/14 of 2 September 2015 of the Court of Justice of the European Union and incorrectly characterised the facts by holding that a parent company which is not a member of a tax-integrated group may deduct from its taxable profits, without adding back any proportion of costs and expenses, all the dividends falling within the scope of Article 216 of that code received from its subsidiaries established in a Member State of the European Union other than France.

By a defence registered on 14 April 2022, Bricolage Investissement France contends that the appeal should be dismissed …. It submits that the pleas raised on appeal 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, in 2012, Bricolage Investissement France, which is wholly owned by the Adeo SA group, received dividends from the Polish subsidiary Leroy Merlin Pologne, which it owns in full, and placed them, for the purposes of determining the corporation tax due for the financial year ending in 2012, under the tax scheme for parent companies provided for in Articles 145 and 216 of the General Tax Code. In accordance with the provisions of paragraph I of the latter article, it deducted the amount of those dividends from its net profit, with the exception of a proportion of the costs and expenses of 5%. By a subsequent complaint, Bricolage Investissement France applied for the deduction of all the dividends received from its Polish subsidiary, without any add-back of a proportion of costs and expenses. Following the rejection of that complaint, it applied to the tribunal administratif de Montreuil (Administrative Court, Montreuil) for an order, in the amount of that proportion, reducing its taxable profits for the financial year ending in 2012 and reimbursement of the corresponding tax. The Minister for the Economy, Finance and Recovery lodged an appeal on a point of law against the judgment of 19 October 2021 by which the Administrative Court of Appeal, Versailles, after setting aside the judgment of 10 October 2019 by which the Administrative Court dismissed that undertaking's claims, granted it the discharge of the corporation tax contributions and additional contributions due for the financial year ending in 2012 to the extent of the neutralisation of the proportion which it had added back into its profits.

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 of that code, 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 the 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 Bricolage Investissement France was justified in arguing, in support of its claim for a reduction in the amount of corporation tax which it paid for the financial year ending in 2012, 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 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, despite the existence of capital links with other French undertakings allowing for the constitution of a tax-integrated group, did not belong to such a group.

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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