Case C-556/20

Request for a preliminary ruling

Date lodged:

23 October 2020

Referring court:

Conseil d'État (France)

Date of the decision to refer:

23 October 2020

Appellants:

Schneider Electric SA

Axa SA

BNP Paribas

ENGIE

Orange SA

L'Air liquide, société anonyme pour l'étude et l'exploitation des procédés Georges Claude

Respondents:

Premier ministre

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

[…]

Having regard to the following procedure:

[…] the [appellants] […] claim that the Conseil d'État (Council of State, France) should:

1. annul as *ultra vires* the administrative commentary published in the basic documentation on 1 November 1995 […];

2. annul as *ultra vires* the administrative commentary […] published in the bulletin officiel des impôts (Official Tax Gazette) No 62 on 30 March 2001;

[…]

The appellant companies submit that the contested commentaries restate the provisions governing the advance payment of tax laid down in Article 223 *sexies* of the code général des impôts (General Tax Code), provisions which are themselves incompatible with Article 4 of Directive 90/435/EC of 23 July 1990 on the common system of taxation applicable in the case of **[Or. 2]** parent companies and subsidiaries of different Member States, since the advance payment of tax is in the nature of a tax measure established by the Member State of a parent company providing for the levy of a tax when the parent company distributes dividends and the basis of assessment of which tax is the amounts of the dividends distributed, including those originating from that company's non-resident subsidiaries.

[…] the Minister for Economic Affairs, Finance and Recovery contends that the application should be dismissed [on the ground that it is inadmissible and unfounded].

[…]

[The appellants request the submission of a priority question on constitutionality concerning, in essence, the principle of equal treatment]

[…]

[…] **[Or. 3]**

[…]

[One of the appellants] […] submits that the contested commentaries restate the provisions governing the advance payment of tax laid down in Article 223 *sexies* of the General Tax Code, provisions which are themselves incompatible with:

– Article 4 of Directive 90/435/EC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, since the advance payment of tax is in the nature of a tax measure established by the Member State of a parent company providing for the levy of a tax when the parent company distributes dividends and the basis of assessment of which tax is the amounts of the dividends distributed, including those originating from that company's non-resident subsidiaries;

[…]

[…] **[Or. 4]** […]

Having regard to:

[…]

- the Treaty on the Functioning of the European Union;
- Council Directive 90/435/EC of 23 July 1990;
- the judgment of the Court of Justice of the European Union of 12 February 2009, *Cobelfret*, C-138/07, EU:C:2009:82;
- the judgments of the Court of Justice of the European Union of 15 September 2011, *Accor*, C-310/09, EU:C:2011:581, and of 4 October 2018, *Commission* v *France (Advance payment)*, C-416/17, EU:C:2018:811;
- the judgments of the Court of Justice of the European Union of 17 May 2017, *X*, C-68/15, EU:C:2017:379, and *AFEP and Others*, C-365/16, EU:C:2017:378;

[…]

Whereas:

[…] **[Or. 5]** […] [joinder of the various actions]

<u>Pleas of inadmissibility raised by the Minister</u>:

[…]

[…] [plea of inadmissibility upheld as regards one appellant and dismissed as regards the others] **[Or. 6]**

<u>Interpretation of Article 223 *sexies* of the General Tax Code:</u>

6. In the version applicable on both 1 November 1995 and 21 March 2001, Article 158 *bis* of the General Tax Code provides that persons who receive dividends distributed by French companies are to be deemed in that respect to have received income in the form of the sums they receive from the company and a tax credit represented by a credit opened with the Treasury. Article 216 of that code provides, moreover, that '*net income from shareholdings, conferring entitlement to the application of the regime applicable to parent companies and referred to in Article 145, received by a parent company during a financial year, may be deducted from its total net profits* ...'. Furthermore, under the first paragraph of Article 223 *sexies*(1) of that code, as amended by Article 98 of the loi du 30 décembre 1991 de finances pour 1992 (Law on finance for 1992 of 30 December 1991), '... *where the profits distributed by a company are subject to a deduction on the ground that that company has not been subject to corporation tax at the normal rate ... that company is required to make an advance payment*

equal to the credit provided for in Article 158 bis and applied to those distributions. The advance payment shall be due whoever the recipients of those distributions may be'. Lastly, under Article 146(2) of that code, before its repeal by Article 93 of the loi du 30 décembre 2003 de finances pour 2004 (Law on finance for 2004 of 30 December 2003), '*where distributions made by a parent company give rise to the application of the advance payment provided for in Article 223 sexies, that advance payment shall be reduced, where appropriate, by the amount of the tax credits which are applied to the income from shareholdings ... received in the course of the tax years ending within the last five years at most*'.

7. By judgment of 15 September 2011, *Accor* (C-310/09, EU:C:2011:581), the Court of Justice of the European Union held that 'Articles 49 TFEU and 63 TFEU preclude legislation of a Member State intended to eliminate economic double taxation of dividends, … which allows a parent company to set off against the advance payment, for which it is liable when it redistributes to its shareholders dividends paid by its subsidiaries, the tax credit applied to the distribution of those dividends if they originate from a subsidiary established in that Member State, but does not offer that option if those dividends originate from a subsidiary established in another Member State, since, in that case, that legislation does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary'. It follows that the company in receipt of the dividends is entitled to a tax credit which ensures that dividends originating from companies established in France and those originating from companies established in another Member State of the European Union are given the same tax treatment.

8. Article 4 of Council Directive 90/435/EC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, in the version in force on 1 November 1995 and 21 March 2001, provides as follows: '*1. Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent company shall, except when the subsidiary is liquidated, either: – refrain from taxing such profits, or – tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax. 2. However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company.* **[Or. 7]** *Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary …*'

9. Those provisions, as clarified by the case-law of the Court of Justice of the European Union, in particular by the judgment of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495), are designed to prevent the profits

distributed to a resident parent company by a non-resident subsidiary from being taxed first in the hands of the subsidiary in its State of residence and then in the hands of the parent company in its State of residence. To that effect, they leave Member States a choice between two systems: the exemption system and the imputation system. However, Member States retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. It is also clear from that provision that where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.

10. The choice between the exemption system and the imputation system does not necessarily lead to the same result for the company receiving the dividends. It follows from the case-law of the Court of Justice of the European Union, in particular its judgment of 12 February 2009, *Cobelfret* (C-138/07, EU:C:2009:82), that a Member State which has opted, when transposing a directive, for one of the alternative systems for which it provides cannot rely on the effects or limitations which might have resulted from the implementation of the other system. As regards the tax treatment of profits covered by the Parent-Subsidiary Directive, Articles 145 and 216 of the General Tax Code opted for an exemption system, subject to the imposition of a proportion of the costs and fees, fixed at the flat rate of 5%, representing the costs and fees borne by the parent company relating to its shareholding in the subsidiary which distributed those profits. Those profits are therefore exempt up to 95%.

11. It also follows from the case-law of the Court of Justice of the European Union, in particular its judgments of 17 May 2017, *X* (C-68/15, EU:C:2017:379), and *AFEP and Others* (C-365/16, EU:C:2017:378), that, for the purposes of Articles 5 and 6 and Article 7(1) of Council Directive 90/435/EC of 23 July 1990, a withholding tax is a tax in respect of which the chargeable event is the payment of dividends or any other income from shares, the basis of assessment is the income from those shares, and the taxable person is the holder of the shares. Consequently – and as is common ground between the parties – the advance payment of tax, to which only the redistributing party is subject, is not in the nature of a withholding tax. By contrast, it is apparent from those judgments that, by providing that the Member State of the parent company is to '*refrain from taxing such profits*', Article 4 of Council Directive 90/435/EC of 23 July 1990 prohibits Member States from taxing the parent company in respect of profits distributed to it by its subsidiary, without drawing a distinction based on whether the chargeable event of the taxation of the parent company is the receipt of those profits or their redistribution. Accordingly, the advance payment of tax under Article 223 *sexies* of the General Tax Code is capable of falling within the scope of those provisions.

12. Taxation of those profits by the Member State of the parent company in the hands of that company when they are redistributed, which has the effect of subjecting those profits to taxation exceeding, de facto, the 5% ceiling provided for in Article 4(2) of the directive, would result in double taxation at the level of that

company, which is prohibited by that directive. The Court of Justice inferred from that, in the judgments cited above, that the **[Or. 8]** provisions of Article 4(1)(a) of 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, which reproduce the wording of the first indent of Article 4(1) of Council Directive 90/435/EC of 23 July 1990, must be interpreted as precluding '*a tax measure laid down by the Member State of a parent company … providing for the levy of a tax when the parent company distributes dividends and the basis of assessment of which tax is the amounts of the dividends distributed, including those coming from that company's non-resident subsidiaries*'.

13. However, Article 7(2) of Council Directive 90/435/EC of 23 July 1990 provides that '*this directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends*'. It follows from those provisions, which were clarified by the case-law of the Court of Justice of the European Union, in particular by the judgments of 25 September 2003, *Océ van der Grinten* (C-58/01, EU:C:2003:495), and of 24 June 2010, *P. Ferrero e C. and General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364), that a levy falls within the scope of those provisions only if, first, it is based on provisions designed to eliminate or lessen economic double taxation of dividends and, second, its application does not obstruct the objective pursued by the directive.

14. The advance payment of tax, as provided for in Article 223 *sexies* of the General Tax Code, before its repeal by the Law on finance for 2004 of 30 December 2003, is payable in the event of a distribution of profits giving rise to the application of a tax credit, where those profits have not been subject to corporation tax at the ordinary rate. That levy is thus one of the constituent elements of a mechanism for eliminating economic double taxation of distributed income, which seeks to avoid the situation whereby (i) the justification for the tax credit applied to that income is lost in the light of the tax borne by the distributing company on the profits out of which the distributions were made and, thus (ii) the application of that tax credit results in a windfall for the recipient of the distributions. Having regard in particular to the right to a tax credit which may be set off against the advance payment – a right enjoyed by all companies which receive dividends under the conditions and on the grounds set out in paragraph 7 – the application of that advance payment does not appear to have the effect of obstructing the objective pursued by the directive.

15. The interpretation of the national provisions and the assessment of their compatibility with the Directive of 23 July 1990 depend on whether Article 4 of the directive, in view, in particular, of Article 7(2) thereof, precludes a provision such as Article 223 *sexies* of the General Tax Code, which provides, in order to ensure the correct implementation of a scheme designed to eliminate economic double taxation of dividends, for a levy when a parent company redistributes

profits which have been distributed to it by subsidiaries established in another Member State.

16. That question raises a serious difficulty of interpretation of EU law.

Priority question on constitutionality: **[Or. 9]**

[…]

[…] [There is no need to refer the matter to the Conseil constitutionnel (Constitutional Council, France)].

The other pleas raised in the actions:

19. In the first place, since the question set out in paragraph 15 raises a serious difficulty of interpretation of EU law, as indicated above, it is appropriate, pursuant to Article 267 of the Treaty on the Functioning of the European Union, to refer the matter to the Court of Justice of the European Union for a preliminary ruling.

[…]

[…] **[Or. 10]** […]

22. Accordingly, proceedings on the form of order sought in the applications are stayed until the Court of Justice of the European Union has given a preliminary ruling on the following question:

[…]

THE COURT HAS DECIDED AS FOLLOWS:

[…]

Article 2: The following question is referred to the Court of Justice of the European Union: does Article 4 of Directive 90/435/EC of 23 July 1990, in view, in particular, of Article 7(2) thereof, preclude a provision such as Article 223 *sexies* of the General Tax Code, which provides, in order to ensure the correct implementation of a scheme designed to eliminate economic double taxation of dividends, for a levy when a parent company redistributes profits which have been distributed to it by subsidiaries established in another Member State?

[…]

[…] **[Or. 11] [Or. 12]**

[…]

[…]

[…] [Signatures]