Case C-92/24

Request for a preliminary ruling

Date lodged:

24 January 2024

Referring court:

Corte di giustizia tributaria di secondo grado della Lombardia (Italy)

Date of the decision to refer:

6 October 2023

Applicant and Appellant:

Banca Mediolanum SpA

Defendant and Respondent:

Agenzia delle Entrate – Direzione Regionale della Lombardia

[OMISSIS] Order n. 1467/2023
[OMISSIS] Lodged on 06/10/2023
[OMISSIS]

La Corte di Giustizia Tributaria di secondo grado della LOMBARDIA (the Tax Court at second instance of LOMBARDY) Section 22, [OMISSIS]

[Composition of the court]

on 27/09/2023, makes the following

ORDER

- on the appeal [OMISSIS]

lodged by:

Banca Mediolanum S.p.a.[OMISSIS]

against

Agenzia Entrate Direzione Regionale Lombardia (Lombardy Regional Directorate of the Revenue Agency)

[OMISSIS]

Concerning an appeal against:

- judgment [OMISSIS] delivered by the Commissione Tributaria Provinciale MILANO (Provincial Tax Commission of Milan) sect. 12 [OMISSIS]

Taxation acts:

- REFUSAL REFUND IRAP (regional tax on productive activities) 2014

following discussion in public hearing

RELEVANT FACTS AND POINTS OF LAW

The Tax Court at second instance of Lombardy

- on the appeal lodged by Banca Mediolanum against the judgement delivered by Section 12A of the Provincial Tax Commission of Milan [OMISSIS];

- [OMISSIS];

- whereas the envisaged question of the compatibility of Article 6 of Legislative Decree No 446/1997 with EU law, and in particular with Directive 2011/96/EU, appears necessary for the purposes of deciding on the application for a refund submitted by the taxpayer and rejected by the office;

- refers the following question to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

QUESTION REFERRED FOR A PRELIMINARY RULING ON COMPATIBILITY

WITH THE LAW [OF THE EUROPEAN UNION] OF PARAGRAPH 1

OF ART. 6 OF LEGISLATIVE DECREE N. 446/1997

1. [EUROPEAN UNION] LEGISLATION ON THE TAXATION OF DIVIDENDS DISTRIBUTED BY A SUBSIDIARY RESIDENT IN A MEMBER STATE TO A PARENT COMPANY RESIDENT IN ANOTHER MEMBER STATE

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 (recast of Directive 90/435/EEC of 23 July 1990) (‘Parent-

Subsidiary Directive') aims to eliminate disadvantages and distortions faced by parent companies resident in one Member State of the European Union, when receiving dividends from subsidiaries resident in other Member States of the European Union. In fact, the recital identifies the objective as being 'to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company' in so far as 'the grouping together of companies of different Member States …. necessary in order to create within the Union conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market", they should not to be hampered "… by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States" and it is therefore necessary "with respect to such groupings, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level'.

In order to achieve those objectives, article 4(1) of the Parent-Subsidiary Directive provides that, "where a parent company … by virtue of the association of the parent company with its subsidiary, receives distributed profits, the Member State of the parent company ", shall "except when the subsidiary is liquidated", a) refrain from "taxing such profits" or b) "tax such profits while authorising the parent company … to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary".

In addition, Art. 4 (3) of the Parent-Subsidiary Directive grants 'each Member State … 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', but "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". Consequently, where the Member States exercise the option to determine the non-deductible management costs of the holding as a flat rate, that provision requires them to make those costs non-deductible and thus to subject to tax a corresponding proportion of the dividends received by the parent company determined at a percentage rate not exceeding 5 per cent of their amount.

2. THE TAX REGIME APPLICABLE TO IRAP (REGIONAL TAX ON PRODUCTIVE ACTIVITIES) IN ITALY IN RESPECT OF DIVIDENDS PAID BY RESIDENT SUBSIDIARIES IN OTHER MEMBER STATES TO PARENT COMPANIES RESIDENT IN ITALY

Decreto Legislativo 15 dicembre 1997, n. 446 (Legislative Decree No 446 of 15 December 1997 ('Legislative Decree No 446') governs the regional tax on productive activities ('IRAP'). Under Article 2 of Legislative Decree No 446, the condition for the application of IRAP is the regular exercise of an independently

run activity whose object is the production of or trade in goods or the provision of services and, also under that provision, the activity carried on by companies and organisations is, in any event, a condition for the application of the tax.

Consequently, Article 3 of Legislative Decree No 446 (a) and (e) also includes, among the persons liable to IRAP, the persons referred to in point l) of Part A of Annex I to the Parent-Subsidiary Directive, which contains the 'list of companies referred to in Article 2(a) (i)' of that directive, namely "companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsabilità limitata', 'società cooperative', 'società di mutua assicurazione', and private and public entities whose activity is wholly or principally commercial'.

Article 4 of Legislative Decree No 446 determines the basis of assessment for IRAP as the 'net value of production deriving from activity carried on within the region'.

Article 6 of Legislative Decree No 446 establishes that, for banks and other financial intermediaries, the basis of assessment for IRAP is determined by the algebraic sum of the following items in the income statement:

(a) intermediation margin reduced by 50 per cent of the dividends;

(b) depreciation/amortisation of tangible/intangible assets for functional use in the amount of 90 per cent;

(c) other administrative expenditure in the amount of 90 per cent;

(c-bis) net value adjustments and write-backs for credit risk, limited to those relating to loans to customers credits stated in the financial statement under that heading.

Consequently, banks and other financial intermediaries resident in Italy, which are classified as parent companies for the purposes of the Parent-Subsidiary Directive, are obliged to include 50 per cent of the total amount of dividends distributed by companies resident in other Member States of the European Union, which are classified as subsidiaries, in their basis of assessment for IRAP, where those dividends are included in the intermediation margin recorded in the income statement.

Under Article 16 (1-bis) and (3) of Legislative Decree No 446, with regard to banks and other financial intermediaries, IRAP applies at the rate of 4.65 per cent and the regional authorities may vary that rate up to a maximum of 0.92 percentage points.

Banks and other financial intermediaries which are classified as parent companies for the purposes of the Parent-Subsidiary Directive and which have included 50 per cent of dividends distributed by subsidiaries resident in other Member States

of the European Union in the basis of assessment for IRAP, are not permitted to deduct the fraction of corporation tax relating to those profits paid by those subsidiaries in their Member State of residence from the IRAP tax due.

Consequently, banks and other financial institutions resident for tax purposes in Italy, which are classified as parent companies for the purposes of applying the Parent-Subsidiary Directive, tax dividends received by subsidiaries resident in other Member States, which fulfil the conditions laid down in the Parent-Subsidiary Directive, to taxation for IRAP purposes, at the rate of 50 per cent of their total amount.

3. THE MAIN PROCEEDINGS

In the 2014 tax year, BANCA MEDIOLANUM S.p.A. ("BANCA MEDIOLANUM") held shares in the following companies, which took one of the forms set out in Annex A to the Parent-Subsidiary Directive, were resident for tax purposes in Ireland, Luxembourg and Spain, without being considered, under the terms of the double taxation agreement concluded with a third State, as resident for tax purposes outside the Union and were subject, without benefiting from exemption schemes, to one of the taxes listed in Annex B to the Parent-Subsidiary Directive:

(a) a 51 per cent holding in the capital of Mediolanum International Funds Ltd, which is resident for tax purposes in Ireland;

(b) a 51 per cent holding in the capital of Mediolanum Asset Management Ltd, which is resident for tax purposes in Ireland;

(c) a 99.996 per cent holding in the capital of Gamax Management AG, resident for tax purposes in Luxembourg;

(d) a 100 per cent holding in the capital of Banco Mediolanum S.A., resident for tax purposes in Spain.

Banca Mediolanum received dividends from those subsidiaries totalling EUR 231,912,007.51 and received, more precisely:

(a) the sum of EUR 164,820,000.00 from Mediolanum International Funds Ltd;

(b) the sum of EUR 10,710,000.00 from Mediolanum Asset Management Ltd;

(c) the sum of EUR 6,382,007.51 from Gamax Management AG;

(d) the sum of EUR 50,000,000.00 from Banco Mediolanum S.A..

The subsidiaries, resident for tax purposes in Ireland, Luxembourg and Spain and subject there to corporation tax, did not withhold any tax at source on the dividends paid to BANCA MEDIOLANUM, in so far as all the conditions laid

down in Article 2 of the Parent-Subsidiary Directive were satisfied, this article providing for exemption from withholding tax on dividends paid by a 'subsidiary' which '(i) takes one of the forms listed in Annex I, Part A; ii) which, according to the tax laws of that Member State, is considered to be resident for tax purposes in that Member State and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the union; iii) that, moreover, it is subject, to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes" with regard to a 'parent company' which, under Article 3 of that Directive, "fulfils the conditions set out in Article 2 and has a minimum holding of 10% in the capital of a company of another Member State fulfilling the same conditions'.

BANCA MEDIOLANUM recognised the dividends received from those companies in the tax year 2014 under the item 'dividends and similar income' in the income statement, included in the intermediation margin.

BANCA MEDIOLANUM therefore included the aforementioned dividends in the basis of assessment for corporate income tax (IRES) relating to the aforementioned tax year 2014 up to a maximum of 5 per cent of the total amount, in accordance with Article 89 of the Italian Tax Consolidation Act (TUIR).

BANCA MEDIOLANUM is classified as a financial intermediary within the meaning of Article 6 of Legislative Decree No 446. Thus, that company also included, in its IRAP tax return submitted for the tax period 2014, 50% of the total amount of those dividends in the basis of assessment for that tax and therefore for the sum of EUR 115,956,003.76, in accordance with Article 6 of Legislative Decree No 446.

Finally, BANCA MEDIOLANUM paid EUR 10,392,278.00 as IRAP due, in the same tax return, by applying the rate of 5.57 per cent to the basis of assessment thus determined, and, having acquired an IRAP tax surplus of EUR 5,712,250.00 in its previous tax return and made down payments totalling EUR 9,451,969.00 during the tax period 2004, it stated an IRAP tax surplus of EUR 4,771,941.00.

On 4 June 2019, BANCA MEDIOLANUM submitted a request to the Lombardy Regional Directorate of the Revenue Agency ("Office") for a refund of the IRAP paid in excess on the ground that it had applied that tax to 50 per cent of the dividends received by the company from Mediolanum International Funds Ltd, Mediolanum Asset Management Ltd, Gamax Management AG and Banco Mediolanum S.A., taking the view that, by imposing IRAP on 50 per cent of the amount of those dividends, Article 6(1) of Legislative Decree No 446 was contrary to Article 4 of the Parent-Subsidiary Directive, which precludes dividends distributed by subsidiaries to parent companies from being taxed at more than 5 per cent of their amount.

On 16 October 2020, the Office served a rejection decision on BANCA MEDIOLANUM, dismissing the request for a refund submitted by that bank.

In particular, in the statement of reasons for that decision, the Office maintained that Article 6 of Legislative Decree No 446, in so far as it requires financial intermediaries resident for tax purposes in Italy, which are classified as parent companies for the purposes of the Parent-Subsidiary Directive, to subject to IRAP tax also 50 per cent of dividends distributed by companies resident in other Member States of the European Union, which are classified as subsidiaries for the purposes of that directive, is not contrary to Article 4 of that directive, since that provision does not apply to IRAP, but only to income taxes.

By an application served on 15 December 2020, BANCA MEDIOLANUM challenged the aforementioned rejection decision by making an application to the Corte di Giustizia Tributaria di Primo Grado di Milano (Tax Court of First Instance of Milan), challenging its legality and merits and asking that court to order the Office to pay the refund requested.

In its judgment, the Tax Court of First Instance of Milan dismissed that application, finding, in turn, that the prohibition laid down in Article 4 of the Parent-Subsidiary Directive does not apply to IRAP tax.

By an appeal lodged on 31 January 2023, BANCA MEDIOLANUM challenged the aforementioned judgment of the Tax Court of First Instance of Milan before the Referring court, requesting that it be amended and, consequently, that the Office be ordered to refund the amount of the IRAP tax surplus claimed in the initial application.

4. THE QUESTION SUBMITTED FOR A PRELIMINARY RULING

That said, the resolution of the question relating to the taxation for the purposes of IRAP of 50 per cent of the dividends received by financial intermediaries, which are classified as a parent company for the purposes of the Parent-Subsidiary Directive, from companies resident in other Member States of the European Union, which are classified as subsidiaries for the purposes of that directive, on the basis of national law, is, as a result of Article 6(1) of Legislative Decree No 446/1997, conditional upon the solution of the question referred concerning the compatibility of subjecting to IRAP 50 per cent of those dividends with Article 4 of the Parent-Subsidiary Directive. According to the defined legal framework [of the European Union], the prohibition on treating dividends distributed by a subsidiary resident in another Member State as taxable in the hands of a parent company resident in a Member State, in excess of 5 per cent of their amount, could also be applied in Italy in respect of IRAP.

However, if that were the case, Article 6(1) of Legislative Decree No 446 would be incompatible with the prohibition thus defined, in so far as it requires banks and other financial intermediaries, which are classified as parent companies for

the purposes of the Parent-Subsidiary Directive, to subject to IRAP 50 per cent of dividends received by companies resident in other Member States of the European Union, which are classified as subsidiaries for the purposes of that directive, without Italy guaranteeing to the parent companies the right to deduct from IRAP the proportion of corporation tax relating to those dividends paid by the subsidiaries

In that regard, it is significant to note that the Court of Justice of the European Union ("CJEU"), in its judgments of 17 May 2017, relating to Case C-365/16 (AFEP v Ministre des Finances et des Comptes publics) and to Case C-68/15 (X v Ministerraad), clarified that Article 4 of the Parent-Subsidiary Directive prohibits EU Member States from subjecting to any form of taxation, with regard to parent companies, and thus not only to corporation tax, dividends distributed to them by their subsidiaries in excess of 5 per cent of their amount.

More specifically, in Case C-365/16, the French Council of State referred to the European Court of Justice the question whether Article 235ter ZCA of the French General Tax Code was compatible with the combined provisions of paragraphs 1 and 3 of Article 4 of the Parent-Subsidiary Directive, in so far as it imposed on parent companies, not only the obligation to subject to corporation tax 5 per cent of the dividends which they receive, in respect of the non-deductible management costs relating to the holding fixed as a flat rate, but also the obligation to subject them to an additional tax of 3 per cent when redistributing them to the shareholders of that parent company. In response to that question, the CJEU, having established that 'since the Parent-Subsidiary Directive pursues, in accordance with recital 3 thereof, the objective of eliminating double taxation of profits distributed by a subsidiary to its parent company at the level of the parent company, taxation of that parent company by its Member State in respect of those profits when they are distributed, which would have the effect of making the profits subject to taxation exceeding the ceiling of 5% laid down in Article 4(3) of that directive, would lead to a double taxation at the level of the parent company contrary to that directive', held that the French tax legislation was incompatible with Article 4 of the Parent-Subsidiary Directive. That provision 'precludes a tax measure laid down by the Member State of a parent company, such as that at issue in the main proceedings, 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', since 'Article 4(1)(a) of Parent-Subsidiary Directive does not limit its application to a particular tax', by providing that 'the Member State of the parent company shall refrain from taxing the profits distributed by the non-resident subsidiary " and "thus seeks to avoid Member States adopting tax measures which lead to double taxation of parent companies in respect of those profits" and therefore "in that context,….it is irrelevant whether or not the tax measure is classified as corporation tax". Furthermore, in Case C-68/15, the Belgian Constitutional Court referred to the European Court of Justice the question whether it was compatible with the combined provisions of paragraphs 1 and 3 of Article 4 of the Parent-Subsidiary Directive, Chapter 15 of the Belgian

Income Tax Code, in so far as it imposed on parent companies, not only the obligation to subject to corporation tax 5 per cent of the dividends which they receive, in respect of the non-deductible management costs relating to the holding fixed as a flat rate, but also the obligation to subject them to a 5.15 per cent Fairness Tax when redistributing them to the shareholders of the parent company, in the event that those dividends consist of profits which had not been included in its taxable income. In answer to that question, the CJEU held that 'Article 4(1)(a) of the Parent-Subsidiary Directive, read in conjunction with Article 4(3), must be interpreted as precluding national tax legislation, such as that at issue in the main proceedings, in so far as that legislation, in a situation where profits received by a parent company from its subsidiary are distributed by the parent company after the year in which they were received, has the consequence of subjecting those profits to taxation exceeding the 5% ceiling provided for in that provision".

[Repetition of extracts from Court judgments already cited in the preceding paragraph].

The approach taken by the CJEU is therefore that Article 4 of the Parent-Subsidiary Directive prohibits EU Member States from subjecting to any form of taxation, with regard to parent companies, dividends distributed to them by their subsidiaries in excess of 5 per cent, not only when the dividends are received, but also upon their subsequent distribution to the shareholders of the parent company.

In the light of the foregoing, Article 6 of Legislative Decree No 446, in so far as it obliges banks and other financial intermediaries resident in Italy, which are parent companies for the purposes of the Parent-Subsidiary Directive, to subject to IRAP 50 per cent of the dividends they have received from companies resident in other Member States of the European Union, which are classified as subsidiaries for the purposes of that directive, could be incompatible with the prohibition on subjecting profits received by parent companies resident in one Member State from subsidiaries resident in other Member States to taxation at a percentage rate exceeding 5 per cent of the corresponding amount provided for in Article 4 of the Parent-Subsidiary Directive, as interpreted by the CJEU and the judgments passed on 17 May 2017, Case C-365/16 and Case C-68/15. The introduction of such an obligation ' has the consequence of subjecting those profits to taxation exceeding the 5% ceiling provided for in that provision'.

The resolution of the envisaged question is obviously relevant and decisive for the purposes of resolving the present case due to the fact that, if Article 6 (1) of Legislative Decree No 446 of 15 December 1997 is found to be incompatible with the aforementioned provisions of Council Directive 2011/96/EU of 30 November 2011, in so far as it allows, with regard to financial intermediaries resident in Italy, which are classified as parent companies for the purposes of the Parent-Subsidiary Directive, 50 per cent of the dividends distributed by companies resident in other Member States of the European Union, which are classified as subsidiaries within the meaning of that directive, to be subjected to IRAP, the contested rejection decision and the judgment under appeal are unlawful and the

application for a refund made in the present case is well founded, given that BANCA MEDIOLANUM requested a refund of the IRAP in excess paid on account of the inclusion in the basis of assessment of 50 per cent of the dividends which that company received from its subsidiaries established in Ireland, Luxembourg and Spain, and the Office rejected that request with the decision made.

In conclusion, the referring Tax Court of Second Instance, Lombardy, refers the following question to the Court of Justice of the European Union for a preliminary ruling, pursuant to Article 267 TFEU:

is the claim made by the Italian Republic, contained in Article 6(1) of Legislative Decree No 446/1997, to subject to IRAP 50 per cent of dividends received by financial intermediaries resident in Italy, which are classified as parent companies for the purposes of Council Directive 2011/96/EU of 30 November 2011, and distributed by companies resident in other Member States of the European Union, which are classified as subsidiaries within the meaning of that directive, without authorising the parent companies to deduct from IRAP the fraction of corporation tax relating to those profits paid by the subsidiaries, not incompatible with the prohibition on subjecting profits received by parent companies resident in one Member State from subsidiaries resident in other Member States to taxation at a percentage rate exceeding 5 per cent of the amount referred to in Article 4 of that directive?

ON THESE GROUNDS

[OMISSIS] [Standard wording]

[OMISSIS] 27.9.2023

[OMISSIS] [Formation of the Court]