Case C-601/23

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:

29 September 2023

Referring court:

Tribunal Superior de Justicia del País Vasco (Spain)

Date of the decision to refer:

19 September 2023

Applicant:

Credit Suisse Securities (Europe) Ltd

Defendant:

Tribunal Económico-Administrativo Foral de Bizkaia (TEAFB)

Subject matter of the main proceedings

Administrative proceedings – Taxation applicable to income from profit distribution – Complaint lodged by a company not resident in Spain – Possible difference in treatment compared with companies resident in Spain – A non-resident company that has suffered losses during a financial year CANNOT recover amounts withheld at source as Income Tax for Non-Residents **compared with the fact that** a resident company that has suffered losses during a financial year CAN recover the amounts withheld at source as Corporate Income Tax

Subject matter and legal basis of the request

Request for a preliminary ruling on interpretation – Article 267 TFEU – Compatibility of national provisions with Article 63 TFEU

Question referred for a preliminary ruling

'Must Article 63 of the Treaty on the Functioning of the European Union on the free movement of capital be interpreted as precluding the fact that the Kingdom of Spain, and in particular the fiscally autonomous Province of Bizkaia, despite applying the same percentage to non-residents as to residents, does not reimburse to non-residents the withholding tax levied on the payment of dividends by a resident entity – which cannot be compensated on the basis of the convention on the elimination of double taxation – whereas residents who likewise suffer losses during the financial year are reimbursed that tax in full?'

Provisions of international law relied on

Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Spain for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital and the Protocol thereto, signed in London on 14 March 2013. In accordance with Article 10 of that convention, dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but with the following limitation: if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed, as a general rule, 10 per cent of the gross amount of the dividends. For its part, Article 22 lays down a number of rules for the elimination of double taxation. In particular, it is apparent from paragraph 2 of that article that, for the withholding tax to be deductible, there must be profits or chargeable gains.

Provisions of European Union law relied on

Article 63 of the Treaty on the Functioning of the European Union.

Judgments of the Court of Justice of the European Union, in particular of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943), and of 16 June 2022, *ACC Silicones* (C-572/20, EU:C:2022:469).

Provisions of national law relied on

Ley 12/2002, de 23 de mayo, por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco (Law 12/2002 of 23 May 2002 approving the Economic Agreement with the Autonomous Community of the Basque Country). Article 21 of that law provides that the income tax on non-residents is a coordinated tax (that is to say that it is regulated, managed and levied by the

provinces of the Basque Country), which is governed by the same substantive and formal rules as those laid down at any time by the State.

Norma Foral 12/2013, de 5 de diciembre, del Impuesto sobre la Renta de no Residentes (Provincial Law 12/2013 of 5 December 2013 on Income Tax for Non-Residents, IRNR). Article 1 of that law states that this tax is levied on the income earned in the Province of Bizkaia by natural persons or entities who are not resident in Spanish territory and who do not have a permanent establishment. Article 4 recognises that the provisions of the IRNR are without prejudice to the provisions of the international treaties and conventions that form part of the Spanish domestic legal order. Article 13 treats dividends and other income from participation in the capital of private entities as income earned in Bizkaia. Article 25 sets a general IRNR tax rate of 24%. However, that rate is 19% for taxpayers resident in another Member State of the European Union or the European Economic Area. Furthermore, Article 31 imposes a withholding tax or advance payment on entities resident in Spanish territory that pay income subject to that tax. That withholding tax or advance payment is equal to the amount resulting from the application of the provisions under which the amount of tax payable is determined.

Norma Foral 11/2013, de 5 de diciembre, del Impuesto sobre Sociedades (Provincial Law 11/2013 of 5 December 2013 on Corporate Income Tax, IS). Article 68 provides that the withholding tax and advance payments are deductible from the actual tax due. If the amount of the withholding tax and advance payments exceeds the actual tax due, the tax authority is required to repay the excess automatically. Moreover, Article 130 states that entities that pay income subject to this tax *are required to withhold* or make advance payments, by way of payments on account, of the amount determined by the regulations and *are required to pay that amount* to the *Hacienda Foral* (Provincial Treasury).

Succinct presentation of the facts and procedure in the main proceedings

1 The company CREDIT SUISSE SECURITIES (EUROPE) LIMITED, resident in the United Kingdom and having no permanent establishment in territory of the Province of Bizkaia, received, in financial year 2017, the sum of **EUR 2 763 848.73** in dividends distributed by a company resident in Bizkaia, **Siemens Gamesa Renewable Energy, S.A**. In accordance with the applicable legislation, Siemens Gamesa Renewable Energy, in its tax self-assessments, withheld a deduction at source of the income tax for non-residents due from Credit Suisse Securities (Europe) in respect of the dividends distributed to the latter. That withholding, based on the domestic tax rules, was set at 19%, a rate equal to that applied to residents, reduced to 9% under application to Credit Suisse Securities (Europe) of the UK-Spain Double Taxation Convention (DTC), which limits the rate to 10%, which results in an amount of **EUR 276 384.87**.

2 On 10 February 2021, Credit Suisse Securities (Europe) applied to the Servicio de Tributos Directos de la Hacienda Foral de Bizkaia (Direct Tax Department of the Provincial Treasury of Bizkaia) for rectification of the self-assessments submitted by the withholding company (Siemens Gamesa Renewable Energy) and also requested reimbursement of the 9% on the grounds that this was undue income. In this respect, Credit Suisse Securities (Europe) first stated that, during that tax year, it had incurred losses. It argued that, in this case, unlike companies resident in Bizkaia that may be in the same situation as regards losses – which would recover that 9% difference through corporate income tax (to which resident companies are subject), given that, for those companies, the withholding tax is, in nature, a withholding '*on account*' of the amount of tax to be paid, such that once the actual amount of tax has been calculated, if the amount withheld is greater than the resulting amount, the difference would be reimbursed automatically – it could not recover the 9% difference in its country of residence (United Kingdom). That application was dismissed by the Provincial Treasury of Bizkaia by means of a decision of 15 February 2021.

3 On 18 March 2021, Credit Suisse Securities (Europe) brought a complaint against that decision before the Tribunal Económico-Administrativo Foral de Bizkaia (Bizkaia Provincial Tax Tribunal, TEAFB). Its arguments were based on the premiss that Provincial Law 12/2013 of 5 December 2013 on Income Tax for Non-Residents gives rise to discriminatory treatment of non-resident taxpayers where these incur tax losses: while resident taxpayers would obtain a refund of the withholding tax if they incurred such losses, as a non-resident entity, Credit Suisse Securities (Europe) could not receive such refund. In its arguments, it relied in particular on the judgment of the Court of Justice of 22 November 2018 in Case C-575/17.

4 By means of an agreement of 23 February 2022, the TEAFB dismissed that complaint. In its legal basis, the TEAFB made extensive reference to the precedents of the Court of Justice and the provincial legislation in force and concluded that there were no grounds for reimbursement of the sum withheld. It considered that there were differences between the situation at issue in the present case and that examined by the Court of Justice in *Sofina and Others*, because the latter involved a situation in which dividends paid by a French company to non-resident companies were subject to a withholding tax of 25 per cent of their amount, reducible on the basis of a possible DTC. In contrast, in the present case, the dividends received by a resident company would be included in the basis of assessment for corporate income tax and, in the case of losses, taxation would be carried forward to the next positive financial year (which presupposes a cash-flow advantage and even a lack of taxation if the company does not once again achieve a sufficient positive result before it ceases trading), whereas dividends received by a non-resident company are taxed immediately and definitively.

5 In such a situation, the TEAFB emphasised that there was no difference in treatment as found in the Court of Justice's judgment in *Sofina and Others*, since the provincial legislation applicable in the present case establishes equal

withholding tax percentages for residents and non-residents (19% in both cases), leading to a different tax scenario. For that purpose, the TEAFB cited points 40 and 41 of the Opinion of Advocate General Wathelet in Case C-575/17. On the basis of those points, it emphasised the idea that the balanced allocation of the power to impose taxes may be ensured by non-discriminatory formulas, such as the levying of a common withholding tax on both groups, which is the measure specifically provided for by the provincial rules applicable in the present case. The TEAFB added that the judgment on equality was independent of the taxation applied by the United Kingdom and should be based solely on the taxation required in the Province of Bizkaia, such that any higher overall taxation on the shareholder is not relevant to the country of origin of the dividend where that country has established practices ensuring treatment that is equal to that of a resident. The TEAFB also rejected the fact that the claimant [Credit Suisse Securities (Europe)] had provided reliable evidence of its tax losses in 2017.

6 On 4 May 2022, Credit Suisse Securities (Europe) brought an action against the aforementioned Agreement of the TEAFB before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country). The applicant's arguments and the defendant's response are set out in the following section.

The essential arguments of the parties in the main proceedings

7 In its main application, Credit Suisse Securities (Europe) seeks the annulment of the TEAFB Agreement and recognition of its right to reimbursement of the sum of EUR 276 384.87, plus default interest. It relies exclusively on legal bases specific to EU law, which, in its understanding, support the view that there has been discriminatory treatment, based on the structure of the withholding tax levied on non-resident entities as a definitive tax, without any mechanism for reimbursement in the event of losses. In contrast, for resident companies subject to corporate income tax, the withholding is merely an advance payment of that tax and actual taxation only takes place if, during the tax year, that company has a positive tax base, as, in the case of a negative tax base, the amounts withheld are not subject to tax and are reimbursed.

8 The applicant also relies on the case-law of the Court of Justice's judgment in Case C-575/17 of 22 November 2018 and judgment issued in Case C-572/20, paragraphs 46 to 49 of which it transcribes, providing the key points of another precedent concerning taxation in Germany. After examining the possible offsetting on the basis of the UK-Spain Double Taxation Convention, the applicant infers that that convention does not allow for the compensation of losses given that Article 22.2 of that convention requires there to be profits or chargeable gains for the withholding tax to be deductible. The United Kingdom is not required to reimburse the withholding of input tax in Spain and only grants a tax credit in the case of a positive tax bill, and it also cannot be deducted in subsequent tax years. The applicant adds that the burden of proving such

offsetting rests with the tax authority in accordance with Spanish domestic case-law.

9 As regards provision of proof of tax losses in 2017, the applicant refers to several tax returns submitted in annex, among other documents. It also refers to internal constitutional principles (economic capacity) or case-law on restrictions on the free movement of capital linked to IRNR.

10 Lastly, the applicant proposes that the referring court submit a request for a preliminary ruling before the Court of Justice or an objection of unconstitutionality before the Tribunal Constitucional (Constitutional Court of Spain).

11 In its defence, the defendant (Diputación Foral de Bizkaia [Provincial Council of Bizkaia]) makes extensive reference to the applicable legislation and rejects the discrimination mentioned in the complaint in relation to resident entities, referring once again to the equal nature of the withholding tax which, after application of the DTC between Spain and the United Kingdom, is reduced to 9%. The defendant submits that the assumptions in the case-law relied on by the applicant, which concern collective investment undertakings (CIUs), based on Directive 2009/65/EC, differ significantly from the situation at issue in the present case (as those cases concern taxation of 1% compared with non-identical taxation of 15 or 18%, as in the present case), and cites, in particular, the judgment of the Tribunal Supremo (Supreme Court of Spain) of 5 January 2021. Furthermore, as regards the Court of Justice's case-law in Case C-575/17, *Sofina and Others*, the TEAFB's considerations are reiterated. Apart from the fact that it disputes the justifiability of submitting an objection of unconstitutionality, it expresses its opposition as regards the proof of tax losses during the financial year, which the applicant declares.

12 On 13 June 2023, the court set a time limit for the parties to submit arguments on a possible referral of a request for a preliminary ruling. By means of letters dated 28 and 29 June 2023, respectively, the parties reiterated their contradictory positions in relation to the referral of a request for a preliminary ruling. While the applicant made reference to the most recent decisions under domestic case-law (referring to the judgment of the Supreme Court of Spain of 5 April 2023 and several others that followed with the same principle) and referred again to the judgments of the Court of Justice in *ACC Silicones* or *Sofina and Others*, the defendant set out its position on the latest judgments of the Supreme Court of Spain and the differences that exist in relation to the present case and insisted that there was a lack of evidence to support the applicant's losses.

Succinct presentation of the reasoning in the request for a preliminary ruling

13 The referring court considers that it is appropriate to submit the request for a preliminary ruling sought by the applicant in view of the following doubts.

14 First, it should not be forgotten that, in domestic case-law, there are very many precedents concerning the difference in the tax treatment of non-residents compared with income earned in Spain. A recent example of that case-law is the judgment of the Supreme Court of 5 April 2023, on which the parties disagree. It is clear from that judgment – in the case of non-resident hedge or non-harmonised funds and their comparable resident funds in Spain – that, in accordance with the case-law of the Court of Justice, the offsetting of the effects of the restriction on the free movement of capital resulting from national legislation can only be considered to have been achieved by the provisions of the double taxation conventions in cases where those provisions allow the tax withheld at source under national legislation to be deducted from the tax payable in the other Member State up to the limit of the difference in treatment under national legislation. However, what defines the situation of non-resident companies in relation to resident companies, from the point of view of income tax for non-residents, as regards the payment of company dividends is that both groups (residents and non-residents) are subject to the same tax rate, initially 19%, and this is the equalisation factor that leads the defendant authority to argue that there has been no infringement in relation to the free movement of capital, even though the indirect tax treatment of the two taxpayers is different. Therefore, in the case of the tax years in which losses are recorded, the mechanics of the corporate income tax leads to the full refund of the withholding tax to the resident company in all cases (Article 68.2 of Provincial Law on Corporate Income Tax) while, on the other hand, for non-residents, it is only hypothetically offset through double taxation conventions, a possibility which, in the case of the UK-Spain DTC of 2013, is not satisfied in this case (Article 22.2).

15 In the light of that case-law, the referring court considers that serious doubts remain as to whether the only criterion for establishing an infringement of Article 63 TFEU must be the disparity in the equivalent (withholding) tax rates between those two types of entity compared, as the defendant authority maintains. On the other hand, it appears that it is not the fact and time of withholding that is taken as reference, either separately or specifically, but the fact and time of actual and final taxation, as is apparent, for example, from the judgment of the Court of Justice of 16 June 2022 in Case C-572/20 (paragraph 49), to the extent that, not even if there were an uncertain possibility of recovering in the future the total withholding levied in the State of residence (the UK), would the difference in treatment be considered to be offset through the double taxation convention. In this sense, it is not possible to assert that domestic law can disregard the fact that, by means of the double taxation convention, the company subject to withholding tax may or may not be able to offset the final excess tax compared with a resident, which the defendant authority argues to be a mere hypothesis outside its scope of action. By contrast, the public authorities of the withholding State (or tax regime) will have to verify, at the request of the party concerned, whether, in the light of the rules of the Treaties and EU law, the offsetting has been achieved, and, if not, reimburse the difference as undue revenue.

16 Finally, the referring court notes that the parties have not set out their views as to the matter's being concerned with entities subject to income tax for non-residents that have recorded negative results. In that court's view, this should likewise have no bearing on the referral of the request for a preliminary ruling, as, despite there being a contradiction between the parties as to the facts and proof of that question, it is an issue that should not be prejudged at this stage, as it will have to be resolved in the final judgment.