Case C-135/24

Request for a preliminary ruling

Date lodged:

20 February 2024

Referring court:

Tribunal de première instance de Liège (Belgium)

Date of the decision to refer:

29 January 2024

Applicant:

John Cockerill SA

Defendant:

Belgian State

Court of First Instance, Liège, Belgium

– Liège Division

Judgment

Civil cases

Tax Division

In the proceedings:

JOHN COCKERILL SA, …

Applicant … ,

v

BELGIAN STATE …

Defendant …

I. PROCEDURE

…

[procedural wording]

Having heard the parties … at the hearing of 18 December 2023 …

II. SUBJECT MATTER OF THE MAIN PROCEEDINGS

1.

The dispute concerns the following levy:

Tax year	Entry No	Type of tax	Date of entry
2020	815319915	Corporation tax	1 February 2021

2.

The applicant ('John Cockerill') is a company resident in Belgium subject to corporation tax in Belgium.

3.

For the 2020 tax year, it was taxed on the basis of the information contained in its tax return.

4.

On 20 April 2021, it lodged an administrative appeal against the tax levied on that basis.

John Cockerill considers that the fact that, under the eighth paragraph of Article 207 of the Code des Impôts sur les Revenus (Belgian Income Tax Code, 'CIR 92'), in the version applicable to the financial year in question, it was unable to deduct all of its previously taxed income for the current year from an intra-group transfer it had received – a transfer that, in its view, satisfied all the requirements of Article 205/5 CIR 92 and had been the subject of the special agreement provided for in the Arrêté royal d'exécution du CIR 92 (Royal decree implementing CIR 92) – constitutes an infringement 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 ('the 'Parent-Subsidiary Directive' or 'the Directive'), which should have been imposed on the Belgian legislature.

5.

Specifically, in 2019, John Cockerill received dividends totalling EUR 102 786 997.32.

…

John Cockerill considers that the dividends, amounting to EUR 96 302 105.00, satisfy the eligibility criteria for the system of definitively taxed income (DTI) under Articles 202 and 203 CIR 92.

6.

In addition, during the same year, John Cockerill received an intra-group transfer of EUR 43 697 824.53 ('the Transfer').

The Transfer is from … [3] companies [resident in Belgium.] …

7.

John Cockerill believes that the Transfer satisfies all the criteria … [to fall under the system of taxation of intra-group transfers].

The amount of the Transfer was added to John Cockerill's tax base in respect of corporation tax for the financial year in dispute. However, John Cockerill was unable to deduct the DTI for the current year from that tax base.

8.

John Cockerill considers that that situation, which requires it to pay corporation tax which it would not have had to pay had it not received dividends, is contrary to the [Parent-Subsidiary] Directive …

9.

John Cockerill therefore filed a complaint on 20 April 2021. That complaint was dismissed by a decision adopted on 16 September 2022. Accordingly, John Cockerill brought the present action … on 5 December 2022.

III. CLAIMS

10.

Principally, John Cockerill seeks the reduction of the levy at issue in so far as it has been unable to deduct the DTI for the current year from the Transfer, contrary to the Directive.

In the alternative, John Cockerill requests that a question be referred to the Court of Justice for a preliminary ruling …, worded as follows:

‘*Is Article 4 of Directive 2011/96/EU, combined with other sources of EU law, to be interpreted as precluding legislation of a Member State (i) which introduces a tax consolidation system allowing groups of companies to transfer, under certain conditions, some or all of the taxable profits made by some subsidiaries to other subsidiaries which incurred losses during the tax year (intra-group transfer), but (ii) which excludes from that tax advantage the loss-making companies, for the amount of dividends received, which qualify for exemption under the legislation of the Member State transposing Directive 2011/96/EU?*’

11.

The Belgian State considers the claim admissible but unfounded and seeks confirmation of the corporate levy.

IV. Admissibility

12.

… [T]he application is admissible …

V. DISCUSSION

First plea in law:

(i) the Parent-Subsidiary Directive and its transposition

13.

Article 4 of the Directive states 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, … refrain from taxing such profits*’.

The Directive thus provides for an exemption of the dividends paid by a subsidiary to its parent company, where the conditions imposed by the Directive are met.

14.

As to the direct effect of the Directive, the Court of Justice … has already clarified, concerning Article 4 of Directive 90/435:

‘*61. In this regard, it is consistent case-law of the Court that the right given to Member States to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals to enforce before the national courts rights the content of which*

> *can be determined with sufficient precision on the basis of the provisions of the directive alone (see, inter alia, Francovich and Others, paragraph 17, and Case C-226/07 Flughafen Köln/Bonn [2008] ECR I-0000, paragraph 30).* [1]

15.

The Directive was transposed into Belgian domestic law using the inclusion/deduction method (Article 202 et seq. CIR 92). In summary, that method provides that the dividends distributed by the subsidiary are first included in the tax base of the parent company and then deducted from that tax base, provided the legal requirements are met. If the DTI is higher than the company's tax base, the surplus DTI may be carried forward to subsequent periods (third paragraph of Article 205 CIR 92).

(ii) Belgian system of intra-group transfers

16.

… [2] … The system of intra-group transfers [, in the version applicable to the present case, [3]] entered into force on 1 January 2019 …

The system of intra-group transfers allows, under very strict conditions, Belgian companies that are profit-making to transfer some or all of their profits to companies in the same group that would have incurred losses during the same tax period.

For the company making the transfer, the amount transferred is deductible for the purposes of corporation tax (Article 205/5 CIR 92).

For the company receiving the transfer, the amount transferred is included in the tax base. Losses for the current year can be used to reduce its tax base.

(iii) Belgian DTI scheme and partial tax consolidation

17.

Under [the eighth paragraph of Article 207 CIR 92, as applicable at the material time] …, the DTI for the current year cannot be set off against the intra-group transfer received ….

… [that provision] stated that '*none of the deductions provided for in Articles [202 and 203 CIR] may be applied to the amount of the intra-group transfer*

1 Judgment of 12 February 2009, *Cobelfret*, C-138/07, ECLI:EU:C:2009:82.

2 …

3 Belgian Official Gazette, 10 August 2018, p. 62656.

referred to in the first subparagraph of Article 185(4), which is included in the tax base'.

The same ban was reproduced in the eighth indent of the first subparagraph of Article 206/3(1) CIR 92.

Since, under the eighth subparagraph of Article 207 CIR 92, no deduction (including DTI) may be applied to the amount of the intra-group transfer, that amount thus constitutes a 'minimum tax base'.

> John Cockerill points out that its tax base for the 2020 tax year amounts to EUR 44 142 423.75 …, that is to say, an amount equal to the Transfer, plus an amount corresponding to [part of] the vehicle expenses … (EUR 444 599.22), on [which] a limit on the deduction of DTI also applies (the seventh paragraph of Article 207 CIR, as applicable at the material time).
>
> The corporation tax due on that amount is EUR 13 057 328.95.
>
> If John Cockerill had received no dividends during the financial year in dispute, its tax base would have been negative (EUR -4 854 452.59). In that case, no corporation tax would have been due for that financial year.

(iv) Summary of the positions of the parties

18.

John Cockerill notes that the system of intra-group transfers under Belgian law does not allow DTI for the current year to be deducted from the intra-group transfer received. John Cockerill finds that it is thus deprived of a 'tax advantage'. It notes a difference in treatment contrary to the Directive when comparing the situation of a company that receives dividends that are exempt under the Directive with a company that does not (when both have benefited from the same intra-group transfer).

John Cockerill also considers that refusing a tax advantage provided for by Belgian domestic law to a company that has received exempt dividends amounts to taxing the dividends in breach of the Directive.

Lastly, according to John Cockerill, even though the DTI that could not be set off against the intra-group transfer received may be carried forward, this does not alter the fact that the system is contrary to the Directive. To tax dividends and then allow a deduction to be carried forward to subsequent periods does not equate to an exemption of those dividends. In addition, in its view, the ban on deducting DTI for the current year from the intra-group transfer received does not constitute an anti-abuse provision.

19.

For its part, the Belgian State points out that, under the applicable system, DTI represented by dividends that cannot be deducted under the eighth paragraph of Article 207 CIR 92 may be carried forward to subsequent periods.

The Belgian State then recalls that the Parent-Subsidiary Directive ‘shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse’ (Article 1(2) of the Directive).

Therefore, according to the Belgian State, while it is true that the deletion of the third paragraph of Article 205/5 CIR 92 no longer prohibits companies that are party to an intra-group agreement from transferring more than is required simply to offset the loss of the company receiving the transfer, such a surplus transfer will be neutralised by the application of the eighth paragraph of Article 207 CIR 92.

According to the Belgian State, the latter provision reduces the incentive for a transfer that exceeds the tax loss of the recipient company. The original intention of the legislature to limit such intra-group transfers thus remains unchanged.

Considering the purpose of the system of intra-group transfers, which is to ensure a fair balance between profits and losses incurred within a group of companies, the provision contained in the eighth paragraph of Article 207 CIR 92 constitutes a ‘limitation’ aimed at thwarting any attempt to abuse the system of intra-group transfers by neutralising the advantages that would result from excessive intra-group transfers and at preventing the distortion of competition within the internal market.

Lastly, the Belgian State insists on the voluntary and free nature of the intra-group system and draws a parallel with the system of exceptional and gratuitous advantages. According to the Belgian State, the application of the eighth paragraph of Article 207 CIR 92 is an integral part of the system of intra-group transfers.

Analysis of the Court

20.

The Court finds that the Court of Justice … has established the direct effect of Article 4(1) of the Parent-Subsidiary Directive. [4]

21.

In addition, various judgments of the Court of Justice … [5] [6] have dealt with similar issues, including the judgment of 19 December 2019, [7] where it is recalled that the Directive:

[4] The direct effect is recalled, inter alia, in advance tax ruling No 2019.0935 of 19 November 2019.

‘*prohibits Member States from taxing the parent company in respect of the profits distributed by its subsidiary … and that that prohibition also applies to national legislation which, although it does not tax the dividends received by the parent company in themselves, may have the effect that the parent company is subject indirectly to taxation on those dividends*.’

According to the Belgian State, however, that case-law cannot be transposed because the Directive only protects the parent company receiving the dividends. Furthermore, under the system of Belgian law applicable to the main proceedings, the recipient of the transfer is not the taxpayer who receives the tax advantage.

In any event, the Court finds that in the present case, an analysis of the case-law of the Court of Justice … raises a difficulty in the interpretation of EU law. [8]

[wording of the question referred for a preliminary ruling reproduced in the operative part] …

5 Judgment of 12 February 2009, *Cobelfret*, C-138/07:

‘*The first indent of Article 4(1) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States is to be interpreted as precluding legislation of a Member State which provides that the dividends received by a parent company are to be included in the latter’s basis of assessment, to be subsequently deducted in the amount of 95%, to the extent to which the parent company has, for the tax period in question, a positive profit balance after other exempted profits have been deducted.’ ‘The first indent of Article 4(1) of Directive 90/435 is unconditional and sufficiently precise to be capable of being relied on before national courts*.’

6 Judgment of 26 October 2017, *Argenta Spaarbank* (C-39/16, ECLI:EU:C:2017:813, paragraph 52):

‘*Second, it must be held that the rule established in Article 4(2) of Directive 90/435 would negate the effectiveness of the rule set out in Article 4(1) of that directive if that first rule had to be interpreted as allowing Member States to preclude the deduction, from the taxable profits of a parent company, of all interest charged in respect of loans up to an amount equal to the amount of dividends, which benefit from a tax exoneration, that the parent company receives from its holding in the capital of a subsidiary, without that non-deductibility being limited to interest charges relating to the financing of that holding which pays out those dividends. Such an interpretation would equate to allowing those Member States to increase indirectly the taxable profits of a parent company, thereby affecting the neutrality, from the tax point of view, of the distribution of dividends paid by a subsidiary located in one Member State to its parent company established another Member State*.’

7 Judgment of 19 December 2019, *Brussels Securities* (C-389/18, paragraph 45): ‘*It is therefore apparent that the combination of the DTI scheme applicable to dividends received, the order of deductions set out in national legislation, and the time limit on the ability to use DRC can have the effect that receiving dividends is likely to result in the parent company losing another tax advantage provided for by national legislation, and, therefore, that company being taxed more heavily than would have been the case if it had not received dividends from its non-resident subsidiary or if, as the referring court states, the dividends had simply been excluded from the parent company’s tax base*.’

8 See also the Finance Minister’s answer to Peter De Roover’s Parliamentary Question No 1301 of 11 January 2023, available at www.fisconetplus.be

ON THOSE GROUNDS,

The Court, ruling *inter partes*; [procedural wording]

…

holds that the following questions should be referred to the Court of Justice of the European Union for a preliminary ruling:

- Does Article 4 of Directive 2011/96/EU have direct effect and, combined with other sources of EU law, must it be interpreted as precluding legislation of a Member State:

  (i) which introduces a tax consolidation system (the intra-group transfer) allowing groups of companies to transfer, under certain conditions, some or all of the taxable profits made by some subsidiaries to other subsidiaries that have incurred losses in the tax year (the intra-group transfer), and

  (ii) which excludes from that advantage loss-making companies, for the amount of the dividends received, which qualify for exemption under the legislation of the Member State transposing Directive 2011/96/EU?

- Is that legislation likely to fall within the scope of Article 1(2) of Directive 2011/96/EU, which states that it 'shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse'? …

[procedural wording and signatures]

…