JUDGMENT OF THE COURT (Fifth Chamber)

8 June 2000 *

In Case C-375/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Supremo Tribunal Administrativo (Portugal) for a preliminary ruling in the proceedings pending before that court between

Ministério Público,

Fazenda Pública

and

Epson Europe BV

on the interpretation of Article 5(4) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of

* Language of the case: Portuguese.

parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P.J.G. Kapteyn, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: G. Cosmas,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Fazenda Pública, by M. Aldina Moreira, of the Legal Service of the Directorate-General for Taxes of the Ministry of Finance, acting as Agent,

— Epson Europe BV, by J. Carvalho Esteves, of the Oporto Bar,

— the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate-General for Community Affairs in the Ministry of Foreign Affairs, Â. Seiça Neves, a member of that service, and M. Palha, Legal Adviser in the Centre for Fiscal Studies of the Directorate-General for Taxes of the Ministry of Finance, acting as Agents,

— the Commission of the European Communities, by T. Figueira and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Epson Europe BV, represented by J. Carvalho Esteves, of the Portuguese Government, represented by V.B. Guimarães, a Lawyer in the Centre for Fiscal Studies of the Directorate-General for Taxes of the Ministry of Finance, acting as Agent, and the Commission, represented by T. Figueira, at the hearing on 16 December 1999,

after hearing the Opinion of the Advocate General at the sitting on 17 February 2000,

gives the following

Judgment

1 By order of 23 September 1998, received at the Court on 19 October 1998, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 5(4) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation

applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6, hereinafter 'the Directive').

2 That question was raised in proceedings between the Fazenda Pública (Portuguese Tax Administration) and Epson Europe BV (hereinafter 'Epson Europe'), a company incorporated under Netherlands law and holding more than 25% of the capital of Epson Portugal SA (hereinafter 'Epson Portugal'), a company incorporated under Portuguese law, regarding the taxation of profits distributed to Epson Europe by its Portuguese subsidiary.

The Community legislation

3 Article 5 of the Directive provides:

'1. Profits which a subsidiary distributed to its parent company shall, at least where the latter holds a minimum of 25% of the capital of the subsidiary, be exempt from withholding tax.

...

4. Notwithstanding paragraph 1, the Portuguese Republic may levy a withholding tax on profits distributed by its [*sic*] subsidiaries to parent companies of other Member States until a date not later than the end of the eighth year following the date of application of this Directive [1 January 1992].

Subject to the existing bilateral agreements concluded between Portugal and a Member State, the rate of this withholding tax may not exceed 15% during the first five years [1992 to 1996] and 10% during the last three years of that period [1997 to 1999].

Before the end of the eighth year the Council shall decide unanimously, on a proposal from the Commission, on a possible extension of the provisions of this paragraph.'

4 Article 2 of the Directive provides:

'For the purposes of this Directive "company of a Member State" shall mean any company which:

...

(c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:

...

— imposto sobre o rendimento das pessoas colectivas [corporation tax, hereinafter "IRC"] in Portugal,

...

or to any other tax which may be substituted for any of the above taxes.'

The national legislation

5 The Directive was transposed into Portuguese law, as far as IRC is concerned, by Decree Law No 123/92 of 2 July 1992 (*Diário da República* I, Series A, No 150, p. 3148), which recast Article 69(2)(c) of the Código do Imposto sobre o Rendimento das Pessoas Colectivas (Corporation Tax Code), which is now worded as follows:

'In the case of income of companies not having their seat or actual management within Portuguese territory and not having any permanent establishment there to which such income may be attributable, the rate of corporation tax shall be 25%, except as regards the undermentioned income:

...

(c) profits which a company established in Portuguese territory, under the conditions laid down in Article 2 of Directive 90/435/EEC of 23 July 1990, makes available to a company established in another Member State which meets the same conditions and has a direct holding in the capital of the former of not less than 25% for two consecutive years or since the incorporation of the subsidiary, provided that, in the latter case, the holding is maintained for that period, in which case the rate of corporation tax shall be 15% until 31 December 1996, without prejudice to the provisions of bilateral conventions in force, and 10% from 1 January 1997 until 31 December 1999.'

6 When the Directive was transposed, however, Articles 182 and 184 of the Código do Imposto Municipal da Sisa e do Imposto sobre as Sucessões e Doações (Code governing the municipal tax on transfers and the succession and donation tax, hereinafter 'the CIMSISD') remained unchanged; they provide for a succession and donation tax in respect of transfers, without consideration, of shares in companies (hereinafter the 'ISD') which is levied, whenever profits are distributed, on the dividends paid by companies which have their seat in Portugal.

7 Article 182 of the CIMSISD provides in that connection:

'The tax on transfers for no consideration:

...

(c) of shares in companies whose seat is in Portugal

shall be withheld at a flat rate from the income from securities.

Proviso

The tax on transfers of shares in respect of which no income is payable shall be calculated and paid in accordance with the ordinary law.'

8 Under Article 184 of the CIMSISD, entitled 'Rate of tax. Withholding tax':

'The flat-rate levy shall be 5% of the interest, dividends or any other income relating to shares and shall be deducted from such income by the bodies which are required to make the relevant payment.

...'

The main proceedings and the question submitted to the Court

9 By resolution of 31 March 1993, Epson Portugal decided to appropriate PTE 80 000 000 to the distribution of dividends, resulting in a payment of PTE 1 066.66 for each share held. The dividends distributed to Epson Europe amounted to PTE 40 795 733. They were paid subject to deduction of IRC at the rate of 15% — a deduction of PTE 6 119 360 — and of a sum of PTE 2 039 786 in respect of ISD at the rate of 5%.

10 Taking the view that ISD had been improperly levied on it, on the ground that since 1 January 1992 the Directive had provided that the withholding tax was not to exceed 15% of the dividends distributed by Portuguese subsidiaries of parent companies established in other Member States, Epson Europe brought proceedings before the Tribunal Tributário de Primeira Instância do Porto (Tax Court of First Instance, Oporto) to recover the tax improperly levied.

11 That court upheld the action in its entirety on the ground that the levy chargeable by the Portuguese Republic under the derogation provided for in Article 5(4) of the Directive had been covered by the withholding tax imposed on Epson Europe in respect of IRC and that liability to ISD as well would render the Directive ineffectual.

12 The Fazenda Pública appealed against that judgment to the Supremo Tribunal Administrativo. The latter expressed doubts as to whether the scope of the Directive extended to ISD and, therefore, whether the Portuguese Republic had erred in transposing the Directive, in so far as it had taken account of the requirements of the Directive only as regards the liability of distributed profits to IRC and not their liability to ISD. In its view, ISD is also income-based, since it is levied in the form of a withholding tax of 5% on dividends or any other income from securities. It is therefore also a tax on income, levied in parallel with IRC, even though it is called a 'succession and donation tax'.

13 It is clear from the case-file that the parent-subsidiary relationship between Epson Europe and Epson Portugal falls within the scope of the Directive, all the relevant conditions being fulfilled.

14 In those circumstances, the Supremo Tribunal Administrativo stayed proceedings pending a preliminary ruling from the Court on the following question:

'Must Article 5(4) of Council Directive 90/435 of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, in so far as it sets limits of 15% and 10% for the derogation granted to Portugal, be interpreted as meaning that such limits refer only to the levying of corporation tax (in Portugal)?

Or does it extend to any tax on the income from shares, levied on dividends, regardless of the legislative instrument which provides for it?'

15 By that question the national court seeks essentially to ascertain whether Article 5(4) of the Directive, in so far as it limits to 15% and 10% the amount of the withholding tax on profits distributed by subsidiaries established in Portugal to their parent companies in other Member States, must be interpreted as meaning that that derogation relates only to IRC or whether it concerns any taxation, of whatever nature and however described, which takes the form of a withholding tax on dividends distributed by such subsidiaries.

16 Epson Europe and the Commission maintain that ISD falls within the scope of the Directive and must therefore not be levied. Article 5(4) of the Directive, which in terms covers every 'withholding tax' and not only tax on income or profits as such, is concerned with all taxation in the form of a withholding tax on dividends distributed by a subsidiary established in Portugal to a parent company in another Member State. In view of its characteristics, ISD is effectively a tax on income and not a tax on transfers of assets. Even though ISD might have been historically justified by the impossibility of taxing share transfers, that substitute tax is now superfluous and is inconsistent with the Portuguese tax system itself.

17 The Commission adds that the aim of the Directive is, in accordance with the principle of fiscal neutrality, to obviate double taxation in dealings between a parent company and its subsidiary where they are established in different Member States, thereby allowing undertakings to adjust to the requirements of the Common Market and facilitating groupings of companies in different Member States. The levying of ISD on dividends, however, is liable to frustrate that objective entirely and to deprive the Directive of any useful effect.

18 Conversely, the Fazenda Pública and the Portuguese Government consider that Article 5(1) and (4) of the Directive is not applicable to ISD. The latter constitutes a special regime and the tax charged reflects the extent to which the dividends are capitalised. The tax is levied not on income but on the value of the security. It is a tax based on a capitalisation factor, which is not equivalent to a tax on the income from securities. The tax at issue in the main proceedings is therefore a tax on transfers of assets for which no consideration is paid; the fact that it is calculated on the basis of income does not mean that it is not a genuine succession and donation tax.

19 The Portuguese Government also contends that it is clear from the negotiations leading to the adoption of the Directive that the tax at issue in the main proceedings is regarded as falling outside the scope of the Directive. In that connection, it refers to several documents from which, in its submission, it is clear that, when the Directive was being drafted, the Portuguese Government had indicated its wish to remove ISD from the scope of the Directive and the Council agreed to that course of action.

20 It must be observed at the outset that, as is clear in particular from the third recital in its preamble, the Directive seeks, by the introduction of a common tax system, to ensure that cooperation between companies of different Member States is not penalised as compared with cooperation between companies in the same Member State and thereby to facilitate the grouping together of companies

at Community level. Thus, with a view to avoiding double taxation, Article 5(1) of the Directive provides for exemption in the State of the subsidiary from withholding tax upon distribution of profits (Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit International and Others* v *Bundesamt für Finanzen* [1996] ECR I-5063, paragraph 22).

21 In that connection, it is important to note that, for a transitional period, the Portuguese Republic was allowed to derogate from the rule laid down in Article 5(1) of the Directive, in that it was authorised, under Article 5(4), to maintain certain taxation of profits distributed by subsidiary companies established in Portugal to parent companies in other Member States until 31 December 1999, namely a withholding tax of 15% for 1992 to 1996 and of 10% for 1997 to 1999. It is clear from the fifth recital in the preamble to the Directive that that temporary derogation was introduced for budgetary reasons. As far as the Portuguese Republic is concerned, no other derogation is mentioned in the Directive.

22 In order to determine whether the levying of ISD on distributed profits falls within the scope of Article 5(1) of the Directive, reference must be made, in particular, to the wording of that provision. The term 'withholding tax' contained in it is not limited to certain specific types of national taxation. In particular, Article 2(c) of the Directive enumerates, for the purpose of identifying those companies in the Member States which are regarded as falling within the scope of the Directive, the national taxes to which those companies are normally subject, and the Portuguese tax referred to is the 'imposto sobre o rendimento das pessoas colectivas', that is to say IRC. However, it cannot be inferred from this that other taxes having the same effect are authorised, particularly since the final part of Article 2 refers expressly to 'any other tax which may be substituted for any of the above taxes'.

23 It is clear from the order for reference and from the observations submitted under Article 20 of the EC Statute of the Court of Justice that ISD is a withholding tax for which the chargeable event is the payment of dividends or of any other income from shares, that the taxable amount is the income from the shares and

that the taxable person is the holder of the shares. ISD thus has the same effect as a tax on income. It is immaterial in that respect that it is called 'succession and donation tax' and that it is levied in parallel with IRC.

24 In those circumstances, the objective of the Directive, which, as stated in paragraph 20 of this judgment, is to encourage cooperation between companies in several Member States, would be undermined if the Member States were permitted deliberately to deprive companies in other Member States of the benefit of the Directive by subjecting them to taxes having the same effect as a tax on income, even if the name given to the latter places them in the category of tax on assets.

25 Consequently, ISD, in so far as it involves the taxation of dividends distributed by subsidiaries established in Portugal to parent companies in other Member States, falls within the scope of the Directive. It follows that, even though the Portuguese Republic may be entitled to maintain that taxation, possibly in combination with IRC, it may do so only within the limits temporarily laid down by Article 5(4) of the Directive, namely by levying a withholding tax at a rate not exceeding 15% for 1992 to 1996 and 10% for 1997 to 1999. If such limits were not observed, the Portuguese Republic would enjoy a further derogation not provided for by the Directive.

26 As regards the Portuguese Government's argument that it is clear from various documents and, in particular, from a declaration of the Council that ISD was excluded from the scope of Article 5(1) of the Directive, there is no basis for that contention in the wording of the Directive. Moreover, according to settled case-law, declarations recorded in Council minutes in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of

interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question, and, moreover, such declarations have no legal significance (see Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18, and Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 51).

27 It follows that the answer to be given to the national court must be that Article 5(4) of the Directive, in so far as it limits to 15% and 10% the amount of the withholding tax on profits distributed by subsidiaries established in Portugal to their parent companies in other Member States, must be interpreted as meaning that that derogation relates not only to IRC but also to any taxation, of whatever nature or however described, which takes the form of a withholding tax on dividends distributed by such subsidiaries.

Costs

28 The costs incurred by the Portuguese Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Supremo Tribunal Administrativo by order of 23 September 1998, hereby rules:

Article 5(4) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, in so far as it limits to 15% and 10% the amount of the withholding tax on profits distributed by subsidiaries established in Portugal to their parent companies in other Member States, must be interpreted as meaning that that derogation relates not only to corporation tax but also to any taxation, of whatever nature or however described, which takes the form of a withholding tax on dividends distributed by such subsidiaries.

Edward Sevón Kapteyn

Jann Wathelet

Delivered in open court in Luxembourg on 8 June 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber