Questions referred

1. (a) Must Articles 56 and 43 of the Treaty Establishing the European Community be interpreted as meaning that they preclude a tax regime intended to eliminate economic double taxation of dividends which:

   (i) 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 come from a subsidiary established in France,

   (ii) but does not offer that option if those dividends come from a subsidiary established in another Member State of the European Community, since, in that case, that regime does not give entitlement to a tax credit applied to the distribution of those dividends by that subsidiary on the ground that such a regime would in itself, with respect to the parent company, infringe the principles of the free movement of capital or freedom of establishment?

   (b) If the answer to the first question is in the negative, must those articles be interpreted as meaning that they none the less preclude such a regime if the shareholders position must also be taken into account on the ground that, given the making of the advance payment, the amount of the dividends received from its subsidiaries and redistributed by the parent company to its shareholders will differ according to the location of those subsidiaries, in France or in another Member State of the European Communities, with the result that that regime deters shareholders from investing in the parent company and, therefore, affects the raising of capital by that company and is likely to deter that company from allocating capital to subsidiaries established in Member States other than France or from creating such subsidiaries in those States?

2. If the answer to I1 or I2 is in the affirmative and if Articles 56 and 43 of the Treaty Establishing the European Community are to be interpreted as meaning that they preclude the advance payment tax regime described above and that, therefore, the administration is, in principle, required to reimburse the sums received on the basis of that regime in so far as they were received contrary to Community law, does that duty, in such a regime which does not of itself lead to the passing on of a tax onto a third party by the person liable for the tax preclude:

   (a) the administration from opposing the reimbursement of the sums paid by the parent company on the ground that that reimbursement would lead to the unjust enrichment of the parent company,

   (b) and, if the answer is in the negative, the fact that the sum paid by the parent company does not constitute an accounting or tax charge for it but is set off only against the total of the sums which may be redistributed to its shareholders can be pleaded in support of an argument that that sum should not be reimbursed to the company?

3. Taking account of the answer to the questions set out in I and II, do the Community principles of equivalence and effectiveness preclude the reimbursement of sums which ensure the application of the same tax regime to dividends redistributed by the parent company, whether those dividends originate from sums distributed by its subsidiaries established in France in another Member State of the European Community being subject to the condition, (apart, where relevant, in the case of stipulations in a bilateral convention applicable between France and the Member State where the subsidiary is established relating to the exchange of information) that the person liable for the tax furnishes evidence which is in its sole possession and relating with respect to each dividend concerned, in particular to the rate of taxation actually applied and the amount of tax actually paid on profits made by its subsidiaries established in the Member States of the European Community other than France, whereas, with respect to subsidiaries established in France that evidence, known to the administration, is not required?

Appeal brought on 12 August 2009 by NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB against the judgment of the Court of First Instance (First Chamber) delivered on 9 June 2009 in Case T-152/06: NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v Commission of the European Communities

(Case C-322/09 P)

(2009/C 233/21)

Language of the case: English

Parties

Appellant: NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB (represented by: M. Merola and L. Armati, avvocati)

Other party to the proceedings: Commission of the European Communities

Form of order sought

The appellant claims that the Court should:

— set aside the judgment under appeal in its entirety;

— declare the action of Destination Stockholm in case T-152/06 admissible and grounded, and therefore grant the forms of order sought at first instance;

— order the Commission to bear costs.

In the alternative:

— set aside the judgment under appeal in its entirety and declare the action of Destination Stockholm in case T-152/06 admissible;

— refer the case back to the Court of First Instance for the examination of the merits of the case;

— reserve the costs of the proceedings at first instance and on appeal.

Pleas in law and main arguments

The appellant submits that, in judgment under appeal, the Court of First Instance:

— misapplied Article 230 EC by manifestly distorting of the content of the contested letters, the intention of their author and the evidence adduced before the CFI;

— incorrectly classified the Commission's position on the compatibility of the contested measures as preliminary and used a contradictory reasoning on the same issue;

— inappropriately made reference to Article 88(1) EC by considering that the Commission rejected a request to recommend appropriate measures;

— incorrectly applied Articles 4, 10, 13 and 20(2) of the Regulation No 659/1999 [1], in particular by ruling that the classification by the Commission of the contested measures as existing aid prevents the rejection of a complaint from being challenged.

[1] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 83, p. 1.

Action brought on 17 August 2009 — Commission of the European Communities v Republic of Austria

(Case C-330/09)

(2009/C 233/22)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: G. Braun and M. Adam, acting as Agents)

Defendant: Republic of Austria

Form of order sought

— Declare that, by failure to adopt the laws, regulations and administrative provisions necessary to implement Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC [1] or by failing to notify the commission thereof, the Republic of Austria has failed to fulfil its obligations under that directive;

— order Republic of Austria to pay the costs.

Pleas in law and main arguments

The period prescribed for implementation of the directive expired on 29 June 2008. At the time the present action was lodged, the defendant had not yet adopted the necessary measures for the implementation of this directive, or had in any case not notified the Commission thereof.

[1] OJ L 157, p. 87.