



Reports of Cases

Case C-47/12

Kronos International Inc.
v
Finanzamt Leverkusen

(Request for a preliminary ruling from the Finanzgericht Köln)

(Reference for a preliminary ruling — Articles 49 TFEU and 54 TFEU — Freedom of establishment — Articles 63 TFEU and 65 TFEU — Free movement of capital — Tax legislation — Corporation tax — Legislation of a Member State designed to eliminate double taxation of distributed profits — Imputation method applied to dividends distributed by companies resident in the same Member State as the company receiving them — Exemption method applied to dividends distributed by companies resident in a different Member State from the company receiving them or in a third State — Difference in treatment of losses of the company receiving the dividends)

Summary — Judgment of the Court (First Chamber), 11 September 2014

1. *Freedom of establishment — Free movement of capital — Provisions of the Treaty — Scope — National legislation concerning taxation of dividends distributed by a non-resident company to a resident company incorporated in accordance with the law of a third State and having a certain holding in the capital of the company making the distribution — Included — Provisions governing freedom of establishment not applicable*

(Arts 49 TFEU, 63 TFEU and 65 TFEU)

2. *Freedom of movement for persons — Freedom of establishment — Provisions of the Treaty — Scope — Company formed in accordance with the law of a third State and established in a Member State — Not included — Reliance on the inability of the company of a third State to invoke the provisions governing freedom of establishment in the event of discrimination for tax purposes in the Member State of residence — No effect*

(Art. 49 TFEU)

3. *Free movement of capital and freedom of payments — Restrictions — Tax legislation — Corporation tax — Taxation of dividends — Exemption method applied to dividends distributed by companies resident in other Member States and in third States — Imputation method applied to dividends distributed by companies resident in the same Member State as the company receiving them — Full or partial refund if losses are recorded — Lawfulness*

(Art. 63 TFEU)

1. The compatibility with EU law of national rules under which a company resident in a Member State cannot set off corporation tax paid in another Member State or in a third State by capital companies distributing dividends, because of the exemption of those dividends from tax in the first Member

State when they stem from shareholdings representing at least 10% of the capital of the company making the distribution and, in the case in point, the actual shareholding of the capital company receiving the dividends exceeds 90% and the recipient company has been incorporated in accordance with the law of a third State, must be assessed in the light of Articles 63 TFEU and 65 TFEU.

Where the national legislation relating to the treatment of dividends is not intended to apply exclusively to situations in which the parent company exercises decisive influence over the company distributing the dividends, account must be taken of the size of the shareholding of the company receiving the dividend in the company distributing it, in so far as both Article 49 TFEU and Article 63 TFEU may be relied upon and it can be determined in the light of the shareholding's size that the situation envisaged falls within the scope of one or the other of the freedoms respectively laid down by those two provisions of EU law.

This reasoning is also applicable, by analogy, where solely the free movement of capital may be relied upon given the limits of the personal scope of freedom of establishment. That is so in a situation where the company receiving the dividends is a company formed in accordance with the law of a third State.

In a situation where freedom of establishment cannot be relied upon because of the connection of the company receiving the dividends to the legal system of a third State, national rules which relate to the tax treatment of dividends originating in another Member State or in a third State and do not apply exclusively to situations in which the parent company exercises decisive influence over the company distributing the dividends must be assessed in the light of Article 63 TFEU.

Consequently, a company incorporated in accordance with the law of a third State that is resident in a Member State may, irrespective of the extent of its shareholding in the company distributing dividends resident in another Member State or in a third country, rely upon that provision in order to call the legality of such rules into question. Since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom.

(see paras 40, 42, 43, 51-53, 55, operative part 1)

2. See the text of the decision.

(see paras 44-48)

3. Article 63 TFEU must be interpreted as not precluding application of the exemption method to dividends distributed by companies resident in other Member States and in third States, when the imputation method is applied to dividends distributed by companies resident in the same Member State as the company receiving them and, if the latter company records losses, the imputation method results in the tax paid by the resident company that made the distribution being fully or partially refunded.

First, the free movement of capital, enshrined in Article 63(1) TFEU, cannot have the effect of requiring Member States to go beyond the cancelling of national income tax payable by a shareholder in respect of foreign-sourced dividends received and to reimburse a sum whose origin is in the tax system of another Member State, if the first Member State is not to see its fiscal autonomy limited by the exercise of the fiscal power of the other Member State.

Second, the refund requested by a company subject to taxation constitutes, in the context of the imputation method, the logical complement of taking the dividends into account and of the previous reduction of the losses that can be carried forward. Without such a refund, the taking of the dividends into account and the reduction of the losses of the company receiving them are liable to

result in economic double taxation of those dividends in subsequent tax years when the results of the company receiving the dividends are positive. By contrast, in the context of the exemption method, as the losses are not reduced, there is no risk of economic double taxation of the dividends received. The lack of a refund is counterbalanced by not taking the dividends into account when determining the basis of assessment.

(see paras 83, 87-89, operative part 2)