



## Reports of Cases

### Joined Cases C-116/16 and C-117/16

Skatteministeriet

v

T Danmark and Y Denmark Aps

(Requests for a preliminary ruling from the Østre Landsret)

**Judgment of the Court (Grand Chamber), 26 February 2019**

(Reference for a preliminary ruling — Approximation of laws — Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States — Directive 90/435/EEC — Exemption of the profits distributed by companies of a Member State to companies of other Member States — Beneficial owner of the distributed profits — Abuse of rights — Company established in a Member State and paying to an associated company established in another Member State dividends all or almost all of which are then transferred outside the European Union — Subsidiary subject to an obligation to withhold tax on the profits at source)

1. *EU law — General principles of law — Prohibition on relying on EU law for fraudulent or abusive ends — Presence of a fraudulent or abusive practice — Obligation to refuse to grant exemption from withholding tax on dividends as laid down in Article 5 of Directive 90/435 — Lack of domestic or agreement-based anti-abuse provisions providing for such a refusal — Irrelevant*  
(Council Directive 90/435, as amended by Directive 2003/123, Art. 5)

(see paragraphs 70-72, 76, 77, 79, 82, 83, 91, 92, 95, operative part 2)

2. *EU law — Abuse of a right arising from a provision of EU law — Transactions constituting an abusive practice — Elements to be taken into consideration — Tax avoidance or optimisation — Artificial arrangements — Conduit company — Tax provisions — Direct taxation — Directive 90/435 — Proof of an abusive practice — Criteria — Objective and subjective elements — Definition — Indications showing an abuse of rights — Included — Condition — Objective and consistent indications*  
(Council Directive 90/435, as amended by Directive 2003/123)

(see paragraphs 97, 98, 100, 108, 114, operative part 3)

3. *Approximation of laws — Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States — Directive 90/435 — Status of beneficial owner of dividends — Refusal to accord that status to an entity or establishment of*

*an abuse of rights committed by that entity — Burden of proof — Requirement to identify the actual beneficial owner — No such requirement*  
(Council Directive 90/435, as amended by Directive 2003/123)

(see paragraphs 117, 118, 120, operative part 4)

4. *Approximation of laws — Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States — Directive 90/435 — Exemption of dividend payments from any taxes — Non-applicability of the exemption where there is an abuse of rights — National legislation providing for the taxation of dividends — Lawfulness — Reliance on the freedoms enshrined in the Treaty — Precluded*  
(FEU Treaty; Council Directive 90/435, as amended by Directive 2003/123, Art. 1(2))

(see paragraph 123, operative part 5)

### Résumé

In the judgments *N Luxembourg 1 and Others* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16) and *T Danmark and Y Denmark* (C-116/16 and C-117/16), delivered on 26 February 2019, the Court of Justice was asked to rule, essentially, on the interpretation of the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends, and on the concept of ‘beneficial owner’ of (i) interest or royalty payments and (ii) dividends within the meaning of, respectively, Directive 2003/49<sup>1</sup> and Directive 90/435,<sup>2</sup> as amended by Directive 2003/123.<sup>3</sup>

In those cases, the Court was requested to examine the scope of the prohibition on abuse of rights in relation to a tax exemption provided for by those two directives with regard to withholding tax, in respect of cross-border payments of dividends or interest between related companies established in different Member States. In that regard, it must be pointed out that, in order to benefit from the system of exemption, the entity receiving the dividends or interest must satisfy certain conditions, including being the ‘beneficial owner’ of those payments. However, the disputes in the main proceedings raised the question of how to treat payments made within groups of companies where the distributing company does indeed pay dividends or interest to one or more companies which formally meet the conditions required by the relevant directives, but those companies themselves transfer all or almost all of the sums received to a beneficial owner who is not covered by the system of exemption since that owner is established outside the territory of the European Union.

At the material time, Denmark had not adopted specific transposition provisions to combat abuse of rights, but only provisions transposing the rules on exemption laid down by the directives in question. Those national rules thus provided that withholding tax should not be applied in respect of cross-border payments between companies meeting the conditions laid down by those directives. However, in the cases in the main proceedings, the Danish tax authority had refused to apply that exemption to the tax on dividends or interest. It claimed that the companies established

<sup>1</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

<sup>2</sup> 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).

<sup>3</sup> Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2003 L 7, p. 41).

in Member States other than Denmark which received interest or dividends from Danish companies were not, in actual fact, the beneficial owners of those payments. In view of that finding, the Danish tax authority obliged the Danish companies making the payments to withhold tax at source. The legal challenges to that taxation raised various questions relating to the concept of 'beneficial owner', the need for a legal basis to refuse entitlement to the exemption on the basis of an abuse of rights and, in so far as such a legal basis exists, the constituent elements of any abuse of rights, and the conditions for proving it.

As regards the concept of 'beneficial owner', used in particular in Directive 2003/49, the Court ruled, referring not only to the objective thereof but also to the commentaries in the OECD Model Tax Convention for the avoidance of double taxation with respect to taxes on income and capital, that that concept concerns not a formally identified recipient but rather the entity which benefits economically from the interest received, and accordingly has the power freely to determine the use to which it is put. While Directive 90/435 does not formally refer to the concept of 'beneficial owner', the Court nonetheless ruled that the exemption from withholding tax provided for in that directive was also reserved for the beneficial owners of dividends established in a Member State of the European Union.

Next, as regards the conditions under which entitlement to the exemptions in question could be refused on the ground of a finding of an abuse of rights, the Court observed that there is, in EU law, a general legal principle which must be complied with by individuals and according to which they cannot rely on EU law for abusive or fraudulent ends. A Member State must therefore refuse to grant the benefit of provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions, but with the aim of benefiting from an advantage in EU law although the relevant conditions are fulfilled only formally and the application of those provisions would be inconsistent with the objectives thereof.

Noting that the transactions in question, which according to the Danish tax authorities, constitute an abuse of rights and, therefore, may be incompatible with the objective pursued by the directives in question, fall within the scope of EU law, the Court stated that to authorise financial arrangements whose sole or essential aim is to benefit from the tax advantages resulting from the application of Directive 2003/49 or Directive 90/435 would not be consistent with such objectives. The right to take advantage of competition engaged in by the Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of that general principle. Admittedly, the pursuit of the most favourable tax regime cannot, as such, set up a general presumption of fraud or abuse. However, a right or an advantage arising from EU law should not be granted where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned. In that regard, it is incumbent upon the national authorities and courts to refuse to grant entitlement to the rights provided for by the directives concerned where they are invoked for fraudulent or abusive ends, and the absence of domestic or agreement-based anti-abuse provisions has no effect on that obligation to refuse.

The Court concluded from this that entitlement to the exemption from withholding tax on interest or dividends paid by a subsidiary to its parent company, provided for in Directives 2003/49 and 90/435, is, where there is a fraudulent or abusive practice, to be refused by the national authorities and courts to a taxpayer, in accordance with the general principle prohibiting such practices, even if there are no domestic or agreement-based provisions providing for such a refusal.

The Court also examined the question of what the constituent elements of an abuse of rights are and how those elements may be established. Making reference to its well-established case-law, the Court noted that proof of an abuse requires, first, a combination of objective circumstances and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. A group of companies may therefore be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so, *inter alia*, where, on account of a conduit entity interposed in the structure of the group between the company that pays interest or dividends and the company in the group which is their beneficial owner, payment of tax on that interest or those dividends is avoided. It is thus an indication of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 1(1) of Directive 2003/49 and Article 5 of Directive 90/435 that the entirety or almost the entirety of that interest or those dividends is, very soon after receipt thereof, passed on by the receiving company to entities which do not fulfil the conditions for the application of Directive 2003/49 or Directive 90/435.

Finally, the Court examined the rules relating to the burden of proving an abuse of rights. In that context, the Court found, in its judgment on Directive 2003/49, that it is clear from that directive that the source Member State may require the company which has received interest to establish that it is its beneficial owner. In that regard, there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied. In its judgment on Directive 90/435, the Court stated that that directive does not contain rules relating to the burden of proving an abuse of rights. However, the Court concluded that it is for the tax authority of the source Member State which, on a ground relating to the existence of an abusive practice, seeks to refuse to grant the exemption provided for in Directive 90/435 to establish the existence of elements constituting such a practice. While such an authority does not have to identify the beneficial owners, that authority does have the task of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed.