Reports of Cases

Case C-685/16

EV
v
Finanzamt Lippstadt

(Request for a preliminary ruling from the Finanzgericht Münster)

(Reference for a preliminary ruling — Articles 63 to 65 TFEU — Free movement of capital — Deduction of taxable profits — Shareholdings of a parent company in a capital company whose management and registered office are located in a non-member State — Dividends distributed to the parent company — Tax deductibility subject to stricter conditions than deduction of profits from shareholdings in a non-tax-exempt capital company governed by national law)

Summary — Judgment of the Court (Fifth Chamber), 20 September 2018

1. *Freedom of establishment — Free movement of capital — Scope — Tax legislation — Corporation tax — Taxation of dividends — Tax treatment of dividends distributed by a resident company of a third country — Tax treatment based on national legislation not intended to apply exclusively in the case of decisive influence exercised by the beneficiary company over the distributing company — Provisions governing freedom of establishment not applicable — Applicability of provisions governing free movement of capital*

   (Arts 49 TFEU, 63 TFEU, 64 TFEU and 65 TFEU)

2. *Free movement of capital and liberalisation of payments — Restrictions on movements of capital to and from non-Member States — Restrictions on movements of capital involving direct investment existing on 31 December 1993 — Concept of direct investment — Shareholding of a controlling company of 100% in a sub-subsidiary resident in a non-member State — Included — Concept of restriction existing on 31 December1993 — National laws adopted after that date restricting the scope of a national measure, both personal and material — Change in the context of the overall legislation — Not included*

   (Art. 64(1) TFEU)

3. *Free movement of capital and liberalisation of payments — Restrictions — Tax legislation — Corporation tax — Taxation of dividends — Deduction of taxable profits — Shareholdings of a parent company in a capital company whose management and registered office are located in a non-member State — Dividends distributed to the parent company — National legislation submitting the deductibility of those profits to stricter conditions that the deduction of profits from shareholdings in a non-tax-exempt capital company governed by national law — Not permissible — Justification — None*

   (Arts 63 TFEU, 64 TFEU and 65 TFEU)

1. See the text of the decision.

(see paras 38-41, 43-46)

2. See the text of the decision.

(see paras 72, 75, 77-79, 82)

3. Articles 63 to 65 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which subjects a deduction of profits from shareholdings in a capital company with its management and head office in a non-member State to stricter conditions than a deduction of profits from shareholdings in a non-exempt capital company governed by national law.

In that regard, it is clear from the Court's case-law that the comparability of a cross-border situation with an internal one must be examined having regard to the aim pursued by the national provisions at issue as well as their purpose and content (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

Moreover, only the relevant distinguishing criteria established by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects an objectively different situation (judgments of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 28, and of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 49).

With regard to national legislation, such as that in the main proceedings, which seeks to prevent double taxation by authorising the deduction from the trade tax base of dividends from shareholdings in one or more capital companies, the situation of a company receiving dividends distributed by resident companies is comparable to that of a company receiving income from shareholdings from non-resident companies (see, by analogy, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 62, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 113).

In that context, it should be noted that, in order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage (judgments of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 40, and of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 30 and the case-law cited).

Thus, a general presumption of fraud and abuse cannot justify a measure which prejudices the enjoyment of a fundamental freedom guaranteed by the Treaty and the mere fact that the company distributing the dividends is located in a non-member State cannot set up a general presumption of tax evasion (see, to that effect, judgment of 19 July 2012, *A*, C-48/11, EU:C:2012:485, paragraph 32 and the case-law cited).

(see paras 88, 89, 92, 95, 96, 100, operative part)