OPINION OF ADVOCATE GENERAL ALBER

delivered on 10 May 2001 [1]

I — Introduction

1. By the present reference for a preliminary ruling, the Diikitiko Protodikio (Administrative Court of First Instance), Athens, asks the Court to interpret Article 5(1) of the Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. The national court wishes to ascertain whether there is a withholding tax prohibited under that provision where, as laid down by Greek income tax law, in the event of the distribution of profits to a parent company which is not resident in Greece, certain tax exemptions in respect of those profits, which would be applicable if the profits remained within the company making the distribution, are withdrawn, so that by virtue of the distribution the tax burden of the undertaking making the distribution increases.

II — Legal framework

A — *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 (hereinafter 'the Directive')* [2]

2. The relevant provisions of the Directive are as follows:

'Article 1

1. Each Member State shall apply this Directive:

— to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

1 — Original language: German.

2 — OJ 1990 L 225, p. 6.

— to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.

2. ...

...

Article 5

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.

2. ...

...

Article 7

1. The term "withholding tax" as used in this Directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company.

2. This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.'

B — *Greek law*

3. Article 106 of the Income Tax Code — Law No 2238/1994 — reads as follows:

'1. Where the income of legal persons... includes dividends or profits from shares in other companies, whose profits have been taxed in accordance with the provisions of the present article or Article 10, that income shall be deducted from total net profits for the purposes of calculating the taxable profits of the legal person. However, in a case where the net profits of a Greek... company... also include, apart from the dividends and profits from shares in other companies referred to above, income subject to special taxation entailing extinction of tax liability or non-taxable income *and in addition distribution of profits takes place* [emphasis added], in order to determine the distributed profits corresponding to income, as referred to in paragraphs 2 and 3 of this article, total net profits arising from the balance sheet of those legal persons shall be taken into account.

2. If the net profits arising from the balance sheet of... Greek public limited companies... also include non-taxable income, in order to determine the taxable profits of the legal person there shall be added thereto the fraction of non-taxable income corresponding to distributed profits in any form, after transformation of that amount into a gross amount by the addition of the corresponding tax...

3. The provisions of the previous paragraph shall also apply by analogy to the distribution of profits by... Greek public limited companies... whose profits also include profits subject to special determination or taxation in their own name.'

C — *Double taxation agreement between Greece and the Netherlands, signed in Athens on 16 July 1981*

4. Article 10 of the double taxation agreement states as follows:

'1. Dividends paid by a company resident in one of the Contracting States to a resident of the other State are taxable in that other State.

2. Such dividends are none the less taxable in the State in which the company paying the dividends is resident, in accordance with the legislation of that State, but where the recipient is the person entitled to the dividends, the tax is not to exceed:

(a) ...

(b) as regards dividends paid by a company resident in Greece to a resident of the Netherlands: 35% of the gross amount of the dividends.

3. ...'

III — Facts

5. The applicant, Athinaiki Zithopiia AE, is a public limited company which produces and markets beer. It has its seat in Aigaleo, Attica. 92.17% of its capital is owned by the Netherlands company Amstel International.

6. In 1996, Athinaiki Zithopiia had income which, while in principle exempt from Greek income tax, was taxed because it distributed profits to Amstel International.

7. Athinaiki Zithopiia declared the following amounts:

(1) non-taxable income of GRD 2 391 600 073, made up of:

   (a) a surplus from the buying and selling of shares in mutual funds (Article 48(3) of Law No 1969/91), amounting to GRD 2 082 270 518 and corresponding to GRD 540 405 967 in tax; and

   (b) the 5% rebate allowed to it on the ground of its payment of income tax for the 1996 financial year in a lump sum, amounting to GRD 309 329 555 and corresponding to GRD 80 279 452 in tax; and

(2) income subject to special tax made up of interest on deposits in credit institutions (Article 12(1) and (2) of Law No 2238/1994), amounting to GRD 1 170 631 283 and corresponding to GRD 173 606 134 in tax.

8. Athinaiki Zithopiia claimed that of the total of GRD 794 291 553 levied in additional tax, corresponding to its non-taxable income and its income subject to special taxation for the 1997 financial year, the sum of GRD 738 384 406 had been unduly paid. This consisted of 92.17% of the first mentioned amount, corresponding to the distribution to Amstel, but the entire amount of GRD 80 279 452 in respect of the 5% rebate (referred to above under b).

9. Athinaiki Zithopiia contended that that sum had to be refunded to it, since Article 106(2) and (3) of Law No 2238/1994 imposed a type of taxation which, by the mere fact of being linked to the distribution of profits, constituted a 'withholding tax' and infringed Article 5(1) of the Directive. Under the Greek provisions, the distributed profits were taxed in full even if a part of those profits derived from sources which, in the absence of a distribution, rendered them non-taxable income or income subject to special taxation.

IV — Question referred for a preliminary ruling

10. The Diikitiko Protodikio, Athens, therefore referred the following question to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC):

'Is there a withholding tax within the meaning of Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 where national legislation provides that, in the event of distribution of profits by a subsidiary (a public limited company or equivalent company) to its parent company, account is to be taken, in determining the taxable profits of the subsidiary, of its total net profits, including income which has been subject to special taxation entailing extinction of tax liability and also non-taxable income, when those two categories of income would not be taxable on the basis of the national legislation if they remained with the subsidiary and were not distributed to the parent company?'

V — Analysis

A — *Interpretation of Article 5(1) of the Directive*

Arguments of the parties

11. The Greek Government submits that the Directive derogates from the principle of territoriality of tax systems in order, first, to prevent cross-border ownership of companies from being disadvantaged in comparison with domestic ownership and, second, to create a taxation system that is neutral from the point of view of competition. The Directive's objective is to avoid double taxation. Therefore, either distributed profits are taxed in the hands of the parent company, or the parent company can deduct the tax paid by the subsidiary from its own tax.

12. The Directive does not provide for a tax exemption. Article 4 of the Directive presupposes that the subsidiary is taxed and Article 5(1) precludes a withholding tax only at the time when profits are distributed.

13. The Greek Government emphasises that the provisions in question do not correspond to a withholding tax but come under taxation of the subsidiary's income. It refers to the fact that withholding taxes on the distribution of profits are expressly prohibited by law. There is absolutely no question of understanding the income tax provisions in question as a withholding tax on the distribution of profits.

14. Athinaiki Zithopiia and the Commission, for largely the same reasons as each other, consider that the tax provisions in question constitute a prohibited withholding tax.

15. They submit that the Directive is supposed to create fiscal neutrality, in order to reduce the tax burden on cross-border cooperation and thereby to promote the freedom of establishment and the free movement of capital.

16. The concept of withholding tax is not defined. It is merely delimited negatively in Article 7(1) of the Directive. However, Article 5(1) of the Directive grants a right to Community citizens and is thus to be interpreted broadly; exceptions, on the other hand, must be interpreted narrowly. It is immaterial how the tax is classified at national level. All that must be examined is whether it satisfies the conditions of a withholding tax.

17. The national tax provisions lead to special taxation where profits are distributed. Moreover, it is because of the distributions that tax is levied. Thus, although the taxation falls within the framework of income tax payable by the undertaking making the distribution, it involves a withholding tax.

18. The exception in Article 7(1) of the Directive is not applicable in the present case, since it is not an advance payment or prepayment but definitive taxation that is at issue.

19. The fiscal sovereignty of the Member States does not preclude application of

Article 5(1) of the Directive, since that sovereignty must be exercised in a way that is compatible with Community law.

20. The representative of the Commission stated at the hearing, as a further argument in favour of classifying the tax as a tax on distributions, that no account is taken within its framework of losses of the undertaking making the distribution which have been carried forward.

Assessment

21. The conditions for application of the Directive are fulfilled. Athinaiki Zithopiia and Amstel are companies for the purposes of Article 2. Athinaiki Zithopiia is a subsidiary of Amstel, since Amstel holds more than 25% of its capital (Article 3(1)(a) and (b)). Athinaiki Zithopiia distributes profits to Amstel (second indent of Article 1(1)).

22. The derogation for Greece under Article 5(2) of the Directive has in the meantime come to an end.

23. It follows that the issue to be considered is whether the provisions in question represent a withholding tax within the meaning of Article 5(1) of the Directive. The concept of a withholding tax is not defined in the Directive. However, the Court has already had the opportunity, in its judgment in *Epson Europe*, to interpret the Directive in this regard:

'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.

...

In order to determine whether the levying [of tax] 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... 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".' [3]

24. It follows that the application of Article 5(1) of the Directive depends not on how the domestic tax provision is described or on the tax regime it forms part of, but exclusively on its effect.

25. The concept of withholding tax becomes even clearer when regard is had to the fact that, in the field of conflict of laws in taxation matters, it typically forms the counterpart to the principle of worldwide taxation. There it designates the imposition of local taxes on the local income of non-residents. When an undertaking's profits are distributed to non-residents (but also to residents), there is a withholding tax in that the undertaking making the distribution deducts the tax from the distribution and pays it directly to the tax authorities. Where the recipients of the distribution are taxed domestically on their total income, deductions of tax at source are normally taken into account in settling their overall tax liability.

26. If, on the other hand, the recipients are not resident within the territory and are therefore taxed only at the place of their seat in respect of the aggregate of their worldwide income, there is usually no provision for such account to be taken. They must then in practice pay tax twice on the same income. In order to avoid, or at least to limit, the cumulation of withholding taxes and worldwide taxation, States frequently conclude double taxation agreements. The Directive pursues exactly the same objective. It follows that, under the broad interpretation required by the Court, the concept of withholding tax includes every tax provision that has the effect of taxing distributions of profits by a resident subsidiary company to a non-resident parent company. The specific designation or the structure of the tax is immaterial.

27. On the other hand, taxation of the activity of the resident subsidiary company must be distinguished from withholding tax. In principle, the former is not affected by the Directive. However, a Member State is unable in that context to enact provisions which are in practice equivalent to a withholding tax. Thus, within the field of application of the Directive, tax legislation that links particular fiscal charges to a

3 — Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 20 et seq., and the further references cited.

distribution of profits is prohibited if in the absence of the distribution those fiscal charges would not arise. In practice, the distribution of profits is thereby equated to their retention.[4]

28. In *Epson*, the Court therefore took into account:

— that the chargeable event was the payment of dividends or of other income from shares,

— that the taxable amount was the income from the shares, and

— that the taxable person was the holder of those shares.[5]

29. In the present case, the tax burden increases only because the applicant distributes its profits. Thus, there is a comparable chargeable event here.

30. The taxable amount for the increased tax burden is the distributed profit, since the amounts which are to be taken into account in reducing tax are themselves reduced in proportion to the fraction of the profit that has been distributed.

31. However, the taxable person in the present case is not the owner of the stake in the company which makes the distribution. The increase in tax affects as a matter of form the company making the distribution, whose income tax increases. In contrast to *Epson*, here the applicant is thus not the parent company resident in a different Member State, but the subsidiary resident in the Member State levying the tax.

32. Nevertheless, the fact that the tax burden is imposed on the subsidiary cannot be given decisive importance. The economic effect of taxation of the subsidiary is tantamount to taxation of the parent company, since the tax — as is typical for withholding taxes — is retained, and paid directly to the tax authorities, by the company making the distribution.

33. This analysis is confirmed by the Commission's argument that the provisions at issue do not take account of losses carried forward from previous years, whereas this

4 — See Jutta Förster and Andres Schollmeier, 'Harmonisierung der Unternehmensbesteuerung', in Dieter Birk, *Handbuch des Europäischen Steuer- und Abgabenrechts*, Verlag Neue Wirtschaftsbriefe Herne, 1995, § 30, point 131.

5 — *Epson*, cited in footnote 3, paragraph 23.

does usually occur within the framework of corporation tax.

34. Therefore, the provisions which lead to the increase in tax are to be equated to a withholding tax and are incompatible with Article 5 of the Directive.

B — *Double taxation agreement between Greece and the Netherlands*

Arguments of the parties

35. The Greek Government relies on the double taxation agreement between Greece and the Netherlands, under which dividends arising from stakes held by foreign companies in Greek companies are taxed in Greece. In its submission, that is authorised by Article 7(2) of the Directive.

36. A representative of Athinaiki Zithopiia pleaded at the hearing for a narrow interpretation of Article 7(2), since it involved an exception to the general principles of the Directive.

37. Citing the reference for a preliminary ruling pending in *Océ van der Grinten*, [6] he also referred to doubts as regards the legality of Article 7(2) of the Directive, since the Parliament was not consulted on this provision and the recitals in the preamble do not explain it.

38. At the hearing, the representative of the Commission invoked the supremacy of Community law over agreements between Member States. For that reason, the double taxation agreement could not restrict the effect of the prohibition on withholding tax.

Assessment

39. Under Article 7(2) of the Directive, domestic or agreement-based provisions designed to eliminate or lessen double taxation of dividends remain unaffected.

6 — Case C-58/01.

40. That provision encompasses both domestic provisions and treaties under public international law. Clearly, not every domestic provision can fall within the scope of this exception, since otherwise the prohibition on withholding tax would be without any practical effect. Rather, it is necessary to focus on the particular legal effect of the domestic provisions. Only provisions whose direct consequence is the avoidance of double taxation are not affected by the Directive.

41. This means that, equally, not every provision of a double taxation agreement between Member States of the Community remains unaffected, but only those provisions actually intended to avoid double taxation. By contrast, provisions which merely form part of the balancing of the interests of the States concerned with regard to allocation of the relevant tax revenue, but do not directly prevent double taxation, do not fall within the scope of Article 7(2) of the Directive.

42. The double taxation agreement referred to by Greece permits it to impose tax of up to 35% of the gross amount on dividends of Greek companies paid to residents of the Netherlands. It may be that this provision was a precondition for Greece concluding a double taxation agreement with the Netherlands at all. However, the provision does not make any direct contribution to the avoidance of double taxation. Therefore, Article 7(2) of the Directive is inapplicable here.

43. Since Article 7(2) of the Directive thus has no bearing on the answer to the question referred for a preliminary ruling, it is unnecessary to forestall the proceedings in the case of *Océ van der Grinten* and take a view on the legality of Article 7(2).

C — *Application of fundamental freedoms*

44. Since the direct application of Article 5(1) of the Directive itself leads to the answer to the question referred for a preliminary ruling and the effect of fundamental freedoms is also not the subject of the question referred, it is unnecessary in the present case to express a view on the application of fundamental freedoms.

VI — Temporal limitation of the effect of the judgment

Arguments of the parties

45. At the hearing, the Greek Government's representative requested that retrospective effect of the judgment be excluded should it be found that Community law prohibits taxation of the type at issue in the main proceedings. Its representative referred in justification to the high costs that were to be feared if the taxes withheld were repaid.

46. Athinaiki Zithopiia rejects a restriction on the temporal effect of the judgment. In its submission, there is no reason for allowing the Greek State to retain tax revenue levied unlawfully. On no account can a restriction on retrospective effect extend to cases pending before the courts or administrative authorities, or to instances where such legal recourse is still possible.

Assessment

47. Where the Court, in the exercise of its jurisdiction under Article 177 of the Treaty, interprets a rule of Community law, it ascertains the meaning and the scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied. [7]

48. However, the Court restricts the retrospective effect of preliminary rulings where the legal position was at least unclear prior to delivery of its judgment and serious — above all financial — consequences are to be feared in respect of legal relationships entered into in good faith in the past. [8] As regards financial consequences, the issue is frequently the budgets of the Member States concerned, but in the context of this second condition the number of legal

7 — Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, paragraph 47; see also Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 57, and the further references cited.

8 — Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 71 and 73 et seq., Case 24/86 *Blaizot* [1988] ECR 379, paragraph 31 et seq., Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 143 et seq., Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 109 et seq., and *EKW and Wein & Co.*, cited in footnote 7, paragraph 58 et seq.

relationships affected and possible detrimental effects on private persons appear to have particular weight. [9] In addition, the Court has held that such a restriction on the effect of a preliminary ruling must remain strictly exceptional. [10]

49. In the present case, there is no need to fear any burden on private persons. However, it appears conceivable that retrospective application of the proposed answer to the question referred for a preliminary ruling would entail significant financial burdens for the Greek State.

50. As regards the clarity of the legal position, the Greek legislation giving rise to the reference for a preliminary ruling was enacted in 1994, that is to say after the period for implementation of the Directive expired on 1 January 1992.

51. It follows that when Greece adopted the legislation in question it was already required to comply with Article 5(1) of the Directive. It is true that the concept of withholding tax used therein is not easily understood on its own. However, against a revenue law background, it was clear, even in 1994, that taxation occasioned by the distribution of profits would carry with it the risk of contravening the prohibition on withholding tax.

52. Nor was there any basis for relying on the fact that the provisions in question were not expressly described as introducing a withholding tax but were incorporated into the rules on taxation of income of the company making the distribution. It is a general principle when applying Community law that it is not the designation of a provision but its practical effect alone that is decisive when assessing it.

53. Greece can thus rely on an alleged lack of clarity as to the scope of Article 5(1) of the Directive only if it assured itself of the compatibility of the provisions in question with Article 5(1) — for example by addressing an enquiry to the Commission in advance. [11] The Greek Government has

9 — *Defrenne*, paragraphs 71 and 73 et seq., and *Bosman*, paragraph 143 (both cited in footnote 8).

10 — *Bautiaa and Société française maritime*, cited in footnote 7, paragraph 48.

11 — See *Defrenne*, paragraphs 71, 72 and 73, and *Blaizot*, paragraph 32 (both cited in footnote 8), and also *EKW and Wein & Co.*, cited in footnote 7, paragraph 58, in each of which the Court, on the basis of potentially misleading conduct on the part of the Commission, the Council or the Member States as regards the legal position, limited the retrospective effect of its judgment.

not, however, adduced any evidence to show that it assured itself that the provisions in question were compatible with the Directive.

54. Given the strictly exceptional nature of a restriction on the retrospective effect of judgments of the Court, there is thus no reason for such a restriction.

VII — Conclusion

55. I accordingly propose that the question referred for a preliminary ruling should be answered as follows:

There is a withholding tax within the meaning of Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 where national legislation provides that, in the event of distribution of profits by a subsidiary (a public limited company or equivalent company) to its parent company, account is to be taken, in determining the taxable profits of the subsidiary, of its total net profits, including income which has been subject to special taxation entailing extinction of tax liability and also non-taxable income, when those two categories of income would not be taxable on the basis of the national legislation if they remained with the subsidiary and were not distributed to the parent company.