

television broadcasting activities (89/552/EEC ⁽¹⁾), the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that directive, read in conjunction with Article 10 of the EC Treaty;

— Order the Kingdom of Spain to pay the costs.

Pleas in law and main arguments

The Commission submits that the restrictive interpretation which the Kingdom of Spain gives to the concept of advertising spots — which results in certain advertising practices (in particular, infomercials, telepromotion spots, sponsorship spots and micro-advertising spots) not being regarded as advertising spots, and therefore not being subject to the hourly limits imposed by Directive 89/552/EEC — infringes that directive.

⁽¹⁾ OJ 1989 L 298, p. 23.

Action brought on 23 July 2009 — Commission of the European Communities v Federal Republic of Germany

(Case C-284/09)

(2009/C 256/15)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: R. Lyal and B.-R. Killmann, acting as Agents)

Defendant: Federal Republic of Germany

Form of order sought

— Declare that, by taxing dividends paid to a company with its registered office in another Member State or in the European Economic Area at a higher rate than dividends paid to a company with its registered office in the Federal Republic of Germany, the Federal Republic of Germany has failed to fulfil its obligations under Article 56 EC where the minimum threshold for the parent company's shareholdings in the share capital of the subsidiary set out in Directive 90/435 ⁽¹⁾ is not reached, and, with regard to the Republic of Iceland and the Kingdom of Norway, under Article 40 of the Agreement on the European Economic Area.

— order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The subject-matter of the present action is the German law on the taxation of dividends. The provisions of the German income

tax law lay down that parent companies with unlimited tax liability in Germany can offset the withholding tax paid during the tax assessment procedure against their liability to corporation tax. Consequently, German parent companies were exempted from the withholding tax. Parent companies with limited tax liability in Germany, on the other hand, have the possibility of being fully exempted from the withholding tax only where the applicable minimum threshold for the relevant parent company's shareholdings in the share capital of the subsidiary as set out in Directive 90/435 is reached. Below that minimum threshold it is not possible, under German law, for parent companies with limited tax liability to be exempted in the same way as companies with unlimited tax liability. As a result of that law, therefore, German dividend payments of parent companies from other Member States were treated for tax purposes differently from those of parent companies with unlimited tax liability in Germany.

The Commission regards that discrimination as incompatible with the principle of the free movement of capital as tax payers resident in other Member States or in the EEA could, as a result, be dissuaded from making investments in Germany.

It follows from the free movement of capital, which is guaranteed by the EC Treaty and the EEA Agreement, that, if a Member State grants advantages with regard to the taxation of dividends, those advantages cannot be restricted to domestic recipients of dividends. Fiscal discrimination between domestic recipients of dividends and those of other Member States or EEA States is prohibited; domestically granted tax advantages are to be extended also to shareholders from other Member States or EEA States. Where the relevant Member State has also, as in the present case, concluded a double taxation convention with the other Member States, that Member State may rely on that convention only if its rules concerning offsetting fully compensate the possible economic multiple taxation of shareholders from other Member States or EEA States, and in the same way as is guaranteed to domestic shareholders by its own tax system.

That is not, however, the case with respect to the conventions concluded by Germany with the other Member States; in order to prevent double taxation, those conventions provide, indeed, for rules concerning offsetting the German withholding tax against the tax burden in the Member State of the parent company, however, the amount to be taken into account may not exceed the part of the tax assessed prior to the offset, which is imposed on income from Germany. The offset is consequently restricted, a refund of possible funds from the difference between the tax burden in the relevant Member State and the German withholding tax is not provided for in that convention and is therefore excluded.

With regard to a possible justification of the present infringement, it should be noted that Germany has presented no overriding reason in the public interest in the course of the pre-litigation procedure which would be capable of justifying the contested tax system.

(¹) 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).

Reference for a preliminary ruling from First-tier Tribunal (Tax Chamber) (United Kingdom) made on 24 July 2009 — British Sky Broadcasting Group plc v The Commissioners for Her Majesty's Revenue & Customs

(Case C-288/09)

(2009/C 256/16)

Language of the case: English

Referring court

First-tier Tribunal (Tax Chamber)

Parties to the main proceedings

Applicant: British Sky Broadcasting Group plc

Defendant: The Commissioners for Her Majesty's Revenue & Customs

Questions referred

1. Is a set-top box with the specifications of the Sky+ set-top box model DRX 280 to be classified under subheading 8528 71 13, as set out in Commission Regulation 1214/2007 (¹) amending Annex I to Council Regulation 2658/87, despite the Explanatory Notes to the CN adopted by the Commission on 7 May 2008 (2008/C 112/03) concerning subheading 8521 90 00 and subheading 8528 71 13?
2. Does Article 12(5)(a) of Council Regulation (EEC) No 2913 (²) of 12 October 1992 establishing the Community Customs Code, as amended, oblige a national customs authority to issue binding tariff informations that accord with the explanatory notes to the CN, unless and until those explanatory notes have been declared to be in conflict with the wording of the relevant provisions of the CN, including the General Rules for the Interpretation of the CN, or may the national customs authorities form their own individual view of the matter and disregard the explanatory note in the event they consider there to be such a conflict?

3. In the event that a set-top box with the specifications of the Sky+ set-top box model DRX 280 were to be classified under CN subheading 8521 90 00, would the application of a positive rate of customs duty be unlawful as a matter of Community law, as a consequence of violating the Community's obligations under the Information Technology Agreement ('ITA') and Article II: 1(b) of the General Agreement on Tariffs and Trade 1994 or does classification under heading 8521 entail a conclusion that the product in question falls outside the scope of the relevant part of the ITA?

(¹) Commission Regulation (EC) No 1214/2007 of 20 September 2007 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff

OJ L 286, p. 1

(²) OJ L 302, p. 1

Reference for a preliminary ruling from First-tier Tribunal (Tax Chamber) (United Kingdom) made on 24 July 2009 — Pace plc v The Commissioners for Her Majesty's Revenue & Customs

(Case C-289/09)

(2009/C 256/17)

Language of the case: English

Referring court

First-tier Tribunal (Tax Chamber)

Parties to the main proceedings

Applicant: Pace plc

Defendant: The Commissioners for Her Majesty's Revenue & Customs

Questions referred

1. Is a set top box with a communication function ('STB') and a hard disk drive ('HDD') to be classified under Combined Nomenclature ('CN') subheading 8528 71 13, as set out in Commission Regulation 1549/2006 (¹) and Commission Regulation 1214/2007 (²) amending Annex 1 to Council Regulation 2658/87, despite the Explanatory Notes to the CN ('CNEN') adopted by the European Commission on 7 May 2008 (2008/C113/02) concerning CN subheading 8521 90 00 and subheading 8528 71 13?