JUDGMENT OF THE COURT (Fifth Chamber)

4 October 2001

(Taxation of company profits - Parent companies and subsidiaries - Directive 90/435/EEC - Concept of withholding tax)

In Case C-294/99,

REFERENCE to the Court under Article 234 EC by the Diikitiko Protodikio Athinon (Greece) for a preliminary ruling in the proceedings pending before that court between

Athinaiki Zithopiia AE

and

Elliniko Dimosio (Greek State),

on the interpretation of Article 5(1) of 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),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: S. Alber,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Athinaiki Zithopiia AE, by I. Stavropoulos and N. Skandamis, dikigoroi,

- the Greek Government, by G. Alexaki and K. Grigoriou, acting as agents,

- the Commission of the European Communities, by H. Michard and M. Patakia, acting as agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Athinaiki Zithopiia AE, represented by I. Stavropoulos and N. Skandamis; the Greek Government, represented by G. Alexaki and by V. Kiriazopoulos, acting as agent; and the Commission, represented by H. Michard and M. Patakia, at the hearing on 28 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 10 May 2001,

gives the following

Judgment

1. By order of 26 July 1999, received at the Court on 5 August 1999, the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 5(1) of 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; the Directive).

2. The question was raised in proceedings brought by Athinaiki Zithopiia AE against the implied rejection by the head of the Athens tax collection service of the claim made by that company with regard to the taxation of its income.

The Directive

3. The Directive is one of three instruments adopted on 23 July 1990 with a view to eliminating certain fiscal obstacles to the grouping together of companies of different Member States. The other instruments are Council Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) and Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10).

4. In accordance with the first recital in its preamble, the Directive is intended to introduce tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level . As stated in the third recital, it seeks, in particular, to eliminate tax disadvantages suffered by groups of companies of different Member States compared with groups of companies of the same Member State.

5. The need for the Directive results from the double taxation to which groups comprising companies established in a number of States may be subject.

6. If there is no specific exemption granted by States either unilaterally or under bilateral agreements, profits made by a subsidiary are liable to be taxed both in the State of the subsidiary, as operating income of the subsidiary, and in the State of the parent company, as dividends.

7. In order to avoid fraud and simplify the collection of tax on dividends, States often resort to the technique of a withholding tax. In that case, the company distributing dividends must withhold part of the dividends, which it pays to the tax authorities. The amount deducted can then be set against the overall tax liability of shareholders resident in the State in which that company is established. By contrast, where the deductions relate to dividends distributed to shareholders resident in another State,

they represent the levying on those shareholders of a supplementary tax by the State where the company is established which the State in which they are resident may fail to take into account when it taxes their income.

8. Article 1(1) of the Directive reads as follows:

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,

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

9. Article 5(1) of the Directive, the provision at the heart of the main proceedings, states:

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.

10. Article 7(1) defines the scope of the term withholding tax as follows:

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.

11. Article 4(1) states:

Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent company shall, except when the latter is liquidated, either:

- refrain from taxing such profits, or

- tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax.

12. Article 7(2) provides:

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.

National legislation

13. Article 99(1) of Greek Law No 2238/94 relating to the Income Tax Code (the Income Tax Code) provides:

The tax is chargeable:

(a) in the case of Greek public limited companies generally ... on the total net income or profits earned in Greece or abroad. Distributed profits shall be taken from profits remaining after deduction of the corresponding income tax ...

In order to determine the fraction of the profits corresponding to non-taxable income or to income subject to special taxation entailing extinction of tax liability, the total net profits shall be broken down in proportion to the amounts of taxable income and non-taxable income or income subject to special taxation entailing extinction of tax liability. Furthermore, where a distribution is made, the taxable profits arising as described above shall be supplemented by the fraction of the non-taxable profits or profits subject to special taxation entailing extinction of tax liability which correspond to distributed profits in any form, after transformation of that amount into a gross amount by the addition of the corresponding tax.

...

14. Article 106 of the Income Tax Code, the second and third paragraphs of which are considered by the applicant in the main proceedings to be incompatible with the Directive, reads as follows:

1. Where the income of legal persons referred to in Article 101(1) of this Code 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 public limited company, a limited liability company or a cooperative 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, 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 cooperatives, limited liability companies or Greek public limited companies, with the exception of banking and insurance concerns, 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 limited liability companies, Greek public limited companies, with the exception of banking and insurance concerns, and by cooperatives whose profits also include profits subject to special determination or taxation in their own name.

15. It follows from Articles 99 and 106 of the Income Tax Code that, where a public limited company governed by Greek law whose gross income includes non-taxable income or income subject to special taxation, that is to say to reduced taxation, distributes profits, those profits are deemed to arise proportionally from that income. Consequently, in order to determine the basic taxable amount, non-taxable income and income subject to special taxation are reincorporated into the basis of assessment *pro tanto*, after being converted into gross amounts.

The double taxation agreement concluded by the Hellenic Republic and the Kingdom of the Netherlands

16. The Hellenic Republic and the Kingdom of the Netherlands signed a double taxation agreement in Athens on 16 July 1981. Article 10(1) and (2) of the agreement states:

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.

The main proceedings and the question referred for a preliminary ruling

17. The applicant in the main proceedings is a public limited company governed by Greek law whose main object is the production and marketing of beer products. The Netherlands company Amstel International holds 92.17% of its share capital.

18. The national court states that, in its declaration relating to the 1996 tax year, the applicant in the main proceedings referred to income tax amounting to GRD 7 026 210 797. That amount included a sum of GRD 794 291 553 relating to non-taxable income

and income subject to special taxation, in accordance with Article 106(2) and (3) of the Income Tax Code.

19. Of that total of GRD 794 291 553 in additional tax, the applicant in the main proceedings claimed the refund of GRD 738 384 406. It argued in support of its claim that Article 106(2) and (3) of the Income Tax Code imposed a type of taxation which, by the mere fact of being linked to the distribution of profits, constituted a withholding tax prohibited by Article 5(1) of the Directive.

20. Since the head of the Athens tax collection service responsible for public limited companies did not respond within the statutory three-momth time-limit, the claim was deemed to have been impliedly rejected.

21. The applicant in the main proceedings therefore brought an action before the Diikitiko Protodikio Athinon for the annulment of the implied rejection of its claim and the refund of GRD 738 384 406.

22. It was in those circumstances that the Diikitiko Protodikio Athinon stayed proceedings and submitted the following question to the Court of Justice for a preliminary ruling:

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?

Question referred for a preliminary ruling

23. The Greek Government submits that the Directive's sole objective is to avoid double taxation. The Directive does not provide for any exemption from tax. Article 4 of the Directive presupposes taxation of the subsidiary and Article 5(1) precludes a withholding tax only at the time when profits are distributed.

24. The Greek Government maintains that the provisions at issue in the main proceedings do not correspond to a withholding tax, but come under taxation of the subsidiary's income. The method of taxing distributed profits which is laid down in Article 106(2) and (3) of the Income Tax Code is entirely unconnected to withholding tax as prohibited by the Directive. It is immaterial that the tax is paid upon distribution of profits to the parent company, since the profits are taxed in the name of the subsidiary.

25. The Court notes as a preliminary point that, as appears particularly from the third recital in its preamble, the Directive seeks, by the introduction of a common tax system, to eliminate any disadvantage to cooperation between companies of different

Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at Community level. 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 (Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraph 22).

26. In order to determine whether the taxation of distributed profits pursuant to the Greek legislation at issue in the main proceedings falls within the scope of Article 5(1) of the Directive, it is necessary, first, to refer to the wording of that provision. The term withholding tax contained in it is not limited to certain specific types of national taxation (see Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 22).

27. Second, it is settled case-law that the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law (see, in particular, Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, paragraph 39).

28. It is apparent from the order for reference and the observations submitted pursuant to Article 20 of the EC Statute of the Court of Justice that the chargeable event for the taxation at issue in the main proceedings, described in paragraphs 13, 14 and 15 of the present judgment, is the payment of dividends. In addition, the amount of tax is directly related to the size of the distribution.

29. Contrary to the submissions of the Greek Government, the taxation cannot be treated like 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, within the meaning of Article 7(1) of the Directive. The taxation relates to income which is taxed only in the event of a distribution of dividends and up to the limit of the dividends paid. That is shown by the fact (*inter alia*) that, as the applicant in the main proceedings and the Commission have pointed out, the increase in the basic taxable amount generated, in accordance with Article 106(2) and (3) of the Income Tax Code, by the distribution of profits cannot be offset by the subsidiary using negative income from previous tax years, contrary to the fiscal principle enabling losses to be carried forward which is nevertheless laid down in Greek law.

30. The Greek Government also relies on the double taxation agreement concluded by the Hellenic Republic and the Kingdom of the Netherlands in order to justify the taxation in Greece of dividends resulting from stakes held by foreign companies in Greek companies. In its submission, such an agreement is authorised by Article 7(2) of the Directive.

31. Suffice it to state that, far from eliminating or lessening double taxation of dividends, as Article 7(2) of the Directive would permit, the agreement between the Hellenic Republic and the Kingdom of the Netherlands provides for such double taxation. Article 10(1) of the agreement empowers the State in which the shareholder is resident to tax the distributed dividends. Article 10(2) permits the State in which the

company making the distribution has its seat to tax them too, at a rate which is not, however, to exceed 35% as regards dividends paid by a company established in Greece to a shareholder resident in the Netherlands.

32. As for the rest, where the derogation in Article 7(2) of the Directive is not applicable, the rights conferred on economic operators by Article 5(1) of the Directive are unconditional and a Member State cannot make their observance subject to an agreement concluded with another Member State (see, to that effect, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 26).

33. Having regard to all the foregoing considerations, the answer to be given to the national court must be that there is a withholding tax, within the meaning of Article 5(1) of the Directive, 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, in order to determine the taxable profits of the subsidiary its total net profits, including income which has been subject to special taxation entailing extinction of tax liability and non-taxable income, must be reincorporated into the basic taxable amount, when income falling within those two categories 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.

Temporal effects of this judgment

34. At the hearing, the Greek Government's representative asked the Court to limit the temporal effects of its judgment should it be found that Community law precludes taxation of the type at issue in the main proceedings. Its representative pleaded the substantial cost involved in refunding the wrongly levied tax.

35. It is settled case-law that the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 234 EC, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry 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 (see Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 16, and *Bautiaa and Société française maritime*, cited above, paragraph 47).

36. Having regard to those principles, it is only exceptionally that the Court may limit the effects of a judgment ruling on a request for interpretation. The Court has taken such a step only in certain specific circumstances, for instance where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force, and where it appeared that both individuals and national authorities had been prompted to adopt practices which did not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed (see *Bautiaa and Société française maritime*, paragraph 47).

37. In the present case, there is nothing to justify a derogation from the principle that a ruling on the interpretation of Community law takes effect from the date on which the rule interpreted entered into force.

38. First, the Greek Government has not shown that, at the time when the national provisions imposing the taxation at issue in the main proceedings were adopted, Community law could reasonably be understood as authorising such taxation.

39. Secondly, the argument relating to the extent of the financial loss which the Greek Government would have to bear cannot be upheld. The financial consequences which might ensue for a government owing to the unlawfulness of a tax or charge have never in themselves justified limiting the effects of a judgment of the Court. After all, if it were otherwise, the most serious infringements would receive more lenient treatment in so far as it is those infringements that are likely to have the most significant financial implications for Member States (see Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 48). Furthermore, to limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which taxpayers have under Community fiscal legislation (*Bautiaa and Société française maritime*, paragraph 55).

40. Accordingly, there are no grounds for limiting in time the effects of the present judgment.

Costs

41. The costs incurred by the Greek Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Diikitiko Protodikio Athinon by order of 26 July 1999, hereby rules:

There is a withholding tax, within the meaning of Article 5(1) of 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, 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, in order to determine the taxable profits of the subsidiary its total net profits, including income which has been subject to special taxation entailing extinction of tax liability and non-taxable income, must be reincorporated into the basic taxable amount, when income falling within those two categories 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.

La Pergola

Wathelet

Edward

Jann Sevón

Delivered in open court in Luxembourg on 4 October 2001.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber