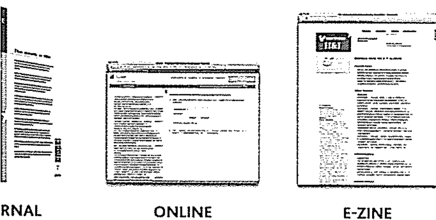
Highlights & Insights on European Taxation



H&I, your infinite and reliable source of European tax law

Highlights & Insights on European Taxation (H&I) contains extensive information about all recent developments in European Taxation in the area of VAT, direct taxation, customs and excise including comments by specialists.

For more information and to subscribe:

www.kluwer.nl/hi

Kluwer
a Wolters Kluwer business

VAKSTUDIE

H&I

Highlights & Insights on European Taxation

Kluwer
a Wolters Kluwer business

This month in H&I

Transfer Pricing on Small and Medium Enterprises (SMEs); Cost Contribution Arrangements (CCAs); non-EU transfer pricing triangular cases; application of the EUTPD. EU Joint Transfer Pricing Forum (comments by Russo and Teixeira)

Secilpar v Fazenda Pública. Parent-Subsidiary Directive. Double taxation convention Portugal-Spain. Supremo Tribunal Administrativo (comments by Dourado)

Commission v Portugal. No failure of Portugal to fulfill its obligations. Taxation of interest received. Court of Justice (comments by van Dam)

Council Directive 2010/45/EU of 13 July 2010 amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing. (comments by Amand)

Future Health Technologies. VAT exemption. Storage of blood from umbilical cord of new-born children for possible future therapeutic use. Court of Justice (comments by de la Feria)

Excise duty rates on alcoholic beverages; on energy products and electricity; and on manufactured tobacco. European Commission (comments by de Jonge)

Pakora Pluss. Date of accession of Latvia. Import of a motor vehicle by sea. Court of Justice (comments by Uitermark)

Gaston Schul. Customs value. Delivered Duty Paid. Court of Justice (comments by Gevers)

10

2010

Editorial Board
Dennis Weber (General editor)
Piet Jan de Jonge (Customs)
René van der Paardt (VAT)
Peter Cools (Direct taxation)

Authors
Direct Taxation:
Austria: Georg Kofler, Michael Lang, Clemens Philipp Schindler, Karin Simader and Gerard Toifl
Belgium: Luc de Broe, Tom Jansen and Robert Neyt
Estonia: Erki Uustalu
Finland: Marjaana Helminen
France: Eric Ginter, Daniel Gutmann and Emmanuel Raingeard
Germany: Axel Cordewener, Joachim Englisch, Alexander Rust and Caroline Wunderlich
Greece: Katerina Perrou
Hungary: Rita Szudoczky
Italy: Pasquale Pistone, Carlo Romano and Mario Tenore
Luxemburg: Jean-Pierre Winandy
Malta: Ramona Piscopo
Netherlands: Janco van Dam, Frauke Davits, Sjoerd Douma, Arjo van Eijsden, Alexander Fortuin, Dick Gladpootjes, Eric Kemmeren, Raymond Luja, Rens Paternotte, Daniël Smit, Pieter van der Vegt and Peter Wattel
Poland: Dagmara Dominik and Karolina Tetlak
Portugal: Ana Paula Dourado and Bruno da Silva
Spain: Antonio Barba de Alba and Pedro Herrera Molina
Sweden: Cécile Brokelind
United Kingdom: Kelly Coutinho, Tom O'Shea, Simon Whitehead and Rupert Shiers
European Union:
Renata Fontana, Antonio Russo and Servaas van Thiel
VAT and Customs:
Belgium: Christian Amand, Diederik Bogaerts and Bert Gevers
Czech Republic: Ditta Hlavackova
Denmark: Jan Huusmann Christensen and Christian Emmeluth
France: Anne Grousset and Jean Marie Salva
Germany: Martin Lausterer and Alice Niemann
Greece: Georgia Drachta, Alex Karopoulos and Tsouramanis Panagiotis
Hungary: Tamàs Fehér and Eszter Kalman
Ireland: Michael O'Connor
Italy: Massimo Fabio and Andrea Parolini
Netherlands: Arthur Denie, Casper Evers, Milo Hartendorf, Jasper Helder, Shima Heydari, Sjoerd Janssen, Erik Mennes, Maurice Mies, Nico Ooyevaar, Trudy Perié, Liesbeth Punt, Jan Sanders, Willemijn Schipper, Arthur Schippers, Hans Sleumer, Gooike van Slooten, Joep Swinkels, Irene Uitermark, Patrick Vettenburg, Dick van Vliet, Eibert de Vries, Joël Wessels and Arjan Wolkers
Norway: Grethel Jevne Østlie
Romania: Daniel Anghel
Spain: Carlos Gomez Barrero
Switzerland: Nicole Fragnière
United Kingdom: Mark Delaney, Rita de la Feria and Timothy Lyons

Advisory Board
Rob Cornelisse, Cora Ettema, Hans van den Hurk, Robert van der Jagt, Peter Kavelaars, Hans Lamens, Frans Rikhof and George de Soeten

Chief editors tax encyclopedia Vakstudie
Daan Bijl, Theo Groeneveld, Frank Jongbloed, Jacques Overgaauw, Theo Schmit, Leo Stevens and Ben Verhoeven.

TABLE OF CONTENTS

	Year 3, no. 10	Page
	Direct Taxation, Legislation	
1	Transfer Pricing on Small and Medium Enterprises (SMEs); Cost Contribution Arrangements (CCAs); non-EU transfer pricing triangular cases; application of the EUTPD. EU Joint Transfer Pricing Forum. European Commission (comments by Russo and Teixeira)	7
2	Revised document on Transfer Pricing for SME's. Joint Transfer Pricing Forum. European Commission	11
3	Report on non-EU triangular case. EU Joint Transfer Pricing Forum. European Commission	29
4	Next steps on cost contribution arrangements. EU Joint Transfer Pricing Forum. European Commission	33
5	Update of the implementation of the Code of Conduct on EU Transfer Pricing Documentation. Secretariat's paper summarising MS' replies on the EUTPD. EU Joint Transfer Pricing Forum. European Commission	42
6	Update of document on the implementation of the Code of Conduct on EU transfer pricing documentation. Greek and Portuguese contributions and a technical amendment from Estonia. EU Joint Transfer Pricing Forum. European Commission	45
7	Future JTPF work programme. EU Joint Transfer Pricing Forum. European Commission	75
8	Table on the number of pending cases under the Arbitration Convention. EU Joint Transfer Pricing Forum. European Commission	76
9	Table on APAs. EU Joint Transfer Pricing Forum. European Commission	77
	Direct Taxation, Case Law	
10	Commission v Portugal. No failure of Portugal to fulfil its obligations. Taxation of interest received. Court of Justice (comments by van Dam)	77
11	Secilpar v Fazenda Pública. Parent-Subsidiary Directive. Double taxation convention Portugal-Spain. Supremo Tribunal Administrativo (comments by Dourado)	85
12	Hengartner and Gassner. Free movement of persons. Charging of a hunting tax. Court of Justice (comments by Smit)	89
13	Banco Bilbao Vizcaya Argentaria. Deduction of tax due in another Member State prohibited when tax is not paid by virtue of exemption or credit. Tribunal Supremo (Spain) (comments by Barba)	98

		Page
14	Cathy Schulz-Delzers and Pascal Schulz. Reference for a preliminary ruling in a German case about the compatibility of paragraph 3(64) of the Einkommensteuergesetz with the TFEU. Finanzgericht Baden-Württemberg	100
15	Harald Jung and Gerald Hellweger. Reference for a preliminary ruling in an Austrian case about the leasing of workers from Hungary to Austria. Unabhängiger Verwaltungssenat Salzburg	101
16	Lotta Gistö. Reference for a preliminary ruling in a Finnish case about the residence for tax purposes. Korkein hallinto-oikeus	101
	Indirect Taxation, Legislation	
17	Council Directive 2010/45/EU of 13 July 2010 amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing. (comments by Amand)	102
	Indirect Taxation, Case Law	
18	Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski. Temporary restriction on VAT deduction. Breach of mandatory use of cash register. Court of Justice (comments by Dominik)	114
19	Future Health Technologies. VAT exemption. Storage of blood from umbilical cord of newborn children for possible future therapeutic use. Court of Justice (comments by de la Feria)	122
20	Macdonald Resorts Limited. Supply of timeshare accommodation. VAT exemption. Advocate general	133
21	Haltergemeinschaft LBL. Reference for a preliminary ruling on the tax exemption on energy products and electricity. Finanzgericht Düsseldorf	134
22	Kopalnia. Reference for a preliminary ruling. Deduction of input tax. Naczelny Sąd Administracyjny	134
23	Logstor ROR Polska Sp. z o.o. Reference for a preliminary ruling in a Polish case about the reintroduction of capital duty, from 1 January 2007, where Poland waived the charging of that duty as from the date of accession. Wojewódzki Sąd Administracyjny w Gliwicach	135
24	ADV Allround Vermittlungs AG in liquidation. Reference for a preliminary ruling in a German case on definition of 'supply of staff'. Finanzgericht Hamburg	136
25	The Rank Group PLC. Reference for a preliminary ruling in a British case about differential VAT treatment between supplies that are identical from the point of view of the consumer. UK Upper Tribunal	137
26	The Rank Group PLC. Reference for a preliminary ruling in a British case about the infringement of the principle of fiscal neutrality when certain types of machines used for gambling are subjected to VAT and others are not. UK Upper Tribunal	138
27	European Commission v Republic of Hungary. Reference for a preliminary ruling in a Hungarian case on refund of excess value added tax. European Commission	139
28	Iulian Andrei Nisipeanu. Reference for a preliminary ruling on a pollution tax on vehicles. Tribunalul Gorj	141
	Customs and Excise	
29	Excise duty rates on alcoholic beverages. European Commission (comments by de Jonge)	142
30	Excise duty rates on energy products and electricity. European Commission (comments by de Jonge)	143
31	Excise duty rates on manufactured tobacco. European Commission (comments by de Jonge)	144

		Page
32	Pakora Pluss. Date of accession of Latvia. Import of a motor vehicle by sea. Court of Justice (comments by Uitermark)	145
33	Gaston Schul. Customs value. Delivered Duty Paid. Court of Justice (comments by Gevers)	153
34	British American Tobacco. Excise duty. Importation of raw tobacco. Court of Justice (comments by Mies)	160
35	KMB Europe BV. Reference for a preliminary ruling about heading 8521 of Combined Nomenclature in version of Annex I to Council Regulation (EEC) No 2658/87 and MP3 media players. Finanzgericht Düsseldorf	167
36	Ze Fu Fleischhandel GmbH. Reference for a preliminary ruling in a German case about the application of the 30-year limitation period in Paragraph 195 BGB in relation to the recovery of wrongly paid export refunds. Finanzgericht Hamburg	168
37	Vion Trading GmbH Reference for a preliminary ruling in a German case about the application of the 30-year limitation period in Paragraph 195 BGB in relation to the recovery of wrongly paid export refunds. Finanzgericht Hamburg	169
38	Pacific World Limited, FDD International Limited. Reference for a preliminary ruling in a British case about the classification of false nails. UK First-tier Tribunal	169
	State aid	
39	Italy v. European Commission. Italy failed to timely abolish State aid scheme that was declared unlawful and incompatible with the common market. Application. European Commission	170

in the nature of an Article 258 TFEU procedure. It is, after all, the Commission that is of the opinion that the Member State has failed to fulfil its obligations under European Law, and it is the Commission that brings the case to court. The task of the CJ is to provide the (legal binding) interpretation of a rule of European law in a particular case. It is not the task of the CJ to ascertain the legal and factual context of a particular case. Under the general principle that the plaintiff needs to prove its claim, it makes sense that the Commission will need to put forward exact and specific facts as evidence (see also the case of 5 October 1989, Case 290/87 *Commission/Netherlands*).

This, however, does not imply that in an action for failure to fulfil an obligation, the defendant Member State can sit back and remain totally passive during an Article 258 TFEU procedure. In the aforementioned *Commission/Netherlands* of 25 May 1982 and in ECJ 26 June 2003, C-404/00 *Commission/Spain*, the Court noted that Member States are obliged, by virtue of the cooperation/loyalty principle (laid down in Article 4 (3) TEU), to facilitate the achievement of the Commission's tasks. This includes the task to ensure that Member States comply with the provisions of European law. As such, Member States have an obligation to provide information if the Commission so requests.

As mentioned by the Court itself in its case of ECJ 26 April 2007, C-135/05 *Commission/Italy*, in this context, account should also be taken of the fact that the Commission does not have investigative powers of its own. As such, the Commission is largely reliant on the information provided by any complainants, private or public bodies active in the Member State concerned and that Member State itself. It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom (see to this effect, ECJ 26 April 2005, C-494/01 *Commission/Ireland*).

Inherently, there is a certain tension between the nature of an Article 258 TFEU procedure and the obligation of the Commission to submit factual evidence that supports its claim. Contrary to cases brought before the Court by domestic courts of the Member States (ex Article 267 TFEU), the Commission does not challenge a particular case but generally challenges a domestic rule of law as whole. Hence, in an Article 258 TFEU procedure, it is obvious that there is less factual context, and more a 'theoretical' context. However, the Commission also does not have to prove that in every case the Member State breaches European law, but it does need to prove that in practice, the Member State has actually infringed European law in a particular case.

The proof of the pudding is in the eating

In the case at hand, the Commission substantiated the alleged infringement of European law by Portugal with an arithmetical example based on the assumption that the profit margin of financial institutions is 10% or lower. With such a profit margin, the taxation methodology applied by Portugal would result in a heavier tax burden for non-resident financial institutions than for resident financial institutions. This assumed profit margin is validated with the general observation that 'banks can achieve only small profit margins on the European market, which is highly transparent on account of the single currency and the harmonised rules governing banks'.

It is clear that this observation of the Commission has merit, but it does not underpin what profit margin a financial institution has in fact actually obtained in relation to its financing activities in Portugal. The Portuguese government simply challenged the calculation of the Commission, by coming up with a theoretical example in which financial institutions make a profit margin of 40% (which, in my view, is probably far more theoretical than the profit margin assumed by the Commission). With an assumed profit margin of 40%, there is no discrimination of non-residents.

The CJ is crystal clear in its judgement. First, it repeats that in this case, the burden of proof lies with the Commission. According to the CJ, the Commission could have fulfilled its obligation by providing statistical data or information concerning the level of interest paid on bank loans and relating to the refinancing conditions in order to support the plausibility of its calculations. The CJ goes further, and notes that 'the Commission has failed to produce, either during the written procedure or the hearing, and not even after an *express request* by the Court,

any conclusive evidence whatever which would have been capable of establishing that the figures which it puts forward in support of its argument are in fact borne out by the actual facts and that the arithmetical example on which it relies is not purely hypothetical'.

Apparently, the Commission had been quite stubborn in its procedural attitude, and was not willing (or not able) to provide a factual substantiation. Consequently, the Commission's action was dismissed by the CJ without taking a view on the question at the heart of this case.

The question in the case at hand was probably greatly anticipated by financial institutions all over Europe, since although withholding taxes are eliminated between related parties (under the Interest and Royalties Directive), when providing financial services to third parties, withholding taxes are still a burden. Albeit the good arguments that support the view that taxation of interest income by means of a withholding tax on a gross basis can infringe European law (also see the Opinion of Advocate General Kokott in this case, in which the AG seems to take the same position), no certainty on that point can be derived from this case. We shall have to await another case of the Commission (in which it does put forward sufficient factual proof) or of a domestic court.

Janco van Dam

11 Secilpar v Fazenda Pública. Parent-Subsidiary Directive. Double taxation convention Portugal-Spain. Supremo Tribunal Administrativo (comments by Dourado)

Reference for a preliminary ruling from the Supremo Tribunal Administrativo in the case Secilpar v Fazenda Pública. Having regard to the provisions of the Double Taxation Convention concluded between Portugal and Spain, does the deduction at source of [corporate] income tax for the year 2003, applied to a company not resident within national territory at the rate of 15%, as the result of cash dividends made available to it in its capacity of shareholder of a company resident in a Member State, breach the principles of non-discrimination, freedom of establishment and free movement of capital and art. 5(1) of the Parent-Subsidiary Directive?

Court of Justice, 26 April 2010, no. C-199/10

Reference for a preliminary ruling from the Supremo Tribunal Administrativo lodged on 26 April 2010 – Secilpar v Fazenda Pública

(Case C-199/10)

Language of the case: Portuguese

Referring court

Supremo Tribunal Administrativo

Parties to the main proceedings

Applicant: Secilpar

Defendant: Fazenda Pública

Question referred

Having regard to the provisions of the Double Taxation Convention concluded between Portugal and Spain, does the deduction at source of [corporate] income tax for the year 2003, applied to a company not resident within national territory at the rate of 15%, as the result of cash dividends made available to it in its capacity of shareholder of a company resident in a Member State, in accordance with Articles 80(2)(c) and 88(3)(b), (4) and (5) of the Código do IRC, Article 71(a) and (d) of the Código do IRS and Article 59 of the EBF as then worded, breach the principles of non-discrimination, freedom of establishment and free movement of capital embodied in Articles 12, 43, 46, 56 and 58(3) of the EC Treaty and Article 5(1) of Directive 90/435/EEC?[1]

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.

Comment

Introduction

The facts of this case are very similar to the ones analysed by the CJ in *Amurta, Denkavit France, Commission v. Italy* and *Commission v. Spain* cited below. The settled case law in respect of the aforementioned cases could have been directly applicable by the Portuguese referring court on the basis of the Acte clair doctrine (or *acte éclairé*). There are, therefore, grounds for the CJ to decide by reasoned order.

Facts

In the pending Secilpar case, the second chamber of the Portuguese Administrative Supreme Court asked the CJ whether the withholding tax on dividends for the year 2003 applicable to a non-resident shareholder breached the principles of non-discrimination, the freedom of establishment and free movement of capital embodied in the then Articles 12, 43, 46, 56 and 58(3) of the EC Treaty (currently Articles 18, 49, 52, 63, 65 (3) of the TFEU) and Article 5(1) of Directive 90/435/EEC. In contrast, dividends distributed to companies resident in Portugal were not subject to tax: neither to withholding tax nor to subsequent taxation (Articles 46 (1) and 90 (1) c) of the Portuguese Corporate Income Tax Code (Codigo de Imposto sobre o Rendimento das Pessoas Colectivas: the 'CIRC').

Secilpar SL is a company incorporated in Spain, with its head office and place of effective management within the Spanish territory. In December 2000, it acquired shares in the Portuguese company, Cimpor – Cimentos de Portugal SGPS SA, in the global amount of EUR 320,436,410.00 (See *Acordao do Supremo Tribunal Administrativo*, Case 01/09, 10 March 2010, 2. Seccao at: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/fdacab23b154f12b802576e7003ffc7e?OpenDocument, in Portuguese) and the latter distributed dividends to Secilpar SL in 2003 in the global amount of EUR 9,273,552.00. The dividends were subject to withholding tax under Articles 80 (2) c), 88 (1) c) and (3) of the CIRC and Article 59 of the Tax Benefits Code (25% on half of the amount of distributed dividends, 12.5% of effective rate), plus 5% under Articles 182 and 184 of the Code governing the Municipal Tax on Transfers and the Succession and Donation (Código do Imposto Municipal da Sisa e do Imposto sobre as Sucessões e Doações: the 'CIMSISD'). In both cases, the withholding tax fell on the gross amount of the dividends and was a final withholding.

In 2003, the transitional regime granted to Portugal by the Parent Subsidiary Directive, according to which it had been authorised to withhold corporate income tax until 1999, subject to the existing bilateral agreements concluded between Portugal and a Member State, the rate of this withholding tax could not exceed 15% during the first five years and 10% during the last three years of that period, had expired. Thus, the general prohibition on withholding taxes on dividends distributed to parent companies resident in another Member State was applicable (Article 5 (1) of the Directive). However, the dividends distributed to Secilpar did not meet all the conditions in the Parent Subsidiary Directive, since the holding was less than 25% (Art. 3, (1) a) of the Parent subsidiary Directive as applicable to the fiscal year of 2003) and consequently, the issue did not involve an appreciation of the Portuguese regime in light of the Directive. Moreover, since the *Epson BV* case (ECJ 8 June 2000, Case C-375/98 *Ministério Público, Fazenda Pú;blica and Epson Europe BV*) was related to the interpretation of the aforementioned Directive, Articles 182 and 184 of the CIMSISD remained unchanged for the rest, being applicable to cases not covered by the same Directive. Allow me here to recall that those Articles provided for a so-called succession and donation tax (withholding tax of 5%) in respect of transfers, without consideration, of shares in companies (the 'ISD') which was levied, when profits were distributed, on the dividends paid by companies which had their seat in Portugal to a company not resident within the national territory.

As a result of a claim to the first instance tax court, confirmed by the Administrative Supreme Court, the application of the double taxation convention concluded between Portugal and Spain implied that the rate was reduced to 15% which was applied to 50% of the dividends and curiously, the 5% withholding tax under the ISD was also cancelled. Contrary to the general and so far undisputed understanding, the first instance court interpreted Article 2 of

the aforementioned convention as including the ISD and not only the corporate income tax code.

However, the fact that dividends paid to a Portuguese shareholder would not, under the same conditions, be subject to corporate income tax, was not considered discriminatory by the first instance court, on the basis that the situations were not comparable (Tribunal Tributario de Lisboa, proc. 1977/06.8 BELSB, 30.9.2008, Point 3). I shall be more specific: if the shareholder were resident in Portugal, as long as the acquisition value was not less than either 10% or EUR 20,000,000.00 (in the case under analysis it amounted to EUR 320,436,410.00) and the holding had been maintained for an uninterrupted period of one year, the dividends would not have been subject to taxation.

Turning now to the question submitted to the CJ by the Portuguese Court, it directly concerns the compatibility of the bilateral tax treaty with the then EC Treaty but read carefully, it also implies an assessment of the compatibility of the domestic legislation with the fundamental freedoms.

Acte clair

My first reaction to this referral is that the CJ had good reasons to decide it by reasoned order, since it can reasonably be argued that *Denkavit France* (ECJ 14 December 2006, C-170/05, *Denkavit Internationaal BV, Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie*), *Amurta* (ECJ, 8 November 2007, C-379/05, *Amurta S.G.P.S. v Inspecteur van de Belastingdienst/Amsterdam NL*), *Commission v. Italy* (ECJ 19 November 2009, C-540/07) and *Commision v. Spain* (ECJ 3 June 2010, C-487/08) have already clarified the issue on discriminatory treatment of outbound dividends (See Ana Paula Dourado, 'Is it Acte clair? General Report on the role played by CILFIT in direct taxation', Ana Paula Dourado/Ricardo da Palma Borges (eds.), *The Acte Clair in EC Direct Tax Law*, Amsterdam, 2008, pp. 13 e ss.). Moreover, in the *Commision v. Spain* case the Court has decided, after hearing the Advocate General, to proceed to judgment without an Opinion, which could indicate that the next step is to proceed by reasoned order.

Independently of the CJ giving its ruling on the referred issue by judgment or reasoned order it will probably consider that both the freedom of establishment and the freedom of capital may be involved, since the domestic regime exempted resident shareholders from withholding taxes if the holding amounted to at least 10% or to an acquisition amount not less than EUR 200,000,00.00, and it should be kept for a minimum period of one year before the distribution of the dividends: the purpose of the legislation does not seem to only apply to investment holdings granting them definite influence (See ECJ 24 May 2007, C-157/05 *Holböck v FA Salzburg-Land*, paras. 22 and 23; ECJ 12 September 2006, C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas*, paras. 31 to 33; ECJ 3 October 2006, C-452/04 *Fidium Finanz*, pars. 34 and 44 to 49; ECJ 12 December 2006, C-374/04 *Test Claimants in Class IV of the ACT Group Litigation*, paras. 37 and 38; ECJ 12 December 2006, Case C-446/04 *Test Claimants in the FII Group Litigation*, para. 36; and ECJ 13 March 2007, C-524/04 *Test Claimants in the Thin Cap Group Litigation*, paras. 26 to 34). If the Court applies a factual test – whether in the concrete case there is definite influence or not – that will imply that one or another fundamental freedom will be at play, depending on the case (See ECJ 18 June 2009, -303/07 *Aberdeen Property Fininvest Alpha Oy*, paras. 33 and 34, *Test Claimants in the FII Group Litigation*, cit., para. 38, and ECJ 26 June 2008, C-284/06 *Finanzamt Hamburg-Am Tierpark v Burda GmbH*, para. 72).

As I shall try to demonstrate in the following paragraphs, the Portuguese referring Court could have decided the case on the basis of the Acte Clair doctrine, taking into account that the domestic legislation was discriminatory and by analysing whether the bilateral tax treaty with Spain allowed for the necessary neutralisation of the discriminatory effects caused by the Portuguese unilateral legislation.

Comparability and discrimination

It is settled case law that the situations of residents and non-residents regarding taxation of dividends (outbound dividends) are comparable: according to the CJ, 'as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income, not only of resident shareholders, but also of non-resident shareholders, from dividends which they receive from a resident company, the situation of those non-resident shareholders

becomes comparable to that of resident shareholders' (*Test Claimants in Class IV of the ACT Group Litigation*, para. 68; *Denkavit France*, para. 35; *Amurta*, para. 38; and *Commission v Italy*, para. 52).

Thus, parent companies receiving dividends paid by resident subsidiaries are in a comparable situation, whether they receive those dividends as resident parent companies or as non-resident parent companies which have a fixed place of business in Portugal, or as non-resident parent companies which do not have a fixed place of business in Portugal (See *Denkavit France*, para. 36).

It is also clear that it is due to the exercise of the power of taxation by the host State (in the case, Portugal) that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving dividends not to be subject to a restriction forbidden by a fundamental freedom, Portugal is obliged to ensure that non-resident shareholder companies are subject to the same treatment as resident shareholder companies (*Test Claimants in Class IV of the ACT Group Litigation*, para. 70; *Amurta*, para. 39; and *Commission v Italy*, para. 53; and *Commision v. Spain*, para. 52).

It also results from the aforementioned case law that the exemption granted by the Portuguese CIRC in respect of dividends received by resident parent companies is designed to avoid the imposition of a series of charges to tax on the profits of subsidiaries which are distributed by way of dividend to the parent companies of those subsidiaries. Since Portugal has chosen to relieve its residents of such a liability to tax, it must extend that relief to non-residents to the extent to which an imposition of that kind on those non-residents results from the exercise of its tax jurisdiction over them (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, para. 70; and *Denkavit France*, para. 37).

The role of bilateral tax conventions

The next issue regards the role of the bilateral tax convention Portugal/Spain. Since, according to the facts an unfavourable treatment against non-resident shareholders also results from the application of the aforementioned tax convention by Portugal (15% on 50% of the outbound dividends), it is necessary to analyse whether this bilateral tax convention entitles the taxpayer to a full tax credit, enabling Portugal in ensuring compliance under the then EC Treaty (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, para. 71; *Amurta*, para. 79; *Commission* v *Italy*, para. 36, and *Commission v Spain*, para. 58).

In fact, it is necessary for this purpose that the application of the bilateral convention allows the effects of the difference in treatment under national legislation to be compensated for. The CJ clarified in the *Commission v Italy* and *Commission v Spain* cases that the difference in treatment between dividends distributed to companies established in other Member States and those distributed to resident companies does not disappear unless the tax withheld at source under national legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation (see, *Commission* v *Italy*, para. 37; and *Commission v Spain*, para. 59). In order to achieve that result, the application of the method of deduction relied on by Portugal should enable the tax on dividends levied by it to be deducted in its entirety from the tax due in Spain, such that if the dividends received by that company were ultimately taxed more heavily than the dividends paid to companies resident in Portugal, that heavier tax burden could no longer be attributed to Portugal, but to Spain (the Member State which exercised its power to impose taxes) (*Commission v Spain*, para. 60). However, in the present case, Article 23 (1) a) of the convention for the avoidance of double taxation concluded by Portugal and Spain provides that the amount deducted or set off in respect of tax withheld in Portugal cannot exceed the fraction of the tax in Spain, calculated before the deduction, corresponding to taxable income in Portugal (*cf. Commission v Spain*, para. 61). Therefore, the difference in treatment may be neutralised only where the dividends from Portugal are sufficiently taxed in Spain. If those dividends are not taxed, or are not sufficiently taxed, the sum withheld in Portugal or a part thereof cannot be deducted. In that case, the difference in treatment arising from the application of national legislation cannot be compensated for by applying provisions of the double taxation convention (see, *Commission v Italy*, para. 38; *cf. Commission v Spain*, para. 62).

If the CJ decides according to the aforementioned line of reasoning, adopted in the above mentioned cases, it will be up to the national court to verify if the aforementioned compensation occurred or not, and only in the case of the former will the Portuguese legislation be considered compatible with the Treaty.

EEA Agreement

Finally, the Portuguese referring Court did not refer to the compatibility of the aforementioned regimes with the EEA Agreement. If the CJ extended its judgment to the EEA countries, the issue would be whether in the absence of exchange of information in the bilateral tax treaties, Portugal could justify the discriminatory treatment. Since the referring Court did not provide information relating to the legislation on dividends distributed to companies established in the EFTA States, the Court does not have sufficient evidence to enable it to conduct an adequate analysis on the infringement of the EEA Agreement (see *Commission v. Spain*, paras. 74 - 75).

Ana Paula Dourado

12 Hengartner and Gassner. Free movement of persons. Charging of a hunting tax. Court of Justice (comments by Smit)

Two Swiss nationals resident in Switzerland, Mr Hengartner and Mr Gasser, concluded a contract with an Austrian hunting collective for the lease of a hunting ground situated in Austria, in return for payment, for a term of six years. Under Austrian law, they were required to pay a hunting tax of 35% for the hunting year from 1 April 2007 to 31 March 2008. Had they been nationals of a Member State of the Union or resident of Austria, a lower tax rate of 15% would have applied. The Austrian Verwaltungsgerichtshof was uncertain whether the hunting tax infringes EU law. The CJ answered this question in the negative. As concerns the freedom of establishment under Article 49 TFEU, it ruled that this provision cannot be relied on by a national of a non-EU Member State such as Switzerland. The CJ also considered whether the applicable hunting tax contravened the relevant provisions relating to the free movement of services as included in the Agreement on the free movement of persons concluded between the EU and its Member States and Switzerland. Article 5(3) of this Agreement grants a right of entry and residence in Austria to Swiss nationals entering Austrian territory solely to receive services. However, the CJ held this provision ineffective in the case at hand. Finally, the CJ also answered the question of whether the Austrian hunting tax was contrary to the general non-discrimination clause under Article 2 of the Agreement in the negative. The CJ held that this provision does not impose a general and absolute prohibition on all discrimination against nationals of one of the contracting parties who are staying in the territory of the other party, but only on discrimination on grounds of nationality where the situation of those nationals falls within the material scope of the provisions of Annexes I to III to the Agreement. The CJ subsequently established that the Agreement and its annexes did not contain any specific rule intended to allow recipients of services to benefit from the principle of non-discrimination in connection with the application of fiscal provisions relating to the commercial transactions whose subject is the provision of services. Therefore, the CJ held the contested hunting tax not contrary to the general non-discrimination clause under the Agreement.

Court of Justice, 15 June 2010, no. C-70/09

Judgment of the Court (Third Chamber)

15 July 2010[1]

(Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Lease of hunting ground – Regional tax – Concept of economic activity – Principle of equal treatment)

In Case C-70/09, REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungs-

1 Language of the case: German.