JUDGMENT OF THE COURT (Grand Chamber)

14 November 2006

(Income tax – Dividends – Tax burden on dividends from shareholdings in companies established in another Member State – No possibility in the State of residence to set off income tax levied at source in another Member State)

In Case C-513/04,

REFERENCE for a preliminary ruling under [Article 267 TFEU] from the Rechtbank van eerste aanleg te Gent (Belgium), made by decision of 1 December 2004, received at the Court on 15 December 2004, in the proceedings

Mark Kerckhaert,

Bernadette Morres

v

Belgische Staat,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and E. Juhász, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, G. Arestis, A. Borg Barthet and E. Levits (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 January 2006,

after considering the observations submitted on behalf of:

– Mr Kerckhaert and Ms Morres, by L. De Broe and P. Wytinck, advocaten,

– the Belgian Government, by E. Dominkovits and M. Wimmer, acting as Agents,

– the German Government, by M. Lumma and U. Forsthoff, acting as Agents,

– the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Netherlands Government, by H.G. Sevenster, acting as Agent,

– the United Kingdom Government, by C. Jackson, acting as Agent, and S. Moore, Barrister,

– the Commission of the European [Union], by R. Lyal and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2006,

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gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of [Article 63(1) TFEU].

2 This reference has been made in the context of an action brought by Mr Kerckhaert and Ms Morres ('Mr and Mrs Kerckhaert-Morres') against the Gewestelijke Directie Antwerpen I ('the Belgian tax administration') in respect of the latter's decision refusing to allow them to set off the fixed percentage of 15% of foreign tax provided for in Article 19.A(1)(2) of the Convention of 10 March 1964 between Belgium and France seeking to avoid double taxation and to establish mutual administrative and legal rules of assistance in the field of income tax, as amended by the supplementary agreement signed on 15 February 1971 ('the France-Belgium Convention').

Belgian tax legislation

The Income Tax Code

3 Under Article 171(3) of the Income Tax Code ('the Tax Code'), dividends are taxable at a rate of 25%.

4 Article 187 of the Tax Code originally provided that, as regards income from shares and invested capital which had been made subject, in another country, to income tax, corporation tax or tax on non-residents, the tax was to be reduced beforehand by a fixed percentage of that foreign tax.

5 Following legislative amendments, natural persons are no longer entitled to benefit from that tax credit when they receive dividends from undertakings established in another State arising from income which has already been taxed in that State by way of tax on income, with the result that that income is subject to taxation at source in that State and to tax at the rate of 25% as laid down in Article 171(3) of the Tax Code.

The France-Belgium Convention

6 The France-Belgium Convention seeks, inter alia, to avoid cases of double taxation concerning imposition in the form of tax on income borne by one and the same person in France and Belgium.

7 Article 15(3) thereof provides that:

'Dividends paid by a French-resident company that would give a right to a tax credit if received by French residents shall also give a right to this tax credit for natural persons resident in Belgium, after deduction of withholding tax calculated at a rate of 15% on the gross dividend consisting of the amount of the distributed dividend increased by the tax credit.'

8 It is stipulated in Article 19.A(1) of that convention that when dividends are paid by a French-resident company to a Belgian resident other than a company subject to corporation tax, and when these dividends have been taxed at source in France, the Belgian tax due on the amount net of this French tax at source is to be reduced by, first, the withholding tax imposed at the normal rate, and, second, a fixed percentage of foreign tax that is deductible under conditions fixed by Belgian law, provided that such percentage may not be lower than 15% of that net amount.

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The main proceedings and the question referred

9 In 1995 and 1996 Mr and Mrs Kerckhaert-Morres, who are resident in Belgium, received dividends from Eurofers SARL, a company established in France.

10 A proportion of the amounts received corresponded to the tax credit, in the amount of 50% of the dividends paid, granted by the French tax authorities under Article 15(3) of the France-Belgium Convention as compensation for corporation tax. Under that provision that tax credit is assimilated to dividend income. In France the gross dividends were made subject to a levy of 15%, deducted at source by way of tax on income.

11 Mr and Mrs Kerckhaert-Morres declared that they had received BEF 34 566 204 (EUR 856 873.81) and BEF 7 173 702 (EUR 177 831.43) by way of income from Eurofers SARL in 1995 and 1996 respectively. In their tax return they applied to take advantage of the tax benefit provided for in Article 19.A(1) of the France-Belgium Convention corresponding to the French tax at source.

12 As that tax benefit had been withdrawn by the Belgian legislature, their application was rejected.

13 Taking the view that denying them the right to take advantage of the tax benefit at issue in the main proceedings subjected dividends originating in France to a heavier tax burden than that imposed on dividends from companies established in Belgium, Mr and Mrs Kerckhaert-Morres sought annulment before the Rechtbank van eerste aanleg te Gent of the decision of the Belgian tax administration rejecting their application, alleging, in particular, infringement of [Article 63(1) TFEU].

14 As it formed the view that the case pending before it required an interpretation of [Union] law, the Rechtbank van eerste aanleg te Gent (Court of First Instance, Ghent) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must [Article 63(1) TFEU] be interpreted as prohibiting a restriction resulting from a provision in the income tax legislation of a Member State (in the present case Belgium) which subjects dividends from resident companies and dividends from companies resident in another Member State to the same uniform tax rate, without in the latter case providing for the setting off of tax levied at source in that other Member State?'

The question referred

15 At the outset it must be pointed out that, according to settled case-law, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence in a manner consistent with [Union] law (see Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21; Case C-315/02 *Lenz* [2004] ECR I-7063, paragraph 19; and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19).

16 In *Verkooijen*, *Lenz* and *Manninen*, the Court found that the laws of the Member States at issue did not treat in the same way dividend income from companies established in the Member State in which the taxpayer concerned was resident and dividend income from companies established in another Member State, thereby denying recipients of the latter dividends the tax benefits granted to the others. Having concluded that the situation of taxpayers receiving dividends from companies established in another Member State is not objectively different to that of taxpayers receiving dividends from companies established in the Member State in which they are resident, the Court held that the laws at issue amounted to restrictions of the fundamental freedoms guaranteed by the Treaty.

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17 Contrary to the arguments submitted by Mr and Mrs Kerckhaert-Morres, the case in the main proceedings differs from those which gave rise to the judgments cited above inasmuch as the Belgian tax legislation does not make any distinction between dividends from companies established in Belgium and dividends from companies established in another Member State. Under Belgian law both are taxed at an identical rate of 25% by way of income tax.

18 In addition, the argument cannot be upheld that, in the present case, shareholders resident in Belgium are in a different situation depending on whether they receive dividends from a company established in Belgium or from a company established in another Member State, such that treating them in the same way, namely by applying a uniform rate of income tax, amounts to discrimination.

19 It is true that discrimination may consist not only in the application of different rules to comparable situations but also in the application of the same rule to different situations (see Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30, and Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 26). However, in respect of the tax legislation of his State of residence, the position of a shareholder receiving dividends is not necessarily altered, in terms of that case-law, merely by the fact that he receives those dividends from a company established in another Member State, which, in exercising its fiscal sovereignty, makes those dividends subject to a deduction at source by way of income tax.

20 In circumstances such as those of the present case, the adverse consequences which might arise from the application of an income tax system such as the Belgian system at issue in the main proceedings result from the exercise in parallel by two Member States of their fiscal sovereignty.

21 It must be recalled, in that regard, that conventions preventing double taxation such as those envisaged in Article 293 EC [repealed] are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems referred to in the preceding paragraph.

22 [Union] law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the [Union]. Apart from 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 Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at [Union] law level.

23 Consequently, it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice. The purpose of the France-Belgium Convention is essentially to apportion fiscal sovereignty between the French Republic and the Kingdom of Belgium in those situations. However, that convention is not at issue in the preliminary reference at hand.

24 In the light of all those considerations, the answer to the question referred must be that [Article 63(1) TFEU] does not preclude legislation of a Member State, such as Belgian tax legislation, which, in the context of tax on income, makes dividends from shares in companies established in the territory of that State and dividends from shares in companies established in another Member State subject to the same uniform rate of taxation, without providing for the possibility of setting off tax levied by deduction at source in that other Member State.

Costs

25 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

[Article 63(1) TFEU] does not preclude legislation of a Member State, such as Belgian tax legislation, which, in the context of tax on income, makes dividends from shares in companies established in the territory of that State and dividends from shares in companies established in another Member State subject to the same uniform rate of taxation, without providing for the possibility of setting off tax levied by deduction at source in that other Member State.

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