62017CJ0575
JUDGMENT OF THE COURT (Fifth Chamber)

22 November 2018 (*1)

(Reference for a preliminary ruling — Free movement of capital — Withholding tax on the gross amount of nationally sourced dividends paid to non-resident companies — Deferral of taxation of dividends paid to a resident company in the event of a loss-making year — Difference in treatment — Justification — Comparability — Balanced distribution of the powers of taxation between the Member States — Effective collection of tax — Proportionality — Discrimination)

In Case C?575/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 20 September 2017, received at the Court on 28 September 2017, in the proceedings

Sofina SA,

Rebelco SA,

Sidro SA

v

Ministre de l'Action et des Comptes publics,

THE COURT (Fifth Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Fifth Chamber, F. Biltgen and E. Levits (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 25 June 2018,

after considering the observations submitted on behalf of:

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Sofina SA, by C. Valentin, avocat,

–

the French Government, by D. Colas, A. Alidière and E. de Moustier, acting as Agents,

–

the Belgian Government, by P. Cottin and J.-C. Halleux, acting as Agents,

–

the German Government, by T. Henze and R. Kanitz, acting as Agents,

–

the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen, J. Langer and J.M. Hoogveld, acting as Agents,

–

the Swedish Government, by A. Falk, H. Shev, C. Meyer-Seitz, L. Zettergren and A. Alriksson, acting as Agents,

–

the United Kingdom Government, by Z. Lavery, acting as Agent, and by J. Rivett, Barrister,

–

the European Commission, by N. Gossement and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 August 2018,

gives the following

Judgment

1

This request for a preliminary ruling concerns the interpretation of Articles 63 and 65 TFEU.

2

The request was made in the context of a dispute between, on the one hand, Sofina SA, Rebelco SA and Sidro SA, companies incorporated under Belgian law, and, on the other, the Ministre de l'Action et des Comptes publics (Minister for the Public Sector and Public Accounts, France) regarding the latter's refusal to reimburse the withholding tax levied on the dividends paid to those companies between 2008 and 2011.

Legal context

French law

3

Under Article 38(1) of the Code général des impôts (French General Tax Code) ('CGI'):

'… the taxable profit is the net profit, calculated on the basis of the results of all transactions of every kind performed by undertakings, including, in particular, all transfers of assets, either during or at the end of operations.'

4

Article 39(1) of the CGI states:

‘The net profit is established after deduction of all charges …’

5

Article 119bis(2) of the CGI provides in particular that the income referred to in Articles 108 to 117bis of the CGI gives rise to the levying of a withholding tax, the rate of which is fixed in Article 187 of that code when such income is received by persons who have their tax residence or registered office in France.

6

Dividends are included in the income referred to in Articles 108 to 117bis of the CGI.

7

In the version applicable at the material time, Article 187(1) of the CGI sets the rate of withholding tax at 25%.

8

In the version applicable until 21 September 2011, the third subparagraph of Article 209(1) of the CGI stated:

‘… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward to subsequent financial years.’

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Since 21 September 2011, the third subparagraph of Article 209(1) of the CGI has been worded as follows:

‘… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year up to a maximum amount of [EUR] 1000000 increased by 60% of the amount corresponding to the taxable profit for that year exceeding the first amount. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward under the same conditions to subsequent financial years. The same shall apply to the portion of the excess not eligible for deduction under the first sentence of this subparagraph.’

The France-Belgium Tax Convention

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Article 15(1) and (2) of the Convention signed in Brussels on 10 March 1964 between France and Belgium 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 Additional Agreements of 15 February 1971, 8 February 1999, 12 December 2008 and 7 July 2009 (‘the France-Belgium Tax Convention’), states:

‘(1) Dividends originating in a Contracting State which are paid to a resident of the other

Contracting State are taxable in that other State.

(2) However, subject to the provisions of paragraph 3, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, in accordance with the law of that State, but the tax so charged shall not exceed:

(a)

10[%] of the gross amount of the dividends if the recipient is a company which has had exclusive ownership of at least 10[%] of the capital of the company distributing the dividends since the beginning of the last financial year of that company closed before the distribution;

(b)

15[%] of the gross amount of the dividends in all other cases.

This paragraph shall not concern the taxation of the company in respect of the profits out of which the dividends are paid.’

11

Article 19A of the France-Belgium Tax Convention provides, in particular:

‘Double taxation shall be avoided as follows:

(A) As regards Belgium:

(1)

Income and proceeds from investment capital which fall within the set of rules in paragraphs 2 to 4 of Article 15, which have actually been taxed at source in France and which are received by Belgian resident companies liable for corporation tax, shall, in return for payment of withholding tax at the normal rate on their amount of French tax, be exempt from corporation tax and distribution tax under the conditions laid down by Belgian domestic law.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12

Between 2008 and 2011 Sofina, Rebelco and Sidro received dividends as shareholders in French companies.

13

Pursuant to Article 119bis(2) of the CGI, read in conjunction with Article 15(2) of the France-Belgium Tax Convention, those dividends were subject to withholding tax at a rate of 15%.

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Since the financial years for the appellants in the main proceedings between 2008 and 2011 were loss-making, they submitted claims to the French tax authority, seeking reimbursement of the withholding tax levied on dividends paid during those financial years.

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When those claims were dismissed, the appellants in the main proceedings brought actions before the competent courts which, at first instance and on appeal, dismissed their applications for reimbursement.

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The appellants in the main proceedings then brought an appeal on a point of law before the referring court.

17

The Conseil d’État (Council of State, France) notes, first, that the application of withholding tax so far as concerns solely the dividends paid to loss-making non-resident companies with respect to their holdings in resident companies creates for those companies a cash-flow disadvantage as compared with loss-making resident companies. The referring court seeks, however, to ascertain whether that fact constitutes in itself a difference in treatment to be classified as a restriction on the free movement of capital, which is prohibited, in principle, by Article 63 TFEU.

18

On the assumption that the national legislation at issue in the main proceedings does constitute such a restriction, the Conseil d’État (Council of State) is uncertain, secondly, whether that restriction might be justified, in the light of the objective of that legislation, that is, the effective collection of tax.

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Thirdly, and in the alternative, if the principle of a withholding tax at issue in this case were to be accepted, the referring court seeks to ascertain, in the first place, whether the fact that the loss-making resident company which ceases trading thereby obtains a de facto exemption from the taxation of dividends which it received in the loss-making financial years is liable to have an influence on the examination of whether the national legislation at issue in the main proceedings is compatible with Articles 63 and 65 TFEU.

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In the second place, the Conseil d’État (Council of State) states that the differences in the way the base for taxing dividends is calculated, depending on whether the recipient company is resident or non-resident, may also constitute a restriction on the free movement of capital. Where the withholding tax provided for in Article 119bis of the CGI is calculated on the gross amount of the dividends, the expenses linked to their actual receipt are deducted from the base for calculating the tax chargeable on dividends paid to a resident company.

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In those circumstances, the Conseil d’État (Council of State) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1)

Must Articles [63 and 65 TFEU] be interpreted as meaning that the cash-flow disadvantage resulting from the application of withholding tax to dividends paid to loss-making non-resident companies, while loss-making resident companies are not taxed on the amount of the dividends they receive until the year when, if at all, they return to profitability, constitutes in itself a difference in treatment characterising a restriction on the free movement of capital?

(2)

Must the potential restriction on the free movement of capital referred to in the preceding question, in view of the requirements resulting from Articles [63 and 65 TFEU], be regarded as being justified by the need to ensure the effective collection of tax, since non-resident companies are not subject to the supervision of the French tax authorities, or by the need to safeguard the allocation of the power to impose taxes between the Member States?

(3)

If application of the withholding tax at issue may in principle be accepted with regard to the free movement of capital:

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Do those provisions preclude the collection of withholding tax on dividends paid by a resident company to a loss-making non-resident company of another Member State where the latter ceases to trade without returning to profitability, while a resident company placed in that situation is not in fact taxed on such dividends?

–

Must those provisions be interpreted as meaning that where taxation rules apply which treat dividends differently depending on whether they are paid to residents or non-residents, it is appropriate to compare the actual tax burden borne by each of them in respect of those dividends, so that a restriction on the free movement of capital resulting from the fact that those rules preclude for non-residents alone the deduction of expenses which are directly linked to the actual receipt of the dividends may be regarded as being justified by the difference in the rate of tax between the general tax payable in a subsequent year by residents and the withholding tax levied on dividends paid to non-residents, where that difference compensates, with regard to the amount of tax paid, for the difference in the taxable base?'

Consideration of the questions referred

The first and second questions, together with the first part of the third question

22

By its first and second questions, together with the first part of its third question, which it is appropriate to examine together, the referring court is asking, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends distributed by a resident company are subject to a withholding tax when they are received by a non-resident company whereas, when such dividends are received by a resident company, under the general corporation tax rules, they are subject to taxation at the end of the financial year in which they were received only if the latter company was profit-making in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without having become profitable after receiving those dividends.

The existence of a restriction on the free movement of capital, for the purposes of Article 63(1) TFEU

23

It is settled case-law of the Court that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (judgments of 10 May 2012, Santander Asset Management SGIIC and Others, C?338/11 to C?347/11, EU:C:2012:286, paragraph 15; of 17 September 2015, Miljoen and Others, C?10/14, C?14/14 and C?17/14, EU:C:2015:608, paragraph 44; and of 2 June 2016, Pensioenfonds Metaal en Techniek, C?252/14, EU:C:2016:402, paragraph 27).

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Specifically, the less favourable treatment by a Member State of dividends paid to non-resident companies, compared to the treatment of dividends paid to resident companies, is liable to deter companies established in a Member State other than that first Member State from undertaking investments in that same first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU (judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C?252/14, EU:C:2016:402, paragraph 28 and the case-law cited).

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Pursuant to the national legislation at issue in the main proceedings, companies which hold shares in a company established in France are subject, so far as concerns the dividends paid to them in that capacity, to two different sets of tax rules, the application of which depends on their status as resident or non-resident on the territory of that Member State.

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It is apparent from the order for reference that, pursuant to Article 119bis(2) of the CGI, dividends paid to non-resident companies by a French company are subject to a withholding tax of 25% on the gross amount thereof; that rate may, however, be reduced pursuant to a double taxation agreement, irrespective of their financial results. As stated by the referring court, the dividends received by the appellants in the main proceedings were subject to a 15% withholding tax pursuant to such an agreement, that is, the France-Belgium Tax Convention.

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By contrast, dividends paid to a resident company are included in that company's tax base and subject to the general tax rules, that is, corporation tax at a rate of 33.33%, in accordance with Article 38 of the CGI. In the event of losses being incurred at the end of the relevant financial year, the third subparagraph of Article 209(1) of the CGI, in the version applicable at the material time, provided for a deferral of that tax to a subsequent profit-making year, with the recorded losses carried forward to the following financial year being set against the amount of the dividends received.

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It follows that, whereas the dividends paid to a non-resident company are subject to immediate and definitive taxation, the tax imposed on dividends paid to a resident company depends on whether the latter's financial year is net loss-making or net profit-making. Thus, where losses are made, the taxation of those dividends is not only deferred to a subsequent profit-making year, thus procuring a cash-flow advantage for the resident company, but is also thereby uncertain, since that tax will not be levied if the resident company ceases trading before becoming profitable.

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First, the exclusion of a cash-flow advantage in a cross-border situation when it is granted in an equivalent situation on national territory constitutes a restriction on the free movement of capital (see, by analogy, judgments of 13 December 2005, Marks & Spencer, C?446/03, EU:C:2005:763, paragraph 33, and of 12 July 2012, Commission v Spain, C?269/09, EU:C:2012:439, paragraph 59).

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Secondly, the assessment of whether there exists a potentially less favourable treatment of the dividends paid to non-resident companies must be undertaken for each tax year, taken individually (judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C?252/14, EU:C:2016:402, paragraph 41).

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Since the dividends received by a non-resident company are taxed at the time when they are distributed, the financial year in which the distribution of those dividends occurs must be taken into account in order to compare the tax burden on such dividends and that on dividends paid to a resident company.

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It should be noted that there is no such tax burden when the resident company is loss-making at the end of such a financial year.

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Thirdly, such a deferral of taxation will be a definitive exemption of the dividends paid to a resident company if the latter does not become profitable before it ceases trading.

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Accordingly, the national legislation at issue in the main proceedings is liable to procure an advantage for loss-making resident companies, since it gives rise, at the very least, to a cash-flow advantage, or even an exemption in the event of that company ceasing trading, whereas non-resident companies are subject to immediate and definitive taxation irrespective of their results.

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The French Government states, in that connection, that the dividends paid to a non-resident company are subject, pursuant to the provisions of Article 119bis(2) of the CGI read in conjunction with Article 15 of the France-Belgium Tax Convention, to a tax burden of 15%, whereas dividends paid to a resident company are subject, pursuant to Article 38 of the CGI, to a tax burden of 33.33%.

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However, it must be said in that regard that the mere fact that the dividends paid to a non-resident company are subject to a 15% withholding tax in France does not preclude the Kingdom of Belgium also taxing those dividends, on the basis of the powers of taxation conferred by Article 15(1) of the France-Belgium Tax Convention, within the limits laid down in Article 19A(1) of that convention.

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Furthermore, the circumstance set out in paragraph 35 of the present judgment cannot, in any case, nullify the less favourable treatment of dividends paid to non-resident companies.

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In the first place, unfavourable tax treatment that is contrary to a fundamental freedom cannot be regarded as compatible with EU law because of the potential existence of other advantages (judgments of 18 July 2007, Lakebrink and Peters-Lakebrink, C 182/06, EU:C:2007:452, paragraph 24 and the case-law cited, and of 13 July 2016, Brisal and KBC Finance Ireland, C 18/15, EU:C:2016:549, paragraph 32).

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In the second place, the less favourable tax rate relied upon by the French Government so far as concerns dividends paid to a resident company is, in any case, irrelevant since those dividends are subject to a tax exemption when the resident company ceases trading without having become profitable following the receipt of those dividends. The Court has previously held that the fact that the applicable national rules place non-residents at a disadvantage cannot be compensated for by the fact that, in other situations, that same legislation does not discriminate between non-residents and residents (judgments of 18 July 2007, Lakebrink and Peters-Lakebrink, C?182/06, EU:C:2007:452, paragraph 23, and of 2 June 2016, Pensioenfonds Metaal en Techniek, C?252/14, EU:C:2016:402, paragraph 38).

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Such a difference in tax treatment of dividends dependent on the place of residence of the companies receiving those dividends is liable to deter (i) non-resident companies from investing in companies established in France, and (ii) investors residing in France from purchasing holdings in non-resident companies.

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It follows that the national legislation at issue in the main proceedings constitutes a restriction on the free movement of capital, which is, in principle, prohibited by Article 63(1) TFEU.

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It is necessary, however, to examine whether that restriction might be justified in the light of the provisions of the FEU Treaty.

The existence of a justification for the restriction on the free movement of capital under Article 65 TFEU

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The French Government argues that, although the national legislation at issue in the main proceedings constitutes a restriction, (i) the positions of resident and non-resident companies are objectively different, and (ii) that legislation is justified by the necessity of ensuring that tax is collected and therefore corresponds to the allocation of powers of taxation between the Member State of residence and the Member State in which the dividends are paid.

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Under Article 65(1)(a) TFEU, ‘the provisions of Article 63 [TFEU] shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested’.

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In so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or of the Member State in which they invest their capital is automatically compatible with the Treaty. The derogation provided for in Article 65(1)(a) TFEU is itself restricted by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]’ (judgment of 17 September 2015, Miljoen and Others, C?10/14, C?14/14 and C?17/14, EU:C:2015:608, paragraph 63).

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A distinction must therefore be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. It is clear from the Court’s case-law that, before national tax legislation can be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (judgment of 17 September 2015, Miljoen and Others, C?10/14, C?14/14 and C?17/14, EU:C:2015:608, paragraph 64).

– Comparability of the situations in question

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It is settled case-law of the Court that 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 taxpayers but also of non-resident taxpayers from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers (judgments of 20 October 2011, Commission v Germany, C?284/09, EU:C:2011:670, paragraph 56, and of 17 September 2015, Miljoen and Others, C?10/14, C?14/14 and C?17/14, EU:C:2015:608, paragraph 67 and the case-law cited).

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Relying on the judgment of 22 December 2008, Truck Center (C?282/07, EU:C:2008:762), the French, Belgian, German and United Kingdom Governments contend, however, that legislation laying down solely the various arrangements for the collection of tax on the basis of the location of the registered offices of the recipient company is justified on account of a difference in the objective situation of resident and non-resident companies.

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Thus, the application of different taxation arrangements depending on the place of residence of the recipient of the dividends is, it is argued, a reflection of the objective difference in the situations of non-resident and resident companies; the French State acts, with regard to non-resident companies, as the Member State in which the dividends are paid and not as the Member State of residence of the recipients of those dividends, a fact which restricts its collection capacity so far as concerns the latter category of companies and justifies the application of a withholding tax to the dividends paid to those companies.

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However, that argument cannot be accepted.

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Although the Court held, in paragraph 41 of the judgment of 22 December 2008, Truck Center (C?282/07, EU:C:2008:762), that a difference in treatment consisting in the application of different taxation arrangements on the basis of the place of residence of the taxable person relates to situations which are not objectively comparable, it nevertheless made clear, in paragraphs 43 and 44 of that judgment, that the income at issue in the case which gave rise to that judgment was, in any event, subject to tax irrespective of whether it was received by a resident or non-resident taxable person.

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As is clear from paragraph 33 of the present judgment, the national legislation at issue in the main proceedings is not limited to laying down different arrangements for the collection of tax on the basis of the place of residence of the recipient of the nationally sourced dividends, but is liable to result in a deferral of taxation of the dividends to a subsequent tax year in the event of a resident company making a loss, or even an exemption in the event of that company ceasing trading in the absence of a return to profitability (see, by analogy, judgment of 10 May 2012, Santander Asset Management SGIIC and Others, C?338/11 to C?347/11, EU:C:2012:286, paragraph 43).

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Accordingly, since that legislation procures a substantial tax advantage for loss-making resident companies which is not granted to loss-making non-resident companies, it cannot be claimed that the difference in treatment in the taxation of dividends that depends on whether those dividends are received by a resident or non-resident company is restricted to the arrangements for the collection of tax.

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It follows that that difference in treatment is not justified by an objective difference in situation.

– Justification based on the balanced allocation of powers of taxation between the Member States

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The French Government argues that the withholding tax to which only those dividends received by a non-resident company are subject is the sole means by which the French State may tax that income without its tax revenue being reduced because of losses arising in another Member State.

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In that connection, the Court has accepted that the preservation of the balanced allocation of taxation powers between Member States constitutes a legitimate objective and that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (judgment of 13 July 2016, Brisal and KBC Finance Ireland, C?18/15, EU:C:2016:549, paragraph 35).

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Such a justification can be accepted where, inter alia, the rules at issue are intended to prevent behaviour capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory (judgment of 12 July 2012, Commission v Spain, C?269/09, EU:C:2012:439, paragraph 77).

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In the present case, the French State has chosen to tax the dividends paid to a non-resident company by means of a withholding tax at a rate fixed in a double taxation agreement, while not taxing dividends paid to a resident company that is loss-making.

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However, in the main proceedings, the deferral of the taxation of dividends received by a loss-making non-resident company would not mean that the French State has to waive its right to tax income generated on its territory. The dividends distributed by the resident company would, in fact, be subject to taxation once the non-resident company became profitable during a subsequent tax year, in the same way as is the case for a resident company in a similar situation.

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Admittedly, if the non-resident company were to fail to become profitable prior to ceasing trading, this would result in an effective exemption of the income generated by the dividends and give rise to tax losses for the Member State of taxation.

61

However, it is settled case-law of the Court that a reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is, in principle, contrary to a fundamental freedom (judgment of 20 October 2011, Commission v Germany, C?284/09, EU:C:2011:670, paragraph 83).

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Further, where Member States make use of the freedom to tax revenue generated on their territory, they are required to respect the principle of equal treatment and the freedoms of movement guaranteed by primary EU law (see, to that effect, judgment of 13 July 2016, Brisal and KBC Finance Ireland, C?18/15, EU:C:2016:549, paragraph 36).

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The French Government cannot claim that the loss of tax revenue associated with the taxation of dividends received by non-resident companies in the event of their ceasing trading is of such a nature as to justify a withholding tax on that income so far as concerns solely those companies, when the French State consents to such losses when resident companies cease trading without returning to profitability.

64

In those circumstances, the justification of the national legislation at issue in the main proceedings by the need to maintain the balanced allocation of powers of taxation between the Member States cannot be accepted.

– Justification on the grounds of the effective collection of tax

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The French Government also argues that submitting dividends, paid to a non-resident company, to a withholding tax is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State in which the dividends are paid.

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The withholding tax to which the dividends paid to non-resident companies are subject serves, it is argued, to minimise the administrative formalities associated with the obligation on those companies to submit a tax return to the French tax authority at the end of the financial year.

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In that connection, the Court has held that the need to ensure the effective collection of tax is a legitimate objective capable of justifying a restriction on fundamental freedoms, provided, however, that that restriction is applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, to that effect, judgment of 13 July 2016, Brisal and KBC Finance Ireland, C?18/15, EU:C:2016:549, paragraph 39).

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Furthermore, the Court has previously held that retention at source is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation (judgment of 18 October 2012, X, C?498/10, EU:C:2012:635, paragraph 39).

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In that connection, it should be recalled that the restriction on the free movement of capital arising from the national legislation at issue in the main proceedings rests, as is clear from paragraph 34 of the present judgment, in the fact that, unlike loss-making resident companies, non-resident companies which are also loss-making do not benefit from the deferral of taxation on the dividends which they receive.

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Granting the benefit of that deferral to non-resident companies, while necessarily eliminating that restriction, would not undermine the achievement of the aim of the effective collection of the tax owed by those companies when they receive dividends from a resident company.

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In the first place, the rules on the deferral of taxation in the event of losses constitute, inherently, a derogation to the principle of taxation during the tax year in which the dividends are distributed, so that those rules are not intended to apply to the majority of companies which receive dividends.

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In the second place, it should be pointed out that it would be the duty of non-resident companies to provide the relevant evidence to allow the tax authorities of the Member State of taxation to determine that the conditions, laid down in the legislation, for benefiting from such a deferral have been met.

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In the third place, the mutual assistance mechanisms existing between the authorities of the Member States are sufficient to enable the Member State in which the dividends are paid to check the accuracy of the evidence put forward by non-resident companies wishing to claim a deferral of taxation of dividends which they have received (see, to that effect, judgment of 12 July 2012, Commission v Spain, C?269/09, EU:C:2012:439, paragraph 68).

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In that connection, Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), repealed and replaced by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799 (OJ 2011 L 64, p. 1), allows a Member State to apply to the competent authorities of another Member State for all the information required to allow it to ascertain the correct amount of income tax.

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Further, Article 4(1) of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28), repealed and replaced by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1), provides that ‘at the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim’. That directive therefore allows the Member State in which dividends are paid to obtain, from the Member State of residence, the information necessary to allow it to recover a tax liability which arose when the dividends were distributed.

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Thus, Directive 2008/55 provides the authorities of the Member State in which dividends are paid with a framework of cooperation and assistance that allows them actually to recover a tax liability in the Member State of residence (see, to that effect, judgments of 29 November 2011, National Grid Indus, C?371/10, EU:C:2011:785, paragraph 78, and of 12 July 2012, Commission v Spain, C?269/09, EU:C:2012:439, paragraphs 70 and 71).

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Accordingly, if the advantage associated with the deferral of taxation on dividends distributed were also granted to loss-making non-resident companies, that would have the effect of eliminating any restriction on the free movement of capital, but would not thereby impede the achievement of the aim pursued by the national legislation at issue in the main proceedings.

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In those circumstances, justification of the national legislation at issue in the main proceedings in the effective collection of tax cannot be accepted.

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In the light of the foregoing, the answer to the first and second questions, together with the first part of the third question, is that Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.

The second part of the third question

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In the light of the answer given to the first and second questions, together with the first part of the third question, there is no need to answer the second part of the third question.

Costs

81

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 (Fifth Chamber) hereby rules:

Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.

[Signatures]

(*1) Language of the case: French.