Arrêt de la Cour
Case C-58/01

Océ Van der Grinten NV
v
Commissioners of Inland Revenue

(Reference for a preliminary ruling from the Special Commissioners of Income Tax)

«(Directive 90/435/EEC – Corporation tax – Parent companies and subsidiaries of different Member States – Concept of withholding tax)»

Opinion of Advocate General Tizzano delivered on 23 January 2003 Judgment of the Court (Fifth Chamber), 25 September 2003
Summary of the Judgment
1..Approximation of laws – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Directive 90/435 – Exemption, in the Member State of the subsidiary, from withholding tax on profits distributed to the parent company – Concept of withholding tax – Charge envisaged by a double taxation convention
(Council Directive 90/435, Art. 5(1))
2..Approximation of laws – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Directive 90/435 – Exemption, in the Member State of the subsidiary, from withholding tax on profits distributed to the parent company – Exception for domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends – Charge envisaged by a double taxation convention
(Council Directive 90/435, Arts 5(1) and 7(2))
3..Approximation of laws – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Directive 90/435 – Domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends – Compliance with the obligations to state reasons and to consult the Parliament and the Economic and Social Committee
(Arts 94 EC and 253 EC; Council Directive 90/435, Art. 7(2))
1. Taxation such as the charge envisaged by a double taxation convention imposed on dividends that are paid by a resident subsidiary to its non-resident parent company amounts to a withholding tax on profits which a subsidiary distributes to its parent company within the meaning of Article 5(1) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, which exempts those profits from withholding tax. On the other hand, such taxation does not amount to a withholding tax prohibited by Article 5(1) of the directive in so far as it is imposed on the tax credit to which that distribution of dividends confers entitlement in the Member State of the subsidiary. see paras 51, 54, 56-57, 59-60, operative part 1
2. Article 7(2) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, which provides that the directive is not to 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, is to be interpreted as allowing taxation such as a 5% charge, envisaged by a double taxation convention, on dividends paid by a resident subsidiary to its non-resident parent company, even though that charge amounts to a withholding tax within the

meaning of Article 5(1) of the directive, which exempts profits distributed by a subsidiary to its parent company from withholding tax. see para. 89, operative part 2
3. Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States clearly indicates in its statement of reasons, in accordance with Article 253 EC, the general objective it pursues, that is to say, fiscal neutrality of cross-border distribution of profits, and that statement of reasons is sufficient to cover also the clause preserving domestic or agreement-based provisions which pursue the same objective, namely Article 7(2) of the directive. Furthermore, the insertion of that provision into the text of the directive after the Commission's initial proposal was submitted to the Parliament and the Economic and Social Committee, in accordance with Article 94 EC, must be regarded as a technical adjustment and does not constitute a substantial change requiring consultation for a second time. see paras 99, 101-102

JUDGMENT OF THE COURT (Fifth Chamber)
25 September 2003 (1)

((Directive 90/435/EEC – Corporation tax – Parent companies and subsidiaries of different Member States – Concept of withholding tax))

In Case C-58/01,
REFERENCE to the Court under Article 234 EC by the Special Commissioners of Income Tax (United Kingdom) for a preliminary ruling in the proceedings pending before them between
Océ van der Grinten NV

and

Commissioners of Inland Revenue,
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, corrigendum at OJ 1991 L 23, p. 35) and the interpretation and validity of Article 7(2) of that directive,

THE COURT (Fifth Chamber),,

composed of: M. Wathelet (Rapporteur), President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann and A. Rosas, Judges,
Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,
after considering the written observations submitted on behalf of:

? Océ van der Grinten NV, by G. Aaronson QC and M. Barnes QC,
? the United Kingdom Government, by J.E. Collins, acting as Agent, L. Henderson QC and R. Singh, Barrister,
? the Italian Government, by U. Leanza, acting as Agent, and G. De Bellis, avvocato dello Stato,
? the Council of the European Union, by J. Monteiro, acting as Agent,
? the Commission of the European Communities, by R. Lyal, acting as Agent,
having regard to the Report for the Hearing,

after hearing the oral observations of Océ van der Grinten NV, represented by G. Aaronson and M. Barnes; the United Kingdom Government, represented by P. Ormond, acting as Agent, L. Henderson QC and M. Hoskins, Barrister; the Italian Government, represented by G. De Bellis; and the Commission, represented by R. Lyal, at the hearing on 3 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2003,

gives the following

Judgment

1 By order of 6 February 2001, received at the Court on 12 February 2001, the Special Commissioners of Income Tax (the Special Commissioners) referred to the Court for a preliminary ruling under Article 234 EC three questions 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, corrigendum at OJ 1991 L 23, p. 35; the Directive) and the interpretation and validity of Article 7(2) of the Directive.
2 The three questions were raised in proceedings between Océ van der Grinten NV (Océ NV) ? a company incorporated and resident in the Netherlands holding the entire capital of Océ UK Ltd, a company incorporated in the United Kingdom ? and the Commissioners of Inland Revenue, concerning the taxation in the United Kingdom of profits which were distributed to Océ NV as dividends by its subsidiary.

Legal context

Community legislation

3 Article 5(1) of the Directive reads as follows: Profits which a subsidiary distributes 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.

4 Article 7(2) of the Directive 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 law

5 Under Part I of the Income and Corporation Taxes Act 1988 (ICTA), companies resident in the United Kingdom, and companies not so resident which are trading in the United Kingdom through a branch or agency, are chargeable to corporation tax (sections 8 and 11 of ICTA).

6 Corporation tax is charged on the profits of a company arising during an accounting period (sections 6(1) and 8(1) and (3) of ICTA), which is normally 12 months (section 12 of ICTA).

Advance corporation tax

7 Under the tax system in force in 1992 and 1993, a company resident in the United Kingdom which makes certain distributions, such as the payment of dividends to its shareholders, is obliged to pay advance corporation tax (ACT) (section 14 of ICTA), on a sum equal to the amount or value of the distribution made. Thus, if the rate of ACT is 25% and the distribution amounts to GBP 4 000, the ACT payable is GBP 1 000.

8 The system has since been changed as section 31 of the Finance Act 1998 abolished ACT with effect from 6 April 1999, but those changes are not relevant to the main proceedings.

9 A company is obliged to submit a return, in principle for each quarter, showing the amount of any distribution made in that period and the amount of ACT payable. The ACT due in respect of a distribution must be paid within 14 days after the end of the quarter in which the distribution was made (paragraphs 1 and 3 of Schedule 13 to ICTA). ACT is therefore payable substantially in advance of the mainstream corporation tax against which it can be set off, as the latter is payable within nine months and one day of the end of the accounting period.

10 In accordance with sections 239 and 240 of ICTA, ACT paid by a company in respect of a distribution made in a given accounting period must in principle, subject to the company's right of surrender, either be set off against its mainstream corporation tax liability for that period or be transferred to its subsidiaries, which can set off the ACT against their own mainstream corporation tax liability.

11 A UK-resident company is not chargeable to corporation tax in respect of dividends or other distributions received from another UK-resident company (section 208 of ICTA). Accordingly, any distribution of dividends subject to ACT by one UK- resident company to another will give rise to a tax credit in favour of the company receiving the dividends.

Tax credit

12 Where a UK-resident company, or any other UK-resident person, receives from another UK-resident company a distribution upon which ACT is payable, the company or person receiving the distribution is entitled to a tax credit.

13 The tax credit is equal to the amount of ACT paid by the company distributing the dividend in respect of that distribution (section 231(1) of ICTA). Thus, if the rate of ACT in force is 25% and the amount of the dividends received is GBP 4 000, the tax credit amounts to GBP 1 000.

14 For a UK-resident company that receives a distribution in respect of which it is entitled to the tax credit envisaged by section 241 of ICTA, the usefulness of the tax credit lies principally in relieving it of the obligation to pay ACT again when it passes on a dividend of an equivalent amount to its own shareholders.

15 Under national law, a non-UK-resident company which does not carry on a trade in the United Kingdom through a branch or agency is not entitled to a tax credit when it receives dividends from a UK-resident company. However, it may be entitled to a tax credit if a double taxation convention so provides.

16 Such a non-resident company is not chargeable to corporation tax in the United Kingdom. It is in principle chargeable to income tax in the United Kingdom in respect of income arising in that Member State, which includes dividends paid to it by its resident subsidiaries. None the less, where a non-resident company receives a dividend from a UK-resident company and is not entitled to a tax credit in respect of the dividend, it is not assessable to income tax on the amount or value of the distribution, as provided by section 233(1) of ICTA.

17 Under the tax system in force in the United Kingdom in 1992 and 1993, a person entitled to a tax credit in respect of a distribution who is not a UK-resident company (for example, a UK-resident individual or an individual or a company resident in a country where the relevant double taxation convention with the United Kingdom provides a right to receive tax credits) can claim to have the credit set against his liability to income tax in the United Kingdom and, where the credit exceeds the income tax, to have the excess paid to him (section 231(3) of ICTA).

18 If the claim is rejected, the person who made it can appeal to the Special or General Commissioners, and from them to the High Court.

The double taxation convention

19 The present case concerns the Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, concluded in 1980.

20 Article 10(3)(c) of the double taxation convention provides: ... a company which is a resident of the Netherlands and receives dividends from a company which is a resident of the United Kingdom shall, ... provided it is the beneficial owner of the dividends, be entitled to a tax credit equal to one half of the tax credit to which an individual resident in the United Kingdom would have been entitled had he received those dividends, and to the payment of any excess of that tax credit over its liability to tax in the United Kingdom ....

21 That means that a parent company which is resident in the Netherlands and receives dividends from a company which is resident in the United Kingdom is entitled, provided it is the beneficial owner of the dividends, to a tax credit equal to half the tax credit to which an individual resident in the United Kingdom would have been entitled had he been paid those dividends.

22 Article 10(3)(a)(ii) of the double taxation convention provides: Where a resident of the Netherlands is entitled to a tax credit in respect of ... a dividend [paid by a company resident in the United Kingdom] under subparagraph (c) of this paragraph tax may also be charged in the United Kingdom, and according to the laws of the United Kingdom, on the aggregate of the amount or value of that dividend and the amount of that tax credit at a rate not exceeding 5%.

23 The Special Commissioners illustrate this with the following calculation by way of example:

Dividend paid by UK company 80
Tax credit to UK individual 20
½ tax credit to Netherlands company 10
90
Less 5% tax on (80 + 10) 4.5
Total received by Netherlands company 85.5

24 It appears from the order for reference that, under Article 10(3)(a)(ii) of the double taxation convention, the Netherlands parent company is entitled to reimbursement of any amount by which the half tax credit exceeds the tax charged. In the example given by the Special Commissioners, set out in the preceding paragraph, the amount payable is 5.5.

25 It should be added, on the basis of information provided by Océ NV in its written observations, that the double taxation convention initially envisaged, for both the United Kingdom and the Netherlands, taxation of dividends in the State of the recipient of the dividends and in the State of the distributing company. According to Océ NV, however, since the transposition of the Directive into Netherlands law the Netherlands no longer imposes the 5% charge on dividends remitted by subsidiaries established in the Netherlands to their parent companies established in the United Kingdom, in accordance with the Law of 10 September 1992 (*Staatsblad* 1992, p. 518), whereas the United Kingdom still applies that charge on the basis of the convention.

26 Article 22(2)(c) of the double taxation convention provides: ... the Netherlands shall allow a deduction from the Netherlands tax so computed for the items of income which according to [*inter alia* Article 10(3)] of this Convention may be taxed in the United Kingdom to the extent that these items are included in the basis referred to in subparagraph (a) of this paragraph. The amount of this deduction shall be equal to the tax paid in the United Kingdom on these items of income, but shall not exceed the amount of the reduction which would be allowed if the items of income so included were the sole items of income which are exempt from Netherlands tax under the provisions of Netherlands law for the avoidance of double taxation.

27 Consequently, the Netherlands must allow a deduction from any Netherlands tax payable by the Netherlands-resident parent company in respect of the dividend, of an amount equal to the tax paid in the United Kingdom pursuant to Article 10(3)(a)(ii) of the double taxation convention.

The main proceedings and the questions referred for a preliminary ruling

28 Océ NV is the parent company of Océ UK Ltd, a company incorporated and resident in the United Kingdom.

29 In 1992 and 1993 Océ UK Ltd paid dividends totalling approximately GBP 13 000 000 to its parent company and, on that basis, was required to pay ACT. Océ NV was granted a tax credit equal to half the tax credit to which an individual resident in the United Kingdom would have been entitled (that is to say roughly GBP 2 174 000), less the abatement of 5% of the aggregate amount of the dividend and the tax credit (GBP 761 000), and was thus paid an additional amount of about GBP 1 400 000.

30 Contending that the 5% abatement constituted a withholding tax on the dividends paid by its subsidiary, contrary to Article 5(1) of the Directive, Océ NV appealed against the assessment to tax to the Special Commissioners. By decision of 17 February 2000, they held that the 5% charge constituted a tax as a matter of United Kingdom law and that it was necessary to submit a reference for a preliminary ruling to the Court of Justice of the European Communities. The tax authorities brought an appeal before the High Court of Justice of England and Wales, Chancery Division (Revenue), challenging solely the characterisation of the 5% abatement as a tax as a matter of United Kingdom law.

31 In its judgment of 2 November 2000, the High Court ruled that it did not matter how the charge was characterised as a matter of United Kingdom law, because the question whether the 5% charge fell within Article 5(1) was a question of Community law. The High Court remitted the matter to the Special Commissioners to draw up the questions to be referred to the Court of Justice.

32 It was in those circumstances that the Special Commissioners referred the following questions to the Court for a preliminary ruling:

1. In the circumstances set out in the order for reference, is the 5% charge specified in subparagraph (a)(ii) of Article 10(3) of the UK/Netherlands Double Taxation Convention 1980 (the 5% charge) a withholding tax on profits which a subsidiary distributes to its parent company within Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 (the Directive)?

2. If the 5% charge is such a withholding tax is its effect preserved as a consequence of Article 7(2) of the Directive?

3. If the 5% charge is preserved only as a consequence of Article 7(2) of the Directive, is Article 7(2) invalid for want of reasoning or failure to consult the ESC and the European Parliament, with the result that it does not have the effect of preserving the right of the United Kingdom to charge the 5% tax?

Consideration of the first question referred for a preliminary ruling

33 By their first question, the Special Commissioners essentially ask whether taxation such as the 5% charge envisaged by the double taxation convention at issue in the main proceedings amounts to a withholding tax on profits which a subsidiary distributes to its parent company within the meaning of Article 5(1) of the Directive.

Observations submitted to the Court

34 Océ NV, the Italian and United Kingdom Governments and the Commission are in agreement that the 5% charge is a withholding tax on profits which a subsidiary distributes to its parent company within the meaning of, and in principle prohibited by, Article 5(1) of the Directive.

35 Océ NV refers to point 26 of the Opinion of Advocate General Alber in Case C-294/99 *Athinaiki Zithopiia* [2001] ECR I-6797, in which he considered that, under the broad interpretation required by the Court, the concept of withholding tax encompasses every tax provision that has the effect of taxing distributions of profits by a resident subsidiary company to a parent company in another Member State. Article 5(1) of the Directive must therefore be interpreted as prohibiting all tax legislation that links particular fiscal charges to a distribution of profits if in the absence of the distribution those fiscal charges would not arise.

36 Océ NV notes that the 5% tax was charged on the aggregate of the dividends declared by Océ UK Ltd and the half tax credits. The dividends declared by Océ UK Ltd clearly constitute profits which a subsidiary distributes to its parent company within the meaning of Article 5(1) of the Directive, so that the 5% charge is, in any event, a withholding tax on profits which a subsidiary distributes to its parent company in so far as it is imposed on the dividends.

37 In Océ NV's submission, however, the charge must also be regarded as a withholding tax in so far as it is applied to the half tax credit. Its arguments are as follows.

38 The concept of profits is not limited to cash dividends and can include all other forms of income from shares. The tax credit constitutes a benefit in money's worth which comes with the distribution of profits. In the case of a non-resident company entitled to a half tax credit under a double taxation convention, that partial tax credit is redeemable in cash, subject to the 5% charge. The tax credit must therefore be regarded as forming part of the profits distributed by the subsidiary. Moreover, the half tax credit is considered to form part of taxable income for the purposes of Netherlands income tax.

39 The United Kingdom Government submits that, in Case C-375/98 *Epson Europe* [2000] ECR I-4243, the Court gave the concept of withholding tax on distributed profits a wide interpretation, which Advocate General Alber confirmed in *Athinaiki Zithopiia* , cited above. It is thus apparent from paragraph 23 of the judgment in *Epson Europe* that a withholding tax is levied where the chargeable event is the payment of dividends or of any other income from shares, the taxable amount is the income from the shares and the taxable person is the holder of those shares.

40 In light of that case-law, the United Kingdom Government abandons the view put forward by it hitherto, even when the Directive was being negotiated, that the 5% charge does not constitute a withholding tax within the meaning of the Directive because, in a literal sense, there is a withholding tax on profits distributed only where the amount of those distributed profits is reduced by the amount of the withholding tax. It submits that the chargeable event for the 5% charge is the payment of a tax credit, which exists only if a dividend is paid, that the taxable amount of the charge is the aggregate of the amount or value of the dividend and the tax credit, and that the taxable person in respect of the charge is the shareholder. It considers therefore, like Océ NV, that the charge is a withholding tax within the meaning of Article 5(1) of the Directive.

41 The Commission points out that classification of a charge as a withholding tax on profits depends on its effects, not on the terms used to define it in national law.

42 It contends that the 5% charge must be regarded as a tax on distributed profits. The resident subsidiary made a profit and distributed to its parent company at least part of the amount of profit remaining after tax. By virtue of the convention, the United Kingdom gave up part of its right to tax the subsidiary's profits. It granted the parent company a tax credit in respect of part of the profits and, where the parent had no other tax liability in the United Kingdom, paid over the amount of the credit. The Commission considers that the source of that payment is, in actual fact, a portion of the profits of the subsidiary which is first taken as tax by virtue of national law, then relinquished by the tax authorities under the convention and passed on to the parent company. The dividend and the amount of the associated tax credit thus constitute distributed profits and the 5% tax charged on that aggregate amount is therefore a tax on distributed profits.

43 It is significant in that regard that the tax charged in the United Kingdom entails a right, under Article 22(2)(c) of the convention, to a deduction of the same amount from the tax payable by the parent company in the Netherlands, in so far as the dividend and the tax credit form part of the tax base in the Netherlands.

44 Finally, in the Commission's submission, that tax on distributed profits is to be regarded as a withholding tax in the sense that it is withheld before payment of the remainder of the distributed profits to the parent company. The chargeable event for the 5% tax is the payment of the dividends and it is not recovered subsequently.

The Court's answer

45 As appears particularly from the third recital in its preamble, the Directive seeks, by the introduction of a common system of taxation, 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. Thus, 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; *Epson Europe*, cited above, paragraph 20; and *Athinaiki Zithopiia*, cited above, paragraph 25).

46 In order to determine whether the taxation of distributed profits pursuant to the United Kingdom 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 *Epson Europe*, paragraph 22, and *Athinaiki Zithopiia*, paragraph 26). 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 *Athinaiki Zithopiia*, paragraph 27, and the case-law cited).

47 The Court has already held that any tax on income received in the State in which dividends are distributed is a withholding tax on distributed profits for the purposes of Article 5(1) of the Directive where the chargeable event for the tax is the payment of dividends or of any other income from shares, the taxable amount is the income from those shares and the taxable person is the holder of the shares (to this effect, see *Epson Europe* , paragraph 23, and *Athinaiki Zithopiia*, paragraphs 28 and 29).

48 The charge at issue in the main proceedings has the distinctive feature that it is imposed on the aggregate amount of the dividends paid by the UK-resident subsidiary to its Netherlands-resident parent company and the partial tax credit to which that distribution confers entitlement. In answering the first question, the 5% charge should, as proposed by the Advocate General in point 19 of his Opinion, be considered separately according to whether it is imposed on the dividend as such or on the tax credit to which distribution of that dividend confers entitlement, even though all the parties which submitted observations to the Court are in agreement that the entire 5% charge constitutes a withholding tax.

49 The part of the 5% charge that applies to dividends is imposed directly on the dividends in the State in which they are distributed because they form part of the amount chargeable to tax.

50 The chargeable event for this part of the charge is the payment of those dividends, and it is to be noted in this regard that it is irrelevant that the charge at issue in the main proceedings is imposed only if a right to the tax credit exists so that, if there were no tax credit granted pursuant to a double taxation convention, the dividends would be paid in their entirety. It is not in dispute that the tax credit is granted by the convention in conjunction with the payment of dividends by a subsidiary established in the United Kingdom to its parent company established in the Netherlands. If there were no such distribution, there would clearly be no charge on the aggregate amount of the distribution and of the tax credit to which the distribution confers entitlement.

51 Finally, that part of the 5% charge applying to the dividends is proportional to their value or amount, the taxable person being the parent company in receipt of the dividends. It affects the income that the parent company established in the Netherlands derives from its holding in its subsidiary established in the United Kingdom because it entails a reduction in the value of that holding.

52 It is immaterial to the classification as a withholding tax, within the meaning of Article 5(1) of the Directive, of the part of the charge imposed on the dividends that, in the main proceedings, the shareholding parent company ultimately receives an overall amount exceeding the amount of the dividends which are paid to it by its subsidiary, inasmuch as it

is not disputed that the dividends are included in the taxable amount and are therefore subject to the charge, which cannot represent a means of calculating the tax credit. The fact that, after the charge has been levied, an amount is received which ultimately exceeds the amount of the dividends results from both the level at which the charge is set and the fact that it is imposed on the aggregate amount of the dividends and of the partial tax credit. The rate of such a charge need only be set at a higher level in order for the sum ultimately received by the shareholding parent company to be less than the amount of the dividends.

53 It would be contrary to the principle of uniform interpretation of Community law if the definition of a withholding tax within the meaning of Article 5(1) of the Directive, the characteristics of which are set out in the case-law referred to in paragraph 47 of this judgment, could depend on the percentage at which the tax in question is set.

54 It follows that, in so far as the 5% charge envisaged by the double taxation convention at issue in the main proceedings is imposed on the dividends distributed by the resident subsidiary to its non-resident parent company, it must be regarded as a withholding tax on distributed profits, in principle prohibited by Article 5(1) of the Directive.

55 The part of the 5% charge applying to the tax credit to which distribution of the dividend confers entitlement does not possess the characteristics of a withholding tax on distributed profits, in principle prohibited by Article 5(1) of the Directive, because it is not imposed on the profits distributed by the subsidiary.

56 The tax credit is a fiscal instrument designed to avoid double taxation, in economic terms, first in the hands of the subsidiary and then in the hands of the parent company in receipt of the dividends, of the profits distributed as dividends. Thus it does not constitute income from shares.

57 Furthermore, as the Advocate General points out in points 30, 33 and 34 of his Opinion, the effects of the charge on the tax credit are not contrary to the prohibition of withholding tax laid down by the Directive. The partial reduction of the tax credit, by virtue of the 5% tax to which it is subject, does not affect the fiscal neutrality of the cross-border distribution of dividends because that reduction does not apply to the distribution of dividends and does not diminish their value in the hands of the parent company to which they are paid.

58 Such an interpretation is, moreover, borne out by the fact that, under the system of the double taxation convention at issue in the main proceedings, the 5% charge in the United Kingdom has as its counterpart the obligation on the Netherlands Treasury to allow it to be set against the tax of the parent company, pursuant to Article 22(2)(c) of the convention.

59 It follows that, in so far as the 5% charge envisaged by the double taxation convention at issue in the main proceedings applies to the tax credit to which distribution of the dividend by the resident subsidiary to its non-resident parent company confers entitlement, it is not to be regarded as a withholding tax on distributed profits, in principle prohibited by Article 5(1) of the Directive.

60 The answer to the first question must therefore be that in so far as taxation such as the 5% charge envisaged by the double taxation convention at issue in the main proceedings is imposed on the dividends paid by a subsidiary resident in the United Kingdom to its parent company resident in another Member State, it amounts to a withholding tax on profits which a subsidiary distributes to its parent company within the meaning of Article 5(1) of the Directive. On the other hand, such taxation does not amount to a withholding tax prohibited by Article 5(1) of the Directive in so far as it is imposed on the tax credit to which that distribution of dividends confers entitlement in the United Kingdom.

Consideration of the second question referred for a preliminary ruling

61 By their second question, the Special Commissioners essentially seek to ascertain whether Article 7(2) of the Directive is to be interpreted as allowing taxation such as the 5% charge envisaged by the double taxation convention at issue in the main proceedings even if that charge amounts to a withholding tax within the meaning of Article 5(1) of the Directive.

62 Because of the answer given to the first question, the second question concerns the 5% charge only in so far as it is imposed on the dividends.

Observations submitted to the Court

63 In Océ NV's submission, Article 7(2) of the Directive cannot be interpreted as authorising national legislation or double taxation agreements in their entirety where they are generally directed to eliminating or lessening double taxation. As Advocate General Alber maintained in point 41 of his Opinion in *Athinaiki Zithopiia*, only those provisions actually intended to avoid or lessen double taxation fall within the scope of Article 7(2) of the Directive, as opposed to provisions which merely form part of the balancing of the interests of the States concerned with regard to allocation of the relevant tax revenue and do not directly prevent double taxation.

64 Consequently, according to Océ NV, the provisions of the convention at issue in the main proceedings which relate to payment of a partial tax credit amount to provisions whose application is preserved by Article 7(2) of the Directive, but not those establishing a withholding tax corresponding to the 5% charge. A 5% charge on the aggregate of the dividends and the tax credit is not a measure designed to eliminate or lessen economic double taxation of dividends. On the contrary, its sole effect is to apportion the proceeds of the economic double taxation of dividends between the United Kingdom and the Netherlands.

65 Océ NV adds that Article 7(2) of the Directive cannot be interpreted as allowing application of domestic or agreement-based provisions relating to a greater or lesser extent to the payment of tax credits.

66 In this connection, it rejects the argument put forward in the main proceedings by the tax authorities that the 5% charge should be regarded as permitted under Article 7(2) of the Directive because it is imposed in conjunction with a tax credit. Such an interpretation would mean that Article 7(2) of the Directive provides an exception to the principle of exemption from withholding tax laid down in Article 5(1) and cannot be upheld.

67 The fifth recital in the preamble to the Directive envisages certain exceptions to Article 5(1), but they are expressly set out in Article 5 itself and are introduced with the words notwithstanding paragraph 1. By contrast, there is no indication in the preamble to the Directive of any intention to create, through Article 7(2), an exception to the principle laid down in Article 5(1) and no justification is suggested in this regard.

68 In the submission of the United Kingdom Government, supported by the Italian Government and the Commission, if the 5% charge amounts to a withholding tax it is none the less authorised by virtue of Article 7(2) of the Directive.

69 In this connection, the United Kingdom Government argues that that article is couched in the broadest terms (this Directive shall not affect) and means that a provision which displays the characteristics mentioned in Article 7(2) must continue to apply, irrespective of any indication to the contrary that the Directive might contain.

70 It is immaterial that Article 10(3)(a)(ii) of the convention, which provides for the 5% charge, is not in itself designed to lessen double taxation. The 5% charge should not be considered in isolation; it forms an integral part of the provisions relating to payment of a tax credit to Océ NV under the double taxation convention. The Italian Government contends, to like effect, that the 5% charge forms part, in the context of bilateral rules, of a body of provisions the object of which is to lessen double taxation of dividends.

71 In the submission of the United Kingdom Government, Article 10, viewed as an inseparable whole, is a provision that relates to the payment of tax credits and seeks to lessen the economic double taxation of dividends, falling within Article 7(2) of the Directive. The Commission for its part refers only to Article 10(3) of the convention.

72 In support of their views, they contend that the position of Netherlands parent companies without Article 10 (or Article 10(3)) of the double taxation convention should be envisaged. In such a case, there would be no lessening of economic double taxation for a shareholder ? such as Océ NV ? not resident in the United Kingdom. The profits of Océ UK Ltd would have been fully subject to corporation tax in the United Kingdom and, on

payment of dividends to Océ NV, no withholding tax would have been paid but the dividends would in principle have been fully taxable in the Netherlands. The United Kingdom (unlike the Netherlands) significantly reduces double taxation because it grants, in Article 10(3)(c) of the convention, a right to payment of a tax credit equal to half of the tax credit to which a UK-resident individual would have been entitled, less the 5% charge. The United Kingdom thus submits that, by virtue of the convention, Océ NV receives not only the dividend itself in its entirety but also an additional sum which is, in fact, a refund of a proportion of the corporation tax payable by the subsidiary in the United Kingdom.

73 The United Kingdom Government explains that Article 7(2) of the Directive is not to be interpreted as preserving an entire double taxation convention or every provision concerning payment of a tax credit. Only provisions the direct consequence of which is the avoidance or reduction of double taxation are concerned, in accordance with the view of Advocate General Alber in points 40 and 41 of his Opinion in *Athinaiki Zithopiia* . Consequently, a withholding tax which, in other circumstances, would be prohibited by Article 5(1) of the Directive remains applicable only if it forms an integral part of a provision the direct consequence of which is the elimination or reduction of double taxation, such as Article 10 of the convention at issue in the main proceedings.

74 In the United Kingdom Government's submission, Océ NV's complaint is really that Article 10(3) of the double taxation convention does not lessen economic double taxation of dividends as much as it would like. The United Kingdom Government points out that Article 7(2) of the Directive does not lay down any requirement that double taxation should be reduced by a minimum amount.

75 Finally, it adds that if the interpretation put forward by Océ NV were to be adopted, and if Article 7(2) of the Directive were unable to cover withholding tax charged in connection with grant of a tax credit, that provision would be entirely meaningless and without substance.

76 The Italian Government adds that Océ NV cannot complain about the fact that the convention provision which entitles it to a tax credit also provides for reduction of the tax credit by the 5% charge. It would be otherwise only if the charge were set at such a percentage that it cancelled out the effect of the tax credit, which is not the case here.

77 The Commission submits that the intent of Article 7(2) of the Directive is to exempt from the prohibition on withholding taxes a charge which forms an integral part of the mechanism for grant of a tax credit aimed at reducing double taxation. It explains in this connection that Article 7(2) was inserted into the Directive at the request of the United Kingdom, at a late stage in the discussions in the Council leading to the adoption of the Directive, precisely in order to ensure that provisions such as Article 10(3) of the double taxation convention could continue to be applied. The Commission acknowledges that the positions taken in Council discussions are not of decisive significance in interpreting the resulting provisions, but is of the opinion that they should be taken into account when determining the intent of the legislature.

78 The United Kingdom Government stated at the hearing that the view which it puts forward in the present case corresponds to the Council's original intentions because Article 7(2) of the Directive was originally inserted at its request.

79 The Commission adds that it cannot be objected that Article 7(2) does not specifically mention withholding tax. If it did not extend to a withholding tax charged in connection with the grant of a tax credit it would be a meaningless provision, for there would be nothing else which could be affected by the Directive.

The Court's answer

80 As pointed out in paragraph 45 of this judgment, the Directive is intended to eliminate, by the introduction of a common system for the taxation of distributed profits, any disadvantage to parent companies and subsidiaries resident in different Member States and thereby to facilitate the grouping together of companies at Community level.

81 To this end, first, as stated in the fourth recital in the preamble to the Directive, where a parent company by virtue of its association with its subsidiary receives distributed profits, the State of the parent company must either refrain from taxing such profits or tax them 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.

82 Second, as is apparent from the fifth recital in the preamble to the Directive, it is necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax. It is stated, however, that the Federal Republic of Germany and the Hellenic Republic, by reason of the particular nature of their corporate tax systems, and the Portuguese Republic, for budgetary reasons, should be authorised temporarily to maintain a withholding tax.

83 On that basis, Article 5(1) of the Directive establishes the principle that withholding taxes on profits distributed by a subsidiary established in one Member State to its parent company established in another Member State are prohibited. The temporary derogations for the German, Greek and Portuguese tax systems, announced in the fifth recital, are laid down in express terms in Article 5(2), (3) and (4) of the Directive. There is no similar provision establishing an express derogation for the United Kingdom tax system.

84 It has, however, been submitted in the present proceedings, without being contested, that account was taken when drawing up Article 7(2) of the Directive of the United Kingdom system under which the distribution of dividends is accompanied by a right to payment of a partial tax credit where a double taxation convention concluded between the Member State of the parent company and the United Kingdom so provides and the aggregate amount of the distributed dividend and the partial tax credit is subject in the United Kingdom to the 5% charge. Such an argument presupposes that that charge is, at least in part, a withholding tax within the meaning of Article 5(1) of the Directive.

85 The Italian and United Kingdom Governments and the Commission deduce therefrom that Article 7(2) of the Directive entitles Member States to derogate from the prohibition in principle of withholding tax on profits distributed by the subsidiary and to tax the distribution of profits in the hands of the parent company where the provision imposing the tax forms an integral part of a body of domestic or agreement-based provisions which are designed to lessen economic double taxation of dividends (which is in principle so in the case of a bilateral convention for the avoidance of double taxation) and relate to the payment of tax credits to the recipients of dividends.

86 It is to be remembered that derogations from a general principle are to be interpreted strictly. As regards, in particular, the principle of exemption from withholding tax laid down in Article 5(1) of the Directive, the Court thus held at paragraph 27 of its judgment in *Denkavit and Others*, cited above, in relation to Article 3(2) of the Directive that since Article 3(2) constitutes a derogation from that principle it is to be interpreted strictly and that the option which it allows the Member States cannot be given an interpretation going beyond its actual words.

87 In the context of the convention at issue in the main proceedings, the 5% charge was established directly in conjunction with payment of a tax credit which was introduced in order to mitigate the economic double taxation of dividends paid by a subsidiary established in the United Kingdom to its parent company established in the Netherlands. That charge, which amounts to a withholding tax within the meaning of Article 5(1) of the Directive in so far as it is imposed on the dividends, was not, as the Italian Government has pointed out, set at a rate such as to cancel out the effects of that lessening of the economic double taxation of dividends. In any event, any tax paid in the United Kingdom in respect of the dividends remains deductible from the tax due in the Netherlands, pursuant to Article 22(2)(c) of the convention at issue in the main proceedings.

88 The withholding tax at issue in the main proceedings may accordingly be regarded as falling within a body of agreement-based provisions relating to the payment of tax credits to the recipients of dividends and as designed thereby to mitigate double taxation.

89 The answer to the second question must therefore be that Article 7(2) of the Directive is to be interpreted as allowing taxation such as the 5% charge envisaged by the double taxation convention at issue in the main proceedings even though that charge, in so far as it applies to dividends paid by the subsidiary to its parent company, amounts to a withholding tax within the meaning of Article 5(1) of the Directive.

Consideration of the third question referred for a preliminary ruling

90 By their third question, the Special Commissioners seek to ascertain whether Article 7(2) of the Directive is invalid for want of reasoning or failure to consult the Economic and Social Committee and the European Parliament, with the result that it does not have the effect of preserving the right of the United Kingdom to charge the 5% tax.

Observations submitted to the Court

91 Océ NV submits that Article 7(2) of the Directive must be considered invalid both for want of reasoning and for failure to consult the Economic and Social Committee and the European Parliament.

92 It contends that, in breach of Article 253 EC, there is not an adequate statement of reasons for Article 7(2) of the Directive. The Directive lacks reasoning with regard to Article 7(2) since no recital in the preamble refers to such a derogation, in contrast to the other derogations contained in the Directive. The fifth recital sets out the principle that, in order to ensure fiscal neutrality, it is necessary that the profits which a subsidiary distributes to its parent company be exempt from withholding tax. Océ NV contends that any exception to that principle should require an explanation. In the case of the express exceptions in Article 5, the fifth recital thus envisages the existence of temporary derogations in favour of certain Member States. By contrast, no reason is given for the exception contained in Article 7(2) of the Directive, which cannot therefore be upheld.

93 Océ NV adds that the text in its initial version submitted to the European Parliament and the Economic and Social Committee contained the original proposal from the Commission (JO 1969 C 39, p. 7) and did not include anything equivalent to the present Article 7. The opinion of the European Parliament and of the Economic and Social Committee was obtained only on the initial version and not on the final version. However the requirement, in particular, to consult the Parliament is especially important. It is thus apparent from settled case-law that the Council must send a proposal back to the Parliament whenever the text finally adopted, taken as a whole, departs substantially from the text on which the Parliament has been consulted. In the present case, Océ NV takes the view that the changes which occurred between the two versions are significant, because a provision which enables any Member State with a tax credit system to charge withholding tax on the cross-border distribution of profits, provided there is a tax credit, amounts to a substantial departure from the initial text. The changes which led to the insertion of Article 7(2) should therefore have required those two organs to be consulted for a second time.

94 The United Kingdom Government, the Council and the Commission contend that Article 7(2) of the Directive is not vitiated by any formal or procedural defect such as to affect its validity.

95 They argue that it is sufficient if there is a general statement of reasons for the Directive as a whole and for its main components. It is not necessary for there to be a specific statement of reasons for each paragraph and subparagraph of a directive, in particular where the provision in question merely adjusts or clarifies a point of detail in a manner consistent with the purpose of the directive. Article 7(2) of the Directive is, in essence, merely a technical adjustment on a point of detail which is consistent with the Directive's general scheme and designed to facilitate the interaction between the Directive and certain double taxation conventions which pursue the same objective.

96 For the same reason, the insertion of Article 7(2) into the Directive does not represent a substantial change to the proposal on which the Parliament had been consulted. The change in question affects neither the intrinsic tenor nor the very essence of the measure. The same logic applies in relation to consultation of the Economic and Social Committee.

The Court's answer

97 As regards the alleged lack of reasoning as to Article 7(2) of the Directive, it is settled case-law that the scope of the obligation to state reasons depends on the nature of the measure in question and, where a measure of general application is involved, the statement of reasons may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other (see, to this effect, Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 25; Case C-284/94 *Spain* v *Council* [1998] ECR I-7309, paragraph 28; and Case C-168/98 *Luxembourg* v *Parliament and Council* [2000] ECR I-9131, paragraph 62).

98 Furthermore, the Court has repeatedly held that, if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made (*United Kingdom* v *Council*, paragraph 26, *Spain* v *Council*, paragraph 30, and *Luxembourg* v *Parliament and Council*, paragraph 62).

99 As the Advocate General observes in point 57 of his Opinion, the Directive clearly indicates in its statement of reasons the general objective it pursues, that is to say, fiscal neutrality of cross-border distribution of profits. That statement of reasons is sufficient to cover also the clause preserving domestic or agreement-based provisions which pursue the same objective, namely Article 7(2) of the Directive.

100 As regards the lack of consultation of the Parliament and the Economic and Social Committee, it is clear from the Court's settled case-law that the requirement to consult the European Parliament in the legislative procedure, in the cases provided for by the Treaty, means that it must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted (see, to this effect, Case C-392/95 *Parliament* v *Council* [1997] ECR I-3213, paragraph 15, and Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 46).

101 It is necessary to examine whether the insertion of Article 7(2) into the text of the Directive represents a substantial change to the text on which the Parliament and the Economic and Social Committee were consulted.

102 Since Article 7(2) of the Directive merely enables specific sets of domestic or agreement-based rules to continue to apply, where they are consistent with the aim of the Directive as set out in the third recital in its preamble and recalled in paragraph 45 of the present judgment, the insertion of Article 7(2) into the text of the Directive must be regarded as a technical adjustment and does not constitute a substantial change requiring consultation of the Parliament and the Economic and Social Committee for a second time.

103 Consequently, the answer to be given to the Special Commissioners is that examination of the third question has revealed no formal or procedural defects such as to affect the validity of Article 7(2) of the Directive.

Costs

104 The costs incurred by the Italian and United Kingdom Governments 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 proceedings pending before the Special Commissioners, the decision on costs is a matter for them.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Special Commissioners of Income Tax (United Kingdom) by order of 6 February 2001, hereby rules:

1. In so far as taxation such as the 5% charge envisaged by the double taxation convention at issue in the main proceedings is imposed on the dividends paid by a subsidiary resident in the United Kingdom to its parent company resident in another Member State, it amounts to a withholding tax on profits which a subsidiary distributes to its parent company within the meaning of Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 on the common

2. Article 7(2) of Directive 90/435 is to be interpreted as allowing taxation such as the 5% charge envisaged by the double taxation convention at issue in the main proceedings even though that charge, in so far as it applies to dividends paid by the subsidiary to its parent company, amounts to a withholding tax within the meaning of Article 5(1) of the Directive.
3. Examination of the third question has revealed no formal or procedural defects such as to affect the validity of Article 7(2) of the Directive.
Wathelet

Edward

La Pergola

Jann

Rosas

Delivered in open court in Luxembourg on 25 September 2003.
R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber

1 – Language of the case: English.