Council of State, 9th - 10th joint chambers, 08/11/2024, 471147

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No. 471147

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Reading for Friday, November 8, 2024

Reporter

Mr. Olivier Saby

Public Rapporteur

Mrs. Emilie Bokdam-Tognetti

Lawyer(s)

SCP CELICE, TEXIDOR, PERIER

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

In view of the following procedure:

Foncière Vélizy Rose requested the Montreuil administrative court to order, as a principal, the discharge of the withholding tax to which it was subject for the year 2014 as well as the corresponding penalties and, as a subsidiary, the reduction of this withholding tax by application of the 5% rate provided for in Article 8 of the Franco-Luxembourg tax treaty. By judgment No. 2003368 of September 23, 2021, this court rejected its request.

By judgment No. 21PA05986 of December 7, 2022, the Paris administrative court of appeal dismissed the appeal filed by Foncière Vélizy Rose against this judgment.

By a summary appeal, a supplementary brief and two new briefs, registered on 7 February and 9 May 2023 and on 2 February and 6 May 2024 at the litigation secretariat of the Council of State, Foncière Vélizy Rose asks the Council of State:

1°) to annul this judgment;

2°) to order the State to pay the sum of 10,000 euros under Article L. 761-1 of the Code of Administrative Justice.

Having regard to the other documents in the case file;

Having regard to:
- the Constitution;
- the Treaty on the Functioning of the European Union;
- Directive 90/435/EEC of 23 July 1990;
- Council Directive 2011/96/EU of 30 November 2011;
- the convention between France and the Grand Duchy of Luxembourg for the avoidance of double taxation and the establishment of rules for mutual administrative assistance in matters of income and wealth taxes, signed on 1 April 1958;
- the convention between France and Germany for the avoidance of double taxation and the establishment of rules for mutual administrative assistance in matters of income and wealth taxes, signed on 21 July 1959;
- the General Tax Code and the Book of Tax Procedures;
- the Code of Administrative Justice;

After hearing in public session:

- the report of Mr Olivier Saby , Master of Requests,

- the submissions of Ms Emilie Bokdam-Tognetti , public rapporteur

; The floor having been given, after the submissions, to SCP Célice , Texidor , Perier, lawyer for Foncière Vélizy Rose;

Considering the following:

1. It is clear from the documents in the case submitted to the trial judges that the company Foncière Vélizy Rose (FVR) was the subject of an accounting audit covering the financial years ending 31 December 2013, 2014 and 2015. At the end of these proceedings, the tax authorities challenged in particular the exemption from withholding tax that the company FVR had claimed on the basis of Article 119 ter of the General Tax Code in respect of the interim dividend of EUR 3.6 million that it had paid in 2014 to the Luxembourg company Vélizy Rose Investment (VRI). FVR is appealing the judgment of 7 December 2022 by which the Paris Administrative Court of Appeal dismissed its appeal against the judgment of 23 September 2021 by which the Montreuil Administrative Court dismissed its application seeking, primarily, to be discharged from this withholding tax and, in the alternative, to reduce it by applying the 5% rate provided for in 1. a) of 2 of

Article 8 of the Franco-Luxembourg tax treaty.

2. On the one hand, under the terms of 2 of Article 119 bis of the General Tax Code, in its wording applicable to the tax year in dispute: "The products referred to in Articles 108 to 117 bis give rise to the application of a withholding tax, the rate of which is set by Article 187 when they benefit persons who do not have their tax domicile or registered office in France (...)". Under the terms of Article 119 ter of the same code: "1. The withholding tax provided for in 2 of Article 119 bis is not applicable to dividends distributed to a legal person that meets the conditions listed in 2 of this article by a company or organization subject to corporation tax at the standard rate. / 2. To benefit from the exemption provided for in 1, the legal person must provide proof to the debtor or the person who ensures the payment of this income that it is the beneficial owner of the dividends and that it meets the following conditions: / a) Have its effective place of management in a Member State of the European Union or in another State party to the Agreement on the European Economic Area which has concluded with France an administrative assistance agreement to combat tax fraud and evasion and not be considered, under the terms of a double taxation agreement concluded with a third State, as having its tax residence outside the European Union or the European Economic Area; (...)". Under the terms of Article 187 of the same Code, in its wording applicable to the tax year in dispute: "(...),the rate of withholding tax provided for in Article 119a is set at: (...) - 30% for all other income."

3. On the other hand, under the terms of Article L. 64 of the Tax Procedures Code: "In order to restore their true nature, the administration is entitled to dismiss, as not being enforceable against it, acts constituting an abuse of rights, either because these acts are fictitious in nature, or because, seeking the benefit of a literal application of the texts or decisions contrary to the objectives pursued by their authors, they could not have been inspired by any other motive than that of evading or reducing the tax burdens that the person concerned, if these acts had not been passed or carried out, would normally have borne in view of his situation or his real activities. (...)".

4. First, in order to dismiss the applicant company's argument that the tax authorities had implicitly resorted to the procedure for the suppression of abuse of rights without offering it the guarantees provided for in Article L. 64 of the Book of Tax Procedures cited in point 3, the court held that after having noted in particular that the Luxembourg company VRI had received, from the French company FVR, of which it held the entire share capital, an interim dividend of EUR 3.6 million on 2 July 2014 and that it had paid the same amount the following day to its sole shareholder, the Luxembourg company Dewnos Investment, when it had no other funds available, and having considered that the Luxembourg company VRI had no other activity than that of holding the securities of the French company FVR, the tax authorities had confined themselves to considering that the

Luxembourg company VRI could not be regarded as being the beneficiary effective, within the meaning and for the application of Article 119 ter of the General Tax Code cited in point 2, of the sum of EUR 3.6 million without dismissing any act as not being enforceable against it. In ruling in this way, the court, which provided sufficient reasons for its judgment, did not commit an error of law or give the facts of the case, which it did not distort, an inaccurate legal characterization.

5. Secondly, the applicant company maintains that the court erred in law in holding that the argument that the implementation of Articles 119a and 119b of the General Tax Code constituted an infringement of the freedom of establishment enshrined in Articles 49 and 54 of the Treaty on the Functioning of the European Union could not be usefully invoked in support of its application for discharge, whereas this argument was, in its view, effective and well-founded since the condition relating to the status of beneficial owner of dividends applied to parent companies established in a Member State other than France is not required for the application to distributions between companies established in France of the parent company regime resulting from the provisions of Articles 145 and 216 of the General Tax Code, that the challenge to the exemption from withholding tax on the basis of Article 119b of the General Tax Code weighs solely on the French distributing subsidiary, whereas that a French parent company alone bears the challenge to the parent company regime from which it may have unduly benefited, and that the tax rate applied to this subsidiary is higher than that to which this French parent company would be subject.

6. Under Article 4 of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, which essentially reproduces the provisions of Directive 90/435/EEC of 23 July 1990: "1. Where a parent company or its permanent establishment receives, in respect of the association between the parent company and its subsidiary, profits distributed otherwise than on the occasion of the liquidation of the latter, the Member State of the parent company and the Member State of its permanent establishment shall: / (a) either refrain from taxing those profits; / (b) or tax them while authorising the parent company and the permanent establishment to deduct from the amount of their tax the portion of the corporation tax relating to those profits and paid by the subsidiary and any sub-subsidiary, (...), within the limit of the amount of the corresponding tax due. (...) 3. Any Member State may provide that expenses relating to the participation and capital losses resulting from the distribution of the profits of the subsidiary are not deductible from the taxable profits of the parent company. (...) ". Under the terms of Article 5(1) of this Directive: "Profits distributed by a subsidiary to its parent company are exempt from withholding tax". Under the terms of Article 6 of this same Directive:"The Member State to which the parent company belongs may not levy withholding tax on the profits which that company receives from its

subsidiary."

7. On the one hand, it follows from the grounds of the judgment of the Court of Justice of the European Union (CJEU) of 26 February 2019, Skatteministeriet v T Danmark and Y Denmark Aps (cases C-116/16 and C 117/16) that the status of beneficial owner of the dividends must be regarded as a condition for benefiting from the exemption from withholding tax provided for in Article 5 of Directive 90/435/EEC of 23 July 1990, reproduced in Article 5 of Directive 2011/96/EU of 30 November 2011. Consequently, Article 119 ter(2) of the General Tax Code, insofar as it makes the benefit of the exemption from withholding tax subject to the condition that the legal person receiving the dividends provides proof to the debtor or the person ensuring payment that it is the beneficial owner, is not incompatible with the objectives of the directive. On the other hand, the parent company regime resulting from the provisions of Articles 145 and 216 of the General Tax Code, which comes from previous legislative texts and which has not been amended following the intervention of Directive 90/435/EEC of 23 July 1990 and then Directive 2011/96/EU of 30 November 2011, must be regarded as ensuring the transposition of the objectives of this directive. Since the legislature did not intend to treat differently the situations concerning only French companies and those which, concerning companies from different Member States, are the only ones within the scope of the directive, the provisions in question must therefore be interpreted in the light of these objectives, since such an interpretation is not contrary to their letter. Since the provisions of Articles 145 and 216 of the General Tax Code must be regarded as transposing the objectives of Article 4 of Directive 90/435/EEC of 23 July 1990, reproduced in Article 4 of Directive 2011/96/EU of 30 November 2011, they must therefore be read in the light of these objectives. Consequently, and since in both cases French law is consistent with the objectives of the Directive, the applicant company cannot usefully argue that the provisions of the General Tax Code would establish a difference in tax treatment between parent companies receiving dividends from a subsidiary established in France of which they are not the beneficial owners, depending on whether they are themselves established in France or in another Member State of the European Union, which infringes the freedom of establishment.

8. Furthermore, the fact that a distributing subsidiary established in France is liable for the withholding tax provided for in Article 119 bis, paragraph 2, of the General Tax Code is inherent in this taxation technique and has no impact on the taxpayer status of the non-resident beneficiary company from which the subsidiary may request reimbursement of this tax paid on its behalf. Consequently, in any event, the applicant company is not justified in arguing that the challenge to the exemption from withholding tax would fall solely on the French distributing subsidiary, while a French parent company would bear alone the challenge to the regime resulting from Articles 145 and 216 of the General Tax Code from which it had unduly benefited.

9. Finally, the fact that the withholding tax which was not spontaneously levied when dividends were paid is established on a basis increased by the amount of the withholding tax in order to reconstitute the gross amount of dividends received by the beneficiary company does not, contrary to what the applicant company maintains, have either the purpose or the effect of applying to the gross basis thus reconstituted a rate higher than that provided for in Article 187 of the General Tax Code cited in point 2, which is, moreover, lower than the rate of corporation tax which would have been applied, in the year of the disputed assessment, to a French parent company not benefiting from the regime provided for by Articles 145 and 216 of the same code, on the basis of the receipt of the same gross amount of dividends.

10. It is appropriate to substitute the grounds set out in paragraphs 7 to 9, which are exclusive of any assessment of fact and which justify the operative part of the contested judgment on this point, for those relied on by the Court to dismiss the argument that the application of Articles 119a and 119b of the General Tax Code would constitute an infringement of freedom of establishment. Consequently, the grounds directed against the grounds thus substituted are ineffective and can only be dismissed.

11. Thirdly, in ruling, in light of the facts set out in point 4, which it did not distort, that the Luxembourg company VRI could not be regarded as the beneficial owner of the interim dividend of EUR 3.6 million in dispute, within the meaning and for the application of Article 119 ter of the General Tax Code cited in point 2, the court, which did not disregard the rules on the devolution of the burden of proof and provided sufficient reasons for its judgment, did not commit an error of law or inaccurately characterise the facts submitted to it.

12. Fourthly, the absence of an express clause in a tax treaty subordinating the application of a reduced withholding tax rate to the status of beneficial owner of a dividend from a French source does not prevent the tax administration from refusing this conventional advantage to the recipient of this income who is only the apparent beneficiary.

13. On the one hand, under the terms of Article 8 of the tax convention signed between France and Luxembourg on 1 April 1958: "1. Dividends paid by a company which has its tax domicile in a Contracting State to a person who has his tax domicile in the other Contracting State are taxable in that other State. / 2. a) However, these dividends may be taxed in the Contracting State where the company paying the dividends has its tax domicile, and according to the legislation of that State, but the tax so imposed may not exceed: 1. 5% of the gross amount of the dividends if the beneficiary of the dividends is a capital company which directly holds at least 25% of the share capital of the capital company distributing

the dividends; 2. 15% of the gross amount of the dividends, in all other cases". Under the terms of Article 10a of this convention: "To benefit from the provisions of Article 8, paragraphs 2, 3 and 4, (...) the person who has his tax domicile in one of the Contracting States must produce to the tax authorities of the other Contracting State a certificate, endorsed by the tax authorities of the first State, specifying the income for which the benefit of the provisions referred to above is requested and certifying that this income and the payments provided for in Article 8, paragraphs 3 and 4, will be subject to direct taxes, under the conditions of ordinary law, in the State where he has his tax domicile. / (...)". On the other hand, under the terms of Article 9 of the tax convention signed between France and Germany on July 21, 1959: "(1) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State. / (2) Each of the Contracting States retains the right to collect tax on dividends by way of withholding tax, in accordance with its legislation. However, this withholding tax may not exceed 15% of the gross amount of the dividends."

14. Neither the provisions of Articles 8 of the Franco-Luxembourg Convention and 9 of the Franco-German Convention, which predate the introduction of a so-called beneficial owner clause in Article 10, entitled "'dividends'", of the model tax convention on income and on capital established by the Organisation for Economic Co-operation and Development, in the version adopted by its Council on 11 April 1977, nor any of the elements relating to the context or purpose for which these conventions were established, prevent the benefit of the application of the reduced rate of withholding tax provided for therein for dividend income paid to a resident of the other State party to the convention from being subject to the condition that the resident in question is the beneficial owner of such income. Consequently, these conventions are not applicable when the recipient of dividends from French sources, who is a resident of Luxembourg or Germany, is only the apparent beneficiary thereof. On the other hand, they are likely to apply when the beneficial owner of such income resides in one or other of these States, even if they have been paid to an intermediary established in a third State.

15. While the status of beneficial owner of the interim dividend in dispute of the Luxembourg company Dewnos Investment and MA.., in the respective amounts of EUR 360,000 and EUR 24,192, is clearly apparent from the documents in the file submitted to the trial judges, in particular the rectification proposal of 21 December 2017, the same is not true of their status as tax residents of Luxembourg and Germany respectively, nor, as regards the company Dewnos Investment, of compliance with the condition provided for in Article 10 bis of the Franco-Luxembourg tax convention cited in point 13. Consequently, and in any event, the applicant company is not justified in arguing that the withholding tax rate of 15% provided for in the provisions of 2. a) of 2 of Article 8 of the Franco-Luxembourg tax convention and Article 9 of the Franco-German tax convention.

16. It follows from all of the above that Foncière Vélizy Rose is not entitled to request the annulment of the judgment it is contesting.

17. The provisions of Article L. 761-1 of the Code of Administrative Justice prevent a sum from being charged to the State in this respect, which is not, in these proceedings, the losing party.

DECIDES:

Article 1:The appeal of the company Foncière Vélizy Rose is dismissed.
Article 2: This decision will be notified to Foncière Vélizy Rose and to the Minister to the Prime Minister, responsible for the budget and public accounts.

Deliberated at the end of the session of September 25, 2024, attended by: Mr. Pierre Collin , Deputy President of the Litigation Section, presiding; Mr. Bertrand Dacosta , Ms. Anne Egerszegi , Chamber Presidents; Mr. Nicolas Polge , Mr. Vincent Daumas , Mr. Olivier Yeznikian , Ms. Rozen Noguellou , Mr. Didier Ribes, State Councilors and Mr. Olivier Saby , Master of Requests-Rapporteur.

Delivered on November 8, 2024.

The President:
Signed: Mr. Pierre Collin
The Rapporteur:
Signed: Mr. Olivier Saby
The Secretary:
Signed: Ms. Fehmida Ghulam
The Republic orders and commands the Minister to the Prime Minister, responsible for the budget and public accounts as far as he is concerned, or any justice commissioners so requested with regard to common law remedies against private parties, to provide for the execution of this decision.
For proper dispatch,
For the Litigation Secretary, by delegation: