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JUDGMENT OF THE COURT (Seventh Chamber)

18 October 2012 (*)

(Reference for a preliminary ruling – Admissibility – Reference by domestic law to European Union law – Directive 90/435/EEC – Directive 90/434/EEC – Prevention of economic double taxation – Exception – Liquidation of a subsidiary upon a merger – Distribution of profits – Concept of ‘liquidation’)

In Case C-371/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hof van Beroep te Gent (Belgium), made by decision of 28 June 2011, received at the Court on 13 July 2011, in the proceedings

**Punch Graphix Prepress Belgium NV**

v

**Belgische Staat,**

THE COURT (Seventh Chamber),

composed of J. Malenovský, acting as President of the Seventh Chamber, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Punch Graphix Prepress Belgium NV, by J. Dumon, advocaat,

– the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the European Commission, by W. Mölls and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 4(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), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) (‘Directive

90/435’).

2 The reference has been made in proceedings between Punch Graphix Prepress Belgium NV (‘Punch Graphix’) and Belgische Staat concerning the taxation of profits realised by Punch Graphix upon a merger by acquisition through which Strobbe Graphics NV (‘Strobbe Graphics’), subsequently Punch Graphix, acquired the companies Advantra Belgium NV (‘Advantra Belgium’) and Strobbe NV (‘Strobbe’).

**Legal context**

*European Union legislation*

Directive 90/435

3 The first, third and fourth recitals in the preamble to Directive 90/435 state:

‘Whereas the grouping together of companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; …

…

Whereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies;

Whereas 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 such profits while authorizing 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.’

4 Article 4(1) of that directive states:

‘Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:

– refrain from taxing such profits, or

– tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.'

5 Directive 90/435 was replaced by 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 (OJ 2011 L 345, p. 8).

Directive 90/434/EEC

6 The first recital in the preamble to Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 1990 L 225, p. 1), as amended by Directive 2006/98 ('Directive 90/434') provides:

'Whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; … '

7 Under Article 1(a) of that directive:

'Each Member State shall apply this Directive to the following:

(a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares involving companies from two or more Member States.'

8 Article 2 of Directive 90/434 states:

'For the purposes of this Directive:

(a) "merger" shall mean an operation whereby:

– …

– a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital.'

9 Directive 90/434 was replaced by Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 2009 L 310, p. 34).

*Belgian legislation*

10 Article 671 of the Companies Code reads as follows:

'Merger by acquisition shall mean the operation whereby one or more companies are dissolved without going into liquidation and transfer to another all their assets and liabilities in exchange for

the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and, as the case may be, a cash payment not exceeding one-tenth of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.'

11 Articles 208 to 210 of the Income Tax Code 1992 ('ITC 92') provide:

'Article 208

Companies in liquidation remain subject to corporation tax …

Their profits include the surpluses realised or determined on the basis of the division of their assets.

Article 209

When the corporate assets of a company are divided due to dissolution or for any other reason, the positive difference between the distributions in cash, in securities or in any other form, and the revalued value of the capital paid in, shall be regarded as a distributed dividend.

Article 210

(1) Articles 208 and 209 shall also apply:

(i) to a merger by acquisition, to a merger by the establishment of a new company, to division by acquisition, to division by the establishment of new companies, to a mixed division or to an operation treated as a merger by acquisition;

…

(2) In the cases mentioned in paragraph 1 above, the actual value of the company assets at the date on which the operations concerned took place shall be treated like the sum distributed during the distribution of the assets of a company.

…'

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

12 During 2001 a 'silent' merger was concluded between Advantra Belgium, Strobbe and Strobbe Graphics, which had its registered office in Belgium. Prior to that, Strobbe Graphics was the 100% shareholder of the other two companies. The transaction was a merger by acquisition within the meaning of Article 671 of the Companies Code, in which Advantra Belgium and Strobbe were dissolved without going into liquidation and all their assets were transferred to Strobbe Graphics, which subsequently became Punch Graphix.

13 As the acquiring company, Punch Graphix realised a merger surplus of EUR 10 669 985.69. Some 95% or EUR 10 136 486.41 of that amount could in principle be deducted from the taxable profits as 'definitively taxed income'. However, in the 2002 tax year Punch Graphix's taxable profits only amounted to EUR 8 206 489.70, so that the difference could not be deducted for the year 2002.

14 In its return for the 2003 tax year Punch Graphix did not claim the 'definitively taxed income' deduction which was to be carried over.

15 On 19 October 2007 Punch Graphix submitted an application for remission due to double

taxation. It claimed that limiting the 'definitively taxed income' deduction to the amount of the profits for the year in which the merger surplus was realised was contrary to Article 4(1) of Directive 90/435. It requested that the 'definitively taxed income' in the amount of EUR 911 426.85 which had not been applied, be applied for the 2002 financial year, relevant to the 2003 tax year.

16 That request for remission was refused by the tax authority by decision of 8 May 2008.

17 By application of 5 August 2008 Punch Graphix brought an action before the Rechtbank van Eerste Aanleg te Brugge (Court of First Instance, Bruges).

18 In its judgment of 28 October 2009, the Rechtbank van Eerste Aanleg te Brugge dismissed the action. Although that Court did accept Punch Graphix's contention that the Belgian 'definitively taxed income' system, in principle, breaches Article 4(1) of Directive 90/435 by not allowing the unused amount of the 'definitively taxed income' deduction to be carried forward to subsequent financial years, it rejected Punch Graphix's application, finding that the merger surplus at issue in the present case is covered by the exception contained in that provision in so far as it was a case of 'liquidation' of subsidiaries.

19 Punch Graphix appealed against that judgment to the Hof van Beroep te Gent (Court of Appeal, Ghent).

20 According to the referring court, the tax authority admits that the Belgian system of 'definitively taxed income' deductions breaches Article 4(1) of Regulation 90/435 in so far as it does not allow the carry forward to subsequent financial years of the amount of the 'definitively taxed income' deduction which could not be used because the taxable profit was insufficient. It also states that the discussion before it between the parties concerns the question whether the merger at issue must be considered to be a 'liquidation' within the meaning of Article 4(1) of Directive 90/435.

21 The referring court considers that the key question in this case is whether the national tax authorities may define the scope of Article 4(1) of Directive 90/435, and more specifically of the exceptions for which it provides, by referring to a provision of domestic law, and more specifically to a deeming provision, or indeed a fiction, by which it is giving its own interpretation of a provision of European Union law. By deeming, through application of Articles 208 and 210 of the ITC 92, a merger by acquisition to be a liquidation of a subsidiary the Belgian system excludes such a transaction from the application of the rule laid down in Article 4(1) of Directive 90/435.

22 In those circumstances, the Hof van Beroep te Gent decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can the national tax authorities exclude the application of Article 4(1) of Council Directive 90/435/EEC of 23 July 1990 … on the basis of the provision in that Article that it is not applicable in a case where the subsidiary is liquidated, by relying on a provision of domestic law (here, Article 210 of the [ITC 92]) which treats a merger by acquisition where in reality no liquidation of the subsidiary takes place, as a merger where liquidation of the subsidiary does in fact take place?'

**Admissibility of the reference for a preliminary ruling**

23 The admissibility of the reference for a preliminary ruling is called into question by the German Government, which claims that the transaction at issue before the referring court is a purely internal situation involving only Belgian companies and is not, therefore, governed by Directive 90/435, since that applies solely to the cooperation of companies of different Member States.

24 According to the German Government, the admissibility of the reference for a preliminary ruling cannot be permitted on the basis of the case-law of the Court relating to references by national law to the provisions of European law in respect of internal situations. First, the referring court in no way mentions a reference by Belgian law to Directive 90/435. Second, Directive 90/435 does not seek to regulate the tax consequences of a merger, since that question is exclusively governed by Directive 90/434. Therefore, the rule laid down by Article 4(1) of Directive 90/435 cannot be extended by a reference by national law to a situation which is not covered by that provision, but regulated, in European Union law, by Directive 90/434.

25 It is not disputed that the main proceedings relate to a provision of domestic law which applies to a purely national context whereas Directive 90/435 applies to distributions of profits received by companies of one Member State which come from their subsidiaries in other Member States (see Case C-138/07 *Cobelfret* [2009] ECR I-731, paragraph 20).

26 However, it is apparent, first, from the reference for a preliminary ruling that the parties at issue start from the premiss that domestic Belgian law refers, as regards the system of 'definitively taxed income', to Directive 90/435, which the Belgian Government also confirmed in its written observations submitted to the Court. Furthermore, the existence of such a reference by Belgian law to Directive 90/435, and the admissibility of a reference for a preliminary ruling under that reference, has already been recognised by the case-law of the Court, of which the most recent example is the order in Joined Cases C-439/07 and C-499/07 *KBC Bank and Beleggen, Risicokapitaal, Beheer* [2009] ECR I-4409, paragraphs 58 and 59.

27 Second, according to settled case-law, where domestic legislation adopts for purely internal situations the same solutions as those adopted by European Union law, it is for the national court alone, in the context of the division of judicial functions between national courts and the Court of Justice under Article 267 TFEU, to assess the precise scope of that reference to European Union law, the jurisdiction of the Court of Justice being confined to the examination of provisions of that law (*KBC Bank and Beleggen, Risicokapitaal, Beheer*, paragraph 59 and the case-law cited).

28 Therefore, the admissibility of the reference for a preliminary ruling cannot be called into question on the basis of the assumption that the substantive scope of Article 4(1) of Directive 90/435 does not relate to a situation such as that at issue before the referring court which is, in principle, governed exclusively by Directive 90/434.

29 It follows from the foregoing that an answer must be given to the question referred for a preliminary ruling.

**Consideration of the question referred**

30 By its question the national court asks, in essence, whether the concept of 'liquidation' in Article 4(1) of Directive 90/435 must be interpreted as meaning that the dissolution of a company in the context of a merger by acquisition is considered to be such a liquidation.

31 That question is asked in a context in which Belgian law deems such an operation to be liquidation of a subsidiary. Thus, according to the Belgische Staat, the general rule provided for in

Article 4(1) of Directive 90/435, namely the obligation to avoid economic double taxation of distributed profits, is not applicable because of the exception relating to distributed profits ‘when the subsidiary is liquidated’.

32 In order to reply to that question, it should be noted that Directive 90/435 does not define the concept of ‘liquidation’.

33 However, according to the third indent of Article 2(a) of Directive 90/434, a ‘merger’ is defined as being an ‘operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital’.

34 It is true that that definition of ‘merger’ appears in Directive 90/434 and not in Directive 90/435. However, that fact does not prevent that definition from being taken into account for the purposes of the interpretation of the concept of ‘liquidation’ within the meaning of Article 4(1) of Directive 90/435.

35 It is important to note that the proposal for Directive 90/435 was submitted by the European Commission on the same day as that for Directive 90/434, that those two directives were adopted on the same day by the Council of the European Union and were also expected to be transposed simultaneously. Furthermore, materially, as is clear from the first recital in their preamble, those directives have the same objective to abolish restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States for the operations covered by those directives, namely, as regards Directive 90/435, cooperation between parent companies and subsidiaries of different Member States, and, as regards Directive 90/434, mergers, divisions, and transfers of assets concerning companies of different Member States. Accordingly, those directives, governing different types of transnational cooperation between companies, constitute, according to the legislature’s plan, a whole, in that they complement each other.

36 Accordingly, that definition of the concept of ‘merger’ in the third indent of Article 2(a) of Directive 90/434 is also relevant for the interpretation of the concept of ‘liquidation’ within the meaning of Article 4(1) of Directive 90/435, so that the dissolution of a company in the context of a merger by acquisition cannot be considered to be a ‘liquidation’ within the meaning of that latter provision.

37 In the light of the foregoing, the answer to the question is that the concept of ‘liquidation’ in Article 4(1) of Directive 90/435 must be interpreted as meaning that the dissolution of a company in the context of a merger by acquisition cannot be considered to be such a liquidation.

**Costs**

38 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 (Seventh Chamber) hereby rules:

**The concept of ‘liquidation’ in Article 4(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, as amended by Council Directive 2006/98/EC of 20 November 2006, must be interpreted as meaning that the dissolution of a company in the context of a merger by acquisition cannot be considered to be such a liquidation.**

[Signatures]

*Language of the case: Dutch.