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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

17 October 2019 (*)

(Reference for a preliminary ruling — Tax legislation — Corporation tax — Deduction for risk capital — Reduction of the amount deductible by companies with a permanent establishment in another Member State which generates exempt income under a double taxation convention — Article 49 TFEU — Freedom of establishment — Unfavourable treatment — No such treatment)

In Case C?459/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp, Belgium), made by decision of 29 June 2018, received at the Court on 16 July 2018, in the proceedings

Argenta Spaarbank NV

v

Belgische Staat,

THE COURT (Seventh Chamber),

composed of P.G. Xuereb, President of the Chamber, T. von Danwitz and A. Kumin (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Argenta Spaarbank NV, by B. De Cock and K. Van Duyse, advocaten,

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

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

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between Argenta Spaarbank NV (‘Argenta’) and Belgische Staat (the Belgian State) concerning calculation of the amount of the deduction for risk

capital in respect of the 2015 tax year.

Legal context

Belgian law

3 The deduction for risk capital was inserted into the income tax regime by the wet tot invoering van een belastingaftrek voor risicokapitaal (Law introducing a tax deduction for risk capital) of 22 June 2005 (*Belgisch Staatsblad*, 30 June 2005, p. 30077).

4 According to its explanatory memorandum, the objective of that law is inter alia to reduce the difference in tax treatment between the financing of companies with loan capital, the return on which is entirely tax deductible, and financing with equity capital (risk capital), the return on which was fully taxed until then, and to increase the solvency ratio of companies, the introduction of the deduction for risk capital falling within the general aim of improving the competitiveness of the Belgian economy.

5 Article 205a of the Wetboek van de inkomstenbelastingen 1992 (Income Tax Code 1992), in the version applicable to the 2015 tax year, reads as follows:

'For the purpose of determining taxable income, the basis of assessment shall be reduced by the amount fixed in accordance with Article 205c. This reduction is referred to as the "the deduction for risk capital".'

6 Under Article 205c(1) of the Income Tax Code 1992, the deduction for risk capital is equal to the risk capital, determined in accordance with Article 205b of the Income Tax Code 1992, multiplied by a rate laid down in the following paragraphs of Article 205c.

7 The first subparagraph of Article 205b(1) provides that, in order to determine the deduction for risk capital in respect of a tax period, the risk capital to be taken into account corresponds, subject to the provisions of Article 205b(2) to (5), to the amount of the company's equity capital at the end of the previous tax period, determined in accordance with accounting legislation and the annual accounts as shown on the balance sheet. The second subparagraph of Article 205b(1) of the Income Tax Code 1992 provides that the risk capital thus determined is to be reduced by certain values, while Article 205b(2) to (5) of the Income Tax Code 1992 sets out the situations in which equity capital must be adjusted in order to serve as a basis for calculation for the purposes of determining the amount of the deduction for risk capital.

8 Until the 2014 tax year, Article 205b(2) of the Income Tax Code 1992 provided that, when a company had one or more establishments abroad the income from which was exempt under a double taxation convention, the risk capital, determined in accordance with Article 205b(1) of the Income Tax Code 1992, was to be reduced by the positive difference between, on the one hand, the net book value of the assets of the foreign establishments and, on the other hand, the total liabilities that do not form part of the company's equity capital and that are attributable to those establishments.

9 Article 205d of the Income Tax Code 1992 provided that, if there were no profits for a tax period in respect of which the deduction for risk capital could be made, the relief not granted for that tax period was to be carried over successively to the profits of the following seven years. Following the adoption of the wet houdende fiscale en financiële bepalingen (Law on various tax and financial provisions) of 13 December 2012 (*Belgisch Staatsblad*, 20 December 2012), this carry-over became impossible as from the 2013 tax year.

10 The Court held, in its judgment of 4 July 2013, *Argenta Spaarbank* (C?350/11, EU:C:2013:447) on a request for a preliminary ruling, that Article 49 TFEU must be interpreted as precluding national legislation under which, for calculation of a deduction granted to a company subject to full tax liability in a Member State, the net value of the assets of a permanent establishment situated in another Member State is not taken into account when the profits of that permanent establishment are not taxable in the first Member State by virtue of a double taxation convention, whereas the assets attributed to a permanent establishment situated in the territory of the first Member State are taken into account for that purpose.

11 By the wet houdende diverse fiscale en financiële bepalingen (Law on various tax and financial provisions) of 21 December 2013 (*Belgisch Staatsblad*, 31 December 2013), paragraphs 2 and 3 of Article 205b of the Income Tax Code 1992 were repealed and a new Article 205d, in force since the 2014 tax year ('Article 205d of the Income Tax Code 1992, as amended') was inserted into the Income Tax Code 1992.

12 Article 205d of the Income Tax Code 1992, as amended, reads as follows:

'When, in another Member State of the European Economic Area, the company has one or more permanent establishments, immovable property or rights in respect of such immovable property not belonging to a permanent establishment the income from which is exempt under a double taxation conventions, the deduction determined in accordance with Article 205a shall be reduced by the lesser of the following two amounts:

1° the amount determined in accordance with subparagraph 3;

2° the positive result of those permanent establishments, that immovable property and those rights in respect of such immovable property as determined in this Code.

...

The amount referred to in paragraphs 1 and 2 shall be determined by multiplying the rate referred to in Article 205c by the positive difference, established at the end of the preceding tax period subject to the provisions of Article 205b(2) to (5), between, on the one hand, the net book value of the assets of those foreign permanent establishments, immovable property or rights referred to in the first and second subparagraphs respectively, with the exception of the shares and participating interests referred to in the second subparagraph of Article 205b(1) and, on the other hand, the total liabilities that do not form part of the company's equity capital and that are attributable to those permanent establishments, immovable property or rights referred to in the first or second subparagraph respectively.'

Double taxation convention between the Kingdom of Belgium and the Kingdom of the Netherlands

13 Article 7(1) to (3) of the Verdrag tussen het Koninkrijk België en het Koninkrijk der Nederlanden tot het vermijden van dubbele belasting en tot het voorkomen van het ontgaan van belasting inzake belastingen naar het inkomen en naar het vermogen (Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and capital) of 5 June 2001 (*Belgisch Staatsblad*, 20 December 2002, p. 57534, 'the Belgium-Netherlands Convention') provides:

'1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent

establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.'

14 Article 23(1) of the Belgium-Netherlands Convention provides:

'So far as concerns Belgium, double taxation shall be avoided as follows:

(a) Where a resident of Belgium receives income — other than dividends, interest, or royalties covered by Article 12(5) — or possesses assets which are taxed in the Netherlands in accordance with the provisions of this convention, Belgium shall exempt that income or those assets from tax, but it may, in order to calculate the amount of tax on the remainder of that resident's income or assets, apply the same rate as if the income or assets in question had not been exempted.

...'

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

15 Argenta, a company established in Belgium, is subject to Belgian corporation tax.

16 During the tax period from 1 January to 31 December 2014 ('the 2015 tax year'), Argenta carried out part of its activities through a permanent establishment situated in the Netherlands, the income from which is exempt in Belgium pursuant to Article 7(1) to (3) and Article 23 of the Belgian-Netherlands Convention.

17 In its corporation tax declaration for the 2015 tax year, Argenta, pursuant to Article 205d of the Income Tax Code 1992, as amended, reduced the deduction for risk capital by the part of the deduction that is calculated on the equity capital of its permanent establishment.

18 The corporation tax assessment for the 2015 tax year was declared enforceable on 12 November 2015 and the assessment notice was sent on 16 November 2015.

19 It is apparent from the request for a preliminary ruling that, pursuant to Article 205d of the Income Tax Code 1992, as amended, the corporation tax assessment was calculated as follows. First of all, in accordance with the third subparagraph of Article 205d of the Income Tax Code 1992, as amended, the amount of the deduction for risk capital relating to Argenta's Netherlands permanent establishment was calculated and corresponds to an amount of EUR 1 970 290.89. Subsequently, in accordance with the first subparagraph of Article 205d of the Income Tax Code 1992, as amended, the amount of the deduction for risk capital relating to the Netherlands permanent establishment, namely EUR 1 970 290.89, was compared with the result of that permanent establishment, which was positive and amounted to EUR 149 185 743.91. Lastly, the deduction for risk capital relating to the Netherlands permanent establishment, namely the amount

of EUR 1 970 290.89, was deducted in full from the total deduction for risk capital because the positive result of the Netherlands permanent establishment was higher than the deduction for risk capital relating to that establishment.

20 On 12 May 2016, Argenta lodged an objection against this assessment alleging that Article 205d of the Income Tax Code 1992, as amended, is inconsistent with Article 49 TFEU. That objection was rejected by decision of 19 December 2016.

21 On 17 March 2017, Argenta lodged an application with the referring court.

22 The referring court notes that the parties disagree on whether, in particular, Article 205d of the Income Tax Code 1992, as amended, is consistent with Article 49 TFEU and the case-law stemming from the judgment of 4 July 2013, *Argenta Spaarbank* (C?350/11, EU:C:2013:447).

23 The referring court states that the deduction for risk capital as calculated according to the detailed rules laid down in Articles 205b and 205c of the Income Tax Code 1992 is reduced by the part of the deduction for risk capital that is calculated on the equity capital of permanent establishments situated in another State of the European Economic Area (EEA) and exempted by a double taxation convention. That reduction is limited to the profits generated by that permanent establishment. The equity capital is defined as the net book value of the assets, reduced by the total liabilities that do not form part of the company’s equity capital and that are attributable to those permanent establishments, as provided for in the third subparagraph of Article 205d of the Income Tax Code 1992, as amended.

24 The referring court states that, unlike for the 2008 tax year, which was at issue in the case that gave rise to the judgment of 4 July 2013, *Argenta Spaarbank* (C?350/11, EU:C:2013:447), there is no longer the possibility of a carry-over to subsequent years if there are no or insufficient profits to make the deduction for risk capital for a particular tax period.

25 The referring court notes that the reduction of the deduction for risk capital provided for in Article 205d of the Income Tax Code 1992, as amended, is not applicable to permanent establishments situated in Belgium, and that Belgian legislation also makes no provision for a similar reduction for Belgian establishments.

26 It follows, according to the referring court, that the scope of the deduction for risk capital is more limited when a company has a permanent establishment in another EEA Member State, particularly where the profits of the establishment exceed the deduction for risk capital attributed to it, than when that permanent establishment is situated in Belgium. The question then arises whether that national legislation is consistent with Article 49 TFEU.

27 According to the referring court, in a situation such as that at issue in the main proceedings, where the profits of the permanent establishment in another Member State exceed the deduction for risk capital calculated on the equity capital attributed to that establishment, the new scheme has a virtually identical effect to the scheme applicable to the 2008 tax year, which was found to be contrary to Article 49 TFEU. However, the assets of the permanent establishment situated in another Member State are, initially in any event, taken into account in the calculation of the deduction, and the limitation of the right to deduction for risk capital in relation to the equity capital of such a permanent establishment, the income from which is exempt under a double taxation convention, remains limited to the amount of the profits of that establishment.

28 In those circumstances, the Rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp, Belgium) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 49 [TFEU] preclude national tax legislation pursuant to which, for the purpose of calculating the taxable profits of a company subject to full tax liability in Belgium which has a permanent establishment in another Member State, the profits of which are wholly exempt in Belgium by virtue of the application of a double taxation convention between Belgium and the other Member State:

– the deduction for risk capital is reduced by an amount in respect of deduction for risk capital calculated with reference to the positive difference between, on the one hand, the net book value of the assets of the permanent establishment, and, on the other hand, the total liabilities that do not form part of the company's equity capital and that are attributable to the permanent establishment and

– the aforementioned reduction is not applied in so far as the amount of the reduction is lower than the profits of that permanent establishment,

whereas no reduction of the deduction for risk capital is applied if that positive difference can be attributed to a permanent establishment situated in Belgium?'

Consideration of the question referred

29 As a preliminary point, it should be noted that the Belgian Government requests the Court to reformulate the question referred for a preliminary ruling, in so far as, in essence, it claims that that question does not correspond to the content of Article 205d of the Income Tax Code 1992, as amended.

30 In that respect, it should be recalled that, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference. It is settled case-law that the Court does not have jurisdiction to interpret the internal law of a Member State (judgment of 17 March 2011, *Naftiliaki Etaireia Thasou and Amaltheia I Naftiki Etaireia*, C?128/10 and C?129/10, EU:C:2011:163, paragraph 40 and the case-law cited).

31 In the grounds for its request for a preliminary ruling, the referring court interpreted Article 205d of the Income Tax Code 1992, as amended, and found that, under that provision, the deduction for risk capital as calculated according to the detailed rules laid down in Articles 205b and 205c of the Income Tax Code 1992 is reduced by the part of the deduction for risk capital that is calculated on the equity capital of a permanent establishment situated in another Member State the profits of which are exempt under a double taxation convention and that that reduction is limited to the profits generated in that permanent establishment. It also found that the reduction of the deduction for risk capital provided for in Article 205d of the Income Tax Code 1992, as amended, does not apply where the permanent establishment is situated in Belgium.

32 It is therefore on the basis of the premisses resulting from the order for reference that it is necessary to understand and answer the question posed by the referring court.

33 Consequently, it must be held that, by its question referred for a preliminary ruling, the referring court essentially asks whether Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, for the calculation of a

deduction granted to a company subject to full tax liability in a Member State and having a permanent establishment in another Member State the income from which is exempt in the first Member State under a double taxation convention, the net value of the assets of such a permanent establishment is taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company, but, subsequently, the amount of the deduction is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to the permanent establishment or the positive result generated by that permanent establishment, whereas such a reduction is not applied in the case of a permanent establishment situated in the first Member State.

34 Freedom of establishment, which Article 49 TFEU grants to EU nationals, includes, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency (judgment of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 15).

35 Even though, according to their wording, the provisions of EU law on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (judgments of 4 July 2013, *Argenta Spaarbank*, C?350/11, EU:C:2013:447, paragraph 20, and of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 16 and the case-law cited).

36 Those considerations also apply where a company established in one Member State carries on business in another Member State through a permanent establishment (judgments of 15 May 2008, *Lidl Belgium*, C?414/06, EU:C:2008:278, paragraph 20; of 4 July 2013, *Argenta Spaarbank*, C?350/11, EU:C:2013:447, paragraph 21; and of 12 June 2018, *Bevola and Jens W. Trock*, C?650/16, EU:C:2018:424, paragraph 17).

37 The deduction for risk capital granted to a company subject to corporation tax in Belgium constitutes a tax advantage which has the effect of reducing the effective rate of corporation tax that such a company must pay in that Member State.

38 The Court has already held, in that context, that the taking into account of the assets of a permanent establishment in order to calculate the deduction for risk capital of a company subject to corporation tax in Belgium also constitutes a tax advantage, since taking them into account helps to reduce the effective rate of the corporation tax that such a company must pay in that Member State (judgment of 4 July 2013, *Argenta Spaarbank*, C?350/11, EU:C:2013:447, paragraph 24).

39 The national legislation at issue in the main proceedings, in particular Article 205d of the Income Tax Code 1992, as amended, now provides that the net value of the assets of a permanent establishment situated in another Member State, the income from which is exempt in the Member State of the resident company under a double taxation convention, is to be taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company.

40 A difference in treatment cannot therefore be found in that respect between a company with a permanent establishment in Belgium and a company with a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, in so far as both the assets attributed to the permanent establishment situated in

Belgium and those attributed to the permanent establishment situated in another Member State are taken into account in the calculation of the overall deduction for risk capital granted to the resident company.

41 Secondly, however, the amount of the overall deduction for risk capital is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, or the positive result generated by that permanent establishment, whereas, in relation to permanent establishments situated in Belgium, no provision is made for such a reduction of the deduction for risk capital.

42 Consequently, the legislation at issue in the main proceedings establishes, in that respect, a difference in treatment between a company with a permanent establishment in Belgium and a company with a permanent establishment in another Member State the income from which is exempt in Belgium under a double taxation convention.

43 It must therefore be determined whether such a difference in treatment constitutes disadvantageous treatment liable to deter a Belgian company from carrying on its business through a permanent establishment situated in a Member State other than the Kingdom of Belgium and therefore constitutes a restriction prohibited in principle by the TFEU provisions relating to freedom of establishment.

44 As is apparent from the documents before the Court, the application of Article 205d of the Income Tax Code 1992, as amended, may give rise to three different situations.

45 First, in a situation where the permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, has not generated any positive result, the overall deduction for risk capital granted to the resident company, which is calculated by taking into account the net value of the assets of that permanent establishment, is not reduced. The resident company's basis of assessment is therefore reduced by the full amount of the deduction for risk capital, including by the part of the deduction for risk capital which relates to that permanent establishment.

46 Consequently, in that first situation, the company with a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, is not, subject to verifications to be carried out by the referring court, treated less favourably than a resident company with a resident permanent establishment.

47 Second, in a situation where the permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, has generated a positive result which is lower than the part of the deduction for risk capital which relates to that permanent establishment, the overall deduction for risk capital calculated by taking into account the net value of the assets of that permanent establishment is reduced. That positive result is deducted from the overall deduction.

48 The consequence of that is that the part of the deduction for risk capital, which relates to that permanent establishment and which exceeds the result of the latter, is however taken into account for the purposes of the overall deduction.

49 The resident company's basis of assessment is therefore reduced by the amount of the deduction for risk capital which relates to that permanent establishment only to the extent that that amount exceeds the positive result of that permanent establishment.

50 Third, in a situation where the permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, has generated a positive result which exceeds the part of the deduction for risk capital that relates to that permanent establishment, the overall deduction for risk capital calculated by taking into account the net value of the assets of that permanent establishment is also reduced, by deducting from that value the deduction for risk capital which relates to that establishment. In that situation, the amount of the deduction for risk capital which relates to that permanent establishment does not result in any reduction of the resident company's basis of assessment.

51 It follows that, in the second and third situations described above, the overall deduction for risk capital is reduced when the resident company has a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, unlike situations where a permanent establishment is situated in Belgium.

52 It is also necessary that the application of such a mechanism be disadvantageous for a resident company with a permanent establishment situated in another Member State in such a way as to render, following the reduction of the overall deduction for risk capital, that company's basis of assessment higher than that of a resident company whose permanent establishment is situated in Belgium.

53 In that regard, while it is true that, in the second and third situations described above, the overall deduction for risk capital is reduced and is not therefore deducted in full from the resident company's basis of assessment, unlike situations where the permanent establishment is situated in Belgium, it should be noted that, according to the information in the documents before the Court, the basis of assessment of the resident company with a permanent establishment in Belgium is, all other things being equal, also higher than that of a company with a permanent establishment in another Member State, the income from which is exempt in Belgium.

54 According to that information, the basis of assessment of the company whose permanent establishments are situated in Belgium includes the results of those permanent establishments. By contrast, in a situation where, in a double taxation convention, the Kingdom of Belgium has exempted the income of a permanent establishment situated in another Member State, the resident company's basis of assessment does not include such income.

55 Thus, as regards the second situation described above, the basis of assessment of a resident company with a permanent establishment in Belgium appears to be reduced, beyond the component of the assessment relating to the positive result generated by that permanent establishment, only to the extent that the amount of the deduction for risk capital which relates to that permanent establishment exceeds that result. In the light of the considerations set out in paragraph 49 of this judgement, it is thus apparent that, in that situation, such a company's basis of assessment is not less than that of a resident company with a permanent establishment in another Member State, the income from which is exempt in Belgium.

56 Moreover, a resident company with a permanent establishment in another Member State does not appear to be at a disadvantage in the third situation described above, in which the positive result of the permanent establishment exceeds the amount of the deduction for risk capital which relates to that establishment. Indeed, in the case of a resident company with a permanent establishment in Belgium, the effects of that deduction appear to be limited to the component of its basis of assessment relating to the positive result generated by that permanent establishment, without however reducing the basis of assessment of the latter company, as it results from the income acquired by it. Thus, in that latter situation, the fact that that company may make a deduction for risk capital which relates to its establishment, whereas a resident company with a

permanent establishment in another Member State, the income from which is exempt in Belgium under a double taxation convention, cannot do so, does not appear to have the effect of making that latter company's basis of assessment higher than that of a resident company with a permanent establishment in Belgium.

57 Consequently, it must be found, subject to verifications to be carried out by the national court, that, because of the reduction of the overall deduction for risk capital, a resident company whose basis of assessment does not include the profits made by a permanent establishment situated in another Member State is not treated less advantageously, as regards taxable income in Belgium, than a resident company whose basis of assessment includes the profits of a resident permanent establishment and whose deduction for risk capital is not reduced.

58 It follows that the difference in treatment introduced by the national legislation at issue in the main proceedings does not constitute disadvantageous treatment liable to deter a Belgian company from carrying on its business through a permanent establishment situated in a Member State other than the Kingdom of Belgium and does not therefore constitute a restriction prohibited in principle by the TFEU provisions relating to freedom of establishment.

59 In the light of all the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the calculation of a deduction granted to a company subject to full tax liability in a Member State and having a permanent establishment in another Member State the income from which is exempt in the first Member State under a double taxation convention, the net value of the assets of such a permanent establishment is taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company, but, subsequently, the amount of the deduction is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to the permanent establishment or the positive result generated by that permanent establishment, whereas such a reduction is not applied in the case of a permanent establishment situated in the first Member State.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

Article 49 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the calculation of a deduction granted to a company subject to full tax liability in a Member State and having a permanent establishment in another Member State the income from which is exempt in the first Member State under a double taxation convention, the net value of the assets of such a permanent establishment is taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company, but, subsequently, the amount of the deduction is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to the permanent establishment or the positive result generated by that permanent establishment, whereas such a reduction is not applied in the case of a permanent establishment situated in the first Member State.

[Signatures]

*	Language of the case: Dutch.