JUDGMENT OF THE COURT (First Chamber)

8 November 2007 *

In Case C-379/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 21 September 2005, received at the Court on 17 October 2005, in the proceedings

Amurta SGPS

v

Inspecteur van de Belastingdienst/Amsterdam,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, R. Schintgen, A. Tizzano, A. Borg Barthet and E. Levits (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: P. Mengozzi,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 January 2007,

after considering the observations submitted on behalf of:

— Amurta SGPS, by L.C.A. Wijsman, J.J. Feenstra and R.M.P.G. Niessen-Cobben, advocaten,

— the Netherlands Government, by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the United Kingdom Government, initially by S. Nwaokolo, and subsequently by V. Jackson, acting as Agents, assisted by J. Stratford, Barrister,

— the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

— the EFTA Surveillance Authority, by S. Rydelski and P.A. Bjørgan, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 56 EC and 58 EC.

2 This reference was made in the context of proceedings between Amurta SGPS ('Amurta'), a company established in Portugal, and the Inspecteur van de Belastingdienst/Amsterdam (Inspector, Tax Office/Amsterdam) concerning the application of withholding tax on dividends paid to Amurta by Retailbox BV ('Retailbox'), a company established in the Netherlands.

Legal context

Community legislation

3 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) provides:

'Profits which a subsidiary distributed 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.'

National legislation

4 Article 1(1) of the 1965 Law on the taxation of dividends (Wet op de dividendbelasting 1965, Stb. 1965, p. 621, the 'Wet DB') provides for a 25% withholding tax to be levied, in principle, on any payment of dividends made by a company established in the Netherlands whose capital is divided wholly or partially into shares.

5 However, Article 4(1) of the Wet DB provides:

'Withholding of tax may be waived with respect to the revenue from shares, profit-sharing notes or money loans referred to in Article 10(1)(d) of the 1969 Law on corporation tax (Wet op de vennootschapsbelasting 1969, 'the Wet Vpb'), if the shareholding exemption provided for in Article 13 of that law is applicable to the proceeds which the beneficiary of the revenue derives from those shares, profit-sharing notes or money loans and the shareholding forms part of the assets of his business carried on in the Netherlands. The first sentence is not applicable to revenue with respect to which the beneficiary is not the final beneficiary.'

6 Article 4a of the Wet DB, based on Directive 90/435, provides for an exemption from dividend tax for shareholders established in the European Union with a minimum shareholding of 25%. According to Article 4(3) thereof, the 25% threshold is reduced to 10% where the Member State in which the shareholder is established applies the same reduction.

7 Article 13 of the Wet Vpb provides:

'1. For the purposes of determining profits, the proceeds derived from a shareholding, as well as the costs — including the proceeds resulting from changes in exchange rate — arising from any shareholding, shall not be taken into account, except if those costs contribute indirectly to making a profit which is subject to taxation in the Netherlands (shareholding exemption). ...

2. A shareholding exists where the company liable to tax:

(a) is a shareholder of at least 5% of the paid-up nominal capital of a company whose capital is wholly or partly divided into shares;

...'

8 As the national court states, the effect of the wording of Article 13 of the Wet Vpb, read in conjunction with Article 4 of the Wet DB, is that the exemption under Article 4 is only applicable where the shares of the Netherlands company distributing dividends are held either by shareholders subject to corporation tax in the Netherlands or by foreign shareholders with a permanent establishment in the Netherlands, with the shares forming part of the assets of that permanent establishment.

The double taxation convention

9 Article 10 of the Convention entered into on 20 September 1999 between Portugal and the Netherlands for the Avoidance of Double Taxation and the Prevention of Tax Evasion in respect of Taxes on Income and Wealth ('the DTC'), provides:

'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. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State; but if the person receiving the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 10% of the gross amount of the dividends.

...'

10 The method of avoiding double taxation is laid down in Article 24 of the DTC, which provides:

'In the case of Portugal, double taxation shall be avoided as follows:

(a) where a resident of Portugal receives income which, in accordance with the provisions of this Convention, may be taxed in the Netherlands, Portugal shall allow, as a deduction from the income tax of that resident, an amount equal to the income tax paid in the Netherlands. Such deduction shall not, however, exceed that part of the income tax, as computed before the deduction is given, which is attributable to the taxable income in the Netherlands;

...'

The dispute in the main proceedings and the questions referred

11 At the material time, Amurta held 14% of the shares in Retailbox. The other shareholders in Retailbox were Sonaetelecom BV, a company established in the Netherlands with a shareholding of 66%, and Tafin SGPS and Perfin SGPS, companies established in Portugal, holding, respectively, 14% and 6% of the shares.

12 On 31 December 2002 Retailbox paid out dividends to its shareholders. While dividend tax was not levied on the dividends paid to Sonaetelecom BV since they benefited from the exemption under Article 4 of the Wet DB, dividend tax was levied at the rate of 25% on the dividends distributed to Amurta and to the other two companies established in Portugal.

13 That tax deduction was the subject of an objection lodged by Retailbox, on behalf of Amurta, on 30 January 2003. Since the objection was rejected in a ruling by the Inspecteur van de Belastingdienst/Amsterdam, Amurta brought an action before the Gereschtshof te Amsterdam for annulment of that ruling and repayment of the dividend tax levied.

14 Taking the view that an interpretation of Community law was necessary in order for it to reach a decision in the main action, the Gerechtshof te Amsterdam decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the exemption under Article 4 of the [Wet DB], as described [in paragraphs 5 and 8 of this judgment], in conjunction with the exemption under Article 4a of that law, contrary to the provisions on the free movement of capital (Articles 56 EC to 58 EC), given that the exemption is applicable only to dividend payments to shareholders liable to corporation tax in the Netherlands or to foreign shareholders with a permanent establishment in the Netherlands, with the shares forming part of the assets of that permanent establishment, to whom the shareholding exemption under Article 13 of the [Wet Vpb] applies?

(2) Does the answer to the first question depend on whether the State of residence of a foreign shareholder/company to which the exemption under Article 4 of the [Wet DB] does not apply grants that shareholder/company full credit for Netherlands dividend tax?'

The first question referred

15 By its first question, the national court is asking, in essence, whether Articles 56 EC and 58 EC preclude legislation of a Member State which, where the minimum threshold for the parent company's shareholdings in the share capital of the subsidiary set out in Article 5(1) of Directive 90/435 is not reached, provides for a withholding tax on dividends distributed by a company established in that Member State to a company established in another Member State, while exempting from that tax the dividends paid to a company liable to corporation tax in the first Member State or which has a permanent establishment in the first Member State which owns shares in the company paying the dividends.

16 It should be noted as a preliminary observation that, according to consistent case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (see, in particular, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 40; and Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36).

17 It must also be pointed out that, in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 24 and 30; Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57; and Case C-470/04 *N* [2006] ECR I-7409, paragraph 44).

18 As appears particularly from the third recital in the preamble to Directive 90/435, the aim of that directive is, 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 (Case C-294/99 *Athinaïki Zithopiïa* [2001] ECR I-6797, paragraph 25, and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 103).

19 Article 5(1) of Dirctive 90/435 only requires Member States to exempt from withholding tax profits which a subsidiary distributed to its parent company where the latter holds a minimum of 25% of the capital of the subsidiary.

20 It is common ground that the situation in the main proceedings does not fall within the scope of that directive.

21 The Dutch and Italian Governments therefore argued that, below the threshold for the minimum holding introduced by Directive 90/435, the fact of making a non-resident company liable to withholding tax on dividends cannot in itself be considered to be a breach of the fundamental freedoms.

22 According to the Italian Government, the treatment of dividends relating to shareholdings which are not covered by the directive falls within the power of the national legislature, and the situation at issue in the main proceedings stems from the allocation of fiscal powers between the Member State in which the dividends are paid and the Member State in which the beneficiary of those dividends is resident.

23 The Netherlands Government submits that the fact of extending the scope of the exemption under Article 4 of the Wet DB, which seeks to prevent double taxation of dividends at national level, to dividends distributed to companies established in another Member State, whose shares in the share capital of the distributing company are below the percentage provided for in Directive 90/435, would effectively abolish the dividend tax and the classical regime in force in the Netherlands would thus no longer be complied with. According to the Netherlands Government, while Article 4 of the Wet DB provides for an exemption from withholding tax on dividends, that tax remains chargeable and, in the event the dividends are redistributed, the tax will be levied. Any adverse effect of Article 4a of the Wet DB on the classical regime is justified only by the requirements of Directive 90/435 and ought not to go beyond what Member States are required to do under the directive.

24 In that regard, it must be pointed out that, in respect of shareholdings which are not covered by Directive 90/435, it is for the Member States to determine whether, and to what extent, economic double taxation of distributed profits is to be avoided and, for that purpose, to establish, either unilaterally or through double taxation conventions concluded with other Member States, procedures intended to prevent

or mitigate such economic double taxation. However, this does not of itself mean that the Member States are entitled to impose measures that contravene the freedoms of movement guaranteed by the EC Treaty (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 54).

25 In the present case, for the purposes of exempting dividend tax from withholding tax, Articles 4 and 4a of the Wet DB, together with Article 13 of the Wet Vpb, introduce a difference of treatment between, on the one hand, companies receiving dividends with their seat in the Netherlands or having a permanent establishment there which holds shares in the distributing company and, on the other, companies receiving dividends which are not established in the Netherlands.

26 Under Article 4 of the Wet DB, exemption from withholding tax may be applied only to dividends distributed to companies with their seat in the Netherlands or having a permanent establishment there which holds shares in the distributing company, which own at least 5% of the shares in the resident distributing company and whose shareholdings may benefit from the exemption under Article 13 of the Wet Vpb. Conversely, under Article 4a of the Wet DB, companies receiving dividends which are not established in the Netherlands may benefit from the exemption from withholding tax on the dividends paid to them only where they hold at least 25% of the share capital of the distributing company, which may be reduced to 10% if the Member State in which the shareholder is established applies the same reduction.

27 As the Advocate General noted in point 26 of his Opinion, as regards taxation of dividends, such legislation treats recipient companies not established in the Netherlands which have a shareholding of between 5% and 25% in a Netherlands company less favourably than Netherlands recipient companies with the same type of shareholding. Dividends distributed to companies not established in the Netherlands are taxed in the hands of the distributing company by way of

corporation tax and in the hands of the recipient company by way of dividend tax and in this way are subject to economic double taxation, whereas, in respect of dividends distributed to companies established in the Netherlands, such economic double taxation is prevented.

28 Treating dividends paid to companies established in another Member State less favourably than dividends paid to companies established in the Netherlands is liable to deter companies established in another Member State from investing in the Netherlands and thus constitutes a restriction on the free movement of capital prohibited, in principle, by Article 56 EC.

29 It must be examined, however, whether that restriction on the free movement of capital is capable of being justified under the provisions of the Treaty.

30 It must be borne in mind that, under Article 58(1)(a) EC '[t]he provisions of Article 56 shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence ...'.

31 Furthermore, the derogation in Article 58(1)(a) EC is itself limited by Article 58(3) EC, according to which the provisions of national law referred to in Article 58(1) EC 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56'.

32 It is therefore appropriate to distinguish unequal treatment permitted under Article 58(1)(a) EC from discrimination prohibited under Article 58(3). According to the case-law, for a national fiscal provision such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the public interest (Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29; and Case C-512/03 *Blanckaert* [2005] ECR I-7685, paragraph 42).

33 It must therefore be ascertained whether, as regards the objective of the national rules at issue in the main proceedings, the recipient companies established in the Netherlands and those established in another Member State are in comparable situations.

34 In this respect, the German and Italian Governments asserted that there is an objective difference between the situation of a recipient company established in the Netherlands, liable to an unlimited tax obligation, and recipient companies established in another Member State, liable to tax in the Netherlands only on dividends received.

35 The United Kingdom Government, supported by the Italian Government, submits that the tax provisions in question in the main proceedings constitute an administrative simplification designed to avoid collection and subsequent reimbursement of taxes, and, on that basis, should not be applied to dividends paid out to companies established in another Member State which are not liable to Netherlands corporation tax.

36 In addition, the United Kingdom Government submits that the Member State of residence of the recipient company is the best placed to prevent double taxation of the dividends.

37 The Court has already held that, in the context of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the economic double taxation of, profits distributed by a resident company, resident shareholders receiving dividends are not necessarily in a situation which is comparable to that of shareholders receiving dividends who are resident in another Member State (Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 34).

38 However, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to income tax not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from a resident company, the position of those non-resident shareholders becomes comparable to that of resident shareholders (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 68, and *Denkavit Internationaal and Denkavit France*, paragraph 35).

39 In fact, it is solely because of the exercise by that State of its taxing powers that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving dividends not to be subject to a restriction on the free movement of capital prohibited, in principle, by Article 56 EC, the State in which the company making the distribution is resident is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax, non-resident shareholder companies are subject to the same treatment as resident shareholder companies (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 70).

40 Clearly, the economic double taxation, to which dividends distributed to companies not established in the Netherlands are subject, stems solely from the exercise by the Kingdom of the Netherlands of its taxing powers, which subject those dividends to dividend tax, whereas that Member State elected to prevent such economic double taxation in respect of recipient companies with their seat in the Netherlands or having a permanent establishment there which owns the shares in the company making the distribution.

41 Even if, as the Italian and United Kingdom Governments submit, Article 4 of the Wet DB seeks to simplify the application of the exemption from corporation tax for shareholdings under Article 13 of the Wet Vpb, which does not apply to recipient companies not established in the Netherlands which are not liable to that tax, this factor is irrelevant. As stated in paragraphs 38 and 39 above, it is the exercise by the Kingdom of the Netherlands of its taxing powers as regards the dividends distributed to recipient companies established in another Member State which makes the situation of those recipient companies comparable to that of recipient companies established in the Netherlands in relation to the prevention of economic double taxation of dividends distributed by companies which are resident in that Member State.

42 It must still be ascertained whether such a restriction can be justified by overriding reasons in the public interest. The Netherlands Government, supported by the Italian and United Kingdom Governments, argues in this regard that the system in question is justified by reasons relating to the cohesion of the tax system.

43 According to the Netherlands Government, the exemption from withholding tax on dividends is a necessary complement to the shareholdings exemption under Article 13 of the Wet Vpb. Without the exemption from withholding tax on

dividends, the shareholdings exemption would be partially — albeit temporarily — negated, since until the dividend tax is set off against the corporation tax, income which is in principle exempt from tax will nevertheless be taxed.

44 The Netherlands Government states that the two exemptions concern the same taxpayer and that although dividend tax and corporation tax are strictly two separate taxes, at national level, the dividend tax is nothing more than an anticipated tax which can be set off in full against corporation tax. The system at issue in the main proceedings, it submits, can therefore be justified by reasons of fiscal cohesion even if, unlike the system at issue in Case C-204/99 *Bachmann* [1992] ECR I-249, there is no grant of a fiscal advantage, on the one hand, and offsetting of that fiscal advantage by a tax deduction, on the other.

45 The United Kingdom Government takes the view that the cohesion of a tax system must be assessed at the cross-border level, since it is guaranteed under the DTC that dividend tax withheld in respect of an outbound dividend is deductible from the corporation tax due from the recipient company in Portugal.

46 In that respect, it should be pointed out that, in paragraphs 28 and 21, respectively, of the judgments in *Bachmann* and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, the Court recognised that the need to maintain the cohesion of a tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. However, for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (*Manninen*, paragraph 42, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 68).

47 The case-law further shows that an argument based on the need to safeguard the cohesion of a tax system must be examined in the light of the objective pursued by the tax legislation in question (Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 67, and *Manninen*, paragraph 43).

48 It is common ground that the argument of the Netherlands Government seeks to show that the exemption from withholding tax on dividends is necessary to ensure that the exemption for shareholdings under Article 13 of the Wet Vpb functions properly. However, as the Advocate General pointed out in point 65 of his Opinion, this being so, the Netherlands Government manages, at most, to clarify the administrative simplification which the Netherlands system is intended to achieve and which of itself cannot justify a restriction.

49 The Netherlands Government itself accepts that there is no tax levy offsetting the exemption from withholding tax on dividends which are paid to recipient companies established in the Netherlands.

50 Even adopting the view that exemption from withholding tax on dividends and the shareholdings exemption are intrinsically linked, it must be held that, since the exemptions seek to prevent economic double taxation, the existence of a direct link between that fiscal advantage, granted only to companies established in the Netherlands, and an offsetting tax levy, has not been established.

51 Since dividends distributed both to companies established in the Netherlands and companies established in another Member State are liable to corporation tax at the level of the distributing company, the Netherlands Government does not show how the cohesion of its taxation system would be jeopardised if the exemption from

dividend tax were also granted to recipient companies established in another Member State and which, while not liable to corporation tax in the Netherlands, are in a comparable situation to that of recipient companies with their seat in the Netherlands or having a permanent establishment there which owns the shares of the distributing company, so far as concerns the taxation of dividends and the possible fiscal advantages connected to the elimination of double taxation.

52 As regards the argument of the United Kingdom Government, it suffices to state, first, that the application of a withholding tax on the dividends distributed to companies established in another Member State under Article 1 of the Wet DB is not made conditional on the existence of a convention for the avoidance of double taxation concluded between the Kingdom of the Netherlands and that Member State that allows the amount withheld to be deducted in the Member State in which the company receiving dividends is established and, secondly, that the possible cohesion of a system established by such a convention is not the subject of the first question referred.

53 The United Kingdom Government submitted, further, that the Netherlands system may be justified by the need to safeguard the balanced allocation between the Member States of the power to tax.

54 According to the United Kingdom Government, the allocation of the powers to tax between the Kingdom of the Netherlands and the Portuguese Republic is expressed in the DTC. Under that DTC, dividends may be taxed by the Member State in which the distributing company resides and by that of the recipient company, since double taxation is eliminated by means of a deduction of corporation tax. That allocation would be called in question if the Kingdom of the Netherlands could no longer deduct dividend tax at source, the effect of which would be to exempt such revenue from any taxation by that Member State.

55 It must be pointed out in this regard that the Kingdom of the Netherlands cannot rely on the DTC in order to avoid the obligations imposed on it by the Treaty (*Denkavit Internationaal and Denkavit France*, paragraph 53).

56 As is clear from paragraphs 51 and 60, respectively, of *Marks & Spencer*, and Case C-231/05 *Oy AA* [2007] ECR I-6373, the need to safeguard the balanced allocation between the Member States of the power to tax has been recognised together with other grounds based on the risks of tax avoidance or of double use of losses.

57 It is common ground that the existence of risks of double use of losses or of tax avoidance was not relied on by the governments who submitted observations to the Court.

58 As regards the argument concerning the loss of the possibility to tax profits generated in the Netherlands, it must be stated that the need to safeguard the balanced allocation between the Member States of the power to tax may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of the Member States to exercise their taxing powers in relation to activities carried on in their territory (see Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 42, and *Oy AA*, paragraph 54).

59 However, where a Member State has chosen not to tax recipient companies established in its territory in respect of this type of income, it cannot rely on the

argument that there is a need to safeguard the balanced allocation between the Member States of the power to tax in order to justify the taxation of recipient companies established in another Member State.

60 In those circumstances, the restriction which national provisions, such as those at issue in the main proceedings, place on the free movement of capital cannot be justified either by the need to safeguard the cohesion of the national taxation system or by the need to safeguard the allocation between the Member States of the power to tax.

61 Consequently, the answer to the first question must be that Articles 56 EC and 58 EC preclude legislation of a Member State which, where the minimum threshold for the parent company's shareholdings in the share capital of the subsidiary set out in Article 5(1) of Directive 90/435 is not reached, provides for a withholding tax on dividends distributed by a company established in that Member State to a company established in another Member State, while exempting from that tax the dividends paid to a company liable to corporation tax in the first Member State or which has a permanent establishment in that Member State which owns the shares in the company making the distribution.

The second question referred

62 By its second question, the national court is essentially asking to what extent the existence of a full tax credit, granted by the Member State of residence of the recipient company to which the exemption under Article 4 of the Wet DB does not apply, may influence the answer to the first question.

Admissibility

63 As is clear from the reference for a preliminary ruling, the national court's finding that the dividend tax levied in the Netherlands could be taken into account in Portugal was based on the statements of Amurta. Before the Court, however, Amurta contests the accuracy of the premiss underlying the second question referred. It contends that the Portuguese Republic exempts the dividends and does not grant it full tax credit for the dividend tax withheld in the Netherlands. Therefore, according to Amurta, the question is merely of academic interest.

64 According to settled case-law, questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraphs 29 and 31). The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-11421, paragraph 22).

65 That presumption of relevance cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts, the accuracy of which is not a

matter for the Court to determine and on which the delimitation of the subject-matter of those proceedings depends (*Cipolla and Others*, paragraph 26, and *van der Weerd and Others*, paragraph 23).

66 The existence of legislation in Portugal providing for dividend tax withheld in the Netherlands to be taken into account, by way of granting a full tax credit, is precisely a matter of fact which is not for the Court to determine.

67 The second question referred must therefore be considered to be admissible.

The substance

68 Amurta, the EFTA Surveillance Authority and the Commission take the view that, according to settled case-law, the application by a Member State of tax provisions which are unfavourable to the taxpayer, and incompatible with a guaranteed fundamental freedom, cannot be justified by a tax advantage from which the party concerned benefits in another Member State.

69 Referring to the DTC, the Netherlands, German, Italian and United Kingdom Governments submit that the tax credit granted by the Portuguese Republic to the recipient company on account of the deduction of tax by the Kingdom of the Netherlands on the dividends distributed by the distributing company is relevant to ascertaining whether the recipient company established in Portugal is subject to discriminatory or restrictive treatment.

70 The Netherlands Government asserts that the DTC forms part of the legal framework applicable to the case in the main proceedings. Even if the DTC does not provide for a full tax credit, the relevant question is whether there is a real possibility of neutralising the difference in treatment. In such a case, the Netherlands rules on exemption of dividends tax from withholding tax do not entail any barrier to the movement of capital. However, it is for the national court to determine whether the total fiscal charge is the same for both residents and non-residents.

71 The United Kingdom Government argues that, since the Kingdom of the Netherlands has exercised its power of taxation, it must ensure that Amurta is not treated less favourably than a recipient company established in the Netherlands. Even though it is for the national court to determine, when interpreting the DTC, whether the Kingdom of the Netherlands has prevented economic double taxation, the United Kingdom Government submits, however, that since the dividend tax levied by the Kingdom of the Netherlands can be deducted from the tax payable in Portugal, the tax burden on Amurta cannot as a whole be greater than that on it if it had invested in Portugal or than the burden on a recipient company established in the Netherlands. In the event that the tax burden were in fact greater, the difference would result from the discrepancy between the rates of taxation in Portugal and in the Netherlands, the Treaty not guaranteeing the fiscal neutrality of free movement.

72 The German Government also takes the view that the DTC must be taken into account. It contends that the compatibility of the tax system in force in the Netherlands with Community law does not depend on whether the withholding tax can in fact be deducted from the tax payable in Portugal, for, first, the Member State applying the withholding tax cannot influence the Member State in which the recipient company resides and, secondly, the failure to deduct such tax may be the result of various subjective reasons. For the tax system in force in the Netherlands to be deemed compatible with Community law, it suffices that the Kingdom of the Netherlands and the Portuguese Republic agree on the withholding tax being taken

into account in Portugal and that the DTC corresponds to the model convention established by the Organisation for Economic Cooperation and Development (OECD).

73 Amurta submits that the existence of the DTC is of no relevance since this convention provides for the set-off of tax paid in the Netherlands while the Portuguese Republic exempts dividend income from taxation.

74 According to the Commission, a Member State cannot rely on a convention for the avoidance of double taxation in order to avoid its obligations. This position is shared by the EFTA Surveillance Authority, which claims that the Member States cannot transfer their obligation to comply with Community law to another Member State, even by entering into a convention. That Authority goes on to state that the objective of such a convention is to avoid double taxation and not to rectify any restrictions.

75 In this regard, it should be recalled that it is settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist (*Verkooijen*, paragraph 61).

76 As stated in paragraph 28 above, there is a restriction on the free movement of capital where dividends paid to companies established in another Member State are treated less favourably than dividends paid to companies with their seat in the Netherlands or which have a permanent establishment in that Member State which owns the shares in the distributing company.

77 It also follows from paragraph 39 of the present judgment that, inasmuch as, with regard to the objective of prevention of economic double taxation, those recipient companies are in a comparable situation to that of recipient companies established in the Netherlands or which have a permanent establishment there which holds the shares in the distributing company, the Kingdom of the Netherlands is under a duty to ensure that, under the procedures laid down by its national law to prevent or mitigate a series of liabilities to tax or economic double taxation, recipient companies established in another Member State are subject to the same treatment as recipient companies established in the Netherlands.

78 Accordingly, the Kingdom of the Netherlands cannot rely on the existence of a tax advantage granted unilaterally by another Member State in order to escape its obligations under the Treaty.

79 However, it cannot be excluded that a Member State may succeed in ensuring compliance with its obligations under the Treaty through the conclusion of a convention for the avoidance of double taxation with another Member State (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 71).

80 Since the tax system resulting from a convention for the avoidance of double taxation forms part of the legal background to the main proceedings and has been presented as such by the national court, the Court of Justice must take it into account in order to give an interpretation of Community law that is relevant to the national court (see, to that effect, Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 51; *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 71; *Denkavit Internationaal and Denkavit France*, paragraph 45; and *Test Claimants in the Thin Cap Group Litigation*, paragraph 54).

81 However, as the Advocate General noted in point 85 of his Opinion, there is nothing in the order for reference to indicate that the Gerechtshof te Amsterdam intended to refer to the relevant provisions of the DTC.

82 It is for the national court to identify the law applicable to the main proceedings.

83 It is therefore for the national court to establish whether account should be taken, in the main proceedings, of the DTC, and, if so, to determine whether that convention enables the effects of the restriction on the free movement of capital identified in the context of the reply to the first question, in paragraph 28 of this judgment, to be neutralised.

84 The answer to the second question must therefore be that a Member State may not rely on the existence of a full tax credit granted unilaterally by another Member State to a recipient company established in the latter Member State in order to escape the obligation to prevent economic double taxation of dividends resulting from the exercise of its power to tax in a situation where the first Member State prevents economic double taxation of dividends distributed to companies established in its territory. Where a Member State relies on a convention for the avoidance of double taxation concluded with another Member State, it is for the national court to establish whether account should be taken, in the main proceedings, of that convention, and, if so, to determine whether it enables the effects of the restriction on the free movement of capital to be neutralised.

Costs

85 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 (First Chamber) hereby rules:

1. **Articles 56 EC and 58 EC preclude legislation of a Member State which, where the minimum threshold for the parent company's shareholdings in the share capital of the subsidiary set out in 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 is not reached, provides for a withholding tax on dividends distributed by a company established in that Member State to a company established in another Member State, while exempting from that tax the dividends paid to a company liable to corporation tax in the first Member State or which has a permanent establishment in that Member State which owns the shares in the company making the distribution.**

2. **A Member State may not rely on the existence of a full tax credit granted unilaterally by another Member State to a recipient company established in**

the latter Member State in order to escape the obligation to prevent economic double taxation of dividends resulting from the exercise of its power to tax in a situation where the first Member State prevents economic double taxation of dividends distributed to companies established in its territory.

Where a Member State relies on a convention for the avoidance of double taxation concluded with another Member State, it is for the national court to establish whether account should be taken, in the main proceedings, of that convention, and, if so, to determine whether it enables the effects of the restriction on the free movement of capital to be neutralised.

[Signatures]