



**RÉPUBLIQUE
FRANÇAISE**

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References

Council of State

N ° 423810

ECLI: FR: CECHR: 2020: 423810.20200605

Unpublished in Lebon collection

9th - 10th rooms combined

Mr Nicolas Agnoux, rapporteur
Ms Emilie Bokdam-Tognetti, public rapporteur
SCP CELICE, TEXIDOR, PERIER, lawyers

reading of Friday, June 5, 2020

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

Full Text

Considering the following procedure:

The company Euro Stockage asked the administrative court of Montreuil to pronounce the discharge of the withholding tax to which it was subject for the years 2007 and 2009 as well as the corresponding penalties. By judgment n ° 1303382 of March 16, 2015, the Montreuil administrative court rejected his request.

By judgment n ° 15VE01531 of July 3, 2018, the Versailles administrative court of appeal rejected the appeal made by the company Holcim France, now the company Eqiom, coming to the rights of the company Euro Stockage, against this judgment.

By a summary appeal, a corrected summary appeal, an additional brief and a reply, registered on 3 and 5 September 2018, on 3 December 2018 and on 12 May 2020 at the litigation secretariat of the Council of State, the companies Eqiom and Enka ask the Council of State:

- 1 °) to cancel this judgment;
- 2 °) to charge the State the sum of 5,000 euros under article L. 761-1 of the administrative justice code.

Having regard to the other documents in the file;

Having regard to:

- the treaty on the functioning of the European Union;
- Council Directive 90/435 / EEC of 23 July 1990;
- the judgment of February 26, 2019 of the Court of Justice of the European Union, aff. C-116/16 and C-117/16, Skatteministeriet v T Danmark Y Denmark Aps ";
- the general tax code and the book of tax procedures;
- the code of administrative justice and ordinance n ° 2020-305 of March 25, 2020;

After hearing in a public session:

- the report by Mr. Nicolas Agnoux, master of requests,
- the conclusions of Ms. Emilie Bokdam-Tognetti, public rapporteur;

The floor having been given, before and after the conclusions, to the SCP Célice, Texidor, Perier, lawyer of the company Eqiom;

Considering the following:

1. It appears from the documents in the file submitted to the trial judges that the simplified joint-stock company (SAS) Euro Stockage, whose activity is the unloading, storage and bagging of cement, has been verified. accounting for the period between January 1, 2007 and December 31, 2009, at the end of which the administration, after noting that the company declared that it had paid dividends, during the years 2007 and 2009, at its Luxembourg parent company Enka, charged for these two years, in application of article 119 bis of the general tax code, a withholding tax at the rate of 25% on the basis of the dividends thus distributed. Eqiom, formerly Holcim France,

2. First, under the terms of Article 1 of Directive 90/435 / EEC of 23 July 1990 on the common tax regime applicable to parent companies and subsidiaries of different Member States, as amended by Directive 2003 / 123 / CE of the Council of 22 December 2003: "1. Each Member State applies this Directive: / - to distributions of profits received by companies of that State and coming from their subsidiaries in other Member States, / - to distributions of profits made by companies of that State to companies of other Member States of which they are subsidiaries. / 2. This Directive does not preclude the application of national or contractual provisions necessary in order to avoid fraud and abuse ". According to the

under the terms of a double taxation agreement concluded with a third State, as having its tax residence outside the Community; / b) Take one of the forms listed on a list drawn up by order of the Minister responsible for the economy in accordance with the annex to the directive of the Council of the European Communities n ° 90-435 of 23 July 1990 amended by directive 2003 / 123 / EC of the Council, of 22 December 2003; / c) Hold directly, uninterrupted for two years or more, 25%. At least 100 of the capital of the legal person distributing the dividends, or make a commitment to keep this participation uninterrupted for a period of at least two years (...) / d) Be liable, in the Member State where it has its place of effective management, corporate tax of this State, without option and without being exempt. / (...) 3. The provisions of 1 do not apply when the dividends distributed benefit a legal person controlled directly or indirectly by one or more residents of States which are not members of the Community, unless this legal person justifies that the chain of participations does not have as main object or as one of its main objects to take advantage of the provisions of 1 (...) ".

4. The Court of Justice of the European Union noted in the reasons for its judgment of 26 February 2019 Skatteministeriet v T Danmark and Y Denmark Aps (case C-116/16 and C 117/16, paragraph 113) that mechanisms of Directive 90/435 / EEC, in particular Article 5 thereof, are "designed for situations in which, without their application, the exercise by Member States of their powers of taxation could lead to distributed profits by the company subsidiary to its parent company are subject to double taxation (...). However, such mechanisms are not intended to apply when the beneficial owner of the dividends is a company having its tax residence outside Union since, in such a case, the exemption from withholding tax on said dividends in the Member State from which they are paid could result in these dividends not being effectively taxed in the Union ".

5. It follows from those reasons that the status of beneficial owner of dividends must be regarded as a condition for benefiting from the exemption from withholding tax provided for in Article 5 of the Directive. Consequently, the court did not commit an error of law in ruling that the company Eqiom was not justified in maintaining that the provisions of 2 of article 119 ter of the general tax code, in that they make the benefit of the exemption conditional on the legal person justifying to the debtor or the person who ensures the payment of the dividends that he is the beneficial owner, would be incompatible with the objectives of Directive 90/435 / EEC of 23 July 1990. If, in its reasons,

6. Second, it appears from the documents in the file submitted to the trial judges that the administration contested before the court the fact that the Luxembourg parent company Enka was the beneficial owner of the dividends in dispute, in the absence of any evidence. , such as a bank identity statement, establishing that she was indeed the holder of the bank account opened in Switzerland to which the dividends were paid. By holding, at the end of a sovereign appraisal free of distortion, that none of the documents produced by the applicants was capable of establishing that that company had apprehended the disputed dividends and by rejecting as not probative a letter bearing two signatures illegible without mentioning the names and qualifications of their author, and under the terms of which "

7. It follows from the foregoing, without there being any need to rule on the admissibility of the appeal as it emanates from the company Enka, that the companies Eqiom and Enka are not entitled to request the annulment of the stop they are attacking.

8. The provisions of Article L. 761-1 of the Code of Administrative Justice preclude a sum from being charged, as such, to the State which is not the losing party in the present proceeding.

DECIDES:

Article 1: The appeal of the companies Eqiom and Enka is rejected.

Article 2: This decision will be notified to the companies Eqiom and Enka and to the Minister of Action and Public Accounts.