d) Cases already before the Court

The Court of Justice examined and will very soon deliver its decisions in respect of cases introduced by the Commission in 1978 and 1979 against France, Italy, Denmark, Ireland and the United Kingdom, for infringement of Article 95 in respect of taxation of alcoholic drinks and against Italy for infringement of the same provisions in respect of taxation of regenerated mineral oils.

Taxation of Investment Fund Income

Opinion of the Economic and Social Committee [1] on the proposal for a Council Directive on the application to collective investment institutions of the Council Directive concerning the harmonization of systems of company taxation and of withholding taxes on dividends. [2]

On August 2, 1978 the Council of the European Communities referred the above proposal to the Economic and Social Committee for its comment. The Committee prepared its opinion at the plenary session in Brussels on October 24-25, 1979. The text of the opinion is as follows.

1. Preliminary remarks

1.1. The Committee is pleased to see that the Commission is now proposing to bring collective investment institutions within the scope of the (still pending) Directive concerning the harmonization of systems of company taxation and of withholding taxes on dividends. [3] The Commission is thus doing what the Economic and Social Committee expressly asked it to do in its opinion of 29 September 1976. [4] The Committee would reiterate the view voiced in that opinion, namely that both Directives should enter into force at the same time, because it is impossible to accept that collective investment institutions should be excluded from measures to harmonize systems of company taxation.

1.2. The Committee regrets that the Council has still failed to discuss and adopt:

(a) the proposal of 16 January 1969 for a Directive on the common tax arrangements applicable to parent and subsidiary companies in different Member States, [5] and

(b) the proposal of 16 January 1969 for a Directive on the common tax arrangements applicable to mergers, scission and contribution of assets involving companies in different Member States. [6]

Both proposals are referred to in the list of definitions given in Article 2 of the proposal for a Directive concerning the harmonization of systems of company taxation, and therefore have to be adopted before the latter. The Committee therefore urgently requests the Council to discuss and adopt these two 1969 proposals without delay so that progess towards the harmonization of company taxation is no longer impeded on that score at least.

1.3. The Committee approves the proposal, subject to the comments set out below:

2. General comments

2.1. Collective investment institutions (CIIs) should not be discriminated against but should, on the contrary, be encouraged. This is the goal pinpointed by the Commission but the proposal falls clearly short of it. The permanent or temporary financial discrimination and administrative difficulties which the proposal will entail for CII participants are considered by the Committee to be unacceptable. It will therefore be necessary not only to eliminate this discrimination but also to provide for relief to encourage saving through CIIs in keeping with the proposal's object.

1. Published in the Official Journal of the European Communities No. C 53 of March 3, 1980 at 58. The opinion is dated October 24, 1979.
2. See for a discussion of this proposal: Richard P. Casna, *E.E.C: Another Step Forward to Tax Harmonization*, 18 EUROPEAN TAXATION 372 (1978). The text of the proposal was published in OJ of August 2, 1978 at 8. It was reproduced in 18 EUROPEAN TAXATION 379 (1978). It also appears in SUPPLEMENTARY SERVICE TO EUROPEAN TAXATION, Section D and in THE TAXATION OF COMPANIES IN EUROPE., Vol. 3, Section E.E.C. Directives, II. Tax Law.
3. OJ No. C 253 of November 5, 1975.
4. OJ No. C 278 of November 24, 1976.
5. OJ No. C 39 of March 22, 1969.
6. Id.

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3. Specific comments

3.1. *Article 2*

3.1.1. The definition of 'collective investment institutions' does not offer adequate legal certainty at the Community level in the Committee's view. The conditions which CIIs must fulfil, namely that they must make 'offers to the public' and must observe 'the principle of spreading the investment risk', are vague from the legal point of view and the Committee considers that they are not necessary. The tax claim should be adequately secured for example by Article 2(2), which stipulates that dividends received by a CII must be attributed for tax purposes to the participants in the same or the following year if they are to count as redistributed dividends. The Committee therefore thinks that additional criteria of the kind mentioned above should be dispensed with and that a suitable Annex would suffice. Moreover, this would avoid the unnecessary perfectionism, which is also reflected in the derogation in Article 3.

3.1.2. The proposal states that dividends may not be placed to reserve for a period of more than five years. A time limit was approved in principle in the Committee's opinion of 29 September 1976 on the harmonization of systems of company taxation, though the Committee did request that the time limit should, if possible, be longer than five years. Otherwise, there is a risk that CII participants will forfeit their tax credit.

3.2. *Article 3*

3.2.1 So that citizens in all Member States will know where they stand legally, the Committee thinks that the system of bilateral and multilateral agreements should be abandoned. It would then be possible, in conjunction with Article 2 (see last sentence of 3.1.1.), to dispense with the perfectionist provision for an agreement in the case of CIIs whose capital is not raised by means of difficult-to-define 'offers to the public'.

3.2.2. The Committee therefore thinks that uniform derogations applicable to the whole of the Community should be laid down in the Annex referred to in Article 2, which might have to be amended and expanded accordingly.

3.3. *Article 4*

3.3.1. Three procedures exist side-by-side, viz:
(a) tax credit for CII participants (paragraph 1);
(b) set-off for CIIs (paragraph 2);
(c) repayment to CIIs (Article 10).

This makes matters neither clear nor simple. These various procedures might inevitably lead to different dividend distribution practices, which would rule out the comparability necessary for an evaluation of CIIs.

The Committee therefore considers that a simple uniform and practical procedure is called for.

3.3.2. Viewed in conjunction with Article 12 (under which the basis of assessment is to be the dividends minus the costs incurred by the CII), the provisions of paragraph 3 place CII participants at a clear disadvantage compared with shareholders. In the case of shares, no costs, such as custody or other bank charges, are deducted from the dividends in calculating the basis of assessment. The Committee therefore thinks that the tax credit must be based on the gross dividend without deduction of 'proportionate costs'. Furthermore, the CII participant should be able to set off the administrative costs as expenses in his income tax return.

3.3.3. The Committee considers that discrimination against CII participants from the liquidity angle can only be precluded if the participant's tax credit is reflected in the unit price the minute the dividends are received by the CII. This is most readily ensured if the tax credit is repaid to the CII immediately. Otherwise, the CII participant will be penalized and will not enjoy the promised relief or concession. The perfectionistic safeguarding of the tax claim must take second place here.

3.3.4. The words 'other than a CII' in Article 4.1., should not imply that where income is passed from one CII to a second the tax credit is denied to the participants of the second CII.

3.4. *Articles 5 to 9*

3.4.1. In the Committee's view the use of tax credit in connection with the withholding tax is extremely irksome especially as Article 8 in conjunction with Article 7 will practically force the Member States to levy such a tax in all cases. This gross discrimination *vis-à-vis* fixed-interest investments, which are not subject to withholding tax in several Member States and will not be in the future either, is diametrically opposed to the proposal's object.

3.4.2. The Committee would therefore reiterate the proposal made by the Committee in its opinion of 29 September 1976 under point 2.12.1., viz.

'The Member States should find ways of mitigating the hardship that a withholding tax of

25 percent might have on shareholders with small incomes'.

What holds good for shareholders must apply all the more to CII participants who, by the very nature of things, are mostly people with small incomes. Because of the special features of saving through CIIs, it is not enough, however, to provide for exemption of CII participants on the basis of a certificate or the like, as in the case of shareholders. This red tape by itself would be bound to make saving through CIIs less attractive than saving through fixed-interest or other investments where no withholding tax is levied. Therefore withholding tax should be dropped completely in the case of CIIs.

3.4.3. Reference should be made to 3.3.2 and 3.3.3. in connection with the question of net dividends which arises agains in Article 9.

3.5. *Article 10*

3.5.1. This matter has already been dealt with in essence in 3.3.

3.5.2. The procedure set out in this Article is to be recommended in general since the concession always comes into operation prior to the redistribution of the dividends to the participants, and the basic object of promoting rather than penalizing investment in CIIs can be achieved most readily in this way.

3.5.3. The 'proportionate costs' provisions hamper this procedure and should be rejected. These costs cannot be calculated before the end of the year.

3.6. *Article 12*

3.6.1. These provisions, taken together with those laid down in Articles 4 and 10, are emphatically rejected by the Committee because they penalize saving through CIIs (cf. 3.3. and 3.5.3.). The Committee therefore feels that Article 12 should be deleted thereby making it possible to write off the costs to the fund's capital.

3.6.2. The taking into account of the 'proportionate costs' will also have unacceptable repercussions.

On account of the time-lag the proportion of costs and thus the cost allocation to participants will depend on the numbers of participants on the relevant date. A change in participants will have an intolerable arbitrary effect.

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