EPSON EUROPE

OPINION OF ADVOCATE GENERAL COSMAS
delivered on 17 February 2000 *

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1. In the present case, which came to the Court by way of reference for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal), the Court is asked to interpret Article 5(4) 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 [1] (hereinafter 'the Directive') in respect of a special rule applicable to Portugal only.

I — Legal framework

A — *The Community legislation*

2. The Community legislature adopted the Directive with the aim of establishing a common system of taxation applicable to parent companies and subsidiaries of different Member States.

3. The need for the Directive arises from the double taxation to which groups of companies established in more than one

* Original language: Greek.
1 — OJ 1990 L 225, p. 6.

Member State may be subject. 'Subject to specific relief granted by States either unilaterally or under bilateral agreements, the profits made by a subsidiary company are liable to be taxed both in the State of the subsidiary as trading income of the subsidiary and, upon distribution of the income to the subsidiary's parent company, as dividend income of the parent company in the latter's State of residence'. [2]

4. The Directive is made up of nine articles establishing the scope of the Directive (Article 1), the definition of certain fundamental concepts (Articles 2 and 3), the principles and fundamental rules of Community law in that field and the way they are to be implemented (Article 4) and a series of exceptions applying to certain Member States with regard to withholding tax (Article 5). Articles 6 and 7 establish certain additional elements concerning withholding tax and Articles 8 and 9 include the usual provisions on the Directive's entry into force and its addressees.

2 — Point 6 of the Opinion of Advocate General Jacobs in Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063. The Advocate General then added that 'the income may be subject to further taxation at the company level if the parent company is merely an intermediate holding company owned by a company in another State'. The main issue in those cases was whether the Directive permits a Member State to apply a rule under which withholding tax must be deducted by a subsidiary company from distributions which it makes to its parent company in the first year following its acquisition by that company, so that the parent company is denied the exemption from withholding tax for the first year even where it ultimately maintains its holding beyond that period.

5. Specifically, Article 1(1) of the Directive provides:

'Each Member State shall apply this directive:

— to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

— to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.'

6. Article 2 provides:

'For the purposes of this directive "company of a Member State" shall mean any company which:

(a) takes one of the forms listed in the Annex hereto;

(b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;

(c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:

...

— imposto sobre o rendimento das pessoas colectivas in Portugal,

...'.

7. Article 3 of the Directive provides:

'1. For the purposes of applying this directive:

(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 25% in the capital of a company of another Member State fulfilling the same conditions;

(b) "subsidiary" shall mean that company the capital of which includes the holding referred to in (a)

...'. [3]

8. Article 4(1) provides:

'1. Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent

3 — Article 3(2) states that by way of derogation from paragraph 1, Member States are to have the option of replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights. They also have the option of not applying the Directive to those of their companies which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.

company shall, except when the latter is liquidated, either:

— refrain from taxing such profits, or

— tax such profits while authorising the parent company to deduct form the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax.'

9. Moreover, as regards exemption from withholding tax, the Community legislature provided for certain exceptions to the common system for three Member States (the Federal Republic of Germany, the Hellenic Republic and the Portuguese Republic). [4] Specifically, although the Council considered that it was 'necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax', it pointed out that 'the Portuguese Republic, for budgetary reasons, should be authorised to maintain temporarily a withholding tax'. [5]

10. Thus, Article 5 states:

'1. 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.

...

4. Notwithstanding paragraph 1, the Portuguese Republic may levy a withholding tax on profits distributed by its subsidiaries to parent companies of other Member States until a date not later than the end of the eighth year following the date of application of this directive.

Subject to the existing bilateral agreements concluded between Portugal and a Member State, the rate of this withholding tax may not exceed 15% during the first five years

4 — See the fifth recital in the preamble to the Directive.

5 — The Federal Republic of Germany and the Hellenic Republic were authorised to maintain temporarily a withholding tax by reason of the particular nature of their corporate tax systems.

and 10% during the last three years of that period.

Before the end of the eighth year the Council shall decide unanimously, on a proposal from the Commission, on a possible extension of the provisions of this paragraph.'

11. Under Article 6, the Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary.

12. Article 7(1) provides:

'1. The term "withholding tax" as used in this directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company.'

13. Article 8 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary for them to comply with the Directive before 1 January 1992 and are forthwith to inform the Commission thereof.

B — *The national legislation*

14. The Directive was transposed into Portuguese law, as far as the imposto sobre o rendimento das pessoas colectivas (corporation tax, hereinafter 'IRC') is concerned, by Decree Law No 123/92 of 2 July 1992, which recast Article 69(2)(c) of the Código do Imposto sobre o Rendimento das Pessoas Colectivas (Corporation Tax Code, hereinafter 'the CIRC'), which is now worded as follows:

'In the case of income of companies not having their seat or actual management within Portuguese territory and not having any permanent establishment there to which such income may be attributable, the rate of corporation tax shall be 25%, except as regards the undermentioned income:

...

(c) profits which a company established in Portuguese territory, under the conditions laid down in Article 2 of Direc-

tive 90/435/EEC of 23 July 1990, makes available to a company established in another Member State which meets the same conditions and has a direct holding in the capital of the former of not less than 25% for two consecutive years or since the incorporation of the subsidiary, provided that, in the latter case, the holding is maintained for that period, in which case the rate of corporation tax shall be 15% until 31 December 1996, without prejudice to the provisions of bilateral conventions in force, and 10% from 1 January 1997 until 31 December 1999.'

15. When the Directive was transposed, however, Articles 182 and 184 of the Código do imposto municipal da sisa e do imposto sobre as sucessões e doacões (Code governing the municipal tax on transfers and the succession and donation tax, hereinafter 'the CIMSISD') remained unchanged. The articles provide for a succession and donation tax in respect of transfers, without consideration, of shares in companies (imposto sobre as sucessões e doacões, hereinafter 'ISD') which is levied, whenever profits are distributed, on the dividends paid by companies which have their seat in Portugal.

16. Article 182 of the CIMSISD provides:

'The tax on transfers for no consideration:

...

(c) of shares in companies whose seat is in Portugal shall be withheld at a flat rate from the income from securities.

Proviso

The tax on transfers of shares in respect of which no income is payable shall be calculated and paid in accordance with the ordinary law.'

17. Under Article 184 of the CIMSISD, entitled 'Rate of tax. Withholding tax':

'The flat-rate levy shall be 5% of the interest, dividends or any other income relating to shares and shall be deducted from such income by the bodies which are required to make the relevant payment.

...'

18. Thus, the flat-rate levy is imposed at a fixed rate of 5% of the income from certain

securities and not at a variable rate connected with the value of the transfers.

II — Facts

19. Epson Europe BV (hereinafter 'Epson' or 'the parent company'), a company whose registered office is in the Netherlands, holds more than 25% of the capital of Epson Portugal SA (hereinafter 'Epson Portugal' or 'the subsidiary'), whose registered office is in Portugal.

20. It is clear from the order for reference that the relationship between the parent company, a private limited company incorporated under Netherlands law, and the subsidiary, a public limited company incorporated under Portuguese law, falls within the scope of the Directive.

21. By resolution of 31 March 1993, the subsidiary decided to appropriate PTE 80 000 000 to the distribution of dividends, that is a payment of PTE 1 066.66 for each share held. [6] The dividends distributed to the parent company thus amounted to PTE 40 795 733. They were paid to the parent company subject to deduction of IRC at the rate of 15% — a deduction of PTE 6 119 360 — and of a sum of PTE 2 039 786 in respect of ISD at the rate of 5%.

22. Taking the view that ISD was not payable in this case, Epson brought proceedings before the Tribunal Tributário de Primeira Instância do Porto (Tax Court of First Instance, Oporto) to recover that tax.

23. The Tribunal Tributário de Primeira Instância do Porto upheld the action on the ground that the levy chargeable under the derogation provided for in Article 5(4) of the Directive had already been covered by the withholding tax imposed in respect of IRC and that liability to ISD as well would render the Directive ineffectual.

24. The tax authorities (the Fazenda Pública, and the Ministério Público) appealed against that judgement to the Supremo Tribunal Administrativo.

25. The Supremo Tribunal Administrativo expressed doubts as to whether the scope of the Directive extended to ISD and, therefore, whether the Portuguese Republic had correctly transposed the Directive, in so far as it had taken account of the Directive only as regards the liability of distributed profits to IRC and not their liability to ISD, under Articles 182 and 184 of the CIMSISD.

6 — Epson informs us that it holds 38 246 Epson Portugal shares.

26. According to the national court, ISD is also income-based, since it is levied in the form of a withholding tax of 5% on dividends or any other income from securities. It is therefore a tax on income, levied in parallel with IRC as provided for by the CIRC, even though it is called a 'succession and donation tax'.

III — Question referred for a preliminary ruling

27. By order of 23 September 1998, the Supremo Tribunal Administrativo sought a preliminary ruling from the Court on the following question:

'Must Article 5(4) 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, in so far as it sets limits of 15% and 10% for the derogation granted to Portugal, be interpreted as meaning that such limits refer only to the levying of corporation tax (in Portugal)?

Or does it extend to any tax on the income from shares, levied on dividends, regardless of the legislative instrument which provides for it?'

IV — Answer to the question referred for a preliminary ruling

28. First, I propose to examine the issues raised by the question (A) and the characteristics of the system established by the Directive (B), then, to what extent the tax at issue (ISD) falls within the scope of the Directive and the implications of the answer to that question, since it is, in essence, the question asked by the national court, the answer to which is useful for disposing of the case, given the particular elements of fact and of (national and Community) law (C).

A — *The issues raised*

29. Both Epson and the Commission maintain that ISD falls within the scope of the Directive, while the Portuguese Government and the Fazenda Pública take the opposite view.

30. Specifically, the Commission and Epson argue that the Directive, and Article 5(4) in particular, cover all taxation, however described, which acts as a withholding tax on dividends distributed by a

subsidiary to its parent company in another Member State.

31. The Commission states that, by failing to amend Articles 182 and 184 of the CIMSISD, the Portuguese Republic granted itself 'an additional derogation' which is not provided for by the Directive and is contrary to its content and objective. The only derogation granted to the Portuguese Republic, for a transitional period and by way of exception, concerns the rates provided for by Article 5(4) of the Directive.

32. The Portuguese Government and the Portuguese tax authority contend that the derogation under Article 5(4) of the Directive does not apply to ISD, since that tax is levied not on income but on the value of securities, reflecting the extent to which the dividends are capitalised. In other words, the tax is based on a capitalisation factor. Thus, the tax levied under Articles 182 and 184 of the CIMSISD should not be confused with the taxation of income from securities, which is connected with income tax. Article 182 establishes a tax on transfers of assets and is therefore not subject to the prohibition under Article 5(4) of the Directive.

33. The Portuguese Government maintains that ISD has a long tradition within the Portuguese legal system and that it was even maintained when the CIMSISD was reformed in 1958. The flat-rate succession and donation tax (ISD) is not a tax on income but a particular way of taxing successions and donations. In actual fact, it is the equivalent of a succession and donation tax pre-payment and, as such, its nature as a tax on transfers of assets without consideration in lieu of a general, progressive-rate tax on succession and donation cannot be doubted.

34. In support of its arguments, the Portuguese Government presented a memorandum of 25 March 1989 from the General Secretariat of the Council [7] to the Permanent Representatives Committee concerning the draft directive on subsidiaries and parent companies, in which it is proposed that a declaration that succession and donation tax remain outside the scope of the Directive be included. The Portuguese Government also submitted to the Court a draft declaration of the Council and the Commission, dated 9 July 1990, [8] with a similar content. Moreover, the Portuguese Government maintained (point 5 of its written answer to a question addressed to it by the Court) that its reservations and observations had been accepted, as evidenced by the minutes of the 1421st Council meeting of 23 July 1990 in Brus-

7 — Annex II to Document No 6773/89 FISC 80, p. 12.
8 — Annex II to Document No 7384/90 FISC 61, p. 6.

sels. It also relied on various documents [9] which have not, however, been duly brought before the Court.

35. Finally, the Portuguese Government points out that during negotiations on agreements to avoid the double taxation of income, the nature of ISD was examined and, although it forms part of the overall tax burden on dividends, it has always been maintained that, since it is levied on succession despite the taxable amount (the dividends distributed) and the way it is collected (as a withholding tax), ISD remained outside the scope of those agreements and was thus not affected by the maximum rates adopted for the taxation of dividends. In the same way, the tax rates provided for by the Directive do not apply to that flat-rate succession and donation tax.

B — *The system established by the Directive*

36. In adopting the Directive, the Council created a tax system applying to the Member States' parent companies and subsidiaries. Its adoption is one of the first attempts to harmonise direct taxation at Community level. [10]

37. That system displays the following two basic characteristics. First, it aims to obviate double taxation of the profits distributed by a subsidiary established in one Member State to its parent company established in another Member State. Second, it abolishes, subject to certain exceptions, withholding taxes on profits distributed by a subsidiary established in one Member State to its parent company in another Member State. [11]

38. Specifically, the Community legislature took the view [12] that the grouping together of companies of different Member States, that is, the formation of groups of such companies, might be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market, and that such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the

9 — Documents No 7945/90, p. 3, point 10; No 8026/90 PN/CONS 41 and ECOFIN 46 of 27 July 1990. Also, Documents No 9598/90 of 31 October 1990 and No 9738/90 PV/CONS/62 and DEVGEN 61, point 2.

10 — I would recall that the Court has held that, as Community law stands at present, direct taxation does not as such fall within the purview of the Community. See, by way of example, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21. Also see Case C-287/94 *Frederiksen* [1996] ECR I-4581, paragraphs 20 and 21, concerning income tax which, as a direct tax, remains outside the scope of Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412).

11 — See paragraph 8 of the Opinion of Advocate General Jacobs in *Denkavit*, cited above at footnote 2.

12 — First recital in the preamble to the Directive.

Member States. It was therefore necessary to introduce with respect to such grouping together of companies of different Member States tax rules which were neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level.

39. To ensure fiscal neutrality, the Directive provides for exemption from withholding tax for a parent company, at least where it holds a minimum of 25% of the capital of the subsidiary (Article 5(1)).

40. In *Denkavit*, [13] the Court held that, 'as appears particularly from the third recital in its preamble, the Directive seeks, by the introduction of a common tax system, 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 cross-border cooperation. Thus, with a view to avoiding double taxation, Article 5(1) of the Directive provides for exemption in the State of the subsidiary from withholding tax upon distribution of profits'.

41. Under Article 5(4), the Portuguese Republic was allowed, *for budgetary reasons*, to levy a withholding tax on profits distributed by its subsidiaries to parent companies of other Member States. The rate of this withholding tax could not exceed 15% during the first five years following the date of application of the Directive (1 January 1992) and 10% during the following three years.

42. The Portuguese Republic's option to levy a withholding tax on profits distributed by subsidiaries to parent companies established in other Member States constitutes a derogation from the principle of the exemption from withholding tax provided for in Article 5(1) of the Directive. Since it constitutes a derogation from the principle prevailing on the subject, it must be interpreted strictly, as the Court has held in similar cases. [14]

43. However, for the prohibition of withholding tax or, in the case of the Portuguese Republic, the restriction of that tax, to

13 — Judgment cited above at footnote 2, paragraph 22.

14 — In this connection, I would recall that in *Denkavit*, cited above at footnote 2, (paragraph 27), the Court reaffirmed the principle of the strict interpretation of the provisions of directives aimed at denying certain persons recognised by law advantages derived from provisions of Community law. The Court thus emphasised that 'the Member States' option to lay down a minimum period during which the parent company must maintain a holding in the subsidiary is to be interpreted strictly, since it constitutes a derogation from the principle of exemption from withholding tax provided for in Article 5(1) of the Directive. That option cannot, therefore, be given an interpretation going beyond the actual words of Article 3(2), to the detriment of beneficiary undertakings'.

apply, the conditions provided for in Articles 2(a), (b) and (c) and 3(1)(a) and (b) must be met. Those conditions are as follows: (a) subsidiaries and parent companies must take one of the forms listed in the Annex to the Directive; (b) according to the tax laws of a Member State, companies must be considered to be resident for tax purposes in that State and not outside the Community, under the terms of a double taxation agreement with a third State; (c) they must be subject, without the possibility of an option or of being exempt, to one of the taxes listed in Article 2(c) (in the case of Portugal, the IRC) or to any other tax which may be substituted for any of those taxes; and (d) the parent company must have a minimum holding of 25% in the capital of the subsidiary established in another Member State. As regards this last requirement, the second indent of Article 3(2) provides that Member States have the option of not applying the Directive to those of their companies which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.

44. Moreover, given that the purpose of the Directive is to facilitate the tax arrangements governing cross-border co-operation, 'Member States cannot therefore, in this regard, unilaterally introduce restrictive measures'. [15]

C — *The tax at issue (ISD) in the light of the Directive*

45. It is necessary at the outset to clarify the following point. It is for the Court to determine, irrespective of classifications under national law, to what extent a withholding tax established by a Member State constitutes a tax within the meaning of the Directive and is therefore prohibited under Article 5(1) of the Directive or, under certain conditions, is allowed in respect of the Portuguese Republic under Article 5(4). In other words, I consider that Community law concepts such as 'withholding tax on profits distributed' should not be interpreted using semantic distinctions or theories of national law. Moreover, that is what the principle of the primacy of Community law over national law requires. If that were not so, it would be possible to determine the scope of Community rules on the basis of distinctions, and therefore

15 — As held by the Court in *Denkavit*, cited above at footnote 2, paragraph 26. In that case, the requirement that the minimum holding period be completed when the profits for which the tax advantage was sought were distributed was a similar restrictive measure.

provisions, of national law, contrary to the intention of the Community legislature. [16]

46. In order to determine whether ISD falls within the scope of the Directive, first, the provisions of that Directive must be given a literal, systematic and teleological interpretation. Then, the nature of that tax must be examined, in particular its chargeable event and taxable amount.

47. The Directive aims, *inter alia*, to obviate the double taxation of profits distributed by a subsidiary to its parent company. According to the provisions of that Directive, the profit made by the subsidiary must be exempt from tax at the level of the parent company, that is, exemptions apply to both the distribution of dividends in the country of origin — taxation at source — and their receipt in the country where the parent company is established — taxation upon entry.

48. From the wording alone of the exemption introduced by Article 5(4) of the Directive it can be noted that the Community legislature refers to 'profits' and 'withholding tax', not income tax, tax on profits or corporation tax, nor does it use any other similar expression which would lead to a strict interpretation [17] of that provision, as Epson rightly points out in point 25 of its written observations. In my view, this means that all withholding taxes are subject to the prohibition laid down in the Directive, whatever the name or nature of the tax levied on distributed profits. In other words, 'withholding tax' cannot be interpreted as being confined to the taxes listed by name in Article 2, since it applies to all taxes levied in the Member State of the subsidiary on distributed profits (dividends).

49. That conclusion reached through a literal and teleological interpretation is the same as that reached through a systematic interpretation. Article 5(4) is a transitional provision and must be interpreted in conjunction with Article 5(1). Thus it is clear that it constitutes a derogation from the rule enshrined in Article 5(1), which introduces a general prohibition of withholding tax on distributed profits. Therefore, as an exception to the general rule, it must be interpreted strictly, as previously discussed.

16 — The Court has held that the classification of a certain national tax as direct or indirect has no decisive significance. Thus, in Joined Cases C-197/94 and C-252/94 *Bautiaa and Société française maritime* [1996] ECR I-505, paragraph 39, where the Court was asked to interpret provisions of Directive 69/335 concerning indirect taxes on the raising of capital, the Court held that 'the nature of a tax, duty or charge must be determined by the Court, under Community law, according to the objective characteristics by which it is levied, irrespective of its classification under national law'. These concepts are independent of the concepts found in national law. In other words, as I have pointed out in the past (see point 60 of my Opinion in C-56/98 *Modelo* [1999] ECR I-6427), these concepts have their own content which cannot be determined in conjunction with analyses, distinctions and theories of the national laws of the now 15 Member States.

17 — See the second indent of Article 4(1) and Articles 5 and 6 of the Directive.

Thus, under Article 5(4), the Portuguese Government is obliged to achieve a specific result, namely not to levy a withholding tax on distributed profits at a rate higher than the maximum rates [18] allowed. [19]

50. Admittedly, Article 2 of the Directive lists as a condition for its application certain national taxes, providing that the company of a Member State must be subject to one of those taxes, without the possibility of an option or of being exempt. Moreover, the IRC is the only Portuguese tax listed. That list of national taxes enables, subject to the other conditions being fulfilled, [20] the scope *ratione personae* of the Directive, meaning the companies subject to its provisions, to be determined.

51. By contrast, the list in Article 2 of the Directive does not enable the scope *ratione materiae* of the harmonisation rule to be determined, that is, which taxes must not be levied and which incomes must not be taxed by the Member States.

52. Moreover, in order to obviate the double taxation of distributed profits where the Member State of the parent company does not refrain from taxing such profits, [21] the Community legislature expressly provides that that State may tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits. [22]

53. The above conclusion is corroborated by the fact that in Article 7(1), where the term 'withholding tax' is defined *a contrario*, the Community legislature provides that that term as used in the Directive is not to cover an 'advance payment or prepayment (précompte)' of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company.

54. Moreover, the flat-rate tax provided for in Articles 182 and 184 of the CIMSISD is characterised by, first, the way it is collected by deduction at source like a with-

18 — As previously mentioned, that rate is currently 10%.

19 — That is the conclusion drawn for example by Francisco de Sousa da Câmara, 'O regime fiscal comum aplicável às sociedades-mães e sociedades afiliadas de diferentes estados membros da Comunidade Europeia. Comentario à Directiva 90/435/CEE', *Fisco*, point 43-44, June 1992, pp. 40 to 48, p. 51 et seq. Also see Alberto Xavier, *Direito Tributário Internacional, Tributação das operaçoes internacionais*, Coimbra, Almedina, 1993, Chapter XXV and 584 p., p. 380.

20 — I would recall that a company must take one of the forms listed in the Annex to the Directive and be resident in that State for tax purposes.

21 — First indent of Article 4(1) of the Directive.

22 — First phrase of the second indent of Article 4(1) and second indent of the fourth recital in the preamble to the Directive.

holding tax and, second, its actual effect. It is a tax of 5% on income received by reason of the possession of certain shares, as the Commission points out in point 28 of its written observations.

55. Accordingly, it is necessary to examine the extent to which that 5% flat-rate tax on distributed profits [23] constitutes a prohibited withholding tax, and thus to what extent the limits established by the Directive are exceeded when that tax is added to the withholding tax on distributed profits which the Portuguese Republic may levy by way of derogation, a derogation which must be interpreted strictly.

56. I would therefore observe that ISD and IRC have a cumulative effect and, as a result, the maximum limits on withholding tax on profits distributed by a subsidiary to its parent company, which are provisionally and exceptionally provided for by the Directive with regard to the Portuguese Republic, namely 15% prior to 1 January 1997 and 10% prior to 1 January 2000, are exceeded.

57. Since the chargeable event for succession and donation tax (ISD) is the payment of income from shares (the distributed share dividend), the taxable amount is the income from shares itself and the tax is deducted at source, I consider that ISD is different only in name, and not in substance, from the tax on distributed profits which the Portuguese Republic is authorised to levy under the Directive.

58. Thus, despite being called a succession and donation tax in Portuguese law, [24] ISD, if examined only from the point of view of Community law, is in reality a tax on income, on distributed dividends, levied in parallel with the corporation tax (IRC) provided for by the CIRC, which is also the tax subject to the derogation provided for by Article 5(4) of the Directive in respect of the Portuguese Republic.

59. The fact that ISD is provided for in the CIMSISD, which governs the taxation of succession and donations, is not significant in classifying it under Community law as a withholding tax levied in addition to the

23 — The Commission points out that that tax is levied on income from shares at a 5% flat-rate and not at the fluctuating rate provided for by Article 41 of the CIMSISD, which changes according to the calculated value of the transfers carried out (point 27 of the Commission's written observations).

24 — Both the Commission and Epson discuss at length the difference of opinion in Portuguese law with regard to that tax, namely whether it is a tax on income or a tax on succession and donations, since it is levied irrespective of whether the transfer is *inter vivos* or *mortis causa*. On this issue, see by way of an example, F. de Sousa da Câmara, cited above at footnote 19, p. 51 et seq., and A. Xavier, cited above at footnote 19, p. 378 et seq. Also see the strong criticism of the present Portuguese tax system made at the opening session of the First Tax Law International Conference at the Fernando Pessoa University, Oporto, 22 and 23 March 1997, by Ana Paula Dourado, 'O principio de Direito Comunitário da não-discriminação na tributação sobre o rendimento em Portugal', *EC Tax Review*, Vol. 1, 1997, pp. 10 to 17.

corporation tax provided for by the CIRC. Both for IRC and for ISD the taxable amount is the distributed dividend and they are both deducted at source.

60. Therefore, the description of ISD as a 'tax on transfers' for no consideration of shares in companies whose seat is in Portugal cannot change the fact that the chargeable event for the tax is the payment of dividends or any other income from shares to the holder of those shares, irrespective of any transfer,[25] and that it is the holder of those shares who pays that tax, as the Commission rightly concludes in point 36 of its written observations.

61. In view of the foregoing, I consider that ISD is not compatible with the attainment of the Directive's objectives. Indeed, the taxation of dividends under the CIMSISD renders Article 5(1) ineffective and, as a result, company income theoretically exempt from withholding tax under that directive will not benefit from that exemption in Portugal.

62. Thus, the objectives of the Directive would be undermined if the Portuguese Republic had the freedom to retain taxes which, although in practice constituting a withholding tax, were given a different name in order to bypass the prohibitions under the Directive[26] or had borne a different name under a provision of national law predating the Directive, which leads essentially to the same result.

63. Moreover, the principle of fiscal neutrality, which is essential for the creation of the internal market, may also be compromised where the Portuguese Republic exceeds the limits of the tax it was allowed to levy by derogation, for budgetary reasons and for a limited period, under Article 5(4) of the Directive.

64. Thus, the retention in Portuguese Law of ISD or any other withholding tax on distributed profits, whatever its name, could fracture the system of protection established by the Directive, since the Portuguese Republic would be able to retain all taxation of distributed profits, increasing at will the rate of withholding tax as a result of the flat-rate ISD or of any

25 — See A. Xavier, op. cit., p. 123, and F. de Sousa da Câmara, op. cit., p. 51 et seq.

26 — Moreover, in Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 26, where the Court was asked to interpret the provisions of Directive 69/335 concerning indirect taxes on the raising of capital, it held that 'the objectives of the Directive would be undermined if the Member States were entirely free to retain taxes with the same characteristics as capital duty by categorising them as duties paid by way of fees or dues. It follows that the interpretation of the term at issue, considered in its entirety, cannot be left to the discretion of each Member State'. Also see Case 270/81 *Felicitas* [1982] ECR 2771, paragraph 14.

other tax levied in the same way, and avoiding the prohibition under Article 5(1) of the Directive since, because of its wording, that tax would not be classified as a tax on income.

65. The provision of national law therefore acts as a brake on cooperation between companies established in different Member States, going against the Directive's objective which, as the Court has held, is to facilitate the grouping together of companies within the Community. [27] With the additional taxation of distributed dividends at 5%, the Portuguese Republic is in essence introducing specific restrictions, disadvantages or distortions of competition through provisions of national law which compromise the Directive's objective, namely to facilitate the grouping together of companies of different Member States under conditions analogous to those of an internal market, thus improving their competitive strength at the international level. [28]

66. As regards the Portuguese Government's claims that it is clear from a declaration of the Council and the Commission that ISD was excluded from the scope of the Directive, I believe it does not suffice to alter my opinion that the application in the present case of ISD falls within the scope of the Directive's prohibition. The arguments put forward by that Government in order to demonstrate that it believed that it benefited from a further derogation, in addition to that provided for by Article 5(4) of the Directive, which meant in practice that it was allowed to apply rates other than those laid down in Article 5(4) of the Directive, are immaterial. It is settled case-law that 'declarations recorded in Council minutes in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question'. [29] In other words the implications and legal effects of acts of the Community institutions are determined primarily by their wording, so that their validity and scope cannot be subject to limitations resulting from reservations or declarations made at the stage of the preparatory work on the act in question. [30]

27 — See *Denkavit*, cited above at footnote 2, paragraph 22.

28 — See the first recital in the preamble to the Directive.

29 — See, *inter alia*, *Bautiaa*, cited above at footnote 16, paragraph 51, and *Denkavit*, cited above at footnote 2, paragraph 29. Also see Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; Case 429/85 *Commission* v *Italy* [1988] ECR 843, paragraph 9; Case 237/84 *Commission* v *Belgium* [1986] ECR 1247, paragraph 17; Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraphs 12 and 13; Case 38/69 *Commission* v *Italy* [1970] ECR 47, paragraph 12.

30 — See point 43 of my Opinion in *Bautiaa*, cited above at footnote 16. I would recall that in that case the issue was whether the French Government could rely on a declaration to the Council which indicated that, despite the final wording of Directive 69/335, a special status had been granted to the French tax system in respect of a registration duty payable on company mergers. The Court held (paragraph 51) that the French Government had been unable to provide any information on the question whether the declaration was ever recorded in the minutes of the Council meeting. The declaration relied on by the French Government was not regarded as sufficient evidence to support the conclusion that a special status for the tax at issue had been obtained despite the final wording of Directive 69/335.

V — Conclusion

67. In view of the foregoing, I propose that the Court give the Supremo Tribunal Administrativo the following answer:

Article 5(4) 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 must be interpreted as meaning that the limits of 15% and 10% set for the derogation granted to the Portuguese Republic apply to taxation such as that at issue in the present case, even though it is described as a succession and donation tax.