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Judgment of the Court in Case C-705/20 | Fossil (Gibraltar)

Corporate income tax in Gibraltar: the national authorities responsible for the recovery of aid classified as unlawful may apply a domestic provision in order to prevent double taxation

Following a formal investigation procedure into the corporate income tax regime in Gibraltar, the Commission made a decision that the tax exemption regime applied between 2011 and 2013 to passive interest income and royalty income selectively favoured certain types of company and therefore constituted unlawful State aid which was incompatible with the internal market within the meaning of Article 107(1) TFEU. In order to comply with that decision[1], Gibraltar amended its domestic legislation to permit retrospective taxation of royalty income generated between 2011 and 2013.

Fossil (Gibraltar) is a company established in Gibraltar and wholly owned by Fossil Group Inc., a fashion design and manufacturing group with its registered office in the United States of America. Neither the Commission's investigation nor its decision specifically related to Fossil (Gibraltar) Limited, although it benefitted until then from a tax exemption on its royalty income since that income was, furthermore, subject to tax in the United States paid by Fossil Group Inc. at a rate of 35 %. That company therefore relied on an exemption under section 37 of the Income Tax Act 2010 which provides for relief in respect of foreign tax paid. However, subsequent to the Commission's decision, the Commissioner of Income Tax refused to grant that exemption, having requested the Commission's opinion in that regard.

Having had an action brought before it by Fossil (Gibraltar) Limited, the Income Tax Tribunal of Gibraltar decided to stay the proceedings and to put a question to the Court of Justice regarding the effect of Decision 2019/700, and more specifically, whether that decision precluded the Commissioner of Income Tax from granting tax relief under the laws and domestic legislation which were not the specific subject of the Commission's investigation into the State aid affected by that decision.

The second chamber of the Court rules that Commission Decision 2019/700 does not preclude the national authorities responsible for the recovery from the beneficiary of aid which is unlawful and incompatible with the internal market from applying a domestic provision which prescribes a mechanism for the set-off of taxes paid by that beneficiary abroad against taxes for which it is liable in Gibraltar, where it appears that that provision was applicable on the date of the operations in question

In today's judgment the Court states, as a preliminary point, that, taking as a premiss that section 37 of the ITA 2010

[1] Commission Decision (EU) 2019/700 of 19 December 2018 on the State Aid SA. 34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime (OJ 2019 L 119, p. 151).

applies in the case in the main proceedings, it is necessary to determine whether the grant of a reduction in the amount of aid to be recovered from Fossil (Gibraltar) based on that provision, is liable to compromise the effective enforcement of the recovery order contained in Decision 2019/700.

In the first place, the Court examines whether Decision 2019/700 precludes, as such, the relief sought under section 37 of the ITA 2010. In that regard, the Court observes that, while that decision requires the competent national authorities to recover the tax which should have been levied in the absence of the exemption for passive interest and royalty income, it does not however address the possible discretion to rely on deductions and reliefs laid down in Gibraltar legislation, which could have been applied when calculating the tax due. That decision therefore does not preclude reliance on a mechanism such as that laid down in section 37 of the ITA 2010.

In the second place, the Court points out that the Member State concerned must take all necessary measures ensuring the effectiveness of the Commission decision ordering the recovery of aid incompatible with the internal market. That requirement does not a priori compromise the application of a mechanism, such as that prescribed in section 37 of the ITA 2010, which makes it possible, in order to avoid double taxation of the same income, to grant tax relief in relation to the tax paid by a legal or natural person in a country or territory in which that income is derived or accrues.

In the third place, the Court recalls that outside the spheres in which EU tax law has been harmonised, the determination of the characteristics constituting each tax falls within the discretion of the Member States, in accordance with their fiscal autonomy, that discretion having, in any event, to be exercised in accordance with EU law. A measure such as that referred to in section 37 of the ITA 2010, which seeks to avoid double taxation by prescribing a mechanism for the set-off of tax paid by a taxpayer abroad against taxes for which such taxpayer is liable in Gibraltar, falls, in principle, within the scope of the fiscal autonomy of the Member States and cannot, unless it is established that it is based on discriminatory parameters, be classified as prohibited State aid.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ✆ (+352) 4303 3355