Saint-Gobain, C-307/97

EU tax law and tax treaties

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Rights of a permanent establishment

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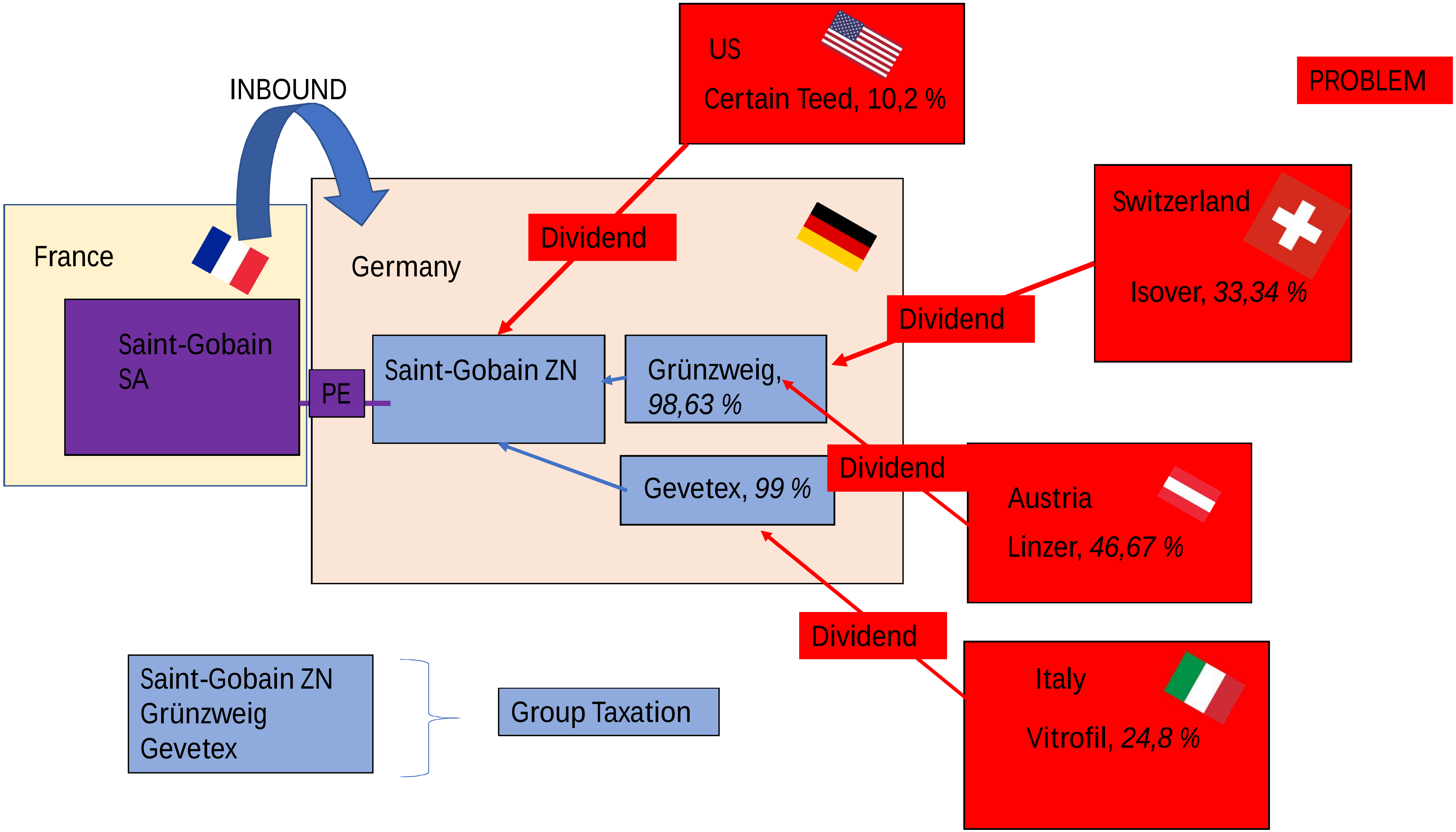
European and International Tax Law


INBOUND
France
Saint-Gobain SA
PE
Germany
Saint-Gobain ZN
Grünzweig, *98,63 %*
Gevetex, *99 %*
US
Certain Teed, 10,2 %
Dividend
Switzerland
Isover, *33,34 %*
Dividend
Austria
Linzer, *46,67 %*
Dividend
Italy
Vitrofil, *24,8 %*
Dividend
PROBLEM
Saint-Gobain ZN
Grünzweig
Gevetex
Group Taxation

What’s the problem?

Saint-Gobain was not happy:

- Loses exemptions and credits because has PE, not a subsidiary in Germany

- German subsidiaries lost the exemption rights by becoming taxable in an Organschaft (income taxable under non-resident rules)

-> Case sent to ECJ by German court

-> Is it compatible with EU law to limit exemptions and credits to residents? (freedom of establishment, requirement of similar treatment)

Case details

- Saint-Gobain's German PE as Organschaft (taxation group) received dividends from
  - US
    - Tax treaty and Corporate tax law exempts dividends if resident and owns 10+ %
    - Capital tax (wealth tax) exempts foreign holdings of 10+ % ownership for determining company value if resident
  - Switzerland
    - Tax treaty exempts subsidiary's dividends if profit that the dividend is payed out of also deductible under German law and if unlimited tax liability
  - Austria
  - Italy

- All cases or country not specified
  - Corporate tax law grants credit for foreign tax on the profit that dividends have been payed from (indirect credit)
    - Credit not available to entities who have limited tax liability

Decision: Germany loses

Argumentation

Difference in teatment

- Difference not contested for direct tax: lighter tax burden for resident companies
- Contestation for capital tax: subsidiary and PE situations are the same (assets not taxed would transfer to be taxed from Saint-Gobain SA)
    - Saint-Gobain: the French-German tax treaty eliminates this possibility (elimination of double-taxation)
    - -> Also for capital tax: there is different treatment

Comparability:

- A PE and subsidiary are not comparable: one has limited tax liability, the other unlimited
- Court:
    - Germany has a equal taxing right to dividends were they payed to a PE or a German resident company, the only difference here is that only one gets the exemptions
    - Paradoxically, the exemption and credit limitations in effect expand taxing right on PEs further than for residents (PE taxed on dividends from outside of Germany, but residents get exempted)
    - -> comparability exists, discrimination exists

Decision: Germany loses

Justifications?

- Loss of tax revenue, PE has to be treated differently
  - a PE can not pay out dividends to ”parent” and thus no tax can be levied and Germany loses tax revenue, but loss of revenue is <u>not an acceptable justification</u>

- Scope of EU Law:
  - Bilateral treaties with non-member states are not part of EU control, but member states must obey EU rules when concluding tax treaties
  - Sweden: limitation of tax treaties with non-EU countries would harm the balance and reciprocity that tax treaties are for
    - Court & Advocate General: Extension of tax treaty benefits in German taxation is a unilateral extension (does not provide any obligation towards or limit the rights of a non-member state)

- Implications
  - Sweden: in extreme cases the extension of tax treaty privileges to PEs may lead to non-taxation
    - Court & Advocate General: no non-taxation scenario is presented as relevant in this case

implications, opportunities

- Implication: Tax treaties have to be adjusted / have to be read differently
- Benefit: Holdings as part of PE less of a problem, at least in Germany (what is part of a PE is a difficult issue in itself, Art. 7, 10 of Model convention)
- Implication: Sweden's non-taxation problem -> other cases might not always be acte clair
- Of note, tax year in question was 1988. Credits were expanded in 1994 for PEs, capital tax removed altogether in 1997, First Parent-Subsidiary Directive 1990 (What if this happened in tax year 1998?)

Sources/links

- Judgment of the Court of 21 September 1999. Case C-307/97.
- Saint-gobain v finanzamt aachen-innenstadt. OPINION OF ADVOCATE GENERAL MISCHO delivered on 2 march 1999
- Model tax convention (condensed version). OECD 2014.
- 2010 report on the attribution of profits to permanent establishments. OECD 2010