JUDGMENT OF THE COURT (Fifth Chamber)
8 May 1990 *

In Case C-175/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Conseil d'État du Luxembourg (State Council of Luxembourg) for a preliminary ruling in the proceedings pending before that court between

Klaus Biehl, of Aachen (Federal Republic of Germany),

and

Administration des contributions du grand-duché de Luxembourg (Tax Department of the Grand Duchy of Luxembourg),

on the interpretation of Articles 7 and 48 of the EEC Treaty,

THE COURT (Fifth Chamber)

composed of: Sir Gordon Slynn, President of Chamber, M. Zuleeg, President of Chamber, R. Joliet, J. C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator

after considering the written observations submitted on behalf of

the administration des contributions du grand-duché de Luxembourg, by Jacques Loesch of the Luxembourg Bar,

the Commission, by Jean-Claude Séché, Legal Adviser, acting as Agent,

* Language of the case: French.

having regard to the Report for the Hearing,

having regard to the oral observations of Mr Biehl, represented by Mr Rogalla, Rechtsanwalt, Münster, of the administration des contributions du grand-duché de Luxembourg and of the Commission at the hearing on 8 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 24 January 1990,

gives the following

Judgment

1 By judgment of 21 June 1988, which was received at the Court on 29 June 1988, the Conseil d'État du Luxembourg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 7 and 48 of the Treaty.

2 That question arose in proceedings between Mr Biehl and the administration des contributions du grand-duché de Luxembourg concerning the repayment of an over-deduction of income tax.

3 Mr Biehl is a German national who was resident in the Grand Duchy of Luxembourg from 15 November 1973 to 31 October 1983. During that period, he pursued an activity as an employed person in Luxembourg. On 1 November 1983, he moved to the Federal Republic of Germany where he now works.

4 For the period from 1 January to 31 October 1983 Mr Biehl's Luxembourg employer deducted sums by way of income tax from Mr Biehl's salary. It emerged from Mr Biehl's final tax assessment for the year of assessment 1983 that the amount deducted by his Luxembourg employer exceeded the total amount of his liability to tax.

5 Mr Biehl asked the administration des contributions du grand-duché de Luxembourg to repay the overdeduction of income tax. The bureau d'imposition de Luxembourg (Tax Office, Luxembourg) refused that request on the basis of Article 154(6) of the loi sur l'impôt sur le revenu (Income Tax Law) (*Mémorial A* No 79, of 6 December 1967). Mr Biehl lodged a complaint against the decision of the bureau d'imposition, which was rejected on the same basis by the directeur des contributions (Director of Taxation).

6 Article 154(6) of the loi sur l'impôt sur le revenu provides that:

'Amounts duly deducted from capital income shall become the property of the Treasury and are not repayable. The same shall apply to the deduction of tax from the salaries and wages of taxpayers resident during only part of the year because they take up residence in the country or leave it during the course of the year'.

7 Mr Biehl challenged the decision of the directeur des contributions before the Conseil d'État du Luxembourg. He claimed that Article 154(6) of the loi sur l'impôt sur le revenu introduced covert discrimination between taxpayers, prohibited by Community law, because the article applied mainly to taxpayers who were not Luxembourg nationals.

8 The response of the administration des contributions to that argument was that a difference in treatment between two distinct categories of taxpayers did not constitute discrimination prohibited by Community law if it was justified by objective reasons. Such reasons did indeed exist in the case at issue. Article 154(6) of the loi sur l'impôt sur le revenu sought to prevent taxpayers who took up residence abroad from obtaining, in certain cases, an unjustified advantage over taxpayers who remained resident in Luxembourg.

9 In those circumstances, the national court stayed the proceedings and referred the following question to the Court:

'Does Article 7 of the EEC Treaty or any other provision of Community law, in particular Article 48 of the said Treaty guaranteeing freedom of movement for workers, preclude a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable?'

10 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant provisions and the observations submitted to the Court, which are referred to or mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

11 Under Article 48(2) of the Treaty freedom of movement for workers entails the abolition of all discrimination based on nationality between workers of the Member States, particularly with regard to remuneration.

12 The principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax. For that reason the Council laid down, in Article 7 of Regulation (EEC) No 1612/68 of the 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), that workers who are nationals of a Member State are to enjoy, in the territory of another Member State, the same tax advantages as national workers.

13 According to the case-law of the Court, the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result (judgment of 12 February 1974 in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11).

14 Even though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment of an overdeduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States. It is often such persons who will in the course of the year leave the country or take up residence there.

15 In order to justify the national rule at issue in the main proceedings, the administration des contributions claimed that the purpose was to protect the system of progressive taxation. It pointed out that a taxpayer who took up residence or who left Luxembourg in the course of the year (hereinafter referred to as a 'temporarily resident taxpayer') spread his income, and consequently his tax liability, among at least two States, namely Luxembourg and the Member State he left or in which he took up residence. That distorted the system of taxation. If a temporarily resident taxpayer were to obtain a refund of an overdeduction of tax he would, because he received income in two Member States in succession, be taxed at a more favourable rate than that applied to the income of a resident taxpayer who, with the same annual income, must declare to the Luxembourg authorities all his income, whether or not it originated in Luxembourg.

16 That justification cannot be accepted. A national provision such as the one at issue is liable to infringe the principle of equal treatment in various situations. That is so in particular where no income arises during the year of assessment to the temporarily resident taxpayer in the country he has left or in which he has taken up residence. In such a situation, that taxpayer is treated less favourably than a resident taxpayer because he will lose the right to repayment of the overdeduction of tax which a resident taxpayer always enjoys.

17 At the hearing, the administration des contributions also observed that there exists in Luxembourg law a non-contentious procedure allowing temporarily resident taxpayers to obtain repayment of an overdeduction of tax by adducing the unfair consequences which the application of Article 154(6) of the loi sur l'impôt sur le revenu entailed for them.

18 Even if taxpayers are entitled to commence non-contentious proceedings to have their situation reviewed, the Luxembourg Government has not cited any provision imposing an obligation on the administration des contributions to remedy in every case the discriminatory consequences arising from the application of the national provision at issue.

19 The reply to the national court must therefore be that Article 48(2) of the Treaty precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable.

Costs

20 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Conseil d'État du Luxembourg, by a judgment of the 21 June 1988, hereby rules:

Article 48(2) of the Treaty precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed

persons who are nationals of a Member State and are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable.

Slynn Zuleeg

Joliet Moitinho de Almeida Grévisse

Delivered in open court in Luxembourg on 8 May 1990.

J.-G. Giraud
Registrar

G. Slynn
President of the Fifth Chamber.