JUDGMENT OF THE COURT
26 January 1993 *

In Case C-112/91,

REFERENCE to the Court by the Finanzgericht Köln, Federal Republic of Germany, for a preliminary ruling under Article 177 of the EEC Treaty in the action pending before that court between

Hans Werner

and

Finanzamt Aachen-Innenstadt

on the interpretation of Articles 7 and 52 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg, J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Hans Werner, by Wolfgang Kaefer, Tax Adviser,

* Language of the case: German.

— the Finanzamt Aachen-Innenstadt, by Hermann Kersten, Regierungsdirektor, acting as Agent,

— the Belgian Government, by R. Verhoeven, Director General, Ministry of Finance, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Joachim Karl, Regierungsdirektor in the same ministry, acting as Agents,

— the French Government, by Edwige Belliard, Directeur-Adjoint des Affaires Etrangères in the Ministry of Foreign Affairs, and Gérard Bergues, Secrétaire Adjoint Principal in the same ministry, acting as Agents,

— the Italian Government, by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Matters, Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato,

— the Portuguese Government, by Luís Inez Fernandes, Director of the Legal Affairs Department of the Directorate-General for the European Communities, António Goucha Soares, a member of the Legal Affairs Department of the Directorate-General for the European Communities, and Maria Margarida Mesquita Palha, a lawyer in the Fiscal Studies Centre of the Ministry of Finance, acting as Agents,

— the United Kingdom, by Christopher Vajda, Barrister, and John Collins, of the Treasury Solicitor's Department, actions as Agent,

— the Commission of the European Communities, by Henri Étienne, Principal Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Werner, represented by Mr Kaefer and Mr Sass, Rechtsanwälte, Munich, the Finanzamt Aachen-Innenstadt, the German Government, the French Government, the Italian Government, the Portuguese Government, the United Kingdom and the Commission, at the hearing on 19 May 1992,

after hearing the Opinion of the Advocate General at the sitting on 6 October 1992,

gives the following

Judgment

1 By order of 10 April 1991 received at the Court Registry on 15 April 1991, the Finanzgericht Köln (Finance Court, Cologne, Federal Republic of Germany) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the provisions of the Treaty concerning the right of establishment and the prohibition of discrimination on grounds of nationality in order to enable it to determine whether two German statutes, one concerning income tax and the other assets tax, which treat taxpayers differently according to whether they reside within or outside national territory, were compatible with Community law.

2 Those questions were raised in proceedings between Mr Werner and the Finanzamt Aachen-Innenstadt (Tax Administration, Aachen) concerning the conditions governing liability to tax laid down in the Einkommensteuergesetz (Income Tax Law) and in the Vermögensteuergesetz (Assets Tax Law).

3 Pursuant to the first sentence of Paragraph 1(1) of the Einkommensteuergesetz, natural persons residing or having their usual abode in Germany are subject to tax on all their income in Germany. However, pursuant to Paragraph 1(4), natural persons who have no residence in Germany or who do not habitually reside in that country are subject to tax only on the part of their income which they earn in Germany. Pursuant to Paragraph 49(1)(3), that income of German origin is in particular that deriving from an activity which is or has been carried out as a self-employed person in Germany. For the purposes of unlimited taxation, a preferential scale, known as the 'splitting tariff', is applied to married couples. Furthermore, taxpayers are entitled to deduct certain expenses from their taxable income, *inter alia* their contributions to sickness, accident and liability insurance schemes, statutory retirement and unemployment insurance, alimony, a proportion of savings set aside for building purposes, church levies and certain vocational training expenses. Those advantages are unavailable to persons who are subject only to limited taxation. Those persons are, moreover, subject to different rates of tax.

4 There are similar provisions in the Vermögensteuergesetz. That statute provides for special reliefs for persons subject to unlimited taxation, particularly where a married couple is taxed jointly or children are taxed jointly with one parent. Those advantages are unavailable to persons who are subject only to limited taxation.

5 Mr Werner, who is of German nationality, has lived with his wife in the Netherlands since 1961. It is clear from the parties' observations that he possesses the degrees and qualifications required by German law to practise as a dentist. Until October 1981 he worked as a salaried dentist in a dental surgery in Aachen, Federal Republic of Germany. He then opened his own practice, again in Aachen. His dental practice is his sole source of income.

6 When assessing the tax payable for 1982, the Finanzamt Aachen-Innenstadt took the view that Mr Werner should be subject to limited taxation as regards income tax and assets tax since he did not reside in Germany.

7 Mr Werner, who considered himself entitled to the benefit of the 'splitting tariff' for the purposes of income tax and reliefs against assets tax then lodged complaints regarding those two taxes with the Finanzamt Aachen-Innenstadt. He contended that the German tax legislation was contrary to Article 52 of the Treaty. His complaints were rejected by the Finanzamt. He therefore appealed to the Finanzgericht Köln (Finance Court, Cologne).

8 That court considered that a preliminary ruling was required on three questions concerning the interpretation of Articles 7 and 52 of the Treaty. Those questions are as follows:

'1. Is the scope of Article 52 of the EEC Treaty limited to the requirement to accord national treatment to EEC nationals or does it also contain a prohibition of restrictions on the freedom of establishment?

2. Do tax disadvantages arising from the fact that a taxpayer

(i) resides in one Member State of the European Communities (the Netherlands) and

(ii) in another Member State (Federal Republic of Germany) exclusively or almost exclusively (as to more than 90%) earns taxable income and/or possesses assets subject to Vermögensteuer [assets tax] because he has established himself in a profession in the latter State and is self-employed there

constitute an infringement of the prohibition of restrictions?

Must the Member State in which the taxpayer carries on his professional activity as a self-employed person consequently treat that person like a resident taxpayer?

3. Does it constitute an infringement of the prohibition of indirect discrimination laid down in Article 7 of the EEC Treaty if, under the rules on beschränkte Steuerpflicht (limited domestic tax liability), a German national in the factual circumstances mentioned in Question 2 above bears a substantially higher tax burden than a resident person subject to unlimited taxation in otherwise identical circumstances?'

9 Reference is made to the Report for the Hearing for a fuller account of the facts, the applicable legislation and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The right of establishment

10 It is apparent from the documents before the Court that by its first and second questions the national court seeks to ascertain whether Article 52 of the Treaty precludes a Member State from making its nationals, who work in its territory and receive all or almost all their income there or hold all or most of their assets there, bear a heavier tax burden if they do not reside in that State than if they do.

11 The national court states that, in the light of the case-law of the Court, it entertains doubts as to whether the differing tax treatment accorded by the Einkommensteuergesetz and the Vermögensteuergesetz to residents and non-residents is compatible with Article 52. In that regard, it refers, first, to the judgment in Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399 in support

of the view that Mr Werner, having established himself in a country other than that in which he resides, is in a situation which may be deemed to be the same as that of all other persons enjoying the rights and liberties guaranteed by the Treaty. Referring next to the judgment in Case C-175/88 *Biehl* v *Administration des Contributions du Grande Duché de Luxembourg* [1990] ECR I-1779, it considers that the withholding of fiscal advantages is restrictive of the right of establishment conferred by Article 52. Finally, it observes that, according to the judgment in Case 270/83 *Commission* v *France* [1986] ECR 273, unequal treatment in the exercise of the rights conferred by the Treaty cannot be justified by the lack of harmonization of tax legislation or by compliance with a convention concluded with another Member State such as, in the present case, the Agreement of 16 June 1959 between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the avoidance of double taxation as regards income and assets tax and various other taxes and other tax matters (*Bundesgesetzblatt* 1960 II, p. 1781).

12 It must first be observed that there are far-reaching differences between the facts in the cases cited above and those in this case.

13 In the first place, unlike Mr Knoors, a Netherlands national who wished to establish himself in the Netherlands in reliance on the professional qualifications that he had acquired in another Member State (Belgium, in that case), Mr Werner is a German national setting up a practice in his State of origin on the basis of a professional qualification and professional experience acquired in that State.

14 In addition, the issue in the main proceedings is far removed from that dealt with by the Court in *Biehl*. Mr Biehl was a German national subject to Luxembourg tax legislation, which linked the possibility of a refund of an overpayment of tax to the requirement of permanent residence in the territory of the Grand Duchy of Luxembourg and therefore had a particularly adverse effect on taxpayers who were nationals of other Member States, whereas Mr Werner is a German national who remains subject to the legislation of the State of which he is a national.

15 Finally, the facts in *Commission* v *France*, cited above, are also different. That case was concerned with the application to companies of tax rules which differed according to whether their registered office was in France or in another Member State, with the result that companies in the latter category received less favourable treatment that those established in France. Pursuant to Article 58 of the Treaty, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated, for the purposes of the chapter on the right of establishment, in the same way as natural persons who are nationals of Member States. Against that background, as the Court stated in that judgment (paragraph 18), the registered office in the sense referred to above constitutes the same factor for a company as nationality does for natural persons. However, the different tax treatment provided for in the legislation criticized by Mr Werner is applied by reference not to the nationality of natural persons but to their place of residence.

16 Mr Werner is a German national who obtained his degrees and professional qualifications in Germany; he has always practised his profession in Germany and is subject to German tax legislation. The only factor which takes his case out of a purely national context is the fact that he lives in a Member State other than that in which he practises his profession.

17 Accordingly, it must be stated in reply to the national court that Article 52 of the EEC Treaty does not preclude a Member State from imposing on its nationals who carry on their professional activities within its territory and who earn all or almost all of their income there or possess all or almost all of their assets there a heavier tax burden if they do not reside in that State than if they do.

Discrimination

18 By its third question, the Finanzgericht Köln seeks to ascertain whether Article 7 of the Treaty prevents a Member State from imposing a heavier tax burden on its nationals engaged in a professional activity within its territory if they do not reside in that State than if they do.

19 In that connection, Article 7 provides that, within the scope of application of the Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited.

20 As the Court held in its judgment in Case 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091, paragraph 27, since Article 52 upholds, in the sphere of the right of establishment, the application of the principle laid down by Article 7 of the Treaty, it follows that if rules are compatible with Article 52 they are also compatible with Article 7.

Costs

21 The costs incurred by the Belgian, German, French, Italian, Portuguese and United Kingdom Governments, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Finanzgericht Köln by order of 10 January 1991, hereby rules:

Article 52 of the EEC Treaty does not preclude a Member State from imposing on its nationals who carry on their professional activities within its territory and who earn all or almost all of their income there or possess all or almost all

of their assets there a heavier tax burden if they do not reside in that State than if they do.

Due Kakouris Rodríguez Iglesias Zuleeg Murray

Mancini Joliet Schockweiler

Moitinho de Almeida Grévisse Diez de Velasco Kapteyn Edward

Delivered in open court in Luxembourg on 26 January 1993.

J.-G. Giraud — O. Due

Registrar — President