JUDGMENT OF THE COURT (Sixth Chamber)
26 October 1995 *

In Case C-151/94,

Commission of the European Communities, represented by Hélène Michard and Enrico Traversa, of its Legal Service, acting as Agents, with an address for service at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Grand Duchy of Luxembourg, represented by Nicolas Schmit, Conseiller de Légation 1re Classe, acting as Agent, with an address for service in Luxembourg at the Ministry of Foreign Affairs, 5 Rue Notre-Dame,

defendant,

APPLICATION for a declaration that, by maintaining in force provisions under which excess amounts of tax deducted from the wages or salaries of nationals of a Member State who resided in Luxembourg and/or occupied a salaried position there for only part of the tax year shall remain the property of the Treasury and cannot be repaid nor adjusted, the Grand Duchy of Luxembourg has failed to

* Language of the case: French.

fulfil its obligations under Article 48(2) of the EC Treaty and Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, and in particular Article 7(2) thereof (OJ, English Special Edition 1968 (II), p. 475),

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch, G. F. Mancini (Rapporteur), F. A. Schockweiler and H. Ragnemalm, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 June 1995, at which the Grand Duchy of Luxembourg was represented by Mr Elvinger, of the Luxembourg Bar, and the Commission by Gérard Berscheid, of its Legal Service, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 3 June 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by maintaining in force provisions under which the excess amounts of tax deducted from the wages or salaries of nationals of a Member State who have resided in Luxembourg and/or occupied a salaried position there for only part of the year remain the property of the Treasury and can be neither repaid nor adjusted, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 48(2) of the EC Treaty and Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 Under Luxembourg tax legislation the method by which excess amounts of income tax are refunded differs according to whether or not the taxpayer is taxed by direct assessment.

3 A taxpayer is taxed by direct assessment if he has received wages or a salary exceeding *a certain threshold* or has significant income and has therefore been required to submit an annual tax return to the competent authority, which issues a notice of assessment on the basis of that tax return. Under Article 154(5) of the Loi sur l'Impôt sur le Revenu (Income Tax Law) (Mémorial A No 79 of 6 December 1967, hereinafter 'the LIR') excess tax paid is set against other tax liabilities or, if there are none, automatically refunded to the taxpayer.

4 That procedure does not apply to a taxpayer whose income is basically taxed at source and does not exceed *a certain threshold*. Under Article 145(1) of the LIR the deductions are adjusted on the basis of an annual calculation.

5 However, in order to be entitled under Article 154(5) of the LIR to repayment of excess amounts of tax paid or to an adustment under Article 145(1) of the LIR on the basis of an annual calculation, the taxpayer must, during the tax year, have resided or occupied a salaried position in Luxembourg for at least nine months.

6 Article 154(6) of the LIR provides:

'Tax deducted from salaries and wages is not repayable where the deduction was made in respect of employees who are resident taxpayers during only part of the year because they took up residence in the country or left it during the course of the tax year.'

7 Similarly, Article 145(1) of the LIR provides:

'Only taxpayers who, during the 12 months of the relevant tax year, had their tax domicile or habitual residence in the Grand Duchy and taxpayers who, while not fulfilling that condition, were in salaried employment there for at least nine months of the relevant tax year and were in continuous employment during that period are entitled to an annual adjustment.'

8 In order that taxpayers not satisfying the abovementioned conditions may nevertheless obtain an 'equitable' refund of the excess amount of tax deducted, they are required to initiate a non-contentious procedure before the Director of Taxes in accordance with Paragraph 131(1) of the Abgabenordnung (Tax Code, 'the AO'), claiming that the taxation was out of proportion to their annual income.

9 The Commission refers to the judgment in Case C-175/88 *Biehl* v *Administration des Contributions* [1990] ECR I-1779, and states that the effect of Articles 145 and 154(6) of the LIR is to deprive workers who leave the country or take up residence there during a tax year of the right to repayment of excess amounts of tax deducted, a right which permanent residents enjoy. Consequently, the Commission considers that those provisions introduce discrimination, contrary to Article 48(2) of the Treaty and Article 7(2) of Regulation No 1612/68, against taxpayers who have made use of their right to free movement.

10 Furthermore, in the Commission's opinion, unless the relevant provisions of national law are expressly amended, the existence of a non-contentious procedure enabling a taxpayer to obtain a review of his situation does not sufficiently guarantee the protection of the rights directly conferred by the Treaty.

11 In reply to that argument, the Luxembourg Government states that the aim of Articles 145 and 154(6) is not to deprive temporarily resident taxpayers of the repayment to which permanently resident taxpayers are entitled, but is to ensure the application of the principle of progressive taxation by preventing the procedure normally followed by the tax offices from leading to the grant to temporary residents of repayments of arbitrary amounts owing to the lack of information in the possession of the tax offices concerning the taxpayer's annual income. Furthermore, the provisions at issue should be read in conjunction with Article 131(1) of

the AO, under which the Director of Taxation may, in certain cases, allow a total or partial rebate of tax where its recovery would be inequitable or, in similar cases, order the repayment of tax already paid. Moreover, taxpayers are specifically informed of the procedure to be followed in order to make an appropriate application for an equitable refund.

12 It should first be noted that Article 48(2) of the Treaty provides that the freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States, *inter alia* as regards remuneration.

13 In that regard, the Court held in its judgment in *Biehl*, cited above, at paragraph 12, that 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 had laid down, in Article 7 of Regulation No 1612/68, that workers who were nationals of a Member State were to enjoy, in the territory of another Member State, the same tax advantages as national workers.

14 Secondly, the Court has held that 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 in fact to the same result (Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11).

15 In its judgment in *Biehl*, the Court deduced from the foregoing that Article 48(2) of the Treaty precluded a Member State from providing in its tax legislation, as in Article 154(6) of the LIR, that sums deducted by way of tax from the salaries and

wages of employed persons who were nationals of a Member State and were resident taxpayers for only part of the year because they had taken up residence in the country or left it during the course of the tax year were to remain the property of the Treasury and were not repayable. Even though the criterion of permanent residence in the national territory in connection with obtaining any repayment of excess amounts of tax deducted applied irrespective of the nationality of the taxpayer concerned, there was a risk that it would work in particular against taxpayers who were nationals of other Member States, since it was often those persons who in the course of the year left the country or took up residence there.

16 The same conclusion must be reached, on the same grounds, as regards legislation under which a taxpayer who has no right to taxation by direct assessment must, during the course of a tax year, have been employed on the national territory for a period of at least nine months in order to become entitled, pursuant to Article 145 of the LIR, to an adjustment on the basis of an annual calculation.

17 As the Court has already held in the judgment in *Biehl*, at paragraphs 17 and 18, the fact that under Luxembourg law there exists a non-contentious procedure allowing temporarily resident taxpayers to request the tax authority to repay excess amounts of tax deducted by showing the unfair consequences which the application of Article 154(6) or Article 145 of the LIR entails for them cannot in every case remedy the discriminatory consequences which follow from the application of the national provisions at issue (see also Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 56 and 57).

18 The Court has consistently held that the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same

legal force as those which require to be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights as guaranteed by the Treaty (see in particular Case C-80/92 *Commission* v *Belgium* [1994] ECR I-1019, paragraph 20, and in Case C-307/89 *Commission* v *France* [1991] ECR I-2903, paragraph 13).

19 In the present case, the Luxembourg Government did not amend Articles 145(1) and 154(6) of the LIR in order to eliminate their incompatibility, evident from the judgment in *Biehl*, with Community law, nor has it demonstrated the existence of a clear and specific national provision conferring on temporary residents, as does the national legislation in point on permanent residents, entitlement to repayment of excess amounts of tax.

20 The Luxembourg Government has claimed that for the purpose of calculating tax repayments for temporary residents it is necessary that the tax authority be informed of foreign income earned by that taxpayer before he took up residence in the Grand Duchy or after he left it, so that it may determine the appropriate tax rate to be applied, under that country's progressive system of taxation, to his Luxembourg income.

21 In that regard, it must be pointed out that, although the special situation of temporary residents may objectively justify the adoption of specific procedural arrangements to enable the competent tax authorities to determine the tax rate applicable to national income, it cannot justify the exclusion of that category of taxpayer from the entitlement, otherwise than by means of a non-contentious procedure, to repayment of tax, where excess amounts of tax deducted are repayable as of right to permanent residents.

22 It follows that, by maintaining in force provisions under which excess amounts of tax deducted from the wages or salaries of nationals of a Member State who resided in Luxembourg or occupied a salaried position there for only part of the tax year are to remain the property of the Treasury and are not repayable, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 48(2) of the Treaty and Article 7(2) of Regulation No 1612/68.

Costs

23 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Grand Duchy of Luxembourg has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by maintaining in force provisions under which excess amounts of tax deducted from the wages or salaries of nationals of a Member State who resided in Luxembourg or occupied a salaried position there for only part of the tax year are to remain the property of the Treasury and

are not repayable, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 48(2) of the Treaty and Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community;

2. Orders the Grand Duchy of Luxembourg to pay the costs.

Kakouris Hirsch Mancini

Schockweiler Ragnemalm

Delivered in open court in Luxembourg on 26 October 1995.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber