JUDGMENT OF THE COURT
11 August 1995 *

In Case C-80/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Gerechtshof te 's-Hertogenbosch (Netherlands) for a preliminary ruling in the proceedings pending before that court between

G. H. E. J. Wielockx

and

Inspecteur der Directe Belastingen

on the interpretation of Article 52 of the EEC Treaty, now the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler, P. J. G. Kapteyn, C. Gulmann and P. Jann (Presidents of Chambers), G. F. Mancini,

* Language of the case: Dutch.

J. C. Moitinho de Almeida, D. A. O. Edward (Rapporteur), G. Hirsch, H. Ragnemalm and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted:

— by the Inspecteur der Directe Belastingen, J. W. K. Keizer,

— on behalf of the Italian Government, by Professor U. Leanza, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, assisted by M. Fiorilli, Avvocato dello Stato,

— on behalf of the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— on behalf of the Commission of the European Communities, by H. Michard and B. J. Drijber, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of G. H. E. J. Wielockx, represented by A. W. Gaertner, Tax Adviser, the Netherlands Government, represented by Mr Van den Oosterkamp, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, the German Government, represented by E. Röder, Ministerialrat at the

Federal Ministry of Economic Affairs, acting as Agent, and the Commission of the European Communities at the hearing on 2 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 31 May 1995,

gives the following

Judgment

1 By order of 16 February 1994, received at the Court on 2 March 1994, the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 52 of the EEC Treaty, now the EC Treaty.

2 Those questions were raised in proceedings between Mr Wielockx, a Belgian national resident in Belgium, and the Inspecteur der Directe Belastingen (Inspector of Direct Taxes, hereinafter 'the inspector') concerning the latter's refusal to deduct from the former's taxable income contributions to a pension reserve.

3 In the Netherlands, Article 1 of the Wet op de Inkomstenbelasting of 16 December 1964 (Law on Income Tax, *Staatsblad* 519, hereinafter 'the 1964 law') defines 'national taxpayers' as natural persons resident in the Netherlands as opposed to 'foreign taxpayers', natural persons who are not resident in the Netherlands but who do receive income there.

4 The Law of 16 November 1972 (*Staatsblad* 612) amended the 1964 law, adding Article 44*d*(1) which establishes a voluntary pension-reserve tax scheme for self-employed persons. Under that scheme, such persons may allocate a proportion of the profits of their business to form a pension reserve with the advantage that the amounts set aside each year remain in the business.

5 Article 3(3) of the 1964 law provides that national taxpayers are subject to tax on the income arising from their business profits, reduced by amounts added to the pension reserve and increased by amounts taken out of it. The maximum annual deductible contribution to a pension reserve is reduced by the amount of any premium paid pursuant to compulsory membership of an occupational pension scheme.

6 Article 44*f*(1)(e) of that law provides that when the taxpayer reaches the age of 65 the pension reserve is to be liquidated. It is then treated as income and taxed either once on the total capital or as and when periodic payments are made from that capital.

7 Pursuant to Articles 48 and 49 of the 1964 law, foreign taxpayers are taxed solely on their 'taxable national income', namely their total income in the Netherlands during a calendar year as reduced by losses. Article 48(3) of the 1964 law does not include pension-reserve contributions among the amounts which may be deducted from that income. However, a ministerial tax-law circular provides for a correction under which personal commitments and extraordinary charges may be deducted where at least 90% of the non-resident taxpayer's world-wide income is subject to income tax in the Netherlands. That circular does not cover pension reserves.

8 Article 18 of the OECD draft convention (Model Double-Taxation Convention on Income and on Capital, Report of the Committee on Fiscal Affairs of the OECD, 1977) provides: 'Subject to the provisions of paragraph 2 of Article 19 [concerning civil servants' pensions], pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.'

9 Article 14(1) of the double-taxation convention between the Netherlands and Belgium (*Tractatenblad*, 1970, no 192) provides furthermore that profits and income derived by a resident of one of the States from a profession are taxable in the other State if he has a stable establishment there for the exercise of his profession.

10 Mr Wielockx is a partner in a physiotherapy practice in Venlo (Netherlands). He receives his entire income and is liable to pay tax there.

11 Mr Wielockx asked the inspector to deduct from his taxable income in the Netherlands for 1987 (HFL 73 912 reduced to HFL 65 643 by the tax authorities) the sum of HFL 5 145 representing his contribution to the pension reserve. The inspector refused.

12 Mr Wielockx appealed against that decision to the tax chamber of the Gerechtshof te 's-Hertogenbosch. That court has doubts about the compatibility of the Netherlands provisions on pension reserves with the freedom of establishment laid down by Article 52 of the EC Treaty. It accordingly stayed the proceedings and

requested the Court of Justice to give a preliminary ruling on the following questions:

'1. Does Article 52 of the Treaty establishing the European Economic Community or any other provision of that Treaty preclude a Member State, such as the Netherlands, from levying a tax on the income of natural persons whereby taxable persons receiving profits from a business enterprise are accorded the right to constitute a so-called *oudedagsreserve* (pension reserve), thereby reducing gross income (see Article 3(3)(a), in conjunction with Articles 44*d* to 44*l* inclusive, of the Wet op de Inkomstenbelasting (Law on Income Tax) 1964 in the version in force for the year in question), if that right is not granted to a taxable person who is a national of, and resident in, another Member State who receives profits from a business enterprise in the first-mentioned Member State on which he is liable to pay the abovementioned tax?

2. In that regard, is it relevant that on the basis of Chapter III of the Wet op de Inkomstenbelasting 1964 (Taxable Amount in the case of Foreign Taxable Persons) sums removed from the *oudedagsreserve* do not form part of the taxable Netherlands income of the foreign taxable person, as a result of which, in the prevailing Netherlands taxation system, the connection between the deductibility of contributions to the *oudedagsreserve* and the liability to taxation of sums removed therefrom is not ensured with regard to foreign taxable persons?

3. Is it also relevant whether or not all or almost all of the foreign taxable person's income is earned through activities performed in the first-mentioned Member State?'

13 The national court's first and third questions ask essentially whether Article 52 of the Treaty precludes a Member State from allowing residents to deduct from their taxable income business profits which they allocate to form a pension reserve while denying that benefit to Community nationals liable to pay tax who, although resident in another Member State, receive all or almost all of their income in the first State.

14 The national court's second question asks the Court whether that difference in treatment may be justified by the fact that the periodic pension payments subsequently drawn out of a pension reserve by the non-resident taxpayer are not taxed in the State in which he works but in the State of residence with which the first State has concluded a double-taxation convention.

15 Those questions should be examined together.

16 Although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination by reason of nationality (Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraphs 21 and 26).

17 It is settled law that discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations.

18 In relation to direct taxes, the situations of residents and of non-residents in a given State are not generally comparable, since there are objective differences between them from the point of view of the source of the income and the possibility of taking account of their ability to pay tax or their personal and family circumstances (*Schumacker*, paragraph 31 et seq.).

19 A difference in treatment between those two categories of taxpayers cannot therefore in itself be categorized as discrimination within the meaning of the Treaty.

20 However, a non-resident taxpayer, whether employed or self-employed, who receives all or almost all of his income in the State where he works is objectively in the same situation in so far as concerns income tax as a resident of that State who does the same work there. Both are taxed in that State alone and their taxable income is the same.

21 If a non-resident taxpayer is not given the same tax treatment as regards deductions from his taxable income as a resident, his personal situation will be taken into account neither by the tax authorities of the State where he works — because he is not resident there — nor by the State of residence — because he receives no

income there. Consequently his overall tax burden will be greater and he will be at a disadvantage compared to a resident.

22 It follows that a non-resident taxpayer who, as in the main proceedings, receives all or almost all of his income in the State where he works but who is not entitled to set up a pension reserve qualifying for deductions under the same tax conditions as a resident taxpayer suffers discrimination.

23 In order to justify the fiscal disadvantage suffered in this respect by non-resident taxpayers, the Netherlands Government relies on the principle of fiscal cohesion laid down in Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, according to which there must be a correlation between the sums which are deducted from the taxable income and the sums which are subject to tax. If a non-resident could set up a pension reserve in the Netherlands and thus secure a right to a pension, that pension would not be taxed in the Netherlands since, by virtue of the double-taxation convention between Belgium and the Netherlands referred to above, such income is taxed in the State of residence.

24 As the Advocate General observed in point 54 of his Opinion, the effect of double-taxation conventions which, like the one referred to above, follow the OECD model is that the State taxes all pensions received by residents in its territory, whatever the State in which the contributions were paid, but, conversely, waives the right to tax pensions received abroad even if they derive from contributions paid in its territory which it treated as deductible. Fiscal cohesion has not therefore been established in relation to one and the same person by a strict correlation between the deductibility of contributions and the taxation of pensions but is shifted to another level, that of the reciprocity of the rules applicable in the Contracting States.

25 Since fiscal cohesion is secured by a bilateral convention concluded with another Member State, that principle may not be invoked to justify the refusal of a deduction such as that in issue.

26 In any event, as the Commission points out in its written observations, the tax authorities may always collect all necessary information pursuant to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

27 Accordingly, a rule laid down by a Member State which allows its residents to deduct from their taxable income business profits which they allocate to form a pension reserve but denies that benefit to Community nationals liable to pay tax who, although resident in another Member State, receive all or almost all of their income in the first State, cannot be justified by the fact that the periodic pension payments subsequently drawn out of the pension reserve by the non-resident taxpayer are not taxed in the first State but in the State of residence — with which the first State has concluded a double-taxation convention — even if, under the tax system in force in the first State, a strict correspondence between the deductibility of the amounts added to the pension reserve and the liability to tax of the amounts drawn out of it cannot be achieved by generalizing the benefit. Such discrimination is therefore contrary to Article 52 of the Treaty.

Costs

28 The costs incurred by the German, Italian and Netherlands Governments and the Commission of the European Communities, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Gerechtshof te 's-Hertogenbosch by order of 16 February 1994, hereby rules:

A rule laid down by a Member State which allows its residents to deduct from their taxable income business profits which they allocate to form a pension reserve but denies that benefit to Community nationals liable to pay tax who, although resident in another Member State, receive all or almost all of their income in the first State, cannot be justified by the fact that the periodic pension payments subsequently drawn out of the pension reserve by the non-resident taxpayer are not taxed in the first State but in the State of residence — with which the first State has concluded a double-taxation convention — even if, under the tax system in force in the first State, a strict correspondence between the deductibility of the amounts added to the pension reserve and the liability to tax of the amounts drawn out of it cannot be achieved by generalizing the benefit. Such discrimination is therefore contrary to Article 52 of the EC Treaty.

Rodríguez Iglesias Schockweiler Kapteyn

Gulmann Jann Mancini

Moitinho de Almeida Edward Hirsch

Ragnemalm Sevón

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President