JUDGMENT OF THE COURT (Fifth Chamber)

29 April 1999 *

In Case C-311/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Diikitiko Protodikio Peiraios (Greece) for a preliminary ruling in the proceedings pending before that court between

Royal Bank of Scotland plc

and

Elliniko Dimosio (Greek State)

on the interpretation of Article 7 of the EEC Treaty (now Article 6 of the EC Treaty) and Article 52 of the EC Treaty,

* Language of the case: Greek.

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the First Chamber, acting for the President of the Fifth Chamber, J. C. Moitinho de Almeida, D. A. O. Edward, L. Sevón and M. Wathelet (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Royal Bank of Scotland plc, by K. Papakostopoulos, of the Athens Bar,

— the Greek Government, by V. Kyriazopoulos, legal administrator at the State Law Council, and G. Alexaki, Adviser in the Special Community Legal Service of the Ministry of Foreign Affairs, acting as Agents,

— the French Government, by K. Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and G. Mignot, Foreign Affairs Secretary in that Directorate, acting as Agents,

— the Commission of the European Communities, by M. Condou-Durande and H. Michard, of its Legal Service, acting as Agents, having regard to the Report for the Hearing,

after hearing the oral observations of the Royal Bank of Scotland plc, of the Greek Government and of the Commission at the hearing on 8 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 19 November 1998,

gives the following

Judgment

1 By judgment of 30 June 1997, received at the Court on 8 September 1997, the Diikitiko Protodikio (Administrative Court of First Instance), Piraeus, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 7 of the EEC Treaty (now Article 6 of the EC Treaty) and Article 52 of the EC Treaty.

2 The question has been raised in proceedings between the Royal Bank of Scotland plc (hereinafter 'the Royal Bank of Scotland') and the DOY (the authority dealing with the direct taxation of public limited companies) concerning the rate of tax applicable to profits earned in Greece in the 1994/95 financial year by the branch of the Royal Bank of Scotland. That rate of tax is higher than the rate applying to banks having their seat in Greece.

3 The Royal Bank of Scotland has its seat in the United Kingdom. It carries on business in Greece through a branch established in Piraeus.

4 On 14 February 1996, the Royal Bank of Scotland submitted to the DOY at Piraeus its income tax declaration for the 1994/95 financial year. For the period from 1 October 1994 to 30 September 1995 it declared taxable profits from the business carried on by its branch of GRD 1 031 256 016 and stated that, applying the rate of tax of 40% laid down by Article 109(1)(a) of Law No 2238 of 16 September 1994 (*Official Journal of the Hellenic Republic* No 151, Vol. A, hereinafter 'Law No 2238/1994'), the tax on those profits was GRD 412 502 406.

5 To its tax declaration the Royal Bank of Scotland added a reservation to the effect that its branch's profits should have been taxed, in accordance with Article 109(1)(b) of Law No 2238/1994, at the rate of 35% applied to Greek banks.

6 The Royal Bank of Scotland in its reservation pointed out that the application of the 40% rate subjected it to heavier taxation than that to which Greek banks are subject, and invoked, first, Article XVI of the Convention between the Hellenic Republic and the United Kingdom on the avoidance of double taxation and the prevention of tax evasion in the matter of income tax, concluded on 25 June 1953 and ratified in Greece by Decree-Law No 2732/1953 (*Official Journal of the Hellenic Republic* No 329, of 12 November 1953, Vol. A), according to which '(1) the nationals of one of the Contracting Parties shall not be subject, on the territory of the other Contracting Party, to taxation or any connected requirement which differs from, or is greater or more burdensome than that which the nationals of the other Contracting Party are or may be subject'. It also invoked the first paragraph of Article 52 of the Treaty, claiming that it was the subject of discriminatory tax treatment.

7 That reservation was rejected by letter No 3814 of 19 February 1996 from the Director of the DOY at Piraeus on the ground that, as regards income tax, the Royal Bank of Scotland was governed by Article 109(1)(a) of Law No 2238/1994, providing for a rate of taxation of 40% in the case of foreign companies and organisations carrying on business for profit in Greece.

8 The Royal Bank of Scotland brought an action for annulment of the decision rejecting its reservation and sought repayment of a sum of GRD 51 562 800, which it claims was unduly paid, together with interest at the statutory rate.

9 In Greece, tax on the income of natural and legal persons is governed by Law No 2238/1994, which forms the income tax code (hereinafter 'the Code').

10 As far as legal persons are concerned, it appears from Article 98 of the Code that tax is payable on the total net income, from whatever source, earned by any legal person referred to in Article 101 of the Code. Those persons include Greek public limited companies [Article 101(1)(a) of the Code] and 'foreign undertakings, whatever the form of company under which they operate, and all types of foreign organisations seeking to make financial profit' [Article 101(1)(d)].

11 Article 99(1) of the Code provides that, as far as legal persons are concerned, income tax is to be charged:

'(a) in the case of Greek public and private limited companies, with the exception of banking institutions and insurance companies, on the total net income or profits earned in Greece or abroad. Distributed profits shall be treated as profits after deduction of income tax. In the case of Greek banking institutions and insurance companies, on the total net income or profits earned in Greece or abroad, after deduction of the portion corresponding to non-taxable receipts or to income subject to special tax entailing extinction of the tax debt. In order to determine the fraction of the profits corresponding to non-taxable receipts or to the income subject to special tax entailing extinction of the tax debt, the total net profits shall be broken down in proportion to the amounts of taxable receipts and non-taxable receipts or income subject to special taxation entailing extinction of the tax debt.

...

(d) in the case of foreign undertakings carrying on business in Greece under any form of company and foreign organisations of whatever type, operating with a view to profit, on the net income or profit arising from any source in Greece and on the net profit arising from the permanent establishment of the undertaking in Greece, within the meaning of Article 100. For the purposes of determining the taxable profits of branches of banking institutions and insurance companies which lawfully carry on their business in Greece and which also earn income exempt from tax or submit to special taxation entailing extinction of the tax debt, there shall be deducted from the net profits referred to in the first paragraph the fraction of those profits corresponding to the aforementioned income, which is to be calculated by breaking down those profits in proportion to the gross receipts subject to tax and exempt income or income subject to special tax entailing extinction of the tax debt.'

12 According to Article 100(1)(a) of the Code, a permanent establishment of a company or foreign organisation is regarded as existing in Greece if that company or organisation:

'has in Greece one or more shops, agencies, branches, offices, warehouses, factories or workshops and plant for the exploitation of physical resources'.

13 Article 105 of the Code defines the method by which the gross income and net income of legal persons are determined. It does not distinguish between Greek companies and foreign companies.

14 Determination of the rate of the tax is governed by Article 109 of the Code, which provides:

'1. Tax shall be calculated on the total taxable income of the legal person at tax rates to be determined, according to the category of the taxpayer, as follows:

(a) in respect of domestic public limited companies the shares of which, at the end of the accounting period, are bearer shares not quoted on the Athens Stock Exchange and in respect of foreign companies and organisations operating with a view to profit, forty per cent (40%);

(b) in respect of other domestic public limited companies, thirty-five per cent (35%). Where domestic public limited companies have registered and bearer shares not quoted on the Athens Stock Exchange, the tax rate under (a) shall be charged on that part of the profits which corresponds to the number of existing bearer shares. In order to determine that part of the profits, the total net profits shall be apportioned in accordance with the number of registered and bearer shares as they appear in the books of the company at the end of the accounting period.'

15 In the case of banks, Article 109 of the Code was amended by Article 13(4) of Law No 2459/1997, under which the rate of income tax on profits of banks having their seat in Greece was increased from 35 to 40% and is therefore now the same as that applicable to profits earned by branches of foreign companies. However, that amendment concerns only profits recorded in balance sheets drawn up after 31 December 1996 and does not therefore apply to the case in the main proceedings.

16 Finally, under Article 11a(2) of Law No 2190/1920, shares of credit institutions are registered shares. Under Law No 5076/1931 on public limited companies and banks, banks may be constituted and carry on their business only in the form of public limited companies.

17 By judgment of 30 June 1997, the Diikitiko Protodikio Peiraios, unsure as to the compatibility of the national legislation with Community law, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 109(1)(a) of the Greek Income Tax Code (Law No 2238/1994, *Official Journal of the Hellenic Republic* No 151 A), which, in applying a tax rate of 40% to the taxable income of foreign companies, imposes on foreign companies a different, heavier tax charge than on domestic companies, to which a tax rate of 35% is applied, permissible under Community law and, in particular, is it in conformity with Articles 7 and 52 of the Treaty? In other words, is the Greek State entitled to impose that differential tax treatment on foreign companies?'

18 By its question, the national court is asking essentially whether legislation of a Member State, such as the tax legislation in question in the main proceedings, which, in the case of companies having their seat in another Member State and carrying on business in the first Member State through a permanent establishment situated there, excludes the possibility, accorded only to companies having their seat in the first Member State, of benefiting from a lower rate of tax on profits, is compatible with Community law, in particular with Article 7 of the EEC Treaty (now Article 6 of the EC Treaty) and Article 52 of the EC Treaty.

19 The first point to be made is that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law and avoid any discrimination on grounds of nationality (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 21 and 26; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36; and Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 19).

20 Next, according to the case-law of the Court, the general prohibition of discrimination on grounds of nationality laid down by Article 7 of the EEC Treaty (now Article 6 of the EC Treaty) has been implemented, in the particular fields which they govern, by Articles 48, 52 and 59 of the Treaty. Consequently, any rules incompatible with those provisions are also incompatible with Article 6 of the Treaty (Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 12). Article 6 of the EC Treaty therefore applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific non-discrimination rules (*Commission* v *Greece*, cited above, paragraph 13, and Case C-1/93 *Halliburton Services* [1994] ECR I-1137, paragraph 12).

21 It is common ground that the essential aim of Article 52 of the Treaty is to implement, in the field of self-employment, the principle of equal treatment laid down in Article 6 of the Treaty. Consequently, the latter provision does not apply in the case in the main proceedings.

22 Article 52 of the Treaty constitutes one of the fundamental provisions of Community law and has been directly applicable in the Member States since the end of the transitional period. Under that provision, freedom of establishment for nationals of one Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13).

23 Freedom of establishment, which Article 52 accords to nationals of any Member State and which for them includes the right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected, includes, pursuant to Article 58 of the EC Treaty, the right of companies or firms formed in accordance with the

law of a Member State and having their seat registered office, central administration or principal place of business within the Community to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their seat in the abovementioned sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it different treatment solely by reason of the fact that its seat is situated in another Member State would thus deprive that provision of all meaning (*Commission* v *France*, cited above, paragraph 18).

24 It is clear from the case-file and in particular from the judgment making the reference that Article 109 of the Code introduces a difference of treatment in the calculation of tax on the profits of companies depending on whether they have their seat in Greece or outside that Member State. Two rates of tax are applicable to the profits of companies having their seat in Greece, which, on certain conditions relating to their legal form and the nature of the shares which they issue, may be taxed at the rate of 35% instead of the rate of 40%. On the other hand, a single rate of tax, the higher one, applies to the profits taxable in Greece of companies having their seat in another Member State, whatever their legal form and the nature of the shares they issue.

25 Moreover, in order to be able to carry on banking business in Greece, the national legislation on banks — Law No 2190/1920 and Law No 5076/1936 — requires a company having its seat in Greece to carry on that business in the form of a public limited company and to issue registered shares, so that it thereby escapes application of the rate of tax at 40% provided for by Article 109(1)(a) only in respect of 'domestic public limited companies the shares of which, at the end of the accounting period, are bearer shares not quoted on the Athens stock exchange and in respect of foreign companies and organisations operating with a view to profit'. Consequently, as regards banks, the higher rate of taxation applies only to banks having their seat in another Member State and a permanent establishment in Greece.

26 In order to determine whether a difference in tax treatment such as that resulting from Article 109 of the Code is discriminatory, it is necessary to ascertain whether, for the purposes of the taxation of profits earned in Greece, a company having its seat in Greece and a branch established in Greece of a company having its seat in another Member State are in an objectively comparable situation. It is settled case-law that discrimination consists in the application of different rules to comparable situations or in the application of the same rule to different situations (see, for example, *Schumacker*, cited above, paragraph 30; *Wielockx*, cited above, paragraph 17; and *Asscher*, cited above, paragraph 40).

27 As far as direct taxation is concerned, the Court has held, in cases relating to the taxation of income of natural persons, that the situations of residents and 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*, cited above, paragraphs 31 to 32; *Wielockx*, cited above, paragraph 18; and *Asscher*, cited above, paragraph 41). However, it has explained that, in the case of a tax advantage denied to non-residents, a difference in treatment between the two categories of taxpayer might constitute discrimination within the meaning of the Treaty where there is no objective difference such as to justify different treatment on this point as between the two categories of taxpayers (*Schumacker*, cited above, paragraphs 36 to 38, and *Asscher*, cited above, paragraph 42).

28 As far as the method of determining the taxable base is concerned, the Greek tax legislation does not establish, as between companies having their seat in Greece and companies which, whilst having their seat in another Member State, have a permanent establishment in Greece, any distinction such as to justify a difference of treatment between the two categories of companies. As the Commission points out in its written observations, which on this point were not contradicted at the hearing, pursuant to the combined provisions of Articles 99(1)(d) and 105 of the Code, tax is calculated, in the case of both Greek and foreign companies, on net income or profits after deduction of the part thereof corresponding to non-taxable receipts, this being determined according to that method both for Greek companies and for foreign companies.

29 It is true that companies having their seat in Greece are taxed there on the basis of their world-wide income (unlimited tax liability) whereas foreign companies carrying on business in that State through a permanent establishment are subject to tax there only on the basis of profits which the permanent establishment earns there (limited tax liability). However, that circumstance, which arises from the limited fiscal sovereignty of the State in which the income arises in relation to that of the State in which the company has its seat is not such as to prevent the two categories of companies from being considered, all other things being equal, as being in a comparable situation as regards the method of determining the taxable base.

30 Consequently, national legislation, such as the Greek tax legislation, which, for the purposes of taxing income, does not establish, as between companies having their seat in Greece and companies which, having their seat in another Member State, have a permanent establishment in Greece, any distinction such as to justify, in relation to the same taxation, a difference in treatment between the two categories of companies and which establishes a difference in treatment as regards the rate of income tax, introduces discrimination against companies having their seat in another Member State in so far as it imposes on them, irrespective of their legal form and the nature of the shares which they issue, a rate of taxation of 40% whereas the rate of 35% applies only to companies whose seat is in Greece.

31 Moreover, as the French Government pointed out in its written observations, without being contradicted on this point at the hearing, the fact that the different methods of taxing income provided for by Article 109 of the Code are not based on any objective difference between the situation of companies having their seat in other Member States and that of companies whose seat is in Greece is borne out by the fact that, in the Convention between the Hellenic Republic and the United Kingdom on the avoidance of double taxation, in particular in Articles II, III and XVI thereof, a branch in Greece of a bank having its seat in the United Kingdom constitutes in Greece a permanent establishment treated for tax purposes as a resident company, so that, in that respect, it is accepted in a formal convention that it is in a situation objectively comparable to that of a Greek company.

32 Finally, it is necessary to examine whether discrimination such as that in question in the main proceeding may be justified. According to settled case-law, only an express derogating provision, such as Article 56 of the EC Treaty, could render such discrimination compatible with Community law (see Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 32 and 33, and Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007, paragraph 11).

33 The Greek Government has not relied on any of the grounds referred to in Article 56 of the Treaty in order to justify the discrimination contained in the legislation in question.

34 Consequently, the answer to be given to the national court must be that Articles 52 and 58 of the Treaty are to be interpreted as precluding legislation of a Member State, such as the tax legislation in question in the main proceedings, which, in the case of companies having their seat in another Member State and carrying on business in the first Member State through a permanent establishment situated there, excludes the possibility, accorded only to companies having their seat in the first Member State, of benefiting from a lower rate of tax on profits, when there is no objective difference in the situation between those two categories of companies which could justify such a difference in treatment.

Costs

35 The costs incurred by the Greek and French Governments and by the Commission, 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 (Fifth Chamber),

in answer to the question referred to it by the Diikitiko Protodikio Peiraios by judgment of 30 June 1997, hereby rules:

Articles 52 and 58 of the EC Treaty are to be interpreted as precluding legislation of a Member State, such as the tax legislation in question in the main proceedings, which, in the case of companies having their seat in another Member State and carrying on business in the first Member State through a permanent establishment situated there, excludes the possibility, accorded only to companies having their seat in the first Member State, of benefiting from a lower rate of tax on profits, when there is no objective difference in the situation between those two categories of companies which could justify such a difference in treatment.

Jann Moitinho de Almeida Edward

Sevón Wathelet

Delivered in open court in Luxembourg on 29 April 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber