JUDGMENT OF THE COURT (Sixth Chamber)
14 December 2000 *

In Case C-141/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hof van Beroep te Gent (Belgium) for a preliminary ruling in the proceedings pending before that court between

Algemene Maatschappij voor Investering en Dienstverlening NV (AMID)

and

Belgische Staat,

on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris and J.-P. Puissochet, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Algemene Maatschappij voor Investering en Dienstverlening NV (AMID), by F. Marck, of the Antwerp Bar,

— the Belgian Government, by P. Rietjens, Director-General in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the Commission of the European Communities, by H. Michard and H. Speyart, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgian Government, represented by B. van de Walle de Ghelcke, of the Brussels Bar, and the Commission, represented by H. Speyart at the hearing on 13 April 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2000,

gives the following

Judgment

1 By judgment of 13 April 1999, received at the Court on 21 April 1999, the Hof van te Beroep te Gent (Ghent Court of Appeal) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2 That question was raised in a dispute between Algemene Maatschappij voor Investering en Dienstverlening NV ('AMID') and the Belgische Staat (Belgian State) concerning the latter's refusal to allow AMID, for tax purposes, to deduct losses incurred by its Belgian establishment in the previous accounting year from the profits made by that same establishment in the subsequent accounting year, on the ground that those losses should have been set off against the profits made by its Luxembourg establishment in the previous accounting year.

National legal background

3 Under Article 114 of the Belgian Income Tax Code, as consolidated by the Royal Decree of 26 February 1964 consolidating statutory provisions on income tax (*Moniteur Belge* of 10 April 1964, p. 3809; 'the of 1964 Code'), there shall be set off against the profit made during a taxable period of the business losses incurred during the previous five taxable periods.

4 Article 66 of the Royal Decree of 4 March 1965 implementing the 1964 Code (*Staatsblad* of 30 April 1965, p. 4722; 'the Royal Decree implementing the 1964 Code') provides:

'The total amount of profits determined in accordance with Article 65 shall where appropriate be broken down, according to their provenance, into:

1. profits made in Belgium, hereinafter referred to as "Belgian profits";

2. profits made abroad for which tax is reduced, hereinafter referred to as "profits taxable at a lower rate";

3. profits made abroad and exempted from tax by virtue of agreements to prevent double taxation, hereinafter referred to as "profits exempted by treaty".

Before such breakdown is carried out, any losses incurred during the taxable period, in one or more of the company's establishments in Belgium and abroad, are to be successively set off against the total amount of the profits of the other establishments in the order indicated below:

(a) losses incurred in a country for which the profits are exempted by treaty: first against profits exempted by treaty and, if these are insufficient, against profits taxable at a lower rate and then against Belgian profits;

(b) losses incurred in a country for which profits are taxable at a lower rate: first against profits taxable at a lower rate and, if these are insufficient, against profits exempted by treaty and then against Belgian profits;

(c) losses incurred in Belgium: first against Belgian profits and, if these are insufficient, against profits taxable at a lower rate and then against profits exempted by treaty.'

5 Under Article 69 of the Royal Decree implementing the 1964 Code, the previous business losses referred to in Article 114 of the 1964 Code are to be offset in so far as they have not hitherto been capable of being offset or have not previously been covered by profits exempted by treaty.

6 The Kingdom of Belgium has concluded bilateral conventions with all the other Member States in order to avoid double taxation. All those conventions are based on a model established by the Organisation for Economic Cooperation and Development. The convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation ('the Convention') was concluded on 17 September 1970.

7 Under Article 7 of the Convention, 'The profits of an undertaking of a contracting State are taxable only in that State, unless the undertaking carries on its business in the other contracting State through the intermediary of a permanent establishment which is situated there. If the undertaking carries on its business in such a manner, the profits of the undertaking are taxable in the other

State, but only in so far as they are attributable to that permanent establishment'. Under Article 5(2), point 3, of the Convention, the expression 'permanent establishment' includes in particular an office or branch.

8 Under Article 23(2), point 1, of the Convention, income from Luxembourg which is taxable in that State by virtue of the Convention is exempt from tax in Belgium.

The dispute in the main proceedings

9 AMID is a Belgian limited liability company which has its seat and fiscal domicile in Belgium. The company also has a permanent establishment in the Grand Duchy of Luxembourg. Under the Convention, AMID's income from its permanent establishment in Luxembourg is exempt from tax in Belgium.

10 During the 1981 accounting year, AMID made a loss in Belgium of BEF 2 126 926, whereas in the same year its Luxembourg branch made a profit of LUF 3 541 118.

11 Since, under the Luxembourg corporation tax system, it was not possible to set off the Belgian loss against the Luxembourg profit, AMID, in its Belgian corporation tax return in respect of the 1982 accounting year, deducted its Belgian loss of 1981 from its Belgian profits of 1982.

12 The Belgian administration for direct taxes rejected that deduction by notice of rectification on the ground that, in this case, the Belgian loss of 1981 should, in accordance with subparagraph (c) of the second paragraph of Article 66 of the Royal Decree implementing the 1964 Code, have been set off against the profits made the same year in Luxembourg, with the result that, taking into account Article 69 of the Royal Decree implementing the 1964 Code, it could not be deducted from the Belgian profits of 1982.

13 On 8 March 1985, AMID lodged a complaint against the tax notice of 8 October 1984 which had given effect to the notice of rectification. That complaint having been rejected by the regional director for direct taxes on 11 July 1990, AMID brought an action against that rejection decision before the Hof van Beroep te Gent.

14 In the proceedings before that court, AMID argued that the provisions applied to it were incompatible with the Convention and that, furthermore, they placed companies with branches abroad at a disadvantage compared with companies having branches only in Belgium, in breach of the EC Treaty.

15 The Hof van Beroep te Gent held that the disputed tax notice in the main proceedings complied with the Convention. It found, however, that AMID had been subject to corporation tax on profits made both in Belgium and at its permanent Luxembourg establishment without ever being able to deduct the losses incurred in Belgium in 1981 from the taxable profit. Had AMID had its branch not in Luxembourg but in Belgium, the losses incurred by that company in Belgium in 1981 could have been capable of being deducted from its taxable income. The Belgian court considered that it had to be asked whether the Belgian

tax legislation did not thereby hinder the freedom of establishment guaranteed by the EC Treaty.

16 In those circumstances, the Hof van Beroep te Gent decided to stay the proceedings pending a preliminary ruling from the Court of Justice on the following question:

'Does Article 52 of the Treaty of 25 March 1957 establishing the European Community preclude the application of national legislation of a Member State under which, for the purposes of assessment to corporation tax, a business loss incurred in that Member State during an earlier taxable period by a company established in that State can be offset against the profits made by that company during a later taxable period only to the extent to which that loss cannot be attributed to the profit made by a permanent establishment of that company in another Member State during that earlier taxable period, with the result that the loss thus attributed cannot be offset, in either of the Member States concerned, against the taxable income of that company for the purposes of assessment to corporation tax, whereas, if the permanent establishment were located in the same Member State as the company, the business losses in question could certainly be set off against the taxable income of that company?'

The question referred for a preliminary ruling

17 By its question, the national court asks essentially whether Article 52 of the Treaty precludes legislation of a Member State under which a company incorporated under national law, having its seat in that Member State, may for the purposes of corporation tax deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, when the loss, although set off, cannot be deducted from taxable income in either of the

Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat.

18 In its observations the Commission has called into question whether the Belgian provisions that were applied in the case concerned in the main proceedings are in conformity with the Convention. There is, however, no need to reply on that point, since the referring court has not asked any question in that respect (see, in particular, Case C-435/97 *World Wildlife Fund* v *Automome Provinz Bozen* [1999] ECR I-5613, paragraph 29) and, in any event, the Court of Justice has no jurisdiction under Article 177 of the Treaty to rule on the interpretation of provisions other than those of Community law (see, in particular, the order of 12 November 1998 in Case C-162/98 *Hartmann* [1998] ECR I-7083, paragraphs 8, 9, 11 and 12).

19 That having been said, it should be remembered that, although direct taxation is a matter for the Member States, they must nevertheless exercise their direct taxation powers consistently with Community law (see Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; Case C-264/96 *ICI* v *Colmer* [1998] ECR I-4695, paragraph 19; Case C-35/98 *Staatssecretaris van Financiën* v *Verkooijen* [2000] ECR I-4071, paragraph 32).

20 Moreover, according to established case-law, the freedom of establishment which Article 52 grants to nationals of the Member States and which entails the right for them to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, includes, pursuant to Article 58 of the Treaty (now Article 48 EC), the right of 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, 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 corporate seat in the above sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons (Case 270/83

Commission v *France* [1986] ECR 273, paragraph 18; Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13; *ICI* v *Colmer*, cited above, paragraph 20).

21 Finally, it must be pointed out that, even though, according to their wording, the provisions concerning freedom of establishment are mainly aimed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 of the Treaty (Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 16; Case C-200/98 *X and Y* v *Riksskatteverket* [1999] ECR I-8261, paragraph 26).

22 As regards the calculation of the taxable income of companies, it must be noted that, for companies incorporated under the national law of a Member State which have their seat there and have used their right of free establishment in order to create branches in other Member States, the legislation at issue in the main proceedings limits the possibility of carrying forward losses incurred in that Member State during a previous tax period where, during that same tax period, those companies made profits in another Member State through the intermediary of a permanent establishment, whereas it would be possible to set off those losses if the establishments of those companies were situated exclusively in the Member State of origin.

23 Thus, by setting off domestic losses against profits exempted by treaty, the legislation of that Member State establishes a differentiated tax treatment as between companies incorporated under national law having establishments only on national territory and those having establishments in another Member State. As the Belgian Government itself recognises, where such companies have a permanent establishment in a Member State other than that of origin and a convention to prevent double taxation binds the two States, those companies are likely to suffer a tax disadvantage which they would not have to suffer if all their establishments were situated in the Member State of origin.

24 The Belgian Government maintains that the legislation at issue in the main proceedings does not constitute a hindrance contrary to Article 52 of the Treaty, arguing that it should be evaluated in its overall context. The Government argues that, whilst it is true that the specific situation under examination by the referring court constitutes a disadvantage for AMID, it is equally true that, if that same undertaking were to make profits in Belgium and the establishment situated in Luxembourg made a loss, the basic amount which the undertaking in Belgium stood to have charged to tax would be diminished; that loss might moreover be set off in Luxembourg against profits subsequently made there. In that event, the position of that undertaking would be better than that of undertakings without a foreign establishment. Thus, to meet the complexity caused by the numerous situations in which undertakings may find themselves in relation to tax legislation, Article 66 of the Royal Decree implementing the 1964 Code had established an effective system of setting off losses, at the risk of putting a Belgian company with one or more of its establishments in other Member States at a disadvantage in some cases and an advantage in others. In reality, the Government argues, that system does not influence the choice by undertakings whether or not to create a foreign establishment. Bearing in mind that, when an undertaking decides to open a permanent establishment in another Member State, it does not know whether it will consistently make losses or profits, and that, moreover, it certainly does not know whether the losses will occur in the new permanent establishment or at the main seat of the business, that system does not create a hindrance contrary to the Treaty.

25 The Belgian Government further argues that, in this case, Belgian undertakings which have a permanent establishment abroad are not in the same position as undertakings which have concentrated all their operations in Belgium. The latter have the whole of their income calculated globally and taxed at the rate applicable in Belgium. Belgian companies with foreign establishments are taxed, in respect of the income of the latter, in accordance with the tax provisions of the Member State where those establishments are situated, subject to the provisions of conventions to prevent double taxation. The Belgian Government maintains that, from the point of view of their tax treatment, the two categories of undertaking will always be in a different situation, so that the application of a system leading to different results does not necessarily constitute discrimination.

26 Those arguments cannot be accepted.

27 Even if the Belgian tax system were favourable to companies with establishments abroad more often than not, that does not prevent it resulting, where that system proves disadvantageous for those companies, in an inequality of treatment in relation to companies without establishments outside Belgium and thus creating a hindrance to the freedom of establishment guaranteed by Article 52 of the Treaty (*Commission* v *France*, cited above, paragraph 21).

28 As for the argument based on the differences between Belgian companies having a permanent establishment abroad and those without, the differences referred to by the Belgian Government cannot in any way explain why the former cannot be treated in the same way as the latter for the purposes of the deduction of losses.

29 A Belgian company which, having no establishments outside Belgium, incurs a loss during a given tax year finds itself, for tax purposes, in a comparable situation with that of a Belgian company which, having an establishment in Luxembourg, incurs a loss in Belgium and makes a profit in Luxembourg during that same tax year.

30 Since an objective difference in the companies' respective positions has not been established, a difference in treatment as regards the deduction of losses when calculating the companies' taxable income cannot be accepted.

31 In the absence of justification, that difference in treatment is contrary to the provisions of the EC Treaty on the freedom of establishment.

32 In that respect, it should be noted that the Belgian Government has not attempted to justify that difference in treatment in relation to the Treaty provisions on freedom of establishment on any grounds other than those indicated in paragraph 25 of this judgment.

33 In the light of the above, the answer to be given to the question referred must be that Article 52 of the Treaty precludes legislation of a Member State under which a company incorporated under national law, having its seat in that Member State, may, for the purposes of corporation tax, deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, when the loss, although set off, cannot be deducted from taxable income in either of the Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat.

Costs

34 The costs incurred by the Belgian Government 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 (Sixth Chamber),

in answer to the question referred to it by the Hof van Beroep te Gent by judgment of 13 April 1999, hereby rules:

Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes legislation of a Member State under which a company incorporated under national law, having its seat in that Member State, may, for the purposes of corporation tax, deduct a loss incurred the previous year from the taxable profit for the current year only on the condition that that loss was not capable of being set off against the profit made during that same previous year by one of its permanent establishments situated in another Member State, when the loss, although set off, cannot be deducted from taxable income in either of the Member States concerned, whereas it would be deductible if the establishments of that company were situated exclusively in the Member State in which it has its seat.

Gulmann Skouris Puissochet

Delivered in open court in Luxembourg on 14 December 2000.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber