JUDGMENT OF THE COURT (Fifth Chamber)

11 December 2003 *

In Case C-364/01,

REFERENCE to the Court under Article 234 EC by the Gerechtshof te 's-Hertogenbosch (Netherlands) for a preliminary ruling in the proceedings pending before that court between

The heirs of H. Barbier

and

Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen,

on the interpretation of Articles 48 and 52 of the EEC Treaty (subsequently Articles 48 and 52 of the EC Treaty, now, after amendment, Articles 39 EC and 43 EC), Article 67 of the EEC Treaty (subsequently Article 67 of the EC Treaty, repealed by the Treaty of Amsterdam), Articles 6 and 8a of the EC Treaty (now,

* Language of the case: Dutch.

after amendment, Articles 12 EC and 18 EC) and the provisions of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5),

THE COURT (Fifth Chamber),

composed of: P. Jann, acting as the President of the Fifth Chamber, D.A.O. Edward (Rapporteur) and A. La Pergola, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the heirs of Mr Barbier, by P. Kavelaars, tax advisor,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— Commission of the European Communities, by R. Lyal and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the heirs of Mr Barbier, represented by P. Kavelaars; the Netherlands Government, represented by C. Wissels, acting as Agent; and the Commission, represented by R. Lyal and H.M.H. Speyart, at the hearing on 24 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2002,

gives the following

Judgment

1 By order of 5 September 2001, received at the Court on 24 September 2001, the Gerechtshof te 's-Hertogenbosch referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Articles 48 and 52 of the EEC Treaty (subsequently Articles 48 and 52 of the EC Treaty, now, after amendment, Articles 39 EC and 43 EC), Article 67 of the EEC Treaty (subsequently Article 67 of the EC Treaty, repealed by the Treaty of Amsterdam), Articles 6 and 8a of the EC Treaty (now, after amendment, Articles 12 EC and 18 EC) and the provisions of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

2 Those questions were raised in proceedings between the heirs of Mr Barbier and the Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen (Inspector of Taxes responsible for non-resident taxpayers (private individuals and companies), Heerlen, hereinafter 'the Inspector') as regards the Inspector's refusal, when assessing the immovable property held by Mr Barbier in the Netherlands, to deduct the value of the obligation to transfer the legal title to that property on the ground that Mr Barbier was not resident in that Member State at the time of his death.

Legal framework

Community legislation

3 Article 67(1) of the Treaty, which was in force at the time of Mr Barbier's death, provides that:

'During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.'

4 That provision has been implemented by several directives, in particular Directive 88/361, applicable at the material time. Pursuant to Article 1(1) of that directive:

'Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this directive, capital movement shall be classified in accordance with the nomenclature in Annex I.'

5 For the purposes of the present case, Annex I of Directive 88/361, entitled 'Nomenclature of the capital movements referred to in Article 1 of the Directive', is worded as follows:

'In this nomenclature, capital movements are classified according to the economic nature of the assets and liabilities they concern, denominated either in national currency or in foreign exchange.

The capital movements listed in this nomenclature are taken to cover:

— all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers. The transaction is generally between residents of different Member States although some capital movements are carried out by a single person for his own account (e.g. transfers of assets belonging to emigrants),

— operations carried out by any natural or legal person...

— access for the economic operator to all the financial techniques available on the market approached for the purpose of carrying out the operation in question. For example, the concept of acquisition of securities and other financial instruments covers not only spot transactions but also all the dealing techniques available: forward transactions, transactions carrying an option or warrant, swaps against other assets, etc.

...

This nomenclature is not an exhaustive list for the notion of capital movements — whence a heading XIII-F, "Other capital movements — Miscellaneous". It should not therefore be interpreted as restricting the scope of the principle of full liberalisation of capital movements as referred to in Article 1 of the Directive.'

6 That nomenclature comprises 13 different categories of capital movements. The second category concerns 'Investments in real estate', which are defined as follows:

'A — Investments in real estate on national territory by non-residents

B — Investments in real estate abroad by residents'.

7 The 11th category of that nomenclature, entitled 'Personal capital movements', includes 'inheritances and legacies'.

8 Article 4 of Directive 88/361 provides:

'This directive shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information.

Application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law.'

9 The first subparagraph of Article 1(1) of Directive 90/364 states:

'Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they

themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.'

National legislation

10 Under Netherlands law, every estate is subject to tax. Article 1(1) of the Successiewet 1956 (1956 Law on Succession) of 28 June 1956 (Stbl. 1956, p. 362, hereinafter the 'SW 1956') draws a distinction on the basis of whether the person whose estate is subject to probate (hereinafter the 'deceased') resided in the Netherlands or abroad. That article states:

'In accordance with this law, the following taxes shall be levied:

1. Inheritance duty on the value of all the assets transferred by virtue of the right to inherit following the death of a person who resided in the Netherlands at the time of death....

2. Transfer duty on the value of the assets set out in Article 5(2) obtained as a gift or inheritance following the death of a person who did not reside in the Netherlands at the time of that gift or that death;

...'

11 Article 5(2) of the SW 1956 states:

'2. Transfer duty is levied on the value:

1. of the domestic possessions referred to in Article 13 of the Wet op de vermogensbelasting 1964 (Stbl. 529), after deducting any debts referred to in that article;

...'

12 The first indent of Article 13(1) of the Wet op de vermogensbelasting 1964 (1964 Law on inheritance tax) of 16 December 1964 (Stbl. 1964, p. 513, hereinafter 'WB 1964') defines 'domestic possessions' as including 'immovable property situated in the Netherlands or rights relating thereto' (in so far as they do not belong to a Netherlands undertaking).

13 Article 13(2)(b) of the WB 1964 allows the deduction of debts secured by a mortgage on immovable property situated in the Netherlands only to the extent that the interest and charges relating to those debts are taken into account for the purpose of determining gross domestic income under Article 49 of the Wet op de Inkomstenbelasting 1964 (1964 Law on income tax) of 16 December 1964 (Stbl. 1964, p. 519, hereinafter the 'IB 1964').

14 Pursuant to Article 49 of the IB 1964, 'gross domestic income' under that provision includes the total net income received by a person not residing in the Netherlands from immovable property situated in that Member State.

15 Article 13 of the WB 1964, as construed by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) (judgment of 5 December 1962, BNB 1962/23), implies that a non-resident deceased, if he was still the owner of immovable property situated in the Netherlands at the time of his death but had previously transferred financial ownership of the property to a separate legal person under an agreement of sale/purchase, should have declared the full value of that property as a domestic possession for the purposes of both inheritance tax and transfer duty, regardless of the fact that a third person has financial ownership thereof.

16 Moreover, the Hoge Raad held that when the notarised mortgage deed has not been recorded in the public registers, contrary to the requirements of the Netherlands Civil Code, such a right under a mortgage does not amount to a 'debt secured by a mortgage' for the purpose of Article 13(2)(b) of the WB 1964 (judgment of 23 December 1992, BNB 1993/78).

17 Accordingly, in the case of the estate of a person who was not resident in the Netherlands at the time of death, an obligation to transfer title to immovable property situated in that Member State is not one of the domestic debts referred to in Article 13 of the WB 1964 and therefore cannot be deducted from the basis of assessment laid down in Article 5(2) of the SW 1956. By contrast, in the case of the estate of a person resident in the Netherlands, that obligation may be deducted, since inheritance duty relates to all the assets and liabilities falling within the estate.

Main proceedings and the questions referred for a preliminary ruling

18 Mr Barbier, a Netherlands national born in 1941, died on 24 August 1993. His heirs are his wife and his only son (hereinafter 'the heirs').

19 In 1970, Mr Barbier moved from the Netherlands to Belgium, from where he continued to exercise his activities as director of a private company established in the Netherlands operating clothing boutiques.

20 In the period from 1970 to 1988, while he was resident in Belgium, Mr Barbier acquired a number of properties situated in the Netherlands, from which he received rent. Under Article 49(1)(b)(2) of the IB 1964 such rent contributes to the gross domestic income of the taxpayer. Those properties were mortgaged.

21 Netherlands law recognises that the legal title to immovable property may be separated from its so-called 'financial' ownership. In 1988, Mr Barbier carried out a series of transactions, including the transfer of financial ownership of his properties, to private Netherlands companies which he controlled. Those companies took over the mortgage debts from the finance company, although Mr Barbier formally remained the mortgagor. With regard to those companies, he undertook, apparently unconditionally, to transfer the title to those properties and waived any rights relating to them in the meantime.

22 Those transactions gave rise to certain tax advantages for Mr Barbier, such as avoiding the payment of a 6% registration duty.

23 After Mr Barbier's death, for the purpose of paying transfer duty, his notary declared the value of certain other properties held absolutely by Mr Barbier, less the mortgage debts incurred in acquiring them.

24 The value of the properties whose financial ownership Mr Barbier had transferred was not included in that notarial declaration, but the Inspector added the value of all those properties to the declared estate and did not allow any deduction in respect of the obligation to transfer legal title.

25 The heirs appealed against the tax assessment made by the Inspector on the ground that, as a result of the obligation to transfer legal title, the value of those properties should have been reduced to zero. The Inspector nevertheless rejected the appeal and confirmed the tax assessment. The heirs appealed against that rejection to the Gerechtshof te 's-Hertogenbosch, on the sole ground that the national legislation was in breach of Community law.

26 In those circumstances, the Gerechtshof te 's-Hertogenbosch decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is cross-border economic activity still a precondition for being able to rely on Community law?

2. Does Community law preclude a Member State (the State in which the property is situated) from levying on the inheritance of immovable property

situated in that Member State a tax on the value of that property which allows the value of the obligation to transfer title to that property to be deducted if, at the time of death, the deceased resided in the State where the property is situated but not if he resided in another Member State (the State of residence)?

3. Does it affect the reply to Question 2 if, at the time he acquired that property, the deceased no longer resided in the State in which the property is situated?

4. Is the distribution of the deceased's capital as between the State in which the property is situated, the State of residence and any other States relevant to the reply to Question 2?

5. If so, in which State must the capital be considered to be invested in the case of a current account claim against a private company of the type referred to in paragraph 2.4 [of the order for reference]?'

Questions referred for a preliminary ruling

27 By those questions, which must be considered together, the national court essentially asks whether Community law, in particular the provisions of the Treaty relating to the free movement of capital and of persons and Directive 88/361, precludes national legislation concerning the assessment of tax due on the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property's value, the fact that the

deceased was under an unconditional obligation to transfer legal title to another person who has financial ownership of that property may be taken into account if, at the time of death, the deceased resided in that Member State but may not be taken into account if he resided in another Member State.

28 In that context, the national court asks whether the existence of cross-border economic activity is a precondition for relying on those freedoms. It refers in this respect to Article 8a of the Treaty on citizenship of the Union and to Directive 90/364. It also asks the Court whether it is relevant that the deceased, who was a national of the Member State in which the property is situated, had transferred his residence but not his economic activity to another Member State before he acquired the property in question, and whether it might be of relevance that his capital was distributed over several Member States.

Observations submitted to the Court

Deduction of the obligation to transfer title on the basis of the deceased's place of residence

29 The heirs point out that, by creating a situation where elements of an estate situated in the Netherlands and burdened by an obligation to transfer title are subject to different tax treatment according to whether the deceased resided in the Netherlands or abroad at the time of his death, Netherlands law is operating a covert form of discrimination on grounds of nationality (Case C-330/91 *Commerzbank* [1993] ECR I-4017, Case C-1/93 *Halliburton Services* [1994] ECR I-1137, and Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161).

30 The Netherlands Government does not deny that there is a difference in treatment based solely on the criterion of residence and admits that, in the case of a person residing in the Netherlands at the time of his death, an obligation to transfer title may be deducted, while it may not be deducted where a person resides in another Member State at the time of his death.

31 Nevertheless, the Government contends that the present case does not involve different treatment of identical situations. It points out that it is important to distinguish clearly between the case where the deceased had absolute ownership of immovable property and that where, as in the case in the main proceedings, he retained only legal ownership of that property. In the latter case, according to the Netherlands Government, the obligation on the owner to transfer legal ownership at a given time is a personal obligation and not an obligation *in rem* in respect of immovable property.

32 While it relies on that distinction, the Netherlands Government maintains that the general principle of international tax law as to the allocation of the power to tax between States should be applied. According to that principle, obligations *in rem* in respect of property are a matter for the State in which the property is situated, while personal obligations, such as the obligation at issue in the main proceedings to transfer title, are for the State of residence to take into account.

33 Accordingly, in the light of that principle, the situation where the deceased resided in the Netherlands is different from one where the deceased resided in another Member State. In the first case, the whole of the estate, including personal obligations, attaches to the Netherlands, as the State where the property is situated and where the person concerned resided.

34 By contrast, in the second case only obligations *in rem* are to be taken into account by the Netherlands, as the State where the property is situated, while personal obligations fall under the fiscal competence of the State of residence. While it concedes that in certain cases other obligations *in rem* which are economically related to immovable property are taken into account in application of that principle, including debts connected to the acquisition, transformation, renovation or maintenance of such an item in the estate, the Netherlands Government maintains that personal obligations such as the obligation to transfer title at issue in the main proceedings are not real property obligations and are therefore, in accordance with international tax law, a matter for the State of residence.

35 In addition, it follows from Article 73d(1)(a) of the EC Treaty (now Article 58(1)(a) EC) and from the Court's settled case-law (Case C-204/90 *Bachmann* [1992] ECR I-249; Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305; Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-391/97 *Gschwind* [1999] ECR I-5451;; and Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43) that it may be justifiable to draw a distinction between resident and non-resident taxpayers.

36 The Commission points out that, although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with Community law (*Verkooijen*, cited above, paragraph 32).

37 It maintains that the unequal treatment at issue in the main proceedings does not lie in the exercise of tax powers but in the failure to take into account an obligation encumbering the estate. That failure to take into account the economic value of a debt artificially increases the basis of assessment.

38 In contrast to the case which led to the *Schumacker* judgment cited above, there is no objective difference in the case in the main proceedings which could justify such a difference in treatment between residents and non-residents.

39 Moreover, contrary to the Netherlands Government's contention, it is not legitimate to take into account for assessment purposes the transfer of legal ownership but not obligations affecting such ownership. The Commission states that the Netherlands Government takes account of such obligations only if the deceased was a Netherlands resident. The situation of a non-resident is no different as regards supervision.

Free movement of capital

40 The heirs submit that there is no condition as regards cross-border economic activity or that there is such activity simply because cross-border investments in immovable property made through a company are involved. It relies on *Verkooijen* in that regard.

41 The heirs maintain that the difference in treatment at issue in the main proceedings is incompatible with free movement of capital, on the ground that a non-resident will hesitate to purchase immovable property in the Netherlands since, in that case, his heirs would be liable to a greater tax burden than if he had not invested in that Member State or had invested there in another way.

42 By contrast, the Netherlands Government takes the view that there is no cross-border economic activity that is impeded by Netherlands tax law. The purchase by Mr Barbier of immovable property in the Netherlands while he resided in Belgium was not hindered in any way, and the same is true of the transfer of the financial ownership of that property, for the purpose of which he was treated in the same way as a Netherlands resident.

43 However, the acquisition of property by inheritance is not in itself an economic activity. Nor is investment in property of an exclusively legal nature, without financial ownership, such an activity. The Netherlands Government emphasises that Mr Barbier made such an investment solely for tax purposes.

44 At the hearing, the Netherlands Government pointed out that retaining the legal ownership of a property constitutes neither an economic activity nor an investment. Legal ownership does not account for value in the economic circuit. Contrary to what the heirs suggest, it is not a genuine capital transaction.

45 The Netherlands Government also points out that in the case in the main proceedings Mr Barbier had acquired property in the Netherlands when he was already living in Belgium and that that purchase was in no way hindered. Moreover, Mr Barbier did not meet any obstacles either in retaining legal ownership or in effecting the transfer of the financial ownership of his properties.

46 In addition, observing that the sale of the financial ownership of those properties was almost exclusively motivated by the desire to avoid paying registration duties or to delay doing so, the Netherlands Government maintains that there was no real economic activity and that, as a result, no protection under the Treaty is

necessary. In the alternative, even if such a transaction had to be considered a genuine economic activity, the link between the decision to set up such a complicated arrangement for the purpose, in particular, of avoiding transfer tax and the fact that it was not subsequently possible to deduct the personal obligation to transfer title is so tenuous that it cannot be said that the free movement of capital might thereby have been hindered.

47 The Commission, for its part, states at the outset that Article 1(1) of Directive 88/361, the direct effect of which is not disputed, requires Member States to abolish all restrictions on movements of capital.

48 Moreover, Mr Barbier's estate is affected by the fact that at the time of his death he owned immovable property in the Netherlands without being resident there. In this respect, it should be noted that Mr Barbier had acquired that property after leaving the Netherlands and therefore found himself in the same objective situation as any person who, as a resident of another Member State, wishes to acquire immovable property situated in the Netherlands. For that reason the dispute also concerns the free movement of capital laid down in Article 1 of Directive 88/361. Any cross-border investment in itself constitutes cross-border economic activity.

Freedom of movement for persons

49 According to the heirs, the Netherlands provisions at issue in the main proceedings are also incompatible with the provisions of the Treaty relating to freedom of movement for persons, since the Netherlands legal system prevents persons resident in the Netherlands and in the same position as Mr Barbier from emigrating. Emigration results in more burdensome death duties than would be

the case had those persons continued to reside in that Member State, unless they extinguish the obligation to transfer title before their death.

50 The Netherlands Government submits that the case in the main proceedings does not concern the consequences in inheritance law of the exercise of freedom of movement for persons provided for by the Treaty. Before moving, Mr Barbier was the director of a Netherlands undertaking. After his move, he simply continued that professional activity. Referring to Case C-112/91 *Werner* [1993] ECR I-429, the Netherlands Government maintains that Mr Barbier merely changed his domicile, which is not an economic activity.

51 First, it points out that only the legislation in force at the time of Mr Barbier's death on 24 August 1993 can be relevant in resolving the dispute in the main proceedings. Since Article 8a of the Treaty did not come into force until 1 November 1993, it cannot be taken into account in the present case.

52 Second, Directive 90/364 is intended to harmonise national provisions on the right of nationals of the Member States to take up residence in a Member State other than that in which they reside in order to ensure freedom of movement of persons. However, the provisions of the SW 1956 are unrelated to the conditions for the right of entry to and residence within the territory of another Member State. Netherlands legislation neither impeded nor restricted the right of the Barbier family to reside within Belgian territory.

53 Taking up that point, the Commission first observes that the possible effects on inheritance rights of the exercise of freedom of movement as provided for in the Treaty are among the considerations which it is imperative that any person concerned take into account in deciding whether or not to make use of the right

to freedom of movement. Thus, although by definition such effects on inheritance rights no longer concern the person in question directly, they may nevertheless hinder the exercise of freedom of movement.

54 That being the case, the Commission points out that the order for reference does not indicate that, after leaving the Netherlands for Belgium, Mr Barbier ceased his previous economic activities.

55 In the circumstances of the present case, the Commission concludes that Mr Barbier's estate was affected by the fact that he made use of the freedom to establish himself, in an employed or self-employed capacity, in another Member State. The fact that the tax measure at issue in the main proceedings was adopted by the Member State of origin is irrelevant (see Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21, and Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, paragraph 21).

The Court's answer

56 It must be borne in mind, first, that although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (see *Schumacker*, cited above, paragraph 21; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; and *Gschwind*, paragraph 20, and *Verkooijen*, paragraph 32, cited above).

57 Second, Directive 88/361 brought about complete liberalisation of capital movements and to that end Article 1(1) thereof required the Member States to

abolish all restrictions on such movements (*Verkooijen*, paragraph 33). The direct effect of that provision was recognised by the Court in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 33.

58 Investments in property such as those made within Netherlands territory by Mr Barbier, acting from Belgium, clearly constitute 'movements of capital' within the meaning of Article 1(1) of Directive 88/361, as does the transfer of immovable property by its sole owner to a private company in which he holds all the shares, as well as the inheritance of that property.

59 The rights conferred by that directive are not subject to the existence of other cross-border elements. The mere fact that the result of a national provision is to restrict movements of capital by an investor who is a national of a Member State on the basis of his place of residence is sufficient for Article 1(1) of Directive 88/361 to apply.

60 Accordingly, neither the fact that Mr Barbier had changed residence to another Member State before acquiring the property in question nor the fact that his capital may have been distributed over two Member States is relevant as regards the application of that provision.

61 Similarly, it is not relevant that the tax measure at issue in the main proceedings was adopted by the Member State of origin of the person concerned (see, to that effect, Case 115/78 *Knoors* [1979] ECR 399, paragraph 24; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 15; Case C-419/92 *Scholz* [1994] ECR I-505, paragraphs 8 and 9; and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 32).

62 As for the existence of a 'restriction' within the meaning of Article 1(1) of Directive 88/361, national provisions such as those at issue in the main proceedings, which determine the value of immovable property for the purposes of assessing the amount of tax due when it is acquired through inheritance, are such as to discourage the purchase of immovable property situated in the Member State concerned and the transfer of financial ownership of such property to another person by a resident of another Member State. They also have the effect of reducing the value of the estate of a resident of a Member State other than that in which the property is situated who is in the same position as Mr Barbier.

63 Accordingly, the national provisions at issue in the main proceedings have the effect of restricting the movement of capital.

64 None the less, the Netherlands Government, without, however, taking Directive 88/361 into account, puts forward a series of considerations in support of the difference in treatment of resident and non-resident taxpayers.

65 First, it maintains that this case does not involve the different treatment of comparable situations, in the light of the principle of international tax law pursuant to which obligations *in rem* in respect of property are a matter for the State in which the property is situated while personal obligations, such as the obligation to transfer title at issue in the main proceedings, are for the State of residence to take into account.

66 In that regard, the national court sets out a similar argument put forward by the Inspector, to the effect that it follows from the generally recognised allocation of the power to tax between States that the distinction made on the basis of residence is compensated for by the fact that that power is limited on the death of a non-resident whose estate is subject to probate. The national court, however,

takes the view that there is no such principle of allocation. The divergences between Member States' legal systems and concepts in the field of taxation of real property are too wide, and only a bilateral agreement could settle the effects of those differences. There is no agreement between the Netherlands and the Kingdom of Belgium intended to prevent double taxation in matters of inheritance.

67 The legal difficulties to which the national court refers are illustrated by the possibility provided by Netherlands law, of which Mr Barbier made use, of separating the legal title to immovable property from its so-called 'financial' ownership, a distinction which does not exist in certain other legal systems. In a case where the inheritance law of the State of residence of the deceased does not recognise that possibility, only a bilateral agreement can ensure that the deceased's obligation to transfer legal title will be taken into account by that State as the basis for a deduction from the personal estate and that, in that case, the legal title will be assigned the same value as in the Netherlands.

68 In any event, according to the information supplied to the Court at the hearing, the value of the estate of a person residing in the Netherlands at the time of death is not assessed, in circumstances such as those in the case in the main proceedings, on the basis of a strict distinction between rights *in rem* and rights *in personam*, since the obligation to transfer title is simply taken into account as a deduction, so that the right *in rem* attaching to the estate of that person at the time of death is assessed at zero.

69 Second, in support of the difference in treatment in question, the Netherlands Government maintains that no duty will be levied if the value of the obligation to transfer title is deducted, either for the 1988 transfer of financial ownership (registration duty) or for the 1993 inheritance (transfer duty).

70 In that regard, as the Commission has stated, there is no link between transfer duty and inheritance duty. As the Advocate General pointed out in paragraph 66 of his Opinion, no such duties would be paid if a deceased person had resided in the Netherlands and carried out the same transfers of financial ownership of property as Mr Barbier, without registering a mortgage. Moreover, the heirs were able to state, without being contradicted on that point, that duty is in any event payable when legal ownership is finally transferred.

71 As regards the Netherlands Government's argument that the fact that the objective of selling the financial ownership of that immovable property was to avoid or delay the payment of a transfer tax should deprive the heirs of protection under Community law, suffice it to recall that a Community national cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided by the rules in force in a Member State other than his State of residence.

72 The Netherlands Government also relies on Article 73d(1)(a) of the Treaty to support its argument that it may be justifiable to distinguish between resident taxpayers and non-resident taxpayers in this case.

73 In that regard it must be pointed out that, apart from the fact that Article 73d of the Treaty came into force after Mr Barbier's death, Article 73d(3) provides that the national measures referred to inter alia in paragraph 1 of that article must not constitute a disguised restriction on the free movement of capital.

74 The Netherlands Government did not put forward any other factor capable of bringing the legislation at issue in the main proceedings within the scope of the derogation in Directive 88/361. It follows that Article 1(1) thereof precludes national legislation such as that at issue in the main proceedings.

75 It follows from the foregoing that it is not necessary to examine the questions referred for a preliminary ruling in so far as they concern freedom of movement for persons. Suffice it to point out in that regard that the tax consequences in respect of inheritance rights are among the considerations which a national of a Member State could reasonably take into account when deciding whether or not to make use of the freedom of movement provided for in the Treaty.

76 The answer to the questions referred to the Court must therefore be that Community law precludes national legislation concerning the assessment of tax due on the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property's value, the fact that the person holding legal title was under an unconditional obligation to transfer it to another person who has financial ownership of that property may be taken into account if, at the time of his death, the former resided in that Member State, but may not be taken into account if he resided in another Member State.

Costs

77 The costs incurred by the Netherlands 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 proceedings 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 questions referred to it by the Gerechtshof te 's-Hertogenbosch by order of 5 September 2001, hereby rules:

Community law precludes national legislation concerning the assessment of tax due on the inheritance of immovable property situated in the Member State concerned according to which, in order to assess the property's value, the fact that the person holding legal title was under an unconditional obligation to transfer it to another person who has financial ownership of that property may be taken into account if, at the time of his death, the former resided in that Member State, but may not be taken into account if he resided in another Member State.

Jann Edward La Pergola

Delivered in open court in Luxembourg on 11 December 2003.

R. Grass
Registrar

V. Skouris
President