JUDGMENT OF THE COURT (Grand Chamber)

5 July 2005 *

In Case C-376/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te 's-Hertogenbosch (Netherlands), made by decision of 24 July 2003, received at the Court on 8 September 2003, in the proceedings

D.

v

Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and A. Borg Barthet, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr (Rapporteur), M. Ilešič, J. Malenovský, J. Klučka and U. Lõhmus, Judges,

* Language of the case: Dutch.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 September 2004,

after considering the observations submitted on behalf of:

— D., by D.M. Weber and E.M.S. Spierts, advocaten,

— the Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, by G.P. Soethoudt, acting as Agent,

— the Netherlands Government, by H.G. Sevenster and J.G.M. van Bakel, acting as Agents,

— the Belgian Government, by E. Dominkovits, acting as Agent,

— the German Government, by A. Tiemann, acting as Agent,

— the French Government, by G. de Bergues and C. Jurgensen-Mercier, acting as Agents,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the United Kingdom Government, by M. Bethell and K. Manji, acting as Agents, and D. Wyatt QC,

— the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2004,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC).

2 The reference has been made in proceedings between Mr D., a German national, and the Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen (the relevant Netherlands tax authority) concerning the latter's refusal to grant him a wealth-tax allowance.

D.

Legal context

The Law on Wealth Tax

3 At the material time, the Kingdom of the Netherlands imposed a wealth tax on the basis of the Law of 16 December 1964 on Wealth Tax (Wet op de vermogensbelasting 1964, Stbl. 1964, p. 520; 'the Wet VB'). This is a direct tax on net assets, charged at a rate of 0.8% on the amount of those assets.

4 Under Article 1 of the Wet VB, in the version applicable to the tax year at issue in the main proceedings, all natural persons resident in the Netherlands (resident taxpayers) and all natural persons who, although not resident in the Netherlands, have net assets there (non-resident taxpayers) are subject to wealth tax.

5 Under Article 3(1) and (2) of the Wet VB, resident taxpayers are taxed on the basis of their net worldwide assets at the beginning of the calendar year. Their taxable wealth is equal to the value of all their assets less the amount of all their liabilities.

6 By virtue of Article 12 of the Wet VB, non-resident taxpayers are taxed according to the net assets owned by them in the Netherlands at the beginning of the calendar

year in question. Their taxable wealth is equal to the value of their assets situated in the Netherlands less the amount of their liabilities there.

7 Article 14(2) of the Wet VB provides that resident taxpayers are entitled to an allowance applied to their net worldwide assets while non-resident taxpayers taxed on their net assets in the Netherlands are not entitled to an allowance.

8 By virtue of Article 14(3) of the Wet VB, the amount of the allowance varies according to whether the resident taxpayer falls within tax category I, relating to unmarried persons, or tax category II, relating to married couples. In the tax year at issue in the main proceedings the allowance amounts to NLG 193 000 for the former and NLG 241 000 for the latter.

9 By order of 18 April 2003, made on the basis of a judgment of the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, the Hague) of 18 July 2000, the Minister for Finance approved extension of the application of the allowance to non-resident taxpayers at least 90% of whose wealth is held in the Netherlands.

The Convention for the avoidance of double taxation

10 The Convention between the Government of the Kingdom of Belgium and the Government of the Kingdom of the Netherlands for the avoidance of double taxation of income and property and for the regulation of certain other taxation matters was signed on 19 October 1970 ('the Belgium-Netherlands Convention').

11 Article 23(1) of the Belgium-Netherlands Convention, which is in the chapter relating to the taxation of wealth, provides:

'Wealth constituted by real property, ..., is taxable in the State where the property is situated.'

12 Article 24 of the Belgium-Netherlands Convention is in the chapter entitled 'Provisions for the avoidance of double taxation'. Article 24(1) and (2) concern residents of the Netherlands and residents of Belgium respectively. Under Article 24 (1)(1), 'the Netherlands may, when taxing their residents, include in the basis of assessment the items of income or wealth which, in accordance with the provisions of this Convention, are taxable in Belgium'. Article 24(1)(2) provides that, in that case, the amount of tax is reduced in order to take account of tax paid in Belgium and lays down a rule for calculating the reduction. Article 24(2) contains specific provisions applicable to residents of Belgium who have received income from the Netherlands.

13 Article 25(3) of the Belgium-Netherlands Convention, under the heading 'Non-discrimination', provides:

'Natural persons resident in one of the two Member States are entitled in the other to the personal allowances, concessions and reductions which are granted by the latter to its own residents by reason of their civil status or dependents.'

The rules relating to reimbursement of costs in legal proceedings

14 Under the General Law relating to Administrative Law (Algemene Wet Bestuursrecht) and the decree on legal costs (Besluit proceskosten bestuursrecht), costs in legal proceedings are reimbursed under a flat-rate system. Acts carried out by a member of the legal profession are awarded points which are converted into a sum to be reimbursed. In certain cases it is possible to depart from that system and obtain reimbursement of a larger sum.

The main proceedings and the questions referred for a preliminary ruling

15 Mr D. resides in Germany. As at 1 January 1998, 10% of his wealth consisted of real property situated in the Netherlands, while the remainder was held in Germany. In accordance with Article 1 of the Wet VB, he was liable to wealth tax, as a non-resident taxpayer, for 1998.

16 Although he did not hold 90% of his wealth in the Netherlands, Mr D. applied, in reliance upon Community law, for the allowance referred to in Article 14(2) of the Wet VB. His application was, however, rejected by the tax inspector.

17 Mr D. then brought an action against the decision rejecting the application before the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch), in support of which he pleaded discrimination in the light in particular of Articles 56 EC and 58 EC and the Belgium-Netherlands Convention.

18 Mr D. also contests the validity of the Netherlands rules on the reimbursement of costs in legal proceedings on the ground that, even if his arguments were upheld, he could be reimbursed only to a limited extent, rendering extremely difficult, or impossible, the exercise of the rights conferred by Community law.

19 Since the Gerechtshof te 's-Hertogenbosch had doubts as to the arguments relating to Community law raised by Mr D., it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does Community law, and in particular Article 56 EC et seq., preclude legislation such as that referred to in the main proceedings, under which a domestic taxpayer is always entitled to deduction of a tax allowance in respect of wealth tax, whereas a non-resident taxpayer has no such entitlement in the case where the assets in question are situated predominantly in the taxpayer's State of residence (in which no wealth tax is levied)?

2. If not, does it make a difference in this case that the Netherlands has, under a bilateral treaty, granted to residents of Belgium, who in all other respects are in comparable circumstances, entitlement to the tax allowance (no wealth tax being levied in Belgium either)?

3. If either of the previous two questions is answered in the affirmative, does Community law preclude a legal costs scheme such as that in issue, under which, in principle, only a limited contribution is made towards legal costs where a citizen is successful in proceedings brought before the national courts for breach of Community law by a Member State?'

Question 1

Observations submitted to the Court

20 Mr D. contends that legislation such as the Netherlands legislation at issue in the main proceedings constitutes an impediment to the free movement of capital that is contrary to Article 56 EC and not justified by Article 58 EC, on the ground that it gives rise to discrimination against non-residents who invest in real property in the Netherlands. Where wealth of an equal amount is held in the Netherlands, only the resident is entitled to an allowance when wealth tax is calculated.

21 There is no objective circumstance capable of justifying different treatment of the two categories of taxpayer for the purposes of the Court's case-law (Case C-279/93 *Schumacker* [1995] ECR I-225). The circumstance that non-residents' liability to wealth tax is limited, that is to say they are liable only in respect of that part of their wealth situated in the Netherlands, whereas residents are liable to the tax without limitation, on their worldwide assets, does not constitute an objective difference. That difference is explained by the limitation on the Member States' powers of taxation.

22 Mr D. adds that wealth tax should be distinguished from income tax which was at issue in the case of *Schumacker*. Solutions adopted in relation to income tax are not necessarily transposable to wealth tax. In contrast to what is accepted as regards income tax, it matters little in the case of wealth tax that the major part of the taxpayer's wealth is concentrated in his State of residence.

23 According to the Netherlands, Belgian, German and French Governments and the Commission of the European Communities, on the other hand, residents and non-residents are not, as a rule, in a comparable situation in relation to direct taxes and the difference in treatment contested by Mr D. is compatible with the Treaty rules.

The Court's answer

24 It should be noted first of all that an investment in real estate such as that made by Mr D. in the Netherlands constitutes a capital movement as referred to in Article 1

of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) and in the nomenclature of capital movements set out in Annex I to the directive. This nomenclature still has the same indicative value for the purposes of defining the notion of capital movements (see Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 7). An investment of that kind falls within the scope of the rules relating to the free movement of capital that are laid down in Article 56 EC et seq.

25 Article 56 EC prohibits restrictions on the movement of capital, subject to Article 58 EC. It is clear from Article 58(1) and (3) EC that the Member States may, in their tax law, distinguish between resident and non-resident taxpayers in so far as the distinction drawn does not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

26 In relation to direct taxes, the Court has accepted that the situations of residents and of non-residents are not, as a rule, comparable (*Schumacker*, paragraph 31).

27 With regard to income tax, the Court has held that the situation of a resident is different from that of a non-resident in so far as the major part of his income is normally concentrated in the State of residence. Moreover, that State generally has available all the information needed to assess the taxpayer's overall ability to pay, taking account of his personal and family circumstances (*Schumacker*, paragraph 33).

28 The Court has concluded from this that the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to residents is not, as a rule,

discriminatory since those two categories of taxpayer are not in a comparable situation.

29 The Court has nevertheless held that the position could be different where the non-resident receives no significant income in the Member State of residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances. There is then no objective difference between such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances (see, in particular, *Schumacker*, paragraphs 36 and 37, and Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraph 17).

30 The Court has thus allowed a Member State to make grant of a benefit to non-residents subject to the condition that at least 90% of their worldwide income must be subject to tax in that State (Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 32).

31 The situation of a person liable to wealth tax and that of a person liable to income tax are similar in several respects.

32 First of all, wealth tax, like income tax, is a direct tax based on the taxpayer's ability to pay. Wealth tax is often regarded as a complement to income tax, relating to capital in particular.

33 Second, a person liable to wealth tax as a rule holds the greater part of his assets in the State where he is resident. As the Court has already stated, that Member State is usually where the taxable person's personal and financial interests are centred (see Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 43).

34 It should therefore be examined whether, as in the case of income tax, in the context of wealth tax the situation of a resident and that of a non-resident are as a rule not comparable.

35 It is necessary to analyse the situation of a person such as Mr D. who holds 90% of his wealth in the Member State where he is resident and 10% in another Member State which has wealth-tax legislation such as that laid down in the Netherlands. That person is subject to wealth tax in the other Member State on the 10% of his net assets that he holds there, without being entitled to any allowance. Residents of that other Member State are taxed on the value of all the wealth held by them worldwide, and not only in that State, less an allowance.

36 This allowance — which is intended to ensure that at least a part of the total net assets of the taxable person concerned is exempt from wealth tax — performs its function fully only if the imposition of the tax relates to all his wealth. Consequently, non-residents who are taxed in that other Member State on part only of their wealth do not in general have grounds for entitlement to the allowance.

37 As in the case of income tax, the view is to be taken as regards wealth tax that the situation of a non-resident is different from that of a resident in so far as not only the

major part of the latter's income but also the major part of his wealth is normally concentrated in the State where he is resident. Consequently, that Member State is best placed to take account of the resident's overall ability to pay by granting him, where appropriate, the allowances prescribed by its legislation.

38 It follows that a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that other Member State and the refusal of the authorities concerned to grant him the allowance to which residents are entitled does not discriminate against him.

39 In Mr D.'s submission, however, the fact that the legislation of the Member State in which the person concerned is resident does not impose a wealth tax means that that person is not entitled in either of the relevant Member States to have his personal and family circumstances taken into account for the purposes of grant of an allowance and gives rise to a situation in which he is discriminated against. Mr D. contends that, in the Netherlands, the allowance granted to residents takes account of their personal and family circumstances because it varies according to a taxpayer's marital status. In order to avoid his being treated less favourably than residents of the Netherlands, that Member State should accord him the same benefits as those granted to its residents.

40 That proposition cannot be upheld.

41 The different treatment of residents and non-residents by the Member State in which the person concerned holds only 10% of his wealth and the lack of an allowance in that case can be explained by the fact that the person concerned holds

only a minor part of his wealth in that State and that he is accordingly not in a situation comparable to that of residents. The circumstance that that person's State of residence has abolished wealth tax has no bearing on this factual situation. Since he holds the major part of his wealth in the State where he is resident, the Member State in which he holds only a proportion of his wealth is not required to grant him the benefits which it grants to its own residents.

42 It should be added that the circumstances of the main proceedings can be distinguished from those in the case of *Wallentin*, cited above, inasmuch as sums such as the subsistence allowance paid to Mr Wallentin by his parents and the grant which he received from the German State did not of their nature constitute taxable income under German tax legislation. Accordingly, the sums received by Mr Wallentin in Germany and the wealth held by Mr D. there cannot be regarded as comparable for the purpose of determining whether, with regard to taxation of the wealth possessed by him in the Netherlands, Mr D. must be eligible for the allowance provided for by Netherlands legislation.

43 The answer to the first question must therefore be that Articles 56 EC and 58 EC do not preclude legislation under which a Member State denies non-resident taxpayers who hold the major part of their wealth in the State where they are resident entitlement to the allowances which it grants to resident taxpayers.

Question 2

Preliminary remarks

44 The second question relates to the application of the Belgium-Netherlands Convention in the light of the Treaty rules prohibiting discrimination with regard

to the free movement of capital. Under Article 25(3) of the Convention, which applies to the two Member States party to the Convention, a natural person resident in Belgium is entitled in the Netherlands to the allowances and other tax benefits which the Netherlands grants to its own residents.

45 It follows that a resident of Belgium in a situation analogous to that of Mr D., owning a property in the Netherlands that accounts for only 10% of his total wealth, is entitled, unlike Mr D., to the wealth-tax allowance granted by the Kingdom of the Netherlands to its own residents.

46 By its second question, the national court inquires whether, in light of the Treaty, the different treatment, in such a case, of a resident of Belgium and a resident of Germany is lawful. It essentially asks whether Articles 56 EC and 58 EC preclude a Member State from according, pursuant to a bilateral convention for the avoidance of double taxation, only to residents of the other State party to the convention the allowance which it grants to its own residents, without extending the allowance to residents of the other Member States.

Observations submitted to the Court

47 Mr D. submits that the difference, resulting from application of the Belgium-Netherlands Convention, between his situation and that of a resident of Belgium in an equivalent situation amounts to discrimination prohibited by the Treaty. First, while it is true that the Court has accepted differences in treatment between Community citizens resulting from the allocation of powers of taxation, grant of the allowance to residents of Belgium alone is not, however, the result of such allocation. Nor, second, does the treatment accorded by the Kingdom of the Netherlands to

residents of Belgium reflect reciprocal treatment accorded to residents of the Netherlands by the Kingdom of Belgium, since the latter does not impose a wealth tax and therefore does not grant an allowance to residents of the Netherlands who own a property on its territory.

48 The governments which have submitted observations and the Commission submit conversely that the different treatment of a person such as Mr D. and a resident of Belgium is not discriminatory. They argue that a Member State party to a bilateral convention is not in any way required, by virtue of the Treaty, to extend to all Community residents the benefits which it grants to residents of the Contracting Member State. Those governments and the Commission refer to the danger which the extension of the benefits provided for by a bilateral convention to all Community residents would entail for the application of existing bilateral conventions and of those which the Member States might be prompted to conclude in the future, and to the legal uncertainty which that extension would cause.

The Court's answer

49 Under Article 293 EC, Member States are, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals the abolition of double taxation within the Community.

50 The Court noted in Case C-336/96 *Gilly* [1998] ECR I-2793, at paragraph 23, that apart from Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10), no unifying or harmonising measure for the elimination of double taxation had yet been adopted at Community level and that the Member States had not yet concluded any multilateral convention to that effect under Article 293 EC.

51 In the absence of other Community measures or conventions involving all the Member States, numerous bilateral conventions have been concluded between the latter.

52 As the Court has already pointed out, the Member States are at liberty, in the framework of those conventions, to determine the connecting factors for the purposes of allocating powers of taxation (see Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57). The Court has also accepted that a difference in treatment between nationals of the two Contracting States that results from that allocation cannot constitute discrimination contrary to Article 39 EC (see *Gilly*, cited above, paragraph 30).

53 The main proceedings do not, however, relate to the consequences of allocating powers of taxation in relation to nationals or residents of Member States that are party to a convention, but are concerned with drawing a comparison between the situation of a person resident in a State not party to such a convention and that of a person covered by the convention.

54 The scope of a bilateral tax convention is limited to the natural or legal persons referred to in it.

55 However, there are situations where the benefits under a bilateral convention may be extended to a resident of a Member State which does not have the status of party to that convention.

56 The Court has thus held that, in the case of a double taxation convention concluded between a Member State and a non-member country, the national treatment principle requires the Member State which is party to the convention to grant to permanent establishments of non-resident companies the benefits provided for by that convention on the same conditions as those which apply to resident companies (see *Saint-Gobain ZN*, cited above, paragraph 59).

57 In such a case, the non-resident taxable person having a permanent establishment in a Member State is regarded as being in a situation equivalent to that of a taxable person resident in that State.

58 However, the second question asked by the national court is based on the premiss that a non-resident such as Mr D. is not in a situation comparable to that of a resident of the Netherlands. The question is designed to ascertain whether Mr D.'s situation can be compared to that of another non-resident who receives special treatment under a double taxation convention.

59 Similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium presupposes that those two taxable persons are regarded as being in the same situation.

60 It is to be remembered that, in order to avoid the same income and assets being taxed in both the Netherlands and Belgium, Article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and Article 25(3) lays down a rule under which natural persons resident in one of those two States are entitled in the other to the personal allowances which are granted by it to its own residents.

61 The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands.

62 A rule such as that laid down in Article 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance.

63 Having regard to the foregoing considerations, the answer to the second question asked must be that Articles 56 EC and 58 EC do not preclude a rule laid down by a bilateral convention for the avoidance of double taxation such as the rule at issue in the main proceedings from not being extended, in a situation and in circumstances such as those in the main proceedings, to residents of a Member State which is not party to that convention.

Question 3

64 There is no need to answer the third question since it is asked only in the event that one of the first two questions is answered in the affirmative.

Costs

65 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Articles 56 EC and 58 EC do not preclude legislation under which a Member State denies non-resident taxpayers who hold the major part of their wealth in the State where they are resident entitlement to the allowances which it grants to resident taxpayers.**

2. **Articles 56 EC and 58 EC do not preclude a rule laid down by a bilateral convention for the avoidance of double taxation such as the rule at issue in the main proceedings from not being extended, in a situation and in circumstances such as those in the main proceedings, to residents of a Member State which is not party to that convention.**

[Signatures]