JUDGMENT OF THE COURT (First Chamber)

8 September 2005 *

In Case C-512/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te 's-Hertogenbosch (Netherlands), made by decision of 4 December 2003, received at the Court on 8 December 2003, in the proceedings

J.E.J. Blanckaert

v

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

THE COURT (First Chamber),

composed of K. Lenaerts (Rapporteur), President of the Fourth Chamber, acting for the President of the First Chamber, N. Colneric, K. Schiemann, E. Juhász and M. Ilešič, Judges,

* Language of the case: Dutch.

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 March 2005,

after considering the observations submitted on behalf of:

— Mr Blanckaert, by P.J.M. de Graaf, adviseur,

— the Netherlands Government, by H.G. Sevenster and C. ten Dam, acting as Agents,

— the German Government, by A. Tiemann and W.-D. Plessing, acting as Agents,

— 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 12 May 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the question of whether Community law precludes a national rule according to which only persons insured under the national social security system may obtain tax credits in respect of national insurance where the reductions in contributions granted under that system could not be offset in full against the social security contributions due.

2 That reference has been made in proceedings between Mr Blanckaert and the Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen (Heerlen Tax Inspector for Foreign Individuals and Undertakings) concerning the latter's refusal to grant him tax credits in respect of national insurance.

Legal framework

Community law

3 Article 56(1) EC states:

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

4 Article 58(1) EC provides:

'The provisions of Article 56 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation ...'

5 Article 58(3) EC provides:

'The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.'

6 Article 13(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) ('Regulation No 1408/71') provides that persons carrying out employed or self-employed activities are to be subject to the legislation of a single Member State only.

7 Under Article 13(2)(a) and (b) of that regulation, a person carrying out employed or self-employed activities in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State.

National law

Social insurance legislation

8 The forms of national insurance in issue in the main proceedings are those governed by the General Law on old-age pensions (Algemene Ouderdomswet), the General Law on survivors' pensions (Algemene Nabestaandenwet) and the General Law on special medical expenses cover (Algemene Wet Bijzondere Ziektekosten). In accordance with the provisions of those three national insurance laws, Netherlands residents and non-residents subject to income tax on account of employment in that Member State are insured persons.

9 Article 12(1) of the Decree on the extension and restriction of the category of insured persons in respect of national insurance (Besluit uitbreiding en beperking kring verzekerden volksverzekeringen) of 24 December 1998 provides, however, that Netherlands residents carrying out their occupational activity in another Member State are insured under the social security system of the latter Member State.

10 In accordance with Article 6 of the Law on the financing of national insurance (Wet financiering volksverzekeringen; 'the WFV'), the insured person is liable to pay social security contributions.

11 Article 8 of the WFV provides that those contributions are to be calculated on the basis of the insured person's taxable income from employment and home ownership. The contributions owed represent a percentage of that income. The amount thus obtained is reduced, however, in accordance with Article 10 of that Law, by reductions in contributions in respect of the various forms of national insurance referred to in the first sentence of paragraph 8 of this judgment ('reductions in contributions in respect of national insurance').

Tax legislation

12 In accordance with the first paragraph of Article 2.1 of the 2001 Law on income tax (Wet op de inkomstenbelasting 2001; 'the IB Law'), natural persons are regarded as liable to income tax if they reside in the Netherlands (resident taxpayers) or if they do not reside in that Member State but receive income there (non-resident taxpayers).

13 Article 2.3 of the IB Law provides that income tax applies to the following income received by the taxpayer during the calendar year:

(a) taxable income from employment or home ownership;

(b) taxable income from a substantial interest in a company; and

(c) taxable income from savings and investments.

14 Under Article 5.2 of the IB Law, income from savings and investments is set by statute at 4% of the average value of capital assets less liabilities at the beginning and at the end of the calendar year, in so far as that average exceeds the tax-free allowance for capital assets. At the relevant time, the latter was EUR 17 600, the aim of which is to exempt small savers from the tax on savings and investments.

15 Income tax and social security contributions are collected by the Netherlands tax authorities.

16 Resident taxpayers are entitled to a tax-free capital allowance and to various tax deductions in respect of income tax. If they are insured under the Netherlands social security system, they can also claim reductions in contributions in respect of national insurance.

17 Article 2.7(2) of the IB Law provides that if the taxpayer is liable to pay social security contributions and the reductions in those contributions cannot be set off in full against the contributions due, the amount of income tax is to be reduced in the amount of that non deductible portion. The reductions in contributions in respect of national insurance may thus be converted into tax credits.

18 Non-resident taxpayers are not entitled either to a tax-free capital allowance or to tax credits in respect of income tax. They are entitled to reductions in contributions in respect of national insurance only if they are insured persons under the Netherlands social security system.

19 Non-resident taxpayers who, in the Netherlands, have income only from savings and investments are not insured under the Netherlands social security system and are not able, unlike resident taxpayers who have such income, to obtain tax credits in respect of national insurance.

20 Under Article 2.5 of the IB Law, non-resident taxpayers may opt to be placed in the same category as resident taxpayers. Exercise of that option means, first, that those taxpayers are entitled to a tax-free capital allowance and to tax credits in respect of income tax, without, however, being able to claim tax credits in respect of national insurance if the only income they receive in the Netherlands is from savings and investments, and, secondly, that they are subject to tax in the Netherlands on their worldwide income.

The Convention for the avoidance of double taxation

21 Article 25(3) of the Convention for the avoidance of double taxation signed on 19 October 1970 between the Government of the Kingdom of Belgium and the Government of the Kingdom of the Netherlands (*Tractatenblad* 1970, p. 192) provides in general terms that 'natural persons resident in one of the States shall be entitled in the other State to the personal deductions, tax-free allowances and reliefs which that State grants to its own residents on account of their personal circumstances or family responsibilities'.

22 The decree of the Secretary of State for Finance of 21 February 2002 provides that the tax-free capital allowance and tax credits in respect of income tax are taken into account when the tax due on savings and investments of non-resident taxpayers living in Belgium is calculated. However, no tax credit in respect of national insurance is granted to those taxpayers.

The main proceedings and the questions referred for a preliminary ruling

23 Mr Blanckaert is a Belgian citizen who is resident in Belgium. Together with his wife, he is the owner of a holiday home in the Netherlands. That home provides him with income from savings and investments within the meaning of Article 2.3 of the IB Law.

24 Mr Blanckaert receives less than 90% of his income in the Netherlands. The only taxable income he receives there is the income from his holiday home. He has not opted to be placed in the same category as a resident taxpayer, within the meaning of Article 2.5 of the IB Law.

25 He is not insured under the Netherlands social security system and is therefore not liable to pay social security contributions in the Netherlands.

26 In respect of 2001, Mr Blanckaert was assessed by the Netherlands tax authorities as liable to pay income tax on account of his taxable income from savings and investments. Pursuant to the provisions of the Convention for the avoidance of double taxation of 19 October 1970, the tax-free capital allowance and the tax credits in respect of income tax were taken into account when his tax was assessed. By contrast, no tax credit in respect of national insurance was granted to him.

27 Mr Blanckaert entered an objection against the tax assessment in respect of 2001 with the defendant in the main proceedings. Since that objection was rejected, Mr Blanckaert appealed against that decision before the Gerechtshof te 's-Hertogenbosch ('s-Hertogenbosch Regional Court of Appeal).

28 Taking the view that the EC Treaty and the case-law of the Court do not provide a clear answer to the questions raised by the action before it, the Gerechtshof te 's-Hertogenbosch decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is a non-resident taxpayer, who is a resident of a Member State and does not receive any income from employment in the Netherlands, but only from savings and investments, and who is therefore not obliged to pay, and does not pay, any social security contributions to the Netherlands national insurance schemes, entitled under EC law to Netherlands tax credits for national insurance schemes (general old-age insurance, general insurance for survivors and general insurance against special medical expenses) in the calculation of his taxable income from savings and investments, in the case where resident taxpayers are entitled to those tax credits in the calculation of their taxable income from savings and investments because they are regarded as insured and as obliged to pay social security contributions to the Netherlands national insurance schemes, even if they do not receive any income in the Netherlands from employment, but only from savings and investments, and for that reason do not pay any social security contributions in the Netherlands either?

2. In answering the first question, is it relevant that the non-resident taxpayer in question earns in excess of or less than 90% of his family income in the Netherlands? In particular:

(a) Is the *Schumacker* test [Case C-279/93 *Schumacker* [1995] ECR I-225] for residents and non-residents applicable only in the case of subjective or person-related tax aspects, such as the right to a personal or family-related tax-free allowance, or does it also apply to non-person-related tax aspects, such as the tax rate?

(b) When deciding whether to treat a non-resident as a resident, are Member States allowed to apply a quantitative rule (such as the 90% rule), despite the fact that this does not guarantee that all discrimination will be removed?

3. Is the right of option as referred to in Article 2.5 of the IB Law an adequate procedural remedy which ensures that the party concerned may make use of his rights as guaranteed under the EC Treaty and rules out all forms of discrimination?

If so, is this also an adequate remedy in the present case, where the party concerned only receives income from savings and investments, given that the party concerned is unable to benefit from the right of option ...?'

Consideration of the questions referred for a preliminary ruling

29 The questions asked by the national court do not refer to any specific provision of Community law. They refer to 'Community law' in general and to 'rights as guaranteed under the EC Treaty'.

30 It is clear, however, from the wording of those questions, read in conjunction with the grounds of the decision of the national court, that they concern the interpretation of Articles 56 EC and 58 EC. In those grounds, the national court notes that those provisions 'prohibit all restrictions on the movement of capital

between the Member States and include the prohibition of discriminatory restrictions'. That court states that the investment in property made by the applicant in the main proceedings may fall within the scope of those provisions.

The first question

31 By its first question, the national court asks, essentially, whether Articles 56 EC and 58 EC must be interpreted as precluding a national rule, such as that at issue in the main proceedings, which denies entitlement to tax credits in respect of national insurance to a person resident in Belgium who is not insured under the Netherlands social security system and who has taxable income in the Netherlands only from savings and investments, whereas a person resident in that Member State who is insured under that system and receives income of the same kind is entitled to those credits even if he or she does not have any income from employment or home ownership and therefore does not pay social security contributions.

32 Mr Blanckaert submits that the legislation at issue in the main proceedings leads to an unjustified difference in treatment between residents and non-residents. The situation of a resident in the Netherlands who receives only income from savings and investments and does not pay social security contributions is, he argues, the same as that of a non-resident who also receives in the Netherlands only income from savings and investments and who does not pay contributions under the Netherlands social security system.

33 The German Government, the Netherlands Government and the Commission submit that the tax advantage to which residents are entitled falls within social

security law. They take the view that there is an objective difference between, on the one hand, the situation of a non-resident taxpayer with income exclusively from savings and investments, such as Mr Blanckaert, who is not insured under the Netherlands social security system and is not therefore liable to pay contributions under that system, and on the other, the situation of a resident taxpayer with income of the same kind who is insured under the Netherlands social security system and is accordingly liable, as a rule, to pay such contributions. That difference in situation justifies the difference in treatment of those two categories of taxpayer.

34 In that regard, it is important to note that Mr Blanckaert, who is resident in Belgium, has invested in property in the Netherlands. In accordance with Articles 2.3 and 5.2 of the IB Law, that investment provides him with notional income which is taxed in the Netherlands as income from savings and investments.

35 It is settled case-law that capital movements within the meaning of Article 56 EC include investments in property on the territory of a Member State by non-residents (see Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21, Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 30).

36 It is thus appropriate to examine whether the national rule in question in the main proceedings involves a restriction on capital movements between the Member States inasmuch as it has a restrictive effect with regard to persons resident in a Member State other than the Netherlands who wish to invest in property in that State.

37 Under Article 2.7(2) of the IB Law, reductions in contributions in respect of national insurance, which, where appropriate, are deducted from the tax due on income in the year concerned — of which income from property investments is part — are allowed only to taxpayers who are insured under the Netherlands social security system.

38 The criterion of insurance chosen by the Netherlands legislation favours, in the majority of cases, persons resident in that Member State. Taxpayers who are not insured under that system are more often than not non-residents.

39 Less favourable tax treatment for non-residents only might deter the latter from investing in property in the Netherlands. That legislation is therefore capable of hindering the free movement of capital.

40 It is, however, necessary to examine whether such a restriction on the free movement of capital may be justified in the light of the Treaty provisions.

41 In that respect, it is important to note that, under Article 58(1)(a) EC 'Article 56 shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence ...'.

42 However, unequal treatment permitted under Article 58(1)(a) EC must be distinguished from arbitrary discrimination, which is prohibited under Article 58 (3) EC. According to case-law, a national provision such as that at issue in the main proceedings could be regarded as compatible with the provisions of the Treaty on the free movement of capital provided that the difference in treatment applies to situations which are not objectively comparable or is justified by overriding reasons in the general interest (Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43, and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraphs 28 and 29).

43 The question is therefore whether, as regards the grant of tax credits in respect of national insurance, there is an objective difference between the objective situation of a non-resident such as Mr Blanckaert and that of a resident who, in the same way as the applicant in the main proceedings, receives in the Netherlands only income from savings and investments.

44 It must be stated, first, that, for a taxpayer receiving taxable income in the Netherlands, the tax advantage the latter can claim must be regarded as such only when the reductions in contributions in respect of national insurance cannot be offset in full by the social security contributions due.

45 Even if, as far as tax is concerned, the national legislation at issue in the main proceedings places non-residents in particular at a disadvantage, the grant of reductions in contributions in respect of national insurance is directly and exclusively linked to the status of the taxpayer concerned as an insured person under the Netherlands social security system. Both residents and non-residents who are insured under that system are entitled to those reductions, whereas residents and non-residents who are not insured thereunder are not entitled to them.

46 In that respect, the applicant in the main proceedings claims that a taxpayer resident in the Netherlands who receives income only from savings and investments is entitled, as an insured person under the Netherlands social security system, to real tax credits in respect of national insurance. He does not pay contributions in respect of national insurance since he has no income from employment or home ownership, with the result that the reductions in those contributions cannot be set off against social security contributions. On the other hand, a non-resident taxpayer who receives in the Netherlands only income from savings and investments is not insured under that system and also does not pay contributions in respect of national insurance in that Member State, but he cannot claim tax credits in respect of national insurance.

47 However, granting the tax advantage in question in the main proceedings to persons who are not insured under the Netherlands social security system would amount to treating different situations in the same way, since insured persons under that system are entitled only in exceptional circumstances to tax credits in respect of social security. It is only in a situation where an insured person cannot set off reductions in contributions against contributions due that he can seek to obtain such tax credits. On the other hand, non-insured persons, such as the applicant in the main proceedings, would always automatically be entitled to a tax credit by virtue of the grant of reductions in contributions in respect of social security. As there is no obligation to pay contributions, such a person can never offset those reductions against social security contributions due.

48 Next, it is important to state that the provisions of national legislation on insurance under the Netherlands social security system are consistent with Article 13(2)(a) and

(b) of Regulation No 1408/71. Residents carrying out their occupational activity outside the Netherlands do not fall within that system, whereas non-residents who work in that Member State are subject to that system.

49 Since Community law does not detract from the power of the Member States to organise their own social security systems (Case C-385/99 *Müller-Fauré and Van Riet* [2003] ECR I-4509, paragraph 100), in the absence of harmonisation at Community level it is for the legislation of the Member State concerned to determine the range of insured persons and the level of contributions payable by insured persons to the national social security system and the respective reductions. Further, it falls within the internal process of such a system to allow entitlement to reductions in contributions only to persons liable to pay them, that is to say, persons insured under that system.

50 It follows that a national rule such as that at issue in the main proceedings can be justified, in the light of Article 58(1)(a) EC, by the objective difference between the situation of a person who is insured under the Netherlands social security system and that of a person who is not so insured.

51 The answer to the first question must therefore be that Articles 56 EC and 58 EC must be interpreted as not precluding a law of a Member State under which a non-resident taxpayer who receives income in that State only from savings and investments and who is not insured under the social security system of that Member State cannot claim entitlement to tax credits in respect of national insurance, whereas a resident taxpayer who is insured under that social security system is entitled to those credits when his taxable income is calculated, even if he receives only income of that same kind and does not pay social security contributions.

The second and third questions

52 In the light of the answer to the first question, it is no longer necessary to answer the second and third questions referred by the national court.

Costs

53 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 (First Chamber) hereby rules:

Articles 56 EC and 58 EC must be interpreted as not precluding a law of a Member State under which a non-resident taxpayer who receives income in that State only from savings and investments and who is not insured under the social security system of that Member State cannot claim entitlement to tax credits in respect of national insurance, whereas a resident taxpayer who is insured under that social security system is entitled to those credits when his taxable income is calculated, even if he receives only income of that same kind and does not pay social security contributions.

[Signatures]