# JUDGMENT OF THE COURT (First Chamber)

22 March 2007 *

In Case C-383/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (Belgium), made by decision of 7 October 2005, received at the Court on 24 October 2005, in the proceedings

**Raffaele Talotta**

v

**État belge**,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, R. Schintgen, A. Borg Barthet, M. Ilešič (Rapporteur) and E. Levits, Judges,

* Language of the case: French.

Advocate General: P. Mengozzi,
Registrar: R. Grass,

after considering the observations submitted on behalf of:

— Mr Talotta, by X. Thiebaut and X. Pace, avocats,

— the Belgian Government, by M. Wimmer, acting as Agent, assisted by B. van de Walle de Ghelcke, avocat,

— the Commission of the European Communities, by R. Lyal and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2006

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2 The reference was made in the context of proceedings between Mr Talotta and the État belge (Belgian State) regarding the application to Mr Talotta in his capacity as a non-resident taxpayer of a minimum tax base in respect of the 1992 tax year.

### Legal context

3 In Belgium, tax on the income of natural and legal persons is governed by the Income Tax Code 1992 (*Moniteur belge* of 30 July 1992), the first paragraph of Article 341 of which, in the version in force at the time of the events in the main proceedings, provides:

'Failing evidence to the contrary, the assessment of the tax base, for legal as well as natural persons, may be made on the basis of signs or indications that the level of economic well-being enjoyed is higher than the level accounted for by the income declared.'

4 Article 342 of the Code states:

'1. In the absence of evidence provided by the interested parties, or by the administration, the profits or earnings referred to in points (1) and (2) of Article 23(1) shall be determined, for each taxpayer, by reference to the normal profits or earnings of at least three similar taxpayers and having regard, as appropriate, to the capital invested, the turnover, the number of workers, the source of power used, the rental value of land used, and any other relevant information.

...

2. The King shall lay down, having regard to the factors indicated in the first subparagraph of paragraph 1, the minimum taxable profits of foreign undertakings operating in Belgium.'

5 Article 182 of the Royal Decree of 27 August 1993 implementing the Income Tax Code 1992 (*Moniteur belge* of 13 September 1993) ('the Royal Decree of 27 August 1993') provides:

'1. The minimum taxable profits of foreign undertakings operating in Belgium which are taxable in accordance with the comparison-based procedure laid down in the first subparagraph of Article 342(1) of the Income Tax Code 1992 shall be as follows:

...

(3) undertakings in the commercial and services sectors:

(a) ... horeca [(hospitality sector: hotels, restaurants and cafeterias)] ...: [BEF] 100 per [BEF] 1 000 turnover, subject to a minimum of [BEF] 300 000 per employee (average number for the year under review);

...

2. In no case may the amount of the taxable profits determined in accordance with paragraph 1 be less than [BEF] 400 000.

...'

6 Under Article 24(5) of the Convention between Belgium and Luxembourg for the prevention of double taxation and the resolution of a number of other problems regarding taxes on income and wealth, signed at Luxembourg on 17 September 1970 ('the Double Taxation Convention'):

'Where an undertaking of one contracting State has a fixed establishment in the other contracting State, the latter State may not determine the taxation of that

undertaking in a manner less favourable than the taxation of domestic undertakings engaged in the same activity.'

## The dispute in the main proceedings and the question referred for a preliminary ruling

7 Mr Talotta is resident in the Grand Duchy of Luxembourg and runs a restaurant in Belgium in his capacity as a natural person.

8 Since Mr Talotta has not established his tax domicile in Belgian territory, he is a taxable person in Belgium — for the purposes of the tax on non-resident natural persons — solely in respect of income earned in that Member State.

9 Mr Talotta was late in submitting his tax return for the 1992 tax year for the purposes of the tax on non-resident natural persons and, consequently, the Belgian tax authorities notified him that they intended to apply that tax to him automatically, pursuant to Article 342(2) of the Income Tax Code 1992. That provision allows the authorities, in the absence of evidence provided either by the party concerned or by the authorities, to tax foreign businesses operating in Belgium on the basis of the turnover and the size of the workforce, by reference to the minimum taxable profits determined by the Royal Decree of 27 August 1993, which, for those operating in the hospitality sector, could not be less than BEF 400 000 for the tax year at issue in the main proceedings.

10 On the basis of that legislation, the Belgian tax authorities charged Mr Talotta tax on non-resident physical persons for the 1992 tax year, calculated on the basis of six members of staff.

11 By decision of 23 June 1998, those authorities rejected Mr Talotta's complaint against that charge.

12 Mr Talotta challenged that decision before the Cour d'appel (Court of Appeal), Liège, which dismissed the action by judgment of 16 June 2004.

13 In his appeal before the Cour de cassation (Court of Cassation) Mr Talotta asserted, by the first part of his first ground of appeal, that the Cour d'appel, Liège, had failed properly to state the reasons for the judgment under appeal, contrary to Article 149 of the Belgian Constitution, in so far as it had failed to address his plea in law that the tax he was charged had been established in accordance with rules which were less favourable than those applied to Belgian undertakings engaged in the same activity. Mr Talotta maintained, by the second part of his first ground of appeal, that the Cour d'appel, in concluding that the tax at issue had been lawfully imposed pursuant to Article 342(2) of the Income Tax Code 1992 and Article 182 of the Royal Decree of 27 August 1993, had infringed Article 24(5) of the Double Taxation Convention and Article 52 of the Treaty.

14 After dismissing the first part of the first ground of appeal as having no factual basis, the Cour de cassation decided, in respect of the second part of the first ground of

appeal, to stay proceedings pending a preliminary ruling from the Court of Justice on the following question:

'Is ... Article 52 ... of the EC Treaty to be interpreted as prohibiting a provision of national law, such as Article 182 of the Royal Decree of 27 August 1993, implementing Article 342(2) of the Income Tax Code 1992, whereby minimum tax bases are applied only in the case of non-residents?'

## The question referred for preliminary ruling

15 By its question, the referring court asks essentially whether Article 52 of the Treaty precludes legislation of a Member State, such as the rule resulting from Article 342(2) of the Income Tax Code 1992 and Article 182 of the Royal Decree of 27 August 1993, which lays down minimum tax bases only for non-resident taxpayers.

16 The first point to be made is that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19 and the case-law cited).

17 The rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 26 and the case-law cited).

18 Discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (*Schumacker*, paragraph 30, and Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 21).

19 In relation to direct taxation, the Court has accepted, in cases relating to taxation of the income of natural persons, that the situation of residents and the situation of non-residents in a given State are not generally comparable, since there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax or the possibility of taking account of their personal and family circumstances (*Schumacker*, paragraphs 31 to 34, Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 18; and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 41). The Court has made it clear, however, that, in the case of a tax advantage which is not available to a non-resident, a difference in treatment as between the two categories of taxpayer may constitute discrimination within the meaning of the Treaty where there is no objective difference between the situations of the two such as to justify different treatment in that regard (*Schumacker*, paragraphs 36 to 38, and *Asscher*, paragraph 42).

20 In that respect, it should be pointed out that, according to the documents before the Court, Article 342(1) of the Income Tax Code 1992 is designed to regulate situations

in which the taxpayer, resident or non-resident, has not provided the tax authorities with evidence regarding his profits or earnings.

21 As regards resident taxpayers, it is also clear from the documents before the Court that the Belgian tax authorities may, in accordance with the criteria laid down in Article 342(1) of the Income Tax Code 1992, determine the profits to be taken into consideration by analogy with the normal profits of at least three similar resident tax payers.

22 In the event that it is impossible to use that method for determining the profits, the documents before the Court also show that the authorities may, in accordance with the first paragraph of Article 341 of the Code, apply — in the case of resident taxpayers only — the flat-rate method of taxation on the basis of 'signs or indications that the level of economic well-being enjoyed is higher than that accounted for by the income declared'.

23 The turnover of non-resident taxpayers, on the other hand, must, in the absence of evidence, be determined by applying the minimum tax bases.

24 It must therefore be held that the national legislation at issue in the main proceedings treats taxpayers differently according to whether or not they are resident in Belgium.

25 It cannot be accepted that the Member State of establishment may apply minimum tax bases solely to non-resident taxpayers merely by reason of the fact that their tax residence is situated in another Member State, without depriving Article 52 of the Treaty of all meaning (see, by analogy, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18).

26 In fact, the income received by a resident taxpayer in the context of a self-employed activity in the territory of the Member State concerned and the income acquired by a non-resident taxpayer also in the context of a self-employed activity carried out in the territory of that Member State are in the same category of income, that is to say, income arising from self-employed activities carried out in the territory of the same Member State.

27 The Belgian Government asserts in support of its contentions that there are objective differences between the situation of residents and the situation of non-residents as regards the means of proof available to the tax authorities for the purposes of establishing the base of the taxable income. In cases where a non-resident taxpayer's operations are carried out in part in the territory of a Member State other than that in which he carries out his self-employed activity, it seems neither realistic nor effective, as a means of overcoming the practical problems entailed by the application of comparison-based taxation, to engage in an exchange of information with the State of residence using the mechanism provided for in Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15). In the first place, the Belgian tax authorities do not have the benefit, in such cases, of information sent by the State of residence in the context of spontaneous or automatic exchanges of information and, secondly, they do not have precise factual evidence, with the result that the request for exchange of information would not be admissible.

28 As the Advocate General pointed out at point 70 of his Opinion, in cases where a part of their operations is carried out in the territory of a Member State other than that in which they carry out their self-employed activities, a resident taxpayer and a non-resident taxpayer present, for the tax authorities concerned, the same difficulties, with the result that those two categories of taxpayers are in an objectively comparable position.

29 Moreover, it should be recalled that, in cases where the operations of a taxpayer are carried out in part in the territory of a Member State other than that in which he carries out his self-employed activity, a Member State may rely on Directive 77/799 in order to obtain from the competent authorities of the other Member State all the information enabling it to ascertain the correct amount of income tax, or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer under the legislation which it applies (see Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42 and the case-law cited).

30 Consequently, it must be held that, for the purposes of the national legislation at issue in the main proceedings, resident taxpayers and non-resident taxpayers are in an objectively comparable situation.

31 That interpretation is in no way weakened by the Belgian Government's observation that the minimum tax bases provided for in the national legislation at issue in the main proceedings are often more favourable to non-resident taxpayers than the comparison-based taxation applied to resident taxpayers. Even on the assumption that the Belgian tax system is more often favourable to non-resident taxpayers, the

fact remains that where that system proves disadvantageous for non-resident taxpayers, it results in unequal treatment by comparison with resident taxpayers and thus creates a hindrance to the freedom of establishment guaranteed by Article 52 of the Treaty (see, by analogy, Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 27 and the case-law cited).

32 In those circumstances, legislation of a Member State, such as the rule resulting from Article 342(2) of the Income Tax Code 1992 and Article 182 of the Royal Decree of 27 August 1993, which lays down minimum tax bases only for non-resident taxpayers constitutes indirect discrimination on grounds of nationality within the meaning of Article 52 of the Treaty. In fact, even if such legislation provides for a distinction on the basis of residence, in that it denies non-residents certain tax benefits which are, conversely, granted to persons residing within the national territory, it is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, by analogy, *Schumacker*, paragraph 28).

33 It is necessary therefore to consider whether that discrimination may be justified.

34 The Belgian Government contends that the application of the minimum tax bases only to non-resident taxpayers is justified by the need to ensure the effectiveness of fiscal supervision and that it is consistent with the principle of proportionality. It

states that the comparison-based method of taxation laid down for resident taxpayers is not applicable to non-resident taxpayers owing to difficulties of a practical nature, in particular, the impossibility of having recourse to Directive 77/799.

35 In that respect, it must be pointed out that the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty (see, to that effect, Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18 and the case-law cited).

36 However, as appears from paragraph 28 of this judgment, the difficulties of a practical nature on which the Belgian Government relies apply in the same way to resident taxpayers and, as appears from paragraph 29, it is open to the Member State concerned, on the basis of Directive 77/799, to enter into an exchange of information with other Member States.

37 It follows that the need to guarantee the effectiveness of fiscal supervision does not justify a difference in treatment, and the treatment applied to non-resident taxpayers must therefore be identical to that provided for resident taxpayers.

38 Having regard to all of the foregoing, the answer to the question referred must be that Article 52 of the Treaty precludes legislation of a Member State, such as the rule

resulting from Article 342(2) of the Income Tax Code 1992 and Article 182 of the Royal Decree of 27 August 1993, which lays down minimum tax bases only for non-resident taxpayers.

## Costs

39 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:

**Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes legislation of a Member State, such as the rule resulting from Article 342(2) of the Income Tax Code 1992 and Article 182 of the Royal Decree of 27 August 1993 implementing the Income Tax Code 1992, which lays down minimum tax bases only for non-resident taxpayers.**

[Signatures]