JUDGMENT OF THE COURT (Third Chamber)

16 October 2008(*)

(Freedom of movement for workers – Article 39 EC – Tax legislation – Income tax – Determination of the basis of assessment – National of a Member State receiving all or almost all of his income in that State – Residence in a different Member State)

In Case C-527/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 22 December 2006, received at the Court on 27 December 2006, in the proceedings

R.H.H. Renneberg

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, A. Ó Caoimh, J. Klučka, U. Lõhmus and P. Lindh, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 May 2008,

after considering the observations submitted on behalf of:

– Mr Renneberg, in person,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, Agents,

– the Swedish Government, by K. Wistrand, Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 25 June 2008

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 39 EC and 56 EC.

2 The reference has been made in the course of proceedings between Mr Renneberg, a Netherlands citizen, and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the refusal of the tax authorities to take into account the rental loss on immovable property in Belgium owned by Mr Renneberg and in which he resides, for the purposes of determining the basis of assessment of the income tax which he is liable to pay in the Netherlands, where he receives all his work-related income.

Legal context

Treaty law

3 Article 4(1) of the Convention between the Government of the Kingdom of the Netherlands and the Government of the Kingdom of Belgium for the avoidance of double taxation in the field of taxes on income and capital and for the settlement of other matters in the field of taxation (Overeenkomst tussen de regering van het Koninkrijk der Nederlanden en de regering van het Koninkrijk België tot het vermijden van dubbele belasting op het gebied van belastingen naar het inkomen en naar het vermogen en tot het vaststellen van enige andere regelen verband houdende met de belastingheffing), signed in Brussels on 19 October 1970 (*Tractatenblad* 1970, p. 192; 'the Bilateral Tax Convention'), under the heading 'Residence for tax purposes', provides:

'For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature; …'

4 Article 6(1) of the Bilateral Tax Convention provides:

'Income received from immovable property may be taxed in the State in which that property is located.'

5 Article 19(1) of the Bilateral Tax Convention reads:

'Remuneration, including pensions, paid by a Contracting State or a political subdivision thereof, either directly or from funds established by them, to a natural person in respect of services which that person has performed for that State or political subdivision are taxable in that State. …'

6 Article 24(1)(1) and (2) of the Bilateral Tax Convention provides:

'With regard to residents of the Netherlands, double taxation is avoided in the following manner:

1. [The Kingdom of the] Netherlands may, when taxing [its] residents, include in the basis of assessment the items of income or capital which, in accordance with the provisions of this Convention, are taxable in Belgium;

2. Subject to the application of the provisions relating to compensation for losses laid down in the domestic rules for the avoidance of double taxation, the Kingdom of the Netherlands will make a reduction in the amount of tax calculated in accordance with [subparagraph] (1). The reduction is to be equal to the amount of tax corresponding to the ratio between the amount of income or capital included in the basis of assessment referred to in [subparagraph] (1) and taxable in Belgium under [in particular, Article] 6 of the Bilateral Tax Convention, and the amount of the

total income or total capital constituting the basis of assessment referred to in [subparagraph] (1).'

7 Article 25(3) of that Convention, under the heading 'Non-discrimination', provides that:

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

National legislation

8 Article 1 of the Law on Income Tax 1964 (Wet op de inkomstenbelasting 1964) of 16 December 1964 (*Staatsblad* 1964, No 519), in the version applicable at the material time ('the WIB'), defines 'national' taxpayers ('resident taxpayers') as natural persons resident in the Netherlands, as opposed to 'foreign' taxpayers ('non-resident taxpayers'), namely natural persons who are not resident in that Member State but who do receive income there.

9 Resident taxpayers are subject to tax on their entire income and non-resident taxpayers are subject to tax only on income received in the Netherlands.

10 In the case of resident taxpayers, the basis of assessment is made up of world-wide gross income, less deductible losses (Paragraph 3 of the WIB). That income includes, in particular, net income from work and from assets (Paragraph 4(1)(c) of the WIB), including the advantage which the taxpayer derives from occupying his own dwelling.

11 Pursuant to Paragraph 42a(1) of the WIB, that advantage is fixed as a flat-rate amount, and other advantages and costs, charges and depreciations – other than interest on debts, the costs of loans, and periodic payments for rights in respect of a long lease or building lease – are not taken into account.

12 Pursuant to Paragraph 4(2) of the WIB, if the calculation of net income results in a negative amount, that negative amount is deducted from taxable gross income.

13 It is common ground that the result of applying all the various provisions referred to above is that the full amount of the interest on a debt taken on to finance a personal dwelling is deducted from gross income and, consequently, from the taxable income of a resident taxpayer, even if the interest exceeds the advantage the taxpayer derives from living in his own dwelling.

14 As the national court notes, if a resident taxpayer has a negative income from immovable property located in Belgium, that negative income component may be deducted from the income taxable in the Netherlands. However, in a subsequent year in which a positive income is derived from that immovable property, the reduction in order to avoid double taxation on that income will be calculated by deducting that prior loss from that positive income, by application of Paragraph 24(1)(2) of the Bilateral Tax Convention, in conjunction with Article 3(4) of the Decree on the Avoidance of Double Taxation 1989 (Besluit voorkoming dubbele belasting 1989, *Staatsblad* 1989, No 594; 'the Decree of 1989).

The tax position of a taxpayer resident in Belgium who receives work-related income in the Netherlands

15 The tax position of a taxpayer who receives work-related income in the Netherlands and resides in Belgium is determined by the WIB and the Bilateral Tax Convention.

16 Pursuant to Paragraph 48 of the WIB, tax is levied, with regard to non-resident taxpayers, on the national taxable income, that is to say, the gross national income received during the calendar year.

17 In accordance with Paragraph 49(c) of the WIB, national gross income consists, inter alia, of the total net work-related income received by a person who does not reside in the Netherlands, provided that that income is received from employment which is or was carried out in the Netherlands, or from immovable property situated in that Member State.

18 In principle, pursuant to Paragraph 2(2) of the WIB, Netherlands nationals who are not resident in the Netherlands but are employed by a legal person governed by Netherlands public law are deemed to be resident in the Netherlands. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) states that it follows none the less from its judgment of 12 March 1980 (No 19180, BNB 1980/170) that, in respect of income which the Bilateral Tax Convention allocates to the Kingdom of Belgium, determination of residence under Paragraph 2(2) of the WIB must be disregarded in favour of the provisions of that Convention.

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

19 Mr Renneberg transferred his residence from the Netherlands to Belgium during December 1993. In 1996 and 1997 he lived in Belgium in a dwelling of his own which he had acquired during 1993 and which had been financed with a mortgage loan from a Netherlands bank.

20 During 1996 and 1997, Mr Renneberg was employed in the public service by the Netherlands municipality of Maastricht. During those two years, he received his entire work related income in the Netherlands.

21 In Belgium, Mr Renneberg was liable to a tax on his own dwelling, namely a property tax (‘précompte immobilier’). It is established that Mr Renneberg’s negative income on his Belgian dwelling did not affect the amount of that tax.

22 With regard to the taxation of his income in the Netherlands for the tax years 1996 and 1997, Mr Renneberg applied for deduction of the negative income relating to his Belgian dwelling. That application for deduction related to the difference between the interest paid on the mortgage and the rentable value of the dwelling.

23 In the Netherlands, the Netherlands tax authorities calculated the assessments for those years on the basis of taxable income of NLG 75 265 and NLG 78 600 respectively, without accepting as a deductible item from Mr Renneberg’s Netherlands income the negative income from his Belgian dwelling. According to Mr Renneberg’s tax return, those negative amounts were NLG 8 165 in 1996 and NLG 8 195 in 1997.

24 The objections to those assessments were unsuccessful.

25 Since the Gerechtshof te ’s-Hertogenbosch (’s-Hertogenbosch Regional Court) dismissed the appeals lodged against those decisions, Mr Renneberg lodged an appeal in cassation against those decisions before the Hoge Raad der Nederlanden.

26 It follows from the findings of the national court that Mr Renneberg must, pursuant to Article 4 of the Bilateral Tax Convention, be regarded as a Belgian resident.

27 In the Netherlands, therefore, Mr Renneberg is not regarded as having unlimited liability to tax and is treated, as regards the income which the Bilateral Tax Convention allocates to Belgium, in accordance with the regime which applies to non-resident taxpayers. Accordingly, income, whether negative or positive, which, pursuant to the Bilateral Tax Convention, has been allocated to the Kingdom of Belgium for taxation, does not affect the tax on income, positive or negative, which, pursuant to that same Convention, is taxable in the Kingdom of the Netherlands.

28 In his appeal, Mr Renneberg relied on Case C-279/93 *Schumacker* [1995] ECR I-225. He submits that, since he has exercised his right to freedom of movement guaranteed by Article 39 EC, he must be able to benefit in the Netherlands from the advantages granted there to resident taxpayers, since, with regard to his taxable income and the place where it is obtained, he is to a very great extent in a situation comparable to that of those taxpayers.

29 The Hoge Raad der Nederlanden notes that the tax advantage at issue in the main proceedings is not based on a taxpayer's personal and family circumstances, unlike those at issue in *Schumacker*.

30 That court considers that, unlike the case in which personal and family circumstances are taken into account under the principle of progressivity in direct taxation, the possibility of setting off – within a single tax jurisdiction – negative income from one particular source of income against positive income from another source of income is not such a universal characteristic of direct taxation that taxpayers who are liable to tax in different Member States, having taken advantage of a right to freedom of movement guaranteed by the EC Treaty, should benefit from that possibility in one of those States.

31 Taking the view, nevertheless, that the dispute in the main proceedings raises certain difficulties of interpretation of Community law, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 39 EC and 56 EC be interpreted as precluding, either individually or jointly, a situation in which a taxpayer who, in his [Member State] of residence, has negative income from a dwelling owned and occupied by him, and obtains all of his positive income, specifically work-related income, in a Member State other than that in which he resides, is not permitted by that other Member State … to deduct the negative income from his taxable work-related income, even though the [Member] State of employment does allow its own residents to make such a deduction?'

32 By letter notified on 4 April 2008, the Court posed two written questions to the Netherlands Government relating to certain aspects of the tax law applicable in the Netherlands at the material time, to which that government replied by letter lodged at the Court Registry on 24 April 2008.

The question referred

33 By its question, the national court essentially asks whether Article 39 EC and/or Article 56 EC are to be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which a Community national who is not resident in the Member State in which he receives all or almost all of his taxable income cannot, for the purposes of determining the basis of assessment of that income in that Member State, deduct negative income relating to a house owned by him and used as a dwelling in another Member State, whereas a resident of the first Member State is able to deduct such negative income for the purposes of determining the basis of assessment of taxation of his income.

The question referred as it relates to Article 39 EC

Applicability of Article 39 EC

34 As a preliminary point, it should be stated that it has not been asserted that the situation of a person such as Mr Renneberg falls outside the scope of the freedom of movement for workers on the ground that the post which he holds constitutes employment in the public service within the meaning of Article 39(4) EC. Furthermore, the documents in the case contain no indication to that effect. Consequently, one must start from the premiss that the economic activity at issue in the main proceedings does not fall within the types of employment which are excluded, under Article 39(4) EC, from the scope of Article 39(1) to (3) EC.

35 In the view of the Netherlands Government and, in its written observations, of the Commission of the European Communities, as regards the freedom of movement for workers, the main proceedings concern a purely internal situation. A Netherlands citizen who continues to carry out his economic activities in the Netherlands after moving to Belgium for personal reasons is not a migrant worker and has not exercised the right of free movement for workers.

36 In that regard, it should also be noted that any Community national who, irrespective of his place of residence and his nationality, works in a Member State other than that of his residence falls within the scope of Article 39 EC (see to that effect, inter alia, Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 31; Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17; Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705, paragraph 15; Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 46; and Case C-152/05 *Commission* v *Germany* [2008] ECR I-0000, paragraph 20).

37 It follows that the situation of a Community national such as Mr Renneberg who, following the transfer of his residence from one Member State to another State, works in a Member State other than that of his residence falls, after that transfer, within the scope of Article 39 EC.

38 Consequently, it is necessary to consider whether, as Mr Renneberg claims and as the Commission submitted at the hearing, Article 39 EC precludes, in a situation such as that of Mr Renneberg, the application of national legislation such as that at issue in the main proceedings.

Freedom of movement for workers

– Observations submitted to the Court

39 In the event that the Court rules that Article 39 EC does apply to a situation such as that at issue in the main proceedings, the Netherlands and Swedish Governments take the view that the different treatment accorded to Mr Renneberg compared to a resident taxpayer is not contrary to Article 39 EC, since it is exclusively the result of the allocation of the power to tax provided for under the Bilateral Tax Convention.

40 In the view of the Netherlands Government, because of that allocation, it is for the Kingdom of Belgium alone to take account of the negative and positive income received from Mr Renneberg's Belgian dwelling. The Kingdom of the Netherlands can tax only his work-related income and is not entitled to include his rental income in the basis of assessment. Furthermore, the Treaty offers no guarantee to a citizen of the European Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation.

41 The Netherlands Government concludes that the difference in treatment at issue in the main

proceedings relates to situations which are not objectively comparable and that therefore there is no discrimination.

42 However, the Commission considers, in essence, that, from the point of view of the Member State of employment, the situations of a resident and of a non-resident who receive all or almost all of their income in that State are comparable. In its view, the legislation at issue in the main proceedings introduces a difference in treatment between those two categories of taxpayer solely on the ground of their place of residence. Such a difference in tax treatment constitutes indirect discrimination prohibited by Article 39 EC since, in the Netherlands, negative income relating to a dwelling in Belgium is taken into account in the case of a resident taxpayer, but is not in that of a non-resident taxpayer.

– Findings of the Court

43 It is established case-law that the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the European Community, and preclude measures which might place them at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, inter alia, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 24; *Ritter-Coulais*, paragraph 33; *Lakebrink and Peters-Lakebrink*, paragraph 17; and *Commission* v *Germany*, paragraph 21).

44 It follows from the case-law referred to in paragraphs 36 and 43 of the present judgment that the point made in the latter paragraph concerns measures which might place Community citizens at a disadvantage when they wish to pursue an occupational activity in the territory of a Member State other than that of their residence. This includes, in particular, Community nationals wishing to continue to pursue an economic activity in a given Member State after having transferred their residence to another Member State.

45 It is apparent from the decision for reference that, unlike persons working and residing in the Netherlands, Mr Renneberg, who works in the Netherlands while residing in Belgium, is not entitled under Netherlands legislation to have the negative income relating to his immovable property in Belgium taken into account in determining the basis of assessment for taxation of the income he obtains in the Netherlands.

46 Consequently, under legislation such as that at issue in the main proceedings, the treatment of non-resident taxpayers is less advantageous than that of resident taxpayers.

47 Accordingly, it must be examined whether, as submitted by the Netherlands and Swedish Governments, such a difference in tax treatment affecting taxpayers who do not reside in the Member State concerned is not contrary to Article 39 EC, since it is based on the allocation of the power of taxation laid down by a convention to prevent double taxation such as the Bilateral Tax Convention.

48 Pursuant to the case-law of the Court, in the absence of unifying or harmonising measures at Community level, the Member States retain competence for determining the criteria for taxation on income and capital with a view to eliminating double taxation by means, inter alia, of international agreements. In that context, the Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction in bilateral agreements for the avoidance of double taxation (see, inter alia, Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57; Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 93; Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 49).

49 In the circumstances of this case, in adopting Articles 6 and 19(1) of the Bilateral Tax Convention, the Kingdom of the Netherlands and the Kingdom of Belgium availed themselves of the freedom to determine the connecting factors of their choice for the purpose of determining their respective fiscal jurisdictions. Thus, under Article 6 of that Convention, it is for the Kingdom of Belgium to tax income derived from immovable property within its territory, while, under Article 19(1) of the Convention, the pay of a Netherlands civil servant such as Mr Renneberg is taxable in the Netherlands.

50 Nevertheless, that allocation of the power of taxation does not mean that the Member States are entitled to impose measures that contravene the freedoms of movement guaranteed by the Treaty (see, so that effect, *Bouanich*, paragraph 50; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 54; and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 24).

51 As far as concerns the exercise of the power of taxation so allocated by bilateral conventions to prevent double taxation, the Member States must comply with Community rules (see, to that effect, *Saint-Gobain ZN*, paragraph 58, and *Bouanich*, paragraph 50) and, more particularly, respect the principle of national treatment of nationals of other Member States and of their own nationals who exercise the freedoms guaranteed by the Treaty (see *de Groot*, paragraph 94).

52 In the context of the main proceedings, it should be noted that the use made by the parties to the Bilateral Tax Convention of their liberty to determine the connecting factors for the determination of their fiscal jurisdiction does not, however, mean that the Kingdom of the Netherlands has no power whatsoever to take into account negative income relating to immovable property in Belgium, for the purposes of determining the basis of assessment of the income tax of a non-resident taxpayer who obtains the major part or all of his taxable income in the Netherlands.

53 As the Advocate General observes in point 81 of his Opinion, in the case of resident taxpayers, the mere fact that they receive income from a property located in Belgium in respect of which that State exercises its fiscal jurisdiction does not preclude the Kingdom of the Netherlands from including such property income in the taxable basis of income tax to be paid by those taxpayers.

54 That fact, highlighted by the national court, has, moreover, been confirmed by the Netherlands Government in its replies to the Court’s written questions.

55 More precisely, with regard to positive income from immovable property in Belgium which is included in the basis of assessment of the tax payable in the Netherlands under Article 24(1)(1) of the Bilateral Tax Convention, a reduction in the tax proportional to the amount of that income in the basis of assessment is to be granted, in accordance with the rules in Article 24(1)(2) of that Convention, in order to avoid double taxation.

56 As regards negative income from immovable property in Belgium, it is apparent from the decision for reference and the replies of the Netherlands Government to the Court’s written questions that it may be taken into account in the determination of the taxable income of resident taxpayers and that, provided that positive income is received from that property in a subsequent year, the reduction intended to avoid double taxation is calculated by deducting the earlier negative income from that positive income in accordance with Article 3(4) of the Decree of 1989, which follows the provisions on the setting-off of losses in the Netherlands legislation on avoidance of double taxation, to which Article 24(1)(2) of the Bilateral Tax Convention refers.

57 Since that Convention does not preclude the taking into account of negative income received from immovable property in Belgium for the calculation of income tax payable by a resident taxpayer, it is therefore evident, contrary to the submissions of the Netherlands Government, that the refusal by the Netherlands tax authorities to allow a taxpayer such as Mr Renneberg to make a deduction is not the result of the choice made in the Convention to allocate the power to tax income from immovable property of taxpayers falling within the scope of the Convention to the Member State in whose territory that property is located.

58 The taking into account of the relevant negative income, or the refusal to do so, thus depends in reality on whether or not those taxpayers are residents of the Netherlands.

59 In relation to direct taxation, the Court has indeed 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 Member 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 (Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 19 and the case-law cited).

60 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 which would justify different treatment in that regard (*Talotta*, paragraph 19, and the case-law cited).

61 Such is the case particularly where a non-resident taxpayer receives no significant income in his Member State of residence and derives the major part of his taxable income from an activity pursued in the Member State of employment, so that the Member State of residence is not in a position to grant him the advantages which follow from the taking into account of his personal and family circumstances (see, inter alia, *Schumacker*, paragraph 36, and *Lakebrink and Peters-Lakebrink*, paragraph 30).

62 In such a situation, discrimination arises from the fact that the personal and family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the State of residence nor in the State of employment (*Schumacker*, paragraph 38, and *Lakebrink and Peters-Lakebrink*, paragraph 31).

63 In paragraph 34 of *Lakebrink and Peters-Lakebrink*, the Court stated that the scope of the case-law arising from *Schumacker* extends to all the tax advantages connected with the non-resident's ability to pay tax which are granted neither in the State of residence nor in the State of employment.

64 That case-law applies in a situation such as that at issue in the main proceedings.

65 A taxpayer such as Mr Renneberg cannot, for the purposes of determining the basis of assessment of the tax on his work-related income received in the Netherlands, request that rental losses relating to immovable property which he owns in Belgium be taken into account, unlike a taxpayer who resides and works in the Netherlands and who, suffering rental losses relating either to immovable property in the Netherlands which he occupies himself or to immovable property in Belgium which he does not himself occupy on a permanent basis, may set off those losses for the purposes of determining the basis of assessment of income tax in the Netherlands.

66 To the extent that, although residing in one Member State, a person such as Mr Renneberg derives most of his taxable income from salaried employment in another Member State and has no significant income in his Member State of residence, he is, for the purposes of taking into account his ability to pay tax, in a situation objectively comparable, with regard to his Member State of employment, to that of a resident of that Member State who is also in salaried employment there.

67 It is apparent that such a person, not being liable in his Member State of residence to pay tax applicable to natural persons in respect of income from immovable property other than the property tax paid in advance, is not able to have the negative income relating to his immovable property in that Member State taken into account and, moreover, is deprived of any possibility of setting off that negative income in the determination of the basis of taxation of his taxable income in his Member State of employment.

68 In principle, therefore, Article 39 EC requires that, in a situation such as that of Mr Renneberg, negative income related to a dwelling in the Member State of residence is to be taken into account by the tax authorities of the Member State of employment for the purposes of determining the basis of assessment of taxable income in the latter State.

69 It must be pointed out in that regard that, as the Advocate General observed in point 84 of his Opinion, the extension by the Kingdom of the Netherlands of the treatment reserved for resident taxpayers to the situation of a non-resident taxpayer such as Mr Renneberg, who receives all or almost all of his taxable income in the Netherlands, does not affect the Kingdom of Belgium's rights under the Bilateral Tax Convention and does not impose any new obligation on it.

70 Furthermore, it should be noted that, in paragraph 101 of the judgment in *de Groot*, the Court held that the mechanisms used to eliminate double taxation or the national tax systems which have the effect of eliminating or alleviating double taxation must, however, permit the taxpayers in the Member States concerned to be certain that, ultimately, all their personal and family circumstances will be duly taken into account, irrespective of how those Member States have allocated that obligation amongst themselves, in order not to give rise to inequality of treatment which is incompatible with the Treaty provisions on the freedom of movement for workers and in no way results from the disparities between the national tax laws. Having regard to the guidance given in *Lakebrink and Peters-Lakebrink*, referred to in paragraph 63 of this judgment, those considerations also apply with regard to the taking into account of workers' overall ability to pay tax.

71 Since, as noted in paragraph 56 of the present judgment, the Kingdom of the Netherlands takes into consideration, in determining the basis of assessment of income tax payable by resident taxpayers, negative income from immovable property located in Belgium, it is also required, with regard to residents of the latter Member State who receive all or almost all of their income in the Netherlands and who do not have significant income in their Member State of residence, to take into account that negative income for the same purposes. Otherwise the situation of non-resident taxpayers would not be taken into consideration in that regard in either of the two Member States concerned.

72 Nevertheless, it is appropriate to examine the argument raised by the Netherlands Government that the negative tax consequences which follow for Mr Renneberg from the acquisition of his dwelling in Belgium are the result of the disparity between the internal tax systems of the two Member States concerned.

73 In its view, the disparity lies in the fact that the Netherlands tax system allows deduction of mortgage

interest from work-related income while the Belgian tax system does not. Under Belgian tax law, mortgage interest can never be set off against income other than income from immovable property. Thus, even if the person concerned had received work-related income in Belgium, the negative balance of mortgage interest could not be deducted from that income.

74 The Netherlands Government takes the view that it is not the application of the Netherlands system itself which has unfavourable tax consequences for Mr Renneberg, but the fact that the Belgian tax system allows less scope for deduction of mortgage interest than the Netherlands system. The fact that it is not possible for Mr Renneberg to have his negative income taken into account in Belgium is the consequence of the transfer of his residence to that Member State and not of the application of the Netherlands tax legislation. Where a restriction on the freedoms guaranteed by the Treaty is the result merely of a disparity between national tax systems, it is not prohibited by Community law.

75 In that regard, it must be noted that the difference in treatment at issue in the main proceedings does not arise, contrary to the assertions of the Netherlands Government, simply from the disparity between the national tax rules concerned. Assuming the Belgian income tax system to be as it is presented by the Netherlands Government, even if the Kingdom of Belgium allowed losses such as those at issue in the main proceedings to be taken into account for determination of the basis of assessment of income tax of its residents, a taxpayer in a situation such as that of Mr Renneberg, who receives all or almost all of his income in the Netherlands, would be unable, in any event, to take advantage thereof.

76 Furthermore, the Court must reject another argument raised in that respect by the Netherlands Government, at the hearing, alleging, in essence, that there is a risk that losses related to a non-resident taxpayer’s immovable property located in Belgium could be taken into account twice.

77 Firstly, the national legislation on double taxation, read in conjunction with Article 24(1)(2) of the Bilateral Tax Convention, seeks to avoid that risk becoming reality with regard to resident taxpayers who suffer losses of income relating to a property located in Belgium, whose situation may be compared with that of a non-resident taxpayer such as Mr Renneberg.

78 Secondly, 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) may, 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 employed activity, be relied upon by a Member State in order to obtain from the competent authorities of the other Member State all the information enabling it to establish income taxes correctly, or all the information it considers necessary to ascertain the correct amount of the income tax payable by a taxpayer under the legislation which it applies (see, to that effect, Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42).

79 Accordingly, as the Commission submitted at the hearing, a difference in treatment such as that at issue in the main proceedings, which is based on residence, is discriminatory since, while negative property-related income relating to immovable property located in another Member State is taken into consideration by the Member State concerned in determining the basis of assessment of income, in particular work-related income, of taxpayers working and residing in the latter Member State, it cannot be taken into account in the case of a taxpayer who derives all or almost all of his taxable income from salaried activity carried out in that Member State but does not live there.

80 Consequently, national legislation such as that at issue in the main proceedings constitutes an obstacle to the freedom of movement for workers which is, in principle, prohibited by Article 39 EC.

81 It is, however, necessary to examine whether that obstacle can be accepted. According to the Court's case-law, a measure restricting one of the fundamental freedoms guaranteed by the Treaty may be accepted only if it pursues a legitimate objective which is compatible with the Treaty and is justified by overriding reasons in the public interest. But even if that were so, application of that measure would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, to that effect, Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 33, and Case C-40/05 *Lyyski* [2007] ECR I-99, paragraph 38).

82 No possible justification has been put forward by the governments which submitted observations to the Court, nor any mentioned by the national court.

83 Accordingly, in a situation in which a non-resident taxpayer, such as Mr Renneberg, receives all or almost all of his taxable income in one Member State, Article 39 EC prohibits the tax authorities of that Member State from refusing to take into consideration the negative income relating to immovable property located in another Member State.

84 In the light of all the foregoing considerations, the answer to the question referred must be that Article 39 EC is to be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which a Community national who is not resident in the Member State in which he receives all or almost all of his taxable income cannot, for the purposes of determining the basis of assessment of that income in that Member State, deduct negative income relating to a house owned by him and used as a dwelling in another Member State, whereas a resident of the first Member State may deduct such negative income for the purposes of determining the basis of assessment of taxation of his income.

The question referred in so far as it relates to Article 56 EC

85 In the light of the answer to the question concerning the implications of Article 39 EC on the applicability of tax legislation such as that at issue in the main proceedings, it is not necessary to consider whether the provisions of the Treaty relating to free movement of capital also preclude that legislation.

Costs

86 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 (Third Chamber) hereby rules:

Article 39 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which a Community national who is not resident in the Member State in which he receives all or almost all of his taxable income cannot, for the purposes of determining the basis of assessment of that income in that Member State, deduct negative income relating to a house owned by him and used as a dwelling in another Member State, whereas a resident of the first Member State may deduct such negative income for the purposes of determining the basis of assessment of taxation of his income.

[Signatures]

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* Language of the case: Dutch.