In Case 23/68

Reference to the Court by the Second Chamber of the Gerechtshof (Fiscal Chamber), The Hague, for a preliminary ruling in the action pending before that court between

JOHANNES GERHARDUS KLOMP, an official of the European Coal and Steel Community, residing at The Hague,

and

INSPEKTIE DER BELASTINGEN, First Division, The Hague, on the interpretation of Article 11(b) of the Protocol on the Privileges and Immunities of the European Coal and Steel Community,

THE COURT

composed of: R. Lecourt, President, A. Trabucchi and J. Mertens de Wilmars, Presidents of Chambers, A. M. Donner, W. Strauß, R. Monaco and P. Pescatore (Rapporteur), Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

Mr J. G. Klomp, an official of the High Authority of the ECSC, has been employed since 1 February 1959 in the Press and Information Department of the European Communities at The Hague and took up residence there in May 1959.

The Inspectorate of Taxes, The Hague, by an assessment dated 30 November 1961 for the year 1959, requested Mr Klomp to pay a contribution of Fl. 300 under the Netherlands Algemene Ouderdomswet (General Law on Old Age) of 31 May 1956 (Staatsblad 1956, No 281).

Mr Klomp refused to pay this contribution, maintaining that it ought not to be calculated on the basis of his salary as an official of the ECSC, and pointing out that Article 11(b) of the Protocol on the Privileges and Immunities exempts officials from all national taxes on salaries and emoluments paid by the Community. On 14 January 1963 the Inspectorate of Taxes, The Hague, rejected the plaintiff's objection and confirmed its assessment of 30 November 1961.

Mr Klomp appealed against this decis-

ion to the Gerechtshof, The Hague; before the Second Chamber (Fiscal Chamber) of that court he submitted that the said Inspectorate had insufficiently stated the reasons for the disputed decision and, in particular, that it had not dealt with the objection based on Article 11(b) of the Protocol on the Privileges and Immunities of the ECSC.

The plaintiff relied in this connexion on the judgment of the Court of Justice in Case 6/60 (*Humblet* v *Belgian State*, Rec. 1960, p. 1125). The Inspectorate of Taxes, on the other hand, maintained that:

— since Mr Klomp is a 'resident' within the meaning of Article 2 of the General Law on Old Age, by virtue of Article 6 he is automatically subject to that Law and liable to the contribution;

— Article 11 (b) of the Protocol on the Privileges and Immunities of the ECSC is not applicable in the present case, since a contribution to a general compulsory insurance embracing the whole population cannot be regarded as a tax;

— that the Gerechtshof, The Hague, does not have jurisdiction with regard to the question whether the assessment relating to the contribution is compatible with the Protocol, since Article 16 thereof provides that all disputes on the interpretation or application of the Protocol shall come within the jurisdiction of the Court of Justice.

By letter dated 24 September 1968 the Gerechtshof, The Hague, requested the Court of Justice to give a preliminary ruling on the interpretation of Article 11(b) of the Protocol on the Privileges and Immunities of the ECSC and in particular to answer the following question:

'Must a contribution levied under the (Netherlands) General Law on Old Age be considered to be included in the expression 'all taxes on salaries and emoluments paid by the Community' in Article 11(b) of the Protocol?'

The Gerechtshof's decision to refer the question was received at the Court Registry on 26 September 1968.

Written observations were submitted to the Court by the Government of the Kingdom of the Netherlands and by the Commission of the European Communities.

The plaintiff in the main action, J. G. Klomp, the Government of the Kingdom of the Netherlands and the Commission of the European Communities presented oral argument at the hearing on 15 January 1969. On that occasion the plaintiff in the main action and the said Government also answered questions from certain judges.

The Advocate-General delivered his opinion at the hearing on 29 January 1969.

II — Observations submitted to the Court

The written and oral observations submitted to the Court may be summarized as follows:

A — *The jurisdiction of the Court*

1. The *Government of the Kingdom of the Netherlands* questions whether the Court has jurisdiction to entertain the question asked.

In fact, Article 41 of the ECSC Treaty only confers on it jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council and the provisions of the ECSC Treaty relating to the jurisdiction of the Court have not been amended by Article 30 of the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities.

It may appear possible to base the jurisdiction of the Court on Article 16 of the former Protocol on the Privileges and Immunities of the ECSC.

2. The *Commission of the European Communities* observes that the rights and obligations of an official of the ECSC with regard to a contribution requested for the year 1959 remain subject to the substantive provisions of the Protocol on the Privileges and Immunities of the ECSC, although it has been repealed, with effect from 1 July 1967, by the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities.

On the other hand, with regard to the jurisdiction of the Court, the repeal of the former ECSC Protocol means that, by virtue of the provisions of the new Protocol and of the principles common to the legal systems of Member States, Article 16 of the former ECSC Protocol can no longer be employed after 1 July 1967 as the legal basis for a reference to the Court by a national court.

The Commission, however, refuses to recognize that the absence in the new Protocol of transitional provisions with regard to jurisdiction and procedure in disputes concerning the interpretation and application of the former ECSC Protocol may have the effect of withdrawing such disputes from the jurisdiction of the Court, thus breaking the continuity in the formation of its jurisdiction. The rules of the EEC and EAEC Treaties on jurisdiction and procedure should therefore be considered applicable; this view is all the more acceptable since Article 11(b) of the former ECSC Protocol is, in the final analysis, substantially identical with the second paragraph of Article 13 of the new Protocol, to which Article 177 of the EEC Treaty and Article 150 of the ECSC Treaty are expressly declared to be applicable by Article 30 of the Treaty of 8 April 1965.

B — *The nature of the contribution in dispute*

1. *Mr Klomp, the plaintiff in the main action,* considers that the arguments relied upon to deny a fiscal character to the general old-age insurance contribution are irrelevant. For his part, he particularly emphasizes the following arguments.

The fact that the payment gives rise to a corresponding benefit is not peculiar to the disputed contribution; there is also a more or less directly corresponding benefit for every tax.

The system of allocation of charges, on which the general old-age insurance is based, means that there is no direct connexion between the contribution and the corresponding benefit: the old-age pension is only granted on request; there is no relationship between the amount of the contribution and that of the pension and in certain cases a pension is paid without any contribution. The contributions to the general old-age pension are, like a tax, fixed in terms of the contributor's income and collected by the Inspector of Taxes; disputes concerning them come under the jurisdiction of the fiscal chambers of the Netherlands courts. In these circumstances the contribution to the general old-age insurance is indisputably in the nature of a tax; under Article 11 (b) of the Protocol on the Privileges and Immunities of the ECSC, the salary paid by the Community may not be taken into consideration in fixing this contribution.

2. The *Government of the Kingdom of the Netherlands* maintains that the contribution levied pursuant to the General Law on Old-Age cannot be treated as equivalent to a tax.

Although, like a tax, it is collected periodically and according to a register of assessments, the contribution is distinguished by the fact that to its payment there is an actual (differentiated) corresponding benefit, namely a right to a pension from the fund to which the payment was made. This distinction was established by the judgment of the Court of Justice in Case 32/67 (*Van Leeuwen,* Rec. 1968, p. 63).

The contribution paid under general old-age insurance does not fall to the Treasury but goes to a special fund managed by an agency specially set up for this purpose and does not come under the budget of the State. The general old-age insurance is financed by an allocation of charges, which in principle implies self-finance.

The only analogies, purely technical or practical, with a tax are the fact that the contribution is to a certain extent calculated proportionally on the contributor's income and that the revenue authorities are involved in its collection.

The judgment in the *Humblet* case cannot be relied on in this case as it relates to procedure which is indisputably fiscal.

3. The *Commission of the European Communities* considers that, in interpreting the provision in question of the former ECSC Protocol with regard to its application in the legal context of specific national legislation, less weight should be given to expressions borrowed from the field of taxation than to material factors, to the objective and the scope of the Protocol and to the national legislation concerned.

With regard to the Netherlands General Law on Old Age of 31 May 1956, the Commission identifies certain factors common to social security contributions and tax levies: the obligatory nature of the payment of contributions owing to automatic affiliation, through the intention of the legislature, to a system set up as a public service; the fiscal nature of the contributions levied by the authority, even in the form of a charge for a special purpose; the method of collecting the contributions which, like a tax, are directly enforceable without judicial proceedings.

The development of social security in the direction of a tax has however yet to receive express recognition in the national laws of the Member States and legal opinion remains divided as to the nature of the social security contributions, which leads to the frequent use of the term 'quasi-taxation'. Nor does national case-law treat social security contributions as equivalent to the levying of a tax.

Moreover certain treaties and international agreements on the privileges and immunities of international organizations distinguish between exemption from national taxes and the non-applicability of national social security systems.

However, it is essentially by a consideration of the rules of Community law that the question put to the Court should be answered. For its part the Commission takes the view that the national taxes referred to in Article 11(b) of the former ECSC Protocol do not include social security contributions levied by a Member State on an official of the Community.

The Commission maintains that in any event this interpretation must be given to the corresponding, and substantially identical, provisions of the former EEC and EAEC Protocols and of the new Protocol applicable to the three Communities. In fact, besides the provision on the fiscal immunity of salaries, those Protocols contain a provision (Article 14 of the former EEC and EAEC Protocols, Article 15 of the new Protocol) on the scheme of social security benefits for officials and other servants of the Communities. It follows that, if those Protocols contain an element which may be invoked against the request for a national social security contribution from an official of the Communities, that element is to be found in the provision on the social security system of officials of the Communities and not the provision providing for the exemption of their salaries. It would be difficult to give a different interpretation to the similar provision on immunity in the former ECSC Protocol.

C — *Affiliation to the general old-age insurance scheme*

1. *Mr Klomp, the plaintiff in the main action,* in no way disputes his compulsory participation in the general old-age insurance.

The line of argument which he expounded before the Gerechtshof, The Hague, no doubt implies that he could obtain a pension without having paid the corresponding contributions; it is nevertheless the law itself which gives rise to the apparent illogicality of this view.

The plaintiff in the main action also maintains that:

— The pension fund is financed not only by contributions from insured persons but by general taxation;

— special measures were taken in favour of certain categories of insured persons, particularly with regard to the rate of salaries, in partial compensation for payment of the contribution to the general old-age insurance;

— the contributions of public officials are paid entirely by the State;

— since comparable provisions were not made for the Netherlands officials of the Communities, the compulsory payment of a contribution to the general old-age insurance calls in question the competence of the Communities to fix the net remuneration of the members of their staff and discriminations on the basis of nationality.

In these circumstances, the plaintiff in the main action refuses to submit to an unreasonable tax. On the other hand, it is difficult to defend the standpoint of the Netherlands Government which, with effect from 1 January 1965, exempted the officials of the three Communities from payment of contributions to the general old-age insurance but refuses to apply this measure to an official of the ECSC resident in the Netherlands since 1959.

2. The *Government of the Kingdom of the Netherlands* observes that the action brought by the plaintiff would take on a completely different aspect if it were based on the ground that the person concerned was not compulsorily insured pursuant to the General Law on Old Age.

In this case the question is whether the Communities may adopt for their officials staff regulations with a social security scheme excluding those officials from the application of the compulsory social security legislation of the Member States.

With regard to the EEC such a view may be supported by Article 14 of the former Protocol on the Privileges and Immunities of that Community; a similar provision does not, however, exist with regard to the ECSC.

Nevertheless, if the Court considers that it must take the view that the officials of the Community have an exclusive social security system, it follows that the Netherlands laws on social security are not applicable to the plaintiff in the main action and that he was not insured under the General Law on Old Age.

At all events the plaintiff in the main action cannot claim both the benefit of the general old-age insurance and exemption from the charges which this involves.

The only persons exempted from payment of the contributions are those with insufficient income; the State pays the contributions of its officials because obtaining a pension under the general old-age insurance involves a reduction of the officials' retirement pensions.

3. The *Commission of the European Communities* points out that no complaint was made in this respect before the Gerechtshof, The Hague, and raises the question whether compulsory affiliation to a national social security scheme which provides benefits similar to the Staff Regulations of Officials is permissible.

It considers that the Communities cannot be denied the right to issue staff regulations comprising a social security system and that affiliation to that system excludes compulsory affiliation to a national scheme.
The fact that a provision like Article 14 of the former Protocols of the EEC and of the EAEC does not appear in the former ECSC Protocol is not conclusive; the non-applicability of the national provisions of social security to the officials of international organizations in fields where their staff regulations provide them with similar benefits and require the same type of contributions is a principle generally recognized in international law.
Moreover, this principle is recognized in the Netherlands: Article 6(3)(b) of the General Law on Old Age lays down that the provisions of this Law, and consequently levying the contribution, may be waived with regard to persons 'to whom a corresponding system . . . of an organization in international law applies'; a ministerial order of 17 January 1967 with retroactive effect from 1 January 1965 used this power in connexion with the officials of the three Communities.

Grounds of judgment

1-2 The Gerechtshof, The Hague, by letter dated 24 September 1968, received at the Registry on 26 September, has requested the Court to give a preliminary ruling on the interpretation of Article 11(b) of the Protocol on the Privileges and Immunities of the European Coal and Steel Community. The question is whether the words 'all taxes on salaries and emoluments paid by the Community' (Article 11(b) of the Protocol) include the contribution charged on the basis of income under the Netherlands General Law on Old Age.

A — The jurisdiction of the Court

3-5 The Gerechtshof, The Hague, bases its request to the Court for a preliminary ruling on the disputed point of law relating to 'the relevant provisions of the Treaty establishing the European Coal and Steel Community'. The rules relating to jurisdiction in force at the time of the contribution period to which the case pending before the Gerechtshof relates (1959) by virtue of Article 41 of the Treaty establishing the European Coal and Steel Community provided for a procedure for preliminary rulings only in respect of questions relating to the validity of the acts of certain institutions of the Community but not in respect of questions relating to the interpretation of the provisions of that Treaty. However, Article 16 of the Protocol on the Privileges and Immunities of the ECSC conferred on the Court a wider jurisdiction in relation to all disputes concerning the interpretation or the application of that Protocol.

6-11 The legal position at the time of the facts giving rise to the case before the Gerechtshof, The Hague, was changed by the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities. By virtue of this Treaty the Protocol on the Privileges and Immuni-

ties of the ECSC was replaced by the Protocol on the Privileges and Immunities of the European Communities. Article 13(2) of that Protocol in substance re-enacts the provisions of Article 11(b) of the Protocol on the Privileges and Immunities of the ECSC, whereas the new Protocol did not re-enact Article 16 of the Protocol on the Privileges and Immunities of the ECSC. On the other hand, Article 30 of the Treaty of 8 April 1965 provided for the extension to the said Treaty and to the Protocol annexed thereto of the provisions of the Treaties establishing the European Economic Community and the European Atomic Energy Community concerning the jurisdiction of the Court of Justice and the exercise of that jurisdiction. Hence, at the time when the Gerechtshof, The Hague, asked the Court of Justice for a perliminary ruling, the provisions of Article 177 of the Treaty establishing the EEC and of Article 150 of the Treaty establishing the EAEC were extended to the provision now governing the question which forms the subject-matter of the case pending before the national court.

12-14 The procedure provided for by Article 16 of the Protocol on the Privileges and Immunities of the ECSC, which was applicable at the time when the dispute arose, and the provisions on preliminary rulings for interpretation of the Treaties establishing the EEC and the EAEC have an identical objective namely to ensure a uniform interpretation and application of the provisions of the Protocol in the six Member States. In accordance with a principle common to the legal systems of the Member States, the origins of which may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention, continuity of the legal system must be ensured. Accordingly the Court has jurisdiction to give a ruling on the request for interpretation.

B — Substance

15 The Gerechtshof, The Hague, requests the Court to interpret the words 'all taxes on salaries and emoluments paid by the Community' used in Article 11(b), which was applicable at the time when the case arose, with particular reference to the contribution levied on such incomes under the Netherlands General Law on Old Age.

16-17 It is not for the Court, in the context of the present procedure, to appraise, with reference to the said provisions of Community law, the characteristics of a contribution due under the legislation of one of the Member States of the Community, such a function being reserved for the national court which has to apply Community law to the case pending before it. The Court does, however, have jurisdiction to interpret the relevant provisions of the Protocol on the Privileges and Immunities with a view to enabling the national court to apply the provisions of Community law correctly to the disputed contribution.

18-22 Article 11(b) of the Protocol on the Privileges and Immunities refers to national taxes on salaries and emoluments in whatever form and under whatever name they may be levied. It is however a matter for consideration in connexion with the exemption claimed whether the said salaries and emoluments are indeed subject to a tax within the meaning of this provision. For this purpose it is proper to distinguish between a tax intended to provide for the general expenses of public authorities and a contribution intended to finance a social security scheme, even if such a contribution is levied in a manner resembling the levying of taxes. Accordingly when such a contribution is assessed on the basis of the income of the person concerned there is no objection to salaries and emoluments paid by the Community being taken into account in determining the basis of assessment. However, this finding leaves open the question, which has not been submitted to the Court, whether an exemption from the disputed contribution might not result from either Community or national provisions intended to avoid compulsory affiliation of officials of the European Communities to a national scheme of social security, in so far as they are already automatically subject to a corresponding scheme established by the Communities.

Costs

23-24 The costs incurred by the Government of the Kingdom of the Netherlands and the Commission of the European Communities which have submitted observations to the Court are not recoverable and as these proceedings are, in so far as the parties are concerned, a step in the action pending before the Gerechtshof, The Hague, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of Mr Klomp, the plaintiff in the main action, of the Government of the Kingdom of the Netherlands and of the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Coal and Steel Community, especially Article 41;
Having regard to the Protocol on the Privileges and Immunities annexed to the Treaty establishing the European Coal and Steel Community, especially Articles 11(b) and 16;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;

Having regard to the Treaty establishing the European Atomic Energy Community, especially Article 150;
Having regard to the Treaty establishing a Single Council and a Single Commission of the European Communities, especially Article 30;
Having regard to the Protocol on the Privileges and Immunities of the European Communities annexed to the Treaty establishing a Single Council and a Single Commisson of the European Communities, especially the second paragraph of Article 13;
Having regard to the Protocols on the Statute of the Court of Justice of the European Economic Community and the Statute of the Court of Justice of the European Atomic Energy Community, especially their respective Articles 20 and 21;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the Second Chamber of the Gerechtshof, The Hague (Fiscal Chamber), hereby rules:

A contribution intended to finance a social security scheme does not constitute a tax within the meaning of Article 11(b) of the Protocol on the Privileges and Immunities of the European Coal and Steel Community even if such a contribution is levied in a manner resembling the levying of taxes.

Lecourt Trabucchi Mertens de Wilmars

Donner Strauß Monaco Pescatore

Delivered in open court in Luxembourg on 25 February 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 29 JANUARY 1969[1]

Mr President,
Members of the Court,

Since 1956 a general old-age insurance scheme (Algemene Ouderdomsverzekering) (hereinafter referred to as 'the AOW') has existed in the Netherlands, applicable in principle to all persons resident there and financed by contributions assessed on the income of the persons concerned and recovered in the same way as taxes. The application of

1 — Translated from the French.