JUDGMENT OF THE COURT (Fifth Chamber)

13 April 2000 *

Case C-251/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Gerechtshof te 's-Gravenhage (Netherlands) for a preliminary ruling in the proceedings pending before that court between

C. Baars

and

Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem

on the interpretation of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC) and Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, C. Gulmann, J.-P. Puissochet, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by M. Fierstra, Legal Adviser, acting for the Head of Department of European Law of the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by H. Michard and P. van Nuffel, of its Legal Service, acting as Agents, having regard to the Report for the Hearing,

after hearing the oral observations of the Netherlands Government, represented by M. Fierstra and J. van Bakel, Deputy Legal Adviser in the Department of European Law of the Ministry of Foreign Affairs, acting as Agent, assisted by S. Verheij, Official in the Ministry of Finance, and the Commission, represented by P. van Nuffel, at the hearing on 24 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 14 October 1999,

gives the following

Judgment

1 By order of 8 July 1998, which was received at the Court on 10 July 1998, the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC) and of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC).

2 Those questions have been raised in proceedings between Mr Baars, a Netherlands national, and the Netherlands tax authority regarding the latter's refusal to grant him a tax allowance in respect of wealth tax.

The situation under national law

3 In the Netherlands, a wealth tax was introduced by the Wet op de Vermogensbelasting 1964 (1964 Wealth Tax Law, Stbl. 1964, p. 520, hereinafter 'the Wealth Tax Law'). It is a direct tax levied annually on assets, the rate of taxation being 0.8% of total assets.

4 According to Article 1 of the Wealth Tax Law, the tax applies to all natural persons residing in the Netherlands (domestic taxpayers) and to all natural persons who, although not residing in the Netherlands, have assets there (foreign taxpayers). Domestic taxpayers are in principle liable to wealth tax on the whole of their assets, wherever those assets may be. Foreign taxpayers are liable to the tax in respect of assets situated in the Netherlands.

5 Under Article 3(2) of the Wealth Tax Law, taxable assets are to be equal to the value of the assets held, including shares in partnerships or companies, less the value of any debts or liabilities.

6 The Wet tot Uitbreiding van de Ondernemingsvijstelling in de Vermogensbelasting 1986 (Law of 24 April 1986 extending the wealth tax exemption for

undertakings, Stbl. 1986, p. 248) inserted into the Wealth Tax Law a tax exemption known as 'the undertaking exemption'.

7 Article 7 of the Wealth Tax Law, as amended, which sets out the undertaking exemption for taxpayers, provides in Article 7(2) and (3)(c), as follows:

'2. As regards a taxpayer on whose behalf one or more undertakings are operated... the assets invested in that undertaking or in those undertakings shall be the subject of a tax allowance:

(a) if those assets do not exceed NLG 135 000: 100%,

(b) if those assets exceed NLG 135 000: NLG 135 000 plus 50% of capital exceeding that amount, but not exceeding NLG 1 541 000.

3. Where assets invested in one or more undertakings falling within the scope of paragraph 2 are less than NLG 2 947 000 or if no undertaking is operated on

behalf of the taxpayer, the second paragraph shall apply *mutatis mutandis* and, for that purpose, assets invested in an undertaking shall be deemed to be those which relate:

...

(c) to shares in companies or partnerships which represent for the taxpayer a substantial holding, within the meaning of the Wet op de Inkomstenbelasting 1964, in a company or partnership established in the Netherlands other than an investment institution within the meaning of Article 28 of the Wet op de Vennootschapsbelasting.

...'.

8 The concept of a 'substantial holding' in Article 7(3)(c) of the Wealth Tax Law, as amended, is defined in Article 39(3) of the Wet op de Inkomstenbelasting 1964 (Law of 16 December 1964 on income tax, Stbl. 1990, p. 103). According to that article:

'There is a substantial holding if, over the preceding five years, the taxpayer has been directly or indirectly a shareholder or partner, whether or not with his or her spouse and blood relations or relations by marriage in direct line or in the second degree by collateral line, holding at least one third and, whether or not with his or her spouse, more than seven percent of the nominal value of the paid up capital...'.

The main proceedings

9 Mr Baars is resident in the Netherlands. He owns all the shares in Ballyard Foods Limited (hereinafter 'Ballyard'), a limited company incorporated under Irish law established in Dublin, Ireland.

10 It is apparent from the order for reference that those shares represent a 'substantial holding in a company' in terms of Netherlands law.

11 For the purposes of the 1994 wealth tax assessment, Mr Baars declared assets amounting, at 1 January 1994, to NLG 2 650 600, which included the value of his shares in Ballyard, which on that date amounted to NLG 749 800.

12 Arguing that his shares in Ballyard represented a substantial holding in terms of Netherlands law, Mr Baars claimed the undertaking exemption provided for in

Article 7(3) of the Wealth Tax Law, as amended, in the form of an allowance of NLG 442 400 against his taxable assets.

13 The Inspector in the Belastingdienst Particulieren/Ondernemingen (Tax Office responsible for private individuals/undertakings), Gorinchem (hereinafter 'the Inspector') did not dispute that Mr Baars' holding in Ballyard was a substantial holding in terms of Netherlands law. However, he refused to allow the exemption on the ground that Ballyard did not satisfy the requirement that it be established in the Netherlands, as provided in Article 7(3)(c) of the Wealth Tax Law, as amended.

14 Mr Baars lodged an objection against that refusal on 9 November 1995 which was rejected by the Inspector on 27 September 1996.

15 Mr Baars brought an action challenging that decision before the Gerechtshof te 's-Gravenhage. In that action Mr Baars submitted *inter alia* that it was contrary to Article 52 of the Treaty, which provides for freedom of establishment, and Article 73b of the Treaty, which prohibits restrictions on movements of capital between the Member States, to limit the undertaking exemption to holdings in companies established in the Netherlands.

16 Taking the view that in order to give judgment it would be necessary to obtain an interpretation of Articles 6, 52, 73b and 73d of the Treaty, the Gerechtshof te 's-Gravenhage decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 6 and/or 52 of the EC Treaty be interpreted as meaning that a restriction in a provision of a Member State's wealth tax legislation which exempts assets invested in shares in an undertaking — provided that the shares form a substantial holding — from wealth tax to which the shareholder is liable but which restricts that exemption to shares in companies established in that Member State is incompatible with those articles?

(2) If Question 1 is to be answered in the negative, must Article 73b and 73d of the EC Treaty be interpreted as meaning that a restriction such as that referred to in Question 1 is incompatible with those articles?'

The first question

17 It must be remembered from the outset that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law and avoid any discrimination on grounds of nationality (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19).

18 As regards Article 52 of the Treaty, the Netherlands Government submits that the provisions of the Treaty relating to freedom of establishment are not applicable to a situation such as that of the applicant in the main proceedings, which, it

maintains, is covered solely by the provisions of the Treaty on the free movement of capital.

19 The Court must therefore examine whether the provisions of the Treaty relating to freedom of establishment, and in particular Article 52 of the Treaty, are applicable to a situation such as that of the applicant in the main proceedings giving rise to the reference for a preliminary ruling.

20 Under Netherlands laws, a substantial holding, which is essentially a holding for the last five years of at least one third of the shares in a company and more than seven percent of paid-up nominal capital, does not necessarily imply control or management of the company, which are factors connected with the exercise of the right of establishment. Consequently, the fact that a Member State does not allow its taxpayers the undertaking exemption for a substantial holding, within the meaning of its domestic legislation, in companies established in other Member States does not necessarily affect freedom of establishment.

21 However, the situation from which the main proceedings have arisen concerns a national of a Member State who resides in that Member State and who holds all the shares in a company established in another Member State. A 100% holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of application of the Treaty provisions on the right of establishment.

22 It is clear from the second paragraph of Article 52 of the Treaty that freedom of establishment includes the right to set up and manage undertakings, in particular companies or firms, in a Member State by a national of another Member State. So, a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment.

23 As to Article 6 of the Treaty, it follows from the case-law of the Court of Justice that that article, which lays down a general prohibition of all discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific non-discrimination rules (Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 12 and 13; Case C-1/93 *Halliburton Services* [1994] ECR I-1137, paragraph 12, and *Royal Bank of Scotland*, cited above, paragraph 20).

24 It is common ground that the principle of non-discrimination has been given effect, in the field of the right of establishment, by Article 52 of the Treaty (*Halliburton Services*, cited above, paragraph 12, and Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 21).

25 Consequently, Article 6 of the Treaty is not applicable in the case before the national court.

26 It is therefore necessary to determine, as in essence the national court essentially asks by its first question, whether Article 52 of the Treaty precludes a Member State's tax legislation, such as that at issue in the main proceedings, which, in circumstances where a holding in the capital of a company confers on the shareholder a definite influence over the company's decisions and allows him to determine its activities — which is self-evidently always the case wherever there is a 100% holding,

— allows nationals of Member States resident on its territory an exemption, in whole or in part, from wealth tax in respect of the assets invested in shares in the company,

— but makes that exemption subject to the condition that the holding be held in a company established in the Member State concerned, thus denying it to holders of shares in companies established in other Member States.

27 Article 52 of the Treaty constitutes one of the fundamental provisions of Community law and has been directly applicable in the Member States since the end of the transitional period. Under that provision, freedom of establishment for nationals of a Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13, and *Royal Bank of Scotland*, cited above, paragraph 22).

28 Even though Article 52 of the Treaty, like the other provisions concerning freedom of establishment, is, according to its terms, aimed particularly at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, it also prohibits the Member State of origin from hindering the establishment in another Member State of one of its own nationals (see, to that effect, Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 16; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21, and Case C-200/98 *X and Y* [1999] ECR I-8261, paragraph 26).

29 Article 52 of the Treaty likewise prohibits a Member State from hindering the establishment in another Member State of nationals of Member States residing on its territory.

30 By refusing to grant the tax advantage conferred by the undertaking exemption to nationals of Member States residing in the Netherlands who, in exercise of their right of free establishment, manage a company having its seat in a Member State other than the Netherlands, while granting that advantage to nationals of Member States residing in the Netherlands who hold a substantial holding in a company having its seat in the Netherlands, the national legislation at issue in the main proceedings provides for a difference in treatment between taxpayers by adopting as its criterion the seat of the companies of which those taxpayers are shareholders.

31 That difference in the treatment of taxpayers is in principle contrary to Article 52 of the Treaty.

32 It is therefore necessary to see whether there is any justification for that difference in treatment under the Treaty provisions relating to freedom of establishment.

33 The Netherlands Government argues that the restriction of the undertaking exemption to shares held in companies having their seat in the Netherlands is justified by the need to maintain cohesion in the Netherlands tax system.

34 It contends that the exemption is designed to mitigate the effects, in economic terms, of double taxation arising from a company's profits being charged to corporation tax and the assets invested by the shareholder in that company being charged to wealth tax.

35 It explains that only assets invested in shares in a company established in the Netherlands are wholly or partially exempt from wealth tax, since only profits which such a company has made in the Netherlands are subject to corporation tax there. Assets invested in shares in a company having its seat in another Member State ought not to benefit from the exemption from wealth tax because profits made by that company are not subject to corporation tax in the Netherlands, so that there is no double taxation to offset.

36 That line of argument cannot be upheld.

37 The Court of Justice has indeed held that the need to safeguard a tax system's cohesion may justify rules that are liable to restrict the fundamental freedoms (Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR-305).

38 However, that is not the case here.

39 First, there is no double taxation of profits, even in economic terms, because the tax at issue in the main proceedings is not charged on the profits distributed to shareholders in the form of dividends but on the assets of the shareholders through the value of their holdings in the capital of a company. Whether or not the company makes a profit does not in any event affect liability to wealth tax.

40 Second, in *Bachmann* and *Commission* v *Belgium*, cited above, there was a direct link between the deductibility of pension and life assurance contributions and the taxation of the sums received under those insurance contracts, and it was necessary to preserve that link in order to safeguard the cohesion of the tax system in question. There is, however, no such link in the present case, which concerns two separate taxes levied on different taxpayers. It is therefore irrelevant, for the purposes of granting shareholders a tax allowance in respect

of the wealth tax, that companies established in the Netherlands are subject to corporation tax in the Netherlands and that companies established in another Member State are not.

41 Consequently, the answer to the first question must be that Article 52 of the Treaty precludes a Member State's tax legislation, such as that at issue in the main proceedings, which, in circumstances where a holding in the capital of a company confers on the shareholder a definite influence over the company's decisions and allows him to determine its activities,

— allows nationals of Member States resident on its territory an exemption, in whole or in part, from wealth tax in respect of the assets invested in shares in the company,

— but makes that exemption subject to the condition that the holding be held in a company established in the Member State concerned, thus denying it to holders of shares in companies established in other Member States.

The second question

42 In view of the answer given to the first question, it is unnecessary to reply to the second question.

Costs

43 The costs incurred by the Netherlands Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Gerechtshof te 's-Gravenhage by order of 8 July 1998, hereby rules:

Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes a Member State's tax legislation, such as that at issue in the main proceedings, which, in circumstances where a holding in the capital of a company confers on

the shareholder a definite influence over the company's decisions and allows him to determine its activities,

- **allows nationals of Member States resident on its territory an exemption, in whole or in part, from wealth tax in respect of the assets invested in shares in the company,**

- **but makes that exemption subject to the condition that the holding be held in a company established in the Member State concerned, thus denying it to holders of shares in companies established in other Member States.**

Edward Gulmann Puissochet

Jann Wathelet

Delivered in open court in Luxembourg on 13 April 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber