JUDGMENT OF THE COURT (Fifth Chamber)
27 June 1996 *

In Case C-107/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

P. H. Asscher

and

Staatssecretaris van Financiën

on the interpretation of Article 48 of the EEC Treaty, now the EC Treaty,

THE COURT (Fifth Chamber),

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

* Language of the case: Dutch.

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— P. H. Asscher, by M. W. C. Feteris, financial adviser,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, acting as Agent,

— the Belgian Government, by J. Devadder, Director of Administration in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the French Government, by C. de Salins, Assistant Director in the Legal Directorate of the Ministry of Foreign Affairs, and J.-L. Falconi, Foreign Affairs Secretary in the same directorate, acting as Agents,

— the Commission of the European Communities, by H. Michard and B. J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of P. H. Asscher, represented by M. W. C. Feteris; the Netherlands Government, represented by J. S. van den Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the French Government, represented by F. Pascal, Special Adviser in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom, represented by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, and A. Moses QC; and the Commission, represented by B. J. Drijber, at the hearing on 14 December 1995,

after hearing the Opinion of the Advocate General at the sitting on 15 February 1996,

gives the following

Judgment

1 By order of 23 March 1994, received at the Court on 30 March 1994, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation of Article 48 of the EEC Treaty, now the EC Treaty.

2 Those questions arose in the context of a dispute between the Staatssecretaris van Financiën (State Secretary for Finance) and Mr Asscher, a Netherlands national who works but does not reside in the Netherlands, over the taxing of Mr Asscher's salary at a rate higher than that applicable to taxpayers engaged in the same activity who are resident in the Netherlands or treated as such.

3 In the Netherlands, direct taxation of natural persons is governed by the Wet op de Inkomstenbelasting of 16 December 1964 (*Staatsblad* 1964, 519, 'the Income Tax Law') and the Wet op de Loonbelasting 1964 of 18 December 1964, (*Staatsblad*

1964, 521, 'the Wages Tax Law'), which were the subject of a reform in 1989 (amended versions in *Staatsblad* 1990, 103 and 104 respectively).

4 Under Laws of 27 and 28 April 1989 (*Staatsblad* 1989, 122, 123, 129 and 611), joint collection of social security contributions with both income tax and wages tax was introduced with effect from 1 January 1990. There is now a uniform basis of collection: taxable income is the same as that on which social security contributions are calculated, so that the amount exempt from both tax and contributions ('the basic allowance') is the same.

5 The scale of tax rates, which comprises three bands, is laid down in Articles 20a and 20b of the Wages Tax Law (and likewise in Articles 53a and 53b of the Income Tax Law). Within the first band of taxable income only, two different rates are provided for. In the scale in force prior to the tax reform, however, a single rate of 14% was applicable to the first band for taxpayers receiving salaries from a source within the Netherlands.

6 Article 20a lays down the scales of rates applicable to taxpayers resident in the Netherlands or treated as such. A non-resident taxpayer is treated as resident where he can show that all or almost all — that is to say at least 90% — of his worldwide income is taxable in the Netherlands, that condition being deemed to be fulfilled if the taxpayer is subject in the Netherlands to contributions under the national compulsory social insurance scheme ('volksverzekeringen'). For such taxpayers, the rate of tax on the first band of taxable income is 13%.

7 For the 1990 tax year, the first band of taxable income covered annual taxable income up to and including HFL 42 123. The rate at which national insurance contributions were levied, jointly with tax on income in the first band alone, was 22.1%. The total rate levied on the wages of resident taxpayers and those treated as such was thus 35.1%.

8 Article 20b lays down a 'foreign' scale of tax rates applicable to non-resident taxpayers who do not meet the criteria in Article 20a, that is to say who obtain less than 90% of their worldwide income in the Netherlands and are not obliged to contribute to the Netherlands national insurance system. Such taxpayers pay tax at a higher rate of 25% on income in the first band.

9 In the other two bands, tax is charged at the same rates for all taxpayers, without distinction: 50% on taxable income in the second band and 60% (72% prior to the 1989 reform) in the third.

10 In the Netherlands, according to the case-file, Mr Asscher is the director of a private limited company, P. H. Asscher Beheer BV, of which he is sole shareholder.

11 Mr Asscher also works in Belgium, where he is manager of Vereudia, a company governed by Belgian law; that work is carried out wholly in Belgium.

12 In May 1986, Mr Asscher left the Netherlands to live in Belgium; that move did not involve any change in the activities he engaged in either in the Netherlands or in Belgium.

13 As regards taxation, the rules on the division of powers between the Kingdom of Belgium and the Kingdom of the Netherlands are laid down in a bilateral convention of 19 October 1970 ('the Convention') for the avoidance of double taxation of income and property and for the regulation of certain other taxation matters (*Tractatenblad* 1970, No 192).

14 Under the combined effects of Article 16(1) and the first sentence of Article 24(2)(1) of the Convention, Mr Asscher's income in the Netherlands, namely the remuneration he receives from his company there, is taxable exclusively in the Netherlands.

15 In Belgium, where he resides, Mr Asscher is taxed on the remainder of his income. The income he receives in the Netherlands is exempt from that tax but, pursuant to the second sentence of Article 24(2)(1) of the Convention, Belgium is entitled to take that exempt income into account when determining the rate of tax and thus apply progressive taxation.

16 As regards social security, Mr Asscher's situation is as follows.

17 He was insured with the Netherlands national insurance scheme until he moved to Belgium in May 1986. Since that date, he has no longer been obliged to contribute to that scheme and has been subject solely to the Belgian social security legislation. At the material time, he was compulsorily insured in Belgium with the social security scheme for self-employed persons.

18 In June 1990, the earnings period in issue in the main proceedings, the salary received by Mr Asscher in the Netherlands was taxed at the rate of 25% in the first tax band.

19 Following dismissal of his objection to the amount of tax deducted from his salary for June 1990, Mr Asscher sought review by the Gerechtshof (Regional Court of Appeal), Amsterdam, arguing that the application of the 25% rate constituted indirect discrimination on grounds of nationality contrary to Articles 7 and 48 of the EEC Treaty, now Articles 6 and 48 of the EC Treaty.

20 In its decision of 13 April 1992, the Gerechtshof rejected his arguments on discrimination. It pointed out that until 1 January 1990 a taxpayer in Mr Asscher's position, who was not obliged to pay national insurance contributions (a 'non-contributing taxpayer'), paid wages and income tax at the same rate as one who did have to pay such contributions (a 'contributing taxpayer') but that the latter could deduct the contributions from the amount on which the tax was assessed.

21 The Gerechtshof stated that for contributing taxpayers the general lowering of rates as from 1 January 1990 was offset by withdrawal of the entitlement to deduct national insurance contributions from the taxable amount. Non-contributing taxpayers, however, were not affected by that withdrawal. In the Gerechtshof's view, the general lowering of rates would have given non-contributing taxpayers an unjustified advantage over other taxpayers if a higher rate of tax had not been applied to them. It therefore considered that the introduction as part of the tax reform of different rates of tax depending on whether the taxpayer contributed or not was objectively justified.

22 Mr Asscher has lodged an appeal to have that judgment set aside.

23 The Hoge Raad had doubts as to the interpretation of provisions of the EC Treaty and decided to stay the proceedings in order to seek a preliminary ruling from the Court on the following questions:

'1. Does Article 48 of the Treaty permit a Member State (the State of employment) to impose an appreciably higher rate of income and wages tax on wages earned in that State from an employer established there, where the employee does not reside in the State of employment but in another Member State?

2. If not, is such difference in treatment nevertheless permitted if less than 90% of the employee's worldwide income, calculated according to the criteria of the State of employment, consists of income which may be taken into account for income tax purposes by the State of employment in the case of non-residents?

3. Is it permissible to take account, by means of a different rate of tax such as that in issue here, of the fact that the employee is not required to pay contributions to the national insurance scheme operated in the State of employment?

4. Is it relevant in that regard whether the employee must pay contributions for comparable insurance in the State of residence?

5. Does it make any difference to the answers to the above questions whether the employee is a national of the State of employment?'

24 In order to determine Mr Asscher's precise legal situation with regard to the Treaty provisions on freedom of movement for persons, it is first necessary to define the nature of his economic activities.

25 It is settled law that any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is to be treated as a 'worker' within the meaning of Article 48 of the Treaty. According to the case-law, the essential characteristic of the employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 17).

26 In the Netherlands, Mr Asscher is the director of a company of which he is the sole shareholder; his activity is thus not carried out in the context of a relationship of subordination, and so he is to be treated not as a 'worker' within the meaning of Article 48 of the Treaty but as pursuing an activity as a self-employed person within the meaning of Article 52.

27 Mr Asscher's professional activity in Belgium must also, on the basis of the documents made available to the Court and in the absence of any contestation by the parties, be considered to be in a self-employed capacity.

28 It must thus be considered whether legislation such as that in issue is compatible with Article 52, and not Article 48, of the Treaty.

29 In any event, as was held in Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, paragraph 17, a comparison of Articles 48 and 52 of the Treaty shows that they are based on the same principles both as regards entry into and residence in the territory of the Member States by persons covered by Community law and as regards the prohibition of all discrimination against them on grounds of

nationality. The same applies to the pursuit of an economic activity in the territory of the Member States by persons covered by Community law.

30 The questions raised by the Hoge Raad der Nederlanden must be answered in the light of those considerations.

The fifth question

31 In its fifth question, which it is convenient to consider first, the national court seeks in substance to ascertain whether a national of a Member State pursuing an activity as a self-employed person in another Member State, in which he resides, may rely on Article 52 of the Treaty as against his State of origin, on whose territory he pursues another activity as a self-employed person.

32 It is settled law that, although the provisions of the Treaty relating to freedom of establishment cannot be applied to situations which are purely internal to a Member State, Article 52 nevertheless cannot be interpreted in such a way as to exclude a given Member State's own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty (see Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, paragraph 24; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13; Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 15; and Case C-419/92 *Scholz* v *Opera Universitaria di Cagliari* [1994] ECR I-505).

33 In the present case, until 1986 Mr Asscher pursued an economic activity in Belgium while residing in the Netherlands, his State of origin. Since moving his residence to Belgium in May 1986 he has pursued economic activities at the same time in the Netherlands and in Belgium and those dual activities have had direct repercussions on the calculation of his income tax in the Netherlands for the 1990 tax year, at issue in the main proceedings. He must therefore be held to have exercised the rights and liberties recognized by the Treaty and is entitled to rely on the relevant provisions thereof.

34 The answer to the national court's fifth question must therefore be that a national of a Member State pursuing an activity as a self-employed person in another Member State, in which he resides, may rely on Article 52 of the Treaty as against his State of origin, on whose territory he pursues another activity as a self-employed person, if, by virtue of pursuing an economic activity in a Member State other than his State of origin, he is, with regard to the latter, in a situation which may be regarded as equivalent to that of any other person relying as against the host Member State on the rights and liberties guaranteed by the Treaty.

The first and second questions

35 In its first and second questions, which it is convenient to consider together, the national court asks in substance, first, whether Article 52 of the Treaty is to be interpreted as precluding a Member State from applying to a Community national who pursues an activity as a self-employed person within its territory and at the same time pursues another activity as a self-employed person in another Member State, in which he resides, a higher rate of income tax than that applicable to residents pursuing the same activity and, secondly, whether the answer to that question is affected by the fact that less than 90% of the taxpayer's worldwide income consists of earnings which may be taken into account for income-tax purposes by the State in which he works but does not reside.

36 In answering those questions, it must first be borne in mind that although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination by reason of nationality (Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraphs 21 and 26; Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493, paragraph 16).

37 The legislation in issue in the main proceedings applies irrespective of the nationality of the taxpayer concerned.

38 However, national legislation of that kind, which lays down a distinction founded on, *inter alia*, residence inasmuch as the rate of wages and income tax applicable to certain non-resident taxpayers is higher than that applied to those who are resident or treated as such, is liable to act mainly to the detriment of nationals of other Member States, since non-residents are most frequently non-nationals. Legislation of the kind in issue in the main proceedings is, moreover, all the more likely to concern mainly foreign nationals in that it applies, in addition to the residence criterion, a threshold of at least 90% of worldwide income originating in the Netherlands.

39 In those circumstances, applying a higher rate of wages and income tax to non-resident taxpayers who receive less than 90% of their worldwide income in the Netherlands (that condition being deemed to be met if they do not pay national insurance contributions) than to taxpayers who are resident or treated as such may constitute indirect discrimination on grounds of nationality.

40 It is, furthermore, settled law that discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations (*Wielockx*, paragraph 17).

41 In relation to direct taxes, the situations of residents and 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 that of their ability to pay tax or the possibility of taking account of their personal and family circumstances (*Wielockx*, paragraph 18, citing *Schumacker*, paragraph 31 et seq.).

42 However, 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, 37 and 38).

43 Thus, if a Member State refuses tax benefits linked to the taking into account of personal and family circumstances to a taxpayer who works but does not reside in its territory whilst granting them to resident taxpayers, the Court has held that there is discrimination where the non-resident receives all or almost all of his worldwide income in that State since the income received in the State in which he resides is insufficient to allow his personal and family circumstances to be taken into account. The situations of the two categories of taxpayer are in that case comparable with regard to the taking into account of their personal and family circumstances (*Schumacker*, paragraphs 36, 37 and 38).

44 However, a Member State in which a non-resident taxpayer works may be justified in refusing him such benefits where he does not receive all or almost all of his income in that State, since comparable benefits are granted in the State in which he resides and which is responsible, under international tax law, for taking personal and family circumstances into account.

45 In the present case, the difference in treatment is constituted by the fact that tax on income in the first band is charged at a rate of 25% on non-residents who receive less than 90% of their worldwide income in the Netherlands, but at 13% on those residing and pursuing the same economic activity in the Netherlands even if they receive less than 90% of their worldwide income there.

46 According to the Netherlands Government, the higher rate of tax is intended to offset the fact that certain non-residents escape the progressive nature of the tax because their tax obligations are confined to income received in the Netherlands.

47 It must be noted in that regard that, under Article 24(2)(1) of the Convention, modelled on Article 23A(1) and (3) of the OECD Model Convention (exemption with maintenance of progressivity), income received in a State in which the taxpayer pursues an economic activity but does not reside is taxable exclusively in that State and exempt in the State of residence. The State in which the taxpayer resides may nevertheless take that income into account in calculating the amount of tax on the remaining income in order, *inter alia*, to apply the rule of progressivity.

48 The fact that a taxpayer is a non-resident thus does not enable him, in the circumstances under consideration, to escape the application of the rule of progressivity. Both categories of taxpayer are therefore in comparable situations with regard to that rule.

49 In those circumstances, the application of a higher rate of tax to the income of certain non-residents than is applicable to those who are resident or treated as such constitutes indirect discrimination prohibited by Article 52 of the Treaty.

50 It must now be considered whether there is any justification for that discrimination.

51 First, the Netherlands Government submits that a difference in tax rates as between non-resident, non-contributing taxpayers on the one hand and those who are resident or treated as such on the other is justified by the need to avoid the tax burden on the former being appreciably lighter than on the latter. If a higher rate were not applied, non-resident, non-contributing taxpayers would enjoy a tax advantage over residents and those treated as such, for whom the abolition of the right to deduct social security contributions has entailed an increase in taxable income and, concomitantly, in the amount of tax payable.

52 That argument cannot be accepted.

53 The advantage which such non-residents are presumed to enjoy arises, if at all, from the decision of the Netherlands legislature to abolish the right to deduct social security contributions which, by its nature, affects only such taxpayers as are under an obligation to pay them, thus favouring, in the Netherlands Government's submission, those who do not have to pay such contributions in the Netherlands. Such a circumstance may not be offset by tax differentials affecting the latter category, since that would amount to penalizing them for not paying social security contributions in the Netherlands.

54 In any event, the alternative is this: either Mr Asscher is properly insured with the Belgian social security scheme alone and there can be no question of penalizing him by means of a tax differential for not paying social security contributions in the Netherlands; or he should be insured either exclusively or additionally with the Netherlands social security scheme, which would enable the Netherlands to claim social security contributions from him and would thus take him out of the 'foreign' scale of tax rates, as indicated in paragraph 8 above. Consequently, whether he is insured or not with one or the other national social security scheme is not a factor which can justify, in either of the two situations envisaged, the application of a higher rate of tax to a non-resident.

55 Secondly, it must be considered whether the difference between the two rates is justified by the need to ensure cohesion of the tax system within the Member State concerned, as contended both by the Staatssecretaris van Financiën in the national proceedings and by the French Government.

56 This Court has held, in Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, that the need to ensure the cohesion of a tax system may justify rules restrictive of the freedom of movement of workers within the Community.

57 Here, however, that is not the case.

58 In the cases cited above, there was a direct link between the right to deduct contributions and the taxation of sums payable by insurers under pension and life assurance contracts and it was necessary to preserve that link in order to safeguard the cohesion of the tax system in question. Taxpayers had a choice between being able to deduct the assurance premiums but being taxed on the capital and pensions

received when the contract matured and not being able to deduct the premiums but in that case not being taxed on the capital and pensions received at maturity.

59 In the present case, however, there is no such direct link between the application of a higher rate of tax to the income of certain non-residents who receive less than 90% of their worldwide income in the Netherlands and the fact that no social security contributions are levied on the income of such non-residents from sources in the Netherlands.

60 The application of a higher rate of tax does not provide any social security protection. In addition, the fact that certain non-residents are not insured with the Netherlands social security scheme and that social security contributions are consequently not levied on their income from sources in the Netherlands can only derive, if it is justified, from the application, when determining the legislation applicable, of the binding general system set up by Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) and in principle entails, pursuant to the same provisions, insurance solely under the social security scheme of the State in which they reside and pursue part of their professional activity.

61 The Court's rulings to the effect that Member States are not entitled to determine the extent to which their own legislation or that of another Member State is applicable since they are under an obligation to comply with the provisions of Community law in force (see Case 276/81 *Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027, paragraph 14, Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821, paragraph 21, and Case 60/85 *Luijten* v *Raad van*

Arbeid [1986] ECR 2365, paragraph 14) preclude a Member State from using tax measures in reality to make up for the fact that a taxpayer is not insured with, and does not pay contributions to, its social security scheme.

62 In the light of the foregoing, the answer to the first two questions must be that Article 52 of the Treaty is to be interpreted as precluding one Member State from applying to a national of a Member State who pursues an activity as a self-employed person within its territory and at the same time pursues another activity as a self-employed person in another Member State, in which he resides, a higher rate of income tax than that applicable to residents pursuing the same activity where there is no objective difference between the situation of such taxpayers and that of taxpayers who are resident or treated as such to justify that difference in treatment.

The third and fourth questions

63 The third and fourth questions have already been answered in the context of the examination of possible justifications for the discrimination (see, in particular, paragraphs 53, 54 and 59, 60 and 61).

64 The answer to be given to the national court is therefore that Article 52 of the Treaty precludes a Member State from taking account, by means of a higher rate of income tax, of the fact that, by virtue of the relevant provisions of Regulation No 1408/71 concerning the determination of the applicable legislation, the taxpayer is not obliged to pay contributions to its national social insurance scheme. The fact that, also by virtue of Regulation No 1408/71, the taxpayer is insured under the social security scheme of the State in which he resides is irrelevant in that regard.

Costs

65 The costs incurred by the German, Belgian, French, Netherlands and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by order of 23 March 1994, hereby rules:

1. **A national of a Member State pursuing an activity as a self-employed person in another Member State, in which he resides, may rely on Article 52 of the EC Treaty as against his State of origin, on whose territory he pursues another activity as a self-employed person, if, by virtue of pursuing an economic activity in a Member State other than his State of origin, he is, with regard to the latter, in a situation which may be regarded as equivalent to that of any other person relying as against the host Member State on the rights and liberties guaranteed by the Treaty.**

2. **Article 52 of the Treaty is to be interpreted as precluding a Member State from applying to a national of a Member State who pursues an activity as a self-employed person within its territory and at the same time pursues**

another activity as a self-employed person in another Member State, in which he resides, a higher rate of income tax than that applicable to residents pursuing the same activity where there is no objective difference between the situation of such taxpayers and that of taxpayers who are resident or treated as such to justify that difference in treatment.

3. **Article 52 of the Treaty precludes a Member State from taking account, by means of a higher rate of income tax, of the fact that, by virtue of the relevant provisions of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, concerning the determination of the applicable legislation, the taxpayer is not obliged to pay contributions to its national social insurance scheme. The fact that, also by virtue of Regulation No 1408/71, the taxpayer is insured under the social security scheme of the State in which he resides is irrelevant in that regard.**

Edward Puissochet Moitinho de Almeida

Gulmann Wathelet

Delivered in open court in Luxembourg on 27 June 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber