OPINION OF ADVOCATE GENERAL LÉGER

delivered on 15 February 1996 *

1. The Hoge Raad der Nederlanden is asking the Court to fill in a further detail in the picture it is gradually building up of the tax situation of a non-resident taxpayer in a Member State. This case follows on from the Court's recent judgments in *Finanzamt Köln-Altstadt* v *Schumacker* [1] and *Wielockx* v *Inspecteur der Directe Belastingen.* [2]

The proceedings before the national court

Legislation applicable in the main proceedings

2. In the Netherlands, direct taxation of natural persons is governed by the Wet op de Inkomstenbelasting 1964 ('the Income Tax Law') [3] and the Wet op de Loonbelasting 1964 ('the Wages Tax Law'). [4]

3. Those laws were amended by laws of 27 April 1989 [5] and 28 December 1989, [6] which came into effect on 1 January 1990. Under that reform, wages tax and national insurance contributions are now collected together, so that taxation in the first band of income comprises a tax element and a social security contribution element. The basis of taxation has been broadened because national insurance contributions are no longer deductible and certain other deductions have also been abolished. To offset this, the tax rate on the first band of income has been lowered for residents and certain non-residents treated as residents, and the rate for the third band has been lowered for all taxpayers.

4. The wages tax is an income tax deducted at source from employees' earnings.

5. A director with a large shareholding in a private limited company is treated as an employee as regards his earnings, which are subject to wages tax. He is also treated as an employee for national insurance purposes.

* Original language: French.

1 — Case C-279/93 [1995] ECR I-225.

2 — Case C-80/94 [1995] ECR I-2493.

3 — Law of 16 December 1964, *Staatsblad* 1964, 519, and — as since amended — *Staatsblad* 1990, 103.

4 — Law of 18 December 1964, *Staatsblad* 1964, 521, and — as since amended — *Staatsblad* 1990, 104.

5 — *Staatsblad* 1989, 122, 123 and 129.

6 — *Staatsblad* 1989, 611.

He is not, however, so treated for the purposes of employee insurance. [7]

6. Cross-border tax situations are governed by the Convention of 19 October 1970 between the Government of the Kingdom of Belgium and the Government of the Kingdom of the Netherlands for the avoidance of double taxation of income and property and for the regulation of certain other taxation matters ('the bilateral convention'). [8]

7. Under Articles 15(1) and 16(1) of the bilateral convention, for example, the earnings of a person resident in Belgium and employed in the Netherlands or a director of a limited company resident in the Netherlands are taxable in the Netherlands. The remainder of such a person's income is taxed in the country of residence, Belgium.

8. Article 20a(1) of the Wages Tax Law contains a scale of tax rates applicable to employees resident in the Netherlands or treated as such. An employee is treated as resident where all or almost all — that is to say at least 90% — of his worldwide income is taxable in the Netherlands. Under Article 20a(3), that condition is deemed to be fulfilled if the income in question is subject to national insurance contributions in the Netherlands.

9. An employee who does not reside in the Netherlands and does not have worldwide income all or almost all of which is taxable in the Netherlands is subject to wages tax in accordance with the scale of rates in Article 20b.

10. The rates under Article 20a and those under Article 20b differ only in the first tax band. In 1990, employees coming under Article 20a were taxed at 13% in the first band, whereas those coming under Article 20b were taxed at 25%. Prior to 1990, a single tax rate of 14% in the first band was applied to all employees.

11. In 1990, national insurance contributions were levied concurrently with tax at a rate of 22.10% in the first tax band alone.

7 — See the Commission's account of the national case-law at point 5 of its written observations.

8 — *Moniteur Belge*, 25 September 1971.

12. An employee making national insurance contributions and paying wages tax in the Netherlands therefore had a total of 35.10% — 13% and 22.10% — deducted at source.

Facts of the case

13. Mr P. H. Asscher, a Netherlands national, has been resident in Belgium since May 1986. He is director of a private limited company established in the Netherlands and works in that capacity in the Netherlands. He is also director of a company governed by Belgian law, established in Belgium, and works in that capacity in Belgium.

14. Mr Asscher is taxed in Belgium on his income from the Belgian company. He is also compulsorily insured there under the social security scheme for self-employed persons.

15. His income in the Netherlands is less than 90% of his worldwide income and no national insurance contributions are paid thereon.

16. In June 1990, he received a gross salary of HFL 16 250, from which HFL 7 891.17 was deducted pursuant to Article 20b of the Wages Tax Law.

17. He lodged an objection to that deduction with the competent tax inspector, but his objection was rejected.

18. He then challenged that rejection in proceedings before the Gerechtshof (Regional Court of Appeal), Amsterdam, which dismissed his action on 13 April 1992.

19. Mr Asscher has sought to have the Gerechtshof's decision set aside in an appeal to the Hoge Raad der Nederlanden.

The national court's questions

20. The Hoge Raad considered that an interpretation of Article 48 of the EC Treaty was necessary to decide the case. By judgment of 23 March 1994, therefore, it stayed the proceedings and referred the following five

questions to this Court for a preliminary ruling:

'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 taxation, 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?'

21. First of all, however, I wish to examine whether a situation such as that in the present case might fall under Article 52, rather than Article 48, of the Treaty. I shall then deal with the national court's questions, beginning with the last.

Applicability of Article 52 of the Treaty

22. The national court refers only to Article 48 of the Treaty, concerning freedom of movement for workers. Under national tax law, the applicant in the main proceedings is regarded as an employee.

23. From the point of view of the Treaty, since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term 'worker' in

Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning. [9]

24. The Court has stated:

'That concept must be defined in accordance with objective criteria which distinguish the employment relationship *by reference to the rights and duties of the persons concerned.* The essential feature of an employment relationship, however, 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.' [10]

25. The Commission points out [11] that the Court has not yet had to rule on the problem of the classification in Community law of the position of a director who is shareholder in a company. It stresses that Mr Asscher is the sole shareholder of the Netherlands company, and doubts whether a person in such a position can be regarded as a 'worker' within the meaning of Article 48 of the Treaty. It considers that Article 52 is in fact applicable.

26. The Kingdom of the Netherlands hopes that the Court will explicitly define the situation of a company director under Community law. [12] It does not rule out the possibility that the cross-border activities of a company director of Community nationality may fall under Article 52 rather than Article 48 of the Treaty.

27. I feel that in this case the Court should further refine its definition of the Community concept of 'worker' in order to enable the national court, which alone has power to do so, to decide on the classification of the appellant's situation in the light of both that definition and the considerations of fact and law in the case before it.

28. Subordination of one party to another in the employment relationship is one of the essential features inherent in the concept of a 'worker'. If there is no such subordination, an activity carried on for the benefit of other economic operators or consumers is to be regarded as self-employment. It is thus proper, in my opinion, that a person carrying on such activity should fall under Article 52, and not Article 48, of the Treaty.

29. A manager of a company or firm engaged in business for profit, irrespective of

9 — Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035 and Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 16.

10 — *Lawrie-Blum*, paragraph 17 (emphasis added).

11 — At point 20 of its written observations.

12 — Point 28 of its written observations.

the classification under national law of his legal relationship with that company or firm, must therefore be regarded as *self-employed* for the purposes of Article 52 of the Treaty even if over a certain period he performs remunerated services for that company or firm *when, under the allocation of control made by statute or the articles of association, he is not under the direction of any other person or of any body which he does not himself control.* It is for the national court to decide whether there is such subordination in the light of the considerations of fact and law in each particular case.

30. In the present case, therefore, the national court must analyse the situation in the light of the national law applicable to the organization of Mr Asscher's company in order to determine whether he falls under Article 48 or Article 52 of the Treaty.

The fifth question

31. By this question, the national court seeks in substance to ascertain whether a national of a Member State pursuing an economic activity in another Member State in which he resides may rely on Article 48 or 52 of the Treaty, as the case may be, as against his State of origin in connection with another activity which he pursues as an employed or self-employed person in that State.

32. That question raises the problem of what is commonly referred to as 'reverse discrimination'.

33. The Belgian, French and Netherlands Governments consider that Mr Asscher's situation is purely internal inasmuch as he is a national of, and pursues a professional activity in, the Kingdom of the Netherlands.

34. The French and Netherlands Governments refer to *Werner* v *Finanzamt Aachen-Innenstadt*, [13] in which the Court held that:

'Article 52 of the EEC Treaty does not preclude a Member State from imposing on its nationals who carry on their professional activities within its territory and who earn all or almost all of their income there or possess all or almost all of their assets there a heavier tax burden if they do not reside in that State than if they do.'

35. It is clear that Community law does not apply to situations which are purely internal to a Member State.

13 — Case C-112/91 [1993] ECR I-429.

36. However, it is settled law that the nationals of a Member State may rely on Articles 48 or 52 of the Treaty concerning freedom of movement when, by virtue of their conduct, they have placed themselves in one of the positions envisaged by Community law and '... are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty'. [14]

37. In *Scholz* v *Opera Universitaria di Cagliari and Cinzia Porcedda*, [15] the Court held, very generally, that:

'Any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of [the provisions of Community law relating to freedom of movement for workers] .'

38. In the *Werner* case, cited above, the appellant, a dentist, was a German national established in Germany who had gained his academic and professional qualifications there, and merely resided in another Member State. The Court found that there was no foreign element which might have entitled him to rights under Community law.

39. In his Opinion in that case, Advocate General Darmon stressed that:

'Until the adoption on 28 June 1990 of the Council directives relating to the right of residence, which make that right more widely available, the free movement of persons within the Community was determined — and delimited — by the economic character of the Treaty.' [16]

40. As those directives [17] were inapplicable at the material time in the *Werner* case, Advocate General Darmon concluded that:

'It follows that the freedom of movement granted to Community nationals is deemed

14 — Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, paragraph 24, and Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 15.

15 — Case C-419/92 [1994] ECR I-505, paragraph 9.

16 — Point 30.

17 — Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26); Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28); and Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30), which was annulled by judgment of the Court in Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193 because it had been adopted on the wrong legal basis, but whose effects were maintained in force until the entry into force of a directive adopted on the proper legal basis, and which was then replaced by Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

to involve movement *for the purposes of an economic activity*.' [18]

41. I think it likely that the Court will in future have to rule on discrimination suffered by nationals of a Member State who have exercised their freedom of movement only under, say, Directive 90/364, [19] which now recognizes a general right of residence subject to certain conditions, regardless of any economic activity.

42. In Mr Asscher's case, no such question arises.

43. Directive 90/364 was not applicable in June 1990, when the contested amount was deducted from his wages.

44. In any event, Mr Asscher had moved his residence to Belgium in 1986 in order to carry on an economic activity in a Belgian company set up prior to that date.

45. Regardless of whether that activity in Belgium is as an employed or self-employed person, the appellant in the main proceedings has thus exercised a freedom recognized by the Treaty.

46. The fact that he was already working with the Belgian company before moving his residence to Belgium is irrelevant. The freedom of movement enshrined in Articles 48 and 52 of the Treaty covers both the taking-up and the pursuit of an activity as an employed or self-employed person. [20] It encompasses in particular a change of residence in the pursuit of an activity already taken up, subject to a State's legitimate right to prevent a fraudulent evasion of legal provisions. [21]

47. Mr Asscher is thus, with regard to his State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty, within the meaning of the *Kraus* judgment, cited above. As in the case of those other persons, there may be no discrimination against him.

48. In my view, therefore, the answer to the fifth question should be that a national of a Member State pursuing an economic activity in another Member State in which he resides

18 — Point 30.

19 — Cited above, note 17.

20 — See the fifth recital in the preamble to, and Title II of, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), and the second paragraph of Article 52 of the Treaty.

21 — *Knoors*, cited above, paragraph 25.

may rely on Article 48 or 52 of the Treaty, as the case may be, as against his State of origin in connection with another activity which he pursues as an employed or self-employed person in that State.

49. That assimilation of the specific situation of a national of the Member State in question to that of any national of another Member State pursuing an activity as an employed or self-employed person in the State of taxation must be borne in mind in the context of the remainder of my examination of the questions raised by the national court.

The first question

50. By its first question, considered in the light of my earlier conclusions regarding the applicability of Article 52 of the Treaty, the national court seeks in substance to ascertain whether Articles 48 or 52 of the Treaty allow a Member State in which a national of another Member State pursues an activity as an employed or self-employed person, whilst residing in his State of origin or in another Member State, to levy a higher rate of tax on the income from that activity than if the person in question were resident there.

51. From the wording of the second question — which envisages, if the first question is answered in the negative, the specific case of the national in question not receiving all or almost all of his income in the State in which the activity is pursued — it may be inferred that the first question refers on the contrary, implicitly but necessarily, to a situation in which all or almost all of that income is received in that State.

52. Before proposing an answer to the first question in the light of that inference, I shall outline the position as regards the substantive law relating to direct taxation.

53. As Community law now stands, direct taxation does not as such fall within the purview of the Community. Article 99 of the Treaty explicitly gives the Council powers of harmonization in the field of indirect taxation alone. Laws relating to direct taxation may be harmonized, under Article 100 of the Treaty, by the Member States acting unanimously, where they directly affect the establishment or functioning of the common market. Article 100a(2), however, excludes fiscal provisions from those which may be harmonized by qualified-majority voting under Article 100a(1) for the purpose of the establishment and functioning of the internal market.

54. Nevertheless, as the Court has noted, [22] 'the powers retained by the Member States must ... be exercised consistently with Community law'.

55. In the field of direct taxation, therefore, they may not adopt measures which would have the effect of unjustifiably impeding freedom of movement for employed persons (Article 48 of the Treaty) [23] or for persons carrying on a self-employed activity (Article 52). [24]

56. It is settled law [25] that the rules regarding equal treatment prohibit not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

57. National rules which are applicable regardless of the nationality of the taxpayer but which, by treating taxpayers differently on the basis of their residence, are less favourable to non-residents, are thus liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners. [26]

58. In those circumstances, benefits granted only to residents of a Member State may constitute indirect discrimination by reason of nationality. [27]

59. It is also settled law that 'discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.' [28]

60. In *Schumacker*, cited above, which concerned the interpretation of Article 48 of the Treaty, the dispute in the main proceedings involved a national rule which allowed, *inter alia*, family circumstances to be taken into account and certain social security expenditure to be deducted only by residents.

22 — See, in particular, Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 12, and *Schumacker*, cited above, paragraph 21.

23 — Case C-175/88 *Biehl* v *Administration des Contributions* [1990] ECR I-1779, paragraph 12.

24 — Case 270/83 *Commission* v *France* [1986] ECR 273, and Case C-330/91 *The Queen* v *Inland Revenue Commissioners* ex parte *Commerzbank* [1993] ECR I-4017.

25 — See, in particular, Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11, and *Commerzbank*, cited above, paragraph 14.

26 — *Biehl*, cited above, paragraph 14, and *Schumacker*, cited above, paragraph 28.

27 — *Schumacker*, cited above, paragraph 29.

28 — Ibid., paragraph 30.

61. The Court had to consider the situation of a non-resident employed taxpayer who, receiving no significant income in the State of his residence and earning most of his taxable resources from activity in the State of his employment, is unable to have his personal and family circumstances taken into account in the State of residence.

62. The Court held that 'there is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances.' [29]

63. It specified that such 'discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.' [30]

64. The Court thus considered that the discrimination was entailed by the application of different rules to comparable situations. The similarity between the situations lay in the fact that both residents and non-residents were taxed on their entire income by the same State. The only difference between the two categories of taxpayer was their place of residence. That criterion was insufficient to justify discrimination.

65. In *Wielockx*, cited above, [31] the Court took the same approach with regard to Article 52 of the Treaty.

66. The same solution must apply, *a fortiori*, under Articles 48 and 52 of the Treaty when the difference in treatment takes the form not, negatively, of an inability to take personal and family circumstances into account in order to alleviate the tax burden but, positively, of an increased rate of taxation. It is obvious that there is no objective factor to justify applying different rates of tax, on the sole basis of their place of residence, on residents and non-residents all or almost all of whose income derives from an activity pursued in the same Member State.

67. The answer to the national court's first question should therefore be that Articles 48 and 52 of the Treaty should be interpreted as not allowing a Member State to levy a higher rate of tax on a national of another Member State pursuing an activity as an employed or self-employed person in the first State, deriving all or almost all of his income from that activity, but residing in his State of origin or in another Member State,

29 — Ibid., paragraph 37.
30 — Ibid., paragraph 38.
31 — At paragraphs 20 and 21.

than if he carried on the same activity but were resident in the State of taxation. Such indirect discrimination by reason of nationality exists whether the difference in treatment takes the form of an inability to take personal and family circumstances into account in the case of a non-resident taxpayer or of an increased rate of taxation.

The second question

68. By this question, the national court asks, in substance, whether Articles 48 or 52 of the Treaty allow a Member State to levy a higher rate of tax on a national of another Member State than on one of its own resident nationals when that non-national pursues an activity there as an employed or self-employed person but resides in his Member State of origin or in another Member State and does not derive all or almost all of his income from that activity.

69. Netherlands law stipulates a specific threshold of 90% of worldwide income below which non-residents are treated differently and above which residents and non-residents are treated identically for tax purposes. In its Recommendation 94/79/EC of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident, [32] the Commission suggests a threshold of 75% of total taxable income. In *Schumacker*, the Court refrained from referring to any particular percentage. To do so would have been inappropriate in a judicial ruling. The threshold corresponding to the Court's analysis in that case was rather the dividing line, variable from one Member State to another, between income which is and income which is not taxable in the State of residence of a taxpayer who is in addition a non-resident taxpayer in another Member State. For the same reasons, I feel that the Court should not refer to a specific percentage in the present case.

70. In *Schumacker*, before dealing specifically with the case of a non-resident all or almost all of whose income is received in the State of employment, the Court accepted that 'in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable.' [33]

71. The Court's analysis was as follows:

'Income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence. Moreover, a non-resident's personal ability to pay tax, determined by reference to his aggregate

32 — OJ 1994 L 39, p. 22.

33 — Paragraph 31. The same statement is made, in the context of Article 52 of the Treaty, in *Wielockx*, cited above, paragraph 18.

income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. In general, that is the place where he has his usual abode. Accordingly, international tax law, and in particular the Model Double Taxation Treaty of the Organization for Economic Cooperation and Development (OECD), recognizes that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence.

The situation of a resident is different in so far as the major part of his income is normally concentrated in the State of residence. Moreover, that State generally has available all the information needed to assess the taxpayer's overall ability to pay, taking account of his personal and family circumstances.' [34]

72. It concluded:

'Consequently, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation.' [35]

73. It is important to note that that judgment did not endorse the view that a difference in treatment could be based on a difference of any kind whatsoever between the situations of residents and non-residents. The Court referred to an '*objective difference between* [those] *situations* ..., such as to justify different treatment'. [36]

74. I think it should be added that the difference in situation must be *fiscally relevant*, that is to say that it must be sufficiently closely linked to the field of taxation in issue.

75. When the Court accepted that a non-resident taxpayer's personal and family circumstances might not be taken into account in the State of employment, it was on the ground that they would in principle already have been taken into account in the State of residence, under international tax law, in respect of the taxpayer's worldwide income. That is an objective and fiscally relevant difference in situation. In the hypothesis under consideration, the difference in treatment has the legitimate aim of preventing the

34 — Paragraphs 32 and 33.

35 — Paragraph 34. The same statement is made, in substance, in the context of Article 52 of the Treaty, in *Wielockx*, paragraph 19.

36 — Paragraph 37, emphasis added.

non-resident from benefiting twice from his personal and family circumstances.

76. It must, however, be noted that in a situation such as that between the Kingdom of the Netherlands and the Kingdom of Belgium, it does not appear possible to treat residents differently from non-residents all or almost all of whose income is not received in the other State as regards taking personal and family circumstances into account. Article 25(3) of the bilateral convention is more favourable in that regard than Article 24 of the OECD Model Convention: 'Natural persons residing in either State shall benefit in the other State from the personal deductions, allowances and reductions accorded by that other State to its own residents by reason of their family commitments or circumstances'.

77. In my view, therefore, the answer to the second question should be that Articles 48 or 52 of the Treaty allow a Member State in principle to levy a higher rate of tax on a national of another Member State than on one of its own resident nationals when that non-national pursues an activity there as an employed or self-employed person but resides in his Member State of origin or in another Member State and does not derive all or almost all of his income from that activity. The difference in treatment must, however, be based on an objective and fiscally relevant difference in situation.

The third and fourth questions

78. By these questions, which should be examined together, the national court wishes in substance to know whether the fact that no social security contributions are levied on the income received by a non-resident taxpayer in the State in which he is taxed constitutes an objective and fiscally relevant difference in situation such as to justify heavier taxation of the non-resident.

79. Let me say at once that I do not think that such a circumstance is fiscally relevant, regardless of whether the non-resident has to pay contributions in his State of residence.

80. I do not think that, as the Netherlands Government maintains, [37] 'an adequate system of taxation makes it possible to offset the exemption from social security contributions enjoyed by certain taxpayers and the effect of that exemption on their ability to pay'.

81. Nor do I believe that, as the French Government submits in very similar

37 — At point 13 of its observations.

terms, [38] 'that exemption is offset under the Netherlands rules by means of a higher tax rate on income in the first band for non-residents than for residents' and that such a solution ensures 'the cohesion of the Netherlands tax system' within the meaning of the judgment in *Bachmann* v *Belgium*. [39]

82. Direct taxation and social security contributions belong to fundamentally different categories of levy, which are not in any way *directly* related. The payment of social security contributions forms part of an *insurance scheme*: it bestows entitlement to specific benefits. The payment of taxes, however, which is unconnected with any insurance transaction, does not give rise to any benefits as such.

83. It is therefore difficult to see, on the face of it, how levies of different kinds could be 'offset'.

84. The mere fact that, for technical reasons, a State finds it preferable to levy direct taxes and social security contributions jointly on a single basis of taxation in no way affects that position.

85. Such socio-economic factors as the amount of social security contributions are taken into account in the same way as any other factor — the burden of indirect taxation, for example — in the economic and tax policy which the State pursues within its territory.

86. The rate of contributions actually levied may thus be a consideration, drawn from a different field, in the light of which the State may limit the pressure exerted by taxation in order to avoid an increase in the overall rate of compulsory levies.

87. When the rate of contribution is nil because the taxpayer either pays contributions in another State or is insured in neither State, it cannot be used to isolate, and apply greater tax pressure to, one category of taxpayer.

38 — Fifth paragraph of point 4 of its written observations.

39 — Case C-204/90 [1992] ECR I-249. In the operative part of that judgment, it was accepted in justification of a difference in treatment between residents and non-residents that, in order 'to preserve the cohesion of the applicable tax system', a Member State may make the deductibility of sickness and invalidity insurance contributions or pension and life assurance contributions conditional on those contributions being paid in that State. Earlier (in paragraph 21), it was stressed that there was 'a connection between the deductibility of contributions and the liability to tax of sums payable by the insurers under pension and life assurance contracts', leading to the conclusion (in paragraph 22) that 'in such a tax system the loss of revenue resulting from the deduction of life assurance contributions from total taxable income ... is offset by the taxation of pensions, annuities or capital sums payable by the insurers. Where such contributions have not been deducted, those sums are exempt from tax.'

88. When the State decides to levy more tax on such a category, either

— it inflicts an unjustified disadvantage on non-resident taxpayers who pay social security contributions in their State of residence

or

— with regard to non-residents not insured and thus not paying contributions in either State, it oversteps the bounds of its fiscal sovereignty by assessing the overall ability of those non-residents to pay, and thus the desired progressivity of the tax which they have to pay, although under international tax law these in principle are matters for their State of residence as regards their worldwide income.

89. In the present case, under Article 24(2)(1) of the bilateral convention, it is for the Kingdom of Belgium to assess overall tax progressivity, since it has the right to take account, *in order to fix its rate of taxation*, of income which is received and taxable in the Netherlands and thus exempted from tax in Belgium pursuant to the convention.

90. In any event, a situation such as that which the national court has to consider in no way falls within the justification accepted in *Bachmann*, cited above.

91. In that case, deduction of contributions paid to companies established in Belgium entailed an actual loss of tax revenue, which was then offset, in Belgium, by taxing the sums paid out by those companies. In addition, the amounts deducted at the earlier stage and those taxed at the later stage related to the same contract.

92. In the present case, there has been no deduction of contributions in the Netherlands by the non-residents concerned, whether before or after 1 January 1990. There is thus no loss of tax revenue directly related to contributions. The higher rate of tax is applied, moreover, not to amounts paid in respect of the contributions but to the taxpayer's professional earnings.

93. The Netherlands Government submits [40] that, since 1 January 1990, residents may no longer deduct from their taxable income the amount of the social security contributions they have paid. Since non-residents who are not insured in the Netherlands were already

40 — At point 11 of its written observations.

unable, prior to that date, to deduct any contributions, they would have been, without reason, in a more favourable position than residents following a lowering of the rate of tax.

94. That submission is, in my view, inaccurate.

95. From a tax point of view, the application of identical tax rates to residents and non-residents does not favour non-residents but merely ensures tax equality as between them and residents.

96. What is to be preserved is not equal treatment of the — favourable or unfavourable — situations at different points in time of one and the same category of person but equal treatment, at a given point in time, of different categories of person in comparable positions.

97. Prior to 1990, income in the first tax band was taxed at the same rate of 14% for both residents and non-residents, who were thus treated equally. The difference in situation at that time, which preceded the application of that rate and derived from the fact that contributions paid by residents were deductible whereas non-residents could not, by definition, deduct contributions which they had not paid, was unrelated to the rate of tax then applied, identically, to both categories. It was, quite logically, related only to the actual payment of, or exemption from, social security contributions.

98. No new factor arises after 1990 to justify suddenly subjecting non-residents to a tax rate of 25% and residents to a rate of only 13%.

99. On the contrary, as the Kingdom of the Netherlands itself has stated, [41] if residents may no longer deduct their social security contributions, with a resultant increase in their taxable income and thus in the tax payable thereon, 'there has nevertheless not been any actual increase in taxation', 'because of an overall reduction in tax and social security levies'.

100. It thus becomes apparent that a reform which was fiscally neutral for residents introduced a difference of 12% between the tax rates on residents and non-residents, to the detriment of the latter.

41 — Ibid.

101. In order, moreover, to prevent certain non-residents from benefiting from a reduction of 1% in the rate applicable prior to 1990, they have been subjected to a tax rate 12% higher than that applied to residents.

102. When the Netherlands Government states [42] that 'it is necessary to prevent ... the tax pressure on non-residents, who ... do not have to ... pay social security contributions, from being considerably less than that on residents', it is doubtless confusing tax pressure in the strict sense with the pressure arising at a broader economic level from all the compulsory levies, in particular taxes and social security contributions, collected by a State.

103. Where the tax rate is the same, the tax pressure remains the same, regardless of whether or not a particular taxpayer must also pay social security contributions.

104. The Kingdom of the Netherlands states [43] that since 1 January 1990 both residents and non-residents are entitled to the basic allowance corresponding to the segment of income exempt from tax and social security contributions. It submits that, as a result, non-residents may be able to benefit twice from an exempt segment, once in their State of residence and once in their State of employment, whereas under Article 24(3) of the OECD Model Convention (as updated to 1 September 1992), the State of employment is not obliged to allow non-residents the personal allowances, reliefs and deductions granted to its own residents on account of civil status or family responsibilities. The fixing of the 25% tax rate applicable to non-residents cannot, it claims, be viewed in isolation and without taking that fact into account.

105. That argument should not be upheld.

106. If non-residents do in fact enjoy a basic deduction in both States, that can only be as a result of the agreement between them. The OECD Model Convention applies, as between the Kingdom of Belgium and the Kingdom of the Netherlands, only in so far as its terms are reproduced in the convention actually concluded. But the bilateral convention does not contain any provision exonerating each of the contracting parties from allowing non-residents the personal allowances, reliefs and deductions granted to residents. On the contrary, Article 25(3) explicitly provides that the residents of one State are to enjoy such allowances, reliefs and deductions in the other State.

42 — At point 12 of its written observations.
43 — At point 14 of its written observations.

107. The Netherlands Government specifies [44] that it also took account, when fixing the rate applicable to non-residents at 25%, of the tax rates in force in neighbouring countries, which it says are generally higher than the rate applied to Netherlands residents, so that the ability to pay of non-residents is relatively higher than that of residents.

108. That analysis is incorrect.

109. As I have already pointed out, [45] it is not for one Member State to take the place of another in assessing the overall ability to pay of residents of that other State when taxing a portion of their income received in the first State.

110. If a State considers that the tax rate applied by a neighbouring State is a proper rate and wishes to emulate it, it may do so only with regard to all its taxpayers and not selectively.

111. The Kingdom of the Netherlands states, finally, [46] that if the rate applicable to non-residents who were not insured had been the same as that applicable to residents, that lower rate could have had a 'suction effect'. Non-residents might have been tempted to acquire a portion of their income in the Netherlands solely on account of the more favourable tax regime.

112. That argument appears to illustrate a fear of what might curiously be termed *tax invasion*.

113. It does not convince me.

114. In the first place, it is difficult to imagine any suction effect as a result of a 1% drop from the 14% rate applicable to the first tax band until 1989.

115. Secondly, and above all, I cannot see what *fiscal damage* might be caused to a State faced with such a problem.

44 — At point 15 of its written observations.

45 — At point 88 above.

46 — At point 16 of its written observations.

116. In general, States seek to protect themselves against *tax evasion*. Taxpayers arrange their affairs in such a way as to be subject to the — *ex hypothesi* less harsh — tax regime of a State other than that in which they should be taxed. The damage to the State 'suffering' the evasion is obvious: a loss of tax revenue.

117. The State to which such a taxpayer deliberately makes his affairs subject, on the other hand, far from suffering any loss, gains tax revenue which it would normally not have been able to receive.

118. It should be noted that in its judgment in *Commission* v *France*, cited above, [47] the Court considered that Article 52 of the Treaty does not allow any derogation from the fundamental principle of freedom of establishment even for reasons related to a risk of tax evasion. [48]

119. In fact, none of the arguments considered is such as to justify a difference in treatment to preserve the cohesion of the tax system, which was the criterion laid down in the *Bachmann* judgment, cited above. None of them falls within the 'grounds of public policy, public security or public health' referred to in Articles 48(3) and 52(1) of the Treaty.

120. If the slightest doubt remained, it would be dissipated in the light of certain observations made by the applicant in the main proceedings and by the Commission, who rightly observe [49] that the discrimination is clearly revealed by a comparison between the situation of a non-resident taxed at 25% and that of a taxpayer resident in the Netherlands who enjoys the lower rate of 13% even if he does not receive all or almost all of his taxable income there and does not pay social security contributions there.

121. In conclusion, a difference in treatment such as that in issue in the main proceedings must be regarded as constituting indirect discrimination by reason of nationality.

122. In my opinion, therefore, the answer to the third and fourth questions should be that the fact that no social security contributions are levied on the income received by a non-resident taxpayer in the State in which he is taxed does not constitute an objective difference in situation, which is relevant for tax purposes, such as to justify heavier taxation of the non-resident.

47 — At point 25.

48 — That statement would appear to me to raise a problem of delimitation, in the specific field of taxation, with regard to the exception of fraudulent evasion referred to in *Knoors*, cited above, in relation to the question of reverse discrimination (see point 46 above, last sentence).

49 — At the end of the third paragraph of point 4.3.2(g) and at point 27, respectively, of their written observations.

Conclusion

123. I therefore propose that the following answers should be given to the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden:

(1) A manager of a company or firm engaged in business for profit, irrespective of the classification under national law of his legal relationship with that company or firm, must therefore be regarded as self-employed for the purposes of Article 52 of the EC Treaty even if over a certain period he performs remunerated services for that company or firm when, under the allocation of control made by statute or the articles of association, he is not under the direction of any other person or of any body which he does not himself control. It is for the national court to decide whether there is such subordination in the light of the considerations of fact and law in each particular case.

(2) A national of a Member State pursuing an economic activity in another Member State in which he resides may rely on Article 48 or 52 of the Treaty, as the case may be, as against his State of origin in connection with another activity which he pursues as an employed or self-employed person in that State.

(3) Articles 48 and 52 of the Treaty should be interpreted as not allowing a Member State to levy a higher rate of tax on a national of another Member State pursuing an activity as an employed or self-employed person in the first State, deriving all or almost all of his income from that activity, but residing in his State of origin or in another Member State, than if he carried on the same activity but were resident in the State of taxation. Such indirect discrimination by reason of nationality exists whether the difference in treatment takes the form of an inability to take personal and family circumstances into account in the case of a non-resident taxpayer or of an increased rate of taxation.

(4) Articles 48 or 52 of the Treaty allow a Member State in principle to levy a higher rate of tax on a national of another Member State than on one of its

own resident nationals when that non-national pursues an activity there as an employed or self-employed person but resides in his Member State of origin or in another Member State and does not derive all or almost all of his income from that activity. The difference in treatment must, however, be based on an objective and fiscally relevant difference in situation.

(5) The fact that no social security contributions are levied on the income received by a non-resident taxpayer in the State in which he is taxed does not constitute an objective difference in situation, which is relevant for tax purposes, such as to justify heavier taxation of the non-resident.