OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 27 October 2009 [1]

1. The Hoge Raad (Netherlands Supreme Court) has referred to the Court of Justice for a preliminary ruling a question asking whether a deduction from Netherlands income tax which discriminates against non-resident taxpayers is compatible with Article 43 EC, where such taxpayers are allowed to choose in advance between the residents and non-residents regimes.

2. This case presents the Court with an opportunity to determine whether, in the light of its case-law on direct taxation, a right of option for the purposes of taxation neutralises discriminatory treatment. However, as I shall explain below, the placing of resident and non-resident taxpayers on an equal footing may be misleading because there are occasions when, to paraphrase the propagandist pig in *Animal Farm*, it is fitting to assert that all European Union taxpayers are equal but some are more equal than others. [2]

3. The question referred for a preliminary ruling provides a good example of that Orwellian distortion.

I — Legal framework

A — *Community legislation*

4. Article 43 EC enshrines the principle of freedom of establishment for undertakings and professional persons throughout the Community:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply

1 — Original language: Spanish.

2 — Orwell, G., *Animal Farm, The Complete Novels of George Orwell*, Penguin Classics, London, 2009, p. 10, recounts how the famous final commandment, which rewrites and distorts the seven original ones, is voiced by Squealer, a pig '... with very round cheeks, twinkling eyes, nimble movements, and a shrill voice. He was a brilliant talker, and when he was arguing some difficult point he had a way of skipping from side to side and whisking his tail which was somehow very persuasive. The others said of Squealer that he could turn black into white.'

to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

B — *Netherlands legislation*

5. In the Netherlands, income tax is governed by the Wet Inkomstenbelating 2001 (Law on income tax). According to Article 2(1) of that Law, natural persons who do not reside in the Netherlands are liable to income tax if they receive income in Netherlands territory.

6. Article 7(2) defines taxable income as follows:

'1. Taxable income derived from income from employment and home ownership consists of the amount of income received from employment and home ownership after deduction of any losses in accordance with Chapter 3.

2. Taxable income derived from income from employment and home ownership is the aggregate total income, comprising:

(a) Profits from a Netherlands undertaking operated with the assistance of a permanent establishment in the Netherlands or a permanent representative in the Netherlands (Netherlands undertaking).

…'

7. The deduction applicable to business owners is defined in Article 3(74) of the Law, but Article 3(76) stipulates that the self-employed person's deduction applies to individuals who work a minimum number of hours. The amount of the deduction depends on the profit and is calculated using a digressive scale which is set out in the Law.

8. Article 3(6) of the Law defines 'minimum number of hours' as:

'… devoting during the calendar year at least 1 225 hours to the activities of one or more undertakings from which the taxable person derives profit as a business owner.'

9. Although the national legislation does not mention it explicitly, the referring court takes the view that only hours spent by a non-resident taxable person carrying on activities in an establishment in the Netherlands count towards that period. According to the documents before the Court, Article 9 of the Besluit voorkoming dubbele belasting 2001 (Decree of 2001 for the prevention of double taxation) provides that individuals who are resident in the Netherlands are entitled to include in the total time calculation hours worked both in the Netherlands and abroad.

10. Article 2(5) of the Law lays down an optional tax regime for non-resident business owners, which is subject to the following conditions:

'Domestic taxable persons who spend only part of the calendar year in the Netherlands and foreign taxable persons who are resident in another Member State of the European Union or in the territory of a power determined by ministerial decision with which the [Kingdom of the] Netherlands [has] concluded a convention for the avoidance of double taxation and the promotion of the exchange of information, who are liable to taxation in that Member State or in the territory of that power may opt to be made subject to the tax regime applicable to domestic taxable persons laid down in this Law. The evidence required for the application of this provision shall be established by ministerial decision ...'

II — Facts

11. F. Gielen is self-employed and resides in Germany, his country of origin, where, together with two partners, he operates a glasshouse horticulture business. Mr Gielen's

business has a branch in the Netherlands for ornamental plants.

12. In 2001, Mr Gielen declared income in the Netherlands of EUR 11 577, which was generated by his Netherlands establishment. Since he had devoted less than 1 225 hours to the Netherlands business, he did not satisfy the condition laid down in Article 3(6) of the Law and, accordingly, he was prohibited from deducting from the taxable amount the EUR 6 084 to which he would be entitled in the light of his earnings in that Member State.

13. After the tax authority had adopted the decision refusing to grant him the right to the deduction, Mr Gielen filed an administrative complaint which was rejected; he therefore brought an action before the District Court, Breda, which was also dismissed. Mr Gielen lodged an appeal against the judgment of that court with the Gerechtshof te 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch), which partially upheld his claims, holding that Mr Gielen was entitled to the deduction despite the fact that he had not worked the minimum of 1 225 hours in the Netherlands, but it apportioned the amount pro rata based on the percentage of Mr Gielen's aggregate total income which was attributable to his Netherlands income. On that basis, the Gerechtshof reduced the taxable amount to EUR 11 188.

14. Mr Gielen appealed against that judgment to the Hoge Raad, arguing that he was entitled to the full deduction of EUR 6 084 in the light of his income in the Netherlands. For its part, the defendant authority brought a cross-appeal in support of the opposite view.

15. On 4 October 2007, the Advocate General of the Hoge Raad, J.A.C.A. Overgaauw, delivered his Opinion in which he subscribed to Mr Gielen's arguments, reasoning that a non-resident who is precluded from counting business hours completed in another Member State for the purposes of a tax deduction suffers discrimination contrary to Community law. The Advocate General went on to state that, under the Netherlands tax system, non-resident business owners like Mr Gielen are permitted to take advantage of the residents' tax regime, in accordance with which all the hours he worked in the Netherlands and in other Member States would be attributed to him. In the view of the Advocate General, that option remedies the discrimination at issue and ensures its compatibility with the EC Treaty.

III — The question referred for a preliminary ruling and the procedure before the Court of Justice

16. In the light of the arguments of the parties and the Opinion of Advocate General Overgaauw, by order of 12 September 2008, the Third Chamber of the Hoge Raad stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 43 EC to be interpreted as meaning that it does not preclude the application of a provision in a Member State's tax legislation to profits which a national of another Member State (foreign taxable person) has derived from an establishment of his undertaking operated in the first Member State, if that provision, when interpreted in a particular way, makes a distinction between domestic and foreign taxable persons which — in itself — is contrary to Article 43 EC, but the foreign taxable person concerned has had an opportunity to opt for treatment as a domestic taxable person and has not done so for reasons of his own?'

17. The reference for a preliminary ruling was lodged at the Registry of the Court on 6 October 2008.

18. Written observations were lodged by Mr Gielen, the Netherlands, German, Estonian, Swedish, and Portuguese Governments, and the European Commission.

19. At the hearing, held on 17 September 2009, oral argument was presented by the legal representative of Mr Gielen, by the agents of the Netherlands, Swedish, German, Portuguese and Estonian Governments, and by the agent of the Commission.

IV — Admissibility

20. The Portuguese Government and Mr Gielen argue that the questions referred by the Hoge Raad are hypothetical and are dependent solely on the interpretation of national law, a task which falls exclusively to the courts of the Member States.

21. According to settled case-law, it is for the national court hearing a dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to

the Court under Article 234 EC.[3] However, the Court has agreed, in exceptional cases, to examine the circumstances in which a national court has submitted a reference, in order to confirm its own jurisdiction.[4] Such is the case where the question submitted is purely hypothetical in nature,[5] since the spirit of co-operation which must prevail in the preliminary-ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions.[6]

22. As I previously stated, the dispute before the Hoge Raad concerns the effects of a right of option governed by Netherlands law. Mr Gielen chose one of the two alternatives available to him (the one relating to non-residents), and has complained about the disadvantage at which he finds himself vis-à-vis Netherlands residents. Although it is only possible to evaluate the alternative chosen by the appellant by means of a 'hypothetical' application of the Netherlands provisions, an equality test must be carried out using a reference parameter.[7] Where a court is seised of a case concerning discrimination that is laid down in a legal provision, it must make a comparison by contrasting that provision with other ones. To supplement the reasoning, the reference parameter is always applied 'hypothetically', although that does not have the effect of rendering the dispute 'hypothetical'.

23. Furthermore, I do not believe that an incorrect reference parameter was used to support the comparison between residents and non-residents. That matter comes within the assessment of equality which must be made when considering the substance of the case and, as such, it does not affect the relevance of the question referred for a preliminary ruling but rather the detailed analysis of that question.

24. Accordingly, I propose that the Court of Justice should declare that the reference for a preliminary ruling is admissible.

3 — Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23; Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraph 34; Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 34; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43; and Case C-248/07 *Trespa International* [2008] ECR I-8221, paragraph 32.

4 — Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21.

5 — Case C-379/98 *Preusen Elektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22; and Case C-458/06 *Gourmet Classic* [2008] ECR I-4207, paragraph 25.

6 — *Foglia*, paragraphs 18 and 20; Case 149/82 *Robards* [1983] ECR 171, paragraph 19; *Meilike*, paragraph 64; and Case C-62/06 *ZF Zefeser* [2007] ECR I-11995, paragraph 15.

7 — Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford, 2006, pp. 81 to 83.

V — Analysis of the question referred for a preliminary ruling

25. This analysis must be made in two stages.

26. First of all, Mr Gielen submits that the fact that he may not count hours he worked in Germany for the purposes of obtaining a deduction from the taxable amount of Netherlands income tax is a restriction which applies in the Netherlands solely to non-residents who opt for the non-residents' tax regime. The Member States which have lodged observations in these preliminary-ruling proceedings, on the one hand, and the Commission and Mr Gielen, on the other, maintain conflicting positions on this point.

27. Second, the Hoge Raad focuses its concerns on the explanation relied on by the Netherlands Government. Self-employed workers who do not reside in the Netherlands but who obtain profits in Netherlands territory are in a position to take advantage of the residents' tax regime. Thus, Mr Gielen could have chosen the latter regime and counted the hours he worked in Germany. He freely decided not to do so, and, therefore he has not suffered any discrimination under the legislation at issue because he was treated unequally through his own choice.

28. The Hoge Raad harbours no uncertainties about the fact that the disputed deduction discriminates against those who are not resident in the Netherlands and is contrary to Article 43 EC. Should the Court of Justice agree with that view, it will be required to analyse only the effects of the right of option laid down in the Law on income tax. However, not all those who have participated in these preliminary-ruling proceedings share the view of the Hoge Raad. Further, as the German Government rightly points out, if the restriction on counting hours worked abroad were compatible with Community law, it would make no sense to give a ruling on the right of option under the tax legislation at issue.

29. In short, it is necessary to determine whether the system of deductions in force in the Netherlands for non-resident self-employed workers is compatible with Article 43 EC. In the event of a negative reply, it will be necessary to examine the right of option laid down in the Law on income tax, under which non-residents are entitled to take advantage of the tax regime applicable to residents.

A — The deduction granted to self-employed workers and the discriminatory nature of the calculation of the hours attributed to non-residents

30. According to settled case-law of the Court, the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [8] Thus, discrimination, whether direct or indirect, only arises through the application of different rules to comparable situations or the application of the same rule to different situations. [9]

31. Starting with the *Schumacker* judgment, [10] the Court has held that, in relation to direct taxes, the situations of residents and non-residents are not comparable. [11] The income received in the territory of a State by a non-resident is, in most cases, only a part of his total income, which is earned in his country of residence. Moreover, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. [12] In general, that is the place where he has his usual abode.

32. That assertion led the Court to accept that, even where a Member State prohibits a non-resident from benefitting from certain tax advantages which it grants to a resident, there is no discrimination on its part since those two categories of taxpayer are not in a comparable situation. [13]

33. The rules set out do not give carte blanche to the Member States or permit them to provide for arrangements which openly discriminate against non-resident taxpayers. Quite the opposite in fact, since the aim of the *Schumacker* case-law was to prevent national measures which treat differently non-residents who are in a similar situation

8 — Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case C-27/91 *Le Manoir* [1991] ECR I-5531, paragraph 10; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; and Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44.

9 — *Wielockx*, paragraph 17; Case C-390/96 *Lease Plan* [1998] ECR I-2553, paragraph 34; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 84; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] I-2107, paragraph 46.

10 — Case C-279/93 *Schumacker* [1995] ECR I-225.

11 — *Schumacker*, paragraph 31; Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 49; and Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 26.

12 — *Schumacker*, paragraphs 31 and 32; Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 22; Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 21; Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 43; Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraph 15; Case C-346/04 *Conijn* [2006] ECR I-6137, paragraph 20; and Case C-329/05 *Meindl* [2007] ECR I-1107, paragraph 23.

13 — *Schumacker*, paragraph [34].

to residents. [14] The *Schumacker* case is highly significant in that regard, since it concerned a Belgian national who was resident in Belgium but who had earned the vast majority of his income in Germany. The Court held that, because he was in the same situation as a worker who resides in Germany and because his personal and family circumstances could not be taken into account, Mr Schumacker had suffered discrimination. The same reasoning was put forward in *Wielockx*, *Gschwind* and *Meindl*. [15]

34. It may be inferred from that case-law that unequal treatment becomes lawful where personal and family circumstances vary significantly between residents and non-residents. However, discrimination becomes unlawful if the difference concerns deductions which are directly linked to the activity that generated the taxable income. [16] *A sensu contrario,* the Court is prepared to respect national provisions on taxation which encourage, reward or penalise, by means of fiscal policy, any economic activity linked to the personal circumstances of taxpayers. [17] That distinction demonstrates a clear acceptance of the fact that Member States have less latitude where the aim is to protect a particular economic activity, irrespective of the personal circumstances of those who carry on that activity. However, case-law guarantees that the fiscal sovereignty of each State must be safeguarded when the obstacle relates to the personal circumstances of the taxpayer, a matter which each authority must assess through the application of national criteria. Although not free of difficulties, [18] there is a certain logic to that view, since competence for taxation remains in the hands of each State and the Court does not wish to interfere in such a sensitive matter which directly affects the finances of the Member States. [19]

35. Both non-residents and residents are entitled to benefit from the deduction provided for in Article 3(74) of the Netherlands Law on income tax. The former must work an annual minimum of 1 225 hours in the Netherlands, while the latter may count not only hours

14 — In my Opinion in *Gschwind*, I reiterate that view and go on to state, in paragraph 42, that in *Schumacker* the Court 'did not intend to do away with the generally accepted principle of international tax law, incorporated in the law of the Member States by means of the OECD Model Double Taxation Convention, that the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence'.

15 — Cited above.

16 — Case C-175/88 *Biehl* [1990] ECR I-1779, paragraph 16; *Schumacker*, paragraph 36; *Gerritse*, paragraphs 27 and 28; Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 42; Case C-345/04 *Centro Ecuestre da Leziria Grande* [2007] ECR I-1425, paragraph 23; and Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 50.

17 — Case-law set out in the previous footnote and Almendral, V., *La tributación del no residente comunitario: entre la armonización fiscal y el derecho tributario internacional*, EUI Working Papers LAW 2008/25, pp. 17 to 21 and 23 to 26.

18 — As Almendral, V. points out, a question mark hangs over the case-law which fails to differentiate (because the Court does not want to or is unable to) objectively between a deduction linked to income and a personal deduction.

19 — The Court has acknowledged that the Member States have competence in the matter of direct taxation, provided that they respect Community law. Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 19; Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 32; Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 15; Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 19; and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29.

worked in that State but also hours worked in other States. There is a clear difference in treatment, which the Netherlands Government admits. However, some Member States refuse to treat the situation of non-residents in the same way as that of residents and assert that such discrimination is compatible with Article 43 EC.

36. I do not agree with that view.

37. In these proceedings, the Netherlands Government has described the aim pursued by the deduction at issue as being to ensure that tax on the income of self-employed workers is levied on those who are carrying on their main activity.[20] Netherlands tax law has provided for a tax regime for self-employed persons which rewards those who exercise a business activity to a significant extent; to ensure that outcome, it is necessary for the number of hours worked to exceed a certain threshold.

38. A non-resident who works on a self-employed basis in the Netherlands and pays tax there must work a minimum number of hours in order to claim the deduction laid down in Article 3 (74) of the Law on income tax. In addition, such an individual must furnish evidence of the number of hours worked *in order to demonstrate that his principal activity is a business activity.*[21] As the Commission rightly pointed out in its written observations, the hours requirement in the Netherlands legislation does not seek to place conditions on or assess a taxpayer's personal and family circumstances but rather to make sure that those who carry on a specific activity (in the present case, working as a self-employed person) are genuine.[22] By requiring the stipulated time to have been worked in the Netherlands, the national provision does not assist with clarifying the type of activity concerned.

39. Article 3(74) of the Law on income tax refers to the nature of the taxed activity rather than the personal and family circumstances of the taxable person, and therefore the situation of a non-resident self-employed worker is comparable to that of a resident self-employed worker, at least with regard to the deduction from the taxable amount laid down in that provision.

40. Accordingly, it is my view that the Netherlands discriminates against

20 — That was confirmed at the hearing by the agent of the Netherlands Government.

21 — Mr Gielen refers to the Opinion of the Advocate General of the Hoge Raad in the main proceedings, point 6.2.3 of which states that 'the hours test cannot be dissociated from the advantage granted to self-employed workers ... In essence, the historical background to the Law shows that the aim of the hours test is to prevent "fake" business owners from benefitting from the advantages afforded to self-employed persons or, in other words, to ensure that only "real" business owners may exercise the right to the deductions laid down in the Law.'

22 — Point 10 of the Commission's written observations.

non-resident self-employed workers by prohibiting them (but not residents) from counting time worked in another State for the purposes of demonstrating that their economic activity is significant in nature.

41. In that connection, it is necessary to ascertain whether the discrimination is justified on the grounds that the non-resident taxpayer could have opted voluntarily for the residents' tax regime.

42. That is where the Gordian knot of this reference for a preliminary ruling lies.

B — *The optional tax regime for non-residents and its role as a mechanism for neutralising discrimination*

43. As I have explained, the Hoge Raad regards the deduction for self-employed workers laid down in the Law on income tax as discriminatory. The Netherlands and Swedish governments and Mr Gielen share that view. However, there are differences of opinion regarding the main uncertainty in these proceedings, relating to the right which the Netherlands legislation grants non-resident business owners to pay tax as residents and not to suffer the alleged discriminatory treatment.

44. On that point, all the States which lodged observations rely on the so-called 'neutralisation theory', pursuant to which the right of option for the purposes of taxation enables a taxpayer to weigh up the advantages and disadvantages of each regime. If a taxpayer chooses the discriminatory regime, which he could have avoided by opting for the other regime, it is not appropriate to complain about the ensuing unequal treatment. The Advocate General of the Hoge Raad also put forward that view in the main proceedings.

45. Mr Gielen and the Commission have adopted a different approach to the resolution of the question referred for a preliminary ruling, focusing, among other grounds, on the administrative charges which taking advantage of the residents' tax regime would entail for a non-resident self-employed worker.

1. The right of option as a mechanism for rendering lawful that which is unlawful

46. This case raises a difficult problem relating to the principle of equal treatment. To put it in more abstract terms, the Hoge Raad asks the Court whether unlawful discrimination may become lawful if it is freely chosen by the victim. The problem is particularly important in the field of taxation, where taxpayers are frequently offered a number of alternative arrangements which, in some cases, contain elements that are not necessarily advantageous. [23]

47. An individual who is subjected to legislative discrimination is not in a comparable situation to one who suffers individual or *de facto* discrimination. When the legislature or the administrative authorities set out a general, stable legal framework, they study a wide range of alternatives and have a broad discretion. However, someone who takes an individual decision or engages in a *de facto* practice usually relies on a more defined, specific legal framework. As a result, more power is granted to the legislature and the range of options available to it is likely to lead to discrimination only in particularly serious circumstances. [24] Regulation alone always entails differences in treatment, since a provision will normally apply to certain individuals but not to everyone. [25] That distinction does not infringe the principle of equal treatment per se, just as a system which provides for a number of options and, therefore, different legal regimes, does not do so either.

48. The Member States which have participated in these preliminary-ruling proceedings maintain that anyone who freely chooses to be bound by a rule is not entitled to complain about it later. Thus, where the law affords someone the right to choose between a number of rules, including one which is discriminatory, that right rectifies the infringement of the principle of equal treatment. To put it another way, where an individual suffers discrimination under an arrangement which he has willingly accepted, the choice

23 — Wouters, J., 'The Principle of Non-discrimination in European Community Law', *European Community Tax Review*, No 2, 1999, p. 102; Peters, C. and Snellaars, M., 'Non-discrimination and Tax Law: Structure and Comparison of the Various Non-discrimination Clauses', *European Community Tax Review*, No 1, 2001, p. 13; and Zalasinski, A., 'The Limits of the EC Concept of "Direct Tax Restriction on Free Movement Rights", the Principles of Equality and Ability to Pay, and the Interstate Fiscal Equity', *Intertax*, vol. 37, No 5, p. 283.

24 — This has been acknowledged by the Court since its early case-law. See, inter alia, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 89 and 90; Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-284/95 *Safety HI-Tech* [1998] ECR I-4301, paragraph 37; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 35; Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 53; Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475; Case C-86/03 *Greece* v *Commission* [2005] ECR I-10979, paragraph 88; and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 57.

25 — Advocate General Poiares Maduro states in his Opinion in *Arcelor Atlantique et Lorraine and Others*: 'It is, then, in the very nature of legislative experimentation that tension with the principle of equal treatment should arise' (paragraph 46). See also Rubio Llorente, F., 'Juez y ley desde el punto de vista del principio de igualdad', *La forma del poder*, CEPC, Madrid, 1997, p. 642.

made neutralises the unequal treatment. Accordingly, it would suffice for the legislature to afford individuals a certain amount of latitude in order for it then to be able to adopt with absolute impunity provisions which openly discriminate against those individuals.

49. I disagree with those who contend that the right of option has the effect of neutralising the discrimination: to my mind, the uncertainties harboured by the Hoge Raad are situated on a more abstract level which, leaving aside the features of this case, enables the question raised to be answered.

50. The reasoning of the Member States is based on an erroneous premiss, which is that it is possible to choose between a lawful option and another, unlawful one.

51. As the widely accepted saying goes, there is no inequality in unlawfulness.[26] For example, if a tax authority makes an error and calculates that a company owes less tax than it actually does, that company's rivals may not claim discriminatory treatment and, as a result, demand a similar tax assessment. Likewise, in the situation at issue, where an individual may choose between a lawful option and an unlawful option, that choice alone does not convert the discriminatory treatment into equal treatment.

52. To counter that argument, the Portuguese Government relies on the Latin maxim *venire contra factum proprium*, which encapsulates the principle of estoppel. However, it is appropriate to point out that that maxim has always been used in the context of lawfulness. If it is not accepted that there is equality in unlawfulness, nor should legal force be afforded to acts which are contrary to the law because that would render lawful an unlawful act, something which the law does not allow.

53. Moreover, the right of option is available to all self-employed business owners, and the Netherlands Government has not referred to any additional requirements for taking advantage of that mechanism. Against that background, a 'crude', unconditional right of option which is available to any business owner, without taking into account the particular features of the different categories of

26 — García Prats, A., *Imposición directa, no discriminación y derecho comunitario*, Tecnos, Madrid, 1998, pp. 222 to 224.

self-employed business owner, makes it all the more difficult to regard it as having a neutralising effect.[27]

54. The question referred for a preliminary ruling may be considered to be resolved at this point. However, in case the Court takes the view that the right of option renders the discrimination lawful, I will now analyse whether it is possible to compare the situation of individuals who reside in other States and exercise the right of option with that of actual Netherlands residents.

2. The consequences for taxpayers of exercising the residents' option

55. According to the Netherlands Government, if Mr Gielen had opted for the residents' tax regime, his tax debt would have been treated in the same way as that of an individual who is effectively resident for tax purposes in the Netherlands. The representative of Mr Gielen does not share that view and submits that there are clear disparities in the administration of the system and in the tax itself, which reduce the right of option to a false choice.

56. It is appropriate to analyse those arguments below.

(a) The administrative costs

57. The Commission and Mr Gielen refer to the administrative costs of a tax return under the residents' regime.

58. That reference may be extrapolated to the majority of the tax systems of the Member States, since there is a widely established principle in international tax law to the effect that each State is responsible for levying tax on income received in its territory (territoriality principle), a rule which is satisfied by granting taxation powers to both the State of residence (home State taxation) and the State where the taxed activity is carried out (source State taxation).[28] The former is the place where it is easiest to assess an individual's personal ability to pay tax and is where a taxpayer is required to declare his aggregate total income, subject always to the right to apply corrective mechanisms aimed at avoiding double taxation (principle of taxation at source). Since the latter State is removed

27 — In that connection, see the Opinion of Advocate General Mengozzi delivered on 18 March 2009 in Case C-569/07 *HSBC Holdings* [2009] ECR I-9047, paragraphs 71 and 72.

28 — Pistone, P., *The Impact of Community Law on Tax Treaties: Issues and Solutions*, Kluwer, The Hague-London-New York, 2002, pp. 197 to 200.

from the taxpayer's personal circumstances, only income received in that State is declared there.

59. It is clear that, in the first case, there is a greater onus on taxpayers to provide evidence to the tax authority.

60. On that premiss, Mr Gielen would be entitled to take advantage of the residents' tax regime in the Netherlands by means of the legal fiction laid down by the Netherlands legislature, although he would not be exempt from the duty to file a tax return in Germany under the residents' regime of that State. Thus, since Mr Gielen's residence is situated in Germany, he must declare his total income there. That would also be the case in the Netherlands if he opted for the residents' regime laid down in the Netherlands Law on income tax. After Mr Gielen had filed tax returns in both States, the appropriate adjustment would be made in each one, pursuant to the territoriality principle.

61. The tax regime for resident self-employed workers entails an additional cost for non-resident taxpayers which resident taxable persons do not necessarily have to bear. While an individual who is resident in the Netherlands simply declares his total income and pays tax abroad on any income earned there, a taxable person like Mr Gielen would be required to declare his total income in two Member States, meaning that he would have to ensure that his accounting rules comply with two national legal systems and pay administrative costs to two tax authorities which, moreover, use different languages. [29] It is clear that a taxpayer like Mr Gielen, who does not live in the Netherlands, is not in the same situation as someone who pays tax and resides in that State.

62. The Court has dealt severely with administrative charges with which a Member State burdens non-resident taxpayers. The risk which such measures pose to the proper functioning of the internal market has led the Court to admit tacitly, in its case-law, that the duty of a non-resident to comply with the accounting rules of the State in which he receives income is liable to constitute an obstacle contrary to Article 43 EC. [30]

29 — On the subject of language, the agent of the Netherlands Government acknowledged at the hearing that the Netherlands tax authority will accept documents and communications in 'commonly used languages' other than Dutch, albeit on an informal basis and without any legal guarantee. In that connection, the agent did not provide any details about the actual situation of someone who needs to deal with the Netherlands authorities in a language other than Dutch. However, the representative of Mr Gielen told the Court that, in the Netherlands, anyone who contacts the tax authorities must do so in the official language of the State, which, to my mind, is more plausible.

30 — *Futura Participations and Singer*, paragraph 25.

63. The dispute in the present case does not concern whether the administrative charges entailed by the option laid down in Article 2(5) of the Law on income tax infringe freedom of movement. Such a finding merely demonstrates that a non-resident self-employed worker does not enjoy the same advantages, despite the fact that he is entitled to pay tax under the residents' regime. That argument was put forward by Mr Gielen and the Commission, but it was not countered sufficiently in the pleadings or oral argument of the Netherlands or in those of the other Member States.

(b) The amount of the tax debt

64. At the hearing in these preliminary-ruling proceedings, the Netherlands Government asserted that, for the purposes of applying the appropriate deduction under Article 2(5) of the Law on income tax, the income comprising the taxable amount under the residents' regime is a taxpayer's total income, which means that if Mr Gielen had opted for the residents' regime, instead of declaring the EUR 11 577 earned in the Netherlands, he would have declared the EUR 88 849 generated in the year by his two establishments in the Netherlands and in Germany. Therefore, the appropriate deduction would be applied to the higher income and amount to EUR 2 984 euros. The calculation does not finish there because Mr Gielen would be entitled to deduct from the taxable amount only the proportion of that deduction corresponding to the profits made in the Netherlands.

65. According to the appellant's representative, to calculate the final deduction, the Netherlands income is divided by the total profits and the result is multiplied by the applicable deduction. That calculation is represented in figures as follows:

(11 577 / 88 849) × 2 984 = EUR 389

66. However, Mr Gielen also submits that an individual who is resident in the Netherlands and who pays tax on all his income, regardless of whether he is originally from the Netherlands or abroad, does not apportion the amount of the deduction on a pro rata basis and instead deducts the full amount allocated from the taxable amount. That discrimination is justified by the fact that, even if Mr Gielen paid tax under the residents' regime, he would be taxed only on income earned in the Netherlands and therefore the pro rata apportionment is used to ensure that a non-resident taxpayer cannot take advantage of a better regime than actual residents.

67. At the hearing, the Netherlands Government put forward an alternative method of calculation, according to which the financial deductions granted to actual residents and to non-residents who have opted for the residents' regime are identical. Moreover, although Mr Gielen's representative insisted that this method is incorrect and that the final financial result is different for the two types of taxable person, the Court does not have sufficient information at its disposal to resolve this issue because it must not involve itself in reviewing the legality of Netherlands tax law, something which goes well beyond the boundaries of its jurisdiction.

68. I am of the opinion, therefore, that it is for the referring court to determine whether the total amount of the tax debt is identical in both cases.

69. Notwithstanding the uncertainty referred to, it is difficult to imagine that the situations are comparable.

70. As the agent of the Netherlands Government explained at the hearing, even if the tax debt is the same, the applicable rules differ for the two types of taxpayer. Further, in line with the reasoning of the Commission, and as I explained in paragraphs 57 to 63 above, filing two returns for total income, one in the Netherlands and the other in Germany, entails a heavy burden, especially when the income earned in the Netherlands is low. Thus, the initial discrimination, analysed in paragraphs 30 to 42 of this Opinion, has not been rectified, since a non-resident taxpayer is not placed on an equal footing with a resident taxpayer, even where he takes advantage of the residents' tax regime.

(c) Provisional conclusion

71. A foreign taxpayer who opts to pay tax in accordance with the rules applicable to residents does not achieve a position equivalent to that of national taxpayers. That lack of equivalence prevents a finding that the right laid down in Article 2(5) of the Law on income tax neutralises unlawful discrimination linked to one of the options. That view is bolstered by an analysis from a more general

perspective, in particular based on the case-law of the Court.

3. The right of option for the purposes of taxation and the *Schumacker* case-law

72. The Netherlands Government asserts that, since the Netherlands income tax system provides for the right to choose between the residents' and non-residents' regimes, it complies with *Schumacker* and even goes beyond the requirements of that case-law. [31]

73. I disagree with that view, which is based on an incorrect interpretation of *Schumacker*.

74. In that judgment, the Court held that where a non-resident does not have significant income in his State of residence and the majority of his income comes from an activity carried on in another State, that income may not be taxed more heavily in the State where he was contracted to perform the work than the income of a resident who carries on the same activity. The concept of comparability therefore underlies that judgment, since an individual who works almost exclusively in a country other than his country of residence must be afforded treatment in the State where he works which is equivalent to that afforded to a resident. Where that equivalence is achieved, the tax system of the host State must taken into account the personal and family circumstances of a non-resident worker, particularly where those circumstances are not taken into consideration in his State of residence. [32]

75. It is not appropriate to rely on *Schumacker* to argue that discrimination such as that suffered by Mr Gielen has been neutralised. That case-law has a specific scope, which is not the same as that in the present case, and its context — namely, a worker whose personal and family circumstances were not assessed — sets it apart from the situation raised in this case. Accordingly, it is not possible to assert, as the Netherlands Government does, that Article 2(5) of the Law on income tax provides greater protection than the *Schumacker* case-law.

31 — That view put forward by the Netherlands Government is also set out in Mr Gielen's written observations in which he points out that the preparatory documents for the Law on income tax include an identical explanation, namely, compliance with the *Schumacker* judgment and providing non-residents with a more advantageous tax regime than the one analysed in that judgment (MvT Kamerstukken (parliamentary documents) II 1998/99, No 3, pp. 79 and 80 (reference taken from the observations of Mr Gielen, p. 11)).

32 — Lenaerts, K. and Bernardeau, L., 'L'encadrement communautaire de la fiscalité directe', *Cahiers de droit européen*, Nos 1 and 2, 2007, pp. 77 to 80.

76. Furthermore, the broad interpretation of *Schumacker* proposed by the Netherlands Government would have adverse consequences. The present dispute attests to that. Nor is it possible to accept that, as a result of providing for optional regimes available to non-residents, a State may introduce as much discrimination as it deems appropriate in the knowledge that the mere fact that there is a choice neutralises the unequal treatment. If the Court accepts the view advanced by the Netherlands Government, safeguards must be established to curb the increase of the discrimination identified against non-residents and reduce it to a strictly defined sphere. Since it is difficult to imagine what such safeguards might be, I am inclined to reject the view that the option at issue has a legalising effect.

4. A final thought

77. I do not wish to conclude this Opinion without addressing the fact that, in this case, the right of option laid down in Article 2(5) of the Law on income tax is not being challenged. Notwithstanding all of the foregoing, I should point out that I have set out the above considerations in order to consider whether the right of option has the effect of neutralising the discrimination identified against non-residents.

78. It is necessary to exercise great care in that regard, since the system implemented by the Netherlands has clear advantages.[33] According to learned authorities, allowing a taxpayer to pay tax on his total income in both the State of residence and the source State is likely to give rise to an ideal outcome, particularly with regard to the transnational taxation of natural persons.[34] Having regard to the various tax models in place in the Member States, the Netherlands system has positive elements which I do not question. Nor do the present proceedings seek to challenge the lawfulness of that system, and the dispute is confined to the question whether such a system has a neutralising effect. It is only in that regard that Article 2 (5) of the Law on income tax is insufficient to justify the unlawful discrimination suffered by non-residents like Mr Gielen.

33 — The Netherlands system analysed in this Opinion provides for an unconditional right of option for non-resident self-employed workers. However, a number of Member States have adopted rights of option similar to the Netherlands one, but have restricted such rights to those who earn a high proportion of their income in a Member State other than the one in which they reside. The Commission encouraged that type of measure in **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** (OJ 1994 L 39, p. 22), stating that a non-resident taxpayer should be able to take advantage of the residents' regime if he receives more than 75% of his income in the source State.

34 — Terra, B.J.M. and Wattel, P.J., *European Tax Law*, 4th ed., Kluwer, Deventer, 2005, pp. 80 to 82.

VI — Conclusion

79. In the light of the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling by the Hoge Raad, declaring that:

Article 43 EC must be interpreted as precluding a national provision which discriminates against non-resident self-employed workers, even where a foreign taxable person has had the opportunity to opt for treatment as a resident self-employed worker but has not done so.