Case C-307/97

Compagnie de Saint-Gobain, Zweigniederlassung Deutschland,

v

Finanzamt Aachen-Innenstadt

(Reference for a preliminary ruling
from the Finanzgericht Köln)

(Freedom of establishment — Taxes on company income — Tax concessions)

Summary of the Judgment

Freedom of movement for persons — Freedom of establishment — Tax legislation — Corporation tax — Capital tax — Where a Member State refuses to grant to permanent establishments of non-resident companies certain tax concessions reserved for resident companies — Not permissible — Whether justifiable — No justification

(EC Treaty, Arts 52 (now, after amendment, Art. 43 EC) and 58 (now Art. 48 EC))

Article 52 of the Treaty (now, after amendment, Article 43 EC) and Article 58 thereof (now Article 48 EC) preclude the exclusion of a permanent establishment in Germany of a company limited by shares having its seat in another Member State from enjoyment, on the same conditions as those applicable to companies limited by shares having their seat in Germany, of tax concessions taking the form of:

— an exemption from corporation tax for dividends received from companies established in non-member countries (corporation tax relief for international groups), provided for by a treaty for the avoidance of double taxation concluded with a non-member country,

— the crediting, against German corporation tax, of the corporation tax levied in a State other than the Federal Republic of Germany on the profits of a subsidiary established there, provided for by German legislation, and

— an exemption from capital tax for shareholdings in companies established in non-member countries (capital tax relief for international groups), also provided for by German legislation.

The refusal to grant those tax concessions — which primarily affects non-resident companies and is based on the criterion of the company's corporate seat in determining the applicable tax rules — makes it less attractive for such companies to have intercorporate holdings through branches in the Member State concerned, which thus restricts the freedom to choose the most appropriate legal form for the pursuit of activities in another Member State, which the second sentence of the first paragraph of Article 52 of the Treaty expressly confers on economic operators. In view of the fact that, as regards liability to tax on dividend receipts in Germany from shares in foreign subsidiaries and sub-subsidiaries and on the holding of those shares, companies not resident in Germany having a permanent establishment there and companies resident in Germany are in objectively comparable situations, the difference in treatment to which branches of non-resident companies are subject in comparison with resident companies must be regarded as constituting an infringement of Articles 52 and 58 of the Treaty.

As regards, specifically, the refusal to grant to permanent establishments of non-resident companies the international group relief provided for by a bilateral agreement, concluded in order to prevent double taxation, finds no justification in the fact that the Member States are at liberty, in the framework of such agreements, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves. As far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless may not disregard Community rules, under which the national treatment principle requires a Member State which is party to the agreement to grant to permanent establishments of non-resident companies the advantages provided for thereunder on the same conditions as those which apply to resident companies.