OPINION OF ADVOCATE GENERAL DARMON

delivered on 16 February 1993 *

Mr President,
Members of the Court,

1. The reference for a preliminary ruling made to the Court by the Directeur des Contributions Directes et des Accises of the Grand Duchy of Luxembourg (Director of Direct Taxes and Excise Duties, hereinafter referred to as the 'Directeur des Contributions') seeks, in substance, an examination, in the light of Article 48 of the Treaty, of a system of taxation which, for the purpose of calculating income tax, takes into account the whole of a taxpayer's income, including the income he receives in the State concerned as a non-resident.

2. Mr Corbiau, who is a Belgian national, lived and worked in Luxembourg until 25 October 1990, when he transferred his residence to Belgium while remaining employed in Luxembourg. As a result, he has since that time been taxed in Luxembourg as a non-resident taxpayer.

3. Having thus established the context of the reference, the first matter, before any examination of the substance of the case, must be to determine whether the Directeur des Contributions constitutes a 'court or tribunal' within the meaning of Article 177 of the Treaty.

4. It may at first seem surprising to have to consider the nature of this authority, since the Conseil d'État (State Council) of Luxembourg (hereinafter referred to as the 'Conseil d'État') recognized its status as a court in contentious matters in a judgment of 26 July 1963, [1] and in non-contentious matters in a judgment of 18 December 1968. [2] Nevertheless, such recognition is not enough to confer on that authority the status of a 'court or tribunal' within the meaning of Article 177, since that concept does not refer in any way to the internal law of Member States, but is an autonomous concept which has been defined by the case-law of this Court.

5. The cornerstone of that case-law is the judgment in the *Vaassen-Göbbels* case, [3] in which, it will be recalled, the question was whether the Scheidsgerecht, an arbitration tribunal with jurisdiction to resolve disputes between a Dutch social security institution and the recipients of certain benefits, constituted a court. In the event it was recognized as such, because it was a permanent body of statutory origin, reference to it was compulsory, and it gave its rulings after a proper hearing and in accordance with legal rules.

6. In its judgment in the *Politi* case, [4] however, the Court held that, even if the procedure of the body in question did not involve a proper hearing, reference to the Court might still be allowed, in so far as

* Original language: French.

1 — Caisse hypothécaire du luxembourg No 5833 on the Court Roll.

2 — Toussaint v Administration des contributions, No 5516 on the Court Roll.

3 — Judgment in Case 61/65 *Vaassen (née Göbbels)* v *Beambtenfonds Mijnbedrijf* [1966] ECR 261.

4 — Judgment in Case 43/71 *Politi* v *Italy* [1971] ECR 1039.

'...The President of the Tribunale di Torino is performing a judicial function within the meaning of Article 177 and ... he considered an interpretation of Community law to be necessary to enable him to reach a decision, there being therefore no need for the Court to consider the stage of the proceedings at which the questions were referred'. [5]

7. In summary proceedings in which the defendant does not appear, the absence of the adversarial element is compensated for by the complete impartiality of the judge and his independence with regard both to the dispute and the parties to it.

8. Because the defendant is absent, the judge must consider the merits of the applicant's claims even more carefully, so as to mitigate the effects of there being no full exchange of argument in the procedure.

9. Thus, the element of independence, the necessary concomitant of the absence of a full hearing, which was not mentioned in the Court's earlier decisions, appeared in the judgment in the *Pretore di Salò* case [6] in the following terms:

'It must be observed that the Pretori are judges who, in proceedings such as those in which the questions referred to the Court in this case were raised, combine the functions of a public prosecutor and an examining magistrate. The Court has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature' [7]

10. That idea of independence, which is an integral element of the judicial function, was referred to again in the Court's judgment in the *Pardini* [8] case, delivered on a reference from a national court in non-adversarial proceedings.

11. Let us now consider whether the Directeur des Contributions, when ruling on an application in non-adversarial proceedings brought by a taxpayer, is exercising a genuine judicial activity, or whether he acts as an administrative authority within a system of internal appeals.

12. Both the Commission (apparently because it thought it opportune to do so [9]) and the Luxembourg Government maintain that the authority in question meets the criteria established by the Court. Whilst the answers given by the Luxembourg Government in the oral procedure have clarified some of the attributes of that authority and the course of the procedure before it, those answers have, nevertheless, entirely failed to convince me that the authority is judicial in character.

13. It is true that the Directeur des Contributions does in fact exercise his functions within the framework of the Loi portant réorganisation de l'administration des contributions directes et des accises (Direct Taxes and Excise Duties Reorganization Law

5 — Paragraph 5.

6 — Judgment in Case 14/86 *Pretore di Salò* v *Persons Unknown* [1987] ECR 2545.

7 — Paragraph 7.

8 — Judgment in Case 338/85 *Pardini* v *Ministero del Commercio con l'Estero* [1988] ECR 2041, paragraph 9.

9 — Observations of the Commission, p. 15, paragraph 13, final subparagraph.

of 17 April 1964), as amended by the Law of 20 March 1970. Article 2 of that Law provides that:

'Responsibility for the administration of taxes and excise duties is hereby conferred upon a director, who shall be the head of the administration'.

14. Similarly, he constitutes an authority to which reference is obligatory and which has permanent existence. Article 8 of the Grand-Ducal Order of 26 October 1944 provides that:

'Taxpayers' complaints and applications for remission or reduction of taxes shall be dealt with by the head of the relevant department or his deputy save where appeal is made to a body to be designated by ministerial order ...'

15. Accordingly, the Ministerial Order of 10 April 1946 designated the Judicial Committee of the Conseil d'État du Luxembourg 'to rule at final instance on appeals in matters of taxation, contributions and entitlements'. [10]

16. However, the mere fact that those three criteria (permanent existence, statutory origin and obligatory reference) are fulfilled is clearly not enough for an administrative authority to be considered a judicial body. Indeed, whilst in principle all administrative authorities indisputably meet those criteria, their fulfilment cannot be enough, otherwise references could be made to the Court by any administrative body whatsoever, which Article 177 is designed to avoid. [11]

17. Those criteria, set out for the first time in the *Vaassen-Göbbels* judgment, allowed a distinction to be made between a court on the one hand and an arbitration body on the other, in so far as the latter cannot, in the great majority of cases, satisfy the criteria of permanent existence, compulsory reference or statutory origin, although it does satisfy the other criteria needed to qualify as a court or tribunal under Article 177, namely the application of legal rules, a full hearing and independence in giving judgment.

18. I will now examine whether the Directeur des Contributions when exercising the authority pursuant to which this reference was made meets each of those criteria.

19. Concerning, first, the application of legal rules, let us remember, in the first place, that all admininistrative authorities are obliged to comply with them, and that, in the second place, in an action such as this the Directeur des Contributions does not rule in law but as a matter of fairness, being clearly directed to do so by a statutory rule, and weighs up special circumstances which, under Paragraph 131 of the Tax Code, justify the repayment or crediting of State taxes already paid. [12] Such circumstances, which might reveal unfair treatment, could arise either from the personal situation of the taxpayer at the time when the tax was collected, or from an unduly strict application of tax law in the particular case.

10 — Article 1.

11 — See G. Isaac: *Droit communautaire général*, Masson, 3rd ed., p. 290.

12 — Report for the Hearing, IIA, fourth subparagraph.

20. Thus, as indeed the Conseil d'État has stated, the Directeur des Contributions enjoys a 'wide discretion in taking his decision'. [13]

21. Thus, in administrative proceedings of this kind, the authority has conferred upon it a quasi discretionary power, which is not to say an arbitrary power, which results from the very wording of the provision quoted above, as interpreted, however, by the Conseil d'État. Thus, subject to the limits of those powers, which are indeed statutory in origin, the task of the Directeur des Contributions consists less in enforcing legal rules than in moderating, for the sake of fairness, the effects of their strict application.

22. I will now consider the extent to which the Directeur des Contributions conducts a procedure involving a proper hearing.

23. When a complaint is made in administrative proceedings of this kind, the taxpayer seeking a repayment or reduction of taxes may refer the matter simply by letter to the Directeur des Contributions, who gives his decision without hearing further argument and in the absence of the applicant. Thus, the procedure does not involve a proper hearing.

24. In the *Politi* case already referred to, [14] the Court admittedly recognized the President of the Tribunale di Torino as a court, in summary proceedings for an injunction during which the defendant, by definition, does not appear.

25. Nevertheless, in recognizing that that institution was exercising a 'judicial function', the Court was implicitly but unmistakeably referring to the attributes that constitute the task of giving judgment, especially the independence and impartiality of the judge, who must not be linked in any way with the parties to the dispute.

26. Thus, the absence of a proper hearing (which is also absent in many procedures in the Member States) must be offset by the independence of the judge in relation to the parties to the dispute in order to give legal effect, having regard to the rules on jurisdiction, admissibility and the merits, to the application and the pleas raised by the applicant in the procedure.

27. That does not appear to be the case with the Directeur des Contributions, who seems to be both judge and party at the same time.

28. In the first place, the Directeur is placed institutionally 'under the immediate authority of the Minister of Finance'. [15] Thus, his authority derives from the central power of the State.

29. In the second place, his task is to resolve a dispute between the administration of

13 — Judgment of 11 October 1988 in *Bertrand* v *Administration des Contributions*, No 7803 on the Court Roll, entered 25 July 1986.

14 — See footnote 4 above.

15 — See P. Majerus: *L'État luxembourgeois*, 6th ed., 1990, p. 288.

which he is director and a taxpayer who is challenging a decision taken by one of his departments. Yet we are told that in performing that task he is totally independent both of his minister and the administration of which he is director.

30. But how can that claim of neutrality be reconciled with the fact that, in many cases, having given his decision, he himself pleads before the Conseil d'État when the taxpayer's appeal against his decision is heard there and he does so in support of the case argued by the administration of which he is director and in order to obtain, albeit indirectly, confirmation of his own decision? [16]

31. By lodging a written statement of his administration's case, in its name and on its behalf, the Directeur des Contributions thus acts as an actual party to the proceedings brought before him. That is enough to demonstrate that the taxpayer's application addressed to him constitutes an internal hierarchical appeal, and not an appeal to a court.

32. Is this to be regarded as a vestige of the old doctrine of *ministre juge*, whereby the minister decided at first instance? Be that as it may, that doctrine has now been abandoned, and appeals to a minister are to be regarded as hierarchical appeals before a purely administrative authority.

33. In the oral proceedings, the Luxembourg Government's representative argued that the duty of the Directeur des Contributions to give reasons for his decisions constituted a further test for recognizing his judicial status. There is indeed a Law of 1 December 1978, brought into force by a Grand-Ducal Order of 8 June 1979, which provides that reasons must be given for every administrative decision adversely affecting an individual.

34. In an article on Luxembourg administrative law and practice, Arendt [17] writes:

'This has been recognized by the legislature, which, in a Law of 1 December 1978 regulating non-contentious administrative procedure, has appreciably strengthened the rights of members of the public when dealing with central and local authorities.

The basic principle on which the Law is based is observance of the right of due process. Compliance with that principle means that the authorities cannot base their decisions on reasons which are not known to the citizen. That rule necessarily entails recognition of the citizen's right of free access to his file, the right to be given reasons, and the right to submit observations'. [18]

35. Whilst the duty to give reasons is an inherent part of judicial decision-making, it

16 — See the cases judged on 6 March 1963 in *Heuardt* v *Administration des contributions* (Nos 5768 and 5884 on the Court Roll), 7 July 1971 in *Pirotte* v *Administration des contributions* (Nos 5984 and 6314), 22 January 1985 in *Ruppert* v *Administration des contributions* (No 6374), 22 May 1985 in *Compagnie générale pour le gaz* v *Administration des contributions* (No 7552), and 11 October 1988 in *Bertrand* v *Administration des contributions*, referred to in note 14 above.

17 — Arendt: '*L'information de l'administré en droit luxembourgeois, diagonales à travers le droit luxembourgeois*', *Livre jubiliaire de la conférence Saint-Yves*, 1946-1986, p. 13.

18 — Ibid., p. 17.

is not, however, restricted to that process. Administrative decisions, too, must be supported by reasons in order to allow the person concerned either to accept the decision or to challenge it before a court, which will perform its reviewing function essentially on the basis of the reasons stated for the measure being challenged. Thus, as far as Community law is concerned, this Court regards compliance with the duty to give reasons laid down in Article 190 of the Treaty as a precondition for the legality of acts of secondary law.

36. I also note that the status of the Directeur des Contributions as a court is challenged in Luxembourg itself by authoritative legal writers.

37. Thus, Olinger remarks that:

'In his manual *Introduction à la science du droit*, 1960, Pescatore appears to deny that the Directeur des Contributions has a judicial function'. [19]

38. Indeed, Pescatore [20] does not mention the Directeur des Contributions as one of the courts of Luxembourg, even though the latest edition of his work was published after delivery of the judgments of the Conseil d'État referred to above.

39. Even more explicitly, Schockweiler has no hesitation in writing:

'This is a real anomaly in our system of administrative organization, and the judicial character of these bodies is due only to the case-law of the Conseil d'État'. [21]

40. I therefore suggest that the Court should declare that it has no jurisdiction in this matter.

41. The course I propose does not in any way endanger the uniform application of Community law, which is a risk that might arise if Member States were tempted to create administrative bodies which decided cases without the possibility of appeal and which, without being courts or tribunals within the meaning of Article 177 of the Treaty, might apply Community law without having the power to make references to this Court or even being obliged to do so.

42. As Advocate General Reischl stated in his Opinion delivered in the Broekmeulen case: [22]

'If on the other hand the term in question [court or tribunal] were to be construed as a reference to national law, Member States would have it in their power to take away from certain decision-making bodies which have to apply Community law the right, and in some cases the obligation, to request a preliminary ruling, by making provision to

19 — Olinger: *Études fiscales*, Nos 81 to 85, November 1989.

20 — P. Pescatore: *Introduction à la science du droit*, Centre universitaire de l'État luxembourgeois, 1960, with revisions 1978, No 272, p. 389.

21 — F. Schockweiler: *Le contentieux administatif et la procédure administrative non contentieuse en droit luxembourgeois*, No 44, p. 20.

22 — Judgment in Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311.

that effect within their system of administration of justice. This would lead eventually to the fragmentation of Community law, which is precisely what the procedure under Article 177 is designed to avoid. Thus the law of the Member States can be relevant only in so far as that law is able to determine whether the *minimum characteristics required by Community law* are present in a given case'. [23]

43. Indeed, that appears to have been a decisive argument in the Court's recognition, in its judgment in that case, that the Appeals Committee for General Medicine constituted a court:

'As a result of all the foregoing considerations and *in the absence, in practice, of any right of appeal to the ordinary courts*, the Appeals Committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are in fact recognized as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State within the meaning of Article 177 of the Treaty'. [24]

44. Turning to the present case, Article 8 of the Grand-Ducal Order of 26 October 1944 provides that complaints are to be dealt with by the head of the relevant department with appeal lying, on the basis of the Ministerial Order of 10 April 1946, to the Judicial Committee of the Conseil d'État.

23 — Opinion of the Advocate General, p. 2332, at p. 2336.

24 — Paragraph 17, my italics.

45. It is therefore for that court to make a reference to the Court of Justice of the European Communities when faced with a question of interpretation of a Community rule.

46. I do notice, however, that Article 8 goes on to provide:

'No appeal shall be allowed where the amount of the tax forming the subject-matter of the complaint or the application is less than LFR 1 000.'

47. That legal impossibility of appeal, and thus of judicial review, does not, however, alter my position.

48. The likelihood of an appeal for LFR 1 000 (about ECU 25) or less bringing into question the interpretation of Community law seems to be so slight as to be purely academic. There is thus no legitimate reason to fear that the uniformity of Community law might be threatened, and the fact that no appeal to the courts lies against decisions concerning such a sum does not justify the adoption of a different view.

49. Even supposing, however, that such a case did arise, in the form of a test case for example, the applicant could not be deprived of his fundamental right of access to a court, which is a right he has both under the recent case-law of this Court and under the European Convention for the Protection of

Human Rights and Fundamental Freedoms, to which, moreover, this Court has taken care to make express reference.

50. I refer in this connection to the judgment in the *Johnston* case, [25] in which the Court stated:

'The requirement of judicial control stipulated by that article [26] reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 (Official Journal 1977 C 103, p. 1) and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law'. [27]

51. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

52. In its judgment in the *Golder* case, [28] the European Court of Human Rights interpreted that article as follows:

'In the field of civil claims, everyone has a right to proceedings instituted by or against him being conducted in a certain way — "fairly", "publicly", "within a reasonable time", etc. — but also and primarily that his case be heard not by any authority whatever but "by a court or tribunal" within the meaning of Article 6(1) ...', [29]

and it went on to state:

'In civil matters one can scarcely conceive of the rule of law without there being a possibility of access to the courts'. [30]

53. Thus, the principle of 'effective judicial control', [31] enshrined in the case-law of this Court, with its express reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms, necessarily has as its corollary the right to have any decision taken by a body which is not a 'court or tribunal' within the meaning of Article 177 reviewed by a court that does

25 — Judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

26 — The article in question is Article 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

27 — Paragraph 18.

28 — Judgment in *Golder* v *United Kingdom*, Series A, No 18.

29 — Paragraph 32.

30 — Paragraph 34.

31 — Paragraph 19 of the *Johnston* case, referred to in footnote 25 above.

come within the meaning of that article. Otherwise, as I said in my Opinion in the *Johnston* case, there is a risk that a 'no-go area for the law' might be created, thus calling into question the very foundations of the Community legal order. [32]

54. It follows from the foregoing that every individual has an inalienable right under Community law to apply to a court or tribunal within the meaning of Article 177 of the Treaty whenever a question of the interpretation of Community law is raised, nothwithstanding any limitation on such remedy under national law. Thus the unity and uniformity of Community law are perfectly preserved.

55. It is therefore for the Conseil d'État alone to refer the matter to this Court, should the occasion arise, and the fact that there is no appeal against decisions of the Directeur des Contributions regarding complaints concerning sums of LFR

1 000 or less does not alter that conclusion.

56. Although it seems to me clearly established that the Court has no jurisdiction to reply to the question referred by the Directeur des Contributions, I will give my opinion on the substance of the matter referred, but only in the alternative.

57. What the question referred is asking is essentially this: Does Article 48(2), for the purpose of the determination by the State of residence of the rate of tax applicable to a taxpayer's income, preclude the Luxembourg Treasury from taking into account the whole of the income received by the taxpayer in Luxembourg during the reference year, including income received by him as a non-resident?

58. Income received by a person in Luxembourg, whether as a resident or a non-resident, is not taxed in Belgium under the Double Tax Convention (United Nations model) signed between those two Member States on 17 September 1970, in particular Article 17 thereof, which provides:

'... wages, salaries and similar remuneration received by a resident of a contracting State in respect of paid employment shall be taxable only in that State, unless the employment is carried out in the other contracting State. If the employment is carried out there, the remuneration received in that respect shall be taxable in that other State ...'.

59. Mr Corbiau therefore made two tax returns in Luxembourg, the first for the period during which he was a resident taxpayer, and the other for the period during which he was non-resident.

60. The Luxembourg tax system, like that of other Member States, applies to salaries and wages in particular the method known as 'deduction at source'.

61. In determining the rate of tax to be applied to the taxpayer's annual income, the

32 — Paragraph 4 of my Opinion.

tax authorities take the most recent remuneration as a basis and assume that the salary earner will receive twelve times that amount during the reference year. Adjustments are made at the end of the year, either upwards or downwards, according to whether the actual taxable income has increased or diminished.

62. In the present case, the year-end tax calculation made by the Administration des Contributions in respect of the first ten months of the year was carried out solely on the basis of the income received by Mr Corbiau as a resident taxpayer, at the tax rate applicable to that amount of income if received over a whole year, thereby leaving out of account the income received by Mr Corbiau as a non-resident. It then turned out, when the actual amount of tax due came to be ascertained, that, by taking into account only the income received during the first ten months, the rate obtained was lower than the initial rate, and showed a difference of LFR 180 048 compared with the amount of tax which would arise from applying the rate applicable to the whole of Mr Corbiau's income for the year.

63. Mr Corbiau therefore applied for repayment of that amount, considering that he was entitled to repayment by virtue of the judgment in the *Biehl* case. [33]

64. In that case, a German national who had been living in Luxembourg but who had transferred his residence to the Federal Republic of Germany in the course of the year had been refused a refund of deductions made by his former employer which were greater than the actual amount of tax due for the reference year, on the basis of Article 154(6) of the Loi sur l'Impôt sur le Revenu (Income Tax Law), which provides:

'Amounts duly deduced from capital income shall remain the property of the Treasury and shall not be repayable. The same shall apply to deductions of tax from the salaries and wages of employed persons who are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the year.'

65. In its judgment, the Court ruled that:

'Article 48(2) of the Treaty precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable'. [34]

66. The discrimination arose from the fact that it was only non-resident nationals who found themselves unable to obtain a refund of any excess tax.

67. As the Court stated in its judgment in the *Werner* case, [35] the Luxembourg tax provision was incompatible with Community law, in so far as it

33 — Judgment in Case C-175/88 *Biehl* v *Administration des Contributions du Grande-Duché de Luxembourg* [1990] ECR I-1779.

34 — Paragraph 19.

35 — Judgment in Case C-112/91 *Hans Werner* v *Finanzamt Aachen-Innenstadt* [1993] ECR I-429.

'... linked the potential repayment of an excess deduction of tax to a criterion of permanent residence on Luxembourg territory, thus acting to the greater detriment of taxpayers who are nationals of other Member States ...'. [36]

68. It is clear from the *Biehl* case, [37] therefore, that it is only the *principle* of depriving a taxpayer of the right to a refund which makes for inequality of treatment in so far as it works to the disadvantage of nationals of another Member State. And, as I said in my Opinion in that case,

'even if the objectives pursued by the national legislature in seeking to introduce the equivalent of a clause ensuring that progressive rates of taxation are not called in question, the manifestly discriminatory nature of the rule at issue is evident in particular in all cases in which the national concerned received no income during the year in question in the Member State of origin or destination.' [38]

69. In holding as it did, the Court did not confer any *automatic right* to a refund on individuals who go from being resident to non-resident.

70. Equally, the Directeur des Contributions is not asking the Court whether he can continue applying the disputed provision in certain situations, but only whether he may calculate the tax rate on income taxed in Luxembourg by reference to the *whole of the income* received by the taxpayer.

71. It thus has to be determined whether taking the whole of the taxpayer's income into account constitutes an infringement of Article 48(2) of the Treaty.

72. That provision, it will be recalled, applies where there is discrimination based on nationality. Moreover,

'... the rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, 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'. [39]

73. So, does a progressive tax system like the one at issue here (envisaged in particular in international conventions based on the United Nations or OECD models [40]) give rise to discrimination of an overt or covert kind?

74. I start with the observation that in international tax law there are two methods of avoiding double taxation.

36 — Paragraph 14.

37 — Judgment referred to in footnote 33 above.

38 — Paragraph 10.

39 — Judgment in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, at paragraph 11.

40 — See, in that respect, Article 23 of the Double Tax Convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg.

75. The full exemption system 'compartmentalizes' the taxpayer's income by reference to its origin. Each State has an absolute right to tax income received within its territory whilst, it must be stressed, a taxpayer whose income is spread across several States partially escapes the progressive element of the tax. As Plagnet writes:

'An unfortunate inequality is thus introduced between persons who receive the whole of their income in the State where they reside and those who receive part of it abroad'. [41]

76. Under the progressive exemption system, on the other hand, the State in which the taxpayer resides takes into account the whole of the taxpayer's income, including that received in other States, when calculating the tax rate. The rate is, however, applied only to the income received in the State of residence. That method restores equality of treatment between all taxpayers. [42]

77. The Court has already considered the compatibility of the latter system with Community law, if only indirectly, in its judgment in the *Humblet* case. [43]

78. The facts of that case are worth recalling. When taxing the income of the wife of an official of the European Communities, the Belgian tax authorities had requested the official to provide them with details of his salary in order to enable them to calculate the tax rate on other income, in particular the income of his wife. The official refused, invoking the immunity to taxation of his salary under Articles 11 and 13 of the Protocol on the Privileges and Immunities of Officials and Other Servants of the European Communities.

79. The Court held that in such a case an exemption of that kind precluded his salary from being taken into account in any way, by reason both of the total immunity of an official's income and the *ratio legis* of the Protocol.

80. That solution could not, however, be extended to taxpayers who are not able to rely on such a provision, and the Court accepted the progressive exemption system on the grounds that

'... application of this system of taxation gives rise to no difficulties where all of the taxpayer's income is liable to tax. In fact the application of different rates to different bands does not prevent the imposition of a single total sum of tax covering the whole of the income with the result that the highest rate applied to the highest band in reality also covers the whole of the income'. [44]

81. Moreover, Advocate General Lagrange said the following about taxpayers not having the benefit of the Protocol on Privileges and Immunities:

'... in spite of the exemption granted [by a double tax convention], the income in question had to be taken into account in determining the rate applicable to other income

41 — Plagnet: *Droit fiscal international*, Litec 1986, No 103, p. 58.

42 — Ibid., No 104, p. 58.

43 — Judgment in Case 6/60 *Humblet* v *Belgium* [1960] ECR 1125.

44 — Judgment in *Humblet*, referred to above, at p. 578.

which in Switzerland remained subject to a tax determined on the basis of the total income ... It is clear that the reverse procedure would have resulted in giving more favourable treatment to a taxpayer who receives income abroad than if he had received the same income in his own country; this would be contrary to the object sought by the conventions on double taxation; avoidance of double taxation must not have the effect of creating a privilege ... In the present case we are not concerned with the avoidance of a double imposition of tax but with creating what in international language is called a "privilege"' [45]

82. That is all the more true if, as in the present case, the whole of the taxpayer's income arises in the Grand Duchy of Luxembourg; if the whole of that income were not taken into account, the equal treatment of taxpayers under tax law would be compromised.

83. As the Luxembourg Government stated in its written reply to the Court's questions, the artificial splitting of this taxpayer's income has meant that for the last two months he was not taxed at all, the taxable amount being lower than the annual rate.

84. Far from creating inequality between Luxembourg nationals and nationals of other Member States, the taking into account of the whole of the taxpayer's income re-establishes equality of treatment, provided that nationals of other Member States enjoy the same benefits and allowances as Luxembourg nationals.

85. My conclusions are, therefore, that:

(1) The Court has no jurisdiction to reply to the question submitted by the Directeur des Contributions of the Grand Duchy of Luxembourg;

(2) Alternatively, Article 48(2) of the Treaty does not preclude the State in which a taxpayer has been resident, when determining the rate of tax applicable to his income, from taking into consideration the whole of his income during the reference year, including income he received in that same State as a non-resident, provided that the person concerned enjoys the same benefits and allowances as nationals of that State.

45 — *Humblet* case referred to above, Opinion of Advocate General Lagrange, p. 583, at pp. 590 and 587: '... It is conceivable that, in the context of a system of personal taxation on income on a rising scale, an individual source of income may be taken into account in determining the total income subject to tax, in particular for determining the rate of tax, but may subsequently be relieved of the application of this rate which, however, remains applicable to income from other sources.'