Case C-470/04

N

v

Inspecteur van de Belastingdienst Oost/kantoor Almelo

(Reference for a preliminary ruling from the Gerechtshof te Arnhem)

(Freedom of movement for persons – Article 18 EC – Freedom of establishment – Article 43 EC – Direct taxation – Taxation of notional increases in value of substantial shareholdings where tax residence transferred to another Member State)

Summary of the Judgment

1. *Freedom of movement for persons – Freedom of establishment – Provisions of the Treaty – Scope*

(Art. 43 EC)

2. *Freedom of movement for persons – Freedom of establishment – Tax legislation*

(Art. 43 EC)

3. *Community law – Rights conferred on individuals – Breach by a Member State*

1. A Community national who has been living in one Member State since the transfer of his residence and who holds all the shares of companies established in another Member State, may rely on Article 43 EC.

(see para. 30, operative part 1)

2. Article 43 EC must be interpreted as precluding a Member State from establishing a system for taxing increases in the value of rights in a company in the case of a taxpayer’s transferring his residence outside that Member State, which makes the granting of deferment of the payment of that tax conditional on the provision of guarantees and does not take full account of reductions in value capable of arising after the transfer of residence by the person concerned and which were not taken into account by the host Member State.

(see para. 55, operative part 2)

3. An obstacle arising from a requirement, in breach of Community law, that a guarantee be constituted cannot be raised with retroactive effect merely by releasing that guarantee. The form of the document on the basis of which the guarantee was released is immaterial to that assessment. Where a Member State makes provision for the payment of interest on arrears where a guarantee demanded in breach of national law is released, such interest is also due in the case of an infringement of Community law. Moreover, it is for the national court to assess, in accordance with the guidelines provided by the Court of Justice and in compliance with the principles of equivalence and effectiveness, whether the Member State is liable on account of the damage caused by the obligation to constitute such a guarantee.

(see para. 67, operative part 3)

JUDGMENT OF THE COURT (Second Chamber)

7 September 2006 (*)

(Freedom of movement for persons –Article 18 EC– Freedom of establishment –Article 43 EC – Direct taxation – Taxation of notional increases in value of substantial shareholdings where tax residence transferred to another Member State)

In Case C-470/04,

REFERENCE for a preliminary ruling under Article 234 EC by the Gerechtshof te Arnhem (Netherlands), made by decision of 27 October 2004, received at the Court on 2 November 2004, in the proceedings

N

v

Inspecteur van de Belastingdienst Oost/kantoor Almelo

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, R. Schintgen, R. Silva de Lapuerta, G. Arestis and J. Klu?ka (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– N, by P.L.M. van Gorkom, advocaat,

– the Netherlands Government, by H.G. Sevenster and C.A.H.M. ten Dam, acting as Agents,

– the Danish Government, by J. Molde, acting as Agent,

– the German Government, by W.-D. Plessing, acting as Agent,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

– the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 18 EC and 43 EC

2 It was submitted in a dispute between N and the Inspecteur van de Belastingdienst Oost/kantoor Almelo ('the inspector') concerning a decision by the latter holding a complaint by N against a tax notice concerning income tax and social security contributions for 1997 to be inadmissible.

Legal context

The law on income tax

3 Under Article 3 of the Law on Income Tax (Wet op de inkomstenbelasting) of 1964 ('the WIB'), the tax payable by a national taxpayer is calculated on the basis of the taxable income, which includes, inter alia, according to Article 4 of that Law, the profits derived from a substantial shareholding.

4 According to the wording of Article 20a(1)(b) of the WIB, the total amount of the benefits gained from the disposal of shares forming part of a holding constitutes a benefit derived from a substantial holding. According to paragraph (3) of that article, there is a substantial holding where the taxpayer directly or indirectly holds 5% of a company's capital.

5 Article 20a(6)(i) of the WIB provides that loss of the status of national taxpayer, other than by death, is assimilated to a disposal of shares.

6 The detailed rules for calculating the benefit derived from a notional disposal are laid down in Article 20c of the WIB. Under Article 20c(1), the gain resulting from the disposal is normally constituted by the difference between the purchase price and the sale price. Under Article 20c(4), where there is no consideration on a disposal or acquisition, it is the market value which may be attributed to the holding at the time of the disposal that is regarded as the consideration. If the taxpayer establishes his residence in the Netherlands, Article 20c(7) provides that the reference amount shall, instead of the purchase price, be the market value of the securities at the date of that taxpayer's entering the Netherlands.

7 Article 20c(18) of the WIB provides:

'A ministerial order shall lay down the rules on the acquisition price in cases where the taxpayer's assets include the shares of a company to which Article 20a(6)(i) has applied in relation to the taxpayer during a previous year. A ministerial order may also lay down rules as regards remission

of the tax determined pursuant to Article 20a(6)(i) or the second sentence of Article 49(4) if the taxpayer returns to the Netherlands less than ten years after transferring his residence outside the Netherlands.'

The Law on the Collection of Taxes

8 The deferment of payment of a tax due by reason of loss of the status of national taxpayer otherwise than by death was provided for, at the time of the facts in the main proceedings, by Article 25(6) of the Law on the Collection of Taxes (Invorderingswet) of 1990 ('the IW'). That provision referred to a ministerial order to determine the rules for granting a deferment of payment for a period of ten years on condition that a sufficient security was provided. Such deferment could end if, in particular, the shares in question were disposed of within the meaning of Article 20a(1) or 6(a) to (h) of the WIB.

9 Article 26(2) of the IW provided, at the time of the facts in the main proceedings:

'A ministerial order shall determine the rules whereby a taxpayer may be granted remission of the tax for which a deferment of payment was granted on the basis of Article 25(6):

…

b) up to the amount of the tax actually levied abroad on the disposal of those shares by virtue of the benefit derived from the disposal within the meaning of Article 25(8), provided that the amount of the remission shall not exceed the amount of the tax in respect of which deferment is still being granted;

c) of an amount equal to that still due after 10 years.'

The Decree Implementing the Law on the Collection of Taxes

10 The Decree Implementing the Law on the Collection of Taxes (Uitvoeringsregeling invorderingswet) of 1990 ('the URIW') is referred to in particular in Articles 25 and 26 of that Law. Articles 2 and 4 of that decree provide:

'Article 2

1. In situations as referred to in Article 25(6) of the Law, the Collector of Taxes shall, on the taxpayer's request and by decision against which an objection may be lodged, grant deferment of payment – without interest on overdue tax being charged – provided that adequate security is provided and agreement is reached on conditions to be specified by the Collector of Taxes.

2. The deferment shall be granted in respect of the amount of the tax due by virtue of the benefit taken into account pursuant to Article 20a(6)(i) of the ... [WIB] and the amount of interest relating thereto ...

3. If the shares, holding certificates or debts concerned by the suspension are disposed of within the meaning of Article 20a, first or sixth paragraph, points (a) to (h) of the ... [WIB], the Collector of Taxes shall, by decision against which an objection may be lodged, put an end to the deferment in relation to those shares

…

…

Article 4

1. In situations as referred to in Article 26(2) of the Law, the Collector of Taxes shall, at the taxpayer's request and by decision against which an objection may be lodged, grant remission of income tax up to an amount as referred to in the abovementioned paragraph, provided that, in relation to a share, the amount of the remission shall not be higher than the lesser of the following amounts:

1. the amount of the tax for which a deferment was granted in relation to that share …;

2. the amount of the tax actually levied abroad on the disposal of that share, by virtue of the benefit derived from the disposal and for which deferment of payment was granted by virtue of Article 25(6) …'.

The main proceedings and the questions referred for a preliminary ruling

11 On 22 January 1997, N transferred his residence from the Netherlands to the United Kingdom. At the time he left the Netherlands, he was the sole shareholder of three limited liability Netherlands companies (besloten vennootschappen), the management of which has since that same date been in Curaçao (Netherlands Antilles).

12 For 1997, N declared taxable income of NLG 15 664 697, comprising NLG 765 in income from his own dwelling and NLG 15 663 932 in profit from a shareholding. The tax notice based on that declaration was for NLG 3 918 275, plus NLG 228 429 by way of interest.

13 N obtained, at his request, a deferment of payment of those amounts. However, in accordance with the national legislation in force at the time of the facts in the main proceedings, such deferment was made subject to the provision of security. N therefore deposited by way of security his holdings in one of his companies.

14 Following the judgment of 11 March 2004 in Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, the Secretary of State for Finance expressed the view, in a letter of 13 April 2004 replying to questions by a member of the Second Chamber of the Netherlands Parliament, that the requirement that security be provided before approval of the deferment of payment could no longer be maintained. As a result, the Collector of Taxes told N that the security he had provided could be regarded as released.

15 Since 2002, N has been running a farm with an apple orchard in the United Kingdom.

16 The dispute in the main proceedings before the Gerechtshof te Arnhem is essentially concerned with the question whether the very principle of a tax based on the system established by the WIB, the IW and the URIW, and the taxable event of which is the transfer of residence of a Netherlands resident, who owns a substantial shareholding within the meaning of Article 20a(3) of the WIB, to another Member State, is compatible with Community law.

17 In the alternative, N challenges the detailed rules implementing that system of taxation. In particular, he considers that the obligation to provide security, with which he had to comply in order to benefit from a deferment of payment in relation to the tax established by the WIB, constitutes an obstacle to the rights conferred on him by Community law. Similarly, he considers that that obstacle cannot be retroactively lifted by the mere freeing of that security ordered by the Secretary of State for Finance.

18 N further argues that the Netherlands rules providing for flat-rate recovery of costs by a

party successful in court is contrary to Community law because it restricts the possibility for Netherlands persons to use the courts effectively.

19 Having before it a question concerned essentially with the compatibility of the system of taxation under the WIB, the IW and the URIW with Articles 18 EC and 43 EC, the Gerechtshof te Arnhem decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘1) Can a resident of a Member State who ceases to reside in that Member State in order to establish himself in another Member State rely, in proceedings against the Member State which he is leaving, on the application of Article 18 EC, solely on the ground that the serving of a tax assessment linked with his departure entails, or may entail, an obstacle to that departure?

2) If the answer to the first question is in the negative, can a resident of a Member State who ceases to reside in that Member State in order to establish himself in another Member State rely, in proceedings against the Member State which he is leaving, on the application of Article 43 EC if it is not clear or plausible from the outset that he will be pursuing in the other Member State an economic activity as referred to in that article? Is it relevant to the answer to the previous question that that activity will be pursued within a foreseeable period? If so, how long may that period be?

3) If the answer to the first or second question is in the affirmative, do Articles 18 or 43 EC preclude the relevant Netherlands legislation by virtue of which an assessment to income tax and social insurance contributions is served in respect of the deemed enjoyment of profit from a substantial shareholding, solely on the ground that a resident of the Netherlands who ceases to be a domestic taxpayer because he has moved his place of residence to another Member State is deemed to have disposed of those of his shares which form part of a substantial holding?

4) If the answer to the third question is in the affirmative because of the fact that security has to be provided to enable a deferment of payment of the tax assessed, can the existing obstacle then be removed with retroactive effect through the release of the security provided? Does the answer to this question depend on whether the security is released on the basis of legislation or a rule of policy, whether or not adopted in the context of enforcement? Does the answer to this question depend on whether compensation is provided for any loss incurred as a result of the provision of security?

5) If the answer to the third question is in the affirmative and the answer to the first part of the fourth question is in the negative, can the obstacle which then exists be justified?’

20 The Gerechtshof te Arnhem further comments that: ‘As for the answer to the question whether, in the event of a court finding in favour of a taxpayer on grounds of a violation of Community law, the Netherlands system of reimbursing legal costs (a flat-rate system) is contrary to Community law, the court endorses the question on this subject referred to the Court by the Gerechtshof te ’s?Hertogenbosch in Case C-376/03 (which gave rise to the judgment of 5 July 2005 in Case C-376/03 D [2005] ECR I ?5821)’.

The questions

The first and second questions

21 By its first two questions, which should be examined together, the national court essentially asks what provisions of the EC Treaty are applicable to a case such as that in the main proceedings. More particularly, the court wants clarification on the linkage and the relationship between freedom of movement and residence of citizens of the European Union and the freedom

of establishment.

22 It should be noted in that regard that Article 18 EC, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 43 EC (Case C?193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22).

23 Therefore, it is only in so far as Article 43 EC does not apply to the whole of the situation in the case in the main proceedings that one needs to assess in relation to Article 18 EC that which is not covered by Article 43 EC.

The applicability of Article 43 EC

24 It needs to be examined whether the mere capacity as sole shareholder of his companies allows N to rely on Article 43 EC.

25 The Netherlands Government considers that there can be no question of freedom of establishment or hindrance to that freedom in the absence of actual exercise of an economic activity by the person claiming the freedom.

26 In that respect, and in accordance with well-established case-law, the concept of "establishment" within the meaning of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin (Case C?55/94 *Gebhard* [1995] ECR I-4165, paragraph 25). More particularly, the Court has held that a 100% holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of application of the Treaty provisions on the right of establishment (Case C?251/98 *Baars* [2000] ECR I?2787, paragraph 21).

27 Where a Community national lives in one Member State and has a shareholding in the capital of a company established in another Member State which gives him substantial influence over the company’s decisions and allows him to determine its activities, as is always the case where he holds 100% of the shares, that may thus fall within the freedom of establishment (see, to that effect, *Baars*, paragraphs 22 and 26).

28 The situation here is that of a Community national who, since the transfer of his residence, has been living in one Member State and holding all the shares of companies established in another. It follows that, since that transfer, N has fallen within the scope of Article 43 EC (see, to that effect, Case C?152/03 *Ritter?Coulais* [2006] ECR I-1711, paragraph 32).

29 In those circumstances, there is no need to examine the applicability of Article 18 EC.

30 The answer to the first two questions must therefore be that a Community national, such as the applicant in the main proceedings, who has been living in one Member State since the transfer of his residence and who holds all the shares of companies established in another Member State, may rely on Article 43 EC.

The third and fifth questions

31 By its third and fifth questions, which should also be examined together, the national court effectively asks whether Article 43 should be interpreted as precluding a Member State from establishing a system, such as that at issue in the main proceedings, of taxing increases in value on the transfer of a taxpayer’s residence outside that Member State.

32 At the time of the facts in the main proceedings, Netherlands law provided for the taxation of latent increases in value of company holdings, the taxable event being the transfer of the residence of a taxpayer, with a substantial holding in a company, outside the Netherlands.

33 In that regard, it must be borne in mind that, according to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (*de Lasteyrie du Saillant*, paragraph 44; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

34 It is undisputed here that, even if the system established at the time of the facts in the main proceedings by the WIB, the IW and the URIW, do not prohibit a Netherlands taxpayer from exercising his rights of establishment, free movement and residence, it is nevertheless likely to restrict the exercise of those rights, by reason of its deterrent effect.

35 In this case, analogously with what the Court has already found in relation to a similar system (*de Lasteyrie du Saillant*, paragraph 46), a taxpayer wishing to transfer his residence outside Netherlands territory, in exercise of the rights guaranteed to him by Article 43 EC, was subjected at the time of the facts to disadvantageous treatment in comparison with a person who maintained his residence in the Netherlands. That taxpayer became liable, simply by reason of such a transfer, to tax on income which had not yet been realised and which he therefore did not have, whereas, if he had remained in the Netherlands, increases in value would have become taxable only when, and to the extent that, they were actually realised. That difference in treatment was likely to discourage the person concerned from transferring his residence outside the Netherlands.

36 An examination of the rules for applying that measure confirms that conclusion. Although it is possible to benefit from suspension of payment, that is not automatic and it is subject to conditions, such as the provision of guarantees. Those guarantees in themselves constitute a restrictive effect, in that they deprive the taxpayer of the enjoyment of the assets given as a guarantee (see, to that effect, *de Lasteyrie du Saillant*, paragraph 47).

37 In addition, decreases in value occurring after the transfer of residence were not taken into account in order to reduce the tax debt at the time of the facts in the main proceedings. Thus, tax on the unrealised increase in value, fixed at the time of that transfer, coupled with a deferment of payment and becoming due on the occasion of a subsequent disposal of the shares in question, could have exceeded what the taxpayer would have had to pay if the disposal had taken place on the same date, without there having been a transfer of the taxpayer’s residence outside the Netherlands. In that event, tax on income would have been calculated on the basis of the increase in value actually achieved at the time of the disposal, which could have been less, or even non-existent.

38 Finally, as the Advocate General rightly observes in paragraph 79 of her Opinion, the tax declaration required at the time of transferring residence outside the Netherlands is an additional formality likely further to hinder the departure of the person concerned, and which is imposed on taxpayers continuing to reside in that Member State only when they actually dispose of their holdings.

39 In those circumstances, the tax system at issue in the main proceedings is likely to hinder the exercise of the freedom of establishment.

40 According to well-established case-law, however, national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make them less

attractive may nevertheless be allowed if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain it (see, to that effect *de Lasteyrie du Saillant*, paragraph 49).

41 Concerning first the condition in relation to the satisfaction of an objective in the public interest, and the possibility of attaining it through the tax system in question, the national court observes that, having regard to the original circumstances of their adoption, the national provisions at issue in the main proceedings are designed, in particular, to allocate between Member States, on the basis of the territoriality principle, the power to tax increases of value in company holdings. According to the Netherlands Government, that legislation is also designed to prevent double taxation.

42 This Court finds that preserving the allocation of the power to tax between Member States is a legitimate objective recognised by the Court of Justice (see, to that effect, *Marks & Spencer*, paragraph 45). In addition, in accordance with Article 293 EC, Member States are to negotiate with each other, as necessary, with a view to securing for the benefit of their nationals the abolition of double taxation within the Community.

43 However, apart from Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10), no unifying or harmonising measure for the elimination of double taxation has yet been adopted at Community level, and Member States have not yet concluded any multilateral convention to that effect under Article 293 EC (see, to that effect, Case C?336/96 *Gilly* [1998] I-2793, paragraph 23, and *D*, paragraph 50).

44 It is in that context that the Court has already held that, in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (*Gilly*, paragraphs 24 and 30; Case C-307/97 *Saint?Gobain ZN* [1999] ECR I-6161, paragraph 57; Case C?385/00 *de Groot* [2002] ECR I-11819, paragraph 93; Case C-513/03 *van Hilten?van der Heijden* [2006] ECR I-1957, paragraphs 47 and 48).

45 In this area, it is not unreasonable for the Member States to find inspiration in international practice and, particularly, the model conventions drawn up by the Organisation for Economic Cooperation and Development (OECD) (*Gilly*, paragraph 31; *van Hilten-van der Heijden*, paragraph 48).

46 Thus, gains realised on the disposal of assets are taxed, in accordance with Article 13(5) of the OECD Model Tax Convention on Income and on Capital, and in particular in accordance with its 2005 version, in the contracting State of which the person making the disposal is a resident. As the Advocate General has observed in paragraphs 96 and 97 of her Opinion, it is in accordance with that principle of fiscal territoriality, connected with a temporal component, namely residence within the territory during the period in which the taxable profit arises, that the national provisions in question provide for the charging of tax on increases in value recorded in the Netherlands, the amount of which has been determined at the time the taxpayer concerned emigrated and payment of which has been suspended until the actual disposal of the securities.

47 It follows, first, that the measure at issue in the main proceedings pursues an objective in the public interest, and, secondly, that it is appropriate for ensuring the attainment of that objective.

48 Finally, it needs to be examined whether a measure such as that at issue in the main proceedings goes beyond what is necessary to attain the objective it pursues.

49 Whilst it was held in paragraph 38 of this judgment that the tax declaration demanded at the time of transfer of residence, necessary in order to calculate the tax on income, constitutes an administrative formality likely to hinder the exercise of fundamental freedoms by the person concerned or make such exercise less attractive, it cannot be regarded as disproportionate having regard to the legitimate objective of allocating the power of taxation, in particular for the purposes of eliminating double taxation between Member States.

50 Though it would have been possible not to determine the part of the tax going to the Member State of origin until after the event, at the date of the actual disposal of the securities, that would have involved obligations no less significant on the part of such a taxpayer. Apart from the tax declaration which the latter would have had to submit to the relevant Netherlands authorities at the time of the disposal of those securities, he would have had to keep all the documentary evidence for determining the market value of those securities at the time of transfer of his residence, and any costs which might be deductible.

51 On the other hand, the obligation to provide guarantees, necessary for the granting of a deferment of the tax normally due, whilst doubtless facilitating the collection of that tax from a foreign resident, goes beyond what is strictly necessary in order to ensure the functioning and effectiveness of such a tax system based on the principle of fiscal territoriality. There are methods less restrictive of fundamental freedoms.

52 As the Advocate General has observed in paragraph 113 of her Opinion, the Community legislature has already taken harmonisation measures, which essentially pursue the same goal. In particular, Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxes on insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004, allows a Member State to request from the compentent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax (Case C-55/98 *Vestergaard* [1999] ECR I?7641, paragraph 26; Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42).

53 Moreover, Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17), provides that a Member State may request the assistance of another Member State in the recovery of debts relating to certain taxes, including those on income and capital.

54 Finally, in order to be regarded in this context as proportionate to the objective pursued, such a system for recovering tax on the income from securities would have to take full account of reductions in value capable of arising after the transfer of residence by the taxpayer concerned, unless such reductions have already been taken into account in the host Member State.

55 The answer to the third and fifth questions must therefore be that Article 43 EC must be interpreted as precluding a Member State from establishing a system for taxing increases in value in the case of a taxpayer’s transferring his residence outside that Member State, such as the system at issue in the main proceedings, which makes the granting of deferment of the payment of that tax conditional on the provision of guarantees and does not take full account of reductions in value capable of arising after the transfer of residence by the person concerned and which were not taken into account by the host Member State.

The fourth question

56 In its fourth question, the national court essentially asks whether, in a situation such as that at issue in the main proceedings, release of the guarantee constituted for the purposes of obtaining deferment of the payment of tax on the increased value of securities amounts to retrospective lifting of all obstacles. It then asks whether the form of the document on the basis of which the guarantee was released has any impact on that assessment. Finally, it asks whether compensation is due in reparation of any damage that might thus have arisen.

57 As the Advocate General has observed in paragraph 128 of her Opinion, the constitution of guarantees is, generally speaking, not without its related costs. In particular, the deposit of company shares by way of security may reduce confidence in the solvency of their owner, to whom less favourable credit conditions might be applied. Thus, such consequences cannot be made good retroactively merely by releasing the guarantee.

58 It is moreover undisputed that the question concerning the form of the document on the basis of which the guarantee is released is of no relevance here.

59 As for the possibility of obtaining compensation for the damage arising from having to constitute a guarantee in order to be able to benefit from a deferment of payment of the tax in question, it is for the Member States, under the principle of cooperation laid down in Article 10 EC, to ensure the legal protection which individuals derive from the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions (principle of equivalence) nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, to that effect, Case 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727).

60 The Court of Justice has, furthermore, already held that it is for national law, observing the principles referred to above, to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated (Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 11 and 12; Case 130/79 *Express Dairy Foods* [1980] ECR 1887, paragraphs 16 and 17; and *Metallgesellschaft and Others*, paragraph 86).

61 The same must apply to a claim for payment of interest on arrears designed to compensate for costs which may have been incurred in the constitution of guarantees, given the similarities that exist between a restitution of taxes unduly levied and a release of guarantees demanded in breach of Community law.

62 Moreover, damage caused by the constitution of a guarantee demanded in breach of Community law is likely to engage the liability of the Member State which enacted the disputed measure.

63 As for the conditions under which a Member State is liable to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible, the case-law of the Court of Justice shows that there are three, namely that the rule of law infringed must have been intended to confer rights on individuals, that the breach must be

sufficiently serious, and that there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. Those conditions are to be applied according to each type of situation (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; Joined Cases C-178/94, C?179/94 and C-188/94 to C?190/94 *Dillenkofer and Others* [1996] ECR I?4845, paragraph 21; and Case C?424/97 *Haim* [2000] ECR I-5123, paragraph 36).

64 More particularly concerning the second condition, the Court has held that a breach of Community law will be sufficiently serious where, in the exercise of its legislative power, a Member State manifestly and gravely disregarded the limits on its discretion (*Factortame*, paragraph 55; *Dillenkofer*, paragraph 25) and that where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C?5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28).

65 In order to determine whether a breach of Community law is sufficiently serious, the national court hearing a claim for compensation must take account of all the factors which characterise the situation which is brought before it. Those factors include, in particular, the clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law (*Factortame*, paragraph 56; *Haim*, paragraph 43).

66 It should be noted in that respect that the rules of Community law concerned are provisions of the Treaty that were in force and directly applicable well before the facts in the main proceedings. However, at the time when the tax system in question entered into force, namely 1 January 1997, the Court of Justice had not yet given its judgment in *de Lasteyrie du Saillant*, in which it held for the first time that the obligation to constitute guarantees for the purpose of obtaining a deferment of payment of a tax on increases in the value of securities, in many respects similar to that at issue in the main proceedings, is contrary to the freedom of establishment.

67 The answer to the fourth question must therefore be that an obstacle arising from a requirement, in breach of Community law, that a guarantee be constituted cannot be raised with retroactive effect merely by releasing that guarantee. The form of the document on the basis of which the guarantee was released is immaterial to that assessment. Where a Member State makes provision for the payment of interest on arrears where a guarantee demanded in breach of national law is released, such interest is also due in the case of an infringement of Community law. Moreover, it is for the national court to assess, in accordance with the guidelines provided by the Court of Justice and in compliance with the principles of equivalence and effectiveness, whether the Member State is liable on account of the damage caused by the obligation to constitute such a guarantee.

The rules applicable to the reimbursement of costs

68 Although the operative part of the decision to refer mentions only the five questions dealt with above, it appears from the reference in that same decision to the judgment in *D*, cited above, that the national court effectively wants clarifications as to the compatibility of the Netherlands rules on the reimbursement of costs with Community law. That is one of the questions with which that court is confronted in the dispute in the main proceedings.

69 However, it is clear from the case-law that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court

define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, in particular, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 and 7; Case C?67/96 *Albany* [1999] ECR I-5751, paragraph 39; and Case C?176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 22).

70 The information provided in decisions making references must not only enable the Court to reply usefully but also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the EC Statute of the Court of Justice. It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the decisions making references are notified to the interested parties (see, in particular, the order in Case C?458/93 *Saddik* [1995] ECR I-511, paragraph 13, and the judgments in *Albany*, paragraph 40, and *Lehtonen*, paragraph 23).

71 In this case, those conditions are not complied with in relation to the rules applicable to the reimbursement of costs.

72 Under those circumstances, the question concerning those rules is inadmissible

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **A Community national, such as the applicant in the main proceedings, who has been living in one Member State since the transfer of his residence and who holds all the shares of companies established in another Member State, may rely on Article 43 EC.**

2. **Article 43 EC must be interpreted as precluding a Member State from establishing a system for taxing increases in value in the case of a taxpayer's transferring his residence outside that Member State, such as the system at issue in the main proceedings, which makes the granting of deferment of the payment of that tax conditional on the provision of guarantees and does not take full account of reductions in value capable of arising after the transfer of residence by the person concerned and which were not taken into account by the host Member State.**

3. **An obstacle arising from a requirement, in breach of Community law, that a guarantee be constituted cannot be raised with retroactive effect merely by releasing that guarantee. The form of the document on the basis of which the guarantee was released is immaterial to that assessment. Where a Member State makes provision for the payment of interest on arrears where a guarantee demanded in breach of national law is released, such interest is also due in the case of an infringement of Community law. Moreover, it is for the national court to assess, in accordance with the guidelines provided by the Court of Justice and in compliance with the principles of equivalence and effectiveness, whether the Member State is liable on account of the damage caused by the obligation to constitute such a guarantee.**

[Signatures]

* Language of the case: Dutch.