OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 26 January 1988 *

Mr President,
Members of the Court,

1. Case 260/86 is an action brought by the Commission for a declaration that the Kingdom of Belgium has failed to fulfil its obligations as regards certain rules governing the levying of a Belgian tax called 'précompte immobilier' (tax at source on income from immovable assets).

2. The tax on income from immovable assets is calculated on the basis of the cadastral income of the property to which it relates. The tax is payable by the owner of the property.

3. Reductions in the tax may be granted in certain circumstances depending on the social circumstances of the occupant of the property. Such is the case, for example, where the occupant is a war invalid, a handicapped person or the head of a family comprising at least two children.

4. Article 162 (6) of the Belgian Code des impôts sur les revenus (Income Tax Code), introduced in 1981, provides that the reductions in question may not be granted if a residence is occupied 'by a tenant who, either himself or on account of his spouse, is exempt from the tax on natural persons by virtue of international conventions'.

5. The Commission submits that by bringing that provision into force the Kingdom of Belgium has failed to fulfil its obligations under Article 7 of the EEC Treaty and under the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the European Communities (hereinafter referred to as 'the Protocol').

6. The Kingdom of Belgium has not formally submitted any conclusions. It has merely referred to a draft law which was submitted to the Chamber of Representatives on 4 May 1987 for the purpose of bringing the breaches of its obligations to an end. The following passage is to be found at page 17 of the statement of the reasons for the draft law:

'Article 162 (6) of the Code des impôts sur les revenus ... is incompatible with Article 7 of the Treaty establishing the European Economic Community, with the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the European Communities and with Articles 7 (2) and 9 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. Since our tax legislation may not include any discrimination on grounds of nationality, this article is intended simply to repeal the provision in question'.

7. The Belgian Government therefore accepts the objections raised by the Commission. However, the aforementioned draft law has not yet been approved by the Belgian Parliament.

8. In view of the common ground between the applicant and the defendant with regard to the substance of the case, it might be tempting to stop at this point and simply propose that the Court should declare the defendant in breach of its obligations.

9. However, before formally submitting that conclusion I feel compelled to raise some reservations with regard to some of the Commission's objections.

* Translated from the French.

I — Infringement of Article 7 of the EEC Treaty

10. The first provision of Community law which the Commission alleges was infringed is Article 7 of the EEC Treaty, which prohibits any discrimination on grounds of nationality.

11. However, the Commission confirmed at the hearing that Community officials having Belgian nationality do not obtain the reduction in the tax on income from immovable assets either. The criterion for the application of the provision at issue is not therefore the nationality of the persons concerned but the fact that they are Community officials.

12. In those circumstances I do not consider it possible to accept the charge that Article 7, nor, moreover, Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475), has been infringed. It follows from that regulation that a worker who is a national of another Member State must enjoy the same social and tax advantages as national workers (Article 7 (2)) as well as the rights and benefits accorded to national workers in matters of housing (Article 9 (1)). The regulation merely specifies, as regards a particular field, the consequences arising from Article 7.

13. Would it be possible, however, to rely in this connection on the Court's judgment in Case 152/82, *Forcheri*[1]? That judgment is certainly not immediately applicable to this case since it concerns a typical example of discrimination on grounds of nationality, namely a situation where Community officials of Belgian nationality enjoyed the same advantages as other Belgian citizens whilst only those Community officials of other nationalities suffered discrimination. Nevertheless, the judgment is interesting in that it states as follows:

'Moreover, although under the second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the European Communities [an official of the Communities] is exempt from national taxes on salaries, wages and emoluments paid by the Communities, he is liable on the other hand, under the first paragraph of the same article, to a tax for the benefit of the Communities on salaries, wages and emoluments from which the host Member State, as a member of the Communities, benefits indirectly. The fact that he does not pay a tax on his salary to the national Treasury is therefore not a valid reason for differentiating the case of the official and his family from that of the migrant worker whose income is liable to taxation by the State in which he resides' (paragraph 19 of the decision).

14. Community officials must therefore be treated in the same way as other migrant workers residing in the same country. The latter must be put on the same footing as national workers as regards social advantages.

15. For their part Community officials who are nationals of the country in which they perform their duties must not suffer discrimination in comparison with Community officials having a different nationality. Otherwise the uniform application of the rules which the Staff Regulations of Officials of the European Communities are intended to ensure for all the persons covered by them would be jeopardized. The Staff Regulations were

1 — Judgment of 13 July 1983 in Case 152/82 *Forcheri* v *Belgian State* [1983] ECR 2323.

laid down by Council Regulation No 259/68 of 29 February 1968; consequently, they possess all the characteristics set out in the second paragraph of Article 189 of the EEC Treaty and are, in particular, binding in their entirety and directly applicable in all the Member States (judgment of 20 October 1981 in Case 137/80 *Commission* v *Belgium*, [1981] ECR 2393, paragraph 7 of the decision at p. 2406).

16. It may therefore be concluded on the basis of that reasoning alone that the exemption from national taxes from which Community officials benefit regardless of their nationality cannot constitute a valid reason for refusing them certain advantages which are granted to other persons residing in the same Member State. However, this reasoning has the defect of taking a circuitous route by taking into consideration the principle of non-discrimination on grounds of nationality laid down in Article 7 of the EEC Treaty in conjunction with the principle of equality of treatment of all Community officials, whereas the provision at issue contains no reference to nationality. In fact it is possible to arrive at the same result by a more direct route by referring to the second paragraph of Article 13 of the Protocol. That is what I would now like to demonstrate.

II — Infringement of the second paragraph of Article 13 of the Protocol

17. The second paragraph of Article 13 of the Protocol provides that officials and other servants 'shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities'.

18. Although the Commission alleged in its reasoned opinion and in its application that this provision had been infringed, it stated in its reply to the questions put by the Court (second paragraph of point 3 on p. 5) that it 'did not proceed from the assumption that the refusal to grant reductions in the tax on income from immovable assets in cases where the tenant is an official or other servant of the Communities constitutes a direct tax on the Community income of such an official or other servant and therefore infringes the second paragraph of Article 13 of the Protocol.'

19. One can only share that point of view. Although the non-reduction in the tax on income from immovable assets certainly imposes a charge on the income of an official, it does not, however, amount to a 'national tax on salaries, wages and emoluments paid by the Communities' since the taxable amount is the cadastral income from the property.

20. It is no less true that, according to Article 162 (6) of the Belgian Code des impôts sur les revenus, a Community official who is a tenant of property is excluded from benefiting from a reduction in the tax solely because he is 'exempt from the tax on natural persons'. That exemption is therefore the legal reason for refusing to grant a reduction in the tax on income from immovable assets.

21. In its judgment of 16 December in Case 6/60 *Humblet* v *Belgian State* [1960] ECR 559, at pp. 574 and 575) the Court stated as follows with regard to Article 11 (b) of the Protocol on the Privileges and Immunities of the European Coal and Steel Community:

'In fact the words "shall be exempt from any tax[2] on salaries" indicate clearly and unambiguously exemption from any fiscal charge based directly or indirectly on the exempted remuneration.

2 — At that time, the tax levied for the benefit of the Communities still did not exist.

Against this it may not be contended that the term "on salaries" justifies the converse argument that Article 11 does not prevent the taxation of other income at a higher rate by reason of the remuneration in question.

Such taxation would be contrary to the exemption provided by Article 11 since the Community salary, which is exempt from all taxation, would even in this case constitute the legal basis of the taxation in question'.

In the operative part of the judgment the Court ruled that the ECSC Protocol 'prohibits the Member States from imposing on an official of the Community any taxation whatsoever which is based in whole or in part on the payment of the salary to that official by the Community'.

22. In the case before the Court the situation is not precisely the same because the salary paid by the Communities is not taken into account, as it was in the *Humblet* case, in order to justify a higher rate of taxation on the other income of officials. In this case, the charge (that is to say the difference between the reduced rate and the normal rate of tax) is not brought about by the level of salary in question but solely by the fact that the salary is exempt from national taxes.

23. Nevertheless, I regard the *Humblet* judgment relevant in this case because it confirms the principle that the salary paid by the Communities should not be taken into account in any manner whatsoever by the tax authorities of the Member States.

24. It may therefore be concluded that Article 162 (6) of the Belgian Code des impôts sur les revenus is incompatible with the second paragraph of Article 13 of the Protocol. It partly deprives the latter provision of its effectiveness.

III — Article 14 of the Protocol

25. Article 14 of the Protocol provides in essence that, in the application of income tax, wealth tax and death duties, officials of the Communities are to be considered as having maintained their domicile for tax purposes in their country of origin.

26. As far as this provision is concerned, it is remarkable that the Commission complains solely of the fact that officials do not benefit from any reductions in the tax on income from immovable assets; it therefore implicitly accepts that in principle they may be liable to the tax (if they are property owners) or that the tax may be levied on them indirectly (if they are tenants). It may therefore be assumed that in the Commission's view the tax on income from immovable assets does not fall within one of the categories of taxes referred to in Article 14. If that is so, there appears to be no reason why the refusal to grant a reduction would constitute an infringement of that provision.

27. It follows from the foregoing observations that it is necessary to declare that the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 13 of the Protocol.

28. Is it also necessary to declare, as the Commission has requested, that Belgium has also specifically failed to fulfil its obligations by failing to provide for the reimbursement of sums wrongly paid by the officials concerned?

29. In my view, such a declaration is not necessary because once the Court has found that there has been a breach of the aforementioned obligation it will be for the Belgian Government to take all the measures necessary to comply with the Court's judgment, pursuant to Article 171 of the EEC Treaty.

30. It may, however, be noted at this point that it is clear from the provisions of the draft law put before the Chamber of Representatives that the Belgian Government has the intention of granting the reimbursement in question. In any event, it is not possible at this stage to declare that Belgium has failed to fulfil its obligations in this respect.

Conclusion

31. In summary I propose that the Court should declare that by adopting and applying Article 162 (6) of the Code des impôts sur les revenus, which provides that certain reductions in the tax on income from immovable assets are not to be granted where a residence is occupied by a tenant who, either himself or on account of his spouse, is exempt from the tax on natural persons by virtue of international conventions, the Kingdom of Belgium has failed to fulfil its obligations under the second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the European Communities.

32. Even though all the Commission's complaints should not, in my view, be accepted, nevertheless the application should be granted in substance. It has, in fact, not been contested by Belgium. Consequently, it is justified to order the defendant Member State to bear the costs.