JUDGMENT OF THE COURT (Sixth Chamber)
28 October 1999 *

In Case C-55/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Højesteret (Supreme Court), Denmark for a preliminary ruling in the proceedings pending before that court between

Skatteministeriet

and

Bent Vestergaard

on the interpretation of Articles 6 and 59 of the EC Treaty (now, after amendment, Articles 12 EC and 49 EC),

THE COURT (Sixth Chamber),

composed of: R. Schintgen (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn and G. Hirsch, Judges,

* Language of the case: Danish.

Advocate General: A. Saggio,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Skatteministeriet, by P. Biering, Advocate, Copenhagen,

— Mr Vestergaard, by T.V. Christiansen, Advocate, Åbyhøj,

— the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by H.P. Hartvig, Legal Adviser, and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Danish Ministry of Fiscal Affairs, represented by P. Biering, of Mr Vestergaard, represented by L. Henriksen, Advocate, Åbyhøj, and of the Commission, represented by H.P. Hartvig, at the hearing on 11 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1999,

gives the following

Judgment

1 By order of 18 February 1998, received at the Court on 24 February 1998, the Højesteret (Supreme Court), Denmark, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 6 and 59 of the EC Treaty (now, after amendment, Articles 12 EC and 49 EC).

2 The questions have been raised in proceedings between the Danish Skatteministeriet (Ministry of Fiscal Affairs) and Mr Vestergaard concerning the refusal of the Ministry to allow expenses incurred by Mr Vestergaard in taking part in professional training courses held abroad to be deducted as operating costs from the taxable income of the company Bent Vestergaard A/S, of which Mr Vestergaard is the sole shareholder.

Danish law

3 In Denmark, Article 4 of the Statsskatteloven (State Law Tax) No 149 of 10 April 1922 (hereinafter 'the 1922 Law') provides that income, in the form of money or goods evaluable in money, is liable to tax.

4 Article 6 of the 1922 Law provides:

'(1) The following are to be deducted from taxable income:

(a) operating costs, that is expenses which, during the course of the year, have been incurred with a view to acquiring, ensuring or maintaining income, including ordinary depreciation;

...

(2) The fiscal income is taxable irrespective of the manner in which it is used, whether it is for personal or family purposes, the purchase of services, benefits or leisure, to increase assets, improve property, extend a business or a company, for savings or funds of the same type, for gifts or in any other way.'

5 The operating costs which are deductible under Article 6(1)(a) of the 1922 Law are defined by administrative practice and case-law. Thus, the guidelines produced by the Danish Ministry of Fiscal Affairs for the 1988 tax year stated:

'Expenditure relating to participation in professional courses is deductible in the case of courses intended to maintain and update the professional knowledge and training of participants ...

In the case where a professional conference or course is transferred to a foreign country (generally ordinary tourist resorts), this will have the effect of setting aside the right to deduct, unless the travel destination/course location can as such be treated as justified on professional grounds.'

6 In the guidelines covering tax years after the year in question in the main proceedings, such as 1996, the following statement also appears:

'It is thus presumed that the holding of the course in a foreign tourist resort involves such a significant tourism element that the course expenditure cannot be regarded as constituting deductible operating costs.'

7 The file shows that this statement was added as a result of judgments of the Vestre Landsret (Western Regional Court) of 17 April 1984 and 8 October 1984, published in the *Tidsskrift for Skatteret* 1984, Nos 238 and 471 respectively, which were subsequently upheld by the Højesteret in a judgment of 19 October 1994, published in the *Ugeskrift for Retsvæsen* 1994, p. 970. In its order for reference, the national court states in this regard:

'When a course is held in an ordinary tourist resort abroad, and this location cannot be justified as such on professional grounds, there is a presumption that the course involves such a significant tourism element that the course expenditure cannot be regarded as constituting deductible operating costs.

This presumption can be rebutted through information concerning, in particular, the content and duration of the course in relation to the duration of the stay ...

When the course is held in an ordinary tourist resort in Denmark, this presumption does not exist.

There is no case-law, whether in the form of judicial rulings or decisions taken by administrative authorities, to the effect that the right to deduct in connection with the participation in courses held in Denmark should be set aside on the grounds that a course was held in an ordinary tourist resort.'

The facts and the main proceedings

8 Mr Vestergaard is a certified auditor and employed by the company Bent Vestergaard A/S which is an auditing company, of which he is the sole shareholder.

9 From 3 to 10 October 1988 Mr Vestergaard attended a tax training course on the island of Crete. It was organised solely for Danish participants by a firm of Danish auditors in conjunction with a travel agency. Out of the seven days spent in Greece, three whole days and two half days were devoted to the course.

10 The costs relating to Mr Vestergaard's participation in the course, his travel and accommodation, amounting to DKK 5 516, were paid by the company Bent Vestergaard A/S. Mr Vestergaard's wife accompanied him on the trip and at the hotel, for which she paid a sum of DKK 3 700 privately.

11 By decision of 29 June 1993, the Landsskatteretten (National Tax Tribunal) decided that the expenses relating to Mr Vestergaard's participation in the course on Crete should be treated as a salary bonus paid to him as sole shareholder in the company Bent Vestergaard A/S and could not therefore be deducted from his taxable income under Article 6(1)(a) of the 1922 Law.

12 Mr Vestergaard instituted proceedings against this decision before the Vestre Landsret (Western Regional Court), which, by judgment of 3 May 1995, found that he had succeeded in overturning the presumption that the course had such a significant tourism element that the costs could not be regarded as deductible operating costs and that, consequently, the tax administration was wrong in treating the costs of the course as a salary bonus for Mr Vestergaard.

13 The Skatteministeriet appealed against the judgment of the Vestre Landsret to the Højesteret. When a new argument, that the taxation of the course fees in question as a salary bonus was incompatible with Articles 6 and 59 of the Treaty, was raised by Mr Vestergaard before the national court, it decided to stay proceedings and to submit the following two questions to the Court for a preliminary ruling:

'(1) Is it in accordance with Articles 6 and 59 of the EC Treaty for Danish case-law (see the judgment of the Højesteret of 19 October 1994, published in the *Ugeskrift for Retsvæsen* 1994, p. 970) to apply a presumption that, in cases in which a course is held in an ordinary tourist resort outside Denmark, and the course location cannot, as such, be justified on professional grounds, the course involves such a significant tourism element that the costs relating to the course cannot be treated as constituting deductible operating costs?

(2) If the answer is in the negative, can the position in domestic tax law, as described above ..., be justified by reference to the case-law of the Court of Justice, in particular Case C-204/90 *Bachmann* v *Belgium* and Case C-250/95 *Futura Participations and Singer* v *Administration des Contributions*?'

The questions referred for a preliminary ruling

14 By its two questions, which can be examined together, the national court asks essentially whether Articles 6 and 59 of the Treaty preclude rules of a Member State which, for the purposes of determining taxable income, presume that professional training courses held in ordinary tourist resorts located in other Member States involve such a significant tourism element that the costs involved in taking part in those courses cannot be treated as deductible operating costs, while such a presumption does not exist for training courses held in ordinary tourist resorts located within the territory of that Member State.

15 It must be observed first of all that, although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law (see, in particular, Case C-118/96 *Safir* [1998] ECR I-1897, at paragraph 21).

16 Secondly, according to settled case-law, the first paragraph of Article 6 of the Treaty, which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific rule against discrimination (see, in particular, Case C-22/98 *Becu and Others* [1999] ECR I-5665, at paragraph 32).

17 With regard to freedom to provide services, this principle is given specific expression and effect by Article 59 of the Treaty. There is therefore no need to rule on the interpretation of Article 6 of the Treaty.

18 Thirdly, it is important to point out that in order for services such as those in question in the main proceedings, namely the organisation of professional training courses, to fall within the scope of Article 59 of the Treaty, it is sufficient for them to be provided to nationals of a Member State on the territory of another Member State, irrespective of the place of establishment of the provider or recipient of the services.

19 Article 59 of the Treaty applies not only where a person providing a service and the recipient are established in different Member States, but also whenever a provider of services offers those services in a Member State other than the one in which he is established (see Case C-381/93 *Commission* v *France* [1994] ECR I-5145, at paragraph 14), wherever the recipients of those services may be established (see Case C-398/95 *SETTG* [1997] ECR I-3091, at paragraph 8).

20 In addition, the right to exercise freedom to provide services includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions (see, in particular, Case C-224/97 *Ciola* [1999] ECR I-2517, at paragraph 11).

21 As regards the question whether the rules of a Member State, such as at issue in the main proceedings, contains a restriction prohibited under Article 59 of the Treaty, it must be observed that, by making the right to deduct costs relating to participation in professional training courses held in an ordinary tourist resort abroad conditional upon the rebuttal, by the taxpayer, of a presumption that such courses involve such a significant tourism element that the costs cannot be treated as deductible operating costs, while such a presumption does not exist for courses

held in ordinary tourist resorts located in the said Member State, those rules subject the provision of services constituted by the organisation of professional courses to different tax arrangements depending on whether the services are provided in other Member States or in the Member State concerned.

22 Rules of a Member State which, like those in question in the main proceedings, make it more difficult to deduct costs relating to participation in professional training courses organised abroad than to deduct costs relating to such courses organised in that Member State involve a difference in treatment, based on the place where the service is provided, prohibited by Article 59 of the Treaty.

23 Such a difference in treatment is not justified by the need to preserve the cohesion of a tax system nor by the effectiveness of fiscal supervision, which, in the judgments in, respectively, *Bachmann* (Case C-204/90 [1992] ECR I-249) and *Futura Participations and Singer* (Case C-250/95 [1997] ECR I-2471), mentioned by the referring court, have been recognised as capable of justifying the regulations and thus restricting the fundamental freedoms guaranteed by the Treaty.

24 In the cases which led to the judgment in *Bachmann*, cited above, and to the judgment delivered on the same day in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, there was a direct link between the deductibility of contributions and the taxation of sums payable by insurers under pension and life assurance contracts, and that link had to be maintained to preserve the cohesion of the tax system in question (see C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, at paragraph 18; Case C-107/94 *Asscher* [1996] ECR I-3089, at paragraph 58, and Case C-264/96 *ICI* [1998] ECR I-4695, at paragraph 29). In the present case, as the Advocate General observes in

paragraph 39 of his Opinion, there is no such direct link between any taxation and the deductibility of costs relating to participation in professional training courses.

25 Furthermore, while a Member State may, in the interests of the effectiveness of fiscal supervision, apply measures which allow the amount of costs deductible in that State as operating costs to be ascertained clearly and precisely, and in particular those incurred in taking part in professional training courses (see *Futura Participations and Singer,* cited above, at paragraph 31, and Case C-254/97 *Baxter and Others* [1999] ECR I-4809, at paragraph 18), it cannot however provide any justification for that Member State to make the deduction subject to different conditions according to whether the courses take place in that State or in another Member State.

26 In that regard, it should be remembered that 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 (OJ 1977 L 336, p. 15) can be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer himself to produce the proof which they consider necessary to assess whether or not the deduction requested should be allowed (see *Bachmann* and *Commission* v *Belgium,* cited above, at respectively paragraphs 18 and 20 and paragraphs 11 and 13).

27 The Skatteministeriet argues that the exchange of information between national tax authorities provided for by Directive 77/799 is not sufficient to enable them to resolve problems which, like those in the instant case, would require an assessment, in particular, of the nature of the training in question and its duration in relation to the duration of the stay, having regard to the rules and case-law of the Member State to which those authorities belong.

28 However, it should be emphasised that the information which Directive 77/799 allows the competent authorities of a Member State to request is in fact all the information which appears to them to be necessary to ascertain the correct amount of revenue tax payable by a taxpayer in relation to the legislation which they have to apply themselves (see, to this effect, *Futura Participations and Singer*, at paragraph 41) and that the directive does not in any way affect the competence of those authorities to assess in particular whether the conditions to which that legislation subjects the deduction of certain costs are fulfilled.

29 The answer to be given to the questions submitted must therefore be that Article 59 of the Treaty precludes a Member State from having rules which, for the purposes of determining taxable income, presume that professional training courses held in ordinary tourist resorts located in other Member States involve such a significant tourism element that the costs of taking part in those courses cannot be treated as deductible operating costs, while such a presumption does not exist in the case of professional training courses held in ordinary tourist resorts located within the territory of that Member State.

Costs

30 The costs incurred by the Netherlands Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Højesteret by judgment of 18 February 1998, hereby rules:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) precludes a Member State from having rules which, for the purposes of determining taxable income, presume that professional training courses held in ordinary tourist resorts located in other Member States involve such a significant tourism element that the costs of taking part in those courses cannot be treated as deductible operating costs, while such a presumption does not exist in the case of professional training courses held in ordinary tourist resorts located within the territory of that Member State.

Schintgen Kapteyn Hirsch

Delivered in open court in Luxembourg on 28 October 1999.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber