OPINION OF ADVOCATE GENERAL ALBER

delivered on 19 November 1998 *

A — Introduction

1. This reference for a preliminary ruling raises the question of the compatibility with Community law of a Greek tax provision [1] under which foreign companies are always subjected to a tax rate of 40% whereas domestic public limited companies are taxed not at 40% but 35% if they issue registered shares or their bearer shares are quoted on the Athens Stock Exchange.

2. The plaintiff in the main proceedings, the Royal Bank of Scotland plc (hereinafter 'the plaintiff'), is established in Britain and operates a branch in Piraeus (Greece). A dispute has arisen over the taxation of that branch for the financial year 1995 (accounting period 1 October 1994 to 30 September 1995).

3. The tax was calculated in accordance with the Greek Income Tax Code, Part II of which governs the taxation of the income of legal persons. Article 109(1) of the Code lays down the tax rates as follows:

'1. Tax shall be calculated on the total taxable income of the legal person liable to tax at tax rates to be determined, according to the category of the taxpayer, as follows:

(a) in respect of domestic public limited companies the shares of which, at the end of the accounting period, are bearer shares not quoted on the Athens Stock Exchange, and in respect of foreign companies and organisations operating with a view to profit, forty per cent (40%),

(b) in respect of other domestic public limited companies, thirty-five per cent (35%). Where domestic public limited companies have registered and bearer shares not quoted on the Athens Stock Exchange, the tax rate under (a) shall be charged on that part of the profits which corresponds to the number of existing bearer shares. In order to determine that part of the profits, the total net profit shall be apportioned in accordance with the number of registered and bearer shares appearing in

* Original language: German.

1 — Article 109(1) of the Greek Income Tax Code (Law No 2238/1994, *Official Journal of the Hellenic Republic No 151 Vol. A*).

the books at the end of the accounting period,

(c) in respect of other legal persons referred to in Article 101, thirty-five per cent (35%).'

4. The plaintiff was subjected to a tax rate of 40% on the basis of that provision. It added to its 1995 income tax declaration a reservation claiming that it should have been taxed at a rate of only 35% as is the case with Greek banks. In support of its claim it relied *inter alia* on Article 52 of the EC Treaty.

5. The reservation was rejected by an administrative decision with reference to the existing legal situation. The plaintiff brought an action against that decision.

6. The referring court, the Diikitiko Protodikio (Administrative Court of First Instance), Piraeus, states that Article 109(1)(a) of the Income Tax Code provides for tax treatment of foreign public limited companies which departs fundamentally from the provisions contained in Articles 7 [2] and 52 of the Treaty. That provision introduces differential tax treatment for public limited companies according to (a) whether or not they are quoted on the Athens Stock Exchange, and (b) the type of their shares, whereas all foreign companies are subject, without exception, to heavier taxation at 40%. The special tax treatment of domestic companies results in a reduction in the cost burden on those undertakings and the acquisition by them of competitive advantages over foreign undertakings and thus to a subsequent distortion of competition.

7. The referring court has referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 109(1)(a) of the Greek Income Tax Code (Law No 2238/1994, *Official Journal of the Hellenic Republic No 151A*), which in applying a tax rate of 40% to the taxable income of foreign companies imposes on foreign companies a different heavier tax charge than on domestic companies, to which a tax rate of 35% is applied, permissible under Community law and, in particular, is it in conformity with Articles 7 and 52 of the Treaty? In other words, is the Greek State entitled to impose that differential tax treatment on foreign companies?'

8. The plaintiff, the Greek and French Governments and the Commission have intervened in the proceedings. I will return to the

2 — Now Article 6 of the EC Treaty.

submissions of the intervening parties when I make my legal assessment.

B — Opinion

9. The *plaintiff* claims that Article 109(1) of the Greek Income Tax Code provides for prohibited unequal treatment between domestic and foreign companies. Whereas domestic public limited companies must be differentiated from one another in accordance with the form of the shares which they issue, and may consequently enjoy the more favourable tax rate if they issue registered shares or bearer shares quoted on the Athens Stock Market, all foreign companies are subjected, under Article 109 of the Greek Income Tax Code, to the higher tax rate, irrespective of the legal form which they have chosen and the type of the shares which they issue.

10. The plaintiff maintains that the unequal treatment in the banking sector is reinforced by the fact that Laws Nos 2190/1920 and 5076/1931 provide that Greek banks must be constituted in the form of a public limited company issuing registered shares. Therefore, Greek banks are *always* taxed at 35% and foreign banks are always taxed at 40%.

11. It maintains that it must be assumed from the structure of the provisions that the more favourable taxation of Greek companies is the norm and taxation at 40% the exception.

12. The plaintiff considers that Article 109(1) of the Greek Income Tax Code infringes the general principle of equality contained in Article 6 of the Treaty and Article 52 thereof. That unequal treatment restricts, in a manner that is prohibited, the freedom of establishment exercised in setting up secondary establishments in the form of agencies, branches or subsidiaries.

13. The plaintiff relies on the judgments of the Court of Justice in Case 270/83 *Commission* v *France* [3] and Case C-1/93 *Halliburton Services*. [4]

14. The *Greek Government* refers, first, to the complementary relationship between Articles 48, 52 and 59 of the Treaty, on the one hand, and Article 6 thereof on the other, and submits that, within the scope of Articles 48, 52 and 59, Article 6 is no longer relevant. The Greek Government then states that freedom of establishment in accordance with Article 52 of the Treaty, read in conjunction with Article 58, also applies to companies and, in accordance with settled case-law, that the seat of the company determines its nationality. It maintains that in those circumstances and

3 — [1986] ECR 273.

4 — [1994] ECR I-1137.

having regard to the observations below, the question referred to the Court of Justice should be worded differently.

15. In its view, it must be assumed that the rule is that the basic tax rate for public limited companies is 40%. According to figures provided by the Ministry of Finance, 80% of public limited companies are taxed at that rate. The vast majority of public limited companies do not issue shares quoted on the stock market since an initial capital of GRD 10 million is required to set up a public limited company and a public limited company has to have share capital and reserves of GRD 1 billion to be quoted on the stock market. The more favourable taxation of public limited companies quoted on the stock exchange is justified by the aim of promoting economic development. Therefore, the question referred for a preliminary ruling should read as follows:

The Court of Justice is requested to give judgment on the compatibility with Articles 52 and 58 of the Treaty of Article 109(1)(a) of Law No 2238/1994 which imposes on foreign public limited companies a rate of taxation of 40% of their taxable income, as it does on domestic public limited companies, which may, however, by way of exception, enjoy a more favourable tax rate of 35%.

16. It maintains that, in answering that question, it must be remembered that matters of direct taxation do not fall within the scope of Community law as it stands at present. Nevertheless, in accordance with the case-law of the Court of Justice, Member States must exercise their direct taxation powers in accordance with Community law in such a way as to avoid any overt or covert discrimination. [5]

17. It considers that, since there is no harmonisation with regard to matters of direct taxation, it is for each Member State to define taxable income and lay down tax rates. In those circumstances, the tax rate of 40% poses no problem and in particular does not constitute discrimination on grounds of nationality.

18. Even if the possibility of lower taxation were to be considered to constitute covert discrimination, it would, in any event, be justified. The position of residents differs a priori from that of non-residents. Therefore, no objection can be raised to the granting of tax benefits only to residents. Under the principles of double-taxation agreements, it is for the country in which the taxpayer is resident to decide whether or not to grant tax benefits to residents. Finally, the differential treatment of foreign and domestic companies is also justified because the definition of taxable income differs from the outset (see Article

5 — Judgment in case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, at paragraph 19; judgment in Case C-279/93 *Schumacker* [1995] ECR I-225, at paragraph 21; judgment in Case C-80/94 *Wielockx* [1995] ECR I-2493, at paragraph 16, and judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, at paragraph 36.

99(1)(a) to (d) of the Greek Income Tax Code) [6] and the differential determination of the tax rates is simply a consequence thereof.

19. The Greek Government proposes that the reworded question referred for a preliminary ruling should be answered as follows:

'As Community law stands on matters of direct taxation, Articles 52 and 58 of the Treaty do not prohibit a Member State from subjecting foreign public limited companies to the same tax rate as is normally applied to domestic public limited companies without allowing them to enjoy the reduced tax rate, applied by way of an exception, to certain domestic public limited companies.'

20. The *French Government* also proposes rewording the question referred for a preliminary ruling but to the effect that the Court of Justice is requested to give judgment on the compatibility of a provision such as Article 109 of the Greek Income Tax Code with Articles 6 and 52 of the Treaty, since it is not for the Court of Justice to rule on the compatibility with Community law of a particular national rule in proceedings for a preliminary ruling brought under Article 177.

21. Furthermore, the French Government refers to the complementary relationship between Articles 6 and 52 of the Treaty. It maintains that, as *lex specialis*, Article 52 takes precedence over Article 6 of the Treaty. Article 6 no longer applies within the scope of Article 52.

22. As regards the definition of the content of Article 52 of the Treaty, the French Government states that that provision establishes the principle of equality of national treatment. Consequently, it prohibits any discrimination on grounds of nationality. As the Court of Justice has consistently held, discrimination is characterised by the application of different provisions to objectively comparable situations or the application of the same provision to different situations.

23. It considers that Article 109 of the Greek Income Tax Code provides for different tax rates for Greek companies depending on their

6 — Under Article 99(1)(a) and (d) of the Greek Income Tax Code, the following are subject to tax:
(a)in the case of Greek public and private limited companies, with the exception of banking institutions and insurance companies, on the total net income or profits earned in Greece or abroad ... In the case of Greek banking institutions and insurance companies, on the total net income or profits earned in Greece or abroad, after deduction of the portion corresponding to non-taxable receipts or to income subject to special tax entailing extinction of the tax debt.
(d)in the case of foreign undertakings carrying on business in Greece under any form of company and foreign organisations of whatever type, operating with a view to profit, on the net income or profit arising from any source in Greece and on the net profit arising from the permanent establishment of the undertaking in Greece, within the meaning of Article 100.

legal form whereas it always subjects foreign companies to the higher tax rate regardless of their legal form. The difference in treatment is based solely on the nationality of the company liable to tax (the nationality of a company liable for tax being, in accordance with Article 58 of the Treaty, the country in which it was formed). The French Government complains that the fact that foreign companies satisfied all the conditions that Greek companies are required to satisfy to qualify for the lower tax rate is completely disregarded. Therefore, a national provision which imposes a tax rate of 40% on the profits of a foreign company, even though it satisfies the criteria applied to a domestic company to qualify for the lower tax rate of 35%, clearly infringes Article 52 of the Treaty.

24. However, it maintains that there is no discrimination where the foreign company is in a situation objectively comparable to that of a domestic company taxed at 40%. The French Government puts forward certain observations on the comparability of the situations. It considers that the criteria 'public limited company' and 'bearer shares' are not in themselves discriminatory. However, that is not the case as regards the criterion of quotation on the Athens Stock Market. To satisfy that criterion it should be sufficient for the shares of the company to be quoted on the stock market of any Member State.

25. The French Government proposes that the Court should reply as follows to the question referred to it for a preliminary ruling:

'Article 52 of the Treaty precludes the application of a national provision such as Article 109 of the Greek Income Tax Code which subjects the companies of other Member States to a higher tax rate than domestic companies which are in an objectively comparable situation, in particular in terms of their legal form.'

26. If the Court of Justice considers that greater clarification of the facts in the main proceedings is necessary, the French Government proposes that it should also reply as follows:

'A company whose shares are quoted on the stock market of a Member State must be considered to be in a situation comparable to that of a domestic company whose shares are quoted on the stock market of the country in which it is established.'

27. In its written observations the *Commission* puts forward a more qualified view. It considers that Article 52 of the Treaty governs a fundamental freedom and prohibits both overt and covert discrimination. In that respect, the linkage to place of residence could constitute covert discrimination. Although differential treatment according to the seat of a company could, in certain circumstances, be permitted under Community law, objective limits are imposed in that respect.

28. It states that the plaintiff maintains a permanent establishment in Greece whose taxable income is determined in the same way as that of Greek companies. Consequently, Article 109 of the Greek Income Tax Code contains both overt and covert discrimination. Since foreign companies are excluded completely from the application of the more favourable tax rate of 35%, Article 109 of the Greek Income Tax Code constitutes overt discrimination. Moreover, Article 109(1) of the Greek Income Tax Code provides for overt discrimination in that it lays down a tax rate of 40% 'in respect of domestic public limited companies the shares of which, at the end of the accounting period, are bearer shares not quoted on the Athens Stock Exchange, and in respect of foreign companies and organisations operating with a view to profit'. That is because that tax rate is never applied to domestic banks — since domestic public limited companies in the banking sector are required to issue registered shares — whereas foreign banks are always subject to it.

29. In its case-law [7] relating to the differential taxation of residents and non-residents, the Court of Justice has ruled that non-residents must also be allowed to enjoy tax benefits where, apart from the residence criterion, they are in an identical situation for tax purposes. Therefore, in this case there is no justification for unequal treatment. Consequently, the Commission proposes that the Court should reply as follows to the question referred for a preliminary ruling:

'A national provision which, for the purpose of taxing profits, treats Greek and foreign companies equally with regard to the determination of taxable income but does not grant to the latter companies the more favourable tax rate of 35% — even under the same conditions as those which apply to companies with their seat in Greece — is incompatible with Article 52 of the Treaty.'

30. During the hearing the Commission would make no distinction at all between overt and covert discrimination. It maintained that, even though no harmonisation of direct taxation had yet taken place, the Member States should not subject the fundamental freedom at issue to any restriction. In this case, there is no justification for the unequal treatment and therefore Article 52 has been infringed.

7 — Case C-279/93 *Schumacker* (quoted in footnote 5, at paragraphs 36 to 38); see also Case C-107/94 *Asscher* (also quoted in footnote 5).

31. It is not disputed that Article 52 of the Treaty is a particular expression of the general principle of equality laid down in Article 6 of the Treaty, as is confirmed by the well-established case-law of the Court of Justice. [8] Consequently, Article 52 prevails over Article 6. Therefore, Article 6 is not applicable within the scope of Article 52.

32. In answering the question referred to the Court for a preliminary ruling it must, of course, be borne in mind that the Court of Justice does not, in such proceedings, rule on whether or not a national provision is incompatible with Community law. Instead, it provides the referring court with all the criteria necessary to determine whether or not a national provision is compatible with Community law. Therefore, the question referred must be reworded. Such a step is permitted under the case-law of the Court of Justice. [9] Consequently, the observations below are intended to answer the question worded as follows:

Is a provision such as Article 109(1)(a) of the Greek Income Tax Code (Law No 2238/1994, *Official Journal of the Hellenic Republic No 151A*), which, by applying a 40% tax rate to their taxable income, imposes a heavier tax burden on foreign companies than on domestic companies to which a tax rate of 35% is applied, compatible with Article 52 of the Treaty?

33. Article 52 embodies one of the four fundamental freedoms established by the Treaty. In conjunction with Article 58 of the Treaty, it guarantees legal persons freedom of establishment within the Community. That freedom is enjoyed by companies formed in accordance with the laws of a Member State and having their registered offices, central administration or principal place of business within the Community. The seat of a company, thus defined, is decisive in determining whether it may be ascribed to a particular legal system in the same way that nationality is in respect of physical persons.

34. In accordance with the second sentence of the first paragraph of Article 52, that freedom may be exercised by the setting up of agencies, branches or subsidiaries. In accordance with the second paragraph of Article 52, freedom of establishment includes in principle the right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected. Therefore, equal national treatment is a basic characteristic of the rule directly applicable since the end of the transitional period [10] and an important part of the freedom of establishment itself.

8 — Judgment in Case 305/87 *Commission* v *Greece* ([1989] ECR 1461, at paragraphs 12 and 13); to this effect, see also the judgment in Case C-330/91 *Commerzbank* [1993] ECR I-4017, at paragraph 21, and the judgment in Case C-1/93 *Halliburton Services* (quoted in footnote 4, at paragraph 12).

9 — See, to this effect, the early judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585 and the judgment in Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487, at paragraph 3.

10 — See the judgment in Case 270/83 *Commission* v *France* (quoted in footnote 3, at paragraph 13).

35. Therefore, if a national provision relating to the taxation of legal persons imposes a tax rate of 40% 'in respect of *domestic public limited companies* the shares of which, at the end of the accounting period, are bearer shares not quoted on the Athens Stock Exchange, and in respect of *foreign companies* and organisations operating with a view to profit', [11] but 35% 'in respect of *other domestic public limited companies*', [12] it is laying down overtly unequal treatment between domestic and foreign public limited companies. Foreign companies are always subject to a tax rate of 40% whereas domestic public limited companies are taxed at 35% where they do not satisfy a particular criterion (bearer shares not quoted on the Athens Stock Exchange at the end of the accounting period).

36. It is clear from the parties' submissions that they differ as to whether taxation at 35% constitutes the norm and 40% the exception, or vice versa. Whereas the plaintiff considers that the tax rate of 35% constitutes the norm, the Greek Government insists that the tax rate of 40% is the norm and taxation at 35% the exception.

37. That difference of opinion may be left unresolved in determining whether or not objectively unequal treatment is accorded to domestic and foreign companies. It is established that foreign companies do not have access to the more favourable tax rate. Therefore, the issue does not turn on the percentage of Greek public limited companies that effectively benefit from the more favourable tax rate. The reality of the situation appears to be that all Greek companies in the banking sector enjoy the more favourable tax rate because by law they must satisfy conditions [13] which remove them from the category of domestic public limited companies liable to tax at 40%.

38. Since the Greek legislature has chosen a form of direct unequal treatment, the infringement of Community law is clear.

39. However, the Greek Government takes the view that unequal treatment may be justified. In doing so it fails to understand that direct discrimination cannot be justified as a matter of principle. The case-law on direct taxation, in which the factor of justification has played an important role each time, [14] has

11 — Article 109(1)(a) of the Greek Income Tax Code; emphasis added.

12 — Article 109(1)(b) of the Greek Income Tax Code; emphasis added.

13 — According to the parties, Greek banks are required by law to constitute themselves as public limited companies and issue registered shares. See Article 11(2)(a) of Law No 2190/1920 and Law No 5076/1936.

14 — See the judgments in Case 270/83 *Commission* v *France* (quoted in footnote 3, at paragraph 17), Case C-330/91 *Commerzbank* (quoted in footnote 8, at paragraph 16), Case C-279/93 *Schumacker* (quoted in footnote 5, at paragraph 39 et seq.), Case C-80/94 *Wielockx* (quoted in footnote 5, at paragraph 23 et seq.), Case C-107/94 *Asscher* (quoted in footnote 5, at paragraph 50 et seq.), Case C-250/95 *Futura Participations and Singer* (quoted in footnote 5, at paragraph 26), and in Case C-264/96 *ICI* [1998] ECR I-4695, at paragraphs 24 and 25.

arisen from rules that have generally linked differential treatment to the criterion of residence or the 'resident' and 'non-resident' term combination. To that extent, indirect discrimination had to be assumed to exist in virtually all those cases. [15] Such discrimination is incompatible with Community law only where it cannot be justified on grounds such as cohesion of tax systems [16] or by pressing reasons of public interest. [17]

40. Both the French Government in its submissions and the Commission in the written procedure applied the test of indirect discrimination in which there must be comparability of situations and the possible justification of any unequal treatment found to exist. Therefore, the attitudes of the intervening parties could stem from the fact that, in view of previous cases decided by the Court, [18] they consider the seat of a company to be a criterion for possible unequal treatment and therefore as decisive as regards any indirect discrimination between domestic and foreign companies. [19]

41. However, the Commission specifically states that Article 109(1) of the Greek Income Tax Code contains direct *and* indirect discrimination.

42. The submissions made by the French Government in which it examines the similarity of the characteristics of a company allowing it to enjoy the more favourable tax rate are clearly based on the premiss that (indirect) discrimination may arise even where those criteria are applied equally to domestic and foreign companies. The conditions relating to legal form (public limited company) and type of shares (bearer shares) are irrelevant in this regard. However, the requirement of quotation on the Athens Stock Market does pose a problem. On that point, quotation on any stock market within the Community ought to be sufficient.

43. In my view, the examination of this question goes beyond the question referred to the Court for a preliminary ruling. In particular, there is insufficient information on the factual context to establish whether the criterion of quotation on the Athens Stock Market constitutes indirect discrimination between domestic and foreign public limited companies and whether that requirement may, in certain circumstances, be justified. In any event, the necessary investigation of the facts falls within the jurisdiction of the referring court. If that court considers that the resolution of the case turns on the answer to the question raised by the French Government, it is for that court, in accordance with established case-law, [20] to outline the analysis to be applied.

15 — However, that was only partially the case in Case C-250/95 *Futura Participations and Singer* (quoted in footnote 5).

16 — See the judgments in Case C-80/94 *Wielockx* (quoted in footnote 5, at paragraph 23) and Case C-279/93 *Schumacker* (quoted in footnote 5, at paragraph 40).

17 — See the judgments in Case C-250/95 *Futura Participations and Singer* (quoted in footnote 5, at paragraphs 26 and 31) and Case C-264/96 *ICI* (quoted in footnote 14, at paragraph 28).

18 — See the judgments in Case 270/83 *Commission* v *France* (quoted in footnote 3), Case C-330/91 *Commerzbank* (quoted in footnote 8), and Case C-264/96 *ICI* (quoted in footnote 14).

19 — In its judgment in Case C-1/93 *Halliburton Services* (quoted in footnote 4), the Court considered the unequal treatment of companies on the grounds of their seat to be *overt* discrimination with reference to the judgment in Case C-330/91 *Commerzbank* (quoted in footnote 8) (see paragraph 15).

20 — See, in this respect, the case-law quoted in footnote 14.

44. However, a clear distinction must first be made between physical and legal persons as regards possible discrimination in the area of direct taxation. That is because the factors decisive to the taxation of physical persons' income, such as personal and family circumstances, [21] do not apply in the same way to legal persons.

45. As Community law stands at present, matters of direct taxation do not fall within the competence of the Community. However, the Member States must exercise the powers which they still have in this area consistently with Community law. [22]

46. The usual distinction made in tax law between residents and non-residents is liable to operate to the detriment of nationals of other Member States since non-residents are in the majority of cases foreigners. Therefore, differential treatment linked to those criteria may constitute indirect discrimination by reason of nationality. [23]

47. If a Member State of establishment were freely allowed to apply unequal treatment solely by reason of the fact that a company's seat is situated in another Member State, this would deprive Article 52, read in conjunction with Article 58, of all meaning. [24]

48. In order to create a balance between, on the one hand, the fundamentally legitimate differentiation between residents and non-residents [25] and, on the other, the associated risk of covert discrimination, it is necessary to examine the comparability of the situations. [26] If the situations are comparable, the same legal consequences, in the form of the grant of tax benefits, for example, must be linked to objectively similar situations. It is only where unequal treatment may be justified by overriding interests such as cohesion of the tax system [27] or pressing reasons of public interest, as these are set out in Article 56 of the Treaty, [28] that such a consequence is not imperative.

49. If the facts in the main proceedings are considered in that context, it must be acknowledged that discrimination, be it direct or indirect, indisputably exists. The parties differ as to the comparability of the situations. While the Commission is firmly of the opinion that the situation of domestic and foreign companies is the same as regards the determination of their taxable income, the Greek Government considers that the situations are

21 — See the judgment in Case C-279/93 *Schumacker* (quoted in footnote 5, at paragraph 37).

22 — See the judgment in Case C-264/96 *ICI* (quoted in footnote 14, at paragraph 19).

23 — See the judgment in Case C-279/93 *Schumacker* (quoted in footnote 5, at paragraphs 28 and 29).

24 — See the judgment in Case 270/83 *Commission* v *France* (quoted in footnote 3, at paragraph 18); see also, to the same effect, the judgment in Case C-330/91 *Commerzbank* (quoted in footnote 8, at paragraph 13).

25 — See the judgments in Case C-279/93 *Schumacker* (quoted in footnote 5, at paragraph 31), Case C-80/94 *Wielockx* (quoted in footnote 5, at paragraph 18) and Case C-107/94 *Asscher*, (quoted in footnote 5, at paragraph 41).

26 — See the judgment in Case 270/83 *Commission* v *France* (quoted in footnote 3, at end of paragraph 20); and the judgment in Case C-264/96 *ICI* (quoted in footnote 14, at paragraph 25).

27 — See the case-law quoted in footnote 16.

28 — See the judgment in Case C-264/96 *ICI* (quoted in footnote 14, at paragraph 28).

different. Both parties rely on Article 99 of the Greek Income Tax Code. [29]

50. In so far as the relevant provisions of the Greek Income Tax Code are reproduced in the procedural documents, it appears that the taxable income of domestic and foreign companies is determined in the same way. That supports the Commission's view. In the final analysis, it is for the referring court to make that assessment in accordance with the facts.

51. However, the fact that even the Greek Government has put forward no reasons to justify the unequal treatment, other than referring to the fundamentally different situations of residents and non-residents and claiming that the situations are different from the outset, is decisive. Consequently, it must be assumed, even without further examination of the facts, that unequal treatment of domestic and foreign companies, such as is provided for by Article 109 of the Greek Income Tax Code, is not justified and therefore incompatible with Articles 52 and 58 of the Treaty.

C — Conclusion

52. In the light of the foregoing observations, I propose that the Court should reply as follows to the question referred for a preliminary ruling:

A provision such as Article 109(1)(a) of the Greek Income Tax Code (Law No 2238/1994, *Official Journal of the Hellenic Republic No 151A*), which, by applying a rate of tax of 40% to their taxable income, imposes a heavier tax burden on foreign companies than on domestic companies, to which a tax rate of 35% is applied, infringes Article 52, read in conjunction with Article 58, of the Treaty.

29 — For the wording of that provision, see footnote 6.