OPINION OF ADVOCATE GENERAL LÉGER

delivered on 20 June 2002 [1]

1. Since direct taxation is a matter falling within the competence of the Member States alone, a Community national who receives a salary in the State in which he resides and also in another Community State risks having his income taxed both in the latter State — the State of employment — and in his State of residence.

2. Although the abolition of double taxation is one of the aims of the Treaty, [2] Community law does not establish the most appropriate method of achieving it. It is for the Member States to adopt the provisions necessary to realise that objective.

3. In the present case, the Court of Justice is asked whether provisions under which an employee, owing to the fact that in the same year he has derived income both in his State of residence and in another Member State, loses, in the calculation of his income tax liability in the State of residence, the benefit of part of his tax allowances, are compatible with Article 48 of the EC Treaty [3] and Article 7 of Regulation (EEC) No 1612/68 of the Council. [4]

1 — Original language: French.

2 — Article 220 of the EC Treaty (now Article 293 EC).

3 — Now, after amendment, Article 39 EC.

4 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

I — Community law

4. It is provided in Article 48(1) and (2) of the Treaty that freedom of movement for workers is to be secured within the Community and must entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

5. Article 7 of Regulation No 1612/68 provides, in particular:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of

his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

...'

II — National law

6. The national law is composed of the bilateral conventions concluded by the Kingdom of the Netherlands with the Federal Republic of Germany, [5] the French Republic [6] and the United Kingdom of Great Britain and Northern Ireland respectively, [7] and of the provisions of Netherlands law designed to avoid double taxation, [8] to which the convention concluded between the Kingdom of the Netherlands and the United Kingdom, mentioned above, refers.

7. Under the applicable bilateral conventions, income derived by a resident of the Netherlands in one of the co-signatory States is taxable in the latter State if the employment is exercised there.

8. In the Netherlands, that income is exempt from tax but is taken into account for calculating the tax payable by residents on the remuneration they receive in the Netherlands, for the purposes of applying the progressive rates of tax. [9]

5 — The Convention between the Kingdom of the Netherlands and the Federal Republic of Germany for the avoidance of double taxation in the field of taxes on income and capital as well as various other taxes and for the settlement of other matters in the field of taxation, signed at The Hague on 16 June 1959 (*Tractatenblad* 1959, 85), as subsequently amended (*Tractatenblad* 1960, 107; 1980, 61 and 200; 1991, 95; 1992, 14 and 1994, 81).

6 — The Convention between the Kingdom of the Netherlands and the French Republic for the avoidance of double taxation and the prevention of tax evasion with regard to taxes on income and capital, signed in Paris on 16 March 1973 (*Tractatenblad* 1973, 83), as subsequently amended (*Tractatenblad* 1974, 41).

7 — The Convention between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, signed at The Hague on 17 November 1980 (*Tractatenblad* 1981, 54 and 108; 1983, 128; 1989, 128, and 1991, 12 to 14 inclusive).

8 — These are the Decree on the Avoidance of Double Taxation of 21 December 1989 (*Staatsblad* 1989, No 594, which came into force on 1 January 1990), as amended by the Decree of 23 December 1994 (*Staatsblad* 1994, 694, which came into force on 1 January 1995) (hereinafter 'the 1989 Decree') and the Income Tax Law of 16 December 1964, as last amended by the Law of 24 December 1994 (*Staatsblad* 1993, 760) (hereinafter 'the Law of 1964').

9 — That method, the 'exemption with progression' method, is a variant of the exemption method, which is itself one of the two standard methods for avoiding double taxation in the State of residence, the principle of which is laid down in Articles 23A and 23B of the Model Convention of the Organisation for Economic Cooperation and Development (OECD). However, those provisions, in particular Article 23A relating to the exemption method, do not specify how the methods should be implemented.

9. The tax payable in the Netherlands is therefore calculated as follows:

$$\text{Tax on foreign} \times \frac{\text{gross income}}{\text{total income}}$$ 11.

— tax is first calculated on the gross income, including the exempt foreign income, in accordance with the generally applicable progressive rate, and deducting maintenance payments made and the tax-free allowance to which the taxpayer's circumstances entitle him;

The maintenance payments made by the taxpayer and his tax-free allowance, which were taken into account for calculating the tax on his total income, are not deducted from the gross income which appears as the denominator in the [fraction representing] the proportionality factor.

— the exemption granted in respect of income received and taxed in the States of employment is deducted from that theoretical amount;

— the exemption is calculated as follows: [10]

10. The aim of the rules for calculating this exemption is to spread the allowances relating to a taxpayer's personal and family circumstances over his total income. [12] It

10 — The method of calculating the exemption is laid down in Article 3 of the Decree of 1989, to which reference is made in the Convention concluded between the Kingdom of the Netherlands and the United Kingdom, cited above, in the following terms: 'The exemption (to be granted under the convention for the avoidance of double taxation) is applied by granting a reduction equivalent to the amount of income tax which would be due (under the Law of 1964) without the application of (the convention). That reduction is equal to the amount which is in the same proportion to the tax which would be payable (under the Law of 1964) as the foreign gross income is to the gross income, taking into account the reductions and increases provided for in Chapter II, sections 5A, 5B, 5C and 7 of that law and reduced by the losses to be offset on the basis of Chapter IV of that law in so far as they consist of negative gross income.' The conventions concluded by the Kingdom of the Netherlands with the French Republic and the Federal Republic of Germany contain calculation methods identical to that set out in the Decree of 1989.

11 — The fraction is called 'the proportionality factor'.

12 — In the Explanatory Memorandum to the Decree of 7 November 1991 amending the 1989 Decree it is stated: 'This formula has been chosen in order to take account of certain deductions which, in the opinion of the Netherlands legislature, affect tax capacity but are not attributable to specific sources of income either in the Netherlands or abroad. Because those deductions are not connected with specific sources, it can be assumed that those expenses must be defrayed from the income as a whole. By taking the gross income as the denominator in the proportionality factor and multiplying by that factor the total amount of tax which would be payable if this decree were not applied, it is ensured that such expenses are charged proportionally against the foreign part of the income and against that part of the income which is taxable in the Netherlands (a procedure known as apportionment)'.

follows that those allowances are deducted from the tax payable in the Netherlands only in proportion to the income received by the taxpayer in that State.

III — Facts and main proceedings

11. In 1994 Mr de Groot was a resident of the Netherlands. During the first quarter of 1994 he received income from paid employment in Germany, France and the United Kingdom amounting to NLG 74 395, NLG 84 812 and NLG 35 009 respectively. He also received income of NLG 89 665 in the Netherlands.

12. From 1 April 1994 he was unemployed, and received NLG 34 743 in benefit payments.

13. During the same year, he made maintenance payments of NLG 43 230 and, on 26 December 1994, paid a lump sum of NLG 135 000 in discharge of that obligation.

14. On the income he received in Germany, France and the United Kingdom, Mr de Groot paid tax in those States amounting to NLG 16 768, NLG 12 398 and NLG 11 335 respectively. No account was taken, in the computation of those amounts of tax, of the maintenance payments he had made.

15. The tax payable on the income received in the Netherlands was calculated by the Netherlands tax authorities according to the method of calculation set out in point 9 of this Opinion. The maintenance payments made by Mr de Groot and also the tax-free allowance, which were taken into account for calculating the tax payable on his total income, were not deducted from the whole gross income, which appears as the denominator in the fraction representing the proportionality factor.

16. As the national court states, it follows that a portion, which is proportional to the proportionality factor, of the amount of the personal tax allowances which Mr de Groot could claim, did not result in effective reduction of the Netherlands tax payable. As a consequence, Mr de Groot received less in tax advantages on account of his maintenance obligations and was

able to take less advantage of the tax-free allowance than would have been the case if he had received his total earned income in 1994 in the Netherlands. [13]

17. Mr de Groot lodged an appeal in cassation against the ruling of the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam), Netherlands, confirming the decision of the Netherlands Taxation Authorities to calculate his taxes in the manner described above.

IV — The questions referred for a preliminary ruling

18. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do Article 48 of the Treaty... and Article 7 of Regulation... No 1612/68 preclude a system for the avoidance of double taxation under which a resident of a Member State, who in a given year (also) derives income in another Member State from employment there, on which he is taxed in that other Member State without account being taken of the employee's personal and family circumstances, loses in his State of residence a proportional part of the advantage of his tax-free allowance and personal advantages?

2. If Question 1 is answered in the affirmative, do specific requirements then arise from Community law with regard to the manner in which the personal and family circumstances of the employee must be taken into account in his State of residence?'

V — Assessment

The first question

19. By its first question, the national court asks, in essence, whether Article 48 of the Treaty and Article 7 of Regulation No 1612/68 must be interpreted as meaning that they preclude the application of provisions contained in bilateral conventions and in national legislation under which a taxpayer loses, for the calculation of his income tax liability in his State of residence, part of the advantage of his tax-free allowance and personal tax advantages, owing to the fact that, during the

13 — See paragraph 3.6 of the order for reference.

year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account.

20. It is apparent from the grounds of the order for reference that the national court [14] seeks to determine whether the disadvantage suffered by Mr de Groot under the contested legislation constitutes an obstacle to freedom of movement for workers, prohibited by Article 48 of the Treaty.

21. It should be remembered that, although direct taxation is a matter for the Member States, they must exercise their powers in that respect in a manner consistent with Community law. [15] It follows that the Member States, in the exercise of their retained competence, must not infringe the fundamental freedoms guaranteed by the Treaty, such as the freedom of movement for workers. [16]

22. The Court of Justice has also held that those freedoms are unconditional and a Member State cannot make respect for them subject to the contents of a double-taxation agreement concluded with another Member State. [17]

23. It is settled case-law that Article 48 of the Treaty prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in practice to the same result. [18]

24. The Court has also held, on several occasions, that Article 48 of the Treaty implements a fundamental principle contained in Article 3(c) of the EC Treaty (now, after amendment, Article 3(c) EC), which states that, for the purposes set out in Article 2 of the EC Treaty (now, after amendment, Article 2 EC), the activities of the Community shall include the abolition, as between Member States, of obstacles to freedom of movement for persons. [19]

14 — Paragraph 3.10.

15 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21, Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 19, and the case-law cited. See, for a recent application, Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 32.

16 — See, in particular, Case C-175/88 *Biehl* [1990] ECR I-1779, paragraph 12, and *Schumacker*, cited above, paragraph 23.

17 — Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 26.

18 — Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11, and Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 18. In the field of taxation, the Court has held on many occasions that legislation which makes a fiscal advantage conditional on residence constituted indirect discrimination, since nationals are able to fulfil that condition more easily than migrant workers who are nationals of other Member States (see the judgments cited in the Opinion delivered by Advocate General Ruiz-Jarabo Colomer in Case C-18/95 *Terhoeve* [1999] ECR I-345, footnote 13).

19 — Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16, and Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 15.

25. The Court has held that the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. [20]

26. It has inferred from that that nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity. [21]

27. It follows that provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned. [22]

28. In the present case, the parties agree that, under the contested legislation, Mr de Groot received less in tax advantages on account of the maintenance obligations borne by him and was able to take less advantage of the tax-free allowance than would have been the case if he had received his total earned income in 1994 in the Netherlands. [23]

29. I agree with the Commission and the German Government that Article 48 of the Treaty precludes the application of the contested legislation.

30. That assessment is based on the following considerations: first, the legislation has caused Mr de Groot — and is likely to cause a certain number of taxpayers — a genuine disadvantage; second, that disadvantage is not attributable to disparities between the tax schemes of the Member States but is a consequence of an obstacle to the free movement of workers, and, third, the reasons put forward to justify the obstacle cannot, in my view, be upheld.

31. Firstly, with regard to evidence of the disadvantage caused by the legislation in question, I note that the Advocate General of the national court estimated at NLG 27 341 the reduction obtained by Mr de Groot in respect of his personal allowances and at NLG 70 055 the reduction he would have received if those allowances had been

20 — Case 143/87 *Stanton* [1988] ECR 3877, paragraph 13; *Singh*, cited above, paragraph 16; and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 94.

21 — Case C-363/89 *Roux* [1991] ECR I-273, paragraph 9; *Singh*, cited above, paragraph 17, and *Bosman*, cited above, paragraph 95.

22 — Case C-10/90 *Masgio* [1991] ECR I-1119, paragraphs 18 and 19, and *Bosman*, cited above, paragraph 96.

23 — See point 16 of this Opinion.

deducted wholly from the income he received in the Netherlands. [24] The parties agree that that part of the tax advantages which Mr de Groot did not receive in his State of residence was not granted to him, either in whole or in part, in the States of employment, since, as the national court points out, none of them took account of Mr de Groot's personal and family circumstances. [25]

32. Also, since the tax-free allowance and the personal allowances are taken into consideration in the Netherlands only in proportion to the income received in that State, it is clear, as the Commission states, [26] that the more of his income a taxpaying Netherlands resident receives in another Member State the greater will be the tax disadvantage he suffers in the Netherlands. [27] As the Advocate General of the national court points out, a taxpayer who has received the main part of his income abroad and whose income in the Netherlands is just enough to be taxed in that State, will experience 'a very severe fiscal disadvantage' because he will lose a very large part of the benefit of the allowances relating to his personal and family circumstances. [28]

33. Secondly, I think that, contrary to what the Netherlands Government maintains, the disadvantage suffered by Mr de Groot is not attributable to disparities between the tax regimes of the Member States but is the consequence of an obstacle to the freedom of movement for workers.

34. The Netherlands Government maintains that it took Mr de Groot's personal and family circumstances into account, in accordance with the requirements laid down by the Court in the *Schumacker* judgment, cited above. It claims that the disadvantage he suffered is the result of the method applied in the case in order to avoid double taxation and is attributable to the tax system in the States of employment which did not take account of his personal and family circumstances. According to that Government, the situation in the present case is comparable to that which gave rise to the judgment in *Gilly*. [29] Furthermore, the contested legislation culminated in the same result as the other method of eliminating double taxation, the 'credit method', [30] which was at issue in that judgment, in that a resident who has exercised his right to freedom of movement may have to bear a heavier tax burden.

24 — Those estimates are cited in point 41 of the Commission's observations.

25 — See paragraph 3.1 of the order for reference.

26 — Points 72 to 74 of its observations.

27 — Provided that part does not exceed the threshold from which States of employment are required to take account of a non-resident taxpayer's personal and family circumstances, as we shall see below.

28 — See point 72 of the Commission's observations.

29 — Case C-336/96 *Gilly* [1998] ECR I-2793.

30 — The credit method is the other method of eliminating double taxation in the State of residence. Under that method, which is prescribed in Article 23B of the OECD Model Tax Convention, the State of residence includes in the tax base all of the income received by the taxpayer and grants him a tax deduction in respect of the tax which he has paid in the State of employment.

35. I do not share the assessment of the Netherlands Government.

36. It should be emphasised that, in this particular case, the States of employment were not under a duty to take account of Mr de Groot's personal and family circumstances. No such requirement was imposed either in the applicable bilateral conventions or in their national legislations. [31] Also, it is apparent from the *Schumacker* judgment, cited above, that a State of employment has that duty only if the taxpayer derives the main part of his taxable income from an activity exercised in that State and receives no significant income in the State of his residence, so that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances. [32] The Court held that, in that case, there is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances. [33]

37. According to the Court of Justice it is, on the contrary, for the State of residence, in principle, to grant a taxpayer all the tax allowances relating to his personal and family circumstances. The Court held that that State is the best placed to assess the taxpayer's financial situation since that is the place where his personal and financial interests are centred. [34] It pointed out that international tax law and, in particular, the OECD Model Tax Convention accepted that solution. [35]

38. That assessment has been confirmed on several occasions, in the judgments in *Asscher*, [36] *Gschwind* [37] and *Zurstrassen*, cited above. [38]

39. In the present case, I consider that the Netherlands Government is not justified in maintaining [39] that the tax authorities took account of Mr de Groot's personal and family circumstances as they are required to do by the position adopted by the Court

31 — The Netherlands Government maintains (point 34 of its observations) that in the United Kingdom Mr de Groot qualified for two personal exemptions, the first, a 'personal allowance' which in 1993/1994 was GBP 3 444, and the second a maintenance allowance of GBP 1 720. I consider that that statement, which was disputed by Mr de Groot at the hearing, cannot rebut the findings of the national court that, in order to calculate the tax payable by Mr de Groot in each of the three States of employment, the maintenance payments he had made were not taken into account, and that none of those States grants to non-resident taxpayers the same allowances relating to personal and family circumstances as to resident taxpayers (see paragraphs 3.1 and 3.10 of the order for reference). In any event, the statement would only apply to the United Kingdom, so that, as the Netherlands Government itself acknowledges, the questions referred for a preliminary ruling would still be fully relevant in respect of the income received by Mr de Groot in Germany and France.

32 — Paragraph 36.

33 — *Ibidem*, paragraph 37.

34 — *Ibidem*, paragraph 32.

35 — *Idem*.

36 — Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 44.

37 — Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraphs 22 and 24.

38 — Paragraph 21.

39 — See point 38 of its observations.

in the judgment in *Schumacker*, cited above. Although the maintenance payments made by Mr de Groot and the tax-free allowance were indeed taken into consideration for calculating the theoretical amount of the tax on his total remuneration, the fact remains that, owing to the effect of the proportionality factor, Mr de Groot was entitled to those allowances only in proportion to the income which he received in the Netherlands.

40. Therefore, because he exercised his right to freedom of movement, Mr de Groot lost the benefit of part of the tax allowances provided for by Netherlands law, which he could claim as a resident of the Netherlands.

41. The disadvantage suffered by Mr de Groot cannot therefore be attributed to the tax regime of the States of employment, but rather to the methods by which the Kingdom of the Netherlands applied to the taxpayer the allowances relating to his personal and family circumstances.

42. I therefore deduce that the situation in the present case is not comparable to that which led to the judgment in *Gilly*, cited above.

43. In that judgment, Mrs Gilly had been taxed in Germany on income received in that State, and in France, where she resided, on her total income. The Convention for the avoidance of double taxation concluded between the Federal Republic of Germany and the French Republic provided that tax paid in Germany entitled her to a tax credit equal to the French tax appropriate to that income. Because of the greater progressive increases in German taxation and the fact that her personal and family circumstances had not been taken into account in Germany, although they had been taken into account in France, the tax credit granted to Mrs Gilly was less than the amount that she had actually paid in Germany. Mrs Gilly had therefore borne a total tax burden which was higher than that which she would have paid on the same income if it had all been received in France. [40]

44. As the Court pointed out, [41] any unfavourable consequences entailed for Mrs Gilly by the contested tax credit mechanism are the result in the first place of the differences between the tax scales of the Member States concerned, and, in the absence of any Community legislation in the field, the determination of those scales is a matter for each of those Member States alone. As regards the effect on the amount of the tax credit of the fact that the taxpayer's personal and family circumstances are taken into account in the State

40 — In accordance with the Opinion of Advocate General Ruiz-Jarabo Colomer, the Court held that Article 48 of the Treaty did not preclude the application of such a tax credit mechanism (paragraph 54). It considered that the object of a convention such as that applicable in this case was simply to prevent the same income from being taxed in each of the two States. It was not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other (paragraph 46).

41 — Paragraph 47.

of residence but not in the State of employment, the Court pointed out that the disparity derives from the fact that, in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable, since income received in the territory of a State by a non-resident is in most cases only part of his total income, which is concentrated at his place of residence. [42]

45. It follows that, unlike Mr de Groot, Mrs Gilly obtained, in her State of residence, all the tax advantages foreseen for its residents by the legislation of that State.

46. Furthermore, as pointed out by Advocate General Ruiz-Jarabo Colomer in his Opinion in the *Gilly* case, cited above, [43] it was only necessary for the German authorities to lower their tax rate or the French authorities to increase theirs for the tax credit mechanism to work in Mrs Gilly's favour. The unfavourable nature of that system is therefore too uncertain to dissuade a worker from exercising his freedom of movement between the two Member States in question.

47. It is clear that there is no such uncertainty in the present case since, under the applicable bilateral conventions, their national law and the case-law, the Member States in which Mr de Groot worked were not required to take account of his personal and family circumstances.

48. I also conclude that the argument put forward by the Netherlands Government — that the contested legislation, inasmuch as it has the effect of placing a higher tax burden on Mr de Groot than if he had not exercised his right to freedom of movement, has the same result as the credit method — is irrelevant. [44]

49. What is conclusive, in the present case, is that the disadvantage suffered by Mr de Groot derives from the fact that he was deprived, by his State of residence, of part of the reductions provided for by the legislation of that State.

50. If the States of employment concerned had taken account of Mr de Groot's personal and family circumstances, he might also have had to bear a heavier tax burden than if he had received his total income in the Netherlands. That might have been the case if the allowances relat-

42 — Paragraph 49.

43 — Points 61 and 62.

44 — The Netherlands Government refers, in particular, to the last sentence of Article 23B(1) of the OECD Model Tax Convention, which provides that, under the credit system, the tax paid in the State of employment is deducted from the tax payable in the State of residence up to the limit of 'that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in [the State of employment]'.

ing to his personal and family circumstances granted in the States of employment had been lower than those provided for by the Netherlands legislation and if those States had taken account, in fixing the tax rate for non-residents, of their total income. Yet, such a disadvantage would not have been the result of an obstacle to the freedom of movement for workers but would have been attributable to the disparities between the tax regimes of the Member States.

51. That is not the situation in the present case. In my view, the fact that the Member States in which Mr de Groot worked did not take account of his personal and family circumstances when taxing the income which he received in those States placed the State of residence under a duty to grant him the benefit of all the allowances to which his circumstances entitled him and which he would have received if he had exercised all of his activity in the Netherlands. [45]

52. The allocation, by the Netherlands tax authorities, of part of Mr de Groot's personal allowances to the income which he received in the other Member States had the effect of putting him at a disadvantage which he would not have had to suffer if he had not exercised his freedom of movement.

53. In my view, the contested legislation therefore constitutes an obstacle to the exercise of that freedom, which is, in principle, prohibited by Article 48 of the Treaty.

54. Thirdly, I consider that the reasons put forward to justify the obstacle at issue cannot be upheld.

55. In the first place, the national court raises the question [46] of the validity of the arguments stated in the reasons for the Netherlands legislation in relation to the proportionality factor. According to that argument, the allowances concerned are used for determining the taxpayer's financial means and, therefore, should not be applied only to the income received in the State of residence. [47]

56. I do not consider that that argument can justify the obstacle found to exist in the present case. Indeed, even though, from the

45 — See to this effect the judgment in *Zurstrassen*, cited above. In that judgment the Court held that the Grand Duchy of Luxembourg should take the taxpayer's personal and family circumstances into consideration, even though his wife had retained her residence in another Member State, and not tax Mr Zurstrassen as a single taxpayer without dependants, because he not only resided in the Grand Duchy but was paid almost the entire earned income of the household there. The Court pointed out that the Grand Duchy of Luxembourg was the only State which could do so (paragraph 23).

46 — See paragraph 3.10 of the order for reference.

47 — See the Explanatory Memorandum to the Decree of 7 November 1991 amending the 1989 Decree, cited in footnote 12 of this Opinion.

point of view of the Member States, it may seem fair to spread the amount of the taxpayer's personal allowances over the whole of his income, such a distribution means that the allowances must also be applied in the States of employment. Under Article 220 of the Treaty, it is for the Member States — in view of the lack of harmonisation or coordination between their tax regimes in that regard — to conclude conventions for that purpose. Without such conventions, the State of residence cannot exempt itself from part of the allowances and thereby infringe the rights which individuals derive from provisions of the Treaty enshrining their fundamental freedoms.

57. Furthermore, unlike the Belgian Government, I do not consider that it necessarily follows from that assessment that the State of residence has to bear a disproportionate burden. It should be remembered that, in the present case, the Kingdom of the Netherlands, as regards the taxation of Mr de Groot's income, has collected higher taxes because of the effect of the progressive increases in its taxation scale. Moreover, it has been held on a number of occasions that the loss of tax revenue can never constitute a reason for restricting the exercise of a fundamental freedom. [48]

58. Finally, I consider that the proportional credit system at issue is not necessary to ensure the cohesion of the exemption with progression method applied in the present case, as referred to in the case-law. [49] In my view, there is no connection between the exemption with progression method, under which the State of residence forgoes taxing income received in other Member States but takes it into account for the purpose of determining the tax rate applicable to the non-exempt remuneration, and the deduction of the allowances in proportion to the income received in the State of residence. [50] In other words, I think that the effectiveness of the progressive increases in income tax in the State of residence, which follows the exemption with progression method, does not depend on the restriction, in that State, on the taking into account of the taxpayer's personal and family circumstances.

59. Secondly, contrary to what the Netherlands and Belgian Governments maintain, the obstacle at issue cannot be justified, in

48 — Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28, and Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 51.

49 — In the judgments in Case C-204/90 *Bachmann* [1992] ECR I-249, paragraphs 21 to 28, and Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraphs 14 to 21, the Court acknowledged that the Belgian legislation refusing to allow life insurance premiums to be deducted from the taxable income if the premiums had been paid abroad was justified by the need to ensure the cohesion of the tax regime concerned. There was a link between the deductibility of contributions and the liability to tax of sums payable by the insurers in fulfilment of the contracts. The Court held that that set-off between the deductibility of contributions and the taxing of sums payable could not be ensured since the payments linked to the exempt contributions would be made by a foreign insurer, abroad, where their liability to tax would be uncertain.

50 — In that regard, the Netherlands Government cannot use the OECD Model Tax Convention as an argument, because Article 23A does not contain any provision concerning allowances relating to a taxpayer's personal and family circumstances. Similarly, paragraphs 40 to 43 of the comments on that Article (see Vogel, K., 'Double Taxation Conventions', *Kluwer Law International*, 1997, 3rd ed., p. 1177), also cited by that Government, cannot justify the obstacle at issue. On the contrary, it is stated, in paragraph 43: 'In view of the wide variety of fiscal policies and techniques in the different States regarding the determination of tax, especially deductions, allowances and similar benefits, it is preferable not to propose an express and uniform solution in the Convention, but to leave each State free to apply its own legislation and technique. Contracting States which prefer to have special problems solved in their convention are, of course, free to do so in bilateral negotiations...'.

my view, by the fact that Netherlands residents who receive income in other Member States derive advantages from the fact that they are taxed in various Member States which offset the disadvantage alleged to exist in the present case, so that the contested legislation is the most consistent with the aim of tax neutrality in cross-border activities.

60. With regard to the consequences of being taxed in various Member States, it is true that the taxation without progression, in Germany, France and the United Kingdom, of income received in those States may have the effect that the average rate of tax on the whole of the taxpayer's income is lower than it would be if the taxpayer had obtained all of his income in the Netherlands.

61. However, it is clear from the views expressed by the Advocate General of the national court that the tax reduction accordingly received by Mr de Groot did not offset the contested disadvantage. [51] Thus, he paid for 1994 in the four States concerned a total tax bill higher than that which he would have paid if he had received all of his income in the Netherlands.

51 — Those views are referred to in point 68 of the Commission's observations.

62. Also, the argument that it may happen that the tax reduction linked to the absence of progression in the States of employment balances out the disadvantage resulting from the contested legislation does not alter the fact that, if that legislation is proved to be detrimental, it must be regarded as an obstacle. [52] I consider that, on that point, the situation in the present case may be compared with the one before the Court in *AMID*, cited above, relating to legislation constituting an obstacle to the freedom of establishment. [53]

63. In the light of the above, I therefore suggest that the Court reply to the first question that Article 48 of the EC Treaty must be interpreted as meaning that it precludes the application of provisions under which a taxpayer loses, for the calculation of his income tax liability in his State of residence, part of the advantage of his tax-free allowance and personal tax advantages, owing to the fact that, during the year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account.

52 — See, by analogy, the judgment in *Commission* v *France*, cited above, paragraph 21.

53 — The legislation in question provided that a company incorporated under national law, having its seat in that State, could not deduct from the taxable profits of one year, for the purposes of corporation tax, a loss suffered in the previous year, unless that loss could not be deducted from the profit made during that previous year by one of its permanent establishments situated in another Member State. The Court held that that legislation might create a fiscal disadvantage for companies having a permanent establishment in another Member State (paragraph 23). It considered that, even if the tax system in question were favourable to companies with establishments abroad more often than not, that does not prevent it resulting, where that proves disadvantageous to those companies, in an inequality of treatment in relation to companies without establishments in another Member State and thus creating an obstacle to the freedom of establishment (paragraph 27).

64. In its first question, the national court also asks the Court of Justice whether that legislation is compatible with Article 7 of Regulation No 1612/68.

65. In the light of the reply which I proposed should be given to the first question, I consider it unnecessary to adopt a position on that point. As the Court ruled as early as 4 December 1974 in *Van Duyn*, [54] Article 48 of the Treaty has direct effect in the legal orders of the Member States and confers on individuals rights which the national courts must protect. It is also settled case-law that every national court must apply Community law in its entirety and protect rights which the law confers on individuals, where necessary disapplying any provision of national law which may conflict with it. [55] As we have seen in point 22 of this Opinion, the same must apply to a bilateral international convention which proves to be contrary to Article 48 of the Treaty. [56]

66. Accordingly, the question whether or not the obstacle at issue falls within the scope of Article 7 of Regulation No 1612/68, used to implement Article 48 of the Treaty, and also constitutes indirect discrimination on grounds of nationality, does not appear to me to be of any practical interest in this case. [57]

The second question

67. By its second question, the national court asks whether Community law contains specific requirements with regard to the manner in which the personal and family circumstances of an employee who has also carried on an activity in another Member State must be taken into account in his State of residence.

68. It is apparent from the grounds of the order for reference [58] that the national court wishes to know whether, in the present case, the Kingdom of the Netherlands is required to grant Mr de Groot an effective reduction equal to that which he would have been entitled to claim had he earned his whole income in his State of residence.

69. For the reasons stated above, in particular in points 51 and 65, I consider that Mr de Groot is entitled to receive the same

54 — Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 1 of the operative part.

55 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and *Terhoeve*, cited above, paragraph 56.

56 — See also to this effect, in respect of a convention concluded with a third country, the judgment in *Gottardo*, cited above, paragraphs 32 to 34.

57 — See to this effect the judgment in *Terhoeve*, cited above, paragraph 41.

58 — Paragraph 3.10.

reductions as those which he would have obtained if he had received his whole income in the Netherlands.

70. Nevertheless, because the second question was formulated in general terms and since it is for the national court to draw the appropriate conclusions from the judgment to be delivered in order to resolve the case which it has to decide, I think a reply on a general level is required.

71. As I have already pointed out, direct taxation is a matter for the Member States. However, they must exercise their powers in that respect in a manner consistent with Community law.

72. I therefore suggest that the Court reply that Community law does not lay down specific requirements with regard to the manner in which the State of residence must take account of the personal and family circumstances of a taxpayer who, during the year in question, has received income in that State and in another Member State. However, the conditions as to that taking into account must not constitute discrimination, either direct or indirect, on grounds of nationality, or an obstacle to the exercise of a fundamental freedom guaranteed by the Treaty.

VI — Conclusion

73. In the light of the foregoing considerations, I propose that the Court give the following reply to the questions raised by the Hoge Raad der Nederlanden:

(1) Article 48 of the EC Treaty (now, after amendment, Article 39 EC) must be interpreted as meaning that it precludes the application of provisions contained in bilateral conventions and in national legislation under which a taxpayer loses, for the calculation of his income tax liability in his State of

residence, part of the advantage of his tax-free allowance and personal tax advantages, owing to the fact that, during the year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account.

(2) Community law does not lay down specific requirements with regard to the manner in which the personal and family circumstances of an employee who has also carried on an activity in another Member State must be taken into account in the State of residence. However, the conditions as to that taking into account must not constitute discrimination, either direct or indirect, on grounds of nationality, or an obstacle to the exercise of a fundamental freedom guaranteed by the Treaty.