JUDGMENT OF THE COURT (Sixth Chamber)

12 April 1994 *

In Case C-1/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Halliburton Services BV

and

Staatssecretaris van Financiën

on the interpretation of Articles 7 and 52 to 58 of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Diez de Velasco (Rapporteur), C. N. Kakouris, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— the Netherlands Government, by A. Bos, Legal Adviser, acting as Agent,

— the Commission of the European Communities, by A. Caeiro, Legal Adviser, and B. Smulders, a member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Halliburton Services BV, represented by B. van Wijck and D. van Unnik, Tax Advisers, the Netherlands Government, represented by J. W. de Zwaan, Deputy Legal Adviser, acting as Agent, and the Commission of the European Communities, at the hearing on 20 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 10 February 1994,

gives the following

Judgment

1 By judgment of 23 December 1992, which was received at the Court on 4 January 1992, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands, hereinafter referred to as the 'Hoge Raad') referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 7 and 52 to 58 of the EEC Treaty.

2 The question was raised in proceedings between Halliburton Services BV, a company incorporated under Netherlands law and established at The Hague, and the

Staatssecretaris van Financiën (hereinafter referred to as 'the tax administration') concerning the conditions for exemption laid down in relation to the taxation of transactions relating to immovable property by the Wet op Belastingen van Rechtsverkeer (Law on the taxation of legal transactions, hereinafter referred to as 'the Law') of 24 December 1970 and the Uitvoeringsbesluit Belastingen van Rechtsverkeer (Order implementing the law on the taxation of legal transactions, hereinafter referred to as 'the implementing order') of 21 June 1971.

3 Halliburton is an international group in which the parent company, Halliburton Inc., is established in the United States of America. It holds all the shares in its German subsidiary (Halliburton Co. Germany GmbH) and Netherlands subsidiary (Halliburton Services BV). The latter is constituted as a private ('closed') company with limited liability ('besloten vennootschap met beperkte aansprakelijkheid') under Netherlands law.

4 As part of a reorganization of the activities of the Halliburton Group in Europe, the German subsidiary, by a document certified by a notary of 22 December 1986, transferred and sold to the Netherlands subsidiary its permanent establishment in the Netherlands, which included immovable property situated at Emmen and valued at HFL 3 178 926.

5 In the Netherlands the transfer of immovable property is subject to the tax on legal transactions. However, the first paragraph of Article 15(h) of the Law provides for exemption of transactions which are carried out 'as part of an internal reorganization of public limited companies and private limited companies'.

6 Under Article 5 of the implementing order, the said exemption is confined to transfers between public limited companies and private limited companies belonging to a group in which the parent company is also constituted in either of those two legal forms. It is clear from the documents before the Court, however, that the Hoge Raad has already decided that, under the principle of non-discrimination as laid down in the bilateral treaty concerning taxation between the Netherlands and the United States of America, Halliburton Services may not be deprived of the benefit of exemption on the ground that the parent company of the Halliburton Group is constituted under United States law.

7 Taking the view that the transfer of immovable property carried out by the German and Netherlands companies could not come within the aforementioned exemption, the Netherlands tax administration claimed payment of the tax on legal transactions from Halliburton Services BV.

8 By decision of 11 December 1990 the Gerechtshof, The Hague, dismissed the action brought by that company on the ground that the transferor, Halliburton Co. Germany GmbH, was not a company incorporated under Netherlands law as defined in Article 5(4) of the implementing order and that accordingly the transaction in question did not qualify for exemption.

9 The plaintiff company appealed to the Hoge Raad, claiming in particular that the aforesaid conditions for exemption involved discrimination on grounds of nationality contrary to the provisions of the Treaty.

10 Since it had doubts regarding the compatibility of the Law and the implementing order with Articles 7 and 52 to 58 of the Treaty, the Hoge Raad decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Where a Member State imposes a charge on the transfer of immovable property in that State or rights *in rem* relating thereto and allows relief where the transfer is part of an internal reorganization — see Articles 2 and 15(1)(h) of the Wet op Belastingen van Rechtsverkeer (Law on the taxation of legal transactions) in conjunction with Article 5 of the relevant implementing regulation (Uitvoeringsbesluit van Rechtsverkeer, 1986 version) — is it compatible with Article 7 of the Treaty establishing the European Economic Community, in conjunction with Articles 52 to 58 inclusive, for relief to be available if the transferor is a company incorporated under the laws of that Member State — in this case a "naamloze vennootschap" or a "besloten vennootschap met beperkte aansprakelijkheid" (a public or private limited company) — but not if it is a similar company incorporated under the laws of, and established in, another Member State — in this case a "Gesellschaft mit beschränkter Haftung"?'

11 As a preliminary point, it should be noted that neither the national court nor the parties to the main proceedings have questioned the fact that, apart from the condition concerning the law governing the constitution of the companies concerned, the transfer at issue satisfied all the conditions for exemption laid down by the Law and the implementing order. It is therefore apparent that if the companies involved in the transfer of the permanent establishment in the Netherlands had both been constituted as public or private limited companies under Netherlands law, the transfer of immovable property carried out as part of the reorganization of the Halliburton Group would have qualified for the exemption in question.

12 As regards Article 7 of the Treaty, it must first be borne in mind (see the judgment in Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 13) that it applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination. It is also common ground (see the judgment in Case 63/86 *Commission* v *Italy* [1988] ECR 29, paragraph 12) that Article 52 is essentially intended to give effect, in the field of activities as self-employed persons, to the principle of equal treatment enshrined in Article 7. Accordingly, the latter provision does not apply in the present case.

13 It appears, therefore, that in its question the national court is asking in substance whether Articles 52 and 58 of the Treaty preclude a Member State from granting exemption from tax on the acquisition of immovable property situated in its territory or of rights *in rem* in relation to such property as part of an internal reorganization only where the property is acquired from a company constituted under its own law and not where it is acquired from a similar company constituted under the law of another Member State.

14 In that regard the first point to bear in mind is that the freedom of establishment which is conferred by Article 52 on the nationals of a Member State and which gives them the right to take up activities as self-employed persons and pursue them on the same conditions as those laid down by the law of the Member State of establishment for its own nationals, comprises, pursuant to Article 58 of the Treaty, for companies constituted in accordance with the law of a Member State

and having their registered office, central administration or principal place of business within the Community, the right to carry on business in the Member State concerned through a branch or agency.

15 Further, the Court has held (see Case C-330/91 *The Queen* v *Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, paragraph 14) that the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

16 Finally, it must be borne in mind that, as the Court has repeatedly stated (see, in particular, the judgment in Case 71/76 *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765), since the end of the transitional period Article 52 of the Treaty has been directly applicable notwithstanding the absence in a particular area of the directives provided for in Articles 54(2) and 57(1) of the Treaty.

17 In the circumstances, it should be noted that the tax rule at issue limits exemption from the tax on transactions relating to immovable property only to transactions between companies incorporated under Netherlands law which have been constituted as public or private limited companies, as defined by the legislation of that State, to the exclusion of companies constituted in equivalent forms under the laws of other Member States.

18 The Netherlands Government considers that such legislation involves no discrimination because the person liable to pay the tax is not the German company but the Netherlands company. Since the situation is purely internal to the Netherlands legal system, it is not a matter for Community law.

19 In that regard, it should be noted that payment of a tax on the sale of immovable property constitutes a burden which renders the conditions of sale of the property more onerous and thus has repercussions on the position of the transferor. In a case such as this, the vendor is in a distinctly less favourable position than if it had chosen the form of a public or private limited company instead of that of a permanent establishment for its business in the Netherlands.

20 Although the difference in treatment has only an indirect effect on the position of companies constituted under the law of other Member States, it constitutes discrimination on grounds of nationality which is prohibited by Article 52 of the Treaty.

21 The Netherlands Government contends that the restriction of the exemption to companies constituted under national law is necessary because the competent tax administration is unable to check whether the legal forms of entities constituted in other Member States are equivalent to those of public and private limited companies within the meaning of the relevant national legislation.

22 That argument cannot be accepted. Information pertaining to the characteristics of the forms in which companies may be constituted in other Member States can be obtained for the purpose of applying the tax on legal transactions as a result of the system provided for by 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 (Official Journal 1977 L 336, p. 15), as amended by Council Directives 79/1070/EEC of 6 December 1979 (Official Journal 1979 L 331, p. 8) and 92/12/EEC of 25 February 1992 (Official Journal 1992 L 76, p. 1). According to Article 1(2) of that directive, the system of exchanging information applies to taxes on the disposal of movable or immovable property. Furthermore, Article 1(1) provides that that system relates to any information which may enable the competent authorities of the Member States to make a correct assessment of the taxes referred to by the directive.

23 Accordingly, the answer to the question submitted by the national court must be that Articles 52 and 58 of the Treaty preclude the law of a Member State from restricting exemption from the tax on transactions relating to immovable property which is normally payable in the event of transfers or sales which take place in connection with a reorganization within a group of companies only to cases where the company qualifying for exemption acquires immovable property from a company constituted under national law, and refusing to grant such relief where the transferor is a company constituted under the law of another Member State.

Costs

24 The costs incurred by the Netherlands Government and the Commission of the European Communities, 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 question referred to it by the Hoge Raad der Nederlanden, by judgment of 23 December 1992, hereby rules:

Articles 52 and 58 of the Treaty preclude the law of a Member State from restricting exemption from the tax on transactions relating to immovable property which is normally payable in the event of transfers or sales which take place in connection with a reorganization within a group of companies

only to cases where the company qualifying for exemption acquires immovable property from a company constituted under national law, and refusing to grant such relief where the transferor is a company constituted under the law of another Member State.

Mancini Diez de Velasco Kakouris

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 12 April 1994.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber