REPORT FOR THE HEARING
in Case C-24/92 *

I — Facts and context of the proceedings

A — *Facts, relevant legislation and question referred for a preliminary ruling*

Mr Corbiau, who is a Belgian national, works at Banque Paribas in Luxembourg. He lived in Luxembourg until 25 October 1990, on which date he transferred his residence to Belgium while at the same time remaining employed in Luxembourg. Formerly a resident taxpayer in Luxembourg, he then became a non-resident taxpayer.

During the period from 1 January 1990 until 25 October 1990, his employer deducted income tax from his salary at the rate which would have been applicable if he had been a taxpayer resident in Luxembourg throughout the year.

When the amount of tax due was finally assessed, Mr Corbiau's income for the first ten months of the 1990 tax year was taxed at the progressive rate normally applicable to such income if earned over the whole year. Because the rate was lower than the one applied in calculating the amount of the deductions, the tax statement for 1990 showed excess taxation amounting to LFR 180 048, which was non-refundable by virtue of Article 154(6) of the Loi sur l'Impôt sur le Revenu (Income Tax Law). That article provides that amounts deducted by way of tax from the salaries and wages of employed persons resident during only part of the year are to become the property of the Treasury, whether such persons take up residence in the country or leave it during the course of the year.

On 28 June 1991, Mr Corbiau made a written request to the Directeur des Contributions (Director of Taxation), relying on the judgment of 8 May 1990 in Case C-175/88 *Biehl* [1990] ECR I-1779.

That case concerned a pending dispute before the Conseil d'État du Luxembourg (State Council of Luxembourg) between the tax authorities of the Grand Duchy of Luxembourg and a German national who, having worked in that country for the first ten months of the year, had transferred his residence to the Federal Republic of Germany and taken up a professional activity there. While he was working in Luxembourg, his salary had also been subject to deductions, which subsequently proved to be higher than the amount of tax due. As in the case of Mr Corbiau, the Luxembourg tax authorities, relying on Article 154(6) of the Loi sur l'Impôt sur le Revenu, had refused to repay the excess tax deducted.

The question whether such rules were compatible with the Treaty was referred to the Court, which held that: 'Article 48(2) of the Treaty (precluded) a Member State from providing in its tax legislation that sums

* Language of the case: French.

deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the year are to remain the property of the Treasury and are not repayable'.

The Court came to that conclusion because it saw a risk that the criterion of permanent residence on national territory for obtaining any repayment of an overdeduction of tax would work in particular against taxpayers who were nationals of other Member States, and because it was often such persons who were likely to leave the country or take up residence there in the course of the year (paragraph 14).

In the decision containing the request for a preliminary ruling, the Directeur des Contributions held that the reference to the judgment in the *Biehl* case was not relevant. In that case, the Court had 'envisaged only the repayment, without discrimination as between temporary and permanent residents, of excess tax paid'. On the facts of the present case, 'any arithmetical difference between the amount of tax deducted from the salary and the tax assessment calculated on the basis of the entire taxable income (could) not yet be described as an excess amount of tax paid ... by having an unadjusted deduction of tax made from his salary, and because of the failure of the Luxembourg tax scale to respond to changes in salary, the applicant paid less than he would have if he had been a resident taxpayer for the whole year or a non-resident taxpayer for the whole year, and thus liable, in either case, to a further assessment on the whole of his taxable income'.

However, in the interests of the proper administration of justice and of legal certainty, the Directeur des Contributions decided, in a decision of 28 January 1992, to refer the following question to the Court for a preliminary ruling:

'In a Member State where employed persons who have been resident taxpayers for the whole year are entitled to repayment of sums legally deducted by way of tax from their salaries by their employer if and to the extent to which the total of those deductions exceeds the amount of income tax assessed at the rate corresponding to the whole of their income for the year, is the fact that a Community national who has been a resident taxpayer for part of the year can obtain repayment of amounts of tax lawfully deducted only and on the same condition and to the same extent contrary to Article 48 of the EEC Treaty?'

B — *Procedure before the Court*

The decision of the Directeur des Contributions was lodged at the Court Registry on 28 January 1992.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted on 25 May 1992 by the Commission of the European Communities, represented by its Principal Legal Adviser, H. Étienne, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral

procedure without any preparatory inquiry. It did, however, decide to put two questions to the Luxembourg Government and one question to the Commission. The answers to those questions appear in section III of this Report for the Hearing.

II — Observations of the Commission

In the Commission's view, besides raising the substantial issue set out in the reference for a preliminary ruling, this case also raises a question of admissibility — can the Directeur des Contributions be treated as 'a court or tribunal of a Member State', within the meaning of Article 177 of the Treaty?

A — *Admissibility of the reference for a preliminary ruling*

The Commission believes that in the present case the question referred for a preliminary ruling by the Directeur des Contributions should be declared admissible. Although he does not form part of the judiciary in the institutional sense, he does appear to have most of the features of a 'court or tribunal of a Member State' within the meaning of Article 177 of the Treaty. Those features, identified by the Court in particular in its judgment of 30 June 1966 in Case 61/65 *Vaassen* v *Beambtenfonds Mijnbedrijf* [1966] ECR 377, are: creation by statute, permanence, the compulsory nature of its jurisdiction, application of rules of law and adversarial procedure.

— Statutory origin

In the Commission's view, there can be no doubt as to the statutory origin of the powers of the Directeur des Contributions. Such powers derive from Paragraph 131 of the Abgabenordnung (Tax Code), Article 8 of the Grand-Ducal Order (*arrêté grand-ducal*) of 26 October 1944 and Article 1 of the Ministerial Order (*arrêté ministériel*) of 10 April 1946.

Paragraph 131 of the Abgabenordnung provides that: 'The Minister for Finance may in individual cases (or in several individual cases taken together, as in cases of tempest or other exceptional circumstances) grant full or partial remission of taxes owing to the State which it would be inequitable to collect having regard to the particular case, or may order in such cases that taxes already paid be repaid or imputed'.

That provision should be read in conjunction with Article 8 of the Grand-Ducal Order, referred to above, which provides that 'taxpayers' complaints and applications for remission or reduction shall be dealt with by the head of the relevant service or his representative, subject to appeal to a body to be designated by ministerial order. The decision of such body shall be final, and no appeal shall be allowed where the amount of the tax forming the subject-matter of the complaint or the application is less than LFR 1 000.'

Pursuant to that provision, Article 1 of the Ministerial Order of 10 April 1946 designated the Judicial Committee of the Conseil d'État du Luxembourg (State Council of Luxembourg), sitting with three members, as the body to deliver final judgment in matters of taxes, duties, contributions and entitlements.

The Commission stresses, moreover, that the statutory origin of the powers of the Directeur des Contributions has already been recognized by the Conseil d'État on numerous occasions (see the judgments of 26 July 1963, No 5833, and 18 December 1968, No 5516).

— The permanence of the authority and the compulsory nature of its jurisdiction

The Commission says the provisions referred to above also show that the Directeur des Contributions is a permanent authority with compulsory jurisdiction.

The compulsory nature of his jurisdiction is demonstrated in particular by the fact that there is no other body with authority to rule at the same level, the fact that the Directeur des Contributions is obliged to rule on cases submitted to him, the fact that his decisions have definitive force, and the fact that matters cannot be submitted to the Conseil d'État before the Directeur des Contributions has given his ruling. On that point, the Commission refers to the two judgments of the Conseil d'État referred to above, dated 18 December 1968 and 26 July 1963, and to a judgment of the Belgian Court of Cassation of 1 October 1957 (Pas. 1958, I, p. 79).

— The application of the rule of law

The Commission explains that, when giving rulings under Paragraph 131 of the Abgabenordnung, the Directeur des Contributions is not exercising a discretionary power, but is bound by legal rules, and that disregarding those rules could result in review on appeal. In support of that statement, the Commission relies on the following points.

First, in the judgment of 26 July 1963 referred to above, the Conseil d'État took the view that the Directeur des Contributions was obliged to 'establish whether a legal situation complied with the rule of law' and that his task consisted in 'resolving a dispute on the basis of the rule of law'.

Secondly, in another judgment of 20 March 1982 (No 6852), the Conseil d'État effectively reversed in substance a decision of the Directeur des Contributions under Paragraph 131 of the Abgabenordnung. The Conseil d'État had also stated that: 'a judge hearing a revenue matter, in applying objective criteria of fairness, must have regard to the express or implied will of the legislator and must put himself in the position of the legislator in order to reach the solution which the legislator would himself have accepted, had he known or foreseen it'.

Moreover, as appears from the terms of the application itself, the Directeur des Contributions has a particular duty to ensure that the principle of fairness is observed. His decision could be reversed if it appeared that he had misapplied that principle.

Finally, the mere fact that the Directeur des Contributions has submitted to the Court a question on the interpretation of Community law, and that the question is necessary

to enable him to rule on the case before him is regarded as determinative by the Commission.

— The adversarial nature of the proceedings

The Commission concedes that the procedure before the Directeur des Contributions does not take the form of an exchange of argument but points out that he is obliged to weigh up the merits of each argument put before him.

The Conseil d'État generally recognizes that decisions taken by the Directeur des Contributions under Paragraph 131 of the Abgabenordnung have the force of judicial decisions.

Moreover, from the standpoint of Community case-law, the judgment of 14 December 1971 in Case 43/71 *Politi* v *Italy* [1971] ECR 1039 (and more particularly the Opinion of the Advocate General at p. 1053) and the judgment of 12 July 1973 in Case 2/73 *Geddo* v *Ente Nazionale Risi* [1973] ECR 865 both show that the fact that proceedings are informal in nature does not preclude a reference to the Court of Justice under Article 177 of the Treaty. In each of those cases, the Court was willing to reply to questions from an Italian Pretore, ruling in summary proceedings under Italian law, known as 'proceedings for an injunction'.

The Commission adds, however, that, if the Court did decide to allow the question from the Directeur des Contributions, such a decision could not be extended to other cases where the situation was different.

B — *Substance*

According to the Commission, the crux of the question referred for a preliminary ruling is whether Member States are entitled to take into account the annual income of a taxpayer who was non-resident for part of the year, in determining the rate of tax to be applied to the period during which he was resident.

The Commission proposes an affirmative answer to that question, thereby allowing the Luxembourg tax authorities to apply Article 154(6) of the loi sur l'impôt sur le revenu to Mr Corbiau. The Commission's position is based on two arguments.

In the first place, the Commission says the question has already been dealt with in paragraph 16 of the *Biehl* case referred to above. In that paragraph, the Court was replying to the argument of the Luxembourg Government that Article 154(6) of the loi sur l'impôt sur le revenu was aimed at protecting the system of progressive taxation (Paragraph 15). The Government had taken the view that, without such a rule, a temporarily resident taxpayer would have an advantage compared with a permanently resident taxpayer. By receiving income in two Member States in succession, a temporarily resident taxpayer could benefit from a more favourable tax rate than that applied to the income of a resident taxpayer who must declare to the Luxembourg authorities all his income, whether or not it originated in Luxembourg.

In Paragraph 16 of its judgment, the Court rejected that argument on the grounds that 'a national provision such as the one at issue is liable to infringe the principle of equal treatment in various situations. That is so in particular where no income arises during the year of assessment to the temporarily resident taxpayer in the country he has left or in which he has taken up residence. In such a situation, that taxpayer is treated less favourably than a resident taxpayer because he will lose the right to repayment of the overdeduction of tax which a resident taxpayer always enjoys'.

In the Commission's view, the Court was thereby obliging the authorities, in calculating the progressive band to be applied to income received during the period when the taxpayer was resident, to take account of his lack of income in the country where he subsequently took up residence. By the same token, it was likewise permissible, in the present case, to take account of the income received during the two months in which Mr Corbiau was no longer resident, to establish the rate applicable to the income received during the first ten months of the year. The fact that, during the period when he was a non-resident taxpayer, his income arose in the Grand Duchy does not, in the Commission's view, in any way affect the Court's reasoning concerning income received in another Member State.

In the second place, the Commission believes that, if the Court were to find for Mr Corbiau, Community nationals would enjoy an advantage compared with national workers, who, in respect of the same period, are taxed at the rate applicable to the amount of their income received over the whole year. In that respect, the Commission points out that nothing prevents a Member State, if the automatic operation of tax law gives migrant workers an advantage over nationals, from taking measures to redress the balance, provided the State gives reasons for its decision that are capable of being legally tested.

The Commission adds that, if Mr Corbiau's income were to be taxed at the rate corresponding to the whole of his income for the entire tax year 1990, a calculation should be made to take account of concessions and reductions (such as removal expenses, extraordinary expenses etc.) which were not included in the calculation of his income, and to which he had been entitled in previous tax years.

Accordingly, the Commission proposes that the question referred should receive the following reply:

'When determining the income tax liability of a taxpayer who was resident for part of the year only, Article 48(2) of the Treaty does not preclude the taking into account of his actual income for the whole tax period (taking account also of all the abatements to which he may be entitled for that period) in order to determine the marginal rate of tax applicable to his income during the period when he was resident for tax purposes'.

III — Replies to the questions put by the Court

Questions put to the Luxembourg Government

In its *first question*, by a letter of 28 October 1992, the Court asked the Luxembourg Government to specify on what basis and at what

rate Mr Corbiau was taxed during the last two months of 1990.

The Luxembourg Government replied:

'The certificate of pay and tax deducted for the whole of the year 1990, drawn up by Mr Corbiau's employer on 17 January 1991, shows that, for the last two months of the year, Mr Corbiau's monthly salary payments were subject to income tax deductions by the employer in the same way as for the first ten months. Such deductions appear to have been made, using the monthly deductions table, in accordance with the relevant statutory provisions and with the information set out in the tax slip of 1 January 1990. To determine the exact amounts of pay and tax deducted, one would have to look at the monthly salary calculations that Mr Corbiau doubtless received from his employer. Assuming, as the bureau d'imposition (Tax Office) Luxembourg IV assumed for the first ten months, that Mr Corbiau's monthly salary remained constant at one twelfth of his effective annual salary, namely ... LFR per month, and that in the same way his social security contributions amounted to ... LFR per month, the monthly tax deduction by the employer should have been ... LFR, applying the formula laid down for such monthly salary by the monthly deductions table. In fact, the employer deducted an average of ... LFR per month. The bureau d'imposition Luxembourg X, which has authority to tax non-resident taxpayers, decided that Mr Corbiau's taxable income in the Grand Duchy for the period from 26 October to 31 December 1990, when he was a non-resident taxpayer, did not warrant an assessment, because that income fell short of the threshold for an assessment laid down by Article 153 of the loi sur l'impôt sur le revenu.'

In its *second question*, the Court asked the Luxembourg Government whether it thought the Directeur des Contributions, ruling under Paragraph 131 of the Abgabenordnung, constituted a court or tribunal, and, if so, by reason of what characteristics.

Basing its answer on a consistent line of decisions of the Conseil d'État, the Luxembourg Government replied that when ruling under Paragraph 131 of the Abgabenordnung the Directeur des Contributions undoubtedly constituted a court or tribunal under Luxembourg law:

'Indeed, Article 8 of the Grand-Ducal Order of 26 October 1944, ratified by the Law of 27 February 1946 and supplemented by the Ministerial Order of 10 April 1946, permits only the Directeur des Contributions to hear applications for the remission of direct taxes, subject to appeal to the Conseil d'État. There is thus a hierarchical structure of organs, established by statute, which, by reason of their exclusive jurisdiction, their procedure and their being subject to the rule of law, fill all the criteria for a two-tier court system, not only in contentious matters (Conseil d'État, 26 July 1963, No 5833), but also in matters concerning remission (Conseil d'État, 21 October 1959, No 5698; 18 December 1968, No 5516, and consistent case-law). Thus, applications for remission of taxes, while still substantially governed by Paragraph 131 of the Abgabenordnung (Conseil d'État, 10 July 1981, No 6852), are not left to the discretion of any administrative authority but are heard by the very same

courts that ensure that the tax imposed is lawful. What started off, under Paragraph 131 of the Abgabenordnung, as an *ex gratia* measure subject only by Paragraph 2 of the Steueranpassungsgesetz (Tax Adaptation Law) has since become, institutionally and functionally an informal (that it is to say non-contentious) procedure. In full accordance with the principle of equality laid down in Article 101 of the Constitution, this arrangement takes over from the contentious procedure where equal application of the law is not enough to do justice in individual cases and where, either objectively by reason of the matter concerned or subjectively in relation to the taxpayer himself, the charging of tax would appear to be unduly harsh and incompatible with the principle of fairness. However, even if the principles governing the proceedings are the same in each case, especially the principles laid down in Paragraph 243 of the Loi Générale sur les Impôts (General Tax Law), the two legal remedies are nevertheless clearly distinct (Conseil d'État, 22 December 1989, No 8149); in the informal procedure there can be no review of the legality of notices of assessments to tax, which is a matter for contentious proceedings alone. As for procedure, even if the petitioner under the informal arrangement cannot exchange argument with any party at first instance and may only appeal, that feature is not unique to informal appeal arrangements but is also found in contentious proceedings. In any case, decisions at first instance taken under either procedure acquire the authority of *res judicata*.'

Question put to the Commission

In a letter of 28 October, the Court asked the Commission to state on what basis and at what rate Mr Corbiau was taxed during the last two months of 1990.

The Commission replied:

'...

The certificate of pay and tax deducted shows that, for the period from 1 January 1990 to 31 December 1990, Mr Corbiau had a salary of (A) LFR, subject to income tax deduction at source, and that, on that basis, the sum of (B) LFR was deducted by way of income tax.

The income tax certificate for 1990, drawn up following assessment, shows that, for the period when Mr Corbiau was resident (from 1 January 1990 to 25 October 1990), taxable income of (C) LFR was declared. During that period, deductions of (D) LFR were made.

Subject to further clarification from the Luxembourg authorities, his taxable income on assessment was calculated after deducting the sum of (E) LFR for items of special expenditure (loan interest, various insurance policies) not taken into account by the employer when calculating the taxable salary in accordance with the income tax scale.

The difference between the taxable salary for the whole year, namely (A) LFR, and the figure for taxable income obtained by assessment for the first ten months, namely (C) LFR, is (X) LFR. The taxable income for the last two months was thus (X) LFR. During that period, deductions of (Y) LFR, equivalent to (B)-(D), were made.

The Commission is not aware of any tax payments made to the Administration des Contributions other than by way of income tax deducted from salary, nor of any correction for the tax year as a whole, taking account of the abatement for extraordinary expenses in respect of the last two months.

Thus, for the last two months of 1990, Mr Corbiau was taxed at the rate of 37.3%.'

R. Joliet
Judge-Rapporteur