OPINION OF ADVOCATE GENERAL DARMON

delivered on 17 March 1993 *

Mr President,
Members of the Court,

1. A tax provision of a Member State lays down arrangements for the repayment of overpaid tax which provide that, in the event of a repayment being made, a company is entitled to compensation calculated as a percentage of the sums repaid, on condition that it is resident for tax purposes in that State.

2. Is such a condition contrary to Article 52 of the Treaty? That, in substance, is the question put to the Court by the High Court of Justice of England and Wales.

3. The London branch of Commerzbank, which is not resident for tax purposes in the United Kingdom, [1] granted certain loans to United States corporations between 1973 and 1976. It paid the tax demanded in the United Kingdom on the interest received.

4. It appears from Article XV of the double taxation convention concluded on 2 August 1946 [2] between the United Kingdom and the United States that dividends and interest paid by a United States company are exempt from United Kingdom income tax except where the recipient is a United Kingdom citizen, resident or corporation.

5. On 12 February 1990 the Chancery Division of the High Court upheld a decision of the Commissioner for the special purposes of the Income Tax Acts to the effect that, by virtue of that article, the tax was not owed by Commerzbank, which on the same day was refunded the overpaid tax, amounting to £4 222 234.

6. Commerzbank then made a further application for interest on the overpaid tax on the basis of section 825(2) of the Income and Corporation Taxes Act 1988, which provides that the repayment of overpaid tax 'shall be increased ... by an amount (a "repayment supplement") equal to the interest on the amount paid ...'.

7. The application was rejected by the Board of Commissioners of the Inland Revenue on the ground that under sub-section (1) of that section repayment supplement is payable only to companies resident for tax purposes in the United Kingdom.

8. In May 1990 Commerzbank applied for judicial review of the tax authorities' decision. It contends that the residence condition constitutes a flagrant breach of Arti-

* Original language: French.

1 — This point is not in dispute between the parties — see the national court's decision, point 35.

2 — As amended by the supplementary protocol of 20 September 1966.

cles 52, 53 and 58 of the Treaty; it also relies on Articles 5 and 7. [3]

9. The High Court therefore asks the Court whether the refusal to pay repayment supplement on the ground that the company is non-resident is compatible with Community law, in particular with the abovementioned articles of the EEC Treaty? It also asks the Court to rule on whether the reply to that question may be influenced by the fact that the company would not have been exempt from tax if it had been resident. [4]

10. The United Kingdom Government contends that in this case there has been no discrimination contrary to the Treaty. Its central argument is that it is necessary to compare Commerzbank's position with that of a British company under the relevant scheme of taxation viewed as a whole. [5] Far from being discriminated against by the British tax system, Commerzbank receives preferential treatment inasmuch as it enjoys an advantage reserved solely to non-residents (namely the possibility of obtaining repayment of tax which residents must pay). If the bank had been resident, it would have had to pay the tax and the question of repayment would not have arisen. It cannot therefore enjoy both the advantages granted to non-residents under the provisions of the double tax convention and those enjoyed by residents under section 825(2) (hereinafter referred to as 'Section 825').

11. In order properly to appraise those arguments, it is first necessary to identify precisely the discrimination alleged by Commerzbank. For that purpose it is necessary to compare the effects of a repayment of overpaid tax for a *resident* company with those for a *non-resident* company, where both are in the following situation: after paying tax that was not due, whatever the tax might be, they obtain a repayment of the tax and claim interest on the sums repaid in respect of the period in which they did not have use of those sums — *regardless of the reason for the repayment*. By virtue of the rule in question, whereas the first company may claim the repayment supplement, the second may not.

12. Contrary to the United Kingdom Government's suggestion, it is not, in my view, appropriate to make an overall comparison of the position of a non-resident company exempt from tax under a double tax convention which paid tax that was not due and claims repayment supplement with the position of a resident company which *is liable* for the tax and which therefore by definition cannot claim a repayment and thus avail itself of section 825.

13. In my view such a rule should apply whatever the reason for the repayment. It has no necessary link with double tax conventions.

14. Admittedly, by virtue of the convention, the non-resident company is not taxed in the United Kingdom in respect of the interest on the loans which it grants. However, that convention is not intended to lay down tax

3 — See point 1.10 of the United Kingdom Government's observations.

4 — The wording of the preliminary question appears in the Report for the Hearing (I-A).

5 — See point 2.3 of the United Kingdom Government's observations.

exemptions but to divide taxation between the States to which the taxpayer concerned has an attachment.

15. Even supposing that what is merely a transfer of tax jurisdiction from one State to another leads to a true exemption — in the absence of taxation of interest in the non-resident company's State of origin —, the advantage which it derives from the exemption flows, in my view, solely from the tax system of the latter State. It has therefore no connection with the repayment supplement, which is *incidental* to the repayment of the overpaid tax, and does not negate the discrimination which flows from the application of a provision whose benefit is denied to a taxpayer on the sole ground that he is not resident for tax purposes.

16. Let us not forget that the non-resident company has paid tax *that was not legally due* and that it is claiming repayment of the tax on the same terms as a resident company which has overpaid tax. The supplement is not a further 'advantage' [6] granted to the non-resident company. It merely represents fair compensation for loss of the use, for a given period, of sums belonging to it.

17. The situation of the non-resident company must be equated with the quite specific and wholly comparable situation of a resident company which has overpaid tax and not with the situation of another company which has paid tax for which it was actually liable.

18. Suppose that the non-resident company wrongly paid tax for which neither resident nor non-resident companies are liable. Would not the discriminatory nature of a provision such as the one in issue be plain since the non-resident company would be deprived of interest which the resident company would receive?

19. There is in addition a more fundamental objection to the United Kingdom's view. According to the United Kingdom, the Anglo-American double taxation convention removed any possibility of discrimination against non-resident companies since the latter are exempt from tax which only resident companies must pay. It is therefore by virtue of the application of a double taxation convention that there is no discrimination with respect to the conditions concerning the recovery of overpaid tax.

20. However, as the Court held in its judgment in Case 270/73 *Commission* v *France*, [7]

'... the rights conferred by Article 52 of the Treaty are *unconditional* and a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State'. [8]

21. In this case the observance of Community law cannot depend on the application of a double taxation convention concluded with a non-member country.

6 — Decision of the national court, Annex 15 *in fine*.

7 — [1986] ECR 273.

8 — Paragraph 26 (my emphasis).

22. The Court has inferred from Article 234 of the Treaty that, where the rights of non-member countries are not involved, conventions concluded prior to the Treaty between such countries and Member States cannot be relied on in order to justify restrictions in intra-Community trade. [9]

23. Equally, a convention concluded with a non-member country by a Member State prior to its accession to the Community cannot be relied upon in order to justify restrictions between Member States on the freedom of establishment.

24. For the purpose of examining whether a non-resident company is discriminated against with respect to the terms on which the repayment supplement is made, its situation may not be compared with that of resident companies whose situation is such that they cannot rely on section 825.

25. Consequently, the fact that a company would not have been exempt from tax (so that the question of repayment of the tax would not have arisen) if it had been resident in the taxing Member State is immaterial for the purpose of answering the national court's question.

26. The right conferred by Article 52 of the Treaty is not only the right to have an establishment in another Member State of the Community but also to set up agencies, branches or subsidiaries. [10]

27. The latter must also be free from all discrimination. The fact that a bank could have set up a subsidiary rather than a branch cannot justify an infringement of the right of establishment:

'The second sentence of the first paragraph of Article 52 expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions.' [11]

28. Can discrimination on grounds of *residence* be analysed as indirect discrimination on grounds of nationality?

29. First of all, Article 52, like Articles 30, 48 and 59, has been held to be a *lex specialis* in relation to Article 7 and merely an application of the principle of non-discrimination laid down by that article.

30. For many years the Court has taken the view that Article 52 precludes overt discrimination based on nationality. [12]

31. It also prohibits 'all covert forms of discrimination which, by application of other criteria of differentiation, lead in fact to the same result ...'. [13] Thus, in its judgment in *Thieffry* [14] the Court referred to the General Programme for the abolition of restrictions on freedom of establishment, adopted on

9 — Case 121/85 *Conegate* v *HM Customs and Excise* [1986] ECR 1007, at paragraph 25, and Case 286/86 *Ministère public* v *Deserbais* [1988] ECR 4907, paragraph 18.

10 — See paragraph 17 of the judgment in Case 81/87 *The Queen* v *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust* [1988] ECR 5483, paragraph 17.

11 — Paragraph 22 of the judgment in *Commission* v *France*, above. See also paragraph 16 of the judgment in Case 79/85 *Segers* [1986] ECR 2375.

12 — Case 2/74 *Reyners* v *Belgium* [1974] ECR 631. Moreover, that judgment establishes that Article 52 has been directly applicable since the end of the transitional period.

13 — Case C-3/88 *Commission* v *Italy* [1989] ECR 4035.

14 — Case 71/76 *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

18 December 1961 pursuant to Article 54 of the Treaty, which provided for the elimination of 'any form of disguised discrimination, by designating in Title III(B) as restrictions which are to be eliminated "any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, in respect of the taking up or pursuit of an activity as a self-employed person where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the taking up or pursuit of such activity by foreign nationals"'. [15]

32. A residence condition may constitute disguised discrimination on grounds of nationality inasmuch as, in practice, it principally affects nationals of other Member States.

33. Thus the Court has held that Article 52 precludes a Member State from requiring, as a condition for the registration of a fishing vessel in its national register, that the owners, charterers and operators of the boat should be nationals of that State and be resident or domiciled in the State. [16]

34. In that regard the Court stated:

'As for the requirement for the owners, charterers, managers and operators of the vessel and, in the case of the company, the shareholders and directors to be resident and domiciled in the Member State in which the vessel is to be registered, it must be held that such a requirement, which is not justified by the rights and obligations created by the grant of a national flag to a vessel, results in discrimination on grounds of nationality. The great majority of nationals of the Member State in question are resident and domiciled in that State and therefore meet that requirement automatically, whereas nationals of other Member States would, in most cases, have to move their residence and domicile to that State in order to comply with the requirements of its legislation. It follows that such a requirement is contrary to Article 52.' [17]

35. Discrimination based on the criterion of residence may therefore be contrary to Article 52.

36. However, what is the position with respect to residence *for tax purposes*?

37. In this area the criterion of residence is of particular importance. It is preferred to the criterion of nationality, which would involve a Member State in taxing persons who have lost any genuine, in particular economic, link with the State.

38. The criterion of residence has moreover been adopted by Community law. Thus, the Council Directives of 23 July 1990 concerning the common system of taxation applicable to mergers and exchanges of shares and

15 — Ibid., paragraph 13. See also Article 67 of the Treaty.

16 — Case C-221/89 *The Queen* v *The Secretary of State for Transport, ex parte Factortame and Others* [1991] ECR I-3905, operative part.

17 — Ibid., paragraph 32.

the common system of taxation applicable to parent companies and subsidiaries of different Member States [18] expressly refer to the concept of residence for tax purposes.

39. By Article 220 of the EEC Treaty the Member States undertook to abolish double taxation within the Community. It is by employing the criterion of residence that the Member States have achieved this by means of bilateral conventions.

40. The Court has not excluded the possibility that in an area such as tax law a distinction based on the location of the registered office of a company or the place of residence of a natural person may, under certain conditions, be justified. [19]

41. The Court has however imposed a limit on this. In determining the rules applicable in tax matters the Member States may not encroach upon the freedoms guaranteed by Community law to *all* nationals of Member States. The principle of freedom of establishment, in particular, would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax. [20] Thus, where non-residents are assimilated to residents and both are subject to the same tax system, the Court does not allow that system to be *applied* in a discriminatory manner.

18 — Respectively Directives 90/434/EEC and 90/435/EEC (OJ 1990 L 225, pp. 1 and 6).

19 — See paragraph 19 of the judgment in *Commission* v *France*, above.

20 — See, with respect to the principle of equal treatment with regard to remuneration, paragraph 12 of the judgment in Case C-175/88 *Biehl* v *Administration des contributions du grand-duché de Luxembourg* [1990] ECR I-1789.

42. That, in my view, is the main principle established by the judgment in *Commission* v *France*, above, where the Court held that

'By treating the two forms of establishment in the same way for the purposes of taxing their profits, the French legislature has in fact admitted that there is no objective difference between their positions in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.' [21]

It is therefore discriminatory to

'treat them differently in regard to the grant of an advantage related to taxation, such as shareholders' tax credits'. [22]

43. It was on the basis of that inconsistency, in particular, that the Court held there to be discrimination contrary to Article 52.

44. Similarly, where a right is granted both to residents and to non-residents, it may not be applied in a discriminatory manner. If the right to recovery of overpaid tax is granted both to non-resident companies and to resident companies because there is no objective difference which would justify not making a repayment to non-residents, that right must be applied in a non-discriminatory manner, that is to say, without distinguishing between such companies with respect to the grant of the repayment supplement, which moreover,

21 — Paragraph 20.

22 — Ibid.

as I have already said, is merely incidental to it.

45. Consequently, by treating differently companies which are in the same position of being owed money by the tax authorities, a provision which denies the payment of interest to non-resident companies discriminates against those companies.

46. In the case before the national court, does the residence criterion conceal disguised discrimination on grounds of nationality?

47. In company law a company's residence for tax purposes does not necessarily coincide with its official address or nationality.

48. The British position is a particularly good illustration: a company has British nationality where it is incorporated and has its registered office, which is also its official address, in the United Kingdom.

49. Residence is essentially a tax concept: it is determined by reference to the place where the actual management of the company is carried on. [23] It has thus been held that a company which was incorporated and had its registered office in the United Kingdom, but whose actual management was carried on in Cairo where the director and staff permanently resided, was resident for tax purposes in Egypt and not in the United Kingdom. [24]

50. In order for there to be disguised discrimination on grounds of nationality, the Court does not require that the measure should affect only non-residents, but that it should affect them principally or 'in particular'. [25]

51. Indeed it is clear that the criteria of residence and nationality overlap to a large extent.

52. As the Court held in *Biehl*,

'Even though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment of an overdeduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States.' [26]

53. It is impossible to maintain that in such circumstances companies resident abroad are treated equally.

54. What of the justification given on this point by the United Kingdom Government?

55. It was argued that, in the absence of such a restriction with respect to the repayment of overpaid tax, non-resident companies would be placed at an advantage in relation to resident companies.

23 — 'In tax law a company is ordinarily resident where the actual management of the company is carried on', *Palmer's Company Law*, Sweet and Maxwell, 1992, London, paragraph 2514.

24 — Egyptian Delta Land and Investment Co. Ltd v Todd, (1929) A. C.1, cited by *Palmer's Company Law*, op. cit., paragraph 2514.

25 — See paragraph 14 of the judgment in *Biehl*, above.

26 — Ibid.

56. The Court rejected such an argument in *Commission* v *France* in the following terms:

'... the difference in treatment also cannot be justified by any advantages which branches and agencies may enjoy *vis-à-vis* companies and which, according to the French Government, balance out the disadvantages resulting from the failure to grant the benefit of shareholders' tax credits. Even if such advantages actually exist, they cannot justify a breach of the obligation laid down in Article 52 to accord foreign companies the same treatment in regard to shareholders' tax credits as is accorded to French companies'. [27]

57. The different treatment to which non-resident companies are subject cannot, moreover, be justified by the particular features or differences with respect to the tax systems of the various Member States or the conditions relating to double taxation.

58. In this respect I would again refer to the judgment in *Commission* v *France*, where the Court stated:

'Although it is true that in the absence of such harmonization, a company's tax position depends on the national law applied to it, Article 52 of the EEC Treaty prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.' [28]

59. Finally, the last reason put forward by the United Kingdom Government appears a little paradoxical. [29] It argues that the repayment supplement is justified for residents because residents' tax affairs can normally be settled rapidly 'without supplement arising' [30]; on the other hand, claims made by non-residents are often late partly through their own fault and partly because of the difficulties flowing from the sharing of tax liability between several Member States. A claim for repayment of overpaid tax submitted late would prove extremely costly for the tax authorities [31] and would enrich the taxpayers who did not show due diligence.

60. I do not think that the complexity of dividing tax jurisdiction between the Member States may be relied upon to the detriment of a taxpayer who has been wrongly taxed. Moreover, I have serious doubts as to whether the application of a statutory rate can lead to enrichment. Above all, however, it seems to me that it is possible to reconcile observance of the principle of non-discrimination with the need to place a temporal limit on the right to repayment of overpaid tax, not by depriving only a non-resident of the right to interest, whether his application is late or not, but by providing a reasonable time-limit, applicable without

27 — Paragraph 21.

28 — Ibid., paragraph 24.

29 — See United Kingdom Government's observations, pages 12 and 13.

30 — Ibid. It should be noted, incidentally, that the provision under consideration was abolished on 7 December 1992.

31 — See section 825: interest is paid at an annual rate of 8.25% on the amount overpaid.

distinction to residents and non-residents, for requesting repayment of overpaid tax. [32]

61. In the absence of any convincing reasons, the refusal of a Member State to pay a company the repayment supplement by reason of its non-residence seems incompatible with Articles 52 and 58 of the EEC Treaty.

62. The preliminary question also concerns Article 7, which prohibits, within the scope of application of the Treaty, overt or covert discrimination based on nationality. [33]

63. As the Court held in its judgment in *Van Ameyde* v *UCI* [34] and, quite recently, in its judgment in *Werner*, [35] since Article 52 of the Treaty guarantees, in the sphere of the right of establishment, the application of the principle laid down by Article 7, it follows that, where rules are compatible with Article 52, they are also compatible with Article 7. [36]

64. Conversely, in its judgment in *Commission* v *Greece* the Court stated that: [37]

'... the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty has been implemented, in regard to their several domains, by Articles 48, 52 and 59 of the Treaty. Consequently, any rules incompatible with those provisions are also incompatible with Article 7 ... .

Article 7 of the Treaty ... applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination'. [38]

65. Since no reference has been made to situations other than those covered by Article 52, it is unnecessary to consider whether there is a specific infringement of Article 7.

66. Finally, the national court's question also refers to Article 5 of the Treaty.

67. Is it necessary to point out that the obligation contained in that article does not confer on individuals rights which the national courts are under a duty to protect? [39]

32 — Case C-163/90 *Administration des douanes et des droits indirects* v *Legros* [1992] ECR I-4625 illustrates the difficulties arising from an excessively long period for making claims for recovery of overpaid tax. In support of its request that the temporal effect of the judgment should be limited, the French Government pleaded that the 30-year time-limit was applicable to claims for repayment of the wrongly paid 'octroi de mer'.

33 — *Sotgiu*, above.

34 — Case 90/76 [1977] ECR 1091.

35 — Case C-112/91 [1993] ECR I-429, paragraph 20.

36 — *Van Ameyde* above, paragraph 27. See also Case 63/86 *Commission* v *Italy* [1988] ECR 29, paragraph 12.

37 — Case 305/87 [1989] ECR 1461.

38 — Paragraphs 12 and 13.

39 — Case 9/73 *Schlüter* [1973] ECR 1135, paragraph 39.

68. I therefore propose that the Court should rule as follows:

Articles 52 and 58 of the Treaty preclude the legislation of a Member State from reserving the payment of repayment supplement, following the payment of tax that was not due, to companies which are resident for tax purposes in that State and from refusing it to non-resident companies, even where those companies are registered in another Member State where they are resident for tax purposes. The fact that the companies would not have been exempt from tax if they had been resident in the Member State is of no importance in that regard.