Case C-298/05

Columbus Container Services BVBA & Co.

v

Finanzamt Bielefeld-Innenstadt

(Reference for a preliminary ruling from the Finanzgericht Münster)

(Articles 43 EC and 56 EC – Taxes on revenue and wealth – Conditions for taxing the profits of an establishment situated in another Member State – Double taxation convention – Methods of exempting or offsetting tax)

Opinion of Advocate General Mengozzi delivered on 29 March 2007

Judgment of the Court (First Chamber), 6 December 2007

Summary of the Judgment

1. *Freedom of movement for persons – Freedom of establishment – Provisions of the Treaty – Scope*

(Art. 43 EC)

2. *Preliminary rulings – Jurisdiction of the Court – Limits*

(Art. 234 EC)

3. *Freedom of movement for persons – Freedom of establishment – Free movement of capital – Tax legislation – Taxes on income*

(Arts 43 EC and 56 EC)

1. The acquisition by one or more natural persons residing in a Member State of all the shares in a company registered in another Member State, conferring on those persons definite influence over the company's decisions and allowing them to determine its activities, is covered by the Treaty provisions on the freedom of establishment. Those provisions thus apply to a situation in which all shares in the company are held, either directly or indirectly, by members of one family who pursue the same interests, take decisions concerning the company by agreement through the same representative at its general meeting and decide on its activities.

(see paras 30-32)

2. The Court has no jurisdiction, under Article 234 EC, to rules on the possible infringement by a contracting Member State of the provisions of bilateral conventions designed to eliminate or to mitigate the effects of double taxation. The Court may not examine the relationship between a national measure and the provisions of a double taxation convention, since that question does not fall within the scope of Community law.

(see paras 46-47)

3. Articles 43 EC and 56 EC must be interpreted as not precluding tax legislation of a Member State under which the income of a resident national derived from capital invested in an establishment which has its registered office in another Member State is, notwithstanding the existence of a double taxation convention concluded with the Member State in which the establishment has its registered office, not exempted from national income tax but is subject to national taxation against which the tax levied in the other Member State is set off.

In the current state of harmonisation of Community tax law, Member States enjoy a certain autonomy. It follows from that tax competence that the freedom of companies and partnerships to choose, for the purposes of establishment, between different Member States in no way means that the latter are obliged to adapt their own tax systems to the different systems of tax of the other Member States in order to guarantee that a company or partnership that has chosen to establish itself in a given Member State is taxed, at national level, in the same way as a company or partnership that has chosen to establish itself in another Member State. That fiscal autonomy also means that the Member States are at liberty to determine the conditions and the level of taxation for different types of establishments chosen by national companies or partnerships operating abroad, on condition that those companies or partnerships are not treated in a manner that is discriminatory in comparison with comparable national establishments.

(see paras 43, 45, 51, 53, 57, operative part)

JUDGMENT OF THE COURT (First Chamber)

6 December 2007 (*)

(Articles 43 EC and 56 EC – Taxes on revenue and wealth – Conditions for taxing the profits of an establishment situated in another Member State – Double taxation convention – Methods of exempting or offsetting tax)

In Case C?298/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Finanzgericht Münster (Germany), made by decision of 5 July 2005, received at the Court on 26 July 2005, in the proceedings

Columbus Container Services BVBA & Co.

v

Finanzamt Bielefeld-Innenstadt,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, J.N. Cunha Rodrigues, M. Ileši? and E. Levits (Rapporteur), Judges**,**

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2006,

after considering the observations submitted on behalf of:

– Columbus Container Services BVBA & Co., by A. Cordewener and J. Schönfeld, Rechtsanwälte, and by T. Rödder, Steuerberater,

– the German Government, by M. Lumma and U. Forsthoff, acting as Agents, and by W. Schön, Law Professor,

– the Belgian Government, by M. Wimmer, acting as Agent,

– the Netherlands Government, by H.G. Sevenster, C. ten Dam and D.J.M. de Grave, acting as Agents,

– the Portuguese Government, by L. Fernandes and J.P. Santos, acting as Agents,

– the United Kingdom Government, by C. White and V. Jackson, acting as Agents, and by P. Baker, QC, and T. Ward, Barrister,

– the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2007,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 43 EC and 56 EC.

2 The reference has been made in the course of proceedings between Columbus Container Services BVBA & Co. (‘Columbus’) and the Finanzamt (Tax Office) Bielefeld-Innenstadt (‘the Finanzamt’) concerning taxation of the profits which Columbus made in 1996.

Legal context

German legislation

3 Under Paragraph 1(1) of the Income Tax Law (Einkommensteuergesetz, BGBl. 1990 I, p. 1902, ‘the EStG’), every German resident is wholly liable to income tax in Germany and is subject to what is known as the principle of ‘worldwide income’. Under this principle, which applies to all types of income, including trading profits (Paragraph 2(1)(2) of the EStG) and income on capital (Paragraph 2(1)(5) of the EStG), income is calculated and taxed uniformly, regardless of whether it was acquired in Germany or elsewhere.

4 Under Paragraph 1 of the EStG, as well as Paragraph 1 of the Law on corporation tax (Körperschaftssteuergesetz, BGBl 1991 I, p. 637), an entity that is regarded as a partnership under German law is not as such subject to tax. The profits made by a partnership, either in Germany or elsewhere, are assigned pro rata to the partners residing in Germany and are taxed

as their own profit (first sentence of Paragraph 15(1)(2) of the EStG) in accordance with the principle of tax transparency of partnerships.

5 This assignment of the profits of a partnership to its partners applies even if the partnership is liable, as such, to corporation tax abroad, namely in the State in which it is registered.

6 With a view to avoiding double taxation of income which German residents acquire abroad, the Federal Republic of Germany has concluded bilateral conventions, including the convention for the avoidance of double taxation and for the settling of certain other questions with respect to taxes on income and wealth, signed in Brussels on 11 April 1967 between the Kingdom of Belgium and the Federal Republic of Germany (BGBl. 1969 II, p. 18, 'the Bilateral Tax Convention').

7 Under Article 7(1) of the Bilateral Tax Convention, the profits of a German undertaking carrying out its activities through a permanent establishment within the territory of the Kingdom of Belgium, such as a limited partnership, are taxed in that Member State to the extent to which they are attributable to that permanent establishment. According to the order for reference, since under Belgian tax legislation a limited partnership is liable to corporation tax, the Bilateral Tax Convention treats the distribution of profits as dividends for the purposes of Article 10 of that Convention.

8 Under Article 23(1)(1) of that Convention, the income of a person resident in Germany which is derived from Belgium and is taxable in that Member State pursuant to that Convention is exempt from tax in Germany. It is not contested that income derived from capital invested in a Belgian limited partnership falls within the scope of the exemption scheme provided for in Article 23(1)(1).

9 Contrary to the provisions of the Bilateral Tax Convention, the Foreign Transaction Tax Law (Gesetz über die Besteuerung bei Auslandsbeziehungen (Außensteuergesetz)), as amended by the Law on combating abuse and harmonising taxation (Missbrauchsbekämpfungs- und Steuerbereinigungsgesetz) of 21 December 1993 (BGBl. 1993 I, p. 2310, 'the AStG'), in force in the period relevant to the main proceedings, provides in Paragraph 20(2) and (3):

'2. Where designated passive income within the meaning of the second sentence of Paragraph 10(6) arises from the foreign establishment of a party with unlimited liability to tax in Germany and where that income would be liable to tax as controlled-foreign-corporation income if that establishment were a foreign corporation, double taxation shall be avoided in this respect by offsetting the foreign taxes levied on that income rather than by way of exemption.

3. Where assets are derived from designated passive income within the meaning of the second sentence of Paragraph 10(6), apart from designated passive income within the meaning of the third sentence of Paragraph 10(6), in the cases referred to in subparagraph (2), double taxation shall be avoided by offsetting the foreign taxes levied on those assets rather than by way of exemption. …'.

10 The second sentence of Paragraph 10(6) of the AStG provides:

'Designated passive controlled-foreign-corporation income shall mean income from a controlled foreign corporation which is derived from holding, administering or maintaining or increasing the value of payment media, receivables, securities, investments and similar assets …'

11 Paragraph 8(1) and (3) of the AStG is worded as follows:

'1. A foreign corporation is a controlled corporation for income that is liable to low taxation …

…

3. Taxation is low within the meaning of subparagraph 1 if the income is subject to a tax on profits of less than 30% in the State in which the management is located or in the State in which the foreign corporation has its registered office, without this being the result of an adjustment taking into account income from other sources, or if the tax subsequently to be taken into consideration is reduced in accordance with the laws of the State in question by the amount of tax to which the corporation from which the income derives is liable ...'.

Belgian legislation

12 Under Belgian law, undertakings regarded as 'coordination centres' fall within the tax regime put in place by Royal Decree No 187 of 30 December 1982 (*Moniteur belge* of 13 January 1983). Pursuant to that Royal Decree, the tax base for profits made in Belgium by a coordination centre is determined at a standard rate in accordance with the 'cost-plus' method.

The dispute in the main proceedings and the question referred for a preliminary ruling

13 Columbus is a limited partnership governed by Belgian law, which at the time of the facts in the main proceedings had its registered office in Antwerp (Belgium). The company is a coordination centre for the purposes of Royal Decree No 187.

14 Columbus' shares are held, on the one hand, by eight members of the same family residing in Germany, each member having a 10% holding, and, on the other hand, as regards the remaining 20%, by a German partnership, the shares in which are also held by members of that family. At Columbus' general meeting, all shareholders are represented by the same person.

15 Columbus is a member of an internationally important economic group. Its objects consist in the coordination of the activities of that group. They cover, in particular, the centralisation of financial transactions and of the accounts, the financing of the liquidity of subsidiaries or branches, the computerisation of data and advertising and marketing activities.

16 Columbus' economic activity centres on the management of designated passive income, within the meaning of the second sentence of Paragraph 10(6) of the AStG. This management activity earned Columbus in the course of 1996 profits derived from 'trading results' amounting to DEM 8 044 619 (EUR 4 113 148) and 'other income' amounting to DEM 53 477 (EUR 27 342).

17 In 1996, Columbus was taxed by the Belgian tax authority at the rate applicable to coordination centres, with taxation amounting in this instance to less than 30% of the profit actually achieved.

18 Under German law, Columbus is a partnership.

19 In accordance with German tax law, and in particular Paragraph 20(2) of the AStG, the Finanzamt, by a tax notice of 8 June 1998, exempted Columbus' other income for the partners, but made it subject to progressivity. By contrast, the partners were taxed on the profits derived from Columbus' 'trading results', even though the Finanzamt did set the amount of tax paid in Belgium off against those profits.

20 By a notice of 16 June 1998 the Finanzamt also determined, in accordance with Paragraph 20(3) of the AStG, the reference value of Columbus' business assets for the purposes of calculating the partners' wealth tax as at 1 January 1996.

21 Columbus appealed to the Finanzamt against those notices, except the notice relating to other income, and, following the dismissal of that appeal, brought an action before the Finanzgericht (Finance Court) Münster.

22 Before the Finanzgericht Münster, Columbus claims in particular that Paragraph 20(2) and (3) of the AStG is incompatible with the provisions of Article 43 EC. According to Columbus, replacing the exemption method provided for in Article 23(1)(1) of the Bilateral Tax Convention with the set-off method provided for in Paragraph 20(2) and (3) of the AStG has the effect of rendering the cross-border establishments referred to less attractive. Such a withdrawal of the tax advantage which the latter enjoyed infringes unjustifiably the freedom of establishment guaranteed by the EC Treaty.

23 Columbus further submits that there is no justification for not applying the provisions of the Bilateral Tax Convention.

24 The Finanzgericht Münster does not exclude the possibility that the rules set out in Paragraph 20(2) and (3) of the AStG infringe freedom of establishment. It also has doubts as to whether those rules are compatible with the free movement of capital. The additional taxation to which those provisions make foreign income subject would, it believes, be likely to dissuade German residents from investing in a Member State other than the Federal Republic of Germany, without there being any justification for this restriction on movements of capital.

25 In those circumstances, the Finanzgericht Münster decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is it contrary to the provisions of Article 52 of the EC Treaty (now Article 43 EC) and Articles 73b to 73d of the EC Treaty (now Articles 56 EC to 58 EC) for the rules in Paragraph 20(2) and (3) of [the AStG] to exempt from double taxation the designated passive income of a foreign establishment of a party with unlimited liability to tax in Germany, which would be liable to tax as controlled-foreign-corporation income if the establishment were a foreign corporation, by offsetting the foreign tax on earnings levied on the income rather than by exempting the income from taxation in Germany contrary to the [Bilateral Tax] Convention?’

The question referred for a preliminary ruling

26 By its question, the Finanzgericht Münster asks essentially whether Articles 43 EC and 56 EC must be interpreted as precluding tax legislation of a Member State, such as that in issue in the main proceedings, under which the income of a resident national derived from capital invested in an establishment having its registered office in another Member State is, notwithstanding the existence of a double taxation convention concluded with the Member State in which that establishment has its registered office, not exempted from national income tax, but is subject to national taxation against which the tax paid in the other Member State is set off.

27 As a preliminary point, it must be recalled, that, according to settled case-law, in the absence of unifying or harmonising measures adopted by the Community, the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means inter alia of international agreements (see, in particular, Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57; Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 54; and Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 52).

28 However, although direct taxation falls within their competence, the Member States must

exercise that competence consistently with Community law (see Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 28, and *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 36).

The existence of a restriction on the freedom of establishment

29 In accordance with settled case-law, national provisions which apply to holdings by nationals of the Member State concerned in the capital of a company established in another Member State, giving them definite influence on the company's decisions and allowing them to determine its activities, come within the scope of the provisions of the Treaty on freedom of establishment (see, to that effect, Case C-231/05 *Oy AA* [2007] ECR I?0000, paragraph 20, and Case C?112/05 *Commission* v *Germany* [2007] ECR I?0000, paragraph 13).

30 Further according to that case-law, the acquisition by one or more natural persons residing in a Member State of all the shares in a company registered in another Member State, conferring on those persons definite influence over the company's decisions and allowing them to determine its activities, is thus covered by the Treaty provisions on the freedom of establishment (see Case C-251/98 *Baars* [2000] ECR I?2787, paragraphs 21 and 22, and Case C-208/00 *Überseering* [2002] ECR I?9919, paragraph 77).

31 In the present case, it is apparent from paragraph 14 of this judgment that all shares in Columbus are held, either directly or indirectly, by members of one family. The latter pursue the same interests, take decisions concerning Columbus by agreement through the same representative at the general meeting of Columbus and decide on its activities.

32 It follows that the Treaty provisions on the freedom of establishment apply to a situation such as that in the main proceedings.

33 Article 43 EC requires the elimination of restrictions on the freedom of establishment. Therefore, even though, according to their wording, the provisions of the Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see, in particular, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21, and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 42).

34 It is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as constituting such restrictions (see Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11).

35 As set out in paragraph 7 of this judgment, income derived from the profits of a German undertaking through a Belgian limited partnership is, under the terms of the Bilateral Tax Convention, exempt for taxpayers residing in Germany. However, if, as in the case in the main proceedings, such a partnership is subject, under Belgian tax legislation, to a tax on profits made in Belgium of less than 30%, the provisions of the AStG in issue in the main proceedings provide that, notwithstanding that Convention, that income is no longer exempt from income tax for taxpayers residing in Germany, but is subject to the German tax regime, the tax levied in Belgium being set off against the taxable amount in Germany.

36 Under Paragraph 20(2) and (3) of the AStG, income derived from a company or partnership that is subject outside Germany to a rate of taxation which Paragraph 8(1) and (3) of the AStG

describes as ‘low’ does not benefit from the exemption provided for under the Bilateral Tax Convention, but falls within the scope of the set-off method provided for in Paragraph 20(2) and (3) of the AStG.

37 According to information which Columbus presented at the hearing, in the tax year 1996 replacement of the exemption method by the set-off method increased the tax burden of Columbus’ partners by 53%.

38 However, it must be stated that even if, in the context of the taxation of Columbus’ partners, application of the set-off method provided for in Paragraph 20(2) and (3) of the AStG in issue in the main proceedings has the effect of rendering the pursuit of Columbus’ activities more expensive than if that taxation had been carried out using the exemption method provided for in the Bilateral Tax Convention, this does not necessarily mean that those provisions constitute a restriction on the freedom of establishment within the meaning of Article 43 EC.

39 Given that the freedom of establishment prohibits any discrimination based on the place in which companies or partnerships have their seat (see, to that effect, *Saint-Gobain ZN*, paragraph 35, and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 40), it is not contested that the German tax legislation in issue in the main proceedings, which is comparable in this respect to the Belgian tax legislation that applied in the case resulting in the judgment in Case C?513/04 *Kerckhaert and Morres* [2006] ECR I?10967, paragraph 17, does not make any distinction between taxation of income derived from the profits of partnerships established in Germany, and taxation of income derived from the profits of partnerships established in another Member State which subjects the profits made by those partnerships in that State to a rate of tax below 30%. By applying the set-off method to such foreign partnerships, that legislation merely subjects, in Germany, the profits made by such partnerships to the same tax rate as profits made by partnerships established in Germany.

40 Since partnerships such as Columbus do not suffer any tax disadvantage in comparison with partnerships established in Germany, there is no discrimination resulting from a difference in treatment between those two categories of partnerships.

41 It is true that, according to well-established case-law, discrimination can also arise through the application of the same rule to different situations (see Case C?279/93 *Schumacker* [1995] ECR I-225, paragraph 30, and Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 26).

42 However, in respect of the tax legislation of his State of residence, the position of a partner receiving profits is not necessarily altered merely by the fact that he receives those dividends from a company or partnership established in another Member State, which, in exercising its fiscal sovereignty, makes those profits subject to taxation amounting to less than 30% of the profit actually made (see, to that effect, *Kerckhaert and Morres*, paragraph 19).

43 In circumstances such as those in the main proceedings, the adverse consequences which might arise from the application of a system for the taxation of profits such as that put in place by the AStG result from the exercise in parallel by two Member States of their fiscal sovereignty (see *Kerckhaert and Morres*, paragraph 20).

44 In this respect, double taxation conventions such as those envisaged in Article 293 EC are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems referred to in the preceding paragraph (*Kerckhaert and Morres*, paragraph 21).

45 Community law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. Consequently, apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level (see *Kerckhaert and Morres*, paragraph 22).

46 Although the Member States have, within the framework of their powers referred to in paragraph 27 of this judgment, entered into numerous bilateral conventions designed to eliminate or to mitigate those negative effects, the fact none the less remains that the Court has no jurisdiction, under Article 234 EC, to rule on the possible infringement of the provisions of such conventions by a contracting Member State.

47 As the Advocate General noted in point 46 of his Opinion, the Court may not examine the relationship between a national measure, such as that in issue in the main proceedings, and the provisions of a double taxation convention, such as the Bilateral Tax Convention, since that question does not fall within the scope of Community law (see, to that effect, Case C?141/99 *AMID* [2000] ECR I-11619, paragraph 18).

48 Contrary to what the applicant in the main proceedings claims, it also does not follow from paragraphs 43 and 44 of the judgment in Case C?294/97 *Eurowings Luftverkehr* [1999] ECR I-7447 that the freedoms of movement guaranteed by the Treaty preclude the application of national legislation such as that in issue in the main proceedings.

49 Although the Court, in the *Eurowings Luftverkehr* judgment, held that a Member State cannot justify the application of a tax levy to recipients of services on the ground that the persons providing those services were subject to low taxation in another Member State, the case which led to that judgment concerned national legislation that subjected providers of services established in the Member State concerned to less favourable tax treatment than those established in other Member States. However, in the main proceedings in the present case, limited partnerships such as Columbus and partnerships established in Germany are subject, as regards their partners, to a tax treatment that is not based on such a difference in treatment.

50 Columbus also submits that the provisions of the AStG at issue in the main proceedings lead to a distortion of the choice that companies and partnerships have to establish themselves in different Member States.

51 As stated in paragraph 44 of this judgment, in the current state of harmonisation of Community tax law, Member States enjoy a certain autonomy. It follows from that tax competence that the freedom of companies and partnerships to choose, for the purposes of establishment, between different Member States in no way means that the latter are obliged to adapt their own tax systems to the different systems of tax of the other Member States in order to guarantee that a company or partnership that has chosen to establish itself in a given Member State is taxed, at national level, in the same way as a company or partnership that has chosen to establish itself in another Member State.

52 Columbus also submits that the provisions of the AStG in issue in the main proceedings lead

to a distortion of the choice between the different types of establishment. Accordingly, Columbus argues that it would have avoided application of those provisions if it had chosen to pursue its activities in Belgium through a subsidiary which was a company with share capital, and not through an establishment such as that in issue in the main proceedings.

53 In this respect, it must be recalled that the fiscal autonomy referred to in paragraphs 44 and 51 of this judgment also means that the Member States are at liberty to determine the conditions and the level of taxation for different types of establishments chosen by national companies or partnerships operating abroad, on condition that those companies or partnerships are not treated in a manner that is discriminatory in comparison with comparable national establishments.

54 In the light of all those considerations and the principle of equality of fiscal treatment between limited partnerships such as Columbus, on the one hand, and partnerships established in Germany, on the other hand, as recalled in paragraph 40 of this judgment, it must be held that the provisions of the AStG cannot be classified as constituting restrictions on the freedom of establishment within the meaning of Article 43 EC.

The existence of a restriction on the free movement of capital

55 In its question, the Finanzgericht Münster also asks whether Article 56 EC must be interpreted as precluding national legislation such as that in issue in the main proceedings.

56 In this respect, suffice it to recall, as follows from the foregoing, that legislation such as that in issue in the main proceedings does not involve discrimination of taxpayers of a Member State to whom profits made by partnerships established in another Member State are attributed. Accordingly, the conclusion arrived at in paragraph 54 of this judgment also applies to the provisions of the Treaty relating to the free movement of capital (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 60).

57 The answer to the question referred is therefore that Articles 43 EC and 56 EC must be interpreted as not precluding tax legislation of a Member State under which the income of a resident national derived from capital invested in an establishment which has its registered office in another Member State is, notwithstanding the existence of a double taxation convention concluded with the Member State in which the establishment has its registered office, not exempted from national income tax but is subject to national taxation against which the tax levied in the other Member State is set off.

Costs

58 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Articles 43 EC and 56 EC must be interpreted as not precluding tax legislation of a Member State under which the income of a resident national derived from capital invested in an establishment which has its registered office in another Member State is, notwithstanding the existence of a double taxation convention concluded with the Member State in which the establishment has its registered office, not exempted from national income tax but is subject to national taxation against which the tax levied in the other Member State is set off.

[Signatures]

* Language of the case: German.