

JUDGMENT OF THE COURT (Fourth Chamber)

11 June 2009

(Freedom to provide services – Free movement of capital – Wealth tax – Income tax – Savings deposited in a Member State other than the Member State of residence – No declaration – Recovery period – Extension of the recovery period in the case of assets held outside the Member State of residence – Directive 77/799/EEC – Mutual assistance of the competent authorities of the Member States in the field of direct and indirect taxation – Banking secrecy)

In Joined Cases C-155/08 and C-157/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decisions of 21 March 2008, received at the Court on 16 April 2008, in the proceedings

X (C-155/08),

E.H.A. Passenheim-van Schoot (C-157/08)

v

Staatssecretaris van Financiën,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, T. von Danwitz, E. Juhász, G. Arestis and J. Malenovský, Judges,

Advocate General: Y. Bot,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 March 2009,

after considering the observations submitted on behalf of:

- X, by J.J. Feenstra and L.C.A. Wijsman, advocaten,
- Mrs Passenheim-van Schoot, by J. Hamer, advocaat, and J.A.R. van Eijsden and E.C.C.M. Kemmeren, belastingadviseurs,
- the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,
- the Belgian Government, by J.-C. Halleux, acting as Agent,
- the Italian Government, by I. Bruni, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

- the Commission of the European Communities, by R. Lyal and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 These references for a preliminary ruling relate to the interpretation of Articles 49 EC and 56 EC.
- 2 The references have been made in the course of two sets of proceedings between natural persons resident in the Netherlands, namely X (Case C-155/08) and Mrs Passenheim-van Schoot (Case C-157/08), and the Staatssecretaris van Financiën (State Secretary for Finance) concerning additional assessments made by the Netherlands tax authorities following the discovery of assets held in another Member State and income from those assets that had been concealed.

Legal context

Community rules

- 3 Article 1(1) of 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 and indirect taxation (OJ 1977 L 336, p. 15), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Directive 77/799'), provides:

'In accordance with this Directive the competent authorities of the Member State shall exchange any information that may enable them to effect a correct assessment of taxes on income and capital ...'
- 4 Article 2(1) of Directive 77/799 provides:

'The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.'
- 5 Article 3 of Directive 77/799 provides:

‘For categories of cases which they shall determine under the consultation procedure laid down in Article 9, the competent authorities of the Member States shall regularly exchange the information referred to in Article 1(1) without prior request.’

- 6 Article 8(1) of Directive 77/799, in the version applicable to the facts of the main proceedings in Case C-155/08, provides:

‘This Directive shall impose no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes.’

- 7 The aim of 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) is, according to Article 1(1) thereof, to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident for tax purposes in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State.

- 8 Chapter II of Directive 2003/48, entitled ‘Exchange of information’, provides for the reporting of information, by the agent paying the interest, to the competent authority of its Member State of establishment (Article 8) and for the automatic exchange of information between that authority and the competent authority of the Member State of residence of the beneficial owner (Article 9).

- 9 According to Article 9:

‘1. The competent authority of the Member State of the paying agent shall communicate the information referred to in Article 8 to the competent authority of the Member State of residence of the beneficial owner.

2. The communication of information shall be automatic and shall take place at least once a year, within six months following the end of the tax year of the Member State of the paying agent, for all interest payments made during that year.

3. The provisions of Directive [77/799] shall apply to the exchange of information under this Directive, provided that the provisions of this Directive do not derogate therefrom. However, Article 8 of Directive [77/799] shall not apply to the information to be provided pursuant to this chapter.’

- 10 Article 10(1) of Directive 2003/48, contained in Chapter III entitled ‘Transitional provisions’, provides that during a transitional period the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Republic of Austria are not required to apply the provisions of Chapter II of the directive.

Netherlands rules

- 11 Article 16 of the General law relating to national taxes (Algemene wet inzake rijksbelastingen, ‘the AWR’) provides as follows:

‘1. If any fact provides grounds for the assumption that an assessment has wrongly not been issued or has been issued at too low an amount, ... the Inspector may recover the unpaid tax. ...

...

3. The authority to issue an additional assessment for recovery shall lapse five years after the date on which the tax debt arose. ...

4. If too little tax has been levied on components of the subject-matter of any tax which have been held or have arisen abroad, the authority to recover the underpaid tax shall lapse, in derogation from the first sentence of paragraph 3, 12 years after the date on which the tax debt arose.’

12 Article 67e(1) and (2) of the AWR provide as follows:

‘1. If, in regard to tax recovered on the basis of an initial assessment, the fact that the notice of assessment has fixed the amount at too low a level or that, in any other manner, too little tax has been paid may be attributed to the deliberate intention or gross negligence of the taxpayer, that constitutes an offence in respect of which the Inspector may, at the same time as the additional assessment is drawn up, impose a fine on the taxpayer in an amount up to 100% of the basis of assessment of the fine, as that basis is determined in paragraph 2.

2. The basis of assessment of the fine is ... the amount of the additional assessment ...’

13 Decision No CPP2001/3595, V-N 2002/29.4 of the State Secretary for Finance on the rules concerning international mutual assistance in regard to tax collection (Besluit van de Staatssecretaris van Financiën nr. CPP2001/3595, V-N 2002/29.4, inzake het voorschrift internationale wederzijdse bijstand bij de heffing van belastingen) of 24 May 2002 (‘the State Secretary’s decision’) contains guidelines for the implementation of Directive 77/799.

14 According to point 4.1 of that decision, headed ‘Conditions for making a request abroad’:

‘A request for information may deal with bodies or natural persons, and can be made if the information may enable a correct assessment of the amount of the tax debt to be effected (Article 1 of [Directive 77/799]) or if the information is necessary to implement the provisions of the bilateral tax conventions concerned and/or for the application of Netherlands tax legislation (see the various articles of the bilateral tax conventions concerning requests for information). The request must concern individual cases. It cannot be a “fishing trip”. Before a request for information is made abroad, the usual national methods of obtaining data must have been exhausted (principle of exhaustion).’

15 Point 5.2 of the State Secretary’s decision is headed ‘Automatic exchange of information’. Point 5.2.1, headed ‘Legal basis’, states as follows:

‘The automatic exchange of information is expressly mentioned in Article 3 of Directive [77/799] and Article 6 of the Convention on Mutual Administrative Assistance in Tax

Matters [concluded in Strasbourg on 25 January 1988]. It is apparent from the commentary on the model convention of the [Organisation for Economic Cooperation and Development (OECD)] of 1977 that the provisions concerning the exchange of information deal, in particular, with automatic exchange of such information.

The automatic exchange of information is implemented by agreements between the parties to the convention. Those agreements deal with the categories of information to be exchanged and the conditions under which, and the manner in which, the exchange is to take place.

The agreements in question are the subject of arrangements (or memoranda of agreement). In the Netherlands, such arrangements must be published in the *Staatscourant* ...

The Netherlands has concluded a number of specific conventions concerning the automatic exchange of information. ...'

- 16 On 16 October 1997, the Kingdom of the Netherlands and the Federal Republic of Germany concluded an agreement for the exchange of information in tax matters (No AFZ97/3934 M, *Stc.* 1997, No 235). That agreement does not provide for the automatic or spontaneous exchange of information regarding interest or savings balances. The Kingdom of the Netherlands has not concluded any agreement for the exchange of information in tax matters with the Grand Duchy of Luxembourg.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-155/08

- 17 By letter of 27 October 2000, the Special Taxation Inspectorate of the Kingdom of Belgium spontaneously forwarded to the Netherlands tax authority information on financial accounts held in the names of Netherlands residents at Kredietbank Luxembourg ('KB-Lux'), a bank established in Luxembourg.
- 18 Since examination of that information led to the presumption that X held such an account, the Inspecteur van de Belastingdienst (Inspector of the Netherlands tax administration, the 'Inspector') asked him for further details in that regard. Following an exchange of correspondence between the Inspector and X's agent, X declared, in a letter of 8 May 2002, that he had been the holder of a bank account at KB-Lux since 1993. By letter of 23 August 2002, X provided more detailed information, in particular regarding the state of the account during the period concerned.
- 19 On 12 November 2002, X received an additional assessment to wealth tax payable in respect of 1998, including adjustments concerning, first, income tax and social insurance contributions for the tax years from 1993 to 2000 and, second, wealth tax for the tax years from 1994 to 2001. A fine amounting to 50% of the additional amounts sought was also imposed on him.
- 20 When his objection disputing that assessment was rejected, X appealed to the *Gerechtshof te Amsterdam* (Regional Court of Appeal, Amsterdam), arguing, inter alia,

that the recovery period of 12 years laid down in Article 16(4) of the AWR in respect of taxable items held abroad is contrary to Community law.

- 21 By decision of 18 January 2006, the abovementioned court declared the action to be unfounded but, since it found that a reasonable period had been exceeded, it annulled the Inspector's decision and reduced the amount of the additional assessment.
- 22 X appealed against that decision on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
 - '1. Must Articles 49 EC and 56 EC be interpreted as meaning that, in cases where foreign savings balances, or income therefrom, are concealed from the tax authorities of a Member State, those articles do not prevent that Member State from applying a statutory rule which, in order to compensate for the lack of effective means of monitoring foreign credit balances, provides for a recovery period of 12 years, whereas a recovery period of five years applies in the case of savings balances, or income therefrom, held in that Member State, in which such effective means do exist?
 2. Does it make a difference to the answer to Question 1 whether the credit balances are held in a Member State in which banking secrecy applies?
 3. If the answer to Question 1 is affirmative, do Articles 49 EC and 56 EC similarly not preclude a fine for concealment of income or assets on which tax has been subsequently claimed from being determined as a proportion of the amount claimed over that longer period?'

Case C-157/08

- 23 After her husband died, Mrs Passenheim-van Schoot, on 10 January 2003, made a full disclosure on her own initiative to the Netherlands tax authority of balances held by herself and her late husband at a bank established in Germany. Until that time those balances had never been included in their declarations relating to income tax and social insurance contributions and to wealth tax.
- 24 At Mrs Passenheim-van Schoot's request, the Inspector granted her the benefit of the 'repentance' scheme and therefore imposed no fine on her. However, on 13 May 2005, he sent her additional assessments for recovery concerning, first, income tax and social insurance contributions for the tax years from 1993 to 1996 and, second, wealth tax for the tax years from 1994 to 1997, together with related decisions in regard to interest.
- 25 Mrs Passenheim-van Schoot brought an action against those assessments before the Rechtbank te Arnhem (Local Court, Arnhem) arguing, inter alia, that the 12-year recovery period laid down in Article 16(4) of the AWR in respect of taxable items held abroad is contrary to Community law.
- 26 Following the dismissal of that action, Mrs Passenheim-van Schoot appealed on a point of law to the Hoge Raad der Nederlanden, which decided to stay proceedings and to refer to the Court for a preliminary ruling a question which is wholly identical to the first question referred in Case C-155/08.

- 27 By order of the President of the Court of 26 May 2008, Case C-155/08 and Case C-157/08 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred to the Court

The first and second questions in Case C-155/08 and the question in Case C-157/08

- 28 By the first and second questions referred in Case C-155/08 and the question referred in Case C-157/08, the national court asks, in substance, whether Articles 49 EC and 56 EC must be interpreted as precluding legislation of a Member State under which, in cases where savings balances and/or income therefrom are concealed from the tax authorities, the recovery period is five years if the savings balances are held in that Member State but is extended to twelve years if they are held in another Member State. It also wonders whether it makes a difference that the legislation of that other Member State provides for banking secrecy.

The existence of a restriction on the freedoms of movement

- 29 In the view of the appellants in the main proceedings and the Commission of the European Communities, legislation such as that at issue in the main proceedings restricts both the free movement of capital and the freedom to provide services. It makes it less attractive for a taxpayer resident in the Netherlands to transfer savings balances to another Member State and keep them there. It is also less attractive for a person established outside the Netherlands to collect assets from persons resident in that Member State and to provide services to its residents.
- 30 On the other hand, the Netherlands and Belgian Governments consider that that legislation restricts neither the freedom to provide services nor the free movement of capital. Article 16(4) of the AWR applies irrespective of the nationality and of the place of establishment or residence of the taxpayer. Nor does that provision hinder a taxpayer who declares to the tax authorities his savings balances and income therefrom from keeping those balances in another Member State. Even where such balances are concealed from the tax authorities, the application of an extended recovery period cannot have any dissuasive effect on keeping them in another Member State since, in such a case, the authorities in question have no real possibility of obtaining information on those balances.
- 31 The Netherlands Government adds that the application of an extended recovery period does not introduce any discrimination in terms of legal certainty with regard to assets held abroad compared to those held in the Netherlands inasmuch as, in both cases, legal certainty can and must be obtained, first and foremost, by declaring those assets and the income from them. The Belgian Government contends that Article 16(4) of the AWR cannot be regarded as discriminatory inasmuch as a declaration of the banking data of taxpayers holding balances in banks established in the Netherlands is made automatically to the tax authorities of that Member State, rendering it impossible to conceal such balances, whereas taxpayers who have deposited their savings in other Member States can be the subject only of a limited exchange of information.

- 32 It should be recalled in this regard that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (see, in particular, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23; Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 23; and Case C-318/05 *Commission v Germany* [2007] ECR I-6957, paragraph 81).
- 33 In addition, measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of Article 56(1) EC (see, in particular, Case C-478/98 *Commission v Belgium* [2000] ECR I-7587, paragraph 18).
- 34 In the present case, it is apparent from Article 16(3) and (4) of the AWR that, if an assessment has not been issued or has been issued for too low an amount, the Netherlands tax authorities may issue an additional assessment within five years in the case of Netherlands assets and income and twelve years in the case of foreign assets or income.
- 35 Although, by making the power of the tax authorities to levy tax subject to a maximum recovery period, the Netherlands legislation thus sought to provide taxpayers resident in the Netherlands with legal certainty in regard to their tax liability, such certainty is acquired in regard to assets and income in another Member State only after 12 years instead of 5 years.
- 36 That difference of treatment on the basis of the place where the savings balances are held does not disappear by reason of the fact, pointed out by the Netherlands and Belgian Governments, that the taxpayer can always declare the assets he holds abroad and the income he derives from them to the tax authorities.
- 37 It is sufficient to note that, as the Netherlands Government admitted at the hearing, in the case of domestic assets or income the recovery period is not extended where there has been concealment from the tax authorities. That is so where domestic assets or income which are not held in a bank account or do not arise from such an account, and which are not therefore covered by an obligation to inform the tax authorities, have not been declared to those authorities. It follows that, when a taxpayer fails to declare such domestic assets or income to the tax authorities, he is already certain after five years that they will no longer be taxed, whereas, when assets or income in another Member State are not declared, that certainty exists only after twelve years.
- 38 In addition, when the additional assessment to tax is accompanied by a fine, that fine is calculated on the basis of the amount of the additional assessment and, consequently, of the period covered by it, which means that, where the extended recovery period laid down in Article 16(4) of the AWR is applied, the taxpayer runs the risk of a fine calculated on the basis of an additional assessment covering a longer period than the period which may be taken into account in a situation in which the taxable items which are the subject of the additional assessment are held or arose in the Netherlands.
- 39 For those reasons, the application to taxpayers resident in the Netherlands of an extended recovery period in regard to assets held outside that Member State and their income therefrom is such as to make it less attractive for those taxpayers to transfer

assets to another Member State in order to benefit from financial services offered there than to keep the assets, and obtain financial services, in the Netherlands.

- 40 It follows that legislation such as that at issue in the main proceedings constitutes a restriction both of the freedom to provide services and of the free movement of capital, which is prohibited, in principle, by Articles 49 EC and 56 EC respectively.

Justification of the restriction on the freedoms of movement

- 41 In the view of the Netherlands, Belgian and Italian Governments, Article 16(4) of the AWR is justified by the need to maintain the effectiveness of fiscal supervision and also, according to the Netherlands Government, to prevent tax evasion.
- 42 Those governments observe, first, that the application of an extended recovery period to assets held abroad by residents of a Member State and to their income arising therefrom may be explained by the lack of a real possibility for the tax authorities of that Member State to obtain information on assets and income held or arising in another Member State. They point out that, in recital 5 of the preamble to Directive 2003/48, the Community legislature accepted that '[i]n the absence of any coordination of national tax systems for taxation of savings income in the form of interest payments, particularly as far as the treatment of interest received by non-residents is concerned, residents of Member States are currently often able to avoid any form of taxation in their Member State of residence on interest they receive in another Member State'.
- 43 In such a context, the extended recovery period makes it possible, when assets are found to have been held in other Member States, to tax such assets and the income from them on equal terms with domestic assets and income. Thus, in the main proceedings, if there had been no extended recovery period, the assets and income concerned could not have been taxed for a number of years. The application of an extended recovery period also compensates for the length of time needed to obtain information by way of mutual assistance between Member States.
- 44 Secondly, the extended recovery period must be regarded as necessary in the context of preventing tax evasion. The Netherlands Government argues in that regard that Article 16(4) of the AWR applies only if the foreign assets have been concealed from the tax authorities and the latter have no specific starting point from which they themselves can initiate an investigation, that is to say, only in cases of tax evasion or tax avoidance.
- 45 As to those submissions, the Court has already held that the need to guarantee the effectiveness of fiscal supervision (see, inter alia, Case C-101/05 A [2007] ECR I-11531, paragraph 55) and the prevention of tax evasion (see, inter alia, Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 81) constitute overriding requirements of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the EC Treaty.
- 46 With regard to capital movements, Article 58(1)(b) EC provides moreover that Article 56 EC is to be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation.

- 47 However, in order to be justified, a restrictive measure must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (Case C-334/02 *Commission v France*, paragraph 28).
- 48 In that context, the appellants in the main proceedings observe, first, that the national legislation at issue in the main proceedings is not suitable for attaining the objectives pursued since the extension of the recovery period does not, in itself, increase the supervisory powers of the tax authorities of a Member State in regard to taxable items held in another Member State, and that that is in particular the case when the other Member State applies banking secrecy.
- 49 It must be stated in that regard that, although the extension of a recovery period does not, as such, strengthen the powers of investigation available to the tax authorities of a Member State, it none the less enables them, in the event of the discovery of taxable items held in another Member State of which they had no knowledge, to initiate an investigation and, where it turns out that those items have not been subject to tax, or that too small an amount of tax has been levied, to issue an additional assessment.
- 50 As is shown by the facts in the main proceedings in Case C-155/08, the same is true when the tax authorities of a Member State are informed of the existence of taxable items held in another Member State which applies banking secrecy.
- 51 In addition, the application by a Member State of an extended recovery period in the case of taxable items which are held or have arisen in another Member State may dissuade taxpayers holding such assets from concealing them, or their income from them, from the tax authorities, so as not to run the risk later of an additional assessment and, as the case may be, a fine, both of which would be determined on the basis of a period which could be as long as 12 years.
- 52 It must therefore be accepted that legislation such as Article 16(4) of the AWR contributes to the effectiveness of fiscal supervision and to the prevention of tax evasion.
- 53 None the less, it must also be assessed whether, as the appellants in the main proceedings claim secondly, such legislation goes beyond what is necessary to attain those objectives.
- 54 In the view of the appellants in the main proceedings, Article 16(4) of the AWR does not take account of the possibility available to the Member States pursuant to Articles 1 to 3 of Directive 77/799 of obtaining from another Member State all the information necessary to determine the precise amount of tax due. They point out that Article 3 provides for the establishment of an automatic exchange of information. The fact that a Member State does not avail itself of those possibilities of exchanging information is a matter of its own choice and cannot be relied on against the taxpayer.
- 55 In addition, the national provision at issue in the main proceedings is disproportionate inasmuch as it does not make a distinction according to whether the Kingdom of the Netherlands has concluded an agreement for the exchange of information with the State from which the taxable items come or whether that State applies banking secrecy, nor

even whether it is another Member State or a non-member country. In this connection, the appellants in the main proceedings state that the implementation of an agreement for the exchange of information normally does not require an additional period of seven years, as is provided in Article 16(4) of the AWR. They claim that that period was fixed in a more or less arbitrary manner by reference to the time-limit within which criminal proceedings for fraud have to be brought even though, in Netherlands criminal law, that time-limit for bringing proceedings is identical for both national and transnational situations.

- 56 On the other hand, in the view of the Member State governments which submitted observations, the application by a Member State of an extended recovery period in regard to taxable items from another Member State is necessary to compensate for the lack of a real possibility for the tax authorities in the first Member State to obtain information about assets held in the second.
- 57 With regard to possible recourse to mutual assistance between Member States, those governments observe that a request for information may be made by a Member State pursuant to Article 2 of Directive 77/799 only in a particular case in which that Member State already possesses sufficient information to serve as a starting point. In addition, when the other Member State applies banking secrecy, Article 8 of the directive prevents communication of information protected by that secrecy. Finally, in the case of savings income, there is no bilateral convention permitting the automatic communication of information as provided for in Article 3 of the directive.
- 58 It should be pointed out in relation to those submissions that, according to Article 16(4) of the AWR, the recovery period is extended from five to twelve years irrespective of whether, in a specific case, the Kingdom of the Netherlands has the means of obtaining the necessary information from the Member State where the taxable items are held, whether by way of the mutual assistance provided for in Directive 77/799 or by an exchange of information under a bilateral convention concluded with that Member State. Moreover, the extended recovery period also applies in a case where a request for banking data cannot succeed by reason of the fact that the other Member State applies banking secrecy.
- 59 It follows that, in the context of legislation such as that at issue in the main proceedings, the further period accorded to the tax authorities of the Member State concerned to issue an additional assessment in regard to taxable items which are held or have arisen in another Member State does not necessarily correspond to the period which those authorities need to verify certain information with that other Member State by having recourse to the mutual assistance provided for in Directive 77/799 or to the system for the exchange of information set up by a bilateral convention.
- 60 However, it does not therefore follow that the extension of the period during which those authorities may issue an additional assessment in the case of assets or income in another Member State is, as a general rule, disproportionate to the objective of ensuring compliance with national tax legislation.
- 61 It must be pointed out in that regard that, without prejudice to any Community harmonising provisions which might be applicable, a Member State cannot be required

to adapt its rules on fiscal supervision in the light of the specific situation prevailing in every other Member State or non-member country.

- 62 To assess whether legislation such as that at issue in the main proceedings goes beyond what is necessary to ensure the effectiveness of fiscal supervision and to prevent tax evasion, two situations must be distinguished.
- 63 The first situation is where items which are taxable in one Member State and located in another Member State have been concealed from the tax authorities of the first Member State and the latter do not have any evidence of the existence of those items which would enable an investigation to be initiated. In that situation, the first Member State is unable to request the competent authorities of the other Member State to communicate to it the information necessary to establish correctly the amount of tax due.
- 64 Since Article 2 of Directive 77/799 permits the authorities of a Member State to contact the competent authorities of another Member State only in a particular case, the tax authorities of the first Member State which do not have any evidence of the existence of taxable items located in that other Member State are in a position to carry out an investigation only if information concerning the existence of those items is first communicated to them either by the other Member State, in particular by way of a system for the automatic exchange of information such as that introduced by Article 9 of Directive 2003/48, or by the taxpayer himself or third parties.
- 65 Contrary to the argument put forward by Mrs Passenheim-van Schoot, the fact that a Member State does not avail itself of the possibility, provided for in Article 3 of Directive 77/799, of automatic exchange of information in order to obtain banking data concerning its taxpayers does not, in itself, suffice to deprive that Member State of the right to apply to those taxpayers a recovery period which differs according to whether their savings balances are held in the same Member State or in another Member State. By leaving it to the Member States to set up a mechanism for the automatic and regular exchange of information in respect of the categories of cases which they are to determine under the consultation procedure laid down in Article 9 of that directive, Article 3 merely permits a Member State to contact the other Member States with a view to setting up such a mechanism, the realisation of which thus depends on the decision of those other Member States.
- 66 When taxable items located in one Member State have been concealed from the tax authorities of another Member State and those authorities have no evidence of the items' existence which would enable an investigation to be initiated, the question whether the application by the latter Member State of an extended recovery period is a proportionate means of attaining the objective of ensuring compliance with tax legislation therefore in no way depends on whether that period corresponds to the time necessary to obtain information from the Member State in which the taxable items are held.
- 67 Since recourse to a mechanism for the exchange of information is impossible in such a case because there is nothing enabling an investigation to be initiated, the grant to the tax authorities of a Member State of a longer period in which to assess liability to tax in regard to taxable items located in another Member State must be regarded as intended not to provide those authorities with the time needed for obtaining from that other

Member State information on taxable items located there, but merely to provide a longer period during which the possible discovery of those taxable items can still give rise to an additional assessment in so far as the investigation resulting from such a discovery may lead to such an assessment being issued before the expiry of that period.

- 68 Moreover, since the application by a Member State of an extended recovery period to taxable items located in another Member State in regard to which the tax authorities of the first Member State had no evidence does not depend on the possibility which those authorities have of obtaining information from the other Member State, it is also not relevant whether the latter Member State applies banking secrecy.
- 69 With regard to the argument that the recovery period provided for in Article 16(4) of the AWR was fixed arbitrarily at 12 years, it must be stated that, in so far as such a period is extended where taxable items have been concealed from the tax authorities, the choice by a Member State to limit that period temporally and to determine the limit on the basis of the time-limit applicable to prosecutions for tax evasion does not seem disproportionate.
- 70 Accordingly, making taxable items which have been concealed from the tax authorities subject to an extended recovery period of 12 years does not go beyond what is necessary to guarantee the effectiveness of fiscal supervision and to prevent tax evasion.
- 71 Finally, a Member State which applies an extended recovery period to taxable items located in another Member State of which the tax authorities of the first Member State had no knowledge cannot have the objection raised against it that, in the event of discovery of taxable items which were also concealed from those authorities but are located in the same Member State, the period of five years during which those authorities may issue an additional assessment cannot be extended.
- 72 Even though a taxpayer is subject to an identical obligation to make a declaration to the tax authorities in respect of both his domestic assets and income and his non-domestic assets and income, the fact remains that, in regard to assets and income which are not the subject of a system for the automatic exchange of information, the risk for a taxpayer that assets and income which have been concealed from the tax authorities of his Member State of residence will be discovered is less in the case of assets and income in another Member State than in the case of domestic assets and income.
- 73 Thus, in so far as a Member State lays down a longer recovery period for taxable items of which the tax authorities had no knowledge, it cannot be reproached for applying that period only to taxable items not located in its territory.
- 74 The second situation is where the tax authorities of a Member State have evidence concerning taxable items located in another Member State which enables an investigation to be initiated. In that situation, the application by the first Member State of an extended recovery period which is not specifically intended to permit the tax authorities of that Member State to have effective recourse to mechanisms of mutual assistance between Member States and which commences once the taxable items concerned are located in another Member State cannot be justified.

75 As the appellants in the main proceedings argue, where the tax authorities of a Member State had evidence enabling them to request the competent authorities of other Member States, whether by way of the mutual assistance provided for in Directive 77/799 or of that provided for under bilateral conventions, to communicate to them the information necessary to establish the correct amount of tax due, the mere fact that the taxable items concerned are located in another Member State does not justify the general application of an additional recovery period which is in no way based on the time needed to have effective recourse to those mechanisms of mutual assistance.

76 It follows from all the foregoing that Articles 49 EC and 56 EC must be interpreted as not precluding the application by a Member State, where savings balances and income from those balances are concealed from the tax authorities of that Member State and the latter have no evidence of their existence which would enable an investigation to be initiated, of a longer recovery period when the balances are held in another Member State than when they are held in the first Member State. The fact that that other Member State applies banking secrecy is not relevant in that regard.

The third question in Case C-155/08

77 By its third question in Case C-155/08, the national court asks, in the event that Articles 49 EC and 56 EC do not preclude the application by a Member State, in regard to assets held in another Member State and the income arising therefrom, of a longer recovery period than that applied to assets and income in the first Member State, whether those articles must be interpreted as also not precluding the fine imposed for concealment of the assets and income which are the subject of the additional assessment from being calculated as a proportion of the amount to be recovered and, consequently, on the basis of a longer period.

78 In its order for reference, the national court states that, given the power which Article 67e of the AWR gives to the tax authorities to impose on a taxpayer who has, deliberately or through gross negligence, paid too little tax a fine of up to 100% of the amount of initially unpaid tax, the extension of the recovery period for foreign assets and income is reflected in the amount of the fines which may be imposed.

79 According to the appellant in the main proceedings in Case C-155/08, even if Community law does not preclude the application of legislation such as Article 16(4) of the AWR, Article 56 EC precludes the application of a rule that, by reason of the extension of the recovery period in the case of foreign assets or income, permits the imposition in such a case of a fine larger than could be imposed in the case of assets and revenue in national territory.

80 On the other hand, the Netherlands, Belgian and Italian Governments consider that the freedoms of movement do not preclude, where an additional assessment is issued following the concealment of non-domestic assets or income, the imposition of a fine calculated as a proportion of the amount being recovered and over that longer period.

81 The Commission observes that, in so far as the application of the abovementioned extended recovery period is not contrary to Articles 49 EC and 56 EC, the same is true of the difference between the fines imposed under the Netherlands tax legislation

according to whether the assets or income concerned are located in that Member State or in another Member State.

- 82 It should be pointed out first that Article 67e(1) of the AWR provides that, where the amount of tax paid was too low by reason of the deliberate intention or gross negligence of the taxpayer, a fine of up to 100% of the amount of the additional assessment may be imposed, without drawing a distinction according to whether the assets in respect of which the additional assessment is issued are held in the Netherlands or in other Member States.
- 83 Contrary to the submissions of the appellant in the main proceedings in Case C-155/08, the national legislation at issue cannot therefore be compared to the Italian and French legislation at issue, respectively, in Case 299/86 *Drexel* [1988] ECR 1213 and Case C-276/91 *Commission v France* [1993] ECR I-4413, which laid down a system of penalties for offences concerning value added tax which was more severe when the tax was payable upon importation from another Member State than when the tax related to transactions which were carried out within the Member State concerned.
- 84 In the case of the legislation at issue in the main proceedings, the risk that a taxpayer resident in the Netherlands might have a higher fine imposed on him in respect of assets and income in another Member State than when domestic assets and income are involved is merely the consequence of the fact that the period which may be taken into account for determining the additional assessment and, consequently, the basis of the fine is liable to be longer in the case of non-domestic assets and income than in the case of domestic assets and income, inasmuch as the latter are not covered by the extended recovery period laid down in Article 16(4) of the AWR.
- 85 As can be seen from paragraphs 60 to 73 of the present judgment, Articles 49 EC and 56 EC do not preclude the application by a Member State of a longer recovery period in the case of assets held in another Member State than in the case of assets held in the first Member State when the assets and income in question have been concealed from the tax authorities of the first Member State and those authorities had no evidence of their existence enabling an investigation to be initiated.
- 86 The answer to be given to the third question referred is therefore that Articles 49 EC and 56 EC must be interpreted as not precluding, when a Member State applies a longer recovery period in the case of assets held in another Member State than in the case of assets held in the first Member State and such foreign assets and the income therefrom were concealed from the first Member State's tax authorities which had no evidence of their existence enabling an investigation to be initiated, the fine imposed for concealment of the foreign assets and income from being calculated as a proportion of the amount to be recovered and over that longer period.

Costs

- 87 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Fourth Chamber) hereby rules:

- 1. Articles 49 EC and 56 EC must be interpreted as not precluding the application by a Member State, where savings balances and income from those balances are concealed from the tax authorities of that Member State and the latter have no evidence of their existence which would enable an investigation to be initiated, of a longer recovery period when the balances are held in another Member State than when they are held in the first Member State. The fact that that other Member State applies banking secrecy is not relevant in that regard.**

- 2. Articles 49 EC and 56 EC must be interpreted as not precluding, when a Member State applies a longer recovery period in the case of assets held in another Member State than in the case of assets held in the first Member State and such foreign assets and the income therefrom were concealed from the first Member State's tax authorities which had no evidence of their existence enabling an investigation to be initiated, the fine imposed for concealment of the foreign assets and income from being calculated as a proportion of the amount to be recovered and over that longer period.**

[Signatures]