

# Renneberg: Is Mortgage Interest Paid on an Owner-Occupied Dwelling in Belgium Deductible from Netherlands-Source Employment Income?

## Contents

1. Introduction
2. Facts and Dispute
3. Decision of the Netherlands Supreme Court
4. Limited Resident Taxpayer
5. Access to the EC Treaty: *Rationae Personae*
6. Difference between Personal Allowances and Negative Income
7. Discrimination or Disparity
8. Grounds of Justification
9. Conclusions

## 1. Introduction

This article discusses a decision of the Netherlands Supreme Court of 22 December 2006<sup>1</sup> regarding the compatibility with the EC Treaty of the Court's refusal to allow the deduction of mortgage interest on an owner-occupied dwelling located in Belgium from the taxpayer's taxable income in the Netherlands (employment income). The Netherlands Supreme Court requested a preliminary ruling from the European Court of Justice (ECJ),<sup>2</sup> as the question remained unanswered following the judgment of the ECJ in *Ritter-Coulais*.<sup>3</sup> This article considers this issue as follows: (1) the facts and the dispute, (2) the decision of the Netherlands Supreme Court, (3) the background to the Netherlands characterization of Mr Renneberg as a limited resident taxpayer, (4) Mr Renneberg's access to the EC Treaty, (5) the relevance of the differences between personal allowances and negative income from the perspective of EC law, (6) the distinction between discrimination and disparity as far as it is relevant to *Renneberg*, (7) the possible grounds that could justify discrimination and (8) summary and conclusions.

## 2. Facts and Dispute

The taxpayer in the case in question, Mr Renneberg, is a Netherlands citizen who emigrated to Belgium in 1993. He owned a dwelling in Belgium that was financed by a mortgage from a Netherlands resident bank. In the years in question (1996 and 1997), Mr Renneberg was a public servant employed by a municipality in the Netherlands. In the relevant years, he derived his entire employment from the Netherlands.

Mr Renneberg deducted the negative income derived from his dwelling, i.e. the difference between the rental

value of his dwelling and the mortgage interest paid, from his employment income. The Netherlands tax inspector refused the deduction. Mr Renneberg argued that this refusal to allow deduction of this negative income contravenes the free movement of workers.<sup>4</sup>

## 3. Decision of the Netherlands Supreme Court

By virtue of Art. 2(2) of the former Netherlands Income Tax Act 1964, a public servant was deemed to be a resident taxpayer of the Netherlands.<sup>5</sup> Under this provision, which applied in 1996 and 1997, Mr Renneberg was, as a public servant, deemed to be a resident taxpayer of the Netherlands. As a result, he was taxed on his worldwide income in the Netherlands, including his employment income and the negative income from his personal dwelling irrespective of the fact that the dwelling was located in Belgium. Accordingly, based on Netherlands domestic law provisions, Mr Renneberg was entitled to deduct the negative income from his Belgian dwelling from his employment income or, possibly, other positive income.

On the basis of national law, a resident of the Netherlands can deduct negative income from real estate located in Belgium, for example a second house, from his other (positive) Netherlands-source income. The rules for the avoidance of double taxation, however, entail that a recapture may apply, i.e. a reduction in the relief from double taxation previously granted, when positive income is derived from the real estate in a later year.<sup>6</sup>

\* Professor in International and European Tax Law, VU University, Amsterdam and tax lawyer, De Brauw Blackstone Westbroek, Amsterdam. The author can be contacted at [frank.potgens@debrauw.com](mailto:frank.potgens@debrauw.com).

\*\* Lawyer, De Brauw Blackstone Westbroek, The Hague and lecturer at the Europe Institute of the Faculty of Law of Leiden University. The author can be contacted at [wessel.geursen@debrauw.com](mailto:wessel.geursen@debrauw.com).

1. FED 2007/6 and BNB 2007/137.

2. ECJ, Pending Case C-527/06, *R.H.H. Renneberg v. Staatssecretaris van Financiën* (Official Journal (EU) 2007, C56/20).

3. ECJ, 21 February 2006, Case C-152/03, *Hans-Jürgen Ritter-Coulais, Monique Ritter-Coulais v. Finanzamt Gernersheim*.

4. Art. 39 EC Treaty.

5. From 1 January 2001, this residence fiction does not apply to civil servants like Renneberg. Art. 2.2(2) of the 2001 Income Tax Act, however, contains a provision deeming residence, for instance, in respect of diplomats.

6. Art. 24(1) of the 1970 Belgium-Netherlands tax treaty and Art. 3(4) of the Unilateral Decree for the Avoidance of Double Taxation applicable to the tax years in question (Art. 11 of the current 2001 Decree on the Elimination of Double Taxation).

As a consequence of Art. 4 (Residence) of the 1970 Belgium–Netherlands tax treaty, which applied in 1996 and 1997,<sup>7</sup> Mr Renneberg was a resident of Belgium for the purposes of that tax treaty. By virtue of Art. 19 (Government service) of the tax treaty, the Netherlands had the authority to tax Mr Renneberg's employment income (the payer State). Art. 6 (Real estate) of the tax treaty provided that the taxation right on the income derived from real estate could be taxed in the State in which that real estate was situated. The Netherlands Supreme Court held that Art. 4 of the tax treaty overruled the Netherlands provision deeming Mr Renneberg to be a resident taxpayer of the Netherlands. Consequently, Mr Renneberg was regarded as a non-resident taxpayer of the Netherlands, which entailed that the taxation right on his employment income was assigned to the Netherlands, whereas Belgium had the authority to tax the income from his dwelling situated in Belgium. The functioning of the relevant tax treaty resulted in adverse tax consequences for Mr Renneberg, as he could not compensate his negative income from his Belgian dwelling with his Netherlands employment income.

The Netherlands Supreme Court held that these adverse tax consequences could impede the freedom of Mr Renneberg to work in a Member State (the Netherlands) without residing in that Member State and the freedom to invest capital in a Member State other than his work Member State (a resident taxpayer of the Netherlands would be entitled to the compensation previously noted). These impediments could contravene Art. 39 (the free movement of workers) and Art. 56 (the free movement of capital) of the EC Treaty. In this respect, the Netherlands Supreme Court referred to the judgment of the ECJ in *Schumacker*,<sup>8</sup> which emphasized the principle that, in relation to direct taxes, the situations of residents and non-residents of a Member State are not, as a rule, comparable. Accordingly, Art. 39 of the EC Treaty does not preclude the application of the rules of a Member State under which a non-resident working as an employed person in that Member State is taxed more heavily on his income than a resident in the same employment in that Member State.<sup>9</sup> An exception to this principle is allowed if the non-resident receives no significant income in his residence Member State and obtains the major part of his taxable income from an activity performed in the work Member State. In this case, the residence Member State is not in the position to grant this person the benefits resulting from the taking into account of his personal and family circumstances. Instead, the work Member State should treat him as a resident taxpayer in respect of these benefits. According to the Netherlands Supreme Court, *Schumacker* is only relevant for tax advantages based on a taxpayer's personal and family situation. This is not so regarding the negative income from the principal dwelling located in Belgium. Specifically, in 2000, the Netherlands Supreme Court had already ruled in a similar case<sup>10</sup> that it is not possible to recognize as a universal characteristic of direct taxes that a person who exercises his right of free movement (protected by the EC Treaty) and becomes a

taxpayer in various jurisdictions should at least in one jurisdiction be able to compensate his positive and negative income from different sources.

Nevertheless, the Netherlands Supreme Court suspended the proceedings in *Renneberg* to await the outcome of *Ritter-Coulais*. The ECJ, however, left unanswered the (first) question in *Ritter-Coulais* as to whether a person who exercised his right to move freely within the European Union should effectively be able to claim the benefits at issue in the work Member State, i.e. the possibility for Mr Ritter-Coulais and Mr Renneberg to compensate their negative income from a French or Belgian dwelling with their German or Netherlands employment income, as resident taxpayers of Germany or the Netherlands are similarly entitled to this type of compensation. Mr Renneberg is to a considerable extent comparable to a resident taxpayer with regard to his income and the place from which that income is derived. As a result, it could be questioned whether or not it could be justified to treat Mr Renneberg differently from a resident taxpayer of the Netherlands. Accordingly, the Netherlands Supreme Court asked the ECJ the following preliminary question:

Must Articles 39 EC and 56 EC be interpreted as precluding, either individually or jointly, a situation in which a taxpayer who, in his country of residence, has (on balance) negative income from a dwelling owned and occupied by him and obtains all of his positive income, specifically work-related income, in a Member State other than that in which he resides is not permitted by that other Member State (the State of employment [the work Member State]) to deduct the negative income from his taxed work-related income, even though the State of employment does allow its own residents to make such a deduction?<sup>11</sup>

#### 4. Limited Resident Taxpayer

The Netherlands Supreme Court ruled in its decision of 12 March 1980<sup>12</sup> on the tax consequences of a taxpayer comparable to Mr Renneberg's situation, i.e. according to the Netherlands Income Tax Act, Mr Renneberg is treated as a resident taxpayer of the Netherlands and under the 1970 Belgium–Netherlands tax treaty he is regarded as a resident of Belgium for the purposes of that treaty. In its 1980 case, the Netherlands Supreme Court held that the Netherlands is only allowed to tax the income or capital components to which the tax treaty allocates taxation rights to the Netherlands. Applying the rationale of the 1980 case, from a national tax law perspective, Mr Renneberg, therefore, remains a resident taxpayer of the Netherlands. These taxpayers are characterized as "limited resident taxpayers" ("*bepaalde binnenlandse belastingplichtigen*"), as, to a great

7. In 2001, a new tax treaty was concluded between Belgium and the Netherlands. The new treaty applies from 1 January 2003.

8. ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*.

9. *Id.*, Para. 35.

10. BNB 2001/192.

11. ECJ, Pending Case C-527/06, *R.H.H. Renneberg v. Staatssecretaris van Financiën* (Official Journal (EU) 2007, C56/20).

12. BNB 1980/170.

extent, the tax treaty limits the Netherlands authority to tax the income of these taxpayers because, from a treaty perspective, the Netherlands is the source State. Consequently, the Netherlands is only allowed to tax the income and capital components to which the tax treaty allocates it taxation rights. This is not the case for the negative income derived from the dwelling located in Belgium. As a result, Mr Renneberg cannot deduct this negative income from positive income.

It is striking that, in its decision of 22 December 2006, the Netherlands Supreme Court neglected its own principles developed in the 1980 case and explicitly regarded Mr Renneberg as a non-resident taxpayer of the Netherlands (*“een buitenlandse belastingplichtige”*), rather than a limited resident taxpayer. The difference between these concepts can be illustrated by supposing that Mr Renneberg receives interest from a Netherlands bank account and by following the tax regime for the tax years in question. A non-resident taxpayer could not be taxed on this income because interest is not designated as one of the sources of income on which the non-resident tax liability could be imposed, whereas a limited resident taxpayer is taxed on his worldwide income, including the interest received. The relevant tax treaty, however, allocated the Netherlands only a limited taxation right, which resulted in the gross interest being taxed at a rate of 10%.<sup>13</sup> A non-resident taxpayer is not taxed at all on the interest payments arising from the Netherlands.

This distinction could be of relevance given the ECJ's decision in *Zurstrassen*.<sup>14</sup> In that case, the ECJ did not follow the doctrine developed in *Schumacker*, according to which non-resident taxpayers and resident taxpayers are not, in principle, comparable. The ECJ regarded Mr Zurstrassen as a Luxembourg resident taxpayer<sup>15</sup> who earned almost all his income in Luxembourg, whereas his spouse and children resided in Belgium. The Court held Mr Zurstrassen to be comparable to other resident taxpayers of Luxembourg.<sup>16</sup> Even though *Zurstrassen* is unclear in this respect and, depending on Belgian national law,<sup>17</sup> Mr Zurstrassen could also be a resident of Belgium for the purposes of the Belgium–Luxembourg tax treaty, as his centre of vital interests could be situated in Belgium.<sup>18</sup> With reference to the Netherlands Supreme Court's 1980 case, the question can be raised as to whether or not Mr Renneberg must be compared with Mr Schumacker (a non-resident taxpayer) or with Mr Zurstrassen (a resident taxpayer). According to Netherlands national law, Mr Renneberg is a resident taxpayer, even though he is a resident of Belgium for the purposes of the relevant tax treaty. As a result, it could be argued that Mr Renneberg is comparable to Mr Zurstrassen and to unlimited resident taxpayers of the Netherlands. Unlimited resident taxpayers can deduct negative income from real estate located in Belgium from their positive Netherlands-source income (a recapture may apply if positive income is derived from that real estate in a later year). From this perspective, it is arguable that Mr Renneberg should be entitled to a similar deduction.

The authors note that the distinction between “limited resident taxpayers” and non-resident taxpayers may similarly be relevant in examining whether or not the principle of territoriality can be applied, a principle which was accepted by the ECJ in *Futura Participations*<sup>19</sup> as a justification (see 7.).

Nevertheless, the Netherlands Supreme Court did not follow its 1980 judgment by disregarding Mr Renneberg as a “limited resident taxpayer”, but instead treated Mr Renneberg as a non-resident taxpayer of the Netherlands. It can be assumed that the ECJ will examine the case based on the “factual and legislative context”<sup>20</sup> stated in the referring decision of the Netherlands Supreme Court, which “enjoy[s] a presumption of relevance”.<sup>21</sup> Consequently, the ECJ will be unable to take note of the concept of limited resident taxpayers and the relevance of this concept in determining to what extent the approach in *Zurstrassen* should be applied in Mr Renneberg's case and to what extent the principle of territoriality is respected in Mr Renneberg's case.<sup>22</sup> There is, therefore, a risk that the ECJ will answer the preliminary question based on the incorrect assumption that Mr

13. Art. 11(2) 1970 Belgium–Netherlands tax treaty. See also S. Douma, FED 2007/6, point 1 and the decision of the Netherlands Supreme Court of 13 January 2006, BNB 2006/216, involving a limited resident taxpayer of the Netherlands (Netherlands public servant who resided in Belgium) who had Netherlands-source interest income.

14. ECJ, 16 May 2000, Case C-87/99, *Patrick Zurstrassen v. Administration des Contributions Directes*.

15. *Id.*, Para. 22. The ECJ's decision demonstrated that Mr Zurstrassen was a resident taxpayer of Luxembourg under Luxembourg national tax law.

16. *Id.*, Paras. 21 and 22. See also ECJ, 25 January 2007, Case C-329/05, *Finanzamt Dinslaken v. Gerold Meindl, Christine Meindl-Berger*, Para. 24.

17. Art. 3(1)(b) of the 1992 Belgian Income Tax Code (CIR) regards an individual as a resident taxpayer of Belgium if he has his domicile or seat of fortune in Belgium. It should be noted that the CIR does not provide a definition of these two criteria. Specifically, Art. 3(2) of the CIR states that the domicile and the seat of fortune must be determined according to the circumstances. What facts and circumstances have to be taken into account is decided in case law. Domicile refers to the habitual abode of the taxpayer and of his family and to the centre of his vital (social, cultural, occupational, etc.) interests. This is a factual concept implying a certain degree of continuity and permanency (see the decisions of the Belgian Supreme Court, 7 September 1965 (*Derks*), *Pas.*, 1966, I, p. 34 and 7 February 1979 (*Prade*), *Pas.*, 1979, I, p. 673). The seat of fortune is intended to cover the place from which the individual has his centre of economic interests. The seat of fortune points to the place from which he manages his private affairs and his wealth irrespective of the place where the wealth is located (see the decisions of the Belgian Supreme Court, 7 February 1979, *Bull. Bel.* 1982, p. 2713 and 30 June 1983, E.J.F. 1983/301). In addition to these criteria, of a more general character, the Belgian CIR contains two legal presumptions of fiscal residency. Specifically, according to Art. 3(2), second sentence of the CIR an individual registered with the national register is presumed (refutable presumption) to be a Belgian tax resident. Art. 3(2), last sentence of the CIR provides that the fiscal residence of married individuals who are not in fact separated is located where the de facto family residence is. The taxpayer is not allowed to prove the contrary (legal irrefutable presumption).

18. Art. 4(2)(1) 1970 Belgium–Luxembourg tax treaty.

19. ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*.

20. ECJ, 10 March 1981, Joined Cases 36 and 71/80, *Irish Creamery Milk Suppliers Association and others v. Government of Ireland and others; Martin Doyle and others v. An Taoiseach and others*, Para. 6 and ECJ, 26 January 1993, Joined Cases C-320/90, C-321/90 and C-322/90, *Telemarsicabruzzo SpA v. Circostel and Ministero delle Poste e Telecomunicazioni and Ministero della Difesa*, Para. 5.

21. ECJ, 15 May 2003, Case C-300/01, *Doris Salzmann*, Para. 31.

22. In ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v. B.G.M. Verkooijen*, the parties requested the reopening of the proceedings

Renneberg is a non-resident taxpayer of the Netherlands. It is striking that *Zurstrassen* is not even referred to in the proceedings, in which the focus is only on *Schumacker*. The latter is only logical if it is assumed that Mr Renneberg is to be treated as a non-resident taxpayer of the Netherlands. In line with this assumption, the authors analyse the possible ruling of the ECJ by regarding Mr Renneberg as a non-resident taxpayer of the Netherlands.

### 5. Access to the EC Treaty: *Rationae Personae*

Mr Renneberg's situation is very similar to the facts in *Werner*.<sup>23</sup> Mr Werner was denied access to the EC Treaty, as he did not perform a cross-border economic activity. He only moved with his family from Germany to the Netherlands, whereas his dental practice remained in Germany, through which his entire income was earned. Mr Renneberg is a Netherlands citizen who had moved his home to Belgium without performing a cross-border economic activity. The ECJ held in *Werner* that Art. 43 of the EC Treaty (freedom of establishment) did not apply. Accordingly, it is questionable whether or not Art. 39 of the EC Treaty (the free movement of workers) applies to Mr Renneberg, as he did not "move" his employment from the Netherlands to Belgium, but remained employed in the Netherlands. For this reason, in his Opinion in *Renneberg*, Netherlands Advocate General Wattel held that Art. 39 of the EC Treaty did not apply to Mr Renneberg.

In *Werner*, the ECJ held that a mere change of residence is not covered by the EC Treaty. The ECJ, however, arrived at another solution in the "N"<sup>24</sup> case. Mr N transferred his residence from the Netherlands to the United Kingdom. He was a 100% shareholder in three Netherlands limited liability companies that continued to be established in the Netherlands.<sup>25</sup> The Netherlands government argued that Mr N had not exercised his freedom of establishment within the meaning of Art. 43 of the EC Treaty, as, similarly to *Werner*, he only moved his home to the United Kingdom, but his economic activities continued to be situated in the Netherlands. The ECJ rejected this argument and held that

[w]here a Community national lives in one Member State and has a shareholding in the capital of a company established in another Member State which gives him substantial influence over the company's decisions and allows him to determine its activities ... that may thus fall within the freedom of establishment .... The situation here is that of a Community national who, since the transfer of his residence, has been living in one Member State and holding all the shares of companies established in another. It follows that, since that transfer, N has fallen within the scope of Article 43 of the Treaty.<sup>26</sup>

In the "N" case, it appears that the ECJ followed a line of thinking that differed from *Werner*. In the latter, the ECJ emphasized the element of whether or not the person who invoked the freedom of establishment had moved his economic activities to another Member State, whereas, in the former, the ECJ appeared to attach more relevance to the fact that the residence Member State and the Member State of economic activities were different. Consequently, Mr N was treated as equal to a UK

resident national who incorporated a Netherlands company and Mr and Mrs Ritter-Coulais were treated in the same way as French resident nationals who accepted an employment in Germany, whereas Mr Werner was treated differently from a Netherlands resident national who established a dental practice in Germany.

That the ECJ really has developed a different line of thinking is confirmed by its recent judgment in *Hartmann*.<sup>27</sup> The German Mr Hartmann married the Austrian Mrs Hartmann and lived in Austria since their marriage. Mr Hartmann, nevertheless, remained employed in Germany. According to the ECJ the fact

[t]hat Mr Hartmann settled in Austria for reasons not connected with his employment does not justify refusing him the status of migrant worker which he acquired as from the time when, following the transfer of his residence to Austria, he made full use of his right to freedom of movement for workers by going to Germany to carry on an occupation there.<sup>28</sup>

Even more recently, the ECJ confirmed its approach, as developed in *Ritter-Coulais* and *Hartmann*, in *Hendrix*.<sup>29</sup> Mr Hendrix moved his home to Belgium, but he continued to be employed in the Netherlands. The facts are comparable to *Renneberg*. With reference to *Werner*, in *Hendrix*, the Netherlands government again argued that Mr Hendrix was not entitled to invoke Art. 39 of the EC Treaty. Advocate General Kokott in her Opinion of 29 March 2007 in *Hendrix* rejected that argument. According to Advocate General Kokott, the ECJ had already dissociated itself from *Werner* in *Van Pommeren-Bour-*

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after they had discovered an omission on the national legislative context in the first Opinion of Advocate General La Pergola of 24 June 1999. However, it was the Advocate General who took account of the national legislative context, even though this context was not mentioned in the file and by the referring court. In that case, this resulted in the reopening of the oral proceedings on request of both parties by order of the President of the Court of 17 September 1999 and a second Opinion of the Advocate General of 14 December 1999. Consequently, *Verkooijen* does not alter the ECJ's case law stipulating the importance of the factual and legislative context determined by the referring court.

23. ECJ, 26 January 1993, Case C-112/91, *Hans Werner v. Finanzamt Aachen-Innenstadt*.

24. ECJ, 7 September 2006, Case C-470/04, *N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*.

25. Id. In spite of the fact that the management of the companies had been exercised from the Netherlands Antilles (Para. 11), the ECJ concluded that the companies were established in the Netherlands (Para. 28). From the perspective of the EC Treaty, the attachment of a company incorporated in accordance with the law of a Member State to a Member State is based on alternative and non-exclusive criteria, i.e. with their registered office, central administration or principal place of business within the Community (Art. 48 of the EC Treaty). As the companies in the "N" case had their registered offices in the Netherlands, they were still established in the Community for purposes (Title III, Chapter 2, Right of Establishment) of the EC Treaty, even though their central administration was exercised from the Netherlands Antilles. Art. 48 of the EC Treaty contrasts with the residence provision of tax treaties, which do not allow alternative criteria, but contain exclusive criteria, with the tie-breaker rule as an ultimate remedy to determine one point of attachment to a sole Member State.

26. Id., Paras. 27 and 28. In this respect the ECJ also referred to ECJ, 21 February 2006, Case C-152/03, *Hans-Jürgen Ritter-Coulais, Monique Ritter-Coulais v. Finanzamt Gernersheim*, Para. 32.

27. ECJ, 18 July 2007, Case C-212/05, *Gertraud Hartmann v. Freistaat Bayern*.

28. Id., Para. 18

29. ECJ, 11 September 2007, Case C-287/05, *D.P.W. Hendrix v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekering*.

*gondiën*,<sup>30</sup> in which the Court held that Art. 39 of the EC Treaty applied to Mrs van Pommeren-Bourgondiën's situation (a Netherlands national, residing in Belgium having spent her entire professional career in the Netherlands). The same analysis should be followed when considering Mr Renneberg's access to the EC Treaty.

Even though Mr Renneberg is, in principle, entitled to invoke Art. 39 of the EC Treaty, the fact that Mr Renneberg was employed by a municipality must also be noted for the purposes of that provision. According to the wording of Art. 39(4) of the EC Treaty, the free movement of workers does not apply to employment in public service. The ECJ has interpreted this exclusion in a rather restrictive way, i.e. it applied only to the *access* to public service employment.<sup>31</sup> Consequently, the Member States are allowed to require that employees have the nationality of that Member State to exercise a public authority employment and to have responsibility for safeguarding the general interest of that Member State (or its public bodies, for example local authorities). Once employed in public service, the Member States cannot exclude the employee from equal treatment or, in the words of the ECJ, "community treatment".<sup>32</sup> As Mr Renneberg was already employed by a municipality, his case does not concern the access to a public service employment, but, rather, the entitlement to community treatment. Accordingly, Art. 39(4) of the EC Treaty cannot apply, even though the wording of this provision seems to indicate otherwise.

If Mr Renneberg is unable to invoke Art. 39 of the EC Treaty, as the ECJ would follow the approach developed in *Werner*, the question arises as to whether or not the free movement of capital<sup>33</sup> applies to *Renneberg*. In *Van Hilten*,<sup>34</sup> the ECJ followed Advocate General Léger's Opinion, in which the ECJ concluded "that mere transfer of residence from one State to another does not come"<sup>35</sup> within the scope of Art. 56 of the EC Treaty. Advocate General Léger took the view that the definition of capital movements (according to the nomenclature of Annex I to Directive 88/361/EEC)<sup>36</sup> only covers investments on national territory by non-residents or investments abroad by residents.<sup>37</sup> When Mr Renneberg invested in his personal dwelling located in Belgium, it can be assumed that he became a resident of Belgium at the same time. As a result, an investment by a non-resident on Belgian territory cannot be identified, as it was an investment by a *resident* on national territory. In line with *Van Hilten*, Art. 56 of the EC Treaty should not, therefore, apply in *Renneberg*.

Mr Werner could not invoke the more general right to the free movement of EU citizens,<sup>38</sup> as the facts in his case occurred before the introduction of this right by the Treaty of Maastricht.<sup>39</sup> If Mr Renneberg is unable to invoke either Art. 39 or Art. 56 of the EC Treaty, he would fall within the scope of Art. 18. Even without a cross-border economic activity, EU citizens are entitled to invoke the provisions of the EC Treaty if they are (indirectly) discriminated against, for example Mr Pusa could invoke Art. 12 of the EC Treaty following his emi-

gration from Finland to Spain,<sup>40</sup> or when they are hindered in their free movement, for example Mr and Mrs Tas could invoke Art. 18 of the EC Treaty following their emigration from the Netherlands to Spain.<sup>41</sup>

*Renneberg*, therefore, falls within the personal scope of the EC Treaty. The Netherlands Supreme Court takes the same view, although the Court does not refer to Art. 18 of the EC Treaty. Apparently, the Netherlands Supreme Court is of the opinion that Mr Renneberg may directly rely on Art. 39 of the EC Treaty, in respect of which the Court appears to refer implicitly to the judgment of the ECJ in the "N" case.<sup>42</sup>

## 6. Difference between Personal Allowances and Negative Income

In this respect, Mr Renneberg requested the deduction of negative Belgian-source income (the owner-occupied dwelling) from positive Netherlands-source income (employment), whereas Mr Schumacker claimed to take account of personal tax benefits when determining the tax due on his positive source income (employment) earned and taxed in his work Member State. In the earlier case in 2000 before the Netherlands Supreme Court, a taxpayer, who was also a Belgian resident, wished to compensate negative income from his Belgian owner-occupied dwelling with his Netherlands employment

30. ECJ, 7 July 2005, Case C-227/03, *A.J. van Pommeren-Bourgondiën v. Raad van bestuur van de Sociale verzekeringsbank*. According to Advocate General Kokott's Opinion in *Hendrix*, the ECJ followed a similar approach in *Ritter-Coulais*.

31. ECJ, 12 February 1974, Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, Para. 4. Compare also the Communication from the Commission of 11 December 2002 on the Free movement of workers – achieving the full benefits and potential (COM(2002) 694 final), Para. 5.2 and J.E. Beenen, *Citizenship, Nationality and Access to Public Service: Employment: The Impact of European Community Law* (Groningen: European Law Publishing, 2001), p. 71.

32. ECJ, 15 March 1989, Joined Cases 389/87 and 390/87, *G.B.C. Echernach and A. Moritz v. Minister van Onderwijs en Wetenschappen*, Para. 14.

33. Art. 56 EC Treaty.

34. ECJ, 23 February 2006, Case C-513/03, *Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*.

35. *Id.*, Para. 48.

36. Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (Official Journal (EC) 1988, L178/5).

37. ECJ, Advocate General Léger's Opinion, 30 June 2005, Case C-513/03, *Erven van M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Para. 58.

38. By virtue of the current Art. 18 of the EC Treaty, every citizen of the European Union has the right to move and reside freely within the territory of the Member States.

39. Signed on 7 February 1992 (Official Journal (EC) 1992, C 224).

40. ECJ, 29 April 2004, Case C-224/02, *Heikki Antero Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö*. Mr Pusa was a retired Finnish national, in receipt of a Finnish disability pension, who had moved to Spain without taking up any economic activity in Spain. Nevertheless, Mr Pusa had access to the EC Treaty under Art. 18 of the EC Treaty.

41. ECJ, 26 October 2006, Case C-192/05, *K. Tas-Hagen, R.A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad*. Mrs Tas-Hagen and Mr Tas were Netherlands nationals who moved from the Netherlands to Spain without performing any economic activity in Spain. Whilst resident in Spain, they applied for the grant of a war pension in the Netherlands. Based on Art. 18, they had access to the EC Treaty.

42. Compare S. Douma, FED 2006/218, point 7. See also I.J.J. Burgers, BNB 2007/134, point 5, who mainly based this conclusion on ECJ, 21 February 2006, Case C-152/03, *Hans-Jürgen Ritter-Coulais, Monique Ritter Coulais v. Finanzamt Germersheim*, Para. 31.

income. According to the Netherlands Supreme Court in its decision of 20 December 2000,<sup>43</sup> the Belgian resident could not claim such compensation on the basis of *Schumacker*, as negative source income was not comparable to the benefits relating to “personal and family circumstances” claimed by Mr Schumacker. This distinction was crucial for the Netherlands Supreme Court in this 2000 case.

Whereas in the 2000 case the Netherlands Supreme Court ruled that disallowing the deduction of negative foreign-source income from Netherlands employment income was not contrary to EC law, the Netherlands Supreme Court took a different view in *Renneberg*, as, during the Court’s proceedings in *Renneberg*, *Ritter-Coulais* was referred to the ECJ as having similarities to *Renneberg*. The ECJ did not, however, rule on the relevance of the fiscal difference between “personal allowances” and “negative source income”, Advocate General Léger in his Opinion in *Ritter-Coulais* took the view that

[m]ore generally, this [the *Schumacker*] case law means ... that non-residents’ ability to pay tax, which depends not only on account being taken of their personal and family circumstances, (68) but also on account being taken of their total income and losses, (69) should not be assessed differently by the competent authorities on the sole ground of place of residence, where resident and non-resident taxpayers alike receive all or virtually all their taxable income in the taxing State.<sup>44</sup>

(68) Examples of tax benefits arising from account being taken of taxpayers’ personal and family situations include, in my [Léger’s] opinion: the mitigation of the progressive nature of income tax rates for married couples (*Schumacker*), the deductibility of profits invested in the formation of a pension reserve (*Wielockx*), or tax allowances related to personal liabilities such as maintenance payments (*De Groot*).

(69) This category includes, in my [Léger’s] view, Case C-234/01 *Gerritse* [2003] ECR I-5933, at least in the part of the judgment concerned with the deductibility of business expenses. The Court held there that the Treaty rules on freedom to provide services preclude a national provision which, as a general rule, taxes non-residents on their gross income, without deduction of business expenses, whereas residents are taxed on their net income, after deduction of such expenses.

According to the authors, Léger’s point of view is supported by one of the primary goals of the free movement of workers, i.e. guaranteeing non-resident workers a treatment equal to the workers residing in the work Member State with regard to their remuneration (including tax advantages). Consequently, they should be treated equally and granted the same advantages as resident taxpayers, regardless of the characterization of these advantages under the domestic law of the work Member State.

In this respect, it is also interesting to take note of a recent judgment of the ECJ in *Lakebrink*<sup>45</sup> in which the ECJ elucidates that

all the tax advantages connected with the non-resident’s ability to pay tax which are not taken into account either in the State of residence or in the State of employment ... since the ability to pay tax may indeed be regarded as forming part of the personal situation of the non-resident within the meaning of the judgment in *Schumacker*.<sup>46</sup>

As a result, the negative rental income relating to property situated in Germany (Mr and Mrs Lakebrink’s Member State of residence) had to be taken into consideration for the purposes of determining the tax rate applicable to the employment income that is entirely derived from Luxembourg (work Member State). However, the question remains as to whether or not the *Schumacker* doctrine is applicable to the deduction of mortgage interest claimed by Mr Renneberg. There is a difference with *Lakebrink* because *Lakebrink* involved determining the applicable tax rate, whereas *Renneberg* concerns determining the taxable base.<sup>47</sup>

## 7. Discrimination or Disparity

The Netherlands Supreme Court has reservations as to whether the refusal of compensation includes a discrimination or hindrance of the free movement of workers or capital safeguarded by the EC Treaty or should be regarded as a disparity, i.e. an obstacle to intra-Community economic activity caused by the differences between the legal systems of the Netherlands and Belgium. Netherlands Advocate General Wattel refers to *Schempp*<sup>48</sup> (alimony payments were not deductible by a German-resident taxpayer because the recipient resided in Austria where the payments were not subject to taxation). In line with *Schempp*, Advocate General Wattel examined whether or not the Belgian tax system allows the compensation of the negative income from the owner-occupied dwelling located in Belgium with other positive Belgian income. Advocate General Wattel stated that the deduction of mortgage interest is limited to that in proportion with the positive income derived from that dwelling. The negative income exceeding this positive income from a personal dwelling cannot be offset against other positive income.<sup>49</sup> As a result, Advocate General Wattel noted that this constitutes an essential difference (disparity) with regard to the Netherlands system of mortgage interest deduction that can be compensated with other income. Consequently, if Mr Ren-

43. BNB 2001/192.

44. ECJ, Advocate General Léger’s Opinion, 1 March 2005, Case C-152/03, *Hans-Jürgen and Monique Ritter-Coulais v. Finanzamt Germersheim*, Para. 98.

45. ECJ, 18 July 2007, Case C-182/06, *État du Grand-Duché de Luxembourg v. Hans Ulrich Lakebrink, Katrin Peters-Lakebrink*.

46. *Id.*, Para 34.

47. See, for the relevance of this distinction, also ECJ, Advocate General Mengozzi’s Opinion, 29 March 2007, Case C-182/06, *État du Grand-Duché de Luxembourg v. Hans Ulrich Lakebrink and Katrin Peters-Lakebrink*.

Para. 40. The European Commission, in its Press Release of 8 January 2007, IP/07/12, stated that the refusal under Belgian tax law to provide tax relief related to a mortgage on an owner-occupied dwelling situated in another Member State contravenes *Schumacker*, provided that the non-resident of Belgium obtains his income entirely or almost exclusively from work performed in Belgium.

48. ECJ, 12 July 2005, Case C-403/03, *Egon Schempp v. Finanzamt München V*.

49. Taxable income is constituted by the deemed rental value (cadastral income) as determined by the tax administration for each property upon its being put into use (Art. 7(1)(2) of the CIR). This cadastral income is a “net income”, i.e. after deduction of the 40% or 10% lump-sum expenses (Art. 16(1) of the CIR). From this “net income” may be deducted interest on loans specifically contracted for acquiring or maintaining the immovable property or the income. A loss resulting from this deduction cannot be set off against other income and cannot be carried forward or back (Art. 14(1) of the CIR).

neberg were to have derived his public employment income from Belgium, the negative income from the dwelling located in Belgium would not be deductible. Mr Renneberg does not, therefore, suffer more adverse tax consequences than regular Belgian resident taxpayers. The ECJ also held in *Kerckhaert-Morres*<sup>50</sup> that

the adverse consequences which might arise from the application of an income tax system such as the Belgian system at issue in the main proceedings result from the exercise in parallel by two Member States of their fiscal sovereignty.<sup>51</sup>

This could support Advocate General Wattel's analysis in *Renneberg*, as Belgium, with the authority to tax the income from real estate located in that State under the relevant tax treaty, does not allow a deduction, whereas the Netherlands allows such deductions, but the tax treaty in question does not assign a taxation right on that income to the Netherlands.

Conversely, it can be argued that there is not a disparity, as, if the Belgian tax legislation were also to provide for the same compensation system as Netherlands legislation, the adverse consequences caused by the Netherlands would continue to exist, i.e. the negative income from the owner-occupied dwelling could not be compensated for with positive Netherlands-source employment income.<sup>52</sup> Accordingly, the Netherlands Supreme Court also left the possibility open that the refusal to compensate these income components could constitute a discrimination or the hindrance of the free movement of workers or capital.

From an EC law perspective, the question, therefore, arises as to with which situation *Renneberg* should be compared, i.e.:

- a resident taxpayer of Belgium earning all his employment income in Belgium; or
- a resident taxpayer of the Netherlands earning all his employment income in the Netherlands.

It is difficult to predict which comparison the ECJ will ultimately adopt.

A possible way of dealing with that problem would be to take account of one of the primary goals of the free movement of workers, i.e. guaranteeing non-resident workers the same conditions as the workers residing in the work Member State. This approach was confirmed by the ECJ in *Biehl*,<sup>53</sup> in which it stated in more general terms and disconnected from the facts of that case that:

[t]he principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax. For that reason ... workers who are nationals [or resident] of a Member State are to enjoy, in the territory of another Member State, the same tax advantages as national workers [or worker residing in that Member State].<sup>54</sup>

From this perspective, it is for the Netherlands to offer Mr Renneberg the same conditions as its (Netherlands resident) colleagues as he would be comparable to a resident taxpayer of the Netherlands earning all his employment income in the Netherlands.

An additional difficulty for the ECJ in making these comparisons is that the adverse tax consequences could be considered to result from the functioning of the relevant tax treaty. It cannot be excluded that the ECJ will be willing to respect the functioning of that tax treaty and the assignment of taxation rights included in the tax treaty. The latter approach could be derived from *Gilly*<sup>55</sup> and *Kerckhaert-Morres*,<sup>56</sup> resulting in the acceptance that the adverse tax consequences in question would not be regarded as a discrimination or hindrance of the free movement of workers or capital.

## 8. Grounds of Justification

The Netherlands Supreme Court did not analyse whether or not there are grounds available justifying the possible discrimination or hindrance. A possible ground of justification could be the way in which the 1970 Belgium–Netherlands tax treaty is applied by the Netherlands Supreme Court. As stated in 4., in its 1980 case, the Netherlands Supreme Court held that, under the relevant tax treaty, the Netherlands did not have the authority to tax the negative or positive income derived from real estate located in Belgium. As a result, the Netherlands government could argue that the necessity to preserve the allocation of the power to impose taxes between the Member States is a ground of justification (see *Marks & Spencer*<sup>57</sup> and *Cadbury Schweppes*).<sup>58</sup> The “N” case demonstrates that this ground of justification is strongly connected to the fiscal principle of territoriality and that a balanced division of the tax authority should be proportionate.

*Marks & Spencer* and the “N” case show that it is, in principle, justified to distinguish between losses suffered inside and outside the jurisdiction of the United Kingdom and the Netherlands respectively, unless this were to lead to a situation in which the losses could not be taken into account at all in a concrete case. In other words, if the losses could not be deducted in the residence Member State, the work Member State must take account of these losses. Consequently, it could be relevant how the negative income from the owner-occupied dwelling is treated under the Belgian tax system. If it must be concluded, in line with Advocate General Wattel's remarks in respect of the disparity element (see 7.), that this negative income is not deductible in Belgium,

50. ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert, Bernadette Morres v. Belgian State*.

51. Id., Para. 20.

52. S. Douma, FED 2007/6, point 12.

53. ECJ, 8 May 1990, Case C-175/88, *Klaus Biehl v. Administration des Contributions du Grand-Duché de Luxembourg*.

54. Id., Para. 12.

55. ECJ, 12 May 1998, Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin*.

56. ECJ, 14 November 2006, Case C-513/04, *Mark Kerckhaert, Bernadette Morres v. Belgian State*, Paras. 20–23. Although the Belgium–France tax treaty did not apply in this case, the ECJ nevertheless indicated this in its judgment.

57. ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*.

58. ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*.

this could be an additional argument to be entitled to compensation in the Netherlands.

Nevertheless, the ECJ has refined the ground of justification of *Marks & Spencer* and *Cadbury Schweppes* in its recent decision in *Rewe Zentralfinanz*.<sup>59</sup> Specifically, the ECJ concluded that

a difference in tax treatment between resident parent companies according to whether or not they have subsidiaries abroad cannot be justified merely by the fact that they have decided to carry on economic activities in another Member State, in which the State concerned cannot exercise its taxing powers. Accordingly, an argument based on the balanced allocation of the power to impose taxes between the Member States cannot in itself justify a Member State systematically refusing to grant a tax advantage to a resident parent company, on the ground that that company has developed a cross-border economic activity which does not have the immediate result of generating tax revenues for that State.<sup>60</sup>

The principle of territoriality accepted by the ECJ in *Futura Participations* is described by the ECJ in *Marks & Spencer* as “taxing resident companies on their worldwide profits and non-resident companies solely on the profits from their activities in that State”. The ECJ added that, in such a case, “the parent company’s Member State is acting in accordance with the principle of territoriality enshrined in international tax law and recognised by Community law”.<sup>61</sup>

In the authors’ opinion, “acting in accordance” with the principle of territoriality is the preliminary condition to invoke this ground of justification. In the event that the Netherlands wants to invoke this ground of justification in *Renneberg*, it should be demonstrated that the Netherlands actually respected the territoriality principle in *Renneberg*. This was confirmed by the ECJ in several decisions in cases involving national gambling monopolies, in which the Court stated that a Member State is not entitled to invoke a ground of justification when they are in reality not applied by that Member State. *Gambelli*<sup>62</sup> provides such an example. Specifically, Italy argued that its restrictive gambling legislation was justified, as it wanted to reduce opportunities for betting, whereas, according to the referring judge, Italy in reality encouraged consumers to participate in gambling activities.

If Mr Renneberg could be regarded as a non-resident taxpayer, the principle of territoriality is in fact respected, as he is only subject to Netherlands income tax on income from a Netherlands source that is designated and recognized as such by the relevant provisions of the Netherlands Income Tax Act. The Netherlands Supreme Court’s 1980 judgment, however, regarded public servants residing in another jurisdiction for the purposes of a tax treaty concluded with that jurisdiction as a “limited resident taxpayer”. As a result, it is arguable that the principle of territoriality is not applied to a “limited resident taxpayer” in which connection the ground of justification formulated in *Futura Participations* should be denied by the ECJ. In line with the Netherlands Supreme Court’s 1980 judgment, Mr Renneberg should have been characterized as a “limited resident taxpayer”. Nevertheless, the Netherlands Supreme Court in its referring decision of 22 December 2006 character-

ized Mr Renneberg as a non-resident taxpayer. The ECJ will only take note of the facts of *Renneberg* stated in the referring decision of the Netherlands Supreme Court. Consequently, the ECJ will not be able to take note of the concept of a “limited resident taxpayer” and to what extent the principle of territoriality is respected.

## 9. Conclusions

The Netherlands Supreme Court in *Renneberg* has referred the question to the ECJ of whether mortgage interest paid on an owner-occupied dwelling located in Belgium should be deductible from Netherlands-source employment income on the basis of Art. 39 of the EC Treaty. A similar question was raised in *Ritter-Coulais*, but was ultimately left unanswered by the ECJ.

According to Netherlands national tax law, Mr Renneberg is regarded as a resident taxpayer of the Netherlands, as he is active as a public servant in the Netherlands (deeming provision). For the purposes of the 1970 Belgium–Netherlands tax treaty, he is regarded as a resident of Belgium. Consequently, Mr Renneberg could be described as a limited resident taxpayer who is only taxed on income and capital in the Netherlands when the tax treaty assigns taxation rights on that income and capital to the Netherlands.

Mr Renneberg claimed a compensation of his negative income derived from his dwelling located in Belgium with his Netherlands-source employment income. Based on *Schumacker* and *Marks & Spencer*, he argued that disallowing this type of compensation contravenes the free movement of workers. The tax treaty allocates the taxation rights on income derived from real estate located in Belgium to Belgium. The Netherlands Supreme Court in its 1980 judgment held that the Netherlands cannot take account of positive or negative income from real estate located in Belgium. The Supreme Court decided in its 2000 judgment that negative income from an owner-occupied dwelling cannot be regarded as personal allowances in the sense of the *Schumacker* case. The Supreme Court had reservations as to whether or not its 2000 judgment could still be upheld after *Ritter-Coulais* and, therefore, referred the case to the ECJ.

If Mr Renneberg were to be deemed to be a resident taxpayer, the ECJ could decide *Renneberg* along the lines set out in *Zurstrassen* and Mr Renneberg would be comparable to Netherlands resident taxpayers. Netherlands resident taxpayers owning real estate in Belgium could deduct negative income from that real estate from their Netherlands positive income. Accordingly, Mr Renneberg should similarly be entitled to the same deduction. The Netherlands Supreme Court did not mention

59. ECJ, 29 March 2007, Case C-347/04, *Rewe Zentralfinanz eG v. Finanzamt Köln-Mitte*.

60. Id., Para. 43.

61. ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*, Para. 39.

62. ECJ, 6 November 2003, Case C-243/01, *Piorgiorgio Gambelli and Others*, Paras. 68 and 69.



the concept of a “limited resident taxpayer”, which the Court has developed in several decisions, in its referring decision. Instead, the Netherlands Supreme Court characterized Mr Renneberg as a non-resident taxpayer. The ECJ will have to respect the qualifications and the facts stated in the referring decision of the Netherlands Supreme Court. As a result, the ECJ will probably answer the preliminary question from the inaccurate assumption that Mr Renneberg is a non-resident taxpayer.

The first issue is whether or not Mr Renneberg has access to the EC Treaty, as he moved only his home to Belgium and not his economic activities. Netherlands Advocate General Wattel in his Opinion in *Renneberg* argued that the ruling in *Werner* is similarly applicable, which results in Mr Renneberg not exercising his right to free movement of workers, as he did not accept an employment in Belgium, but, instead, continued to be employed in the Netherlands. Given the “N” case, *Ritter-Coulais*, *Hartmann* and Advocate General Kokott’s Opinion in *Hendrix*, it is questionable whether or not the decision in *Werner* applies to Mr Renneberg. Accordingly, a resident of one Member State holding shares in companies established in another Member State or working in another Member State exercises his right of free movement as protected by the EC Treaty. If the ECJ were to confirm its decision in *Werner*, Mr Renneberg would, nevertheless, be entitled to invoke Art. 18 of the EC Treaty.

In his Opinion in *Ritter-Coulais*, Advocate General Léger argued that the national fiscal distinction between negative source income and personal allowances is irrelevant from an EC law perspective. In the authors’ view, this is supported by one of the primary goals of the free movement of workers, i.e. guaranteeing non-resident workers the same treatment as workers residing in the work Member State with regard to their remuneration (including tax advantages). A non-resident taxpayer earning (almost all of) his employment income in another Member State is comparable to resident taxpayers of that Member State. Consequently, the non-resident employee should be treated as equal to resident employees. As a result, they should be granted the same advantages as resident employees, regardless of the national characterization of these advantages. Nevertheless, Netherlands Advocate General Wattel rightly pointed out that the deduction of negative income from an owner-occupied dwelling is not deductible from positive employment income in Belgium. As a consequence, the denial of the deduction would place Mr Renneberg in the same situation as a Belgian resident earning all his

employment income in Belgium. Accordingly, this denial could neither be characterized as discrimination, nor as a hindrance, but arises from a disparity between the Netherlands and Belgian tax systems.

The authors are inclined to follow the approach adopted by Advocate General Léger. Art. 39 of the EC Treaty primarily seeks to guarantee that the same conditions apply to both resident and non-resident workers of the work Member State if these non-resident workers earn all their employment income in that Member State. From this perspective, the Netherlands should offer Mr Renneberg the same conditions as (unlimited) resident taxpayers.

The referring decision of the Netherlands Supreme Court does not mention any possible grounds of justification. The way in which the Belgium–Netherlands tax treaty is applied by the Netherlands Supreme Court could constitute a ground of justification in this respect. The Netherlands Supreme Court held in its 1980 judgment that the Netherlands does not have the authority to tax income from real estate located in Belgium under the relevant tax treaty. Accordingly, the Netherlands government could argue that it is justified disregarding the negative income from the owner-occupied dwelling located in Belgium, as the tax treaty allocates the taxation right on that dwelling to Belgium. From this perspective, the necessity to preserve the allocation of the power to impose taxes between the Member States could be regarded as a possible ground of justification (see *Marks & Spencer* and *Cadbury Schweppes*). This could be jeopardized by the fact that the Netherlands does not respect the principle of territoriality recognized by the ECJ in *Futura Participations*, as Mr Renneberg is taxed as a limited resident taxpayer and not as a non-resident taxpayer. Nevertheless, the Netherlands Supreme Court in its referring decision of 22 December 2006 characterized Mr Renneberg as a non-resident taxpayer.

Finally, the single preliminary question in *Renneberg* gives the ECJ sufficient issues to consider, especially the borderline between what is to be regarded as a disparity and what must be seen as a hindrance, which could be well defined by the ECJ. Unfortunately, the Netherlands Supreme Court did not explain and mention its concept of “limited resident taxpayers”, in which connection *Zurstrassen* would have relevance. As a result, the ECJ probably does not have the possibility to apply its reasoning in *Zurstrassen*, which would have been an easy way out.