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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11 – 29 July 2005

DECISION

Communication No. 1192/2003

Submitted by:	Mr. M. de Vos (represented by counsel, Mr. M.W.C. Feteris)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	6 August 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 August 2002 (not issued in document form)
Date of decision:	25 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Unequal taxation of commuters using company cars - Alleged absence of an effective remedy

Procedural issues: Substantiation of claim by author - Admissibility *ratione materiae*

Substantive issues: Right to equality before the law and equal protection of the law - Right to an effective remedy

Articles of the Covenant: 2 (3) and 26

Articles of the Optional Protocol: 2 and 3

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-fourth session

concerning

Communication No. 1192/2003*

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Date of communication:	6 August 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Mr. M. de Vos, a Dutch national born in 1967. He claims to be a victim of violations by the Netherlands[1] of article 26 read alone and in conjunction with article 2, paragraph 3, of the Covenant. He is represented by counsel, Mr. M.W.C. Feteris.

Factual background

2.1 In 2000, the author, a tax consultant, used a company car made available to him by his employer, an international accounting and consulting firm, to commute between his home, which is located more than 30 kilometers away from his workplace, and his office in

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

[1] The Covenant and the Optional Protocol thereto entered into force for the Netherlands on 11 March 1979.

Amsterdam on at least three days a week. He also used the company car (with a catalogue price of 44,590 NLG) for private purposes for a distance exceeding 1,000 kilometers in 2000, subject to payment of an amount of 4,566 NLG to his employer.

2.2 Under Article 42 of the Dutch Income Tax Law (1964), employees using a company car for private purposes must add 20 percent of the catalogue price of the car to their taxable income. By Act of 4 July 1990, amending the Income Tax Act, this amount was increased by an additional four percent of the catalogue price in cases where an employee commutes between his or her home and workplace on at least three days a week for a distance exceeding 30 kilometers (one way). At the same time, employees using a company car were exempted from any increase of the taxable income, if they could prove that their private use of the car does not exceed 1,000 kilometers per year.[2]

2.3 By decision of 15 July 1998 concerning tax year 1994, the Supreme Court found that the additional increase of the taxable income by four percent of the catalogue price in cases where the private use of a company car exceeds 1,000 kilometers per year was contrary to article 26 of the Covenant. It considered that the extent of the private use did not constitute reasonable and objective criteria, which would justify discrimination between commuters, who use a company car for more than 1,000 kilometers per year and commuters who use it for less than 1000 kilometers per year. However, it found that to make the relevant provision of the Income Tax Act inoperative would result in unequal treatment of employees without a company car, who frequently commute between their home and their workplace for distances exceeding 30 kilometers, and for whom the tax allowance for commuters had been capped for environmental purposes by the Act of 4 July 1990. The only way to ensure equal treatment of all employees frequently commuting for a distance exceeding 30 kilometers would be the non-application of all provisions on the capping of the tax allowance for commuters introduced by the Act. Such a consequence would, however, be disproportionate under article 26 of the Covenant. The Supreme Court concluded that it was for the legislator rather than the judiciary to remove this inequality, and that the fact that a new Income Tax Bill was soon to be submitted to Parliament showed that the legislator was in the process of resolving the problem.

2.4 Subsequently, the Government rejected the advice of the Council of State to bring Dutch tax legislation into conformity with article 26 of the Covenant by 1999, arguing that it was preferable to withhold any measures until the adoption of a general reform of the income tax legislation. On 1 January 2001, a new Income Tax Act entered into force, removing the disputed provisions of the Act of 4 July 2000.

2.5 On 11 April 2001, the tax inspector of ‘s Gravenhage assessed the author’s tax declaration for 2000, adding an amount of 10.701 NLG (24 percent of the company car’s catalogue price of 44,590 NLG) to his taxable income and deducting the 4,566 NLG that the author had paid to his employer for the private use of the company car. The net addition to his taxable income was thus 6,135 NLG.

2.6 On 24 January 2001, the Supreme Court dismissed the complaint filed by another taxpayer, who claimed that the tax legislation should have been amended earlier. It

[2] Pursuant to the then applicable Section 6 of Article 42 of the Income Tax Law, traffic between a commuter’s home and workplace was not considered as private use.

considered that it was not unreasonable for the legislator to postpone the amendment of the legislation in order to resolve the issue as part of a general tax reform.

The complaint

3.1 The author claims that the fact that his taxation for the year 2000 was higher than that of other employees commuting with a company car on at least three days a week for a distance exceeding 30 kilometers (one way), merely because his private use of the car exceeded 1,000 kilometers, amounts to discrimination. The extent of his private use of the car could not justify his unequal treatment, given that other long-distance commuters using a company car equally polluted the environment, even if their private use of the car did not exceed 1,000 kilometers per year.

3.2 The author argues that the fact that another group of taxpayers, i.e. employees using other means than a company car to commute between their home and workplace on at least three days a week for a distance exceeding 30 kilometers (one way), had been adversely affected by the capping of the tax allowance for commuters, does not change the discriminatory nature of his taxation.

3.3 For the author, the combined effect of the application of the discriminatory provisions of the Act of 4 July 1990 to his case *and* of the Supreme Court's decision not to interfere in similar cases, despite its obligation under article 2, paragraph 1, to respect and to secure the rights recognized in the Covenant, amounts to a violation of article 26 of the Covenant.

3.4 The author adds that the absence of any remedy, other than a merely declaratory judgment of the Supreme Court which did not require the legislator or the executive to take any immediate measures to respect the Covenant, breached his right to an effective remedy under article 26, read in conjunction with article 2, paragraph 3, of the Covenant.

3.5 On exhaustion of domestic remedies, the author submits that a complaint to the Supreme Court would have been futile, in the light of its jurisprudence on similar cases, and that no other remedies are available to him under Dutch law.

3.6 The author claims compensation for the pecuniary damage suffered because of his discriminatory taxation. He argues that he should have been treated equally with the privileged group of taxpayers which had been exempted from the additional four percent increase of the taxable income. The difference between the income tax paid by him in 2000 and the tax that he would have paid, had he been treated on an equal footing with the privileged group, should be reimbursed to him with statutory interests.

State party's observations on admissibility and merits and author's comments

4.1 On 23 October 2003, the State party submitted its observations on the admissibility and merits of the communication. While conceding that the author was not required to exhaust domestic remedies in the light of the Supreme Court's jurisprudence on similar cases, the State party argues that his claim under article 26 of the Covenant is inadmissible *ratione*

personae under article 1 of the Optional Protocol[3] and that, in any event, his claims under articles 26 and 2, paragraph 3, of the Covenant are unfounded.

4.2 The State party submits that the Supreme Court's finding that the relevant provisions of the Act of 4 July 1990 were incompatible with article 26 of the Covenant, together with its instruction that the legislator amend these provisions, afforded the author adequate redress. Another option to remedy this incompatibility would have been to treat all taxpayers equally. However, the imposition of identical charges on commuters, whose private use of a company car did not exceed 1,000 kilometers per year, would only have resulted in higher taxation of this group, without improving the author's situation. The State party concludes that the author cannot claim to be a victim within the meaning of article 1 of the Optional Protocol and that his claim under article 26 is therefore inadmissible *ratione personae*.

4.3 Subsidiarily, the State party submits that the increase of the author's taxable income by an additional four percent of the catalogue price of the company car did not violate article 26. The purpose of the Act of 4 July 1990 was to reduce commuter traffic, especially by car, for environmental reasons and in order to decongest road traffic in a densely populated country, the Netherlands. The legislative process leading to the adoption of the Act involved a careful examination of the available options to achieve this purpose. The proposed amendments were considered necessary to spread the financial burden equally among taxpayers, i.e. to ensure that employees frequently commuting by company car between their home and workplace for a distance exceeding 30 kilometers (one way) would make a financial sacrifice comparable to the capping of the tax allowance for commuters using their own car or public transport.

4.4 The State party argues that the small group of employees frequently commuting by company car for a distance exceeding 30 kilometers (one way), who bother to keep all records of the use of a company car to prove that their private use does not exceed 1,000 kilometers per year, is so insignificant that it cannot serve as a justification for abandoning the important social objective pursued by the imposition of charges on other long-distance commuters. Reasons of legal certainty militated against removing the privilege enjoyed by this group retroactively.

4.5 For the State party, accepting minor inequalities when elaborating a coherent body of tax legislation to strike a balance between the interests of different groups of taxpayers does not amount to a violation of article 26, if such inequalities only have negligible financial consequences for those concerned.

4.6 With regard to article 2, paragraph 3, the State party submits that objections to tax assessments can be lodged with the Dutch tax and customs administration, whose decisions are subject to appeal to the Court of Appeal and to further appeal on law to the Supreme Court. The author had been provided an effective remedy, as the alleged inequality of treatment had been ascertained in national proceedings and was later removed by the legislator. Insofar as the author claims that the Supreme Court's jurisprudence precluded him from recovering the amount by which his tax assessment exceeded the taxation of other

[3] The author refers to the European Court's jurisprudence in *Auerbach v. The Netherlands*, Application No. 45600/99, Decision on admissibility adopted on 29 January 2002 and *Arends v. The Netherlands*, Application No. 45618/99, Decision on admissibility adopted on 29 January 2002.

commuters, whose private use of a company car did not exceed 1,000 kilometers per year, the State party argues that article 2, paragraph 3, does not guarantee a specific outcome of the remedy in place.

5.1 On 7 January 2004, the author commented on the State party's submission, rejecting the argument that one possibility to remove the inequalities from the Act of 4 July 1990, i.e. elimination of privileges enjoyed by a certain group of taxpayers, would not have changed the applicant's situation. He argues that, ultimately, any discrimination can be undone by downgrading the position of the group that is treated more favourably. This was, however, not intended by the Covenant and impracticable in cases where definite tax assessments could not be increased retroactively.

5.2 For the author, the mere finding of incompatibility of a law with article 26 cannot remove the underlying discrimination, if no effective redress is granted to victims of such discrimination. The subsequent removal of inequalities from the legislation through the tax reform of 1 January 2001 did not change the fact that the Covenant had been and continued to be violated in the meantime. By ratifying the Covenant the State party had undertaken to respect and ensure its guarantees with immediate effect.

5.3 While conceding that the reduction of commuter traffic was a legitimate policy objective, the author argues that this purpose cannot be pursued by discriminatory measures. He argues that the tax law reform of 2001 refutes the State party's argument that the inequalities in the Act of 4 July 1990 were necessary to elaborate a coherent body of tax legislation. Consistency with article 26 could have been ensured by increasing the taxable income of all commuters using a company car, who live more than 30 kilometers from their workplace, by four percent of the car's catalogue price, irrespective of the extent of their private use of the car. It was irrelevant in this context whether such an increase could have been introduced retroactively and whether it would have had any beneficial effect for the author. The limited size of the privileged group could not justify the unequal treatment, given that under tax legislation, privileges are frequently granted to a small group of taxpayers only.

5.4 The author rejects that his discriminatory taxation was negligible, as the extra amount of tax paid by him totaled some 450 US$ in 2000. Unjustified distinctions were unacceptable, even if their financial impact was limited. Nor should distinctions in the field of tax law be accepted more easily than in other fields of legislation, bearing in mind the Committee's jurisprudence that article 26 prohibits discrimination in any field regulated and protected by public authorities.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that the increase of his taxable income by four percent of the catalogue price of the company car used by him, merely because his private use of the car exceeded 1,000 kilometers, was discriminatory, in violation of article 26 of the Covenant, the Committee considers that the author has not substantiated how his different treatment was based on one of the prohibited grounds of discrimination enumerated in article

26, or on any comparable "other status" referred to in that article.[4] Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.3 With regard to the alleged absence of an effective remedy, the Committee recalls that for purposes of the Optional Protocol, article 2 of the Covenant can only be invoked in conjunction with a substantive Covenant right. It notes that the author invoked article 2, paragraph 3, in conjunction with article 26 of the Covenant. However, his claim under article 26 being inadmissible because of the failure of the author to establish its applicability, it follows that his claim under article 26, read in conjunction with article 2, paragraph 3, is likewise inadmissible. The Committee therefore concludes that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[4] See Communication No. 273/1988, *B.d.B. et al v. The Netherlands*, decision on admissibility adopted on 30 March 1989, at para. 6.7.