Arrêt de la Cour
Case C-234/01

Arnoud Gerritse
v
Finanzamt Neukölln-Nord

(Reference for a preliminary ruling from the Finanzgericht Berlin)

«(Income tax – Non-residents – Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) – Non-taxable threshold amount – Deduction of business expenses)»

Opinion of Advocate General Léger delivered on 13 March 2003 I - 0000 Judgment of the Court (Fifth Chamber), 12 June 2003 I - 0000
Summary of the Judgment
1..Freedom to provide services – Restrictions – Tax legislation – Income taxes – Exclusion of non-residents from the right to deduct business expenses – Not permissible
(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))
2..Freedom to provide services – Restrictions – Tax legislation – Income taxes – Rate of taxation fixed in relation to the income of non-residents and progressive in relation to the income of residents – Whether permissible – Conditions
(EC Treaty, Art. 59 (now, after amendment, Art. 49 EC) and Art. 60 (now Art. 50 EC))
1. Article 59 of the Treaty (now, after amendment, Article 49 EC) and Article 60 of the Treaty (now Article 50 EC) preclude a national provision which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses. see para. 55, operative part
2. Article 59 of the Treaty (now, after amendment, Article 49 EC) and Article 60 of the Treaty (now Article 50 EC) do not preclude a national provision which, as a general rule, subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance. see para. 55, operative part

JUDGMENT OF THE COURT (Fifth Chamber)
12 June 2003 (1)

((Income tax – Non-residents – Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) – Non-taxable threshold amount – Deduction of business expenses)

In Case C-234/01,
REFERENCE to the Court under Article 234 EC by the Finanzgericht Berlin (Germany) for a

preliminary ruling in the proceedings pending before that court between
Arnoud Gerritse

and

Finanzamt Neukölln-Nord,
on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC),

THE COURT (Fifth Chamber),,

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, P. Jann and A. Rosas, Judges,
Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,
after considering the written observations submitted on behalf of:

?Mr Gerritse, by H. Grams, Rechtsanwalt, and D. Molenaar, belastingadviseur,
?the Finanzamt Neukölln-Nord, by W. Czarnetzki and S. Wolff, acting as Agents,
?the Finnish Government, by T. Pynnä, acting as Agent,
?the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,
having regard to the Report for the Hearing,

after hearing the oral observations of Mr Gerritse and the Commission at the hearing on 9 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,

gives the following

Judgment

1 By order of 28 May 2001, received at the Court on 19 June 2001, the Finanzgericht Berlin (District Tax Court, Berlin) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).
2 That question was raised in proceedings between Mr Gerritse and the Finanzamt Neukölln-Nord (the Finanzamt) concerning the taxation of income received in Germany as a non-resident.
National legal background
3 Paragraph 50a of the Einkommensteuergesetz (Law on Income Tax) in its 1996 version (the EStG 1996) concerns the taxation of partially taxable persons; that is to say those having neither their permanent residence nor ordinary abode in Germany, and who are taxed there only on the income received in that State. Under Paragraph 50a(4) of that Law:
In the case of partially taxable persons, income tax shall be deducted at source:
1. In respect of income from artistic, sporting or similar performances in national territory or from the exploitation of such performances in national territory, including income derived from other acts of performance connected with the above, irrespective of the person who receives the income ... ...
The deduction at source shall be 25% of the income received ...
4 In accordance with Paragraph 50(5), fourth sentence, of the EStG in its 1997 version, applicable with retrospective effect to remuneration received in 1996, no deduction for business expenses is in principle authorised, unless those costs represent more than half

of the income received.

5 In principle, retention at source constitutes a definitive charge, as is shown by Paragraph 50(5) of the EStG 1996: In the case of partially taxable persons, income tax on income which ... is subject to deduction at source under Paragraph 50a is to be regarded as finally paid by that deduction.

6 Under Paragraph 1(3) of the EStG 1996, certain persons falling within the scope of Paragraph 50a of that law may nevertheless ask to be treated like persons wholly subject to income tax, their tax treatment being thereafter on the same basis as that of a wholly taxable person for the purposes of assessing the tax due in the light of the tax return.

7 However, partially taxable persons may use that option only if one of the following conditions is fulfilled: either at least 90% of the income must have been subject to German income tax during the calendar year, or the income not subject to German income tax during the calendar year must be equal to or less than DEM 12 000.

8 In the clearance procedure for income tax, generally applicable to wholly taxable persons, the basis of assessment, as regards income from a self-employed activity, is the net profit after deducting business expenses (see Paragraph 50(1) and (2) of the EStG). In addition, the progressive table laid down by Paragraph 32a of the EStG 1996, which includes a non-taxable threshold amount limited for 1996 to DEM 12 095, must be applied.

The dispute in the main proceedings and the question referred

9 Mr Gerritse, a Netherlands national resident in the Netherlands, received the sum of DEM 6 007.55 in 1996 for performing as a drummer at a radio station in Berlin. The documents before the Court show that the business expenses occasioned by that performance amounted to DEM 968.

10 In the same year, Mr Gerritse also received gross income totalling around DEM 55 000 in his State of residence and in Belgium.

11 In accordance with the Convention concluded on 16 June 1959 between the Kingdom of the Netherlands and the Federal Republic of Germany for the avoidance of double taxation in the area of income, capital and various other taxes, and for regulating other tax matters (BGBl. 1960 II, p. 1782; the bilateral convention) and with Article 50a(4) of the EStG 1996, the fee of DEM 6 007.55 was subjected to tax on a notional assessment of income, at the rate of 25% (namely DEM 1 501.89), which was deducted at source.

12 In September 1998, Mr Gerritse lodged with the German tax authorities, under Paragraph 1(3) of the EStG 1996, a declaration of income with a view to be being treated as a wholly taxable person. The Finanzamt refused to carry out income tax clearance, however, on the ground that the other income declared exceeded the ceiling of DEM 12 000. Mr Gerritse's administrative complaint was likewise rejected.

13 Mr Gerritse brought an action against that rejection before the Finanzgericht Berlin, relying on the principle of non-discrimination guaranteed by Community law. He argued that a wholly taxable resident in a situation comparable to his own would not be required to pay tax by reason of the non-taxable threshold amount limited to DEM 12 095.

14 The Finanzamt argued that, by applying the basic table, the applicant would escape the progressivity of German income tax, even though the level of his income, having regard to his worldwide income, required the application of a higher rate. In that way, he would be favoured in comparison with wholly taxable residents, in respect of whom, in accordance with Paragraph 32b(1), point 3, of the EStG 1996, worldwide income is taken into account when determining the rate of taxation.

15 The referring court inquires as to the compatibility with Community law of the definitive taxation at the rate of 25% laid down by Paragraph 50a(4), first sentence, point 1, and second sentence, of the EStG 1996.

16 It notes that the possibility, by virtue of the bilateral convention, of the State of residence taking the income received in the State of activity into account for the purposes of taxing the balance of worldwide income might lead to an extra charge for the taxpayer in that a possible leap in the rate of income tax would not be entirely compensated for by deduction of the tax in the State of residence, such deduction being calculated in a purely

abstract way by reference to the relation between the income received in Germany and the taxpayer's worldwide income.

17 According to the referring court, the definitive taxation of Mr Gerritse's income at a rate of 25% cannot be justified by the principle of tax consistency, since there was not, as the case-law of the Court of Justice on the matter requires, a direct link between the tax advantage ? in this case the tax-free allowance ? and the definitive taxation.

18 The referring court also finds that, in certain cases, application of a uniform rate of 25% risks leading to blatant discrimination against a partially taxable person by comparison with a tax resident. For example, in 1996, a single taxpayer with his permanent residence in the Netherlands and receiving there the equivalent of DEM 12 001 by way of net income, as well as gross income in Germany derived from a self-employed artistic activity amounting to DEM 100 000 gross and DEM 50 001 net, was subject to a definitive charge of DEM 25 000 by way of income tax, in addition to the proportionate solidarity surcharge. According to the referring court, that corresponds ? when applied to the net income received in Germany ? to an average rate of tax of 49.99%, which is generally applicable only to persons with very high incomes (the maximum tax rate in 1996 amounted to 53% for single taxpayers with taxable income over DEM 120 042).

19 If the taxpayer's permanent residence had been in Germany, and he had obtained a net worldwide income there of DEM 62 002, he would have had to pay, according to the basic table, a tax on income of only DEM 15 123. In that case, the average rate of taxation would have corresponded to only 24.4%, half the rate mentioned in the previous paragraph.

20 The referring court recognises, however, that, in a large number of cases, particularly where national income is very high and business expenses negligible, the provisions at issue in the main proceedings lead, in relation to the rate of tax to be applied, to more favourable treatment of a partially taxable person subject to the deduction of tax, compared with a taxpayer established in Germany or with a partially taxable person assessed to tax in accordance with Article 50 of the EStG 1996. Mr Gerritse, however, was not one of those favoured persons, given that the tax assessment in respect of income received in German territory would have been nil in the event of full liability to tax.

21 The referring court adds that the dispute in the main proceedings might be resolved by allowing Mr Gerritse the possibility of being assessed to tax on the basis of the basic income tax table, but without taking account of the tax-free allowance, which would lead to income tax slightly lower than has been demanded. The question would then arise whether negligible differences in the matter of taxation constitute an effective obstacle to the exercise of an economic activity in another Member State.

22 In those circumstances, the Finanzgericht Berlin decided to suspend the proceedings and refer the following question to the Court of Justice for a preliminary ruling: Is there an infringement of Article 52 of the EC Treaty ... where, under Paragraph 50a(4), first sentence, point 1 and second sentence, of [the EStG 1996], a Netherlands national who earns in Germany taxable net income of approximately DEM 5 000 from self-employed activity in the calendar year is subject to deduction of tax at source by the person liable to pay his fees at the rate of 25% of his (gross) revenue of approximately DEM 6 000 plus solidarity surcharge, where it is not possible, by means of an application for a refund or an application for a tax assessment, for him to recover, in whole or in part, the taxes paid?

The question referred

23 It should be noted at the outset that Mr Gerritse, who lives in the Netherlands, performed temporary services in Germany, for which he received income the taxation of which is disputed before the referring court. In those circumstances, as Mr Gerritse and the Commission have observed, the question referred should be understood as concerning the freedom to provide services rather than the freedom of establishment.

24 The Court considers, therefore, that the referring court is essentially enquiring whether Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) preclude a national provision such as that at issue in the main proceedings which, as a general rule, on the one hand, takes gross income into account

when taxing non-residents, without deduction of business expenses, whereas residents are taxed on their net income after deduction of their business expenses, and, on the other, makes the income of non-residents liable to a definitive tax at the uniform rate of 25%, deducted at source, whereas the income of residents is taxed in accordance with a progressive table which includes a tax-free allowance.

The deductibility of business expenses

25 Mr Gerritse and the Commission argue that, in the case of self-employed persons who are wholly taxable, only the profit is subject to income tax, business expenses being generally excluded from the basis of assessment, whereas, in the case of partially taxable persons, the tax of 25% is levied on receipts, business expenses being non-deductible (save where they are higher than half of the receipts, in which case tax is repaid in so far as it exceeds 50% of the difference between the receipts and the business expenses).

26 Mr Gerritse argues, in particular, that there are serious consequences for non-resident artists on tour in Germany, whose business expenses are generally very high.

27 It is to be noted at this stage that the business expenses in question are directly linked to the activity that generated the taxable income in Germany, so that residents and non-residents are placed in a comparable situation in that respect.

28 In those circumstances, a national provision which, in matters of taxation, refuses to allow non-residents to deduct business expenses, whereas residents are allowed to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality, contrary in principle to Articles 59 and 60 of the Treaty.

29 Since no precise argument has been put before the Court to justify such a difference in treatment, Articles 59 and 60 must be held to preclude a national provision such as that at issue in the main proceedings in so far as it excludes the possibility for partially taxable persons to deduct business expenses from their taxable income, whereas such a possibility is granted to wholly taxable persons.

The deduction at source of 25%

Observations submitted to the Court

30 Mr Gerritse argues that the effect of exacting income tax by way of deduction at source and the fact that non-residents are thereby excluded from any form of repayment of overpaid amounts are incompatible with the third paragraph of Article 60 of the Treaty. In particular, he maintains that the failure to take account of the tax-free allowance leads to discrimination contrary to Community law, since its effect is to impose a minimum rate of tax, ruled unlawful by the Court in its judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 49.

31 There is, he submits, no objective reason capable of justifying that difference in treatment by comparison with residents. In particular, the argument of tax consistency cannot be validly relied on, since there is here no advantage to compensate for the tax disadvantage, as required by the Court's case-law on the subject.

32 The Finanzamt and the Finnish Government argue, by contrast, that the tax regime at issue in the main proceedings complies with Community law.

33 First, according to the Finanzamt, deduction at source constitutes a legitimate and appropriate method for the tax treatment of a partially taxable person, established abroad.

34 In addition, if the basic tax table were to be applied without restriction, which in this case would result in no German income tax being levied, Mr Gerritse would escape the progressive element of that tax, even though his worldwide income required the application of a higher rate. In that way, a partially taxable taxpayer would be favoured in comparison with wholly taxable persons, for whom worldwide income is taken into account when determining the tax rate.

35 The Finanzamt and the Finnish Government add that, according to the case-law of the Court (judgments in Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 31 to 33; Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 22; and *Asscher* , paragraph 44), the obligation to take account of a taxpayer's personal situation is, in principle, a matter for the

competence of the State of residence, and not that of the State where the income originates, unless, on account of the lack of sufficient income for taxation in the first State, the latter were unable to fulfil that obligation, so that, from the economic point of view, neither of the two States under consideration would in the end take account of the personal situation of the taxpayer for the purposes of tax assessment.

36 However, a tax-free allowance is designed to protect the essential minimum income of taxpayers with low incomes, which is in principle a matter falling within the responsibility of the State of residence, where, as a general rule, the taxpayer receives the greater part of his income. The German tax authorities take account of the essential minimum in the case of a partially taxable person, in so far as that person is subject to assessment in the ordinary way, where the income received abroad is less than DEM 12 000.

37 Finally, according to the Finnish Government, the rate of 25% often corresponds to the actual rate of tax to which the person is subject in his State of residence, so that the deduction at source at issue does not constitute an unforeseeable obstacle to the free movement of persons.

38 The Commission makes a similar argument. It considers that, bearing in mind the circumstances of the case at issue in the main proceedings, account should not be taken of the tax-free allowance, so that the rate corresponding to taxation above that amount should be applied.

39 It thus proposes that the net income (A) be added to the tax-free allowance (B) to obtain a total (C). The amount of tax (D) laid down by the relevant table for that total (C) could be regarded as a fair tax on the net income. The average rate of taxation, which could serve as a reference for non-discriminatory treatment, would then arise from the relationship between the amount of the tax (D) in accordance with the table and net income (A).

40 According to the Commission, the calculation in Mr Gerritse's case would be as follows: the total (C) would be composed of net income (A) amounting to DEM 5 039.55 plus the tax-free allowance (B) of DEM 12 095, and would thus amount to DEM 17 134.55. For that income, the relevant tax table gives a tax (D) of DEM 1 337. Having regard to net income (A), that sum would correspond to an average rate of taxation of 26.5%, close to the rate of 25% actually applied to Mr Gerritse.

41 The Commission argues that, at that rate, there is no discrimination. There is therefore no cause in this case to challenge the German authorities' application of the uniform rate of 25% to partially taxable persons.

42 It also shares the views of the Finanzamt and the Finnish Government as to the benefit of the tax-free allowance. It is in principle for the State of residence, which carries out the global taxation of the person concerned taking his worldwide net income into account, to integrate into its system of progressive taxation the considerations of a social nature that justify the existence of such an allowance.

The answer of the Court

43 As the Court has already held, in relation to direct taxes, the situations of residents and of non-residents are generally not comparable, because the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (*Schumacker* , paragraphs 31 and 32; *Gschwind* , paragraph 22; Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 21).

44 Also, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory having regard to the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (*Schumacker* , paragraph 34; *Gschwind* , paragraph 23).

45 Moreover, for tax purposes, residence is the connecting factor on which international tax law, in particular the Model Convention of the Organisation for Economic Cooperation and Development (OECD) (Model Convention on Double Taxation concerning Income and Capital, Report of the Tax Affairs Committee of the OECD, 1977, version of 29 April 2000) is as a rule founded for the purpose of allocating powers of taxation between States in situations involving extraneous elements.

46 In this case, the documents before the Court show that Mr Gerritse, who lives in the Netherlands, received only a minimal part of his overall income in German territory.

47 The question therefore arises whether the objective difference in situation between such a non-resident and a resident allows one to disregard the discriminatory character of a national provision such as that at issue in the main proceedings which makes the income of non-residents subject to a definitive tax at the uniform rate of 25% deducted at source, whereas the income of residents is taxed according to a progressive table including a tax-free allowance.

48 Concerning, first, the tax-free allowance, since, as the Finanzgericht Berlin, the Finnish Government and the Commission have argued, it has a social purpose, allowing the taxpayer to be granted an essential minimum exempt from all income tax, it is legitimate to reserve the grant of that advantage to persons who have received the greater part of their taxable income in the State of taxation, that is to say, as a general rule, residents.

49 It should be noted that, where it is nevertheless established that a partially taxable person has received the greater part of his income in Germany, by fulfilling one of the two conditions mentioned in paragraph 7 of this judgment, the national provision at issue in the main proceedings assesses him to tax in precisely the same way as a wholly taxable person, by applying to the income of the taxpayer concerned a progressive table including a tax-free allowance.

50 That is not, however, the case with Mr Gerritse.

51 In that regard, the Netherlands Government has stated, in reply to a question by the Court, that, in a case such as that at issue in the main proceedings, the taxpayer may benefit in the Netherlands, the State of residence, from the tax-free allowance which is deducted from overall income. In other words, an advantage comparable to that claimed by Mr Gerritse in Germany is granted in the State of his residence, which must, in principle, take into account the personal and family situation of the person concerned.

52 Moreover, as regards the application to non-residents of a flat rate of tax of 25% while residents are subject to a progressive table, as the Commission has pointed out, the Netherlands as State of residence, pursuant to the bilateral convention, integrates the income in respect of which the right to tax belongs to Germany into the basis of assessment, in accordance with the progressivity rule. It does, however, take account of the tax levied in Germany, by deducting from the Netherlands tax a fraction which corresponds to the relation between the income taxed in Germany and worldwide income.

53 That means that, with regard to the progressivity rule, non-residents and residents are in a comparable situation, so that application to the former of a higher rate of income tax than that applicable to the latter and to taxpayers who are assimilated to them would constitute indirect discrimination prohibited by Community law, in particular by Article 60 of the Treaty (see, by analogy, *Asscher* , paragraph 49).

54 It is for the referring court to verify, in this case, whether the 25% tax rate applied to Mr Gerritse's income is higher than that which would follow from application of the progressive table. In order to compare comparable situations, it is necessary in that respect, as the Commission has rightly pointed out, to add to the net income received by the person concerned in Germany an amount corresponding to the tax-free allowance. According to the Commission, which carried out that calculation, application of the progressive table, in a case such as that at issue in the main proceedings, would lead to a rate of tax of 26.5%, which is higher than that actually applied.

55 In view of the whole of the above considerations, the answer to the Finanzgericht Berlin must be:
?Articles 59 and 60 of the Treaty preclude a national provision such as that at issue in the main proceedings which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses;
?However, those articles of the Treaty do not preclude that same provision in so far as, as a general rule, it subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance.

Costs
56 The costs incurred by the Finnish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.
On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Finanzgericht Berlin by order of 28 May 2001, hereby rules:
1. Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) preclude a national provision such as that at issue in the main proceedings which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses.
2. However, those articles of the Treaty do not preclude that same provision in so far as, as a general rule, it subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance.
Wathelet

Timmermans

Edward

Jann

Rosas

Delivered in open court in Luxembourg on 12 June 2003.
R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber

1 – Language of the case: German.