JUDGMENT OF THE COURT

16 May 2000 *

In Case C-87/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal Administratif, Luxembourg, for a preliminary ruling in the proceedings pending before that court between

Patrick Zurstrassen

and

Administration des Contributions Directes

on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 1 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

* Language of the case: French.

THE COURT,

composed of: J.C. Moitinho de Almeida, President of the Third and Sixth Chambers, acting for the President, D.A.O. Edward, L. Sevón and R. Schintgen, Presidents of Chambers, P.J.G. Kapteyn, C. Gulmann, G. Hirsch, H. Ragnemalm, M. Wathelet (Rapporteur), V. Skouris and F. Macken, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Zurstrassen, by J.-P. Noesen, of the Luxembourg Bar,

— the Luxembourg Government, by P. Steinmetz, Head of Legal and Cultural Affairs in the Ministry of Foreign Affairs, acting as Agent,

— the Spanish Government, by M. López-Monís Gallego, Abogado del Estado, acting as Agent, and

— the Commission of the European Communities, by H. Michard and B. Mongin, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Zurstrassen, represented by J.-P. Noesen; the Luxembourg Government, represented by P. Steinmetz and J.-M. Klein, Conseiller de Direction in the Administration des Contributions Directes; the Spanish Government, represented by M. López-Monís Gallego; and the Commission, represented by B. Mongin, at the hearing on 14 December 1999,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2000,

gives the following

Judgment

1 By judgment of 11 March 1999, received at the Court on the following day, the Tribunal Administratif (Administrative Court), Luxembourg, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 1 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 That question was raised in proceedings between Mr Zurstrassen and the Administration des Contributions Directes (Direct Taxation Authorities) concerning the calculation of income tax.

Relevant national provisions

3 Article 2(1) of the Luxembourg Law on Income Tax of 4 December 1967 (*Mémorial* A 1967, No 79), as amended by the Law of 6 December 1990, states:

'Natural persons are considered to be resident taxpayers or non-resident taxpayers according to whether or not they have their residence for tax purposes or their usual abode in the Grand Duchy.'

4 Article 3 of the Law on Income Tax provides:

'The following shall be assessed jointly to tax:

(a) spouses who at the start of the tax year are resident taxpayers and who do not in fact live apart by virtue of a dispensation of law or judicial authority;

(b) resident taxpayers who marry during the course of the tax year;

(c) spouses who become resident taxpayers during the course of the tax year and who do not in fact live apart by virtue of a dispensation of law or judicial authority.'

5 For the purposes of applying the tax scale when calculating the amount due, taxpayers are divided into three brackets. Article 119 of the Law on Income Tax provides:

'1. Bracket 1 comprises persons who do not fall within either Bracket 1a or Bracket 2.

2. Bracket 1a comprises the following taxpayers in so far as they do not fall within Bracket 2:

(a) widows and widowers;

(b) persons entitled to a child tax reduction as provided in Article 123;

(c) persons who have reached 64 years of age at the beginning of the tax year.

3. Bracket 2 comprises:

(a) persons assessed jointly to tax under Article 3;

(b) widows or widowers whose marriage ended as a result of death during the three years preceding the taxation;

(c) persons who were divorced, legally separated or separated *de facto* by virtue of a dispensation of law or judicial authority during the three years preceding the year of taxation, if before that time and for a period of five years they were not subject to this provision or a previous similar provision.'

6 Taxpayers falling within tax bracket 2 pay less tax, assuming equivalent income and disregarding any deductions, than those falling within bracket 1. Article 121 of the Law on Income Tax provides:

'The tax payable by taxpayers in bracket 2 shall be equivalent to double the amount which, on applying the scale laid down in Article 118, is assessed on half of the taxable income.'

7 In addition, Article 157a(3) provides:

'... non-resident taxpayers who are married and who do not in fact live apart shall, on request, be assessed to tax in tax bracket 2 provided that they are liable to tax in the Grand Duchy in respect of more than 50% of the earned income of their household. If both spouses have earned income which is taxable in the Grand Duchy the request shall entail their joint assessment to tax.'

Main proceedings

8 Mr Zurstrassen and his wife are Belgian nationals. Mr Zurstrassen is in employment in Luxembourg, where he resides, while his wife, who does not work, and their children continue to reside in Battice, Belgium, for reasons in particular of schooling. The couple normally come together at the weekend in Battice.

9 Almost the entire income of the household (98%) derives from Mr Zurstrassen's earned income in Luxembourg, the remaining 2% representing his income from teaching at the Catholic University of Louvain, in Belgium. His wife does not have income of her own and is thus not liable to tax in her State of residence.

10 In income tax notices for the 1995 and 1996 tax years, issued in May 1997, the Administration des Contributions Directes placed Mr Zurstrassen in tax bracket 1, which is applicable to single persons.

11 After lodging a complaint with the Director of the Administration des Contributions Directes which remained unanswered, Mr Zurstrassen brought two actions before the national court on 5 February 1998 'for amendment, failing which annulment', of the income tax notices for the 1995 and 1996 tax years.

12 Mr Zurstrassen argued before the national court that the contested decisions were discriminatory in that he and his wife were placed at a disadvantage, first, compared with spouses residing separately in Luxembourg, who, in accordance with Article 3(a) of the Law on Income Tax, are assessed to tax jointly (and therefore benefit from a more favourable scale), and second, compared with non-residents who are married and not *de facto* separated where more than 50% of

the earned income of their household is paid in Luxembourg and they both work in Luxembourg, inasmuch as they are treated as resident for tax purposes and are eligible for joint assessment to tax under Article 157a(3) of the Law on Income Tax. In Mr Zurstrassen's submission, such discrimination is contrary to Article 48 of the Treaty.

13 Since the Tribunal Administratif, Luxembourg, found that Mr Zurstrassen had exercised his right as a worker to freedom of movement, enshrined in Article 48 of the Treaty, and was unsure whether the tax regime at issue was compatible with Community law, it decided to stay proceedings and submit the following question to the Court:

'Do Article 48 of the Treaty on European Union and Article 1(1) of Regulation (EEC) No 1612/68 of 15 October 1968 preclude national rules under which the joint assessment to tax of two spouses and their classification in tax bracket 2, which allows the spouses a lighter tax burden under certain circumstances than that imposed on them if taxed individually, is subject to the condition that the two spouses — who are not separated either *de facto* or by virtue of a judicial decision — must have their respective residences for tax purposes in the same State, thereby excluding from that tax regime a spouse who establishes himself in one Member State while leaving the rest of his family in another Member State?'

14 Article 48(2) of the Treaty states that freedom of movement for workers 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

15 Article 1(1) of Regulation No 1612/68 provides:

'Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.'

16 In addition, Article 7(2) of that regulation provides that a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers.

17 The question referred for a preliminary ruling should therefore be understood as designed, more specifically, to ascertain whether Article 48(2) of the Treaty and Article 7(2) of Regulation No 1612/68 preclude national rules under which, as regards income tax, the joint assessment to tax of spouses who are not separated either *de facto* or by virtue of a judicial decision is conditional on their both being resident on national territory and that tax advantage is denied to a worker who is resident in that State, where he/she receives almost the entire income of the household, and whose spouse is resident in another Member State.

18 It is settled case-law that the rules of equal treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in practice to the same result (see, in particular, Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11).

19 In the present case, the entitlement of married couples to joint assessment to tax is subject to a residence condition for both spouses, which Luxembourg nationals will be able to satisfy more easily than nationals of other Member States who have settled in the Grand Duchy in order to pursue an economic activity there, the members of whose families more frequently live outside Luxembourg.

20 Accordingly, the condition that both spouses must be resident on national territory does not ensure the equal treatment required by Article 48(2) of the Treaty and Article 7(2) of Regulation No 1612/68.

21 It is true that, as the Court has previously held and the Spanish Government has pointed out, the situations of residents and of non-residents in a given State are not generally comparable as far as direct taxes are concerned, since income received in the territory of a 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 a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy 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 (Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, paragraphs 31 and 32, and Case C-391/97 *Gschwind* v *Finanzamt Aachen-Außenstadt* [1999] ECR I-5451, paragraph 22).

22 However, in the present case Mr Zurstrassen is a resident taxpayer in the State where he is paid almost his entire earned income.

23 In those circumstances, the decision of the Luxembourg tax authorities to treat Mr Zurstrassen as a single taxpayer without dependants even though he is married and has children, on the ground that his wife, who does not have income

of her own, has retained residence in another Member State, cannot be justified in the light of the considerations set out in paragraph 21 of this judgment. The Grand Duchy of Luxembourg is the only State which can take account of Mr Zurstrassen's personal and family circumstances since he is not only resident in that State but, additionally, is paid almost the entire earned income of the household there.

24 In order none the less to justify the position of its tax authorities, the Luxembourg Government has argued that the joint assessment to tax of spouses simplifies tax collection because spouses are jointly and severally liable, and the tax collector may take action against either of them and demand from either payment of the entire tax debt. Such a possibility is lacking if one of the spouses is non-resident.

25 Whether or not the objective of facilitating tax collection may legitimately justify unequal treatment depending on the taxpayer's residence, it is sufficient to note that the Luxembourg tax legislation itself allows the joint assessment to tax of non-resident couples provided only that more than 50% of the couple's earned income is taxable in Luxembourg although the practical obstacles to recovery of the tax are greater than in the present case.

26 Accordingly, the answer to the question referred for a preliminary ruling must be that Article 48(2) of the Treaty and Article 7(2) of Regulation No 1612/68 preclude the application of national rules under which, as regards income tax, the joint assessment to tax of spouses who are not separated either *de facto* or by virtue of a judicial decision is conditional on their both being resident on national

territory and that tax advantage is denied to a worker who is resident in that State, where he/she receives almost the entire income of the household, and whose spouse is resident in another Member State.

Costs

27 The costs incurred by the Luxembourg and Spanish Governments and 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunal Administratif, Luxembourg, by judgment of 11 March 1999, hereby rules:

Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC) and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968

on freedom of movement for workers within the Community preclude the application of national rules under which, as regards income tax, the joint assessment to tax of spouses who are not separated either *de facto* or by virtue of a judicial decision is conditional on their both being resident on national territory and that tax advantage is denied to a worker who is resident in that State, where he/she receives almost the entire income of the household, and whose spouse is resident in another Member State.

Moitinho de Almeida Edward Sevón

Schintgen Kapteyn

Gulmann Hirsch Ragnemalm

Wathelet Skouris Macken

Delivered in open court in Luxembourg on 16 May 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President