JUDGMENT OF THE COURT
14 February 1995 *

In Case C-279/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling in the proceedings pending before that court between

Finanzamt Köln-Altstadt

and

Roland Schumacker

on the interpretation of Article 48 of the EEC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler (Rapporteur), P. J. G. Kapteyn and C. Gulmann (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward, J.-P. Puissochet and G. Hirsch, Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Finanzamt Köln-Altstadt, by D. Deutgen, its Leitender Regierungsdirektor;

— Roland Schumacker, by W. Kaefer, Rechtsanwalt, Aachen, and G. Saß, Avocat and Tax Adviser, Tervuren;

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy and C. D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents;

— the Greek Government, by D. Raptis, State Legal Adviser, and I. Chalkias, Assistant State Legal Adviser in the State Legal Service, acting as Agents;

— the French Government, by C. de Salins, Assistant Director in the Legal Directorate in the Ministry of Foreign Affairs, and J.-L. Falconi, Secretary for Foreign Affairs in the Legal Directorate in the same Ministry, acting as Agents;

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent;

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, and A. Moses QC;

— the Commission, by J. Grunwald and E. Traversa, of its Legal Service, acting as Agents, assisted by B. Knobbe-Keuk, Professor at the University of Bonn,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finanzamt Köln-Altstadt, represented by D. Deutgen and by V. Nickel, Regierungsdirektor, Oberfinanzdirektion Köln, acting as Agents, Roland Schumacker, represented by W. Kaefer and G. Saß, the Danish Government, represented by P. Biering, Legal Adviser, Ministry of Foreign Affairs, acting as Agent, the German Government, represented J. Sedemund, Rechtsanwalt, Cologne, the Greek Government, represented by P. Kamarineas, State Legal Adviser, acting as Agent, the French Government, represented by J.-L. Falconi, the Netherlands Government, represented by J. W. de Zwaan, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the United Kingdom, represented by J. E. Collins and A. Moses QC, and the Commission, represented by J. Grunwald and E. Traversa, assisted by Professor B. Knobbe-Keuk, at the hearing on 18 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 22 November 1994,

gives the following

Judgment

1 By order of 14 April 1993, received at the Court Registry on 14 May 1993, the Bundesfinanzhof referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Article 48 of the EEC Treaty in order to enable it to assess the compatibility with Community law

of certain provisions of the legislation of the Federal Republic of Germany on income tax under which taxpayers are treated differently depending on whether or not they reside within national territory.

2 Those questions were raised in proceedings between the Finanzamt Köln-Altstadt (Tax Office, Cologne Alstadt) and Roland Schumacker, a Belgian national, concerning the way in which the latter's earnings as an employee were taxed in Germany.

3 In Germany, the Einkommensteuergesetz (Law on income tax, hereinafter 'the EStG') applies different tax regimes to employed persons according to their residence.

4 Under Paragraph 1(1) of the EStG, natural persons who have their permanent residence or usual abode in Germany are subject there to tax on all their income ('unlimited taxation').

5 However, under Paragraph 1(4) natural persons with no permanent residence or usual abode in Germany are subject to tax only on the part of their income arising in Germany ('limited taxation'). Under Paragraph 49(1)(4), such income of German origin includes in particular income from employment in Germany.

6 In Germany, in general, tax on income from employment is deducted at source by the employer from workers' wages and is then paid to the tax administration.

7 For this deduction at source to be carried out, employed persons subject to unlimited taxation are divided into several taxation categories (Paragraph 38b of the EStG). Unmarried persons come within category I (general tax tariff). Married employed persons who are not permanently separated come within category III (the 'splitting' tariff, Paragraph 26b of the EStG), provided that both spouses are resident in Germany and are subject to unlimited taxation. The German 'splitting' regime was introduced to mitigate the progressive nature of the income tax rates. Under the 'splitting' regime, the spouses' total income is aggregated, notionally attributed to each spouse as to 50% and then taxed accordingly. If the income of one spouse is high and that of the other low, 'splitting' makes their taxable amounts the same and palliates the progressive nature of the income tax rates.

8 Employed persons subject to unlimited taxation also benefit from the procedure of annual adjustment of wages tax (Paragraph 42b of the EStG). Under that procedure, the employer is required to refund to the employee part of the wages tax which he has levied where the aggregate of the sums deducted each month exceeds the amount indicated by the tax scale for the year, for example, if the amount of wages has varied from month to month.

9 Moreover, employed persons subject to unlimited taxation qualified, until 1990, for annual wages tax adjustment by the tax administration and, since then, have qualified for the procedure whereby the tax is assessed by the administration (Paragraph 46 of the EStG). That procedure makes it possible to set off against income from employment losses suffered in respect of income of another kind (for example, dividends).

10 Finally, in the case of persons subject to unlimited taxation, tax is assessed according to overall ability to pay, that is to say having regard to all the other income received by such taxpayers and to their personal and family circumstances (family expenses, welfare expenses and other outgoings which in general give rise to tax reliefs and rebates).

11 Some of the above benefits are withheld from those employed persons who are subject only to limited taxation. The German Gesetz zur einkommensteuerlichen Entlastung von Grenzpendlern und anderen beschränkt steuerpflichtigen natürlichen Personen und zur Änderung anderer gesetzlicher Vorschriften — Grenzpendlergesetz (Law reducing taxation of the income of cross-frontier workers and other natural persons subject to limited taxation and amending other legislative provisions) of 24 June 1994, which is intended to remedy this situation at national level, is not relevant in the present case since it had not come into force at the material time.

12 Under the legislation in force at the material time, persons subject to limited taxation came within category I (general tariff) regardless of their family circumstances (Paragraph 39d of the EStG). Consequently, they did not qualify for the tax benefit of 'splitting' and married employed persons were treated in the same way as unmarried persons.

13 A simplified tax procedure was applied to persons subject to limited taxation. Their liability to income tax was deemed to be definitively discharged by the monthly deduction at source made by the employer. They were excluded both from the annual wages tax adjustment made by the employer (Paragraph 50(5) of the EStG) and from the annual income tax assessment by the administration. Without such annual wages tax adjustment, they could not qualify for reimbursement of any overpaid tax at the end of the year.

14 Finally, by contrast with employed persons subject to unlimited taxation, persons subject to limited taxation were not entitled to deduct their social expenses (premiums in respect of old-age, sickness or invalidity insurance) where they exceeded the flat rates laid down in the taxation scale.

15 According to the case-file, Mr Schumacker has always lived in Belgium with his wife and their children. After first working in Belgium, he was employed in Germany from 15 May 1988 until 31 December 1989, although he continued to live in

Belgium. Mrs Schumacker, who was not employed, drew unemployment benefit in Belgium only during 1988. Since 1989, Mr Schumacker's wages have been the household's sole income.

16 Pursuant to Article 15(1) of the Double Taxation Treaty concluded between Belgium and Germany on 11 April 1967, the right to tax Mr Schumacker's wages was, as from 15 May 1988, vested in the Federal Republic of Germany, as the State where he worked. Mr Schumacker's wages were thus subject in Germany to a deduction at source by his employer, calculated by reference to taxation category I, pursuant to Paragraphs 1(4) and 39d of the EStG.

17 On 6 March 1989, Mr Schumacker asked the Finanzamt to calculate his tax on an equitable basis (Paragraph 163 of the Abgabenordnung — the German Tax Code), by reference to tax category III (normally applicable to married employed persons residing in Germany, giving them the right to 'splitting') and requested that the difference between the deduction from his wages each month, on the basis of tax category I, and what would be payable by him on the basis of tax category III, be refunded to him.

18 The Finanzamt rejected his request by decision of 22 June 1989, whereupon Mr Schumacker instituted proceedings before the Finanzgericht, Cologne. That court upheld Mr Schumacker's claims in respect of 1988 and 1989 and ordered the Finanzamt to take a decision on an equitable basis pursuant to Article 163 of the German tax code. The Finanzamt then brought an appeal on a point of law before the Bundesfinanzhof against the judgment of the Finanzgericht.

19 The Bundesfinanzhof is uncertain whether Article 48 of the EEC Treaty may have a bearing on the decision to be given in the case before it. It has therefore

stayed the proceedings pending a ruling from the Court of Justice on the following questions:

'1. Does Article 48 of the EEC Treaty restrict the right of the Federal Republic of Germany to levy income tax on a national of another EC Member State?

If so:

2. Does Article 48 of the EEC Treaty allow the Federal Republic of Germany to impose a higher level of income tax on a natural person of Belgian nationality, whose sole permanent residence and usual abode is in Belgium and who has acquired his professional qualifications and experience there, than on an otherwise comparable person resident in the Federal Republic of Germany, if the former commences employment in the Federal Republic of Germany without transferring his permanent residence to the Federal Republic of Germany?

3. Does it make any difference if the person of Belgian nationality referred to in Question 2 derives almost all (that is over 90%) of his income from the Federal Republic of Germany and the said income is also only taxable in the Federal Republic of Germany, in accordance with the Double Taxation Agreement between the Federal Republic of Germany and the Kingdom of Belgium?

4. Is it contrary to Article 48 of the EEC Treaty for the Federal Republic of Germany to exclude natural persons who have no permanent residence or

usual abode in the Federal Republic of Germany and in that country derive income from employment from the annual wages tax adjustment and also to deny them the possibility of being assessed for income tax with account being taken of earnings from employment?'

The first question

20 By its first question, the national court asks essentially whether Article 48 of the Treaty must be interpreted as being capable of limiting the right of a Member State to lay down the conditions concerning the liability to taxation of a national of another Member State and the manner in which tax is to be levied on the income received by him within its territory.

21 Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law (see the judgment in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 12).

22 With regard more particularly to the free movement of persons within the Community, Article 48(2) of the Treaty requires the abolition of any discrimination based on nationality between workers of the Member States as regards, *inter alia*, remuneration.

23 In that connection, the Court held in Case C-175/88 *Biehl* v *Administration des Contributions* [1990] ECR I-1779, paragraph 12) that the principle of equal

treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax. That is why the Council laid down the requirement in Article 7 of Regulation (EEC) No 1612/68 of 15 October 1968 on the free movement of workers within the Community (OJ, English Special Edition 1968 (II) p. 475) that workers who are nationals of a Member State are to enjoy, in the territory of another Member State, the same tax benefits as nationals working there.

24 In view of the foregoing, the answer to be given to the first question is that Article 48 of the Treaty must be interpreted as being capable of limiting the right of a Member State to lay down conditions concerning the liability to taxation of a national of another Member State and the manner in which tax is to be levied on the income received by him within its territory, since that article does not allow a Member State, as regards the collection of direct taxes, to treat a national of another Member State employed in the territory of the first State in the exercise of his right of freedom of movement less favourably than one of its own nationals in the same situation.

The second and third questions

25 By its second and third questions, which it is appropriate to consider together, the national court seeks essentially to ascertain whether Article 48 of the Treaty must be interpreted as precluding the application of rules of a Member State under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there. The national court also asks whether the answer to that question is affected by the fact that the national of the second Member State derives his income entirely or almost exclusively from his work in

the first Member State and does not receive, in the second State, sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.

26 The Court has consistently held that the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (Case 153/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11).

27 It is true that the rules at issue in the main proceedings apply irrespective of the nationality of the taxpayer concerned.

28 However, national rules of that kind, under which a distinction is drawn on the basis of residence in that non-residents are denied certain benefits which are, conversely, granted to persons residing within national territory, are liable to operate mainly to the detriment of nationals of other Member States. Non-residents are in the majority of cases foreigners.

29 In those circumstances, tax benefits granted only to residents of a Member State may constitute indirect discrimination by reason of nationality.

30 It is also settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.

31 In relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable.

32 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. Moreover, 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. In general, that is the place where he has his usual abode. Accordingly, international tax law, and in particular the Model Double Taxation Treaty of the Organization for Economic Cooperation and Development (OECD), recognizes that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence.

33 The situation of a resident is different in so far as the major part of his income is normally concentrated in the State of residence. Moreover, that State generally has available all the information needed to assess the taxpayer's overall ability to pay, taking account of his personal and family circumstances.

34 Consequently, 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 since those two categories of taxpayer are not in a comparable situation.

35 Accordingly, Article 48 of the Treaty does not in principle preclude the application of 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.

36 The position is different, however, in a case such as this one where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.

37 There is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances.

38 In the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence, discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment.

39 The further question arises whether there is any justification for such discrimination.

40 The view has been advanced, by those Member States which have submitted observations, that discriminatory treatment — regarding the taking into account of personal and family circumstances and the availability of 'splitting' — was justified by the need for consistent application of tax regimes to non-residents. That justification, based on the need for cohesion of the tax system, was upheld by the Court in Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, paragraph 28). According to those Member States, there is a link between the taking into account of personal and family circumstances and the right to tax worldwide income. Since the taking

into account of those circumstances is a matter for the Member State of residence, which is alone entitled to tax worldwide income, they contend that the State on whose territory the non-resident works does not have to take account of his personal and family circumstances since otherwise the personal and family circumstances of the non-resident would be taken into account twice and he would enjoy the corresponding tax benefits in both States.

41 That argument cannot be upheld. In a situation such as that in the main proceedings, the State of residence cannot take account of the taxpayer's personal and family circumstances because the tax payable there is insufficient to enable it to do so. Where that is the case, the Community principle of equal treatment requires that, in the State of employment, the personal and family circumstances of a foreign non-resident be taken into account in the same way as those of resident nationals and that the same tax benefits should be granted to him.

42 The distinction at issue in the main proceedings is thus in no way justified by the need to ensure the cohesion of the applicable tax system.

43 At the hearing, the Finanzamt argued that administrative difficulties prevent the State of employment from ascertaining the income which non-residents working in its territory receive in their State of residence.

44 That argument likewise cannot be upheld.

45 Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) provides for ways of obtaining information comparable to those existing between tax authorities at national level. There is thus no administrative obstacle to account being taken in the State of employment of a non-resident's personal and family circumstances.

46 More particularly, it must be pointed out that the Federal Republic of Germany grants frontier workers resident in the Netherlands and working in Germany the tax benefits resulting from the taking into account of their personal and family circumstances, including the 'splitting tariff'. Provided that they receive at least 90% of their income in Germany, those Community nationals are treated in the same way as German nationals under the German Law of 21 October 1980 implementing the additional protocol of 13 March 1980 to the Double Taxation Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands of 16 June 1959.

47 The answer to be given to the second and third questions is therefore that Article 48 of the Treaty must be interpreted as precluding the application of rules of a Member State under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there when, as in the main action, the national of the second State obtains his income entirely or almost exclusively from the work performed in the first State and does not receive in the second State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.

The fourth question

48 By its fourth question, the national court essentially asks whether Article 48 of the Treaty must be interpreted as precluding a provision in the legislation of a Member State on direct taxation under which the benefit of procedures such as annual adjustment of deductions at source in respect of wages tax and the assessment by the administration of the tax payable on remuneration from employment is available only to residents, thereby excluding natural persons who have no permanent residence or usual abode on its territory but receive income there from employment.

49 The answers to the second and third questions have disclosed discrimination of a substantive nature between non-resident Community nationals and nationals resident in Germany. It is necessary to consider whether such discrimination also exists at procedural level in so far as the application of the abovementioned adjustment procedures is available only to resident nationals and is withheld from non-resident Community nationals. If such discrimination is found to exist, it will be necessary to decide whether there is any justification for it.

50 It should be noted at the outset that in Germany the wages tax deducted at source is deemed to discharge all liability to income tax on remuneration from employment.

51 According to the order from the national court, by virtue of the discharge from liability arising from the deduction at source, non-residents are first of all deprived, for reasons of administrative simplification, of the possibility of relying, in the procedure for the annual adjustment of deductions at source or

in connection with the assessment by the administration of tax on remuneration from employment, on certain items forming part of the basis of assessment (for example, occupational expenses, special expenditure or so-called extraordinary costs) which might give rise to a partial refund of the tax deducted at source.

52 Non-residents may thereby be placed in a less advantageous position than residents, the latter being taxed, by virtue of Paragraphs 42, 42a and 46 of the EStG, in principle in such a way that all items forming part of the basis of assessment are taken into account.

53 In its observations, the German Government emphasized that German law provides for a procedure under which non-resident taxpayers may ask the tax administration to supply them with a tax certificate indicating certain reliefs to which they are entitled and which the tax administration must retrospectively apportion equally over the calendar year (Paragraph 39d of the EStG). The employer is then entitled, under that paragraph in conjunction with Paragraph 41c of the EStG, to reimburse, with the next payment of wages, the wages tax collected up to that time if the employee provides the employer with a certificate having retroactive effect. If the employer does not exercise that right, the adjustment may be made by the tax administration after the end of the calendar year.

54 However, it must be noted that those provisions are not binding and that neither the Finanzamt Köln-Altstadt nor the German Government has referred to any provision imposing an obligation on the tax administration to remedy in all cases the discriminatory consequences of application of the provisions of the EStG at issue.

55 Secondly, since they do not have the benefit of the abovementioned procedures, non-residents who in the course of the year have left employment in a

Member State in order to take up another post in another Member State, or who have been unemployed for part of the year, cannot obtain reimbursement of any overpaid tax from their employer or from the tax administration.

56 It is apparent from the order from the national court that an equitable procedure exists under German law pursuant to which a non-resident may ask the tax administration to review his situation and recalculate the taxable amount. That procedure is provided for by Paragraph 163 of the German tax code.

57 However, it does not suffice to meet the requirements of Article 48 of the Treaty for a foreign worker to have to rely on equitable measures adopted by the tax administration on a case-by-case basis. Moreover, in its judgment in *Biehl*, cited above, the Court rejected the arguments to that effect advanced by the Luxembourg tax administration.

58 It follows that Article 48 of the Treaty requires equal treatment at procedural level for non-resident Community nationals and resident nationals. Refusal to grant non-resident Community nationals the benefit of annual adjustment procedures which are available to resident nationals constitutes unjustified discrimination.

59 The answer to be given to the national court is therefore that Article 48 of the Treaty must be interpreted as precluding a provision in the legislation of a Member State on direct taxation under which the benefit of procedures such as annual adjustment of deductions at source in respect of wages tax and the assessment by the administration of the tax payable on remuneration from employment is avail-

able only to residents, thereby excluding natural persons who have no permanent residence or usual abode on its territory but receive income there from employment.

Costs

60 The costs incurred by the Danish, German, Greek, French, Netherlands and United Kingdom Governments and the Commission of the European Communities, 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 questions referred to it by the Bundesfinanzhof by order of 14 April 1993, hereby rules:

1. Article 48 of the EEC Treaty must be interpreted as being capable of limiting the right of a Member State to lay down conditions concerning the liability to taxation of a national of another Member State and the manner in which tax is to be levied on the income received by him within its territory, since that article does not allow a Member State, as regards the collection of direct taxes, to treat a national of another Member State employed in the territory of the first State in the exercise of his right of freedom of movement less favourably than one of its own nationals in the same situation.

2. **Article 48 of the Treaty must be interpreted as precluding the application of rules of a Member State under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there when, as in the main action, the national of the second State obtains his income entirely or almost exclusively from the work performed in the first State and does not receive in the second State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.**

3. **Article 48 of the Treaty must be interpreted as precluding a provision in the legislation of a Member State on direct taxation under which the benefit of procedures such as annual adjustment of deductions at source in respect of wages tax and the assessment by the administration of the tax payable on remuneration from employment is available only to residents, thereby excluding natural persons who have no permanent residence or usual abode on its territory but receive income there from employment.**

Rodríguez Iglesias Schockweiler Kapteyn

Gulmann Mancini Kakouris

Moitinho de Almeida Murray Edward

Puissochet Hirsch

Delivered in open court in Luxembourg on 14 February 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President