JUDGMENT OF THE COURT (Grand Chamber)

21 February 2006 *

In Case C-152/03,

REFERENCE for a preliminary ruling under Article 234 EC, by the Bundesfinanzhof (Germany), made by decision of 13 November 2002, received at the Court on 2 April 2003, in the proceedings

Hans-Jürgen Ritter-Coulais,

Monique Ritter-Coulais

v

Finanzamt Germersheim,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, N. Colneric, S. von Bahr (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 October 2004,

after considering the observations submitted on behalf of:

— Mr and Mrs Ritter-Coulais, by M. Ross, Rechtsanwalt,

— the German Government, by A. Tiemann and K.-D. Müller, acting as Agents,

— the United Kingdom Government, by C. Jackson, acting as Agent, assisted by R. Plender QC,

— the Commission of the European Communities, by J. Grunwald and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 52 of the EEC Treaty (subsequently Article 52 EC and now, after amendment, Article 43 EC) and Article 73B EC (now Article 56 EC).

2 The reference was made in the course of proceedings between Mr and Mrs Ritter-Coulais ('the appellants in the main proceedings') and the Finanzamt (District Tax Office) Germersheim concerning their income tax liability in Germany in 1987.

Legal context; the dispute in the main proceedings and the questions referred for a preliminary ruling

3 In 1987 the appellants in the main proceedings were assessed in Germany for the tax year 1987 as natural persons liable to income tax on their total income in accordance with Paragraph 1(3) of the Law on Income Tax (Einkommensteuergesetz) in the version applicable in 1987 ('EStG 1987'). They earned income in that Member State from employment as secondary school teachers but lived in a private dwelling in France, which they owned. It would appear that at that time Mr Ritter-Coulais was a German national while Mrs Ritter-Coulais had dual French and German nationality.

4 Pursuant to the second point of Paragraph 32b(2) of the EStG 1987, the appellants in the main proceedings requested that 'negative income' (loss of income) deriving from their own use of their house as a dwelling be taken into account for the purposes of determining the rate for their tax liability in the 1987 tax year.

5 That 'negative income' is income derived from the use of immovable property which is taxable only in the State in which that property is situated, namely, in the main proceedings, in France, under Article 3(1) of the agreement between the French Republic and the Federal Republic of Germany for the avoidance of double taxation and making provision for rules on mutual legal and administrative assistance on taxation of income and wealth, and in regard to patent taxes and land taxes, signed in Paris on 21 July 1959, as amended by a supplementary agreement of 9 June 1969 (the 'Franco-German tax agreement').

6 Article 20(1)(a) of the Franco-German tax agreement provides, however, that that does not limit the right of the German Federal Republic to take account of such income for the purposes of determining the rate applicable to taxes payable in that Member State.

7 Accordingly, under Paragraph 32b(1) and (2) of the EStG 1987 the German tax authorities take account of foreign income for the purposes of determining the rate of taxation. The fourth point of the first sentence of Paragraph 2a(1) of the EStG 1987 provides, however, that in the absence of positive income from the letting of real property in another state, no account should be taken of income losses of the same kind incurred in the same state for the purposes of determining the basis of assessment or the rate of taxation.

8 The appellants in the main proceedings appealed to the Finanzamt Germersheim against their 1987 income tax notice seeking to have their negative income relating to that tax year taken into account in determining the rate of taxation. That appeal having been rejected and the court of first instance having upheld the decision of the tax authorities, they then appealed to the Bundesfinanzhof (Federal Finance Court) on points of law.

9 That court asks whether, in the case of taxable persons liable to tax in Germany, treating negative income deriving from the use of immovable property on a different basis according to whether that property is situated in Germany or in another Member State is compatible with Community law and, in particular, with freedom of establishment and the free movement of capital.

10 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it contrary to Article 43 and Article 56 of the Treaty establishing the European Community that a natural person assessable to tax in Germany on his or her total income and in receipt of income from an employment there should be unable to deduct rental income losses arising in another Member State in the computation of taxable income in Germany?

(2) If not: is it contrary to Article 43 and Article 56 of the Treaty establishing the European Community for such losses not to be taken into account for the purposes of what is known as the 'negative tax progression clause'?

Question 1

11 By its first question, the national court asks whether the rules of the Treaty relating to freedom of establishment and the free movement of capital preclude national legislation such as that at issue in the main proceedings. That court points out that that legislation does not permit natural persons in the appellants' position who are in receipt of income from employment in a Member State and are liable to tax on their total income there to deduct, for the purposes of the computation of their taxable income in that State, income losses relating to their own use of a private dwelling situated in another Member State.

12 It is clear from the order for reference that in the course of the main proceedings the appellants asked the Finanzamt Germersheim to take account of rental income losses for the 1987 tax year not for determining the basis of assessment for that year but only for the purposes of determining the applicable rate of taxation, which is the situation referred to in the second question.

13 It is settled case-law that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts (see, inter alia, Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 14; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 30 and the case-law cited therein; and Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraph 33).

14 In the context of that cooperation, the national court seised of the dispute, which alone has direct knowledge of the facts of the main action and must assume responsibility for the subsequent judicial decision, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment and the relevance of the questions which it refers to the Court (see, inter alia, *Lourenço Dias*, cited above, paragraph 15; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; *Schmidberger*, cited above, paragraph 31; and *Siemens and ARGE Telekom*, cited above, paragraph 34).

15 That does not alter the fact that it is for the Court, where necessary, to examine the circumstances in which the case was referred to it by the national court in order to assess whether it has jurisdiction and, in particular, determine whether the interpretation of Community law that is sought bears any relation to the facts of the main action or its purpose, so that the Court is not obliged to deliver advisory opinions on general or hypothetical questions. If it appears that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare

that there is no need to proceed to judgment (Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21; *Lourenço Dias*, cited above, paragraph 20; *Canal Satélite Digital*, cited above, paragraph 19; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraphs 44 and 45; and *Siemens and ARGE Telekom*, cited above, paragraph 35).

16 Given that the dispute before the national court is not concerned with the situation referred to in the first question, namely the determination of the basis of assessment, but only with the situation covered by the second question, namely the computation of the applicable rate of taxation, an answer to the first question is not necessary for the purposes of deciding the case.

17 In the light of the foregoing, there is no need to answer the first question and the Court has merely to answer the second question.

Question 2

18 By its second question, the national court asks whether the rules of the Treaty relating to freedom of establishment and the free movement of capital preclude national legislation, such as that at issue in the main proceedings, which does not permit natural persons in receipt of income from employment in one Member State and assessable to tax on their total income there, to request that account be taken, for the purposes of determining the rate of taxation applicable to that income in that state, of rental income losses relating to their own use of a private dwelling in another Member State.

19 With regard to freedom of establishment, it should be noted that, according to settled case-law, this includes the right to take up and practice activities as a self-employed person (C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 40 and case-law cited therein).

20 The dispute before the national court involves natural persons employed as teachers in a German state secondary school who claim that rental income losses relating to their private dwelling in France should be taken into account for the purposes of determining their income tax liability in Germany.

21 It follows that an interpretation of the rules of the Treaty relating to freedom of establishment will be of no assistance in the resolution of the main dispute.

22 With regard to the free movement of capital, it should be noted that failure to take account of income losses relating to a house in France for the purposes of determining liability to tax on income received in Germany may fall, a priori and as Community law now stands, within the scope of the free movement of capital under Article 56 EC.

23 The case in the main proceedings is concerned with the 1987 tax year, that is to say, a factual and legal situation predating both the insertion of Article 73B in the EC Treaty by the EU Treaty and the adoption and entry into force of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 EC (OJ 1988 L 178, p. 5), which brought about complete liberalisation of capital movements.

24 It should be recalled that Article 67(1) EEC (subsequently Article 67(1) of the EC Treaty, itself repealed by the Treaty of Amsterdam) did not have the effect of abolishing restrictions on movements of capital by the end of the transitional period. Their abolition was a matter for Council directives adopted on the basis of Article 69 of the EEC Treaty (subsequently Article 69 EC, itself repealed by the Treaty of Amsterdam) (see Case 203/80 *Casati* [1981] ECR 2595, paragraphs 8 to 13; and Case C-483/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 5).

25 The relevant directive for the 1987 tax year is First Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty (OJ, English Special Edition 1959-1962, p. 49) as amended and supplemented most recently by Council Directive 86/566/EEC of 17 November 1986 (OJ 1986 L 332, p. 22).

26 That First Directive for the implementation of Article 67 of the Treaty merely provided in Article 1(1) that Member States were to grant foreign exchange authorisations required for the conclusion or performance of transactions or for transfers between residents of the Member States in respect of the capital movements set out in the annexes to that directive.

27 It would therefore appear that the rules on the free movement of capital applicable at the date of the facts in the main proceedings, that is to say, in 1987, did not preclude a prohibition on taking into account income losses relating to a house in one Member State for the purposes of determining the rate of taxation applicable to income received in another Member State.

28 The Commission takes the view that the appellants' position must be considered in the light of the principle of the free movement of workers set out in Article 48 EEC (subsequently Article 48 EC and now, after amendment, Article 39 EC).

29 It must be noted that even though, strictly speaking, the national court has directed its reference for a preliminary ruling solely to the interpretation of freedom of establishment and the free movement of capital, the Court is not thereby precluded from providing the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317, paragraph 7; Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16; and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 44).

30 The national legislation therefore falls to be examined in the light of Article 48 of the Treaty.

31 It should be noted that any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article 48 EC (see Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 76; Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 23; and Case C-277/03 *Van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraphs 19, 44 and 45).

32 It follows that the situation of the appellants in the main proceedings, who worked in a Member State other than that of their actual place of residence, falls within the scope of Article 48 EC.

33 Moreover, it is settled case-law that all of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 16, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 37; Case C-190/98 *Graf* [2000] ECR I-493, paragraph 21; Case C-302/98 *Sehrer* [2000] ECR I-4585, paragraph 32, and *Schilling and Fleck-Schilling*, cited above, paragraph 24).

34 In that regard, it should be noted that, while under the national legislation applicable, namely, Paragraph 32b(1) and (2) and the fourth point of the first sentence of Paragraph 2a(1) of the EStG 1987, positive income deriving from the use of a dwelling situated abroad is taken into account for the purposes of determining the rate of taxation, in the absence of such positive income, no account is taken of income losses of that type.

35 It follows that individuals such as the appellants in the main proceedings, who worked in Germany whilst residing in their own home in another Member State, were not entitled, in the absence of positive income, to have income losses relating to the use of their home taken into account for the purposes of determining their income tax rate, in contrast with individuals working and residing in their own homes in Germany.

36 Even though the national legislation is not specifically directed at non-residents, the latter are more likely to own a home outside Germany than resident citizens.

37 It follows that the treatment of non-resident workers under the national legislation is less favourable than that afforded to workers who reside in Germany in their own homes.

38 Consequently, legislation such as that at issue in the main proceedings is, as a rule, contrary to Article 48 EC.

39 It should, however, be pointed out that the German Government argues that the unfavourable treatment of non-resident taxpayers is justified by the need for fiscal coherence in its national tax system, of which that legislation forms part.

40 It is sufficient to state that, since the German tax system takes into account positive income deriving from the use of a dwelling in another Member State for the purposes of determining the rate of taxation, fiscal coherence is not a suitable justification on any ground for refusing to take into account, for the same purposes, income losses of the same kind arising in the same State.

41 In the light of the foregoing, the answer to the second question must be that Article 48 EC is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not permit natural persons in receipt of income from employment in one Member State, and assessable to tax on their total income

there, to have income losses relating to their own use of a private dwelling in another Member State taken into account for the purposes of determining the rate of taxation applicable to their income in the former state, whereas positive rental income relating to such a dwelling is taken into account.

Costs

42 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 48 of the EEC Treaty (subsequently Article 48 of the EC Treaty and now, after amendment, Article 39 EC) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not permit natural persons in receipt of income from employment in one Member State, and assessable to tax on their total income there, to have income losses relating to their own use of a private dwelling in another Member State taken into account for the purposes of determining the rate of taxation applicable to their income in the former state, whereas positive rental income relating to such a dwelling is taken into account.

[Signatures]