JUDGMENT OF THE COURT (First Chamber)

25 January 2007 *

In Case C-329/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 28 June 2005, received at the Court on 2 September 2005, in the proceedings

Finanzamt Dinslaken

v

Gerold Meindl,

third party:

Christine Meindl-Berger,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász, K. Schiemann and M. Ilešič (Rapporteur), Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2006,

after considering the observations submitted on behalf of:

— the German Government, by M. Lumma and U. Forsthoff, acting as Agents,

— the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2 The reference was submitted in the course of proceedings between the Finanzamt Dinslaken (the Dinslaken Tax Office, 'the Finanzamt') and Mr Meindl concerning the Finanzamt's refusal to allow Mr Meindl joint assessment to tax with his spouse Mrs Meindl-Berger.

National law

3 The first sentence of Paragraph 26(1) of the Law relating to income tax, in the version in force in 1997 (Einkommensteuergesetz 1997, 'the EStG 1997'), grants spouses who live apart on a non-permanent basis the right to opt for joint assessment in accordance with Paragraph 26b of that law or to continue to be assessed separately. That freedom of choice is however subject to the condition that both spouses are fully liable, that is to say, that they have their permanent residence or usual abode in Germany.

4 However, under Paragraph 1a(1)(2) of the EStG 1997, joint assessment can be granted in certain circumstances to spouses living apart on a non-permanent basis by taking into account the income of the spouse residing abroad. Although not subject to German income tax, under that provision the income is used as an element of assessment in connection with Paragraph 26b. More specifically, it is used to calculate the rate applicable to the income of the spouse liable to German income tax in the context of the application of the 'splitting' system.

5 In order to obtain joint assessment, first it is necessary that the fully liable spouse be a national of a Member State of the European Union or the European Economic Area (EEA) and the other spouse have his permanent residence or usual abode outside Germany but in another Union or EEA country.

6 Secondly, joint assessment is possible only where at least 90% of the income of both spouses for the calendar year is subject to German income tax or where the amount of income not subject to that tax does not exceed DEM 24 000.

7 Under the second sentence of Paragraph 1(3) of the EstG 1997, the income of spouses living apart on a non-permanent basis is determined in two stages. The first is to determine worldwide income. The second is to divide that worldwide income into income subject to German income tax and income not so subject.

8 In determining worldwide income, the whole of the spouses' income is taken into account, irrespective of whether it was acquired in Germany or abroad. Paragraph 1a(1)(2) in conjunction with the second sentence of Paragraph 1(3) of the EStG 1997 does not lay down a special rule on how income is to be determined, so that the definition of income is derived from German tax legislation on income tax. That also applies in respect of income which is excluded from the certificate issued by the tax authorities of the State of residence or which is there referred to as income not subject to tax. In fact, since there are no statutory provisions to the contrary, that certificate is deemed not to be binding.

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Mr Meindl is an Austrian national resident in Dinslaken (Germany). His spouse, Mrs Meindl-Berger, is an Austrian national resident in Innsbruck (Austria).

10 In 1997 ('the year in question') Mr Meindl received income in Germany from professional and artisanal activities totalling DEM 138 422. During the same year, his

wife gave birth to a daughter. The Austrian State thus paid her a confinement allowance, a special maternity allowance and a family allowance. Under Austrian law Mrs Meindl-Berger did not receive any taxable income during that period.

11 In accordance with Paragraphs 26 and 26b of the EStG 1997 Mr Meindl and Mrs Meindl-Berger applied for joint assessment for the year in question.

12 The Finanzamt refused that application, on the ground that the conditions laid down in Paragraphs 1a(1)(2) and 1(3) of the EStG 1997 were not met. The Finanzamt took the view, first, that the proportion of income received by the spouses in Germany was less than the 90% threshold and, secondly, that the threshold of DEM 24 000 was reached since Mrs Meindl-Berger had received wage compensation benefits from the Austrian State, namely the confinement allowance and special maternity allowance, in the amount of DEM 26 994.73, without account being taken of the allowances for the child. In addition, wage compensation benefits are not exempt from tax under the EStG 1997 since they were not paid under German law. Furthermore, the fact that those benefits are not subject to tax under Austrian law has no bearing on whether they are to be taken into account in the examination of an application for joint assessment.

13 The Finanzamt, as a result, decided that Mr Meindl should be subject to the tax applicable to unmarried persons and set the amount of his income tax at DEM 45 046.

14 After an unsuccessful objection against that Finanzamt decision, the Finanzgericht (the Finance Court) allowed Mr Meindl's action. That court held that he was entitled to joint assessment in accordance with Paragraph 1a(1)(2) in conjunction with Paragraph 26 of the EStG 1997.

15 The Finanzamt then brought an appeal on a point of law ('Revision') before the Bundesfinanzhof. It submits that the conditions for joint assessment are not fulfilled. It claims, in this connection, that Mrs Meindl-Berger received wage compensation benefits from the Austrian State to the value of DEM 26 994.73, a sum which exceeds the threshold of DEM 24 000 and brings the proportion of the income received by Mr Meindl and Mrs Meindl-Berger in Germany below the threshold of 90%. Moreover, the Finanzamt takes the view that 'income' must be defined and determined exclusively under German tax law and not according to the tax law of the State of residence, that is, Austrian tax law.

16 Specifically, it pleads that Case C-279/93 *Schumacker* [1995] ECR I-225 and Case C-391/97 *Gschwind* [1999] ECR I-5451 confirmed that the 90% threshold complies with Community law.

17 In the Finanzamt's submission, it is not contrary to the principle of freedom of movement for workers laid down in Article 48 of the EC Treaty (now, after amendment, Article 39 EC), where the legislation of a Member State grants resident married couples the benefit of the splitting procedure, for the grant of that tax concession to non-resident married couples to be subject to the condition that a major proportion of their worldwide income be subject to tax in that Member State.

18 Mr Meindl contends that the appeal on a point of law should be dismissed.

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

'Is there an infringement of [Article 52 of the Treaty] when a resident taxpayer is refused joint assessment to income tax with his spouse who lives in Austria, from

whom he is not separated, on the ground that that spouse received both more than 10% of the joint income and more than DEM 24 000, when that income is tax-free under Austrian Law?'

On the question referred

20 By its question, the national court is essentially asking whether Article 52 of the Treaty precludes a resident taxpayer from being refused, by the Member State of his residence, joint assessment to income tax with his spouse, from whom he is not separated and who lives in another Member State, on the ground that that spouse received in that Member State both more than 10% of the household's income and more than DEM 24 000, where the income received by that spouse in the second Member State is not there subject to income tax.

21 At the outset, it should be recalled, first, that, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence in accordance with Community law and must therefore avoid any discrimination on the basis of nationality (see, to that effect, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 22 and the case-law cited) and, secondly, 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 (*Schumacker*, paragraph 26 and the case-law cited).

22 It is settled case-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 (*Schumacker*, paragraph 30, and *Gschwind*, paragraph 21).

23 In relation to direct taxes, the situations of residents and non-residents in a State are generally not comparable, because the 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 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 (Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraph 15, and the case-law cited).

24 However, according to the order for reference, Mr Meindl is a resident taxpayer in the State in the territory of which he receives the entire taxable income of the household.

25 In that regard, he is treated differently from a resident taxpayer whose spouse, who receives only income not subject to tax, is also resident in that Member State. Such a taxpayer is in fact entitled to joint assessment.

26 As the Advocate General pointed out in point 36 of his Opinion, a resident taxpayer whose spouse is resident in the same Member State and receives there only income not subject to tax is objectively in the same situation as a resident taxpayer whose spouse is resident in another Member State and receives there only income not subject to tax because, in both cases, the household's taxable income is derived from the professional activity of only one of the spouses and, in both cases, that spouse is the resident taxpayer.

27 In this connection, it should be stated that Mrs Meindl-Berger did not receive any taxable income in the year in question in the State of her residence in so far as the wage compensation benefits at issue did not constitute taxable income under that State's tax legislation.

28 In addition, the residence condition for the spouse is a requirement which German nationals will be able to satisfy more easily than nationals of other Member States who have settled in Germany in order to pursue an economic activity there, in so far as the members of their families more frequently live outside that Member State (see, by analogy, Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 19).

29 In those circumstances, the decision of the Finanzamt to treat Mr Meindl as a single taxpayer even though he is married and received the entire taxable income of the household in the State of his residence, on the ground that his wife has retained her residence in another Member State and received there income not subject to tax, which exceeded both 10% of the household's income and DEM 24 000, cannot be justified. The State of residence of such a taxpayer is the only State which can take account of the taxpayer's personal and family circumstances, since he is not only resident in that State but, additionally, receives the entire taxable income of the household there (see, by analogy, *Zurstrassen*, paragraph 23).

30 Since in the present case Mr Meindl is not in any way entitled, in connection with joint assessment, to have his personal and family circumstances taken into account, this clearly constitutes discrimination prohibited by Article 52 of the Treaty (see, by analogy, *Wallentin*, paragraph 17, and the case-law cited), even though the income of both spouses for the year in question is, according to the tax decision in the main proceedings, less than the 90% threshold and the income which is not subject to German income tax exceeds DEM 24 000.

31 It should be pointed out that the situation at issue in the main proceedings is fundamentally different from that in *Gschwind*. In that case the grant of favourable tax treatment, such as that claimed by Mr Meindl, to non-resident married couples on condition that at least 90% of their worldwide income be subject to tax in the Member State of employment or, where that percentage is not reached, that their income from foreign sources not subject to tax in that Member State not be above a certain ceiling, was declared to be compatible with the Treaty where the possibility of taking their personal and family circumstances into account in their State of residence is maintained. However, such is not the case in the main proceedings.

32 Having regard to all of the foregoing, the answer to the question referred must be that Article 52 of the Treaty precludes a resident taxpayer from being refused, by the Member State of his residence, joint assessment to income tax with his spouse from whom he is not separated and who lives in another Member State, on the ground that that spouse received in that Member State both more than 10% of the household's income and more than DEM 24 000, where the income received by that spouse in the second Member State is not there subject to income tax.

Costs

33 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 (First Chamber) hereby rules:

Article 52 of the EC Treaty (now, after amendment, Article 43 EC), precludes a resident taxpayer from being refused, by the Member State of his residence, joint assessment to income tax with his spouse from whom he is not separated and who lives in another Member State, on the ground that that spouse received in that Member State both more than 10% of the household's income and more than DEM 24 000, where the income received by that spouse in the second Member State is not there subject to income tax.

[Signatures]