OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 27 January 2000 *

1. The Tribunal Administratif of the Grand Duchy of Luxembourg has, pursuant to Article 177 of the EC Treaty (now Article 234 EC), referred a question to the Court for a preliminary ruling on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and a number of provisions of Regulation (EEC) No 1612/68. [1]

The basic question is whether a worker who is a national of a Member State can be obliged by another Member State, in which he resides and obtains almost all the income of his household, to pay income tax as a single person because his spouse, from whom he is not separated, and his children do not reside in the same State.

I. The facts

2. It is apparent from the order for reference that both Mr Zurstrassen, the plaintiff in the main proceedings, and his wife are Belgian nationals. Mr Zurstrassen completed most of his studies in Belgium, the country in which he worked and resided until he was offered his current employment in Luxembourg. In order to accept that job he had to move to Luxembourg but his wife and children, for reasons to do with schooling, continued to live in Belgium.

Almost the entire income of the household derives from Mr Zurstrassen's earned income in Luxembourg. Mrs Zurstrassen lives in Battice (Belgium), to which Mr Zurstrassen travels at weekends; she does not pursue any economic activity, has no income of her own and is not subject to tax in that country. [2]

3. In 1995 and 1996 Mr Zurstrassen lived in rented accommodation in Luxembourg which his wife visited occasionally, although this did not mean that under Luxembourg law she became resident for tax purposes in that country. [3] In the income-tax returns submitted by Mr Zurstrassen for the years concerned, he stated

* Original language: Spanish.

1 — Council Regulation (EEC) No 1612/68 of 15 October 1968, on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 — A certificate issued by the central tax office of the Administration des Contributions Directes, Verviers (Belgium), on 4 September 1998 states that Mr Zurstrassen's wife 'received no income in respect of the years 1995 and 1996 and is therefore not liable to tax'.

3 — The fact that on 1 April 1998 the married couple bought an apartment in Luxembourg City is irrelevant for this purpose since it was bought after the tax years at issue in the main proceedings.

his residence as Luxembourg and that his wife resided in Belgium. The income tax notices issued to him by the Administration des Contributions Directes placed him in tax bracket 1, the bracket applicable to single persons.

Mr Zurstrassen lodged complaints against the income tax notices with the Director of Administration des Contributions Directes.

II. The question referred for a preliminary ruling

4. Since that department of the tax authority made no decision on the complaints, Mr Zurstrassen brought proceedings before the Tribunal Administratif which, before giving judgment on the substance, decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Do Article 48 of the Treaty on European Union and Article 1(1) of Regulation (EEC) No 1612/68 of 15 October 1968 [4] preclude national rules which subject 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, 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, and which thereby exclude from that tax regime a spouse who establishes himself in one Member State while leaving the rest of his family in another Member State?'

III. The national legislation

5. In the case of natural persons, income tax is governed by the law of 1967, as amended in 1990. [5] Article 2(1) states that 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. Article 3, which regulates the joint assessment to tax of married couples, includes spouses who, throughout the tax year that corresponds to the calendar year, have been resident taxpayers, provided that they are not living apart by virtue of a dispensation of law or a judicial decision.

6. For the purposes of applying the sliding scale for calculation of the tax, taxpayers are divided into tax brackets. Bracket 1 covers single persons without children and, in certain circumstances, separated and divorced persons without children. Bracket 2 is reserved for married couples who are

4 — Cited in footnote 1 above.

5 — Loi concernant l'impôt sur le revenu (LIR), as amended, of 4 December 1967 (Mémorial A 79 of 6 December 1967) as amended by the law of 6 December 1990.

eligible for joint taxation, while bracket 1a comprises *inter alia* widows and widowers. The tax imposed on bracket 1 taxpayers is determined by applying the basic tax scale to taxable income. In accordance with Article 121, which governs the method known as 'splitting', the tax payable by bracket 2 taxpayers is equivalent to double the amount which, applying the basic tax scale, corresponds to half of the taxable income. Assuming equivalent income and disregarding the deductions to which bracket 2 and bracket 1 taxpayers may be individually entitled, the former are liable to a lower amount of tax than the latter.

LIR Circular 3/1 [6] describes the joint assessment to tax of spouses as the most important exception to the rule that all taxpayers are taxed on the basis of their income. Joint assessment is characterised by the simplification, first, of the basis of assessment, through aggregation of income, and, secondly, of collection, through the establishment of joint and several liability of the taxpayers.

7. The advantages attaching to joint assessment to tax are not, however, limited to resident married couples. Article 157a of the Income Tax Law provides that non-resident taxpayers who are married and who do not in fact live apart are, if they so request, to be classified in tax bracket 2, provided that more than 50% of the earned income of the couple is liable to tax in Luxembourg. If both spouses have earned income which is taxable in the Grand Duchy, the request is to entail their joint assessment to tax. [7]

IV. Community law

8. Under Article 48(2) of the Treaty:

'[F]reedom of movement 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'.

9. Article 1(1) of Regulation No 1612/68, whose interpretation the national court has requested, states:

'Any national of a Member State shall, irrespective of his place of residence, have

6 — LIR Circular 3/1 of 19 August 1991 on the joint assessment to tax of spouses.

7 — The representative of the Luxembourg Government has indicated, in reply to the question I put to him at the hearing, that for a non-resident married couple to be able to pay tax on income generated and liable to tax in Luxembourg, it is sufficient if one of the spouses earns more than 50% of the couple's earned income.

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'.

Article 7, which in my opinion will be useful for answering the question referred for a preliminary ruling, provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

[...]'

V. The proceedings before the Court of Justice

10. The plaintiff in the main proceedings, the Luxembourg Government, the Spanish Government and the Commission, have all submitted written observations in these proceedings within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice.

The representatives of Mr Zurstrassen, the Luxembourg Government and the Spanish Government and the Agent of the Commission appeared and presented oral submissions at the hearing on 14 December 1999.

11. The plaintiff in the main proceedings contends that there is a lacuna in the Luxembourg Law on Income Tax because that law accords the advantages inherent in joint assessment to tax to married couples if they are resident and, under certain conditions, allows non-resident married couples to benefit from this method of taxation but does not regulate the situation where one of the spouses resides in Luxembourg and the other in a different Member State. Consequently, a citizen of the Union who wishes to move without his or her spouse to a Member State in order to pursue an economic activity has to bear a heavier tax burden, which may lead that person to decline the employment offered. For this reason the plaintiff in the main proceedings contends that the Luxembourg legislation is contrary to Article 48 of the Treaty and to Article 7(2) of Regulation No 1612/68.

12. The Luxembourg Government points out in its written observations that joint assessment to tax is compulsory for resident taxpayers and that its aim is to simplify the basis of assessment and the collection of tax. When applying this method of assessment the tax authority makes a joint determination without examining the household's financial regime, and the collector can call on either spouse, without distinction, to discharge the full amount owing by way of tax. If one of the spouses is not resident, that option is not available. At the hearing, however, the Government's representative admitted, in reply to the question put to him, that, where Article 157a of the Income Tax Law (which allows the joint assessment to tax of non-resident couples if more than 50% of their earned income is liable to tax in Luxembourg) was applied, the joint and several liability of the spouses in respect of the tax debt constituted, in practice, a problem of fiscal administration but that this technical advantage was granted to non-residents because this was required by Community law.

He added that joint assessment to tax does not subject the household or the head of household to tax but imputes to each of the spouses, in addition to his or her own income and the deductions and allowances to which that spouse is personally entitled, the income, deductions and allowances of the other spouse and then applies the scale under tax bracket 2 to the aggregate income, so that if either of the spouses has no, or very little, income of his or her own, the resulting tax liability is lower than if they had each been taxed separately.

13. The Spanish Government maintains that there can be no question of discrimination where the law of a Member State subjects to joint taxation married couples who reside in its territory and are not separated, but does not extend that fiscal advantage to couples who reside in different Member States, since the two situations are different. In its submission, the Luxembourg Income Tax Law, which applies irrespective of the nationality of the taxpayer, does not treat Mr Zurstrassen, who has availed himself of his right of freedom of movement as a worker, less favourably for tax purposes than a Luxembourg national whose spouse is living in another Member State.

14. The Commission maintains that Mr Zurstrassen and his wife are victims of covert discrimination based on nationality, which is contrary to both Article 48 of the Treaty and also to Article 7(2) of Regulation No 1612/68. This discrimination arises from the different treatment which the Luxembourg legislation applies, assuming equivalent income, to cases where both spouses are resident in the country and to those where only one is resident, even though in both types of case the couple are in the same objective fiscal position and therefore deserve to be treated similarly.

The paradox embodied in Article 157a of the Luxembourg Law is thus evident; that provision allows non-resident couples to be taxed jointly if more than 50% of their earned income is liable to tax in Luxembourg but denies this possibility to a couple in the situation of Mr and Mrs Zurstrassen, 100% of whose income is actually obtained in that State and in which, furthermore, the recipient of that income resides.

The Commission concludes its observations by stating that it can see no possible justification for this discrimination and that it would be consistent with the 1970 Convention between Luxembourg and Belgium on the avoidance of double taxation to equate taxpayers in Mr Zurstrassen's position with a taxpayer who resides in Luxembourg and whose spouse, from whom he or she is not legally separated, has a separate residence in the Grand Duchy.

VI. Examination of the question referred for a preliminary ruling

15. From 1986, and above all throughout the 1990s, the Court of Justice has had to consider, usually at the request of some national court or other, how to reconcile the competence of the Member States, which remains exclusive in the area of direct taxes, such as for example personal income tax and corporation tax, with freedom of movement for workers and freedom of establishment.

16. Of the judgments delivered on this subject, seven refer to personal income tax. In two of those judgments the Court had to decide whether national legislation complied with the principle of equal treatment in the area of the right of establishment, [8] and in the remaining five it ruled on the application of that same principle in the context of the free movement of workers. [9]

Since Mr Zurstrassen is a worker who moved to Luxembourg to pursue an economic activity as an employee, I shall examine only the five judgments of the Court of Justice which interpret Article 48 of the Treaty in relation to national rules governing personal income tax.

17. Of these five judgments, two were delivered against the background of the Luxembourg legislation and its effects on the tax liability of workers who, during the course of the tax year, move to, or leave,

8 — C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493; and C-107/94 *Asscher* v *Staatssecretaris van Financiën* [1996] ECR I-3089.

9 — Case C-175/88 *Biehl* v *Administration des Contributions du Grand-Duché de Luxembourg* [1990] ECR I-1779; Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225; Case C-151/94 *Commission* v *Luxembourg* [1995] ECR II-3685; Case C-336/96 *Gilly* v *Directeur des Services Fiscaux du Bas-Rhin* [1998] ECR I-2793; Case C-391/97 *Gschwind* v *Finanzamt Aachen-Außenstadt* [1999] ECR I-5451.

the country. These are the judgments in *Biehl* v *Administration des Contributions du Grand-Duché de Luxembourg* and *Commission* v *Luxembourg*. [10]

18. The first judgment arose out of a question referred by the Conseil d'État to enable it to decide a case brought by a German national who was resident in the Grand Duchy between November 1973 and October 1983 and who, when moving to Germany to work, considered that he had been the subject of tax discrimination as compared with workers who were resident in Luxembourg. When income tax was assessed for 1983, and although the deductions from his salary exceeded by more than 100 000 francs the amount of his tax liability, the Luxembourg tax authority refused a refund. Their reason for this was a statutory provision that did not allow refunds of deductions to workers who were resident taxpayers for only part of the year.

The Court observed that even though the criterion of permanent residence in the national territory in connection with obtaining any repayment of an overdeduction of tax applied irrespective of the nationality of the taxpayer concerned, there was a risk that it would work in particular against taxpayers who were nationals of other Member States. It is often such persons who will, in the course of the year, leave the country or take up residence there. [11] The reply to the national court was therefore that Article 48(2) of the Treaty precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers for only part of the year, because they take up residence in the country or leave it during the course of the tax year, are to remain the property of the Treasury and are not repayable. [12]

19. Noting that by June 1994 the Grand Duchy had not amended its legislation to bring it in line with the *Biehl* judgment, the Commission took the view that that State was not complying with its obligations under Article 48(2) of the Treaty and Article 7(2) of Regulation No 1612/68. The Luxembourg tax legislation continued to provide that in order to obtain a refund of overpaid income tax, or regularisation by means of annual adjustments, the taxpayer had to have been resident throughout the entire tax period or alternatively to have been employed in Luxembourg for at least nine months. If the taxpayer did not meet these requirements, he had to make an application for review to obtain a refund of the overpaid tax on 'equitable' grounds.

20. The Luxembourg Government argued that the purpose of its legislation was to ensure application of the principle of progressive taxation by preventing the procedure normally followed by the tax office from leading to the grant to temporary residents of repayments of arbitrary amounts owing to the lack of information concerning their annual income. Further-

10 — See footnote 9.

11 — *Biehl*, cited in footnote 9, paragraph 14, of the judgment.

12 — Ibid., paragraph 19.

more, in order to be able to calculate tax repayments to temporary residents, the tax authority had to be informed of income earned abroad by the taxpayer before he took up residence in the Grand Duchy or after he left it, so that it could determine the appropriate rate of tax to be applied to his Luxembourg income.

21. The Court held that, although the legislation in question, which required an unbroken period of residence or work in Luxembourg for a certain period of time before the taxpayer could benefit from certain tax advantages accorded to resident taxpayers, applied irrespective of the nationality of the taxpayer concerned, there was a risk that it would work in particular against nationals of other Member States, since it was often those persons who, in the course of a year, would leave the country or take up residence there. It would also be most often those persons who would cease working in Luxembourg on the expiry of a short-term employment contract. [13]

22. I believe that the same line of reasoning will be useful for the purpose of deciding this case, even though the discrimination suffered by Mr Biehl was due to the fact that he ceased to be resident in the Grand Duchy, whereas Mr Zurstrassen was a permanent resident in that State throughout the tax years in question.

13 — *Commission* v *Luxembourg*, cited above in footnote 9, paragraphs 15 and 16.

23. As I stated at the outset, the Luxembourg income tax legislation reserves joint taxation which, assuming equivalent income, results in a lower amount of tax, to married couples who do not live apart by virtue of a dispensation of law or judicial authority. The documents before the Court show that, if this last condition is met, the spouses may have separate residences [14] and continue to benefit from joint taxation so long as those residences are situated within the Grand Duchy.

24. The Court of Justice's interpretation is that the principle of equal treatment in the area of remuneration would be ineffective if it could be breached by provisions of national law that discriminate in the area of income tax. For this reason the Council provided in Article 7(2) of Regulation No 1612/86 that a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same tax advantages as national workers. [15]

25. In this case, the provision of national law in question applies whatever the nationality of the taxpayer and therefore does not constitute direct discrimination.

14 — The plaintiff in the main proceedings states in his observations that the law of 12 November 1986 abandoned the economic criterion of the common home and replaced it with the requirement that the spouses must cohabit.

15 — *Biehl*, cited in footnote 9, paragraph 12.

According to the case-law of this Court, however, the rules concerning equal treatment prohibit not only overt discrimination by reason of nationality but also any covert form of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [16]

26. It is indisputable that obtaining the advantage which joint taxation constitutes for married couples is subject to the requirement that both taxpayers be residents. [17] This is a requirement which Luxembourg nationals will be able to satisfy more easily than nationals of other Member States who have taken up residence in the Grand Duchy to pursue an economic activity and it is liable to be prejudicial to a greater extent to migrant workers, who will have greater difficulty in complying with it.

Persons who maintain the residence of their family in their country of origin will, for the greater part, be migrant workers who are nationals of other Member States and who have moved to Luxembourg in order to accept employment, often on the basis of fixed-term contracts, while persons whose families reside in the Grand Duchy will for the most part be Luxembourg nationals.

27. I must therefore conclude that if one of the taxpayers is a resident, the requirement that the other spouse must also reside in the Grand Duchy for the benefit of joint taxation to be obtained constitutes covert discrimination on grounds of nationality.

28. I believe this is more than sufficient reason for holding that a Member State cannot require of a couple in the position of Mr Zurstrassen and his wife, as a condition for them to be taxed jointly, that they both reside in its territory. There are, however, further arguments to support this view deriving from recent case-law of this Court concerning the impact of direct taxation by Member States on freedom of movement for workers.

29. I refer to the judgments in the *Schumacker* and *Gschwind* cases concerning the effects of the German Law on Income Tax when applied to non-resident workers, and to the judgment in *Gilly*. [18] I shall consider these in the order in which I have mentioned them.

30. Mr Schumacker, a Belgian national, worked and obtained almost all his family's income in Germany while residing in

16 — Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11.

17 — The Luxembourg Government maintains that joint taxation is not a fiscal advantage and that there are cases of couples doing everything they can to avoid it. I do not deny that such cases do exist, but I consider that since joint taxation attenuates the progressive nature of the tax if one of the spouses has no, or very little, income, it can be characterised as a fiscal advantage.

18 — Cited in footnote 9 above.

Belgium with his family. It fell to Germany, the State in which he worked, to tax the income from his work. The German legislation provided that, whatever their family circumstances, non-resident taxpayers fall within tax bracket 1, which meant that the 'splitting' method of assessment and the scales applicable under it to tax could not be applied to them and they were treated for tax purposes as if they were single persons.

31. The Court observed that 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. However, 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, there is no objective difference between their situations such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances. For this reason, treating them differently constitutes discrimination, the discrimination arising from the fact that the worker's personal and family circumstances are taken into account neither in the State of residence nor in the State of employment. [19]

32. The possibility, in Germany, of claiming joint taxation was very soon the subject of another question referred to the Court for a preliminary ruling. Mr Gschwind, a Netherlands national, worked in Germany and resided with his family in the Netherlands where his wife worked and obtained 42% of the family's income. The income from Mr Gschwind's work, which represented 58% of the family's income, was taxed in Germany while that of his wife was taxed in the Netherlands. The German authorities refused to apply the splitting method and the tax scale applicable under it.

33. This situation was clearly different from that of Mr Schumacker, whose German salary represented almost all the family's income; neither Mr Schumacker nor his wife had any significant income in their State of residence that would enable their personal and family circumstances to be taken into account. On the other hand, the German legislation applicable to Mr Gschwind, which in the meantime had been amended and now set two income thresholds, one in percentage terms and the other in absolute terms, governing entitlement to the splitting method and tax scale under it, [20] specifically took into account the possibility that, given a sufficient tax base in the State of residence, the personal and family circumstances of the taxpayers

19 — *Schumacker*, cited in footnote 9 above, paragraphs 35 to 38.

20 — The limits were 90% minimum of the spouses' total taxable income in Germany and DEM 24 000 maximum not liable to tax in Germany.

would be taken into account in that State. Since Mrs Gschwind obtained about 42% of the couple's total income in the State of residence, the latter was able to take account of Mr Gschwind's personal and family circumstances in accordance with the detailed rules laid down by the legislation of that State, because the tax base was sufficient.

For those reasons the Court held that it had not been proved that a non-resident married couple of which one worked in the State of taxation, and whose personal and family circumstances could be taken into account in the State of residence because a sufficient tax base existed in that State was in a situation comparable to that of a resident married couple, even if one of the spouses worked in another Member State. [21]

34. The third judgment concerns Mr Gilly, a French national who worked in France, and his wife, who had dual German and French nationality and worked in a German state school. The income received by Mrs Gilly in Germany was taxed in that State under tax bracket I, which meant that her personal and family circumstances were not taken into account when calculating her tax liability. However, since these circumstances were taken into account in France for the purpose of calculating the couple's joint tax liability and of granting various tax rebates and deductions, the Court held that the German tax authorities were not obliged to take account of her personal and family circumstances. [22]

35. As can be seen, these cases related to the legislation of Member States that granted different treatment to income-tax payers according to whether they were resident or non-resident.

In that connection, the Court held in its judgment in *Schumacker* that in the matter of direct taxes, the situations of residents and of non-residents are not, as a rule, comparable. 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 easier 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. However, the situation of a resident is different in so far as the major

21 — *Gschwind*, cited in footnote 9, paragraph 30. For a detailed comparison of the differences between the position of the Gschwinds and that of a couple resident in Germany of which one of the spouses works in another Member State, see the Opinions I delivered in *Gschwind* on 11 March 1999, particularly points 45 to 49.

22 — *Gilly*, cited in footnote 9, paragraph 50.

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. [23]

36. Luxembourg legislation also accords different treatment to persons who receive earned income in Luxembourg territory, according to whether they are resident or non-resident. [24] Mr Zurstrassen, like Mr Biehl, Mr Schumacker and Mr Gschwind believes he has been a victim of discrimination on grounds of nationality and asks that the principle of equal treatment enshrined in Article 48(2) of the Treaty and in Article 7(2) of Regulation No 1612/68 be applied to him.

37. However, unlike the other persons mentioned above, Mr Zurstrassen is a taxpayer who is resident in the State in which he pays tax on his earned income. This means that he is a taxpayer, by virtue of a personal obligation, in that State, which is the State in which his entire worldwide income, wherever it may have arisen, is taxed. It falls to that same State, in accordance with the rules of international tax law, to take account of the factors inherent in his personal and family circumstances.

38. The Luxembourg tax authorities, however, consider him to be, for tax purposes, a single person without dependents even though he is married with children, because his wife, who has no income of her own and from whom he is not separated either *de facto* or by virtue of a judicial decision, continues to reside in another Member State and has not taken up residence in Luxembourg.

39. As the Court has already stated in its judgment in *Schumacker*, Article 48 of the Treaty is 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. [25]

23 — Cited in footnote 9, paragraphs 31 to 33 of the judgment.

24 — The representative of the Luxembourg Government stated at the hearing that Mr Zurstrassen's case presented no problem of evidence as regards the economic situation of his wife who is resident in another Member State and that 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 L 336, p. 15) provides the tax authorities with sufficient possibilities of obtaining information.

25 — Cited in footnote 9, paragraph 24 of the judgment.

40. I would observe that there is no objective difference, from the fiscal viewpoint, between the position of the Zurstrassens and that of a couple resident in Luxembourg who, likewise not separated, have different residences within the Grand Duchy, where one of the spouses receives the entire income of the household. In both cases the couple's income is obtained by only one of the spouses, it arises in Luxembourg and that State alone can take into account the couple's personal and family circumstances.

41. The Luxembourg Government has given no justification for this in its observations. It merely indicates that joint taxation of the spouses simplifies tax collection by establishing joint and several liability on the part of the tax debtors, so that the collector may look to either of the spouses without distinction for payment of the entire tax debt, a possibility that ceases to exist if one of them is not a resident.

42. I do not believe that this is a sufficient reason to justify discrimination of the type described, particularly in a case such as this, in which the only member of the couple with an income is the resident. Furthermore, even if this reason were to be seriously advanced as justification, it could not succeed because the Income Tax Law itself allows joint taxation of non-resident couples provided only that more than 50% of the earned income of the couple is liable to tax in Luxembourg.

43. In this respect, I also agree with Mr Zurstrassen that the discrimination created by the legislation at issue cannot be justified by the need to ensure the cohesion of the Luxembourg tax system.

This justification, which has been accepted by the Court only in one situation,[26] cannot be valid where it is a question of taking into account the personal and family circumstances of a resident taxpayer whose spouse resides in another Member State and has no income of her own, for the purpose of applying a tax scale to that taxpayer that is the same as that applied to another resident whose spouse resides in Luxembourg and has no income.

44. I must therefore conclude that the covert discrimination contained in the Luxembourg Income Tax Law is prohibited by Article 48(2) and by Article 7(2) of Regulation No 1612/86.

26 — See judgments in C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249 and C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

VII. Conclusion

45. In the light of the aforementioned considerations, I propose that the Court of Justice reply to the question of the Tribunal Administratif de Luxembourg as follows:

Article 48(2) of the EC Treaty and Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community preclude legislation of a Member State which, in the matter of income tax, makes the joint taxation of spouses who are not separated subject to both of them being residents and excludes from the application of that tax advantage a worker who has taken up residence in that State, where he obtains the entirety of his household's income, and whose spouse has remained in their State of origin.