OPINION OF ADVOCATE GENERAL
LÉGER
delivered on 13 July 2006 [1]

1. In these proceedings, the Bundesfinanzhof (Federal Finance Court) (Germany) refers to the Court the question as to whether Article 52 of the EC Treaty (now, after amendment, Article 43 EC) must be construed as precluding national provisions which, when applied, result in a resident taxpayer being refused joint assessment with his spouse on the ground that the latter resides in another Member State and has there received income considered to be exempt from taxation in that State.

I — National legislation

2. As regards the period at issue in the main proceedings, the German system of taxation of natural persons is governed by the Law relating to income tax in the version applicable in 1997 (Einkommensteuergesetz, hereinafter 'the EStG 1997').

3. Pursuant to Paragraph 1(1) of the EStG 1997, natural persons who have their permanent residence or their usual abode on the national territory are fully liable to German income tax. As provided in Paragraph 1(3), natural persons who have neither their permanent residence nor their usual abode on the national territory may apply to be treated as fully liable if they receive German income in accordance with Paragraph 49 of the EStG 1997, and provided either that at least 90% of this income is subject to German income tax (the 'relative quantitative threshold') or that the amount of income which is not subject to taxation in Germany does not exceed DEM 12 000 (the 'absolute quantitative threshold').

4. Furthermore, Paragraph 1a(1)(2) of the EStG 1997 provides that for nationals of Member States of the European Union or of the European Economic Area (EEA) it is possible, for the purposes of applying Paragraph 26 of the EStG 1997, for the spouse of the person fully liable under Paragraph 1(1) or Paragraph 1(3) of the EStG 1997 to be treated as being fully liable, provided that he

1 — Original language: French.

has his permanent residence or his usual abode on the territory of another Member State of the European Union or of a Member State of the EEA.

5. In addition, the conditions referred to in Paragraph 1(3) of the EStG 1997 apply to a spouse who does not have his permanent residence or his usual abode in Germany. Accordingly, for a non-resident spouse to be considered as fully liable, the amount of income subject to German tax must be equal to or above 90% of the total worldwide income of the couple or the income not subject to German tax must not exceed the absolute quantitative threshold, namely DEM 24 000.

6. The worldwide income of the couple must be determined according to German law, without distinguishing between income obtained in Germany and income obtained abroad. As the second sentence of Paragraph 1(3) and Paragraph 1a(1)(2) of the EStG 1997 together do not lay down a special rule on how income is to be determined, according to the national court the term 'income' must be derived from German tax law concerning income tax, even when such income is excluded or referred to as exempt from taxation in the certificate of the State of residence.

7. Under Paragraph 26 of the EStG 1997, spouses who live apart on a non-permanent basis and who are both fully liable in accordance with Paragraph 1(1) or Paragraph 1a of the EStG 1997 may apply for joint assessment.

8. In such circumstances, Paragraph 26b of the EStG 1997 provides that the income of the spouses shall be aggregated and attributed to them jointly. The spouses are therefore treated as jointly liable to taxation.

9. This method is intended to take into account the personal and family circumstances of the couple, resulting in a lower assessment when there is a significant difference in the income received by the spouses or when one of the two spouses receives no income at all. Thereby, as the spouses are entitled to two basic allowances exempt from income tax, their minimum subsistence is protected.

10. Furthermore, it should be pointed out that, pursuant to Paragraph 22(1) of the EStG 1997, income derived from periodic benefits, which do not belong to the kinds of

income set out in Paragraph 2(1)(1) to (6) of the EStG 1997, [2] are considered to belong to the category of 'other income' taken into account in the calculation of the income thresholds referred to in Paragraphs 1 and 1a of the EStG 1997.

11. Finally, Paragraphs 3(1)(d) and 3(67) of the EStG 1997 provide that maternity benefit and child-care benefit paid under German law are treated as national income exempt from taxation.

II — Facts and procedure in the main proceedings

12. In 1997, Mr Meindl, an Austrian national resident in Germany, received income in this country from a professional activity and from the running of an artisanal activity totalling DEM 138 422. His spouse, Mrs Meindl-Berger, resident in Austria, did not pursue any professional activity during the year at issue, but did receive from the Republic of Austria a confinement allowance of ATS 142 586, a maternity allowance of ATS 47 117 and a family allowance amounting to ATS 15 600, corresponding to a total consideration of DEM 26 994.73.

2 — This income, set out in the first sentence of Paragraph 2(1) of the EStG 1997, is income derived from an agricultural or forestry activity, from an artisanal or commercial activity, from an independent professional activity, from a salaried professional activity and from movable capital and rental income.

13. Under Austrian tax law, the 'income' received by Mrs Meindl-Berger is exempt from taxation.

14. In accordance with German law, Mr Meindl applied to the Finanzamt, the competent German tax authority, for joint assessment. His application was refused by the authority, which assessed Mr Meindl individually, thereby treating him as unmarried, to the sum of DEM 45 046.

15. Firstly, according to the Finanzamt, the conditions laid down in Paragraphs 1a(1)(2) and 1(3) of the EStG 1997 were not satisfied, as the amount of income received by the spouses in Germany was less than 90% of the total sum. Secondly, the amount of income received by Mrs Meindl-Berger in Austria exceeded the threshold of DEM 24 000 prescribed by the second sentence of Paragraph 1(3) and the last sentence of Paragraph 1a(1)(2) of the EStG 1997.

16. The Finanzamt considers that as the compensation benefits received by Mrs Meindl-Berger were not paid under German law, they are not exempt from taxation under Paragraph 3(1)(d) of the EStG 1997. Therefore, in accordance with Para-

graph 22(1) of the EStG 1997, these benefits must be taken into account as foreign income when determining the quantitative threshold.

17. After an unsuccessful administrative appeal, Mr Meindl brought legal proceedings before the Finanzgericht (Finance Court) (Germany) challenging the decision of the Finanzamt. The Finanzgericht allowed his claim and held that he was entitled to joint assessment as the term 'income' was to be interpreted restrictively in accordance with Community law.

18. The Finanzamt brought an appeal on a point of law before the Bundesfinanzhof.

III — The question referred for a preliminary ruling

19. 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?'

IV — Assessment

20. As a preliminary point, it should be determined whether Mr Meindl's situation falls within the scope of Article 52 of the Treaty.

21. Contrary to the German Government, I do not see any reason to question the merits of the analysis of the Bundesfinanzhof according to which the situation of Mr Meindl falls within the scope of Article 52 of the Treaty.

22. Firstly, the Court has consistently held that Article 52 of the Treaty does not apply to situations confined to a single Member State. [3] In the present case, Mr Meindl, an Austrian national, works and lives in Germany, which shows that the situation is not limited to a single Member State. Secondly,

3 — See, for example, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37; Case C-332/90 *Steen* [1992] ECR I-341, paragraph 9; and Case C-134/95 *USSL n° 47 di Biella* [1997] ECR I-195, paragraph 19.

pursuant to the second paragraph of Article 52 of the Treaty, the freedom of establishment includes the right to take up and pursue activities as a *self-employed person*. According to the decision of the referring court, Mr Meindl carried out in Germany a professional activity. He has therefore exercised his freedom of establishment.

23. By its question, the national court asks whether Article 52 of the Treaty must be construed as meaning that a taxpayer resident in Germany cannot be refused joint assessment with his spouse who is resident in Austria, from whom he is not separated, on the ground that this spouse received both above 10% of the joint income and above DEM 24 000, even though this income is exempt from taxation under Austrian law.

24. The German Government considers that this question must be answered in the negative.

25. I do not share this view.

26. First of all, it must be borne in mind that, although direct taxation falls within their competence, the Member States must exercise that competence consistently with Community law. [4] It follows that, in exercising their competences, the Member States must not contravene the fundamental freedoms guaranteed by the Treaty, such as the freedom of establishment. [5]

27. This means, notably, that the Member States must refrain not only from all forms of overt discrimination by reason of nationality, but also from all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result. [6]

28. However, discrimination can only arise through the application of different rules to comparable situations or the application of the same rule to different situations. [7]

29. In relation to direct taxes, the Court has held, notably in *Schumacker*, cited above, and

4 — See, notably, Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 32 and the case-law cited, and Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 22.

5 — See, notably, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13, and Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 40.

6 — See, notably, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case C-27/91 *Le Manoir* [1991] ECR I-5531, paragraph 10; and Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 26.

7 — See, for example, Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 17.

Gerritse, [8] that the situations of residents and of non-residents are not, as a rule, comparable. Income received by the non-resident on the national territory is, in most cases, only a part of his total income, which is concentrated at his place of residence. Furthermore, 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. [9]

30. In the present case, although Mr Meindl is an Austrian national, he has his residence and receives all of his income in Germany.

31. However, he is treated differently from a taxpayer having his residence in Germany and whose spouse, who does not receive any income, is also resident in this Member State.

32. Pursuant to the EStG 1997, the German authorities refuse to take into account Mr Meindl's personal and family circumstances on the ground that his spouse is resident in Austria and receives an income there which is above 10% of the household income and above DEM 24 000. Mr Meindl is therefore treated as an unmarried person by the German tax authorities.

33. Yet, as we have seen earlier, under the same EStG 1997, a taxpayer who is resident in Germany and whose spouse of no profession is also resident on the territory of this Member State is eligible for joint assessment.

34. Is this difference in treatment between a taxpayer resident in Germany whose spouse, of no profession, is resident in another Member State and a taxpayer resident in Germany whose spouse, of no profession, is also resident in this Member State, based on an objective difference in situation, so that it cannot be treated as indirect discrimination by reason of nationality?

35. I do not think so.

36. I am of the opinion that an Austrian national who works and is resident in Germany, and whose spouse does not work and is resident in another Member State, is objectively in the same tax situation as a

8 — Case C-234/01 *Gerritse* [2003] ECR I-5933.

9 — *Schumacker* (paragraphs 31 and 32) and *Gerritse* (paragraph 43), cited above.

taxpayer who is resident in Germany and in the same employment and whose spouse does not pursue any professional activity and who is resident in the same Member State. In both cases, the household income is derived from the professional activity of only one of the spouses.

37. The requirement in respect of the place of residence of the spouse of no specified profession, which is at the root of the difference in treatment, is, in my opinion, a condition which can be more easily fulfilled by nationals than by citizens of other Member States whose family members more frequently live outside German territory.

38. In my opinion, the comparability of the two situations must be examined in accordance with reasoning similar to that adopted by the Court in the *Zurstrassen* case. [10]

39. In that case, the Court held that a resident taxpayer could not be refused joint assessment on the ground that his spouse, from whom he was not separated, was resident in another Member State.

40. It is true that, unlike Mrs Zurstrassen, Mrs Meindl-Berger receives income in her State of residence considered to be taxable under German law.

41. However, according to the national court's decision, that income is in the form of payments which *by their nature* are not taxable in Austria.

42. In the *Wallentin* case, [11] the Court held that income exempt from taxation did not constitute significant income, with the result that the State in which such income is received is not in a position to grant a tax benefit resulting from taking into account the taxpayer's personal and family circumstances.

43. The approach adopted in this judgment appears to me to be capable of being applied to the present case. Firstly, if the income received by Mrs Meindl-Berger had been obtained pursuant to German law, it would have been exempt from taxation in Germany, which demonstrates that under German law such income can be considered to be exempt from taxation by nature. The payments would not therefore have been included in

10 — Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 23.

11 — Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraphs 17 and 18.

the calculation of the worldwide income of the couple. Secondly, if I were to accept the submission of the German Government, the personal and family circumstances of the taxpayer resident in Germany would be taken into account neither in Germany nor in Austria.

44. That is because Mr Meindl, who is resident in Germany, receives no income in Austria, and the only household income received in that State is payments which are exempt from taxation in Austria. Therefore Mr Meindl's personal and family circumstances cannot be taken into consideration in Austria.

45. According to the settled case-law of the Court, discrimination arises from the fact that the taxpayer's personal and family circumstances are taken into account neither in his State of employment nor in his State of residence. [12]

12 — *Schumacker*, cited above, paragraph 38. I also point out that in Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 101, the Court held that the Member States must ensure that the personal and family circumstances of the taxpayers will be taken into account, irrespective of how the States have allocated that obligation amongst themselves.

46. In the present case, the Federal Republic of Germany, the State in which Mr Meindl has his residence, earns almost all of his household income and is compulsorily taxed, is best placed to take into account his personal and family circumstances.

47. Consequently, I consider that the difference in treatment between resident taxpayers whose spouse of no profession is resident in another Member State and the resident taxpayers whose spouse of no profession is resident on the national territory, as results from the application of the EStG 1997, must be considered to be indirect discrimination by reason of nationality, contrary to Article 52 of the Treaty.

48. In light of the above, I propose to reply that Article 52 of the Treaty must be interpreted as meaning that a taxpayer resident in Germany cannot be refused joint assessment with his spouse resident in Austria, from whom he is not separated, on the ground that this spouse received both above 10% of the joint income and above DEM 24 000, even though this income is exempt from taxation under Austrian law.

V — Conclusion

49. In light of those considerations, I propose that the Court should answer the question referred by the Bundesfinanzhof as follows:

'Article 52 of the Treaty (now, after amendment, Article 43 EC) must be interpreted as meaning that a taxpayer resident in Germany cannot be refused joint assessment with his spouse resident in Austria, from whom he is not separated, on the ground that this spouse received both above 10% of the joint income and above DEM 24 000, even though this income is exempt from taxation under Austrian law.'