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Judgments of the Court of Justice in Cases C-76/05 and C-318/05

Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach
Commission of the European Communties v Federal Republic of Germany

GERMAN LEGISLATION ON THE DEDUCTIBILITY OF SCHOOL FEES FROM INCOME TAX IS CONTRARY TO COMMUNITY LAW

Tax relief for school fees paid to certain private schools may not be generally refused to income tax payers in Germany for school fees paid to a school situated in another Member State

A German provision on income tax allows taxpayers to deduct from the taxable amount 30 % of the net price paid by them for attendance by a dependent child at a private school in Germany which fulfils certain conditions[1], with the exception of the price of accommodation, supervision and meals.

Since that tax relief does not apply to school fees paid to schools situated in other Member States, the Finanzgericht Köln and the Commission have both asked the Court of Justice to rule on the compatibility of that provision with Community law.

Case C-76/05

The action before the Finanzgericht Köln was brought by Mr and Mrs Schwarz, who had applied unsuccessfully to the tax authorities for the school fees paid by them to the Cademuir International School in Scotland, attended by two of their children, to be taken into account. On a reference for a preliminary ruling from the Finanzgericht Köln, **the Court has held that Community law precludes the tax relief from being generally refused in respect of school fees paid to schools situated in other Member States.**

In its reasoning, the Court distinguishes two types of school financing.

Only schools essentially financed by private funds may rely on the freedom to provide services. Where those schools, established in a Member State other than Germany, wish to offer education

[1] The schools in question are substitute schools, intended to replace a public establishment existing or planned in the Land in question, which are approved by the State or authorised by the legislation of the Land, and complementary schools, German establishments different from substitute schools, which must be recognised by legislation of the Land as complementary schools for general education.

to the children of taxpayers resident in Germany, the exclusion of the fees of foreign schools from the benefit of the tax relief hinders their freedom to provide services.

As regards schools established in a Member State other than Germany which are not essentially financed from private funds, the freedom to provide services does not apply. However, on account of the freedom of movement of citizens of the Union, the tax relief may not be refused in respect of those schools' fees.

The Court has held that the Schwarz children, by attending a school established in another Member State, have made use of their right to free movement. It points out that national legislation which disadvantages certain nationals merely by reason of the fact that they have used their right to free movement and residence in another Member State constitutes a restriction on those freedoms.

The legislation at issue, which causes the tax relief to be refused to taxpayers who have sent their children to school in another Member State, **disadvantages the children of nationals merely by reason of the fact that they have exercised their freedom of movement.**

The obstacle to the freedom to provide services and the restriction on the freedom of movement of citizens of the Union cannot be justified by the arguments put forward by the German Government.

In particular, the obstacle to the freedom to provide services cannot be justified by the fact that the principle of the freedom to provide services does not imply an obligation to extend the privileged tax treatment granted to certain schools under the educational system of a Member State to those of another Member State. **Even though both direct taxation and the content and organisation of the educational system are within the competence of the Member States,** the fact remains that, in exercising that competence, **Member States must comply with Community law**. Moreover, the legislation in question provides not for a direct subsidy by the German State to the schools concerned, but for the granting of a tax advantage to parents in respect of the school fees paid to those schools.

Nor can refusal to extend the tax relief in question to the school fees paid to private schools established in another Member State be justified by the fact that those schools are not in a situation objectively comparable to that of the German schools referred to by the legislation in question, which are prohibited from charging school fees of an amount which would permit a selection of pupils based on the means of their parents. The legislation at issue makes the grant of the tax relief subject to the private school concerned being approved, authorised or recognised in Germany, without establishing an objective criterion permitting it to be established which types of school fees charged by German schools are deductible. The result is that **any private school established in a Member State other than Germany is**, merely because it is not established in Germany, **automatically excluded from the tax advantage in question**, irrespective of whether it complies with criteria such as charging school fees in an amount not permitting a selection of pupils on the basis of parental means.

Finally, the restrictions found cannot be justified by the objective of avoiding an excessive financial burden. The Court points out in that regard that limitation of the amount deductible for school fees to a given amount, corresponding to the tax relief granted by the German State, taking account of certain values proper to that State, for attending schools situated in its territory, would constitute a less stringent method than refusing to grant the tax relief. **It appears in any event disproportionate to exclude totally from the tax relief school fees paid by taxpayers to schools established in another Member State**. That excludes from the tax relief in question

school fees paid by those taxpayers to schools established in another Member State, irrespective of whether those schools fulfil objective criteria determined on the basis of principles proper to each Member State and allowing it to be determined what types of school fees confer a right to that tax relief.

Case C-318/05

Ruling on the action for failure to fulfil obligations brought by the Commission, the Court has held that **by generally excluding school fees for attending a school situated in another Member State** from the tax relief granted by the German Law on Income Tax, **the Federal Republic of Germany has failed to fulfil its obligations** arising from the freedom of movement of citizens of the Union and of workers, from the freedom of establishment and from the freedom to provide services.

Apart from the obstacles found in Case C-76/05, the Court has found that the German legislation infringes the free movement of workers and the freedom of establishment of the parent taxpayers. That infringement particularly disadvantages employees and self-employed persons who have transferred their normal place of residence to Germany or who work there and whose children continue to attend a fee-paying school situated in another Member State. Those workers do not enjoy the tax relief, whereas they would enjoy it if their children attended a school situated in Germany.

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