OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 11 March 1999 *

Table of contents

1. This case arises from an application, lodged in Germany by a Netherlands national employed in that State and residing with his spouse in the Netherlands, to be given the right to choose the 'splitting' method of assessment and tariff for the purpose of liability to income tax of natural persons. In this connection the Finanzgericht Köln (Finance Court, Cologne), (Germany), has referred a question for a preliminary ruling under Article 177 of the EC Treaty with a view to ascertaining whether the provisions of Community law on freedom of movement for workers preclude the said right to choose, which couples living in Germany have in any case, from being made subject to a condition, for non-resident couples, that the worldwide income of the couple is taxable as to at least 90% in Germany or otherwise, that the couple's income received abroad and exempt from tax in Germany may not exceed DEM 24 000 a year.

* Original language: Spanish.

I. The German income tax legislation

2. Under Paragraph 1(1) of the Einkommensteuergesetz (German Law on Income Tax), natural persons who have their permanent residence or usual abode in German territory are subject there to tax on the whole of their income (irrespective of where it is received). Under Paragraph 1(4), natural persons not having their permanent residence or usual abode in Germany are subject to limited tax (only on income received in Germany).

3. Normally income from employment is subject to a deduction at source by the person paying the salary. For the purpose of such deduction, persons subject to tax on the whole of their income are classified by categories. Unmarried persons form class I. Married persons not separated from their spouses form class III and have a right to choose joint assessment, using the 'splitting' method and tariff if they both reside in Germany. Taxpayers subject to limited tax are placed in class I irrespective of whether they are married or not.

4. As a result of amendments to the legislation in 1996 in order to adapt the income tax rules for non-resident taxpayers to the law as declared by the Court of Justice in its judgments in *Schumacker* [1] and *Wielockx* [2] married taxable persons who have neither permanent residence nor usual abode in Germany may upon application, irrespective of their nationality, be treated as if the whole of their income were subject to tax provided that not less than 90% of their worldwide income received in the tax year is taxable in Germany or that the income received abroad which is tax-exempt in Germany does not exceed DEM 12 000.

5. However, a taxable person who is a national of a Member State of the European Union or a State to which the Agreement on the European Economic Area [3] applies and who has permanent residence in one of those States may be treated as taxable on the whole of his income and, as such, have the right to choose joint assessment and to be placed in class III for the purpose of the deduction at source, provided that the following conditions are fulfilled:

— his or her spouse must have permanent residence or usual abode in another

1 — Case C-279/93 [1995] ECR I-225.

2 — Case C-80/94 [1995] ECR I-2493.

3 — Agreement on the European Economic Area approved by decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (OJ 1994 L 1, p. 1).

Member State of the European Union or a State to which the Agreement on the European Economic Area applies, and

— at least 90% of the worldwide income of the couple received in the tax year is taxable in Germany or, otherwise, the income received abroad which is not taxable in Germany does not exceed DEM 24 000 during the same period.

In this case the spouse is also treated as if the whole of his or her income were taxable by the application of the 'splitting' method and tax scale tariff to determine the amount of tax. This method, which is applied only to married couples, is based on the fiction that each spouse contributed one half of the total taxable income. To determine the tax, the taxable amounts of both spouses are aggregated, the resulting total is divided by two, the mathematical formula laid down by law is applied to one half and the result is multiplied by two. The total is the amount which the spouses must pay.

The use of this method entails certain tax advantages with regard to the deduction of expenses connected with the couple's personal and family circumstances (for example, the deduction twice over of the fixed amount allowed for provident expenses, the deduction of the costs of consulting tax advisers and the deduction of professional training expenses), irrespective of which spouse received the benefit or paid the expenses.

Where only one of the spouses receives income or where there is a large difference between the income of the two, this method results in mitigating the progressive increase in tax rates. On the other hand, its advantages are practically neutralised where the income of the two spouses is more or less the same.

6. The method was adopted as a result of a 1957 judgment of the Bundesverfassungsgericht (Federal Constitutional Court) and is based on a fundamental principle laid down in Article 6 of the Grundgesetz (German Constitution), which places the family under the special protection of the State. This judgment stated that spouses must not, merely by reason of marriage, be liable to a greater tax burden than unmarried persons. As joint assessment means that the income of spouses is aggregated and attributed to them jointly and that the spouses are treated as one taxpayer, the progressive nature of the tax scale would have the

consequence — unless the 'splitting' method were used, thus mitigating the progressive increase in tax rates — that the tax burden would be higher than if the spouses had been taxed separately. This is the reason why the German legislature granted spouses the right to choose between individual assessment and joint assessment. [4]

II. Facts in the main proceedings

7. Mr Gschwind, the plaintiff in the main proceedings, is a Netherlands national living in the Netherlands in a local district near the German border with his wife and a child born in 1992. In 1991 and 1992, which are the tax years for which he has appealed against the income tax assessment issued by the defendant authority, he commuted every working day to the city of Aachen. The income from that employment, which was the only income he received individually during the two years in question, was taxed in Germany pursuant to Article 10(1) of the double taxation agreement between Germany and the Netherlands. During that period his wife was employed in the Netherlands, where the whole of her income was taxed.

8. As the provisions enacted in 1996 apply with retrospective effect to assessments still pending and permit non-resident married taxable persons to be treated, on request and in certain circumstances, as taxable on the whole of their income, Mr Gschwind requested the defendant authority to tax his income together with that of his wife in Germany for 1991 and 1992, using the 'splitting' method and tariff. The request was refused and the basic tariff was applied to him on the ground that he did not fulfil the conditions required by those provisions, namely that at least 90% of the worldwide income of the couple must be taxable in Germany or, otherwise, the couple's aggregate income from foreign sources which is exempt from tax in Germany must not exceed the absolute fixed maximum of DEM 24 000 a year.

9. The plaintiff's claims were dismissed as unfounded by the defendant authority, which stated that the wording of the law precluded him and his wife from being given the right to choose the 'splitting' method and tariff appeal. In his action

4 — I should like to point out that, although the 'splitting' method may be financially advantageous for some taxpayers, it appears to have lost its credibility in legal theory, particularly from the viewpoint of fair taxation. The main forms of discrimination to which 'splitting' is said to give rise are discrimination against single persons compared with married couples, discrimination against persons with low incomes compared with those with higher incomes, and discrimination against married women who work compared with those who do not. See M.T. Soler Roch, 'Subjetividad tributaria y capacidad económica de las personas integradas en unidades familiares' in *Revista Española de Derecho Financiero*, 1990, No 66, p. 193 et seq., p. 209, and the works cited by the author.

before the Finanzgericht Köln he repeats his claim. [5]

III. The question referred by the national court

10. In order to resolve the case, the national court decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it contrary to Article 48 of the EC Treaty for Paragraph 1(3), second sentence, in conjunction with Paragraph 1a.1.2 of the Einkommensteuergesetz (German Law on Income Tax) to provide that a Netherlands national deriving taxable income from employment in Germany without having a permanent residence or usual abode there and his spouse, who is not permanently separated from him and likewise has no permanent residence or usual abode in Germany and earns income abroad, are not to be treated as persons subject to unlimited taxation for the purposes of applying Paragraph 26(1), first sentence, of the Einkommensteuergesetz (joint assessment) on the ground that the combined income of the spouses for the calendar year in question does not fall as to at least 90%, within the Einkommensteuergesetz, or that the income not subject to the Einkommensteuergesetz amounts to more than DEM 24 000?'

IV. The Community legislation

11. The national court seeks interpretation of Article 48 of the EC Treaty which, so far

5 — In his appeal the plaintiff states that, had the German legislature not made the right to choose subject to certain limits in the case of frontier workers, the charge to tax in his case would have been as follows (subject to any error on my part, the average rate for 1992, applying the progression saving rule and the 'splitting' method, should be 23.9632% and not 26.9632%):

	1991 DEM	1992 DEM
Gross salary F. Gschwind	82 535	84 047
Business expenses	-9 001	-9 607
Net income	73 534	74 440
Training and further training expenses	-900	-900
Deductible provident expenses	-3 510	-3 510
Child relief	-4 104	
Taxable income	69 124	65 926
Netherlands income exempt in Germany but taken into account for determining the progression saving (PS)	52 426	53 209
Average rate of income tax, with PS and splitting	24.1761%	26.9632%
Taxable income F. Gschwind	69 124	65 926
Income tax with PS and the 'splitting' scale of rates	16 711	15 798
Income tax at basic scale of rates	17 723	16 522
Additional tax charge compared with nationals	1 012	724

as this case is concerned, provides as follows:

'[...]

2. Such freedom of movement [for workers within the Community] 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.

[...]'

V. The observations submitted in the course of the procedure

12. Written observations were submitted within the time-limit laid down for that purpose by Article 20 of the EC Statute of the Court of Justice by the plaintiff and the defendant in the main proceedings, the Belgian and German Governments and the Commission. At the hearing on 26 January 1999 oral submissions were made by the representative of the parties in the main proceedings, the German Government, the Netherlands Government and the Commission.

13. The plaintiff in the main proceedings contends that there is no justification for the limits laid down by the German legislation for applying the 'splitting' method, with its scale of tax rates, to married Community nationals not residing in Germany. The plaintiff considers it logical that, where a non-resident taxpayer receives almost all his income in the State of employment, the deductions relating to his personal circumstances should be allowed by that State. However, this does not apply with regard to choosing the 'splitting' method. If that method is used, the taxpayer's personal circumstances cannot be taken into account both in the State where he works and the State where he resides, because the taxable income in the State of employment is exempt from tax in the State of residence and cannot give rise to the concessions relating to family circumstances in that State, irrespective of the percentage which such income constitutes of the global income.

14. The defendant tax authority, the Finanzamt (Finance Office) Aachen-Außenstadt, considers that the question referred for a preliminary ruling is inadmissible, but asserts that, with regard to direct taxes, spouses residing in Germany are taxed there on their worldwide income and that the situation of non-resident spouses is similar to that of residents only where almost all the family income is taxable in

Germany. That is why certain conditions must be fulfilled in order for a couple's foreign income to be taken into account for determining the tax rate for the purpose of the progressive saving rule.

In addition, joint assessment of the spouses affects the calculation of the taxable amount and, if it is applied to non-residents irrespective of the income received in the State of residence, it could result in multiple tax concessions. Where spouses are assessed jointly, the fixed deduction for provident expenses is doubled and special expenses and extraordinary costs are considered deductible, regardless of which spouse benefited from them or paid them. If the combined income of a non-resident couple had to be taken into account, with no limit on the income received by one of them in the State of residence, the special expenses and extraordinary costs of that spouse could be taken into account for tax in that State and also for combined assessment in Germany. For example, the defendant authority adds that in the plaintiff's case, if in Germany he could choose the combined assessment of his income and that of his wife, his taxable amount for 1991 and 1992 could be reduced by DEM 3 510 because the deduction for provident expenses could be allowed twice over.

15. The Belgian Government considers that the 'splitting' method is a means of determining the tax rate on the basis of the ability to pay tax of the economic unit formed by the couple. It adds that the method should be applied under the same conditions to residents and non-residents because, as it is not designed to grant tax concessions relating to the taxpayer's personal or family circumstances, there are no grounds for fearing that there may be additional concessions in the State of residence. The Belgian Government proposes that the Court's reply to the question should be in the affirmative as Paragraph 1(3) of the German law in question penalises non-resident taxable persons who receive all or almost all their taxable income in Germany, although there is no difference whatever between their objective situation as non-residents and that of persons living in Germany.

16. The German Government affirms that the plaintiff was treated as a resident in 1991 and 1992. For the purpose of calculating his net income, a deduction was allowed for business expenses, with additional deductions for training expenses and provident expenses. In addition, in 1992, when his child was born, he was entitled to the deduction for a dependent child.

The German Government observes that, in the Netherlands, married couples are taxed individually, so that the personal and family circumstances of the plaintiff's wife are taken into account in accordance with Netherlands law. The plaintiff receives no

income in the Netherlands and the income he receives in Germany is not taxable in the Netherlands, pursuant to Article 10 of the double taxation agreement between Germany and the Netherlands. Consequently there is no taxable income in the State of residence and the income received in Germany is not taken into account with that of his wife for the purpose of the progressive saving rule because in the Netherlands there is no provision for the joint assessment of couples.

The German Government adds that, if the plaintiff's claims had to be granted, he and his wife would be in a more advantageous position for tax purposes than that of spouses residing in Germany. If the progressive saving rule were applied to the income received by the wife in the Netherlands, this would lead to the calculation of a joint taxable amount by the 'splitting' method and the plaintiff and his wife could each be assessed on one half of their combined income as single persons, with the consequent right to two deductions from their aggregate income. In comparison with individual assessment, this method has the effect of applying to the spouse with the higher income a lower tax rate than the rate which would normally be appropriate for that spouse's situation, and to the spouse with the lower income a higher rate. As the plaintiff in the main proceedings has the higher income of the two, he would be liable overall to a lower rate of tax if his wife's income had to be taken into account and if two deductions instead of one were made from the aggregate income, whereas his wife would not be subject to a higher tax rate because her husband's income would not be added to hers in the Netherlands, where she is assessed individually.

17. At the hearing the Netherlands Government confirmed that the plaintiff's income in Germany was not taxable in the Netherlands and therefore he was not entitled to a deduction of any kind. The Netherlands legislation provides that, in such a case, the right to make deductions by reason of marriage, which in principle belongs to the spouse with the higher income, is transferred to the other spouse, so that the marriage is taken into account in the State where the couple live, by means of the deductions which the plaintiff's wife may be allowed.

18. The Commission considers that the 'splitting' method with progressive tax rates fulfils the purpose of taxing persons according to their ability to pay tax and that the method can be applied without regard to the thresholds at present laid down by German law. The rate resulting from the 'splitting' tariff would not be applied directly to the spouses' joint taxable amount, which consists of the plaintiff's gross income after the deductions to which he is entitled; to that taxable amount would be added his wife's income in the Netherlands, which is not taxable in Germany, so as to take account of the pro-

gressive nature of the tax. The resulting total would then be 'split' as if it were the joint taxable amount of the spouses, thus giving the average rate of tax, which will be higher than if the plaintiff's income only were 'split', but lower than the rate which would apply to single persons according to the basic tax scale.

The Commission asserts that the refusal to apply the 'splitting' principle with progressive tax rates to the plaintiff's income is contrary to Article 48 of the Treaty. The plaintiff is a national of a Member State who has exercised his freedom of movement by commuting from the Netherlands to Germany to work there and he should not be treated less favourably than nationals in the same situation.

With regard to the rate of tax, the Commission contends that residents and non-residents are in a comparable situation, provided that non-residents do not avoid progressive tax rates by reason of the fact that their tax liability is limited to the income received in the State of employment. The plaintiff is said to meet this requirement because the 'splitting' method applies to him in conjunction with progressive tax rates.

Alternatively, the Commission observes that it seems inconsistent that German law should take into account the income of both spouses in order to determine that the maximum taxable income in Germany is 90% when the income of only one spouse is taxable there.

VI. Examination of the question

A. *Admissibility*

19. The defendant tax authority considers that the question referred to the Court is inadmissible because the national court has not stated its purpose clearly and the question concerning possible discrimination against the plaintiff, who asks to be assessed by a method not envisaged by the Law on income tax, even for resident taxpayers, is a hypothetical question.

I do not agree. In the first place, the purpose of the question is clearly defined in the order for reference. In the second place, a question referred by a national court under Article 177 of the Treaty cannot be said to be hypothetical within

the meaning of the Court's case-law [6] on the ground that the legislation in question does not envisage the grant to the plaintiff of what he seeks because, in the case of a reference for a preliminary ruling, the Court is not asked to give a ruling on a national law but to interpret the Community law applying to a particular situation. As I shall show, the German law which applied to Mr Schumacker likewise did not envisage that a worker in his situation would have the right to have his personal and family circumstances taken into account in the State of employment. That did not prevent the Court from giving one of the most important judgments of recent years concerning direct taxes and freedom of movement for workers. [7] Community-law specialists are well aware that if the Court had regarded the questions referred by national courts in such cases as hypothetical, European integration would not have proceeded very far.

B. *Substance*

20. With its question the Finanzgericht Köln wishes to ascertain whether it is contrary to Article 48 of the Treaty for the German law on income tax, which gives resident married couples the right to choose the 'splitting' method of assessment and tariff, to lay down, in the case of non-resident married couples who wish to receive that tax concession, a condition that at least 90% of their worldwide income must be taxable in Germany or, otherwise, that income from foreign sources, which is tax-exempt in Germany, must not exceed DEM 24 000.

21. Those who have submitted observations in these proceedings all agree that the 1996 amendment to the German legislation arises from the Court's case-law and, in particular, the *Schumacker* judgment. Before proposing a reply to the question, I shall consider this case-law in some detail.

(a) The limits imposed by Article 48 of the Treaty on the Member States in exercising their taxing powers in relation to direct taxes

22. In April 1991 the Finanzgericht Köln requested a preliminary ruling from the Court on a number of questions in connection with proceedings brought by Mr Werner, a German national who had lived in the Netherlands since 1961. He had obtained his professional qualifications in Germany and worked for 20 years as a salaried dentist in a dental surgery in Aachen. At the end of 1981 he opened a

6 — See the order of 25 May 1998 in Case C-361/97 *Nour* [1998] ECR I-3101, and the judgments in Case C-291/96 *Grado and Bashir* [1997] ECR I-5531; Case C-105/94 *Celestini* [1997] ECR I-2971; Case C-125/94 *Aprile* [1995] ECR I-2919, and Case C-83/91 *Meilicke* [1992] ECR I-4871.

7 — See the *Schumacker* judgment, cited in footnote 1. It is undoubtedly one of the Court's judgments which has received most attention from commentators. The Court's database already lists more than 60 case notes and articles.

practice on his own account in Aachen and took on as an employee his own wife, who was a Netherlands national resident, like him, in the Netherlands. Germany had the right to tax his income from self-employment in that State, while his wife's income was subject to a flat-rate tax withheld at source by her husband as employer. Neither spouse received income in the Netherlands. The main proceedings arose from Mr Werner's request to the German tax authorities to be regarded as taxable on the whole of his income so that he could have the benefit of the 'splitting' method of assessment and tariff. The request was refused and the tax authorities took the view that he should be subject to limited taxation on part of his income.

The national court wanted to know whether Articles 7 and 52 of the Treaty precluded a person resident in a Member State who received most of his income in another Member State from being refused concessions such as the 'splitting' method and tariff or the deduction of certain expenses, which could be claimed by taxable persons resident in that State.

23. In its judgment [8] the Court, following the Advocate General, [9] took the view that it was unnecessary to reply to the question because it related to a purely internal situation, to which Community law was not applicable. The reason was that Mr Werner, who was a German national and had acquired his professional qualifications in Germany, had always practised his profession there and had been subject to German tax law, the only factor which took his case out of a purely national context being the fact that he lived in another Member State and had not exercised his freedom of movement in order to settle elsewhere in the Community. For this reason the Court agreed, in the *Werner* judgment, that a Member State could impose a heavier tax burden on its nationals if they did not reside in its territory. [10]

24. In April 1993, scarcely three months after that judgment was delivered, the German Bundesfinanzhof (Federal Finance Court) referred to the Court of Justice certain questions in connection with proceedings between the Finanzamt Köln and Mr Schumacker, a Belgian national living in Belgium, concerning the conditions governing the liability to taxation on income from employment in Germany. This time the questions received a reply.

25. In giving judgment in that case, the Court laid down various principles which will be very useful in resolving the present case. The Court stated, first, that Article 48

8 — Case C-112/91 *Werner* [1993] ECR I-429.

9 — Opinion of Advocate General Darmon, delivered on 6 October 1992, in the *Werner* case, cited in footnote 8.

10 — In view of subsequent judgments of the Court of Justice, some commentators now regard this judgment as having been superseded. See E. Keeling, 'Some observations on *Finanzamt Köln-Altstadt* v *Roland Schumacker*' in *The EC Tax Journal*, vol. I, 1995/96, issue 2, p. 135 et seq., particularly pp. 143 and 144, and the judgments cited by the author.

of the Treaty may limit 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. [11]

26. Secondly, the Court observed that rules which apply irrespective of the nationality of the taxpayer concerned, but which make a distinction on the basis of residence in that non-residents are denied certain benefits which are granted to residents, may constitute indirect discrimination by reason of nationality because, as non-residents are in the majority of cases foreigners, such rules are liable to operate mainly to the detriment of nationals of other Member States. [12]

However, in relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable, so that the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory and Article 48 of the Treaty does not in principle preclude a Member State from taxing a non-resident employed person in that State more heavily on his income than a resident in the same employment. [13]

27. In reaching that conclusion, the Court took account of the fact that 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, and that a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred, which is generally the place where he has his usual abode. The situation of a resident taxpayer is different in so far as the major part of his income is normally concentrated in the State of residence, and 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. [14]

The distinction between resident and non-resident taxpayers is objective. Residence is the criterion for liability to tax and even today it is the criterion on which international tax law is based, as expressed in the

11 — See the *Schumacker* judgment, cited in footnote 1, paragraph 24.

12 — Ibid., paragraphs 27 and 28.

13 — Ibid., paragraphs 31, 34 and 35.

14 — Ibid., paragraphs 32 and 33.

Model Double Taxation Convention of the Organisation for Economic Cooperation and Development (OECD). [15]

28. However, Mr Schumacker's situation did not fit in with this general scheme in so far as he received the major part of his taxable income from an activity performed in Germany and no significant income in Belgium, where he lived, so that Belgium was not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.

The Court considered that there is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances and that, *in the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence*, [16] discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment. [17]

29. The Court did not accept, as justification for such discrimination, the need to maintain the cohesion of the tax system in question by avoiding a non-resident's personal and family circumstances being taken into account twice because, in Mr Schumacker's case, the tax payable in the State of residence was insufficient for that purpose; nor did it accept that discrimination was justified by the administrative difficulties which may arise for the Member State of employment in ascertaining the income which non-residents working in its territory receive in their State of residence, because Directive 77/799/EEC [18] provides for ways of obtaining information comparable to those existing between tax authorities at national level.

30. The Court gave a ruling to the same effect in the *Wielockx* judgment a few months later. [19] Mr Wielockx was a Belgian national residing in Belgium and working

15 — M. Quaghebeur, 'A bridge over muddied waters. Coherence in the case law of the Court of Justice of the European Communities relating to discrimination against non-resident taxpayers' in *The EC Tax Journal*, vol. I, 1995/96, issue 2, p. 109 et seq., p. 133.

16 — P. Farmer, 'Article 48 EC and the taxation of frontier workers' in *European Law Review*, 1995, p. 310 et seq., p. 317. This writer considers that the Court rejected at the hearing by the United Kingdom that only non-residents with no income outside the State of employment could be regarded as being in the same position as residents.

17 — See the judgment cited in footnote 1, paragraphs 36 to 38. Apart from the existence of substantive discrimination between non-resident Community nationals and German nationals residing in Germany, the Court found unjustified discrimination of a procedural nature in so far as Community nationals who had no permanent residence or usual abode in Germany, but who received income there from employment, were refused the benefit, available to residents, first, of the annual adjustment of deductions at source in respect of wages tax, which prevented them, for reasons of administrative simplification, from claiming certain items in the assessment of tax, such as occupational expenses, special expenditure or extraordinary costs and, second, of asking the authorities for an annual calculation of tax.

18 — Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

19 — Cited in footnote 2.

as a partner in a physiotherapy practice in the Netherlands, where he received all his income, which was also taxed in the Netherlands under the double taxation convention between Belgium and the Netherlands. Although the Law on Income Tax authorised non-resident taxpayers receiving 90% of their worldwide income in the Netherlands to make deductions for personal obligations and extraordinary costs, they were not permitted to deduct the amount allocated to a pension reserve.[20] On the other hand, resident taxpayers could deduct from the income arising from their business amounts added to the pension reserve and that income was increased by amounts taken out of the reserve. When the taxpayer reached the age of 65 the pension reserve was to be liquidated; it was then treated as income and taxed, either once on the total capital or as and when periodic payments were made from that capital.

31. In the *Wielockx* judgment the Court held that if a non-resident taxpayer is not given the same tax treatment as regards deductions from his taxable income as a resident, his personal situation will be taken into account neither by the tax authorities of the State where he works — because he is not resident there — nor by the State of residence — because he receives no income there; consequently his overall tax burden will be greater and he will be at a disadvantage compared to a resident. The discrimination arose in that case because the non-resident taxpayer, who received all his income in the State where he worked, was not entitled to set up a pension reserve qualifying for deductions under the same tax conditions as a resident taxpayer.

32. However, in this case, where the taxpayer sought a right of deduction in respect of his personal circumstances, the question whether he also received all or almost all his family income in the Member State where he worked was neither raised nor discussed.

(b) The reply to the question from the national court

33. As I indicated when describing the German tax legislation in force, married Community nationals who reside with their spouse in another Member State and who fulfil the required conditions may now be regarded as taxable on the whole of their

20 — Article 44(1) of the Law of 16 November 1972, which amended the Nederlandse Wet op de Inkomstenbelasting (Law on income tax of natural persons) of 16 December 1964, establishes a voluntary pension-reserve tax scheme for self-employed persons, under which such persons may allocate a proportion of the profits of their business to form a pension reserve with the advantage that the amounts set aside remain in the business.

income, with income from foreign sources being taken into account for applying progressive tax rates, and they have the right to deductions in respect of their personal and family circumstances, such as business expenses, provident expenses and deductions for dependent children. Likewise, they have a right to choose the 'splitting' method of assessment and tariff.

34. The plaintiff in the main proceedings recognises that the new provisions enable non-resident Community nationals who receive taxable income in Germany to be treated fairly and in accordance with Community law. However, he observes that married Community workers not residing in Germany and not fulfilling the conditions prescribed by law for joint assessment suffer considerable disadvantages by comparison with resident married taxpayers. These disadvantages are that it is impossible to deduct the fixed sum for provident expenses from the taxable amount twice and, primarily, that such workers are not allowed to choose the 'splitting' method of assessment and tariff. In the plaintiff's opinion, since couples residing in Germany have this right to choose, even if they receive income from foreign sources which is tax-exempt in Germany, non-resident workers in a similar situation should have the same right to choose.

35. It is apparent from the documents before the Court that in 1992 Mr Gschwind's income from work in Germany totalled DEM 84 047, representing the whole of his own income and 58.32% of the couple's income, while his wife's income in the Netherlands in the same year was DEM 55 209, also representing the whole of her own income and 41.68% of the couple's income. Under these circumstances, according to German law, the only way in which they could have chosen joint assessment would have been for both of them actually to reside in Germany, even if in a secondary residence, as Mr Gschwind's residence alone was not sufficient.

36. Mr Gschwind's argument is that, although he does not live with his wife in Germany, the couple's income is taxable there only as to 58.32% and the income from a foreign source represents more than double the absolute maximum of DEM 24 000, under Community law he should be treated for tax purposes as if he and his wife fulfilled the condition of joint residence in Germany.

37. For the reasons which I shall now give, I cannot agree with that argument.

38. According to the Court's case-law, 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. [21]

39. As in the *Schumacker* case, the provisions in question apply irrespective of the taxpayer's nationality. However, where, in order to assess the taxpayer's marital situation from the tax viewpoint, legislation makes a distinction on the basis of residence or of the amount of the couple's income from foreign sources and imposes conditions which it is easier for residents than non-residents to fulfil, there will be a risk that nationals of other Member States may be adversely affected to a greater extent because non-residents are more often non-nationals. Under these circumstances it is true that provisions of the kind described may lead to indirect discrimination by reason of nationality.

40. However, the Court has also consistently held that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. [22]

41. To determine whether there is such indirect discrimination by reason of nationality, it is necessary to establish whether, as the rule applied to Mr Gschwind differs from that applied to resident taxpayers, he and they are in a comparable situation, in which case the reply will be in the affirmative, or whether, on the contrary, they are in a different situation, in which case the reply will have to be negative.

42. In this connection, particular importance attaches to the Court's observation that, in the matter of direct taxes, the situation of residents is not comparable with that of non-residents. I think this observation must always be the starting-point where it is necessary to reconcile the principle of equal treatment for workers exercising their freedom of movement with the taxing powers of Member States in the field of direct taxes. In my opinion, when the Court delivered the *Schumacker* and the *Wielockx* judgments it did not intend to do away with the generally accepted principle of international tax law, incorporated in the law of the Member States by means of the OECD Model Double Taxation Convention, that the overall taxation of taxpayers, taking account of their personal

21 — See the judgment in Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11.

22 — See the *Schumacker* and *Wielockx* judgments, cited in footnotes 1 and 2, paragraphs 30 and 17 respectively.

and family circumstances, is a matter for the State of residence.

43. What the situations of Mr Schumacker and Mr Gschwind have in common is that, first, neither they nor their wives lived in Germany and, second, in a particular tax year they both received the whole of their income in Germany.

The differences, on the other hand, are decisive. In the first place, so far as Mr Schumacker is concerned, his income constituted almost the entire income of his family whereas, in Mr Gschwind's case, his income is slightly more than half of the family income or, to be precise, 58.38% in 1991 and 58.32% in 1992. In the second place, neither Mr Schumacker nor his wife had in their State of residence any significant income which would have permitted their personal and family circumstances to be taken into account whereas, although Mr Gschwind had no income in his State of residence, his wife received there 41.62% of the family income in 1991 and 41.68% in 1992. Furthermore, Germany amended its legislation so as to allow a worker such as Mr Gschwind the same deductions relating to his personal and family circumstances as those to which a resident is entitled. The only reservation is that he has been refused the right to choose joint assessment of his income with that of his wife on the ground that, as 41% of the couple's worldwide income is received in the State of residence, that is sufficient to permit Germany to take the taxpayer's family circumstances into account.

44. I have reviewed the case of Mr Schumacker, who was the victim of discrimination because his personal and family circumstances were not taken into account in the State of employment or the State of residence, although his situation for income tax purposes was comparable to that of a resident in the same employment. I have also shown that Mr Gschwind's situation differed markedly from that of Mr Schumacker.

It remains to consider whether there are objective differences between Mr Gschwind's situation as a person liable to income tax in Germany and that of a resident taxpayer in the same employment.

45. To establish whether Mr Gschwind is the victim of covert discrimination by reason of nationality, it is not appropriate to compare him with a taxpayer living in Germany whose wife lives in another Member State, because the right to choose the 'splitting' method of assessment and tariff, which he has requested, is connected with marriage and is granted uncondition-

ally only to married persons who are not separated and who are both residents. In my opinion, the comparison should be made with a couple living in Germany, one of whom works in the Netherlands.

46. There are considerable objective differences between the situation of a married couple living in Germany, one of whom works in the Netherlands, and that of Mr and Mrs Gschwind: in the case of the former couple, one of the spouses will be partly taxable in the Netherlands, but the couple will remain taxable in Germany on the whole of their income, with the result that they may choose joint assessment because their personal and family circumstances will be taken into account in Germany. In the case of Mr and Mrs Gschwind, on the other hand, the wife works in the Netherlands, where she is taxable on the whole of her income and where she is entitled to the deductions allowed to married couples. Furthermore, neither she nor her income, representing more than 41% of the total earned by the couple, has any substantive or personal connection with Germany which would justify that income being taken into account there in order to reduce her husband's tax liability.

As the German Government observes, there is no doubt that, as Mr Gschwind receives the higher income of the couple, overall he would be liable to a lower rate of tax if his wife's income had to be taken into account and if two deductions, instead of one, were made on the whole of the income, while his wife would not be subject to a higher tax rate because the income of the two spouses would not be aggregated in the Netherlands, Mrs Gschwind being taxed on an individual basis.

In addition, her income must be taxed in the Netherlands. Otherwise the same occasion of charge would be taxable twice and it would not be possible to apply, in the Netherlands, the method of exemption or that of tax credits. Consequently her worldwide income would be taxed in two States as States of residence. [23]

47. In my opinion, Mr Gschwind's arguments could be accepted, in the light of the Court's case-law, only if, as a result of exercising his freedom of movement, his personal and family circumstances could not be taken into account in either the State of employment or the State of residence.

However, the State of employment allows him all the personal and family deductions

23 — M.A. Caamaño Anido and J.M. Calderón Carrero, 'Principio de no discriminación por razón de la nacionalidad: Aplicación en el ámbito de la imposición directa (IRPF)' in *Jurisprudencia tributaria del Tribunal de Justicia de las Comunidades Europeas (Comentarios y concordancias con la legislación española), 1992-1995*, Ed. La Ley-Actualidad, Madrid 1997, p. 96 et seq., pp. 104 and 105.

granted to residents, with the exception of the concessions inherent in the 'splitting' method, such as double the fixed deduction for provident expenses or the deduction of the costs of consulting tax advisers, irrespective of which spouse received the benefit or paid those costs. In my opinion, this is explained by the fact that the spouse in whose favour the second deduction would be made is non-resident, works in another Member State and has sufficient income from her work not only to be covered by the social security scheme of that State, but also to be taxable there, so that her personal and family circumstances will be taken into account there in accordance with its law. I do not see why Germany should permit Mr Gschwind to deduct from the joint taxable amount the sum of DEM 3 510 by way of provident expenses twice when his wife is employed in the Netherlands, she pays contributions there and, presumably, those contributions are taken into account in calculating her tax.

48. In the recent *Gilly*[24] judgment, the Court gave a ruling on the fact that Germany, as the State of employment, did not take account of a non-resident taxpayer's family circumstances. In that judgment, the Court observed that, although the taxpayer's individual income from employment was received in Germany, it was none the less aggregated within the basis for assessing the personal income tax payable by her tax household in France, where she was therefore entitled to the tax advantages, rebates and deductions provided for in the French legislation. The Court added that the German tax authorities were not obliged to take account of her personal and family circumstances in such a situation.

49. The fact that the Netherlands legislation on direct taxes does not provide for measures to protect the family which are the same as those of the German legislation is another question. However, to regulate income tax, the Member States have power to introduce the measures which they consider most appropriate for protecting the family unit, while at the same time complying with Community law. In the present case, they must grant the same tax concessions to migrant workers as to persons living in Germany who are in the same objective situation. However, Mr Gschwind and his wife are not in an objective situation similar to that of a couple living in Germany, one of whom travels to work in the Netherlands.

I must therefore conclude that the fact that the German income tax legislation does not give workers in Mr Gschwind's situation the right to choose the 'splitting' method of assessment and tariff does not constitute

24 — See Case C-336/96 [1998] ECR I-2793, paragraph 50.

covert discrimination by reason of nationality.

(c) Cases where a non-resident taxpayer receives most of his income and almost all his family income in a Member State

50. In the *Schumacker* judgment the Court only examined the situation where the taxpayer received most of his own income and almost all his family income in the State of employment, and did not consider the percentage required for that situation to arise. Paragraph 46 of the judgment cites the example of Germany, which already granted frontier workers resident in the Netherlands and working in Germany the tax benefits resulting from the taking into account of their personal and family circumstances, including the 'splitting tariff', since provided that they received at least 90% of their income in Germany those Community nationals were treated in the same way as German nationals under the Ausführungsgesetz Grenzgänger Niederlande (German Implementing Law on Netherlands frontier workers) of 21 October 1980. [25]

Moreover, before the *Schumacker* judgment was delivered, the Grenzpendlergesetz (Law on cross-border workers) of 24 June 1994 extended the rules laid down for workers living in Germany to all cross-border workers receiving at least 90% of their worldwide income in Germany.

51. The Commission for its part adopted Recommendation 94/79/EC, [26] with the object, *inter alia*, of bringing to the notice of the Member States the provisions which, in the Commission's view, are likely to guarantee that non-residents enjoy the same tax treatments as residents where the preponderant part of their income is received in the country of activity.

In the recommendation the Commission suggests that Member States do not subject certain items of income, including income from dependent personal services, in the Member State of taxation, to any heavier taxation than if the taxpayer, his spouse and his children were resident in that Member State. The Commission recommends that this measure be applied subject to the condition that the items of income which are taxable in the Member State in which the natural person is not resident

25 — German Law implementing the additional protocol of 13 March 1980 to the Double Taxation Treaty of 16 June 1959 between Germany and the Netherlands.

26 — Commission Recommendation of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (OJ 1994 L 39, p. 22).

constitute at least 75% of that person's total taxable income during the tax year.

52. Apart from the detail that the recommendation, as such, is not binding on the Member States, it does not consider how the State which taxes the income of the spouse receiving at least 75% of his income in that State should treat the income of the other non-resident spouse with regard to obtaining the benefit of a method such as 'splitting' which permits the couple's income to be taxed jointly. [27]

53. Until the Council adopts directives for harmonising the tax legislation applying to direct taxes [28] — which it is unlikely to do in the short or medium term [29] — I think the requirement imposed by the Court for the purpose of determining that there is no objective difference in situations which would justify unequal treatment as between a resident and a non-resident, namely that the non-resident must receive most of his income in his State of employment, is fulfilled whether the maximum is 90% or 75% of the taxpayer's total income.

54. Although the taxpayer is the individual and not the couple, it is clear that a method such as 'splitting' aims to assess the financial capacity of both spouses. Therefore, when it is proposed to grant the right to choose joint assessment without the residence condition normally required, it seems to me logical to impose other conditions instead, namely that most of the couple's income (90% as in Germany or 75% as proposed by the Commission) should be taxable by the State of employment and that, otherwise, the foreign income not taxable in that State, which is taken into account only in order to determine the tariff applying to the taxed income for the purpose of progressive tax rates, should be fixed at a relatively low level. In any case, it is clear that Mr Gschwind's income in Germany did not represent more than 58% of the couple's total income.

55. This enables the same rules to be applied to a non-resident Community worker who receives most of his income in the State of employment and to non-resident married couples who receive almost all their family income there as to resident workers, as otherwise there would be a strong probability that the taxpayer's

27 — J. Schaffner, 'L'arrêt Schumacker du 14 février 1995: Synthèse de la jurisprudence fiscale de la Cour de justice des Communautés Européennes en matière de libre circulation des travailleurs' in *Revue des Affaires Européennes*, 1995, No 2, p. 86 et seq., p. 92.

28 — T. Lyons, 'Discrimination against individuals and enterprises on grounds of nationality: direct taxation and the European Court of Justice' in *The EC Tax Journal*, 1995, p. 27 et seq., p. 35.

29 — Article 100A(2) of the Treaty provides that paragraph 1, which refers to the adoption of measures by a qualified majority, does not apply to, *inter alia*, fiscal provisions.

personal and family circumstances would not be taken into account either in the State of employment or in the State of residence.

On the other hand, the rules concerning the 'splitting' method of assessment and tariff which apply to residents are not applied where the Community worker's income in the State of employment, although exceeding 90% of his personal income, does not amount to almost all his family income because, in those circumstances, the State of residence can and must assess the taxpayer's situation globally, taking account of his family circumstances.

(d) The effect of the Court's judgment in *Asscher* on this interpretation [30]

56. The plaintiff in the main proceedings and the Commission seek support in that judgment for their view that Mr Gschwind has suffered discrimination prohibited by Article 48 of the Treaty because the tariff applied to him differs from that applying to a married worker living in Germany, which means that his taxable income is taxed at a higher rate. For my part, I do not think that judgment can be used to support this argument.

57. Mr Asscher was a Netherlands national working in the Netherlands and living in Belgium, where he also worked. In accordance with the convention between the two countries for the avoidance of double taxation, the income he received in the Netherlands was taxed there, while the remainder of his income was taxed in Belgium. The income received in the Netherlands was not taxed in Belgium, but was taken into account to determine the rate of tax there so as to allow for progressive tax rates. After he moved to Belgium, he was subject exclusively to that country's social security legislation and was insured under the compulsory scheme for self-employed persons.

58. As a result of amendment of the Netherlands legislation in 1989, a system was introduced for the joint collection of income tax and social security contributions on a uniform basis of collection. Under this system, the taxable income is the same as that on which social security contributions are calculated, so that the amount exempt from both tax and contributions is the same.

The scale of tax rates provided for two different rates for the first band of taxable

30 — Case C-107/94 [1996] ECR I-3089.

income. For taxpayers living in the Netherlands or persons treated as such, namely those whose worldwide income consisted entirely or almost entirely of income taxable in the Netherlands, the tax rate on the first band was 13% and the rate of contributions to the general national insurance scheme was 22.1%. The total rate levied on income in the first tax band for residents and persons treated as such was thus 35.1%. In contrast, for non-resident taxpayers who received less than 90% of their worldwide income in the Netherlands and who were not obliged to contribute to the Netherlands national insurance scheme, the tax rate on income in the first band was 25%. This was the rate which applied to Mr Asscher in respect of the income received in the Netherlands.

59. Of the five questions referred to the Court in the *Asscher* case, the first and the second have a link with the *Gschwind* case; in substance, these two questions asked whether Article 52 precluded a Member State from applying a higher rate of income tax to a Community national who pursues an activity as a self-employed person within its territory and at the same time pursues another activity as a self-employed person in another Member State in which he resides than it does to residents pursuing the same activity and whether the answer to that question is affected by the fact that less than 90% of the taxpayer's worldwide income consists of earnings which may be taken into account for income tax purposes by the State in which he works.

60. It is true that in paragraph 43 of the *Asscher* judgment the Court repeats the case-law developed in paragraphs 36 to 38 of the *Schumacker* judgment to the effect that if a Member State refuses tax benefits linked to the taking into account of personal and family circumstances to a taxpayer who works but does not reside in its territory, there is discrimination where the non-resident receives all or almost all of his worldwide income in that State since the income received in the State in which he resides is insufficient to allow his personal and family circumstances to be taken into account.

61. However, I must confess that I find it difficult to see the parallels between Mr Schumacker's situation, which I have already examined, and that of Mr Asscher, who was the director and sole shareholder of a private limited company in the Netherlands and who at the same time worked in Belgium as a company manager, receiving income in both States concerning which the file shows only that the income in the Netherlands did not constitute 90% of his worldwide income.

The former claimed that the State of employment should take account of his personal and family circumstances for income tax purposes, by granting him the appropriate deductions and also applying the 'splitting' method of assessment and tariff, because the State of residence could not grant him any concessions as he received no significant income there. The latter did not receive almost all his income in the Netherlands, and the file does not show what proportion of his total income was constituted by the income in the State of residence, the fundamental difference in

my opinion being that he requested the same rate of income tax in the Netherlands as that for residents, without being penalised because he did not have to pay national insurance contributions in that State; he did not claim that his personal or family circumstances should be taken into account in the Netherlands.

62. It is also clear that in *Asscher* the Court very quickly departed from its line of reasoning in *Schumacker* because, in paragraph 45, it observes that the difference in treatment (it does not say as between whom, but I infer that it must be the resident and the non-resident, leaving aside the fact that the latter received considerable income in the State of residence) was constituted by the fact that tax on income in the first band was charged at a rate of 25% on non-residents who receive less than 90% of their worldwide income in the Netherlands, but at 13% on those residing and pursuing the same economic activity in the Netherlands even if they receive less than 90% of their worldwide income there.

63. The Court went on to point out that, under the double taxation convention between Belgium and the Netherlands, the State in which the taxpayer resides, in this case Belgium, may nevertheless take the income received in the other State into account in calculating the amount of tax on the remaining income of the taxpayer concerned in order to apply the rule of progressivity. The Court concluded that the fact that a taxpayer was non-resident in the Netherlands did not enable him, in the circumstances under consideration, to escape the application of the rule of progressivity and that both categories of taxpayer were therefore in comparable situations with regard to that rule.

64. In the present case, however, the issue is not the application of progressive tax rates in the State of employment or the State of residence, but whether there is an objective difference in situation which may justify unequal treatment, with regard to the taking into account, for income tax purposes, of the taxpayer's family circumstances, between a Community national in Mr Gschwind's position and a national residing in the State of employment.

VII. Conclusion

65. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred by the Finanzgericht Köln:

Article 48 of the EC Treaty does not preclude the income tax legislation of the State of employment of a worker living with his spouse in another Member State from making that worker's right to choose the 'splitting' method of assessment and tariff subject to the condition that at least 90% of the couple's income be taxable in its territory or, otherwise, that the couple's income from foreign sources which is not taxable in the first State should not exceed a specified amount, even if the said right is not subject to conditions in the case of married couples living in its territory.