

OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 16 May 2006¹

1. By this reference for a preliminary ruling, the Bundesfinanzhof (Federal Finance Court, Germany) asks the Court to examine, with regard to the EC Treaty rules on freedom to provide services, certain provisions of German tax law relating to tax on the income of non-resident service providers engaged in activity in Germany in connection with musical performances.

2. This case raises in particular the issue of the compatibility with Article 59 of the EEC Treaty (later Article 59 of the EC Treaty, now, after amendment, Article 49 EC) and Article 60 of the EEC Treaty (later Article 60 of the EC Treaty, now Article 50 EC)² of both the procedure for collecting tax by retention at source which is applicable in that situation and certain rules for implementing that procedure.

1 — Original language: French.

2 — Since, as we shall see, the facts in the main proceedings occurred during the first and third quarters of 1993, and thus before the entry into force of the Maastricht Treaty, the EEC Treaty applies to those facts.

I — National legislation

3. Under Paragraph 1(4) of the German law on income tax (Einkommensteuergesetz) of 1990³ in force at the time of the facts in the main proceedings, natural persons who do not have their permanent or ordinary residence in Germany — apart from exceptions not arising in this case — have partial liability to income tax where they receive income in Germany within the meaning of Paragraph 49 of the EStG. Such income covers income from cultural, sporting, artistic or similar performances in Germany, including income from other services provided in connection therewith, irrespective of whom that income is paid to.⁴

4. In the case of persons with partial liability to tax, income tax is collected by way of retention at source, pursuant to Paragraph 50a(4)(1) of the EStG. It amounts to 15% of

3 — Law as amended by the Tax Amendment Law of 25 February 1992 (Steueränderungsgesetz, BGBl. 1992 I, p. 297) ('the EStG').

4 — Paragraph 49(1)(2)(d) of the EStG.

the receipts. The total amount of receipts is subject to this retention at source and deductions for such items as business expenses and special expenses are not permitted.⁵

8. Paragraph 50d lays down certain special rules where a convention for the avoidance of double taxation applies.

5. The income tax must be paid at the time payment is made to the payment creditor. At that point in time a payment debtor must make a retention of tax at source on behalf of a payment creditor with partial liability to tax, since he is considered to be the person liable for the tax (tax debtor).⁶

9. Accordingly, it is provided that if income which is liable to retention of tax at source under Paragraph 50a is not taxable or is taxable only at a lower rate under a convention for the avoidance of double taxation, the provisions concerning the retention, payment and declaration of the tax by the payment debtor must nevertheless be applied without prejudice to that convention. In such cases, the entitlement of the payment creditor to obtain a full or partial refund of the tax retained and paid is not affected.⁹

6. The payment debtor must pay the competent Finanzamt (Tax Office) the tax retained during a calendar quarter by the 10th day of the month following that quarter. That person is responsible for retaining and paying the tax.⁷

10. However, the debtor is permitted, under a convention of that type, not to make the retention at source or to make it at a lower level of tax if the Bundesamt für Finanzen (Federal Finance Office)¹⁰ certifies, upon application, that the conditions laid down to that effect are satisfied (exemption procedure).¹¹ In the absence of a certificate of exemption issued by the BfF, the payment debtor is therefore bound to retain tax at source.

7. Apart from exceptions not applying in this case, the tax on the income of persons with partial liability to tax is deemed to have been paid by means of the retention at source.⁸

5 — Paragraph 50a(4), third, fifth and sixth sentences, of the EStG.

6 — Paragraph 50a(5), first and second sentences, of the EStG.

7 — Paragraph 50a(5), third and fifth sentences, of the EStG.

8 — Paragraph 50(5) of the EStG. This is the 'discharging' effect of retention at source.

9 — Paragraph 50d(1), first and second sentences, of the EStG. This entitlement must be applied for on an officially prescribed form.

10 — 'The BfF'.

11 — Paragraph 50d(3), first sentence, of the EStG.

11. Also, where proceedings for liability are brought against the debtor for non-retention of tax at source, he is barred in those proceedings from relying on the rights of the payment creditor under a convention for the avoidance of double taxation.¹²

12. I should like to make clear that, according to the information supplied by the national court, the income derived from artistic services which is at issue in the main proceedings was not taxable in Germany, only in the Netherlands, under the convention between those two Member States for the prevention of double taxation.¹³

13. Lastly, it is appropriate to describe by way of comparison the situation of a service provider who has his permanent or ordinary residence in Germany and is therefore wholly liable to income tax in that Member State.

¹² — Paragraph 50d(1), last sentence, of the EStG.

¹³ — Convention of 16 June 1959 between the Federal Republic of Germany and the Kingdom of the Netherlands for the avoidance of double taxation in the area of income, capital and various other taxes and for regulating other tax matters (BGBl. 1960 II, p. 1782; 'the double taxation convention'). The national court refers to the provisions of Article 5(1) in conjunction with Article 1(2)(1)(a), Article 2(1)(1), (2) and (5), and Article 20(1) of that convention (see order for reference, p. 7).

14. That service provider is subject to the general obligation to submit a tax return as part of the procedure for the assessment of income tax. There is no obligation for the debtor of the payment made to that service provider to make a retention of tax at source and so he can incur no liability for non-retention of tax. Nor is the payment debtor liable for the income tax owed by the payment creditor.

II — Facts and procedure in the main proceedings

15. FKP Scorpio Konzertproduktionen GmbH ('Scorpio') is a company which organises concerts, with its registered office and central management in Germany. In 1993, it entered into a contract with a partner who signed under the name 'Europop', who made a group of musicians available to it. Europop is a natural person who at that time was established in the Netherlands and did not have his permanent or ordinary residence in Germany, nor did he maintain an establishment there. The national court states that it does not know Europop's nationality.

16. In the first and third quarters of 1993, Scorpio paid Europop a total of

DEM 438 600 for the services he provided. Scorpio failed to make the retention of tax at source from that amount provided for in Paragraph 50a(4)(1) of the EStG, even though Europop had not produced the exemption certificate mentioned in Paragraph 50d(3) of the EStG.

17. After it learned of those facts, the competent tax authority declared Scorpio liable and demanded, by a tax assessment notice of 21 March 1997, payment of DEM 70 395.30, being the amount of tax which Scorpio should have retained at source from the payment made to Europop, equivalent to 15% of the gross payment.

18. The objection made by Scorpio to the Finanzamt Hamburg-Eimsbüttel against that assessment notice was rejected. The Finanzgericht, to which the appellant subsequently turned, did not grant its application either, since it found that Scorpio had still not produced an exemption certificate from the BfE, contrary to what is required under Paragraph 50d(3) of the EStG.

19. Scorpio lodged an appeal on a point of law before the Bundesfinanzhof, claiming that the judgment of the Finanzgericht should be set aside and that the tax assessment notice should be annulled.

20. In support of its appeal, the appellant on a point of law puts forward in essence the following arguments.

21. First, Paragraph 50a(4), sixth sentence, of the EStG, in so far as it excludes the deduction of business expenses from the amount from which tax is retained at source, infringes Articles 59 and 60 of the Treaty. That follows from the judgment in *Gerritse*.¹⁴ According to the appellant on a point of law, the Court held in that case that business expenses should be allowed in reduction of tax under the procedure for tax retention at source and not only in a subsequent refund procedure.

22. Secondly, Paragraph 50d(1), fourth sentence, of the EStG, which bars the appellant as the party which may be held liable pursuant to Paragraph 50a(5), fifth sentence, of the EStG from relying on the tax exemption to which the payment creditor — in this case Europop — is entitled under the double taxation convention, is also contrary to the Treaty.

¹⁴ — Case C-234/01 [2003] ECR I-5933.

III — The reference for a preliminary ruling

23. The Bundesfinanzhof is uncertain, in the light of the facts and law thus described, as to the interpretation of Articles 59 and 60 of the Treaty.

24. First it maintains that the Court, in *Gerritse*, did not give a ruling on whether levying tax by way of a retention at source calculated on the basis of gross income and the liability rule supporting that procedure also constitute indirect discrimination contrary to Articles 59 and 60 of the Treaty even if the non-resident is afforded the opportunity, in a procedure subsequent to the tax retention at source, to be taxed on the basis of his net income in Germany, and thus obtain a refund of any difference between the amount of that tax and the amount of tax retained at source. With regard to that refund procedure, the national court refers to a letter from the Federal Ministry of Finance of 3 November 2003.

25. With regard to the levying of tax by way of retention at source and the risk of liability being incurred by the party required to make the retention, the Bundesfinanzhof notes that these may place non-resident service providers in a less advantageous position than resident service providers and may thus

constitute indirect discrimination prohibited under Articles 59 and 60 of the Treaty. According to that court, retention of tax at source may, for example, lead to liquidity problems for a non-resident, whereas a resident's business receipts are not as a rule subject to such a retention. Retention at source also entails the risk for non-residents that they may not be able to obtain a tax refund pursuant to Paragraph 50d(1), second sentence, of the EStG if the payment debtor has not paid over to the tax authority the tax which he has retained.

26. The national court also notes that the payment debtor's obligation to retain tax and his risk of being held liable for non-retention or insufficient retention of tax constitute competitive disadvantages for non-resident service providers since they may induce recipients of such services to employ the services of residents instead of obtaining equivalent services from non-residents. Recipients of services would thereby avoid the costs and risks associated with retention of tax at source.

27. The national court infers from this that the procedure of retention of tax at source and the associated liability rule may make provision of services between Member States

more difficult than provision of services within one Member State, and thereby run counter to the objective of Article 59 of the Treaty.

lands on mutual administrative assistance for the recovery of tax claims and the disclosure of documents,¹⁷ the Kingdom of the Netherlands was not obliged, in cases such as this, to recover German income tax claims.

28. According to that court, however, the disadvantages for non-resident service providers and the burdens for the payment debtor which are entailed by the procedure of retention at source and the liability rule may nevertheless be justified.

30. Moreover, according to the national court, the assessment of income tax levied by way of retention at source on the basis of gross income, subject to a subsequent refund procedure on application by the non-resident service provider, does not infringe Articles 59 and 60 of the Treaty. The payment creditor does not as a rule inform the payment debtor, who is obliged to make the retention at source, of the amount of his business expenses, in particular so as not to reveal the bases for his cost calculations and his profit margin or any other business secrets. The Bundesfinanzhof considers therefore that if the non-resident service provider were required to inform the customer of the expenses economically connected with his service, so that the tax to be retained at source could be assessed on the basis of net income, cross-border provision of services would be made considerably more difficult.

29. The Bundesfinanzhof notes in that regard that the procedure and rule in question are legitimate and appropriate methods for the tax treatment of non-resident service providers in respect of their income in Germany and for avoiding non-taxation of income in that Member State and in the State in which the service provider is established. In its view, it should also be borne in mind that, before the amendment of Directive 76/308/EEC¹⁵ by Directive 2001/44/EC¹⁶ and the entry into force on 23 June 2001 of the convention of 21 May 1999 between the Federal Republic of Germany and the Kingdom of the Nether-

31. The national court also raises the question whether indirect discrimination contrary to Articles 59 and 60 of the Treaty

15 — Council Directive of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18).

16 — Council Directive of 15 June 2001 amending Directive 76/308 and in respect of value added tax and certain excise duties (OJ 2001 L 175, p. 17). The third recital in the preamble to Directive 2001/44 states that 'claims relating to certain taxes on income and capital ... should be added to the scope of the mutual assistance provided for by Directive [76/308]'.

17 — BStBl. 2000 I, p. 66.

exists where, under a double taxation convention, a non-resident service provider can obtain, or could have obtained if he had submitted an application in due time, an exemption from the tax retention at source or a refund of the tax retained at source in accordance with the relevant provisions of German tax law.

32. Lastly, the national court states that the outcome of the main proceedings could hinge on whether Europop was or was not a national of a Member State during the year in question. It refers in particular to the case-law of the Court according to which Article 59 of the Treaty confers rights not only on the provider of services but also on the recipient.¹⁸ The view taken in the legal literature on this question is that this 'passive' freedom to provide services does not require the provider of services to be a national of a Member State.

33. In the light of the provision contained in the second paragraph of Article 59 of the Treaty, the national court considers it doubtful whether that interpretation of the Treaty is correct.

¹⁸ — The national court cites Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447.

34. It was in those circumstances that the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Must Articles 59 and 60 of the [EEC] Treaty be interpreted as meaning that they are infringed if a payment debtor established in Germany of a payment creditor established in another State of the European Union (in this case: in the Netherlands), who holds the nationality of a Member State, can be held liable under Paragraph 50a(5), fifth sentence, of the [EStG] because he has failed to retain tax at source pursuant to Paragraph 50a(4) of the EStG, whereas payments to a payment creditor who is wholly liable to income tax in Germany (a German) are not subject to any retention of tax at source pursuant to Paragraph 50a(4) of the EStG and therefore no liability of the payment debtor for not making a retention or not making a sufficient retention of tax at source can arise?

(2) Is the answer to Question 1 different if, at the time of providing his service, the payment creditor established in another State of the European Union is not a national of a Member State?

- (3) If the answer to Question 1 is in the negative:
- (a) Are Articles 59 and 60 of the [EEC] Treaty to be interpreted as meaning that business expenses incurred by a payment creditor established in another State of the European Union and economically connected with his activities in Germany giving rise to the payments must be taken into account in reduction of tax by the payment debtor at the time of retaining tax at source pursuant to Paragraph 50a(4) of the EStG because Germans too are subject to income tax only on the net income remaining after retention of business expenses?
 - (b) Is it sufficient for the purpose of avoiding an infringement of Articles 59 and 60 of the [EEC] Treaty if, in retaining tax at source pursuant to Paragraph 50a(4) of the EStG, only the business expenses economically connected with the activity in Germany giving rise to the claim for payment and which the payment creditor established in another State of the European Union has reported to the payment debtor are taken into account in reduction of tax, and any further business expenses can be taken into account in a subsequent refund procedure?
 - (c) Are Articles 59 and 60 of the [EEC] Treaty to be interpreted as meaning that they are infringed if the tax exemption to which a payment creditor established in the Netherlands is entitled in Germany under the double taxation convention between the Federal Republic of Germany and the Kingdom of the Netherlands is initially disregarded in the retention of tax at source pursuant to Paragraph 50a(4) in conjunction with Paragraph 50d(1) of the EStG and only allowed in a subsequent procedure for exemption or refund and the payment debtor is likewise not entitled to rely on the tax exemption in proceedings concerning liability, whereas Germans' tax-free income is not subject to any retention of tax and therefore no liability for non-retention or insufficient retention of tax at source can arise either?
 - (d) Are the answers to Question 3(a) to (c) different if the payment creditor established in another State of the European Union is not a national of a Member State at the time of providing his service?

35. The national court explains, in essence, that the answers to these questions will enable it to ascertain whether or not the liability proceedings brought against the appellant in the main proceedings for failing to retain tax at source infringe Community law and, if not, what the extent of the appellant's liability is.

37. The national court therefore requests the Court to rule, in the light of the Treaty rules on freedom to provide services, both on the application to non-resident service providers of a procedure for retaining income tax at source and on its corollary, namely the liability that may be incurred by a recipient of services if he fails to make such a retention at source on a payment made to a service provider.

IV — Analysis

A — Question 1

36. By its first question, the Bundesfinanzhof is seeking a ruling from the Court on whether Articles 59 and 60 of the Treaty must be interpreted as meaning that they preclude a national law under which, in connection with the cross-border provision of a service, a recipient of services established in one Member State can be held liable in that Member State because he has failed to retain at source the tax on a payment made to a service provider residing in another Member State in consideration for that service, whereas payments to a service provider residing in the first State would not be subject to such a retention and therefore no liability of the payment debtor, the recipient of services, for failing to retain tax at source can arise.

38. All the parties which submitted observations in these proceedings, namely Scorpio, the Federal Republic of Germany, the Kingdom of Belgium, the Kingdom of Spain, the Italian Republic, the United Kingdom of Great Britain and Northern Ireland, and the Commission of the European Communities, propose that the answer to the first question should be negative.

39. I am also of the view that Articles 59 and 60 of the Treaty do not preclude either the principle of collection by means of retention at source of tax owed by a non-resident service provider or the potential liability of a recipient of services for failing to retain tax at source.

40. As regards the potential existence of a restriction on freedom to provide services, it

is appropriate to recall that the Court has consistently held that 'although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law'.¹⁹

41. In the view of the Court, Article 59 of the Treaty 'precludes the application of any national legislation which without objective justification impedes a provider of services from actually exercising that freedom'.²⁰ Also, in the perspective of a single market and in order to permit the realisation of its objectives, Article 59 of the Treaty also precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.²¹

42. Also, under the last paragraph of Article 60 of the Treaty, '... the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals'.

19 — See, in particular, Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 28 and case-law cited.

20 — See, in particular, Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 16, and Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 22.

21 — See, for example, *Commission v France*, paragraph 17; *Safir*, paragraph 23; and *Danner*, paragraph 29.

43. The provisions of national tax law which are at issue in the present case concern the procedure for the collection of income tax which is applied in the case of payment received by a service provider who does not reside in Germany. I would point out in that regard that the Court has been required to consider on a number of occasions, with regard to the Treaty rules relating to freedom of movement for workers, procedures applying to non-resident taxpayers with regard to income tax.²² In my view, there is nothing to prevent the same from applying with regard to freedom to provide services.

44. In the present case, it must be stated that under the national tax law there is a difference in treatment between resident and non-resident service providers with regard to the procedure applying to them in respect of collection of income tax. Whereas service providers residing in Germany are taxed on their incomes at the end of each year as part of the procedure for the assessment of income tax, those not residing in that Member State have tax retained at source there from their payments.

45. Non-resident service providers may, as a result of this difference in treatment, be

22 — See, in particular, Case C-175/88 *Biehl* [1990] ECR I-1779; Case C-279/93 *Schumacker* [1995] ECR I-225; and Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685.

placed in a less advantageous position than residents, to the extent, in particular, that the former are deprived of a cash flow advantage in relation to the latter. Non-resident service providers might then be deterred from carrying out their activities in Germany.

resident service providers is justified by the need to ensure that income tax is collected effectively.

46. In addition, the difference in treatment which exists as regards the collection of tax may be a factor that encourages a recipient of services to approach a service provider residing in Germany rather than a service provider residing in another Member State. It is likely that some recipients of services, the payment debtors, will prefer to avoid placing themselves in a situation in which they have to bear the expense and administrative constraints associated with the collection of tax by retention at source and in which they risk incurring liability for non-retention or insufficient retention of tax at source.

48. As the national court has noted, and as *Scorpio* considers,²³ it is necessary in that regard to take into account the difficulty which existed at the relevant time, that is to say in 1993, for a Member State of taxation to recover a tax claim in another Member State, given the legal instruments which were in force at that time. It was only with Directive 2001/44 that the scope of the mutual assistance for the recovery of tax claims introduced by Directive 76/308 was extended to income tax claims. In addition, the double taxation convention did not apply during the period at issue to mutual administrative assistance for the recovery of tax claims because the two States did not conclude a convention on that matter until May 1999.

47. However, the difference in treatment established by the German tax legislation does not, as such, appear to me to infringe Articles 59 and 60 of the Treaty in so far as, on the one hand, resident and non-resident service providers are in an objectively different situation with regard to the requirements concerning the collection of tax and, on the other hand, the procedure for retaining tax at source applying to non-

49. Therefore, as regards the income tax payable by a non-resident service provider in respect of the period at issue, I consider that recourse to the technique of retention of tax at source was justified by the need to ensure

23 — Written observations (p. 17).

the tax was collected effectively, and represented a proportionate means of collecting the tax debts of the State of taxation.

50. The same applies, in my view, with regard to the possibility of a recipient of services who is required to make such a retention incurring liability, which would, where necessary, make it possible to penalise non-retention at source. In so far as such liability constitutes the corollary of that method of collecting income tax, it also contributes, in a proportionate way, to ensuring the tax is collected effectively.

51. In my view, therefore, it follows from the above considerations that, in the case of income tax payable in respect of the period at issue, Articles 59 and 60 of the Treaty must be interpreted as not precluding a national law under which, in connection with the cross-border provision of a service, a recipient of services established in one Member State can be held liable in that State because he has failed to retain at source the tax on a payment made to a service provider residing in another Member State in consideration for that service, whereas payments made to a service provider residing in the first State would not be subject to such a retention and therefore no liability of the payment debtor, the recipient of services, for non-retention of tax at source could arise.

52. In view of the negative answer I propose for the first question, there is no need to answer the second question.

53. It is appropriate to consider now whether certain detailed rules relating to retention at source, as laid down in the German tax law, comply with the provisions of Articles 59 and 60 of the Treaty. That is the subject of Question 3(a).

B — *Question 3(a)*

54. By this question, the Bundesfinanzhof is seeking a ruling from the Court on whether Articles 59 and 60 of the Treaty must be interpreted as precluding a national tax law under which the debtor of a payment made to a non-resident service provider cannot, when retaining tax at source, deduct from taxable income the business expenses of that service provider which are economically connected with his activities in the State in which the service is provided, whereas a service provider residing in the first State would be taxed only on his net income, that is to say, after retention of business expenses.

55. In order to answer that question, it is first necessary to understand clearly the contribution made by the judgment in *Gerritse* with regard to the deductibility of business expenses.

56. In that case, Mr Gerritse, a Netherlands national residing in the Netherlands, had received in 1996 payment for performing as a drummer at a radio station in Berlin. That payment had been subject to income tax, at a rate of 25%, collected by means of retention at source. Before the Court, Mr Gerritse and the Commission contended in particular that in the case of self-employed persons who were wholly taxable, only the 'profit' was subject to income tax, business expenses being generally excluded from the basis of assessment, whereas in the case of persons with partial liability to tax the tax of 25% was levied on 'receipts', business expenses being non-deductible.²⁴ Mr Gerritse had also argued that the contested provisions of the German tax law had serious consequences for non-resident artists on tour in Germany, whose business expenses were often very high.

57. In its judgment, the Court held that 'a national provision which, in matters of

taxation, refuses to allow non-residents to deduct business expenses, whereas residents are allowed to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality, contrary in principle to Articles 59 and 60 of the Treaty'.²⁵

58. In order to arrive at that finding, the Court had to satisfy itself that the situations of residents and non-residents were comparable with regard to the possibility of deducting business expenses. From that point of view, it held that 'the business expenses in question are directly linked to the activity that generated the taxable income in Germany, so that residents and non-residents are placed in a comparable situation in that respect'.²⁶

59. The criterion for comparability between residents and non-residents lies here in the idea that, in the case of income obtained from carrying on the same business activity in Germany, both categories of taxpayer experience, in the same way, a cut in that income as a result of the business expenses they have had to incur directly in connection with the activity in question. In so far as there is no objective difference between them from that point of view, applying

24 — As stated in paragraph 25 of *Gerritse*, an exception to non-deductibility was however made in the EStG of 1996 where business expenses were higher than half of the receipts, in which case tax was repaid in so far as it exceeded 50% of the difference between the receipts and the business expenses.

25 — Paragraph 28.

26 — Paragraph 27.

different treatment to them as regards the possibility of deducting such expenses constitutes indirect discrimination on grounds of nationality contrary to Articles 59 and 60 of the Treaty.

60. The Court therefore acknowledged that resident and non-resident service providers must be treated in the same way as regards the basis on which they are assessed. No specific question was referred to the Court and so it did not give an express ruling as regards the stage of the taxation procedure at which the business expenses incurred by a service provider should be taken into account.

61. The Bundesfinanzhof is now seeking a specific ruling from the Court on whether or not Articles 59 and 60 of the Treaty preclude the retention of such business expenses from taxable income not being possible at the point when the payment debtor retains tax at source.

62. It is clear that where national tax law does not provide a non-resident service provider with a procedure for annual adjustment of tax or for a refund to take into account his business expenses after the event, that is to say, after tax has been retained at source, Articles 59 and 60 of the

Treaty, as interpreted by the Court in *Gerritse*, necessarily preclude the deduction of such expenses from taxable income not being possible at the time when the payment debtor retains the tax at source.

63. In such a situation, failure to take business expenses into account at the stage of retention of tax at source would equate to treating resident and non-resident service providers differently with regard to the actual possibility of deducting such expenses, which constitutes, as the Court held in that judgment, indirect discrimination on grounds of nationality in breach of Articles 59 and 60 of the Treaty.

64. Also, with regard to the possibility of persons with partial liability to tax having their business expenses taken into account after the event, it is appropriate to note that in *Schumacker* the Court examined, in the light of the Treaty rules on freedom of movement for workers, provisions of German tax law under which the benefit of procedures such as annual adjustment of retentions at source in respect of wages tax and the assessment by the administration of the tax payable on income from employment was available only to residents.

65. The Court established first of all that, according to the information supplied by the national court, by virtue of the discharging effect of the retention at source, 'non-residents are ... deprived, for reasons of administrative simplification, of the possibility of relying, in the procedure for the annual adjustment of retentions at source or in connection with the assessment by the administration of tax on remuneration from employment, on certain items forming part of the basis of assessment (for example, *occupational expenses*, special expenditure or so-called extraordinary costs) which might give rise to a partial refund of the tax deducted at source'.²⁷ In the view of the Court, non-residents might thereby 'be placed in a less advantageous position than residents' in so far as the German tax law made provision for the latter to be taxed 'in such a way that all items forming part of the basis of assessment are taken into account'.²⁸

66. In that context, the Court's statement that 'Article 48 of the Treaty requires equal treatment at procedural level for non-resident Community nationals and resident nationals'²⁹ is closely linked to the obligation on Member States not to tax the former more heavily than the latter without objective reason.

²⁷ — *Schumacker*, paragraph 51 (emphasis added).

²⁸ — *Ibid.*, paragraph 52.

²⁹ — *Ibid.*, paragraph 58.

67. It is that line of reasoning which led the Court to rule that 'Article 48 of the Treaty must be interpreted as precluding a provision in the legislation of a Member State on direct taxation under which the benefit of procedures such as annual adjustment of retentions at source in respect of wages tax and the assessment by the administration of the tax payable on remuneration from employment is available only to residents, thereby excluding natural persons who have no permanent residence or usual abode on its territory but receive income there from employment'.³⁰

68. That reasoning is valid in respect of freedom to provide services, so that it may in my view be inferred from this that Articles 59 and 60 of the Treaty also preclude failure to take business expenses of non-resident service providers into account after the event where that possibility exists in the case of resident service providers.

69. As regards the existence in German tax law of a procedure allowing non-resident service providers to have their business expenses taken into account after the event, and thereby be refunded any difference

³⁰ — *Ibid.*, paragraph 59.

between the amount of their net income in Germany and the amount of tax retained at source,³¹ the national court refers to a letter from the Federal Ministry of Finance dated 3 November 2003.³²

70. In its written observations,³³ Scorpio states, however, that, contrary to what was the case for resident service providers, the possibility of persons with partial liability to tax having their business expenses taken into account after the event did not exist in 1993, the year at issue. Scorpio also states that it was not possible to apply after the event for a refund of an overpayment of tax under what is known as the 'simplified refund' procedure until 1996.³⁴

71. Although this information gives cause to doubt whether a refund procedure existed in 1993 which allowed business expenses incurred by non-resident service providers to be taken into account after the event, it is important to stress that it is the responsibility of the national court to decide what

national law is applicable in the main proceedings. It will therefore be for the Bundesfinanzhof to determine whether the German tax law which was in force at the relevant time did provide a refund procedure for non-resident service providers. If that determination were to lead it to conclude that it was impossible for such service providers to have their business expenses taken into account after the event, whereas such a possibility existed for resident service providers, it would be necessary for that court to consider that the law in force at that time was on that point contrary to Articles 59 and 60 of the Treaty, as interpreted by the Court in *Schumacker* and *Gerritse*.

72. Having given those clarifications, I note that it is apparent from the Bundesfinanzhof's order for reference that that court, on the basis of a different premiss, seeks to ascertain whether, in view of what the Court held in *Gerritse*, the levying of tax by means of retention at source calculated on the basis of gross income and the liability rule deriving from it also constitute indirect discrimination in breach of Articles 59 and 60 of the Treaty, since the possibility is offered to a non-resident service provider to obtain after the event a refund of any difference between

31 — Such a procedure does not appear to correspond to the one provided for in Paragraph 50d(1), second sentence, of the EStG. That provision concerns the particular case of total or partial refund of tax retained and paid where, under a convention for the avoidance of double taxation, the income in question cannot be taxed, or can only be taxed at a lower rate, in Germany.

32 — According to the explanations supplied by the Federal Republic of Germany in paragraph 50 of its written observations, that letter was a measure taken following the judgment in *Gerritse* in order to allow 'offsetting' in the context of a procedure for refunding tax.

33 — Written observations (p. 13).

34 — Scorpio refers in that regard to Paragraph 50(5), fourth sentence, point 3, of the EStG of 1996.

the amount of his net income in Germany and that of the tax retained at source.³⁵

73. In other words, should the Court go so far as to adopt an interpretation whereby, even in a case where the possibility of taking into account the business expenses incurred by a non-resident service provider after the event is provided for by national tax law, Articles 59 and 60 of the Treaty preclude the payment debtor from not being able, under that law, to deduct such expenses from his payment at the time when he retains the tax at source?

74. I think not.

75. In so far as the national procedural framework thus described ultimately allows a non-resident service provider to deduct from his taxable receipts the business expenses he has incurred, the determining factor, in my view and in the light of the case-law analysed

35 — I should like to point out in that regard that it is clear from the facts and law in *Gerritse* that, under the German tax law in force in 1996, the applicant in the main proceedings did not benefit from a procedure for annual adjustment or assessment that would have made it possible to take into account his business expenses after the event, that is to say, after tax had been retained at source. Moreover, Mr Gerritse did not fulfil the conditions which would have allowed him to benefit from the refund procedure provided for in Paragraph 50(5), fourth sentence, point 3, of the EStG of 1996, since that procedure applies only where the business expenses are higher than half of the receipts, in which case tax may be repaid if it exceeds 50% of the difference between the receipts and the business expenses.

above, is that that service provider should not, at the end of the day, be taxed more heavily than a service provider residing in Germany. As both those categories of taxpayer are therefore treated in a comparable manner with regard to the option open to them to deduct business expenses from their taxable income, I consider that the mere fact that such expenses cannot be deducted from a non-resident service provider's taxable receipts at the actual point when the tax is retained at source does not constitute an infringement of Articles 59 and 60 of the Treaty.

76. I am therefore of the view that the answer that should be given to the Bundesfinanzhof is that Articles 59 and 60 of the Treaty must be interpreted as not precluding a national tax law under which the debtor of the payment made to a non-resident service provider cannot, when he retains tax at source, deduct from taxable income the business expenses of that service provider which are economically connected with his activities in the State in which the service is provided, on condition, however, that those expenses may be taken into account after the event and therefore that a non-resident service provider is not ultimately taxed more heavily than a resident service provider.

77. In view of the negative answer I am thus proposing the Court should give to Question

3(a), there is no need to answer Question 3(b). I shall therefore proceed directly to consideration of Question 3(c).

many, only in the Netherlands, under the double taxation convention between those two Member States.³⁶

C — Question 3(c)

78. By this question, the Bundesfinanzhof is asking the Court whether Articles 59 and 60 of the Treaty must be interpreted as precluding, on one hand, the tax exemption which a non-resident service provider who has pursued his activity in Germany enjoys under the double taxation convention between the Federal Republic of Germany and the Kingdom of the Netherlands from not being taken into account under the procedure for retention of tax at source by the payment debtor, but only under a subsequent exemption or refund procedure and, on the other hand, as precluding the payment debtor from not being able to rely on that tax exemption in proceedings concerning liability brought against him.

79. According to the information supplied by the national court, the income derived from artistic services which is at issue in the main proceedings was not taxable in Ger-

80. Also, under Paragraph 50d(1) of the EStG, where income which is subject to retention of tax at source pursuant to Paragraph 50a of that law cannot be taxed, or can only be taxed at a lower rate of tax, under a double taxation convention, the provisions of national tax law relating to retention, payment and declaration of tax by the payment debtor must apply nevertheless without prejudice to that convention. In that case, the right of the payment creditor to obtain a total or partial refund of the tax retained and paid is not affected.

81. However, under the provisions of Paragraph 50d(3), first sentence, of the EStG, the payment debtor may, under a convention of that type, refrain from making a retention of tax at source or make it at a lower rate of tax if the BfF certifies on application that the relevant conditions are met (exemption procedure). The payment debtor is therefore required to retain tax at source except where an exemption certificate has been issued by the BfF.

³⁶ — See point 12 and footnote 13 above.

82. The first part of Question 3(c) must therefore be understood as seeking to ascertain, in essence, whether Articles 59 and 60 of the Treaty preclude a national tax law which allows a tax exemption pursuant to a double taxation convention to be taken into account at the stage at which tax is retained at source only where an exemption certificate is issued by the competent tax authority.

83. As the Court has held, 'in the absence of unifying or harmonising measures adopted in the Community, in particular under the second indent of Article 220 of the EC Treaty (now the second indent of Article 293 EC), the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means, *inter alia*, of international agreements. In this context, the Member States are at liberty, in the framework of bilateral agreements concluded in order to prevent double taxation, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves'.³⁷

84. The Court also said that '[a]s far as the exercise of the power of taxation so allocated is concerned, the Member States never-

theless may not disregard Community rules',³⁸ in so far as they are required to exercise their powers with regard to direct taxation consistently with Community law.

85. One of the difficulties in the present case is deciding whether the procedure that a non-resident service provider must follow in order to obtain an exemption certificate from the BfF, since it involves determining whether the criteria for the taxation of income laid down in the double taxation convention are met, falls within the Treaty rules on freedom to provide services.

86. In so far as the implementation of that procedure is closely linked to the definition of connecting factors for the purposes of allocating powers of taxation between the Federal Republic of Germany and the Kingdom of the Netherlands, it could be argued that it does not fall within the scope of Community law and is a matter concerning only the bilateral relationship which those two States have established between themselves in order to avoid double taxation.

87. However, the question referred by the national court does not relate to the actual definition of the criteria for taxation which enable those two States to allocate their

37 — Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 57. See also, to that effect, Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 24 and 30.

38 — *Saint-Gobain*, paragraph 58.

powers of taxation between themselves, but rather to the exercise by the Federal Republic of Germany of what it considers falls within its power of taxation with regard to a non-resident service provider where the latter has neither applied for nor obtained an exemption certificate. In exercising such power, the Federal Republic of Germany is required to comply with Community law, and in particular Articles 59 and 60 of the Treaty.

entitled to exemption.³⁹ Also, it appears to me to be justified to allow the competent tax authority to determine whether the conditions for exemption are met, since, as the Federal Republic of Germany contends, the payment debtor himself cannot be required to clarify in each individual case whether or not the income in question is exempt under a double taxation convention.⁴⁰ Lastly, to allow a payment debtor unilaterally to refrain from retaining tax at source might, in the event of an error on his part, have the effect of prejudicing the collection of the tax from the payment creditor.

88. In that regard, it must, in my view, be considered that the obligation incumbent on a non-resident service provider to apply to the BfF for an exemption certificate in order to avoid taxation of his income in Germany constitutes a restriction on the freedom to provide services due to the administrative steps which it involves at the service provider's expense.

91. I am therefore of the view that Articles 59 and 60 of the Treaty do not preclude a national tax law which allows a tax exemption pursuant to a double taxation convention to be taken into account at the stage at which tax is retained at source only where an exemption certificate is issued by the competent tax authority.

89. However, I consider that restriction to be objectively justified in order to ensure the correct implementation of the procedure for taxation at source.

90. As the Kingdom of Belgium contends, it is important that the payment debtor should be able to refrain from retaining tax at source only if he is certain that the service provider meets the conditions under which he is

92. In order to answer the second part of Question 3(c), it now remains to be decided whether Article 59 of the Treaty precludes

39 — Written observations (paragraph 12).

40 — Written observations (paragraph 77).

the payment debtor not being able to rely on the tax exemption pursuant to the double taxation convention in liability proceedings brought against him.⁴¹

93. As we saw when considering Question 1, Articles 59 and 60 of the Treaty must, in my view, be interpreted as not precluding a national law under which, in connection with the cross-border provision of a service, a recipient of services established in one Member State can be held liable in that State because he has failed to retain at source the tax on a payment made to a service provider residing in another Member State in consideration for that service.

94. Such liability proceedings, which constitute the corollary of the procedure for retention of tax at source, help to achieve, in a proportionate manner, the objective of ensuring that tax is collected effectively.

41 — Under Paragraph 50d(1), last sentence, of the EStG, where proceedings concerning liability are brought against a payment debtor for non-retention of tax at source, that person may not, in those proceedings, rely on rights which a double taxation convention confers on the payment creditor.

95. However, with regard to the rules regarding the bringing of such proceedings, it appears to me to be disproportionate in relation to such an objective for the payment debtor not to be able to rely on a tax exemption under a double taxation convention in proceedings concerning liability.

96. Where the payment creditor has not applied for an exemption certificate and the payment debtor has nevertheless decided not to retain the tax at source and the German tax authorities are therefore holding him liable, it is, in my view, contrary to the freedom to provide services to refuse categorically to allow him to rely on the creditor's rights under a double taxation convention. Such a ban is liable to deter him from approaching a service provider established in another Member State, and also goes beyond what is necessary with regard to the objective of ensuring effective collection of tax.

97. In that regard, as Scorpio states, it should be noted that at the stage of proceedings concerning liability the German tax authorities are in a position to determine whether the conditions for exemption laid down in the double taxation convention are met and, if so, they should be able to withdraw the proceedings against the payment debtor concerning a tax which it has

been finally established does not have to be paid in Germany.⁴² Following the example of the appellant in the main proceedings, it should also be pointed out that if the BfF can make such a determination in the context of an exemption procedure prior to retention at source, the German tax authorities should also be able to make it in the context of subsequent proceedings concerning liability.⁴³

D — *Question 3(d)*

99. By this last question, the Bundesfinanzhof is asking the Court whether the answers to Question 3(a) to (c) would be different if the payment creditor, established in another Member State, was not a national of a Member State when he provided his service.⁴⁴

100. This raises the question of principle of the applicability of the Treaty rules relating to freedom to provide services in a case where the recipient of services who relies on those rules is a national of Member State and the service provider is a national of a non-member country.

98. In view of this, I propose that the answer to the Bundesfinanzhof should be that Articles 59 and 60 of the Treaty must be interpreted as not precluding a national tax law which allows a tax exemption pursuant to a double taxation convention to be taken into account at the stage at which tax is retained at source only where an exemption certificate is issued by the competent tax authority. However, Article 59 of the Treaty precludes the payment debtor not being able to rely on a tax exemption under a double taxation convention in liability proceedings brought against him.

101. It is necessary first of all to consider the admissibility of this question.

102. The national court states that it does not know Europop's nationality. Its question is therefore based on a hypothesis which

42 — Written observations (p. 31).

43 — In that regard, it may avail itself of the opportunities offered by 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 1977 L 336, p. 15).

44 — In view of the answers I propose should be given to Question 3(a) and the first part of Question 3(c), it is only relevant to answer this question in relation to the second part of Question 3(c).

remains to be verified. However, the Court has consistently held that it may refuse to rule on a question referred for a preliminary ruling by a national court 'where the problem is hypothetical'.⁴⁵

103. I am of the view that the Court could, however, agree to answer the question referred by the Bundesfinanzhof since, as a judge of the law and not of the facts, it does not make findings as regards the facts. Its task is to resolve issues of principle, on the basis of the facts established by the Finanzgericht, which is the court of first instance. In the light of the answer given by the Court to that question, it will be for the competent Finanzgericht to which the case is remitted to determine whether Europop was a national of a Member State at the time he provided his service.

104. Also, since this is a question of principle on which, so far as I am aware, the Court has not yet given a ruling, I will present my analysis to it in order to enable it, if appropriate, to answer this question.

45 — See, in particular, Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22, and Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 32.

105. In this connection, it is appropriate first to note that, according to settled case-law, Article 59 of the Treaty confers rights not only on the service provider himself but also on the recipient of services.⁴⁶ In particular, that article confers on the recipient of services the right to go to another Member State in order to receive a service there, without being hindered by restrictions.⁴⁷

106. In addition to the intra-Community movement of the provider or recipient of services, Article 59 of the Treaty also protects the 'movement' of the provision of services itself. By way of illustration, it is clear from *Alpine Investments*⁴⁸ that Article 59 covers the activity of 'cold calling', which includes operations whereby a service provider makes telephone contact with persons established in another Member State in order to offer them various financial services which he provides without moving from the Member State in which he is established.⁴⁹

46 — See, in particular, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377; Case 186/87 *Cowan* [1989] ECR 195; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 13; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 35; and *Eurowings Luftverkehr*, paragraph 34.

47 — See, in particular, *Luisi and Carbone*, paragraph 16; Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 20; and Case C-215/03 *Oulane* [2005] ECR I-1215, paragraph 37.

48 — Case C-384/93 [1995] ECR I-1141.

49 — For another example, concerning the offer of services on the internet, see Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 53 and 54.

107. It has been noted in that connection that 'the purpose of liberalising trade pursued by the Treaty in order to achieve an internal market explains the extent of the meaning attributed by the Court to the concept of provision of services, within the meaning of [Article 60] of the Treaty. It covers services provided from one Member State to another, including cases in which neither the providers of those services nor their actual or potential recipients cross any borders'.⁵⁰

108. That interpretation also applies, in my view, in a case where it is the recipient of services who relies on the Treaty rules relating to freedom to provide services. In a case such as that in the main proceedings, the important point is that the provision of services, which, let us remember, consists in making available a group of musicians, is effected by a service provider established in one Member State to a recipient established in another Member State and thus involves intra-Community 'movement'. Being more tangible than an offer of services by telephone or by internet, the 'movement' of the service provision is in this case given concrete expression by the physical movement of the group of musicians.

109. It follows from this information that the appellant in the main proceedings should, as the recipient of the service

provided by Europop, be able to rely on the subjective rights conferred on it by Article 59 of the Treaty.

110. However, should we consider that it would be the same if the service provider were to prove to be a national of a non-member country?

111. I think the answer should be yes.

112. We have seen above that Article 59 of the Treaty confers rights directly on both the provider and the recipient of services. In the present state of Community law, only nationals of Member States can rely on such rights.⁵¹

113. With regard to the service provider, the first and second paragraphs of Article 59 of the Treaty expressly state that in order to

50 — See Truchot, L., 'Articles 49 et 50 CE', *Commentaire article par article des traités UE et CE*, Helbing & Lichtenhahn, Dalloz, Bruylant, 2000, p. 447, point 33.

51 — According to the first paragraph of Article 58 of the EEC Treaty (later the first paragraph of Article 58 of the EC Treaty, now the first paragraph of Article 48 EC), applying in the field of freedom to provide services under Article 66 of the EEC Treaty (later Article 66 of the EC Treaty, now Article 55 EC), '[c]ompanies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall ... be treated in the same way as natural persons who are nationals of Member States'.

enjoy freedom to provide services a service provider must, as well as being established in a Member State of the European Community, also be a national of a Member State.

on freedom to provide services.⁵⁴ Moreover, I see no reason that would justify third-country nationals enjoying a more favourable position as recipients of services than they would as service providers.⁵⁵

114. The second paragraph of Article 59 of the Treaty, however, contains the possibility, which has so far not been given concrete expression, for the Council, acting by a qualified majority on a proposal from the Commission, to extend the provisions of the chapter relating to services to nationals of a third country who provide services and who are established within the Community.⁵²

116. The situation about which the Bundesfinanzhof has doubts is, however, completely different.

115. I note that no such possibility is provided for recipients of services who are nationals of a non-member country and are established within the Community.⁵³ The absence of a provision of that nature in my opinion supports the view that only recipients of services who are nationals of a Member State may rely on the Treaty rules

117. As we have seen above, this is a case in which the recipient of services, who it is agreed is a national of a Member State, is seeking to enjoy rights under the Treaty rules on freedom to provide services in the context of the relationship he has with a service provider whose nationality is not known by the national court.

52 — The proposal for a Council directive extending the freedom to provide cross-border services to third-country nationals established within the Community (OJ 1999 C 67, p. 17) was withdrawn by the Commission: see the communication from the Commission — 'Withdrawal of Commission proposals which are no longer of topical interest', 1 October 2004 (COM(2004) 542 final/2).

53 — That is doubtless the reason why Article 1(2) of the abovementioned proposal for a directive provided that '[t]his Directive shall not cover nationals of a third country as recipients of cross-border services ...'.

54 — This view, that Article 59 of the Treaty cannot be relied upon 'autonomously' by a third-country national, was supported by Advocate General Elmer in his Opinion in *Svensson and Gustavsson*, point 35 et seq. The Court did not deal with this issue in its judgment, however, perhaps because Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) was also applicable; that directive covers recipients who are residing in Member States but do not have the nationality of a Member State. See, to that effect, Huglo, J.-G., 'Droit d'établissement et libre prestation de services', *Jurisclasseur Europe*, fasc. 710, point 29.

55 — See, to the same effect, the Opinion of Advocate General Elmer in *Svensson and Gustavsson*, point 40.

118. In such a situation, I am of the view that the nationality of the service provider is irrelevant as regards the rights enjoyed by the recipient of the services.

121. Also, as the Commission observes, it is unjustified and unreasonable to distinguish according to the nationality of the service provider, because that would require the recipient of the service systematically to obtain, and check, information concerning the nationality of his trading partners established in another Member State.⁵⁷

119. It is important to note in that regard that it does not follow either from the wording of Article 59 of the Treaty or from the case-law of the Court that enjoyment by a service provider of the freedom provided for in that article is conditional upon the service provider showing that his contractual partner who is the recipient of the services is a national of a Member State.

122. Lastly, as Scorpio states, quite rightly in my view, to accept that protection of a recipient of services depends on the nationality of his contractual partner would amount to depriving freedom to provide services of a significant part of its effects.⁵⁸

120. Nor does such a view hold good where it is the recipient of services who is relying on that article. To take an example cited in Advocate General Elmer's Opinion in *Svensson and Gustavsson*, the right of entry as a tourist into another Member State to receive services without being exposed to discrimination cannot, in my view, be conditional upon the recipient of services demonstrating that the service providers, the owners of a hotel for example, are nationals of a Member State.⁵⁶

123. In the light of the foregoing, I propose that the answer the Court should give to Question 3(d) should be that Article 59 of the Treaty must be interpreted as applying in a case where the recipient of services who relies on that article is a national of a Member State and the provider of the services is a national of a non-member country.

56 — Point 38.

57 — Written observations (paragraph 49).

58 — Written observations (p. 35).

V — Conclusion

124. In the light of the above considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Bundesfinanzhof as follows:

- (1) In the case of income tax payable in respect of the period at issue, Article 59 of the EEC Treaty (later Article 59 of the EC Treaty, now, after amendment, Article 49 EC) and Article 60 of the EEC Treaty (later Article 60 of the EC Treaty, now Article 50 EC) must be interpreted as not precluding a national law under which, in connection with the cross-border provision of a service, a recipient of services established in one Member State can be held liable in that State because he has failed to retain at source the tax on a payment made to a service provider residing in another Member State in consideration for that service, whereas payments made to a service provider residing in the first State would not be subject to such a retention and therefore no liability of the payment debtor, the recipient of services, for non-retention of tax at source could arise.

- (2) Articles 59 and 60 of the Treaty must be interpreted as not precluding a national tax law under which the debtor of the payment made to a non-resident service provider cannot, when he retains tax at source, deduct from taxable income the business expenses of that service provider which are economically connected with his activities in the State in which the service is provided, on condition, however, that those expenses may be taken into account after the event and therefore that a non-resident service provider is not ultimately taxed more heavily than a resident service provider.

- (3) Articles 59 and 60 of the Treaty must be interpreted as not precluding a national tax law which allows a tax exemption pursuant to a double taxation convention to be taken into account at the stage at which tax is retained at source only where an exemption certificate is issued by the competent tax authority. However, Article 59 of the Treaty precludes the payment debtor not being able to rely on a tax exemption under a double taxation convention in liability proceedings brought against him.

- (4) Article 59 of the Treaty must be interpreted as applying in a case where the recipient of services who relies on that article is a national of a Member State and the provider of the services is a national of a non-member country.