CASE C-234/01

ARNOUD GERRITSE
and
FINANZAMT NEUKÖLLN-NORD

(reference for a preliminary ruling
from Finanzgericht Berlin)

Judgment of the Court
12 June 2003

The Court of Justice

of the European Communities

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That question was raised in proceedings between Mr Gerritse and the Finanzamt Neukölln-Nord concerning the taxation of income received in Germany as a non-resident.

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Mr. Arnoud Gerritse, a Netherlands national resident in the Netherlands, received the sum of DEM 6.007,55 in 1996 for performing as a drummer at a radio station in Berlin.

The documents before the Court show that the business expenses occasioned by that performance amounted to DEM 968.

In accordance with the Convention the Netherlands and Germany for the avoidance of double taxation and with Article 50a(4) of the EStG 1996, the fee of DEM 6.007,55 was subjected to tax on a notional assessment of income, at the rate of 25% (namely DEM 1.501,89), which was deducted at source.

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In September 1998, Mr Gerritse lodged with the German tax authorities, under Paragraph 1(3) of the EStG 1996, a declaration of income with a view to be being treated as a wholly taxable person.

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.

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Concerning, first, the tax-free allowance, since, as the Finanzgericht Berlin, the Finnish Government and the Commission have argued, it has a social purpose, allowing the taxpayer to be granted an essential minimum exempt from all income tax, it is legitimate to reserve the grant of that advantage to persons who have received the greater part of their taxable income in the State of taxation, that is to say, as a general rule, residents.

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Moreover, as regards the application to non-residents of a flat rate of tax of 25% while residents are subject to a progressive table, as the Commission has pointed out, the Netherlands as State of residence, pursuant to the bilateral convention, integrates the income in respect of which the right to tax belongs to Germany into the basis of assessment, in accordance with the progressivity rule. It does, however, take account of the tax levied in Germany, by deducting from the Netherlands tax a fraction which corresponds to the relation between the income taxed in Germany and worldwide income.

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That means that, with regard to the progressivity rule, non-residents and residents are in a comparable situation, so that application to the former of a higher rate of income tax than that applicable to the latter and to taxpayers who are assimilated to them would constitute indirect discrimination prohibited by Community law, in particular by Article 60 of the Treaty.

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THE COURT (Fifth Chamber),
in answer to the question referred to it by the Finanzgericht Berlin by order of 28 May 2001, hereby rules:

1. Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) preclude a national provision such as that at issue in the main proceedings which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses.

2. However, those articles of the Treaty do not preclude that same provision in so far as, as a general rule, it subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance.

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