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Arrêt de la Cour
Case C-169/03

Florian W. Wallentin

v

Riksskatteverket

(Reference for a preliminary ruling from the Regeringsrätten (Sweden))

(Freedom of movement for persons – Workers – Income tax – Restricted liability of a taxpayer receiving a small part of his income in one Member State and residing in another Member State)

Summary of the Judgment

Freedom of movement for persons – Workers – Equal treatment – Remuneration – Income tax – Income of non-residents who do not receive income taxable in the Member State of residence subject to deduction at source excluding any tax allowance linked to the personal circumstances of the taxpayer – Not permissible

(Art. 39 EC)

Article 39 EC precludes a Member State's legislation from providing that

– natural persons who are not regarded as being resident for tax purposes in that Member State, but who receive income there from employment, are subject to taxation levied at source such that the basic allowance or any other allowance or deduction linked to the taxpayer's personal circumstances is not granted,

– whereas taxpayers resident in that State are entitled to such allowances or deductions at the time of ordinary assessment to tax on their income received in that State and abroad,

– when the persons not resident in the State of taxation have had, in their own State of residence, only income which, by its nature, is not subject to income tax.

(see para. 24, operative part)

JUDGMENT OF THE COURT (First Chamber)
1 July 2004(1)

(Free movement of persons – Workers – Income tax – Restricted liability of a taxpayer receiving a small part of his income in one Member State and residing in another Member State)

In Case C-169/03,
REFERENCE to the Court under Article 234 EC by the Regeringsrätten (Sweden) for a preliminary ruling in the proceedings pending before that court between
Florian W. Wallentin

and

Riksskatteverket,
on the interpretation of Article 39 EC,

THE COURT (First Chamber),,

composed of: P. Jann (Rapporteur), President of the Chamber, A. La Pergola, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts, Judges,
Advocate General: P. Léger,
Registrar: R. Grass,
after considering the written observations submitted:

– by Mr Wallentin, in person,
– on behalf of the Riksskatteverket, by T. Wallén, acting as Agent,
– on behalf of the French Government, by G. de Bergues and C. Mercier, acting as Agents,
– on behalf of the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,
– on behalf of the Commission of the European Communities, by R. Lyal and K. Simonsson, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 11 March 2004,

gives the following

Judgment

1 By order dated 10 April 2003, received by the Court Registry on 14 April 2003, the Regeringsrätten (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 39 EC with a view to establishing whether the Swedish legislation on the levying of a special tax on the income of persons resident abroad may, in certain regards, be considered contrary to the latter article.
2 That question has arisen in proceedings between Mr Wallentin and the Riksskatteverket (National Tax Board).

The legal background, the main proceedings and the question referred for a preliminary ruling
3 Mr Wallentin, a German national, was, at the time material to the main proceedings, resident in Germany where he was studying. His parents paid him the monthly sum of DEM 650 and he received a grant from the German State of DEM 350 per month for his accommodation and living expenses. Those sums did not of their nature constitute taxable income under German tax law.
4 From 3 to 25 July 1996, Mr Wallentin undertook a period of work experience with the Church of Sweden. For that purpose he stayed in Sweden from 1 July to 20 August 1996. The Church paid him SEK 8 724 as remuneration for his period of work experience.
5 Mr Wallentin applied to the Swedish tax authorities for exemption from income tax on that sum. That application was rejected by the tax authorities, which stated that income tax at a rate of 25% had to be levied on the amount in question under the Lagen (1991:586) om särskild inkomstskatt för utomlands bosatta (Law on special income tax for persons resident abroad; 'the SINK law'), which governs cases of restricted liability for income tax.

6 The SINK law applies to persons resident abroad who receive income in Sweden during short stays there not exceeding six months in a year. The tax is levied at source and there is no right to a deduction or allowance based on the taxpayer's personal situation. In return, the rate of the special income tax is lower than that applicable to standard income tax which, whilst progressive, is around 30% according to the national court.

7 Persons resident in Sweden for more than six months per year and subject to standard income tax (persons with full tax liability) receive a basic allowance which, for the tax year in question, was SEK 8 600. That allowance is granted in full only to those taxpayers resident in Sweden for a full tax year. For periods of residence of less than a year but more than six months, the allowance is granted in proportion to the number of months' residence.

8 Mr Wallentin takes the view that the fact that the basic allowance is granted only to persons fully liable for tax but not to persons with restricted liability constitutes discrimination prohibited by Article 39 EC.

9 The Länsrätten i Norbottens län (Norbotten County Administrative Court, Sweden), which heard the case at first instance, granted Mr Wallentin's application. On appeal by the tax authorities, that decision was set aside by the Kammarrätten i Sundsvall (Sundsvall Administrative Court of Appeal, Sweden) and Mr Wallentin appealed on a point of law to the Regeringsrätten. The latter court, being unsure whether the legislation at issue was inconsistent with Article 39 EC, decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 39 of the EC Treaty to be interpreted as precluding a Member State's legislation which provides that natural persons who are not regarded as resident in the country for tax purposes but who receive income from employment in the country (restricted tax liability) are subject to a tax at source of such a nature that a basic allowance or other allowance or deduction for personal circumstances is not granted, whereas persons resident in the country are entitled to such an allowance or deduction at the time of ordinary assessment to income tax in respect of all income which they receive in the Member State and abroad (full tax liability), but where the first mentioned person's lack of right to a basic allowance is taken into account, inter alia, by means of a tax rate which is lower than the rate applicable for taxable persons resident in the country?'

Consideration of the question referred

Observations submitted to the Court

10 The Riksskatteverket and the French and Finnish Governments submit, basing their arguments on Case C-279/93 *Schumacker* [1995] ECR I-225, Case C-80/94 *Wielockx* [1995] ECR I-2493 and Case C-234/01 *Gerritse* [2003] ECR I-5933, that the distinction between persons fully liable for income tax and persons with restricted liability is appropriate because the situations of those taxpayers are not objectively comparable, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances. The Court's case-law states that a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode. The failure to grant the allowance at issue is therefore not discriminatory.

11 According to the Riksskatteverket, Mr Wallentin cannot claim to be in a situation comparable to that of persons resident in Sweden. His situation is, rather, comparable to that of persons having lived and worked in Sweden for part of the year and who therefore receive the basic allowance on a proportional basis. The allowance in question could therefore be granted to Mr Wallentin on a proportional basis for the two months he spent in Sweden, but not in full.

12 The Finnish Government emphasises the cohesion of the tax system which should be preserved. It would be contrary to that cohesion to grant an allowance applicable to a progressive tax to a taxpayer required to pay a fixed-rate tax under a system of deduction

at source. A taxpayer resident abroad and subject to income tax levied at source in Sweden would thus have an unjustified advantage.

13 Mr Wallentin and the Commission are, however, of the view that the legislation in question constitutes discrimination prohibited by Article 39 EC and that the basic allowance must be granted in full in the circumstances of the present case.

14 The Commission refers in particular to paragraph 36 of *Schumacker*, cited above, where the Court held that the principles set out in paragraph 10 of the present judgment do not apply to the situation where a non-resident receives no significant income in his Member State of residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances. That reasoning is also applicable to the present case.

The answer of the Court

15 As the Court has held, in relation to direct taxes, the situations of residents and of non-residents are generally not comparable, because the income received in the territory of a 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 because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (*Schumacker*, cited above, paragraphs 31 and 32; Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 22; Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 21, and *Gerritse*, cited above, paragraph 43).

16 Also, 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 having regard to the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (*Schumacker*, paragraph 34; *Gschwind*, paragraph 23, and *Gerritse*, paragraph 44).

17 The Court has held that the position is different, however, in a case where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances (see *Schumacker*, paragraph 36, and Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 89). In the case of a non-resident who receives the major part of his income in a Member State other than that of his residence, 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 (*Schumacker*, paragraph 38), irrespective of the different rates applicable to special income tax and to standard income tax.

18 That is exactly the situation in the main proceedings, whose distinguishing feature is that Mr Wallentin did not have, at the material time, any taxable income in his State of residence, since the monthly subsistence allowance from his parents and the grant paid to him by the German State did not constitute taxable income under German tax legislation.

19 As regards whether the basic allowance in question reflects consideration of the taxpayer's personal and family circumstances, the Court has held that the basic tax-free allowance in German law ('Grundfreibetrag') has a social purpose since it ensures that the taxpayer has a minimum subsistence amount which is not subject to income tax (*Gerritse*, paragraph 48). There is nothing in the case-file requiring a different assessment in respect of the basic allowance provided for by Swedish tax law.

20 It follows that the fact that that allowance is not granted to persons with restricted liability for tax who receive no taxable income in their State of residence constitutes discrimination prohibited by Article 39 EC.

21 The argument that the grant of the tax allowance to a non-resident would undermine the cohesion of the tax system, because there is in Swedish tax law a direct link between the taking into account of personal and family circumstances and the right to tax fully and progressively residents' worldwide income, cannot be upheld. In a situation such as that in the main proceedings, the State of residence cannot take account of the taxpayer's personal and family circumstances because there is no liability for tax there. Where that is the case, the Community principle of equal treatment requires that, in the State of employment, the personal and family circumstances of a foreign non-resident be taken into account in the same way as those of resident nationals and that the same tax benefits be granted to him (*Schumacker*, paragraph 41).

22 The distinction between residents and non-residents at issue in the main proceedings is thus in no way justified by the need to ensure the cohesion of the applicable tax system (see, regarding a similar situation, *Schumacker*, paragraph 42).

23 Furthermore, the grant in the present case of the same tax allowance as that laid down for persons resident in Sweden throughout the tax year would not give Mr Wallentin an unjustified fiscal benefit since he has no taxable income in his Member State of residence which could confer entitlement to a similar allowance in that State.

24 The answer to the national court's question must therefore be that Article 39 EC precludes a Member State's legislation from providing that

–natural persons who are not regarded as being resident for tax purposes in that Member State, but who receive income there from employment, are subject to taxation levied at source such that the basic allowance or any other allowance or deduction linked to the taxpayer's personal circumstances is not granted,

–whereas taxpayers resident in that State are entitled to such allowances or deductions at the time of ordinary assessment to tax on their income received in that State and abroad,

–when the persons not resident in the State of taxation have had, in their own State of residence, only income which, by its nature, is not subject to income tax.

Costs

25 The costs incurred by the French and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the question referred to it by the Regeringsrätten by order of 10 April 2003, hereby rules:

Article 39 EC precludes a Member State's legislation from providing that

–natural persons who are not regarded as being resident for tax purposes in that Member State, but who receive income there from employment, are subject to taxation levied at source such that the basic allowance or any other allowance or deduction linked to the taxpayer's personal circumstances is not granted,

–whereas taxpayers resident in that State are entitled to such allowances or deductions at the time of ordinary assessment to tax on their income received in that State and abroad,

–when the persons not resident in the State of taxation have had, in their own State of residence, only income which, by its nature, is not subject to income tax.

Jann

La Pergola

von Bahr

Silva de Lapuerta

Lenaerts

Delivered in open court in Luxembourg on 1 July 2004.
Registrar

President of the First Chamber

R. Grass

P. Jann

1 – Language of the case: Swedish.