Opinion of Advocate General Mengozzi delivered on 25 June 2008

R. H. H. Renneberg v Staatssecretaris van Financiën

Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands

Freedom of movement for workers - Article 39 EC - Tax legislation - Income tax - Determination of the basis of assessment - National of a Member State receiving all or almost all of his income in that State - Residence in a different Member State

Case C-527/06

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I – Introduction

1. In the present reference for a preliminary ruling the Court of Justice is asked in essence whether Article 39 EC and/or Article 56 EC preclude a situation in which a Member State does not permit a non-resident taxpayer receiving all (or almost all) of his work-related income taxable in that Member State to deduct from the tax on such rental income losses in respect of a property located in the Member State in which the taxpayer resides, even though the first Member State (the Member State of employment) allows resident taxpayers working in its territory to make such a deduction.

2. As I shall demonstrate in this Opinion, it is necessary to assess whether the implications from the judgment in *Schumacker*, (2) as recently clarified by the judgments in *Lakebrink and Peters-Lakebrink*, (3) and *Ritter-Coulais* (4) are fully applicable in a case such as that in the main proceedings, in which the principal issue is the application of the provisions of a convention for the prevention of double taxation between the two Member States concerned.

II – Legal background

A – *Treaty law*

3. Article 4(1) of the Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the avoidance of double taxation of income and capital and for the regulation of certain other taxation matters, signed on 19 October 1970, ('the Bilateral Tax Convention') (5) provides:

'For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature; …'

4. Article 6(1) of the Bilateral Tax Convention provides:

'Income derived from immovable property may be taxed in the State in which that property is located.'

5. Article 19(1) of the Bilateral Tax Convention, relating to the taxation of the salaries of officials, reads:

'Remuneration, including pensions, paid by a Contracting State or a political subdivision thereof, either directly or from funds established by them, to a natural person in respect of services which that person has performed for that State or political subdivision are taxable in that State. …'

6. Under Article 24(1)(1) of the Bilateral Tax Convention, in order to avoid double taxation of residents of the Netherlands, the Kingdom the Netherlands may, when taxing its own residents, include in the basis of assessment the items of income or capital which, in accordance with the provisions of the Bilateral Tax Convention, are taxable in Belgium.

7. Article 24(1)(2) of that convention provides that, subject to the application of the provisions relating to compensation for losses laid down in the domestic rules for the avoidance of double taxation, the Kingdom of the Netherlands will make a reduction in the amount of tax calculated in accordance with Article 24(1)(1). The reduction is to be equal to the amount of tax corresponding to the ratio between the amount of income or capital included in the basis of assessment referred to in Article 24(1)(1) and taxable in Belgium under Article 6 of the Bilateral Tax Convention, in particular, and the total amount of income or total capital constituting the basis of assessment referred to in Article 24(1)(1).

8. Article 25(3) of the Bilateral Tax Convention, headed 'Non-discrimination', provides that 'non-resident natural persons of one of the States are entitled in the other State to the personal allowances, concessions and reductions which are granted by the latter to its own residents by reason of their circumstances or dependents.'

B – *National law*

9. Article 1 of the Netherlands Law on Income Tax (Nederlandse wet op de Inkomstenbelasting) of 16 December 1964 ('the WIB') (6) defines 'national' taxpayers ('resident taxpayers') as natural persons resident in the Netherlands, as opposed to 'foreign' taxpayers ('non-resident taxpayers'), namely natural persons who are not resident in that Member State but do receive income there.

10. Taxpayers resident in the Netherlands are subject to tax on their entire income derived in the Netherlands and non-resident taxpayers are subject to tax only on some of their income from the Netherlands.

11. In the case of resident taxpayers, the basis of assessment is made up of gross worldwide income, less deductible losses. Gross income includes, in particular, net income from work and from assets, including the advantage which the taxpayer derives from occupying his own dwelling.

12. Pursuant to Article 42a(1) of the WIB, that advantage is fixed as a flat-rate amount, and other advantages and costs, charges and depreciations – other than interest on debts, the costs of loans, and periodic payments for rights in respect of a long lease or building lease – are not taken into account.
13. Pursuant to Article 4(2) of the WIB, if the calculation of net income results in a negative amount, that negative amount is deducted from taxable gross income.
14. It is settled that the result of applying all the various provisions referred to above is that the full amount of the interest on a debt taken on to finance a personal dwelling is deducted from gross income and, consequently, from the taxable income of a resident taxpayer, even if the interest exceeds the advantage the taxpayer derives from living in his own dwelling.
15. As the national court notes, if a resident of the Netherlands has a negative income from immovable property located in Belgium, that negative income component may be deducted from the remaining (Netherlands) income. However, in a subsequent year in which a positive income is derived from that immovable property, the deduction to avoid double taxation will be calculated by deducting that loss from that positive income (Article 24(1)(2) of the Bilateral Tax Convention, in conjunction with Article 3(4) of the Decree on the avoidance of Double Taxation 1989).

C – *The tax position of a taxpayer resident in Belgium who obtains work-related income in the Netherlands*
16. Although in principle, pursuant to Article 2(2) of the WIB, Netherlands nationals who are not resident in the Netherlands but are employed by a Netherlands legal person governed by public law are deemed to be resident in the Netherlands, the national court points out that the Hoge Raad der Nederlanden has ruled none the less that, in respect of income which the Bilateral Tax Convention allocates to the Kingdom of Belgium, determination of residence under Article 2(2) of the WIB must be disregarded in favour of the provisions of that convention.
17. It therefore follows from the findings of the national court that the appellant in the main proceedings, Mr Renneberg, is, under Article 4 of the Bilateral Tax Convention, to be regarded as a person residing in Belgium.
18. In the Netherlands, therefore, Mr Renneberg is not regarded as having unlimited liability to tax and is treated there, as regards the income which the Bilateral Tax Convention allocates to Belgium, in accordance with the regime which applies to non-resident taxpayers. This means that income, whether negative or positive, which pursuant to the Bilateral Tax Convention has been allocated to the Kingdom of Belgium for taxation does not influence the tax on income, positive or negative, which pursuant to that same convention has been allocated to the Kingdom of the Netherlands.

III – The dispute in the main proceedings and the question referred for a preliminary ruling

19. Mr Renneberg, who has Netherlands nationality, moved from the Netherlands to Belgium in December 1993. In 1996 and 1997 he lived in a dwelling of his own which he had acquired in 1993 and which had been financed with a mortgage loan from a Netherlands bank.
20. During those two years Mr Renneberg was employed in the public service by the Netherlands municipality of Maastricht and obtained his entire work-related income in the Netherlands.
21. In Belgium, Mr Renneberg was liable to a tax on his own dwelling, namely a property tax ('précompte immobilier').
22. In the Netherlands, when calculating the assessments for 1996 and 1997 in respect of taxable income of HFL 75 265 and HFL 78 600, respectively, the Tax Inspectorate did not accept as a deductible item from the other (Netherlands) income the negative return on his Belgian dwelling, that is to say, the balance resulting from the difference between the interest paid on the mortgage and the rentable value of the dwelling. According to Mr Renneberg's tax return, those (negative) amounts were HFL 8 165 in 1996 and HFL 8 195 in 1997.
23. The Tax Inspectorate upheld the tax assessments against which Mr Renneberg had appealed.
24. After the Gerechtshof te 's-Hertogenbosch (the 's-Hertogenbosch Regional Court) dismissed the appeals he had lodged against those decisions, Mr Renneberg lodged an appeal in cassation against those decisions before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
25. The Hoge Raad der Nederlanden notes, first, that Mr Renneberg relies on the judgment in *Schumacker* and, secondly, that the tax advantage at issue in the main proceedings is not based on the taxpayer's personal and family circumstances.
26. It holds that, unlike the consideration – based on the progressivity principle – of personal and family circumstances where direct taxes are levied, the possibility of setting off – within a single tax jurisdiction – negative income from one particular source of income against positive income from another source of income is not such a universal characteristic of direct taxation that taxpayers who, taking advantage of a right to freedom of movement guaranteed by the EC Treaty, are liable to tax in different Member States should benefit from that possibility in one of those Member States.
27. It is in those circumstances that, having stayed proceedings pending judgment by the Court of Justice in *Ritter-Coulais*, the Hoge Raad der Nederlanden decided to refer the following question to the Court for a preliminary ruling:
'Must Articles 39 EC and 56 EC be interpreted as precluding, either individually or jointly, a situation in which a taxpayer who, in his country of residence, has negative income from a dwelling owned and occupied by him, and obtains all of his positive income, specifically work-related income, in a Member State other than that in which he resides, is not permitted by that other Member State (the State of employment) to deduct the negative income from his taxable work-related income, even though the State of employment does allow its own residents to make such a deduction?'

IV – Procedure before the Court of Justice

28. Mr Renneberg, the Netherlands and Swedish Governments and the Commission of the European Communities have submitted written observations. The Netherlands Government and the Commission also presented oral argument at the hearing on 22 May 2008, at which the other interested parties were not represented.

V – Analysis

A – *Applicability of the freedoms of movement*

29. In their written observations the Netherlands Government and the Commission submit as their main contention that neither Article 39 EC nor Article 56 EC is applicable in a situation such as that at issue in the main proceedings. With regard to the free movement of workers, they maintain, by reference to *Werner* (7) and *Turpeinen*, (8) that a national of one Member State may not claim such freedom where he has consistently worked in his home State and has transferred only his residence to another Member State. As regards Article 56 EC, relying on *van Hilten-van der Heijden*, (9) they contend that the mere transfer of residence from one Member State to another does not involve a capital movement. The Commission proposes none the less that the situation which gave rise to the main proceedings should be considered with regard to Article 18 EC, a proposal which it made again at the hearing.

30. For my part, I am not unswayed by the arguments relating to Article 56 EC, although I cannot subscribe to the restrictive interpretation of Article 39 EC put forward by the Netherlands Government and the Commission.

31. In that regard, that interpretation appears incorrectly to confuse the situation of a national of a Member State who is in paid employment in that State and who is attempting to exercise his right of freedom of movement as a worker in that Member State at the time of *the initial transfer* of his residence to another Member State for personal reasons with that of a national who, whilst retaining his paid employment in his Member State of origin, wishes to exercise his right of freedom of movement as a worker in the latter *after transferring his residence to another Member State for personal reasons*, a situation which requires him to travel daily between those two States as a frontier worker.

32. This second case is precisely that of Mr Renneberg. He is seeking to rely on application of the Treaty provisions on the free movement of workers as against the alleged obstacles raised by the tax regime in the Kingdom of the Netherlands, his State of employment, with regard to the taxation of income he received in that Member State *after* the transfer of his residence to Belgium for personal reasons. Such a situation does indeed fall within the scope of Article 39 EC.

33. The Court reached the same conclusion in its recent judgments in *Hartmann* and *Hendrix*. (10) In the first of those judgments, having noted that the situation which gave rise to the main proceedings was that of a person who, since the transfer of his residence, had resided in a Member State other than the one in which he was working, the Court held that the fact that Mr Hartmann settled in Austria for reasons not connected with his employment did not justify refusing him the status of migrant worker which he had acquired as from the time when, following the transfer of his residence to Austria, he made full use of his right to freedom of movement for workers by going to Germany to carry on an occupation there. (11) Similarly, in *Hendrix*, the Court held that the fact that Mr Hendrix, who was of Netherlands nationality, had maintained paid employment in his State of origin after transferring his residence to Belgium gave him the status of a migrant worker and brought him, throughout the period following the transfer of his residence, within the scope of the provisions of Community law relating to freedom of movement for workers. (12)

34. The Court did not therefore accept the arguments put forward by the Netherlands authorities and the United Kingdom Government in their observations in *Hendrix* that, in essence, the reasoning employed by the Court on the subject of freedom of establishment in *Werner* should also be applied in the context of Article 39 EC. (13) For the reasons set out above I am of the view that a similar approach should be taken with regard to the observations of the Netherlands Government and the Commission concerning the inapplicability of Article 39 EC in the present case. The judgment in *Turpeinen*, cited by the Commission in order to justify considering the case in the main proceedings in the light of Article 18 EC, does not alter that view. In that judgment the Court rejected the applicability of Article 39 EC in favour of Article 18 EC, on the ground that Ms Turpeinen, who was of Finnish nationality, had exercised the right to reside in another Member State only after her retirement and thus without any intention of working in paid employment in that State (14) (nor, a fortiori, in her State of origin from which she was receiving her retirement pension). That situation is therefore very different from the one currently being considered by the Court.

35. In my view, there is therefore nothing to preclude the situation in the dispute in the main proceedings being assessed in the light of Article 39 EC. (15)

36. In those circumstances, priority should be given to interpreting Article 39 EC, since consideration of the applicability of Article 56 EC will be appropriate only if the tax legislation at issue in the main proceedings is compatible with Article 39 EC, which, as will be demonstrated below, does not seem to me to be the case.

B – *The existence of indirect discrimination prohibited by Article 39 EC*

37. As I explained in my introductory comments, the issue the Court is required to resolve here amounts, in my view, to deciding whether the judgment in *Schumacker*, as subsequently clarified by the judgments in *Lakebrink and Peters-Lakebrink*, and the ruling in *Ritter-Coulais* may be validly applied to a situation such as that in the main proceedings.

38. In setting out the principle of freedom of movement for workers, Article 39 EC prohibits all discrimination on grounds of nationality between workers of the Member States. (16) That prohibition thus covers not only overt discrimination on grounds of nationality but also discrimination which, by the application of other criteria of differentiation, leads in fact to the same result. (17)

39. In the present case, the Netherlands tax regime applies irrespective of the nationality of the taxpayer concerned. However, as is clear from the order for reference, that regime affords taxpayers who live and work in the Netherlands the right to have rental income losses relating to a property located in another Member State taken into account in the assessment of the tax on their work-related income received in the Netherlands, but excludes non-resident taxpayers working in the Netherlands who suffer similar losses.

40. Although the Court has ruled that tax benefits granted only to residents of a Member State may constitute indirect discrimination on grounds of nationality, the situations of residents and non-residents must also be comparable. (18)

41. In principle, the 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. In addition, international tax law and Community law accept 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. (19) Consequently, 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 since those two categories of taxpayer are not in a comparable situation. (20)

42. However, in well-established case law, initiated by the judgment in *Schumacker*, the Court has held that the position is different where the non-resident receives no significant income in his 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 his State of residence is not in a position to grant him the advantages resulting from the taking into account of his personal and family circumstances. (21) 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, discrimination arises from the fact that the personal and family circumstances of that non-resident are taken into account neither in the State of residence nor in the State of employment. (22)

43. The judgment in *Ritter-Coulais*, on the one hand, and the judgment in *Lakebrink and Peters-Lakebrink*, on the other hand, constituted a development in case-law following the *Schumacker* judgment as regards the obligations incumbent on the Member State of employment of non-residents who receive all or almost all of their taxable work-related income in that State.

44. In *Ritter-Coulais*, the Court was asked whether the freedoms of movement laid down in the Treaty required that natural persons in receipt of income from paid employment in one Member State (Germany) and assessable to tax on their total income there were entitled to request that account be taken, for the purposes of determining the rate of tax applicable to that income and in the absence of positive revenue, of rental income losses relating to their own use of a private dwelling located in another Member State (France), in the same way as taxpayers in Germany.

45. It should be pointed out that the Court did not answer the first question referred by the national court concerning taking into account rental income losses *for the purposes of determining the basis of assessment*, due to the hypothetical nature of that question as regards resolving the dispute in the case before the national court. (23) That question is again raised directly in the present case, in a context which, however, as I will explain below, differs in several respects from that in *Ritter-Coulais*.

46. As regards its answer to the second question concerning calculation of the rate of tax on work-related income of non-residents in the Member State of employment, the Court held that Article 48 of the Treaty precluded that Member State treating differently rental income losses relating to properties located outside German territory, whose owners are more often non-residents, such as Mr and Mrs Ritter-Coulais, and those relating to properties located in Germany, by making the taking into account of the former income losses, for the purposes of determining the rate of taxation, subject exclusively to the existence of positive rental income. (24)

47. It is interesting to observe that, although the situation that gave rise to the dispute between Mr and Mrs Ritter-Coulais and the German tax authorities concerned workers who lived in one Member State but received all or almost all of their taxable work-related income in another Member State, the judgment in *Ritter-Coulais* makes no reference to the *Schumacker* judgment, contrary to the reasoning followed by Advocate General in his Opinion, which was essentially based on the implications that were to be drawn from that judgment. (25)

48. That undoubtedly deliberate omission might be due to the fact that the tax benefits at issue in that case did not correspond to those relating to the taking into account of the personal and family circumstances of the non-resident taxpayers concerned, within the meaning of the judgment in *Schumacker*, but, more generally, to consideration by the Member State of employment of their ability to pay tax, including therefore their total income. (26) It may therefore have seemed to the Court inappropriate to link the situation in *Ritter-Coulais* to the line of cases initiated by *Schumacker*.

49. A further explanation for the omission of any reference to the ruling in *Schumacker* in the judgment in *Ritter-Coulais* may also lie in the fact that the German legislation at issue in that case did not introduce *directly* a difference in treatment between residents and non-residents, but excluded taking into consideration, for the purposes of determining the rate of taxation of taxpayers' incomes, negative rental income derived from properties located in France *in the absence of positive income.* That fact led the Court to state that, in so far as non-residents were more likely to own and personally occupy properties outside Germany, the treatment of non-resident workers under the German legislation was less favourable than that afforded to workers who resided in Germany in their own homes. (27)

50. The Court appears, however, to have gone a step further in *Lakebrink and Peters-Lakebrink*, in a situation similar to that which gave rise to *Ritter-Coulais*, by extending the ruling in *Schumacker*, in so far as it related to the obligations incumbent on the Member State of employment of non-residents receiving all or almost all of their income in that State, to cover the situation of Mr and Mrs Lakebrink.

51. Mr and Mrs Lakebrink were working in Luxembourg but living in Germany and, under Luxembourg law, unlike persons working and living in Luxembourg, they were not entitled to have the negative rental income from their properties in Germany (which they did not occupy) taken into consideration for the purpose of determining the tax rate applicable to their Luxembourg income, which constituted the major part of their taxable income.

52. On the basis of the ruling in *Schumacker*, the Court held, first, that there was discrimination within the meaning of that ruling against non-resident workers, such as Mr and Mrs Lakebrink, who receive no income in their State of residence and obtain all their family income from an activity performed in the State of employment. (28) Secondly, in paragraph 34 of the judgment, the Court explained the ground on which that finding of discrimination in *Schumacker* is based, stating that it relates to *all the tax advantages connected with the non-resident's ability to pay tax which are not taken into account either in the State of residence or in the State ofemployment*, and in adopting the reasoning which I had set out in point 36 of my Opinion in that case and in referring to the analysis given by Advocate General Léger in points 97 and 99 of his Opinion in *Ritter-Coulais*. (29) The Court added, in the same paragraph of the judgment, that such ability to pay tax may indeed be regarded as forming part of the *personal circumstances* of the non-resident within the meaning of the judgment in *Schumacker*. It therefore concluded that the refusal by the tax authorities of a Member State (in that case the Grand-Duchy of Luxembourg) to take into consideration negative rental income relating to a taxpayer's properties abroad constituted discrimination prohibited by Article 39 EC. (30)

53. In *Lakebrink and Peters-Lakebrink*, the Court therefore appears to require the Member State of employment of non-resident taxpayers who obtain the major part of their work-related income in that Member State to take into account, for the purposes of determining the rate of tax applicable to that income, the ability to pay of those taxpayers – including, therefore, the rental income losses suffered by them relating to a property located in their Member State of residence – provided such ability to pay is not taken into account in the latter Member State.

54. The statement made in paragraph 34 *in fine* of *Lakebrink and Peters-Lakebrink*, that the ability to pay tax *may indeed* be regarded as forming part of the personal circumstances of the non-resident within the meaning of the judgment in *Schumacker*, seems to me to be by way of an obiter dictum. That comment also seems to me to be somewhat risky for two principal reasons.

55. First, it seems to treat the non-resident's ability to pay tax as being the same as his personal circumstances although, according to the ruling in *Schumacker*, the ability to pay tax is determined only in part by taking into account the taxpayer's personal circumstances.

56. Secondly, as a corollary, whilst taking into account information concerning the personal and family circumstances of a taxpayer necessarily leads to reducing the income tax he must pay, taking into account the taxpayer's ability to pay tax, including therefore his aggregate income, is likely to lead to an increase in the tax due. Such might be the case, for example, in a situation where the Member State of employment of non-resident taxpayers receiving the major part of their work-related income there requires those taxpayers, in the same way as resident taxpayers, to include all positive income from a foreign source for the purposes of determining the basis of assessment and/or rate of tax whilst enabling them to include in it also, where appropriate, all their negative income from a similar source. In a hypothesis in which such a non-resident taxpayer receives only positive income from a foreign source, the fact that his Member State of employment takes his ability to pay tax into account will not in the end reduce the income tax he must pay, in the same way as if an identical rule were applied in respect of a resident taxpayer.

57. Therefore, although I support the finding in *Lakebrink and Peters-Lakebrink* that, since the situations of a resident and a non-resident are objectively comparable from the point of view of their Member State of employment, a non-resident taxpayer's ability to pay must be taken into consideration by that Member State in the same way as that of a resident taxpayer, I have reservations about the fact that in that judgment such ability to pay is regarded as part of the personal circumstances of the taxpayer, within the meaning of the judgment in *Schumacker*, without further clarification.

58. That said, irrespective of the issue of their link with the judgment in *Schumacker*, the Court's findings in *Ritter-Coulais* and *Lakebrink and Peters-Lakebrink* lead, in my view, to similar results. Those judgments thus require that the Member State of employment should allow non-residents receiving all or almost all of their income in that Member State to request that their negative rental income relating to a property located in the Member State of residence – whether they occupy it themselves (in the case of Mr and Mrs Ritter-Coulais) or not (as in the case of Mr and Mrs Lakebrink) and in so far as similar tax benefits cannot be afforded by the latter State – be taken into account for the purposes of determining the tax rate applicable to that income. (31)

59. The fact that, unlike the German legislation at issue in *Ritter-Coulais*, the Luxembourg legislation did not require rental income losses or profits relating to properties located abroad owned by non-residents working in Luxembourg to be taken into account for the purposes of determining the tax rate applicable did not constitute a factor precluding a finding that such legislation was incompatible with Article 39 EC, in the absence of formal pleading by the governments submitting observations in *Lakebrink and Peters-Lakebrink* of any justification for the difference in treatment demonstrated by the Court, such as the need to safeguard the coherence of their own tax systems. (32) In that regard, the classification of the national measure at issue in *Lakebrink and Peters-Lakebrink* as constituting indirect discrimination on grounds of nationality, unlike the classification in *Ritter-Coulais* as a measure placing Community nationals at a disadvantage, seems to stem from the fact that the Luxembourg legislation, unlike the German legislation at issue in *Ritter-Coulais*, established a difference in treatment based *directly* on whether or not a place of residence existed in Luxembourg.

60. It should also be noted that the refusals which the taxpayers in *Ritter-Coulais* and *Lakebrink and Peters-Lakebrink* received resulted solely from application of the national tax laws concerned and did not originate from the provisions of the bilateral tax conventions between the Federal Republic of Germany and the French Republic on the one hand or Luxembourg and the Federal Republic of Germany on the other hand. (33)

61. The case presently before the Court is similar in several respects to the two cases considered above. It concerns the situation of a non-resident who, whilst exercising his right of freedom of movement as a worker, wishes to obtain from the Member State in which he receives the major part of his taxable work-related income, and like residents of that Member State, to have negative rental income relating to a property which he occupies in his Member State of residence taken into account. Apart from the fact that Mr Renneberg occupies his own property located in Belgium, this case seems more similar to *Lakebrink and Peters-Lakebrink* because, like the Luxembourg legislation at issue in the latter case, the refusal of the Kingdom of the Netherlands, as a taxpayer's

Member State of employment, to take into account for tax purposes the losses in rental income suffered by that person, relating to a property located in his Member State of residence, is based *directly* on the fact that the taxpayer concerned has no place of residence in the Netherlands, as will be expanded upon below.

62. The present case, however, is different from both *Ritter-Coulais* and from *Lakebrink and Peters-Lakebrink* in two important aspects that are closely linked.

63. On one hand, unlike those two cases, the refusal Mr Renneberg received from the Netherlands tax authorities appears not to stem exclusively from Netherlands domestic legislation but from the provisions of the Bilateral Tax Convention, and more particularly from the way in which that convention allocated jurisdiction between the Kingdom of Belgium and the Kingdom of the Netherlands.

64. On the other hand, Mr Renneberg is asking that rental income losses relating to his property located in Belgium should be taken into account for the purposes of determining the basis of assessment of the income tax he pays in the Netherlands and not, as was the case in *Ritter-Coulais* and *Lakebrink and Peters-Lakebrink*, for the purposes of calculating the rate of such tax paid in the Member State of employment.

65. The first of those two aspects leads the Netherlands and Swedish Governments to consider that there is an objective difference between the situation of a taxpayer who is a non-resident in the Netherlands, like Mr Renneberg, and that of a taxpayer who resides in the Netherlands, so even the possibility of indirect discrimination prohibited under Article 39 EC is excluded.

66. In that regard, as the Netherlands and Swedish Governments accept, moreover, there is no doubt in my mind that there is a *difference of treatment* between the situation of a taxpayer such as Mr Renneberg and that of a taxpayer who is a resident, who is in paid employment in the Netherlands and who receives negative rental income from a property located in Belgium. As was confirmed by the Netherlands Government in response to the Court's written questions and at the hearing, a taxpayer such as Mr Renneberg cannot include in the calculation of the tax on work-related income which he pays in the Netherlands rental income losses relating to a property located in Belgium, unlike a taxpayer who lives and works in the Netherlands and who, suffering rental income losses relating either to a property located in the Netherlands which he occupies himself or to a property located in Belgium which he does not permanently occupy himself, could claim those losses against income tax paid in the Netherlands.

67. The Netherlands and Swedish Governments contend, however, that such a difference in tax treatment, *because it stems from the allocation of fiscal jurisdiction* provided for in the Bilateral Tax Convention between the Kingdom of the Netherlands and the Kingdom of Belgium, relates to situations that are not objectively comparable, so that any discrimination is to be excluded.

68. However, the Commission considers, in essence that, from the point of view of the Member State of employment, the situations of a resident and of a non-resident who receive all or almost all of their income in that State are comparable. In its view that measure introduces a difference in treatment between those two categories of taxpayer solely on the ground of their place of residence.

69. As the two previous points demonstrate, the theoretical debate – although not devoid of practical consequences – underlying the observations of the intervening governments and the Commission, relates above all to whether it is sufficient, for the purposes of examining the objective comparability of the situations, that the rules at the origin of the difference in treatment at issue should be taken into account or whether only a factual similarity should be taken into account for those purposes (namely, the comparison of a resident and a non-resident receiving the major part or all of their taxable income in the Member State of employment).

70. The Commission's position appears to me to correspond more closely to the logic evolved in the case-law of the Court. Since discrimination can arise only through the application of different rules to comparable situations, (34) it seems inappropriate to say the least, for the purposes of *examining the objective comparability* of situations, to take as the assessment criterion the national and/or treaty rules at the origin of the difference in treatment, where the Court is in fact being called upon to determine whether those rules are discriminatory. In other words, I find it difficult to understand how it is possible to accept the circular argument, which is however put forward by the intervening governments, that situations are not objectively comparable because a Member State treats them differently.

71. At the same time, it is clear from *Schumacker* and *Lakebrink and Peters-Lakebrink* that the Court regards the situation of a resident as being the same as that of a non-resident where the latter receives no significant income in his State of residence and derives the major part of his taxable income from an activity pursued in the Member State of employment for the purposes of the latter Member State taking into account that taxpayer's ability to pay, without considering *at that stage of the reasoning* the origin of that difference in treatment.

72. That, in my view, should also be the approach in the present case and appears, moreover, to be the one on which the national court is basing its view.

73. Since, as can be seen from the order for reference, it is settled that Mr Renneberg, residing in Belgium, derives all his taxable income from paid employment in the Netherlands and obtains no significant income in his Member State of residence, he is in a situation that is objectively comparable, in respect of his Member State of employment, to that of a Netherlands resident also in paid employment in that Member State, for the purposes of taking into account his ability to pay tax. (35)

74. That approach does not appear to me to affect the freedom of the contracting parties to the bilateral tax convention to determine the connecting factors for the allocation of fiscal jurisdiction, in the way in which that freedom is interpreted by the case-law of the Court. (36)

75. In that regard, it should be pointed out that the Netherlands Government's refusal to allow rental income losses suffered by Mr Renneberg in Belgium to be taken into account is based on the fact that under Article 6 of the bilateral tax convention it falls exclusively to the Kingdom of Belgium to tax income from a property located in the territory of that Member State, although, under Article 19(1) of that convention, Mr Renneberg's salary is taxed in the Kingdom of the Netherlands.

76. I readily accept that in adopting Articles 6 and 19(1) of the bilateral tax convention the contracting parties availed themselves of the freedom to determine the connecting factors of their choice for the allocation of their respective fiscal jurisdictions. (37)

77. However, I do not think that this is a decisive factor in the dispute in the main proceedings.

78. If the Court were to consider that the taking into account of the ability of a non-resident such as Mr Renneberg to pay tax should be regarded as the same as the taking into account of his personal circumstances, as was stated in paragraph 34 *in fine* of *Lakebrink and Peters-Lakebrink*, it should be pointed out that under Article 25(3) of the bilateral tax convention the Kingdom of the Netherlands is required to grant non-resident taxpayers the personal allowances, concessions and reductions which it grants to its own residents by reason of their (personal) situation or dependents. To my mind, and as the Netherlands Government accepted at the hearing, such a provision, which concerns the non-discriminatory treatment of residents of the other contracting party, cannot be linked to the allocation of fiscal jurisdiction between those contracting parties, even though it is an integral part of the structure of the Bilateral Tax Convention. (38) Hence, the fact that the Bilateral Tax Convention does not extend compliance with the principle of non-discrimination to the situation of a non-resident taxpayer, such as that of Mr Renneberg, who undoubtedly falls within the personal scope of application of that convention, does not *per se* preclude compliance with that principle as stemming from Community law.

79. In case, for the purpose of resolving the issue in the present case, the Court does not wish to continue to regard the ability to pay tax and the personal circumstances of a non-resident taxpayer as being the same, as it did in *Lakebrink and Peters-Lakebrink*, I consider that it should none the less arrive at the same result as that stated in the preceding point, in the light in particular of its case-law whereby respect for the rights stemming from application of the freedoms of movement provided for under Community law cannot be subject to the contents of a bilateral tax convention. (39)

80. In that regard, it should be pointed out that in the present case use by the contracting parties of their freedom to determine the connecting factors for the allocation of fiscal jurisdiction does not mean that the Kingdom of the Netherlands is automatically deprived of all jurisdiction to take into account rental income losses relating to a property located in Belgium when determining the rate of tax applicable to the income of a non-resident taxpayer who receives the major part or all of his taxable income in the Netherlands.

81. It notes that, in the case of Netherlands residents, the mere fact that they receive income, whether positive or negative, from a property located in Belgium, in respect of which that State exercises its fiscal jurisdiction, does not preclude the Kingdom of the Netherlands, under Article 24(1)(1) of the Bilateral Tax Convention, including such property-rental income *in the taxable basis* of tax on work-related income to be paid by taxpayers residing in the Netherlands, in order to avoid double taxation. That fact, noted by the national court, was moreover confirmed by the Netherlands Government in its answers to the written questions raised by the Court. More particularly, that government stated that rental income losses incurred in respect of the property located in Belgium are taken into account in determining taxable income and, under Netherlands legislation, are carried over into the following financial years if there is a positive net foreign income. As for positive property-rental income included in the basis on which tax is to be paid in the Netherlands, the latter grants a reduction equivalent to the amount of tax, under detailed rules laid down in Article 24(1)(2) of the Bilateral Tax Convention, with the aim of avoiding double taxation.

82. In those circumstances, it does not seem to me to be correct to state, as the Netherlands Government attempts to do, that the refusal Mr Renneberg received from the Netherlands tax authorities originates in the choice by the contracting parties to allocate the powers to tax property-rental income of taxpayers falling within the scope of application of the Bilateral Tax Convention to the State in whose territory the property is located. On the contrary, that refusal depends in fact on whether or not those taxpayers have a residence in the Netherlands.

83. Although a resident and a non-resident are not as a general rule in objectively comparable situations, as I stated above and as the Commission contends, that is not so as regards the situation of a non-resident taxpayer who receives all or almost all of his taxable work-related income in the Member State of employment as compared with that of a taxpayer who lives and is in similar paid employment in that Member State.

84. The fact that that difference in treatment results from the Bilateral Tax Convention's failure to take into account the special situation of non-resident taxpayers who receive all or almost all their income in the Member State of employment does not appear *per se* to preclude application of the rights stemming from freedom of movement for workers, to the extent that, as noted above, respect for those rights cannot of itself be subject to the content of such a convention. (40) In short, extension by the Kingdom of the Netherlands of the treatment reserved for resident taxpayers to cover the situation of a non-resident taxpayer like Mr Renneberg in no way affects the Kingdom of Belgium's rights under the Bilateral Tax Convention and does not impose on it any new obligation. (41)

85. Moreover, nor does the fact that the refusal given to Mr Renneberg by the Netherlands Tax Authorities concerns the determination of the basis for assessing the tax to be paid in the Netherlands seem to me to be decisive since, as I noted with regard to the situation of Netherlands residents, under Article 24(1) of the Bilateral Tax Convention, the taking into account of rental income losses relating to a property located in Belgium owned by a Netherlands resident for the purposes of determining the basis for assessing income tax paid in the Netherlands does not deprive the Kingdom of Belgium of its power to tax the income relating to such property.

86. I do not understand why taking into account for the same purposes similar losses suffered by a taxpayer who is not resident in the Netherlands but who receives all or almost all of his taxable income in that Member State would lead to a different conclusion.

87. Still in this connection, it is also important to note that in referring to points 97 to 99 of Advocate General Léger's Opinion in *Ritter-Coulais*, which concern the taking into account by the Member State of employment of rental income losses suffered by Mr and Mrs Ritter-Coulais *for the purposes of determining taxable income and the rate of tax*, paragraph 34 of *Lakebrink and Peters-Lakebrink*, which is moreover worded in general terms, appears to exclude the distinction suggested by the Netherlands Government in the present case between taking into account the rental income losses of a non-resident in a situation comparable to that of Mr Renneberg for the purposes of determining the basis of assessment, on the one hand, and of determining the rate of income tax to be paid in that Member State, on the other hand.

88. Furthermore, in *Deutsche Shell* – which I shall revert to in greater detail below – I note that the Court objected to a Member State excluding currency losses borne by a permanent establishment located in another Member State from *the basis of assessment* of the principal establishment located in the first Member State, which by their nature could never be suffered by the permanent establishment despite the existence of a double taxation convention allocating fiscal jurisdiction between the contracting parties with regard to the taxation of income attributable to permanent establishments. (42)

89. I would add that the difference in treatment at issue in the present case, contrary to what is stated by the Netherlands and Swedish Governments, does not come merely from the existence of discrepancies between the different national tax laws. Even if the Kingdom of Belgium were to allow the losses at issue in the dispute in the main proceedings to be taken into account for the purposes of determining the basis for assessing the income tax of its residents, a taxpayer in Mr Renneberg's situation, who receives all or almost all of his income in the Netherlands, would in any case be unlikely to derive any benefit from such an advantage. That possibility would moreover appear to be excluded in Belgium if one is to believe the observations made by the Netherlands Government in that regard. Moreover, since it does not appear from the order for reference – and besides it is hardly likely – that the Kingdom of Belgium allows its resident taxpayers to carry over rental income losses suffered in one or more tax years into subsequent years in which there is positive rental income, the potential existence of such a possibility does not appear decisive in the case-law of the Court, which normally limits its reasoning to the tax years at issue in the cases before it during which the losses were incurred. (43)

90. In any event, the argument put forward succinctly by the Netherlands Government at the hearing in that context, concerning in essence the likelihood of taking into account twice losses incurred on the property located in Belgium does not convince me. First, because the occurrence of such a likelihood is already avoided under Article 24 of the Bilateral Tax Convention in respect of situations comparable to that of Mr Renneberg. Secondly, because in cases where the operations of a taxpayer are carried out in part in the territory of a Member State other than that in which he is in paid employment a Member State may rely on 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 (44) in order to obtain from the competent authorities of another Member State all the information enabling it to establish the income taxes correctly, or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer under the legislation which it applies. (45)

91. Lastly, I consider that in the present case the difference in treatment based on residence is discriminatory because, although the rental income losses relating to a property located in Belgium are always taken into account in determining the basis for assessment of the work-related income of Netherlands resident taxpayers working in the Netherlands, they are never taken into account in the situation of a non-resident taxpayer deriving all or almost all of his taxable income from paid employment in that Member State.

92. Such difference in treatment is, in principle, contrary to Article 39 EC, unless it is appropriate to ensuring the attainment of an objective in the public interest compatible with the Treaty and does not go beyond what is necessary to attain that objective. (46)

93. In that connection, it should be pointed out that neither the national court nor the intervening governments mention, let alone rely on, any ground justifying the indirect discrimination noted above, which should lead the Court to exclude consideration of it in the present case.

94. I am aware that the approach suggested above, based on respect for Community law, ultimately consists in requiring Member States which are contracting parties to a bilateral tax convention to take into account the special situation of certain taxpayers who fall within the personal scope of that convention, so as to avoid what one might call a 'fiscal no man's land', whatever form of bilateral allocation of fiscal jurisdiction those States may have agreed upon.

95. In other words, Member States which are parties to a bilateral tax convention should, according to that approach, be under a genuine obligation to prevent a situation in which aspects of the ability to pay tax of a taxpayer of one of those Member States, like that at issue in the dispute in the main proceedings, are not taken into account by either of those States.

96. That finalist approach is not entirely new. One finds a similar line of reasoning inter alia in *de Groot* and *Deutsche Shell*.

97. In the first of those cases the Court stated, in paragraph 101 of the judgment, that '*the mechanisms used to eliminate double taxation* or the national tax systems which have the effect of eliminating or alleviating double taxation *must* permit the taxpayers in the States concerned to be certain that, as the end result, *all their personal and family circumstances will be duly taken into account, irrespective of how those Member States have allocated that obligation amongst themselves, in order not to give rise to inequality of treatment which is incompatible with the Treaty provisions on the freedom of movement for workers and in no way results from the disparities between the national tax laws*'. (47)

98. Applying that finding in the case at issue, the Court held, in paragraph 102 of the judgment, that 'Netherlands law and the conventions concluded with Germany, France and the United Kingdom do not ensure that result. The State of residence is partially released from its obligation to take into account the taxpayers' personal and family circumstances without the States of employment undertaking to bear the tax consequences of taking such circumstances into account or having them imposed on them by virtue of the conventions for the avoidance of double taxation concluded with the State of residence. The situation is different only as regards the Convention with Germany, in the sole case that 90% of the income is received in the State of employment, which is not the case in the main proceedings'.

99. It should of course be pointed out that the above assessment was made by the Court in a context in which a Member State was exercising its power of taxation arising from the earlier allocation of fiscal jurisdiction.

100. In *de Groot* it was common ground that, under the bilateral allocation of fiscal jurisdiction between the Kingdom of the Netherlands, Mr de Groot's Member State of residence and the Member States in which he had been in paid employment during the same tax year, it was for the Kingdom of the Netherlands to take into account the taxpayer's personal and family circumstances. In the dispute between Mr de Groot and the Netherlands tax authorities, the Kingdom of the Netherlands refused however to exercise *in full* the fiscal

jurisdiction which stemmed from the bilateral conventions with the Member States of employment by failing to grant Mr de Groot the full amount of the tax deductions to which he would have been entitled, because he was making maintenance payments in the Netherlands, if he had been in paid employment solely in that Member State. As stated in paragraphs 93 and 94 in particular of the judgment in *de Groot*, the case referred to the Court was one in which the issue was the (*incomplete*) exercise of the taxation power of a Member State, which has to be done in accordance with Community law, and more particularly with Article 39 EC.

101. I wonder none the less whether that fact excludes extension to the present case of the considerations set out in paragraph 101 of *de Groot*.

102. In the present case, as I observed above, Article 24(1) of the Bilateral Tax Convention confers on the Kingdom of the Netherlands jurisdiction to take into consideration rental income losses relating to a property located in Belgium sustained by Netherlands residents when determining the basis for assessing the tax to be paid by them in the Netherlands, although the jurisdiction of the Kingdom of Belgium to tax income relating to such property is not affected. Since the jurisdiction of the Kingdom of the Netherlands to include rental income losses in respect of a property located in Belgium for the purposes of determining the taxable basis of work-related income taxed in the Netherlands exists on the basis of the Bilateral Tax Convention, the refusal received by Mr Renneberg can, in my view, be regarded as refusal to apply in full such pre-established jurisdiction in the case of a taxpayer covered by the convention who is in an objectively comparable situation to that of Netherlands residents who benefit from application of the provisions of Article 24(1) of the Bilateral Tax Convention.

103. The extension of such treatment in favour of a non-resident taxpayer receiving all or almost all his taxable income in the Netherlands, the Member State of employment, does not therefore affect the allocation of fiscal jurisdiction between the contracting parties to the Bilateral Tax Convention. (48)

104. Since, under the Bilateral Tax Convention, the Kingdom of the Netherlands must take into account rental income losses relating to a property located in Belgium for the purposes of determining the basis for assessing tax paid in the Netherlands, it must also take into account those same losses for the same purposes in the case of non-residents receiving all or almost all of their taxable income in the Netherlands and not deriving any significant income from their Member State of residence, otherwise the situation of those taxpayers will not be taken into account in either of the Member States concerned. (49)

105. It seems to me that the Member States' obligation as to the result to be achieved with regard to the particular situations of certain taxpayers falling within the scope of the Bilateral Tax Convention also arises from *Deutsche Shell*.

106. In that case, a reference had been made to the Court for a preliminary ruling concerning the tax treatment by the German authorities of the monetary depreciation (from Italian lire into German marks) of start-up capital granted by Deutsche Shell, a company whose registered office was in Germany, to one of its permanent establishments located in Italy, upon repatriation of that capital following transfer of the permanent establishment. (50) Primarily, the national court was asking in essence whether freedom of establishment and the free movement of capital precluded the Federal Republic of Germany excluding from the basis of assessment for German tax a currency loss suffered by Deutsche Shell upon repatriation of start-up capital because of the exemption granted under the tax convention between it and the Italian Republic, even though that currency loss could not form part of the permanent establishment's profits to be assessed for purposes of taxation in Italy and thus could not be taken into account either in Germany or in Italy.

107. As is clear from the order for reference and the Opinion of Advocate General Sharpston, (51) the national court concluded that the tax authority had interpreted the double taxation convention between the Federal Republic of Germany and the Italian Republic correctly, so there was no scope for the contested exchange rate loss to be taken into account in Germany because, under that convention, the income of the permanent establishment was to be taxed in Italy and the exchange rate loss related to the activity of that establishment in Italy.

108. Under the convention, the exchange rate loss could therefore be taken into account for tax purposes only in Italy. However, although the Italian Republic had taxed the profits of the permanent establishment generated by its transfer, the depreciation of the value of the start-up capital that had been granted to it was not taken into account as the basis of assessment was established in Italian lire.

109. Having found that, the exchange rate loss being a real financial loss affecting the company established in Germany, the tax system at issue constituted an obstacle to the freedom of establishment of the company established in Germany, (52) the Court rejected in particular the argument put forward by the German Government that by that convention the Federal Republic of Germany and the Italian Government had allocated their fiscal jurisdiction in such a way as to exempt permanent establishments situated on the territory of the other Contracting State from income tax, which excluded the currency loss concerned from being taken into account by the company's Member State of residence.

110. In that context, the Court did acknowledge that the competence of Member States to determine the criteria for taxation of income and wealth also means that a Member State cannot be required to take into account, for the purposes of applying its tax law, the negative results of a permanent establishment situated in another Member State which belongs to a company with a registered office in the first State *solely* because those negative results are not capable of being taken into account for tax purposes in the Member State where the permanent establishment is situated. (53) The Court held that '[f]reedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a company as to the establishment of commercial structures abroad may be to the company's advantage or not, according to circumstances'. (54)

111. The Court does not, however, follow that line of reasoning in the case at issue on the ground that 'the tax disadvantage concerned relates to a *specific operational factor* which is capable of being taken into consideration only by the German tax authorities. Although it is true that *any Member State which has concluded a double taxation convention must implement it by applying its own tax law and thereby calculate the income attributable*

to a permanent establishment, it is unacceptable for a Member State to exclude *from the basis of assessment of the principal establishment* [Deutsche Shell] currency losses which*, by their nature, can never be suffered by the permanent establishment*.' (55)

112. Since the currency exchange loss suffered by Deutsche Shell was caused solely by the monetary depreciation between the time the start-up capital was allocated and the time it was repatriated to Germany upon conversion of its value in Italian lire into German marks, the loss was generated solely on German territory and could not, by its very nature, be taken into account by the Italian tax authorities, as the Court found.

113. Ultimately, in *Deutsche Shell*, the Court therefore appears to require the company's Member State of residence to exercise its fiscal jurisdiction in respect of a cross-border transaction on the ground that that Member State is in fact the only one that can take into account the exchange rate loss at issue in order to ensure compliance with Community law, irrespective of the interpretation given by the referring court of the provisions of the double taxation convention with regard to the allocation of fiscal jurisdiction.

114. It is undeniable that the situation in *Deutsche Shell* is different from that in the present case. However, to my mind it is the approach taken by the Court which is most important, namely that of ensuring that, however fiscal jurisdiction is allocated, the particular situation of a taxpayer falling within the scope of a double taxation convention should be taken into account in one of the Member States parties to that convention.

115. If one were thus to extend the logic underlying the judgments in *de Groot* and *Deutsche Shell* to the situation of a taxpayer such as Mr Renneberg, who receives all or almost all of his taxable income in the Netherlands, it would in my view mean that the latter must, over and above the provisions of the Bilateral Tax Convention, take into account, for the contested tax years, rental income losses suffered by that taxpayer relating to his property in Belgium, the Member State in which he cannot enjoy a comparable advantage as he has no taxable income there.

116. In the light of all these considerations, and without the need to give a view on the interpretation of Article 56 EC, I consider that Article 39 EC must be interpreted as meaning that it precludes a Member State refusing, in the case of a non-resident taxpayer who receives all or almost all of his taxable income from an occupation in that Member State, to take into account, for the purposes of determining the basis of assessment of the income tax that must be paid in that Member State, rental income losses relating to a property located in the taxpayer's Member State of residence but in which he does not receive any income, when the first Member State (the Member State of employment) grants that advantage to its own residents who are in a comparable situation.

VI – Conclusion

117. Having regard to all of the foregoing considerations, I suggest that the Court should rule as follows on the reference for a preliminary ruling from the Hoge Raad der Nederlanden:

Article 39 EC must be interpreted as meaning that it precludes a Member State refusing, in the case of a non-resident taxpayer who receives all or almost all of his taxable income from an occupation in that Member State, to take into account, for the purposes of determining the basis of assessment of the income tax that must be paid in that Member State, rental income losses relating to a property located in the taxpayer's Member State of residence but in which he does not receive any income, when the first Member State (the Member State of employment) grants that advantage to its own residents who are in a comparable situation.

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1 – Original language: French.

2 – Case C-279/93 [1995] ECR I-225.

3 – Case C-182/06 [2007] ECR I-6705.

4 – Case C-152/03 [2006] ECR I-1711.

5 – *Trb.* 1970, 192 and *Moniteur Belge*, 25 September 1971.

6 – *Staatsblad* 1964, No 519.

7 – Case C-112/91 [1993] ECR I-429, paragraphs 16 and 17.

8 – Case C-520/04 [2006] ECR I-10685, paragraph 16.

9 – Case C-513/03 [2006] ECR I-1957, paragraph 49.

10 – Case C-212/05 [2007] ECR I-6303 and Case C-287/05 [2007] ECR I-6909, respectively. In the relevant paragraphs, the judgments in those cases refer to paragraph 31 of the judgment in *Ritter-Coulais*, in which the Court held that 'any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article 48 of the EC Treaty (now, after amendment, Article 39 EC)'. See also *Lakebrink and Peters-Lakebrink*, paragraph 15).

11 – *Hartmann*, paragraph 18.

12 – *Hendrix*, paragraph 46.

13 – *Hendrix*, paragraphs 42 and 44.

14 – *Turpeinen*, paragraph 16.

15 – I would add, although it is clear, that the clause excluding the provisions on the free movement of workers from applying to employment in the public service, contained in Article 39(4) EC, cannot be relied upon against Mr Renneberg because he is of Netherlands nationality and had already begun working for the municipality before exercising the right of freedom of movement for workers.

16 – See, in particular, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 7.

17 – See, in particular, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; *Schumacker*, paragraph 26, and Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16.

18 – See, in particular, *Schumacker*, paragraphs 29 and 31, *Wielockx*, paragraphs 17 to 19, and *Lakebrink and Peters-Lakebrink* (paragraphs 27 to 29).

19 – See, to that effect, *Schumacker*, paragraph 32; Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 22; Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 21; Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 90; Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 43; Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraph 15, and Case C-329/05 *Meindl* [2007] ECR I-1107, paragraph 23.

20 – See, in particular, *Schumacker*, paragraph 34; *Gschwind*, paragraph 23, and Case C-346/04 *Conijn* [2006] ECR I-6137, paragraph 16)

21 – See *Schumacker*, paragraph 36; *Gschwind*, paragraph 27; *de Groot*, paragraph 89; *Wallentin*, paragraph 17, and *Lakebrink and Peters-Lakebrink*, paragraph 30.

22 – See *Schumacker*, paragraph 38; *Wielockx*, paragraphs 21 and 22; *Wallentin,* paragraph 17, and *Lakebrink and Peters-Lakebrink*, paragraph 31.

23 – *Ritter-Coulais*, paragraphs 11 to 17.

24 – *Ritter-Coulais*, paragraphs 34 to 38.

25 – Opinion in *Ritter-Coulais*, paragraphs 84 to 102.

26 – See, to that effect, Opinion of Advocate General Léger, paragraphs 98 to 102.

27 – See paragraphs 36 and 37 of *Ritter-Coulais*.

28 – Paragraph 33 of *Lakebrink and Peters-Lakebrink*.

29 – Ibid., paragraph 34.

30 – Ibid., paragraph 35.

31 – Which is in principle the case where those taxpayers receive no work-related income in their Member State of residence.

32 – For information, in my Opinion in that case I had none the less examined, as a subsidiary point, the observations in which the Luxembourg Government was, it seemed to me, basically trying to demonstrate that legislation at issue sought to safeguard the coherence of its tax system (see points 44 to 52 of the Opinion).

33 – See to that effect *Ritter-Coulais*, paragraph 7, and *Lakebrink and Peters-Lakebrink*, paragraphs 6 to 8, and my Opinion in the latter case, point 39.

34 – Or the application of the same rule to different situations (see in particular *Schumacker*, paragraph 30, and *Lakebrink and Peters-Lakebrink*, paragraph 27).

35 – See also, to that effect, Opinion of Advocate General Léger in *Ritter-Coulais* (points 98 and 99).

36 – See *Gilly*, paragraphs 24 to 30; Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57; *de Groot*, paragraph 93; Case C-265/04 *Bouanich* [2006] ECR I–923, paragraph 49; Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 47; *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 52, and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] I-11949, paragraph 43.

37 – That allocation is moreover based on international practice, in particular on the Model Tax Convention on Income and on Capital drawn up by the Organisation for Economic Cooperation and Development (OECD), a model which

the Court has regularly stated it was not unreasonable for the Member States to base their agreements on: see, in particular, *Gilly*, paragraph 31, and *van Hilten-van der Heijden*, paragraph 48.

38 – In a context in which the issue was whether a German national residing in Germany was entitled to rely on the provisions of the bilateral tax convention the Court, rightly in my view, held that the non-discrimination rule laid down in Article 25(3) of that convention cannot be regarded as relating to the allocation of fiscal jurisdiction between those two Member States [see Case C-376/03 *D* [2003] ECR I-5821, paragraphs 60 to 62].

39 – See, to that effect, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 26, and *Denkavit Internationaal and Denkavit France*, paragraph 53.

40 – See case-law cited in footnote 39 above. It will be noted also that, even in cases in which the Court accepts that it is the choice of a connecting factor for the purposes of allocating bilateral fiscal jurisdiction that is at issue, it none the less checks whether that choice, which is not in itself discriminatory, may be 'to the disadvantage of the taxpayers concerned' [see *Gilly*, paragraph 34].

41 – See, for similar reasoning, *Saint-Gobain ZN*, paragraph 60.

42 – Case C-293/06 [2008] ECR I-00000, paragraph 44.

43 – See in particular *Lakebrink and Peters-Lakebrink*, paragraph 22, and *Deutsche Shell*, paragraphs 40 and 50.

44 – OJ 1977 L 336, p. 15.

45 – See, to that effect, Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 29, and case-law cited therein.

46 – See in particular to that effect, Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 26; Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I–2409, paragraph 49; Case C-470/04 *N* [2006] ECR I-7409, paragraph 40, and Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 25.

47 – Emphasis added.

48 – In order to dispel any doubt, it is not a matter of granting such an extension to any non-resident taxpayer falling within the scope of that convention, nor *a fortiori* of granting it to natural persons who are nationals of a Member State which is not a party to the Bilateral Tax Convention; the Court refused such an extension in *D,* paragraphs 54 to 60.

49 – It should be noted that the method by which this aspect of the ability to pay of a non-resident taxpayer who receives all or almost all of his taxable income in the State of employment is to be taken into account should be governed by national law, in compliance with Community law: see, to that effect, *de Groot*, paragraphs 114 and 115, and my Opinion in *Lakebrink and Peters-Lakebrink*, point 41.

50 – Naturally, the tax year and the monetary depreciation in that case preceded the entry into force of the Euro.

51 – See in particular Opinion delivered on 8 November 2007 in *Deutsche Shell*, point 12.

52 – Paragraphs 27, 29 to 32 of the judgment. As opposed, it would seem, to mere virtual accounting losses.

53 – Paragraph 42 (emphasis added).

54 – Paragraph 43. The Court refers, by analogy, to Case C-403/03 *Schempp* [2005] I-6421, paragraph 45, in which the Court held that 'the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to circumstances'.

55 – Paragraph 44 (emphasis added).