JUDGMENT OF THE COURT (Grand Chamber)

3 October 2006 *

In Case C-290/04,

REFERENCE for a preliminary ruling under Article 234 EC by the Bundesfinanzhof (Germany), made by decision of 28 April 2004, received at the Court on 7 July 2004, in the proceedings

FKP Scorpio Konzertproduktionen GmbH

v

Finanzamt Hamburg-Eimsbüttel,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Makarczyk, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, P. Kūris, U. Lõhmus, E. Levits (Rapporteur) and A. Ó Caoimh, Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 July 2005,

after considering the observations submitted on behalf of:

— FKP Scorpio Konzertproduktionen GmbH, by A. Cordewener and H. Grams, Rechtsanwälte, and D. Molenaar, belastingadviseur,

— the German Government, by M. Lumma, U. Forsthoff and A. Tiemann, acting as Agents,

— the Belgian Government, by E. Dominkovits, acting as Agent,

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. de Bellis, avvocato dello Stato,

— the United Kingdom Government, by C. Jackson, acting as Agent, and G. Barling QC and J. Stratford, barrister,

— the Commission of the European Communities, by R. Lyal and B. Eggers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2006,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 59 of the EEC Treaty (later Article 59 of the EC Treaty, now, after amendment, Article 49 EC) and Article 60 of the EEC Treaty (later Article 60 of the EC Treaty, now Article 50 EC).

2 The reference was made in the course of proceedings between FKP Scorpio Konzertproduktionen GmbH ('Scorpio') and the Finanzamt (Tax Office) Hamburg-Eimsbüttel concerning income tax to which that company was assessed in Germany for the year 1993.

Legal context

Community legislation

3 Article 58 of the EEC Treaty (subsequently Article 58 of the EC Treaty, which in turn became Article 48 EC) provides:

'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

...'

4 Article 59 of the EEC Treaty provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.'

5 Under Article 60 of the EEC Treaty:

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

6 Article 66 of the EEC (subsequently Article 66 of the EC Treaty, which in turn became Article 55 EC) Treaty reads:

'The provisions of Articles 55 to 58 shall apply to the matters covered by this Chapter.'

National legislation

7 The German Law on Income Tax (Einkommensteuergesetz, 'the EStG'), in the version of the Tax Amendment Law (Steueränderungsgesetz) of 25 February 1992 (BGBl. 1992 I, p. 297), in force at the material time, provides in Paragraph 1(4) that natural persons who are neither permanently nor ordinarily resident in Germany — apart from exceptions not arising in the case in the main proceedings — have partial liability to income tax where they receive income in that Member State within the meaning of Paragraph 49 of the EStG. Under Paragraph 49(1)(2)(d) of the EStG, such income covers income from cultural, artistic or similar performances in Germany, irrespective of the person receiving the earnings.

8 Paragraph 50a(4), first sentence, (1) of the EStG provides that, in the case of persons with partial liability to tax, the tax on income of that kind is levied by means of retention at source. The retention amounts to 15% of the total receipts. Under Paragraph 50a(4), third, fifth and sixth sentences, of the EStG, business expenses are not deductible. The value added tax on the services provided in Germany by the person with partial tax liability also forms part of the income.

9 The income tax is payable when the payment is made to the creditor. At that time the payment debtor must, in accordance with Paragraph 50a(5), first and second sentences, of the EStG, make the retention of tax at source for the account of the payment creditor with partial liability to tax, the latter being the taxable person (tax debtor).

10 The payment debtor must pay to the competent Finanzamt the tax retained during the past quarter, and that payment must take place at the latest by the tenth day of the month following that quarter. In accordance with Paragraph 50a(5), third and fifth sentences, of the EStG, that debtor is responsible for retaining and paying the tax. Apart from exceptions which do not apply in this case, the income tax of partially taxable persons is deemed, in view of the discharging effect of the retention at source laid down by Paragraph 50(5) of the EStG, to have been paid once it is retained at source.

11 Paragraph 50d of the EStG lays down certain special rules for the case in which a convention for the avoidance of double taxation applies.

12 Thus Paragraph 50d(1), first sentence, of the EStG provides that, where income subject to retention at source under Article 50a of the EStG cannot be taxed because of such a convention, the provisions relating to retention of tax at source by the payment debtor must none the less be applied without prejudice to the convention. Only if the Bundesamt für Finanzen (Federal Finance Office) certifies on application that the conditions laid down to that end by the convention for the avoidance of double taxation are satisfied is the payment debtor, in accordance with the exemption procedure laid down in Paragraph 50d(3), first sentence, of the EStG, not obliged to make the retention at source. In the absence of a certificate of exemption

issued by the Bundesamt für Finanzen, the payment debtor is required to make the retention.

13 Under Paragraph 50d(1), first sentence, of the EStG, the payment creditor does not, however, lose the rights to exemption from tax granted him by the convention for the avoidance of double taxation. On the contrary, under Paragraph 50d(1), second sentence, of the EStG, the tax retained and paid must be reimbursed to him, on application, to the extent provided for by the convention.

14 Under Paragraph 50d(1), last sentence, of the EStG, where an action for liability is brought against the debtor for failing to retain the tax at source, he cannot rely in those proceedings on the rights conferred on the payment creditor by a convention for the avoidance of double taxation.

15 According to the information provided by the referring court, the income derived from the artistic performances at issue in the main proceedings was not taxable in Germany but only in the Netherlands, by virtue of the Convention of 16 June 1959 between the Federal Republic of Germany and the Kingdom of the Netherlands for the avoidance of double taxation in the area of income, capital, and various other taxes and for regulating other tax matters (BGBl. 1960 II, p. 1782, 'the Germany-Netherlands Convention').

16 Finally, by way of comparison, the situation should be described of a provider of services who is permanently or ordinarily resident in Germany and consequently is wholly liable to income tax in that Member State.

17 That provider of services is subject to the general obligation to make a declaration of income as part of the procedure for assessing income tax. Since the debtor of the payment made to that service provider is not obliged to make a retention at source, it is not possible for him to incur liability by reason of not having made such a retention. Nor can the payment debtor be held liable for the income tax due from the payment creditor.

The main proceedings and the questions referred for a preliminary ruling

18 Scorpio, whose registered office is in Germany, is a company which organises concerts. In 1993 it concluded a contract with a natural person trading under the name of Europop, who made a music group available to it. Europop was at that time established in the Netherlands and was not permanently or ordinarily resident or established in Germany. The national court states that it does not know Europop's nationality.

19 In the first and third quarters of 1993, Scorpio paid Europop a total of DEM 438 600 for the services provided by Europop. From that sum Scorpio did not make the retention of tax at source laid down in Paragraph 50a(4)(1), first sentence, of the EStG, even though Europop had not presented to it the certificate of exemption mentioned in Paragraph 50d(3), first sentence, of the EStG.

20 After learning of those facts, the competent tax authority called on Scorpio's liability and, by a notice of assessment of 21 March 1997, demanded payment of the sum of

DEM 70 395.30 representing the amount of tax which Scorpio should have retained at source from the payment made to Europop, namely 15% of the gross amount of that payment.

21 Scorpio's objection to the Finanzamt Hamburg-Eimsbüttel against that assessment notice was rejected. The Finanzgericht Hamburg (Hamburg Finance Court), to which Scorpio then turned, also dismissed its application, since Scorpio had not presented the certificate of exemption required by Paragraph 50d(3), first sentence, of the EStG.

22 Scorpio appealed on a point of law to the Bundesfinanzhof (Federal Finance Court), seeking to have the decision of the Finanzgericht set aside and the contested notice of assessment annulled.

23 In support of its appeal, Scorpio argues, first, that Paragraph 50a(4), sixth sentence, of the EStG is contrary to Articles 59 and 60 of the EC Treaty in that it excludes the deduction of business expenses from the amount to be retained at source. That, it says, follows from the judgment in Case C-234/01 *Gerritse* [2003] ECR I-5933.

24 It argues, second, that the fact that it is prohibited by Paragraph 50d(1), fourth sentence, of the EStG from relying, as the party whose liability may be incurred in accordance with Paragraph 50a(5), fifth sentence, of the EStG, on the tax exemption to which the payment creditor — in this case Europop — is entitled under the Germany-Netherlands Convention is also contrary to the EC Treaty.

25 The Bundesfinanzhof is uncertain as to how Articles 59 and 60 of the EC Treaty are to be interpreted with respect to the principle of the retention of tax at source, and as to the extent of the action for liability brought by the Finanzamt on that basis. It states that the outcome of the main proceedings depends inter alia on whether the interpretation of those articles would be the same if Europop had not been a national of a Member State when he provided his services.

26 In those circumstances the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Articles 59 and 60 of the EC Treaty be interpreted as meaning that they are infringed if a payment debtor established in Germany of a payment creditor established in another State of the European Union (in this case: in the Netherlands), who holds the nationality of a Member State, can be held liable under Paragraph 50a(5), fifth sentence, of the [EStG] 1990 in the version in force in 1993, because he has failed to retain tax at source pursuant to Paragraph 50a(4) of the EStG, whereas payments to a payment creditor who is wholly liable to income tax in Germany (a German) are not subject to any retention of tax at source pursuant to Paragraph 50a(4) of the EStG and therefore no liability of the payment debtor for not making a retention or not making a sufficient retention of tax at source can arise?

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

(3) If the answer to Question 1 is in the negative:

(a) Are Articles 59 and 60 of the EC Treaty to be interpreted as meaning that business expenses incurred by a payment creditor established in another State of the European Union and economically connected with his activities in Germany giving rise to the payments must be taken into account in reduction of tax by the payment debtor at the time of retaining tax at source pursuant to Paragraph 50a(4) of the EStG, because Germans too are subject to income tax only on the net income remaining after deduction of business expenses?

(b) Is it sufficient for the purpose of avoiding an infringement of Articles 59 and 60 of the EC Treaty if, in retaining tax at source pursuant to Paragraph 50a(4) of the EStG, only the business expenses economically connected with the activity in Germany giving rise to the claim for payment and which the payment creditor established in another State of the European Union has reported to the payment debtor are taken into account in reduction of tax, and any further business expenses can be taken into account in a subsequent refund procedure?

(c) Are Articles 59 and 60 of the EC Treaty to be interpreted as meaning that they are infringed if the tax exemption to which a payment creditor established in the Netherlands is entitled in Germany under the [Germany-Netherlands Convention] is initially disregarded in the retention of tax at source pursuant to Paragraph 50a(4) in conjunction with Paragraph 50d(1) of the EStG and only allowed in a subsequent procedure for exemption or

refund and the payment debtor is likewise not entitled to rely on the tax exemption in proceedings concerning liability, whereas Germans' tax-free income is not subject to any retention of tax and therefore no liability for non-retention or insufficient retention of tax at source can arise either?

(d) Are the answers to Questions 3(a) to (c) different if the payment creditor established in another State of the European Union is not a national of a Member State at the time of providing his service?'

The questions

27 It should be noted at the outset that, as the facts at issue in the main proceedings took place before 1 November 1993, in other words at a date before that of the entry into force of the Treaty on European Union signed at Maastricht on 7 February 1992, the interpretation asked for by the national court relates to Articles 59 and 60 of the EEC Treaty.

Question 1

28 By its first question the national court asks essentially whether Articles 59 and 60 of the EEC Treaty must be interpreted as precluding national legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, while

payments made to providers of services resident in that Member State are not subject to such a retention. The national court asks the Court to rule also on the corollary of such legislation, namely the liability incurred by a recipient of services who has failed to make the retention at source that he was required to make.

29 The legislation at issue in the main proceedings establishes a different tax system depending on whether the provider of services is established in Germany or in another Member State.

30 It must be stated, first, that although direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law (see, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21).

31 It should be recalled, next, that according to the Court's case-law Article 59 of the EEC Treaty requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than the one in which the service is provided (Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 25, and Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 15).

32 Finally, it is settled case-law that Article 59 of the EEC Treaty confers rights not only on the provider of services but also on the recipient (see, in particular, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377; Case C-204/90 *Bachmann* [1992] ECR I-249; Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-224/97 *Ciola* [1999] ECR I-2517; and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447).

33 In the present case, as the referring court points out, the obligation on the recipient of services to make a retention at source of the tax on the payment made to a provider of services residing in another Member State and the fact that that recipient may in certain cases incur liability are liable to deter companies such as Scorpio from calling on providers of services residing in other Member States.

34 It follows that legislation such as that at issue in the main proceedings constitutes an obstacle to the freedom to provide services, prohibited in principle by Articles 59 and 60 of the EEC Treaty.

35 As the governments which have submitted observations and the Commission rightly submit, and as the Advocate General states in his Opinion, such legislation is nevertheless justified by the need to ensure the effective collection of income tax.

36 The procedure of retention at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State of residence and the State where the services are provided. It should be recalled that at the material time, in 1993, no Community directive or any other instrument referred to in the case-file governed mutual administrative assistance concerning the recovery of tax debts between the Kingdom of the Netherlands and the Federal Republic of Germany.

37 Moreover, the use of retention at source represented a proportionate means of ensuring the recovery of the tax debts of the State of taxation.

38 The same is true of the potential liability of the recipient of services who is required to make such a retention, as that enables the absence of retention at source to be penalised if necessary. Since that liability constitutes the corollary of that method of collecting income tax, it too contributes in a proportionate manner to ensuring the effectiveness of collecting the tax.

39 It follows that Articles 59 and 60 of the EEC Treaty must be interpreted as not precluding:

— national legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, whereas payments made to providers of services resident in that Member State are not subject to such a retention;

— national legislation under which liability is incurred by a recipient of services who has failed to make the retention at source that he was required to make.

Question 2

40 Since this question is based on the same premiss as Question 3(d), namely that the payment creditor is a national of a non-member country, it will be examined together with that question.

Question 3(a)

41 The Bundesfinanzhof asks the Court whether Articles 59 and 60 of the EEC Treaty must be interpreted as precluding national legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses of that service provider which are economically connected with his activities in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expenses.

42 The Court has already had occasion to rule on whether Articles 59 and 60 of the EC Treaty preclude national tax legislation 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 (*Gerritse*, paragraph 55).

43 In *Gerritse* the Court first found that the business expenses in question in that case were directly linked to the activity that had generated the taxable income, so that residents and non-residents were placed in a comparable situation in that respect. It then answered in the affirmative the question referred to it for a preliminary ruling, holding that a national provision which, in matters of taxation, refuses to allow non-residents to deduct business expenses, whereas residents are allowed to do so, constitutes indirect discrimination on grounds of nationality, contrary in principle to Articles 59 and 60 of the EC Treaty. It did not, however, rule on the question of the stage of the taxation procedure at which the business expenses incurred by a provider of services must be deducted, in a case where several different stages are possible.

44 In order to provide the referring court with a useful answer, the concept of 'economically connected business expenses' must therefore be understood as referring to expenses that are directly linked, within the meaning of the line of case-law starting with *Gerritse*, to the economic activity that generated the taxable income.

45 The Bundesfinanzhof thus wishes to know whether Articles 59 and 60 of the EEC Treaty likewise preclude national tax legislation which does not allow business expenses to be deducted from taxable income at the time when the payment debtor makes the retention at source of the tax, but gives a non-resident the possibility of being taxed on the basis of his net income in Germany in a procedure following, at his request, the procedure of retention at source, and of thus obtaining a refund of any difference between that amount and that of the retention at source.

46 Starting from the Bundesfinanzhof's premiss, namely the existence at the material time of a refund procedure in which the business expenses of a non-resident provider of services could be taken into account subsequently, it should be recalled that, according to settled case-law of the Court, the application of the host Member State's national rules to providers of services is liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expense and additional administrative and economic burdens (see Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 24, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 30).

47 In the case at issue in the main proceedings, the obligation, even where the non-resident provider of services has informed his payment debtor of the amount of his business expenses directly linked to his activity, to commence a procedure for the

subsequent refund of those expenses is liable to impede the provision of services. In that commencing such a procedure involves additional administrative and economic burdens, and to the extent that the procedure is inevitably necessary for the provider of services, the tax legislation in question constitutes an obstacle to the freedom to provide services, prohibited in principle by Articles 59 and 60 of the EEC Treaty.

48 No argument has been advanced to justify the national legislation at issue in the main proceedings, in so far as it does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses directly linked to the activity of the non-resident provider of services in the Member State in which the services are provided, if the provider of services has reported them to him.

49 The answer to Question 3(a) must therefore be that Articles 59 and 60 of the EEC Treaty must be interpreted as precluding national legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are directly linked to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expenses.

Question 3(b)

50 By this question, which is linked to the preceding one, the Bundesfinanzhof essentially asks whether Articles 59 and 60 of the EEC Treaty must be interpreted as

not precluding national legislation under which only the business expenses directly linked to activities in the Member State in which the service is provided, which the service provider established in another Member State has reported to the payment debtor, are deducted in the procedure for retention at source, and any further business expenses can be taken into account in a subsequent refund procedure.

51 This question must be answered in the light of the considerations on the previous question and bearing in mind the fact that the Court does not have the material to make a comparison between the situations of resident and non-resident providers of services. While the expenses which the provider of services has reported to his debtor must be deducted in the procedure for the retention of tax at source, Articles 59 and 60 of the EEC Treaty do not preclude the taking into account if appropriate of expenses that are not directly linked, within the meaning of the *Gerritse* line of case-law, to the economic activity that generated the taxable income, in a subsequent refund procedure.

52 The answer to Question 3(b) must therefore be that Articles 59 and 60 of the EEC Treaty must be interpreted as not precluding national legislation under which only the business expenses directly linked to the activity that generated the taxable income in the Member State in which the service is provided, which the service provider established in another Member State has reported to the payment debtor, are deducted in the procedure for retention at source, and expenses that are not directly linked to that economic activity can be taken into account if appropriate in a subsequent refund procedure.

Question 3(c)

53 By this question the Bundesfinanzhof asks the Court whether Articles 59 and 60 of the EEC Treaty must be interpreted as precluding a rule that the tax exemption granted under the Germany-Netherlands Convention to a non-resident provider of services who has carried on activity in Germany can be taken into account by the payment debtor in the procedure for retention of tax at source, or in a subsequent procedure for exemption or refund, or, in the circumstances referred to in paragraph 21 above, in proceedings for liability brought against him, only if a certificate of exemption stating that the conditions laid down to that end by that convention are satisfied is issued by the competent tax authority.

54 It should be recalled, first, that, according to settled case-law, in the absence of unifying or harmonising measures adopted by the Community, the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means inter alia of international agreements (see Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 57).

55 However, as far as the exercise of the power of taxation so allocated is concerned, the Member States are obliged to comply with Community rules (see, to that effect, *Saint-Gobain*, paragraph 58; Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 94; and Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 50).

56 Although, as indicated in paragraph 15 above, the income derived from the artistic services at issue in the main proceedings was taxable not in Germany but only in the Netherlands under the Germany-Netherlands Convention, it must be stated, as the Advocate General observes in point 88 of his Opinion, that the obligation imposed

on a provider of services residing in the Netherlands to request the competent German tax authority to issue a certificate of exemption in order to escape additional tax on his income in Germany constitutes, as pointed out in paragraph 49 above, a restriction on the freedom to provide services, because of the administrative steps that it requires the service provider to take.

57 Similarly, the obligation imposed on the recipient of services to produce that certificate of exemption in proceedings for liability brought against him is liable to deter him from calling on a provider of services established in another Member State. As Scorpio submits, the payment debtor has to make sure that his contracting partner has either personally initiated the procedure for exemption or refund (and, in the latter case, pays him the amount of the refund) or else given him authorisation to start that procedure on his behalf. There is a risk that a provider of services established in another Member State will not be interested in taking those steps or will no longer be available once the contractual relationship has come to an end.

58 Consequently, the fact that the tax exemption in question can be taken into account, at the various stages of the taxation procedure mentioned by the Bundesfinanzhof, only on production of a certificate issued by the competent tax authority stating that the conditions laid down to that end by the Germany-Netherlands Convention are satisfied constitutes an obstacle to the freedom to provide services guaranteed by Articles 59 and 60 of the EEC Treaty.

59 That obstacle is, however, justified in order to ensure the proper functioning of the procedure for taxation at source.

60 As the Belgian Government inter alia argues and as the Advocate General states in point 90 of his Opinion, it appears to be important that the payment debtor can refrain from retaining tax at source only if he is certain that the provider of services satisfies the conditions for an exemption. The payment debtor cannot be required himself to clarify whether or not, in each individual case, the income in question is exempt under a convention for the avoidance of double taxation. Finally, authorising the payment debtor unilaterally to refrain from retaining the tax at source could, in the event of an error on his part, have the effect of compromising the collection of the tax from the payment creditor.

61 In the light of the above considerations, the answer to Question 3(c) must be that Articles 59 and 60 of the EEC Treaty must be interpreted as not precluding a rule that the tax exemption granted under the Germany-Netherlands Convention to a non-resident provider of services who has carried on activity in Germany can be taken into account by the payment debtor in the procedure for retention of tax at source, or in a subsequent procedure for exemption or refund, or in proceedings for liability brought against him, only if a certificate of exemption stating that the conditions laid down to that end by that convention are satisfied is issued by the competent tax authority.

Question 2 and Question 3(d)

62 By these questions the Bundesfinanzhof essentially asks whether Article 59 of the EEC Treaty must be interpreted as being applicable if the recipient of services, who relies on that article in order to benefit from the freedom to provide services within the Community, is a national of a Member State and established within the Community, and his contracting partner, the provider of services, is established in another State of the Community but is a national of a non-member country.

63 It should be recalled that, as stated in paragraph 32 above and in accordance with settled case-law, Article 59 of the EEC Treaty confers rights not only on the provider of services but also on the recipient.

64 While those rights include the freedom for recipients of services to go to another Member State in order to receive a service there without being obstructed by restrictions (*Ciola*, paragraph 11, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 20), it is also apparent from settled case-law of the Court that the recipient of services may rely on those rights even if neither he nor the service provider moves within the Community (see, to that effect, *Eurowings Luftverkehr*, paragraph 34; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 55 and 57; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 25).

65 That is the case in the main proceedings. The United Kingdom Government's argument that Scorpio, as the recipient of services, cannot benefit from the freedoms guaranteed in Article 59 of the EEC Treaty since it did not go or seek to go to another Member State to be provided with the service at issue in the main proceedings cannot therefore be accepted.

66 While it follows from the above considerations that Scorpio, which, as a company or firm within the meaning of the first paragraph of Article 58 of the EEC Treaty, is treated in the same way as a natural person who is a national of a Member State, should in principle be able, pursuant to Article 66 of the EEC Treaty, to rely on the rights conferred on it by Article 59 of the EEC Treaty, it must be examined whether the fact that Europop, as a provider of services established in another Member State, is a national of a non-member country precludes Scorpio from relying on those rights.

67 On this point, the EEC Treaty states, since the Council has not made use of the possibility provided for in the second paragraph of Article 59 thereof, that the provisions governing the freedom to provide services apply if the following conditions are satisfied:

— the service must be provided within the Community;

— the provider of services must be a national of a Member State and established in a State of the Community.

68 It follows that the EEC Treaty does not extend the benefit of those provisions to providers of services who are nationals of non-member countries, even if they are established within the Community and an intra-Community provision of services is concerned.

69 Consequently, the answer to Question 2 and Question 3(d) must be that Article 59 of the EEC Treaty must be interpreted as not being applicable in favour of a provider of services who is a national of a non-member country.

Costs

70 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Articles 59 and 60 of the EEC Treaty must be interpreted as not precluding**

   — **national legislation under which a procedure of retention of tax at source is applied to payments made to providers of services not resident in the Member State in which the services are provided, whereas payments made to providers of services resident in that Member State are not subject to such a retention;**

   — **national legislation under which liability is incurred by a recipient of services who has failed to make the retention at source that he was required to make.**

2. **Articles 59 and 60 of the EEC Treaty must be interpreted as**

   — **precluding national legislation which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are directly linked to his activity in the Member State in which the services are provided, whereas a provider of services residing in that State is taxable only on his net income, that is, the income received after deduction of business expense;**

— **not precluding national legislation under which only the business expenses directly linked to the activity that generated the taxable income in the Member State in which the service is provided, which the service provider established in another Member State has reported to the payment debtor, are deducted in the procedure for retention at source, and expenses that are not directly linked to that economic activity can be taken into account if appropriate in a subsequent refund procedure;**

— **not precluding a rule that the tax exemption granted under the Convention of 16 June 1959 between the Federal Republic of Germany and the Kingdom of the Netherlands for the avoidance of double taxation in the area of income, capital, and various other taxes and for regulating other tax matters, to a non-resident provider of services who has carried on activity in Germany can be taken into account by the payment debtor in the procedure for retention of tax at source, or in a subsequent procedure for exemption or refund, or in proceedings for liability brought against him, only if a certificate of exemption stating that the conditions laid down to that end by that convention are satisfied is issued by the competent tax authority.**

3. **Article 59 of the EEC Treaty must be interpreted as not being applicable in favour of a provider of services who is a national of a non-member country.**

[Signatures]