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Personal and family tax advantages granted to non-residents: the CJEU takes a step further

A comment of CJEU, 10 March 2022, Commission v. Belgium, C-60/21

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Abstract

Member-States typically reserve certain family and personal tax allowances to residents, given that they (i.e., the States of residence) are deemed better placed than any other State to consider the personal and family situation of any taxpayer. Non-residents, being excluded from these tax allowances, risk being put in an unfavourable position. The article discusses the challenges faced by non-residents in the European Union regarding personal and family tax advantages, focusing on the disparities in tax systems that hinder mobility across Member States. It centres on the CJEU case law of Commission v. Belgium (C-60/21), in which the Court held that the Belgian deductibility of allowances, which was subject to certain conditions for non-residents of Belgium, violated the free movement of workers guaranteed by article 45 of the TFEU. The author examines previous CJEU case law, including Schumacker, Imfeld, and Renneberg, to illustrate how the Court has interpreted similar scenarios and emphasised the need for Member States to consider personal circumstances for non-residents taxation as well.

Keywords: European Union; Belgium; Free movement of workers; personal tax; family allowances; tax residence.

Differences between Member States' income tax systems can act as a real brake on the mobility of individuals within the European Union ("EU"). Although Article 45 of the Treaty on the Function-

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ing of the European Union ("TFEU") aims to remove all obstacles to the free movement of workers, certain obstacles remain.

In particular, if a resident of one Member State decides to exercise this freedom of movement by going to work in another EU Member State, he may, simply by exercising this freedom of movement, lose certain personal tax benefits to which he would have been entitled had he remained in his Member State of residence. This may result, for example, in the State of work (source State) refusing to grant certain deductions and advantages to take account of the worker's family and private life, while at the same time the State of residence is unable to grant the same tax advantages due to a lack of taxable income in the latter State.

Such scenario was referred to the Court of Justice of the European Union ("**CJEU**"), which rendered its ruling on 10 March 2022.[1] This ruling added a further piece to the pre-existing CJEU's case law on the personal and family tax advantages to be granted by Member States to residents of other EU Member States, that started with the famous Schumacker case.[2]

In this contribution, we propose to review the key takeaways of this decision. We shall first describe the facts and the decision of the CJEU (section 1). We will then draw some lessons from this judgment and links with the pre-existing case law of the CJEU (section 2). Finally, we will briefly expose the Belgian legislative amendment aimed at correcting this infringement (section 3) and propose a brief conclusion on that case law (section 4).

1. CJEU, 10 March 2022, *Commission v. Belgium*, C-60/21

1.1. Facts

The facts of the case are relatively simple: until the assessment year 2022, Belgian non-residents could not deduct alimony payments from their taxable income in Belgium unless they derived at least 75% of their total professional income from Belgium (the so-called "75% rule"). Only in the latter case could non-resident individuals deduct such alimony payments.

This is a relatively familiar issue in personal taxation: in principle, it is the State of residence that is best placed to take account of a taxpayer's personal and family circumstances - it is therefore the State of residence that should, in principle, grant the relevant tax advantages. Therefore, a non-resident could not, in principle, ask Belgium (or any other source State) to take account of his personal and family circumstances - it would be up to his State of residence to do so.

In the present case, however, Belgium allowed the deduction of alimony payments only if the 75% rule was met. It was considered that a non-resident who derived less than 75% of his professional income from Belgium could not be assimilated to a Belgian resident and could therefore not benefit from any reduction or deduction to take account of his family and, even if they could not benefit from the same deduction in their Member State of residence because of the low level of their taxable income in that State.[3]

1.2. Alleged violation

The infringement alleged by the Commission is relatively simple to understand: a Belgian non-resident who does not satisfy the 75% rule, but who nevertheless does not have sufficient taxable income in his State of residence to benefit from a similar tax advantage in that State, would find himself at a disadvantage simply because he has made use of the freedom of movement guaranteed by Article 45 TFEU.

1. CJEU, 10 March 2022, Commission v. Belgium, C-60/21.

2. CJEU,14 February 1995, Finanzamt Köln-Altstadt contre Roland Schumacker, C-279/93

3. Article 28 of the Agreement on the European Economic Area ("**EEA**") contains the same guarantee for three EEA countries (i.e., the European Union, Norway, Iceland and Liechtenstein).

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Indeed, if this worker had simply chosen to remain in his State of residence, he would have been able to benefit from the tax advantage in his State of residence because all his taxable income would have been derived from that State. Similarly, if this worker had earned more than 75% of his income in Belgium, he would have been able to benefit from the tax advantage in Belgium. Since the taxpayer neither (i) satisfies the 75% rule nor (ii) has sufficient income in his State of residence, he cannot benefit from the tax advantage in either State. His family situation would not be taken into account: neither in his State of residence (because of insufficient taxable income) nor in Belgium, the State of origin of the income (because of failure to comply with the 75% rule).

The same problem can also arise when a national (and resident) of a Member State receives income from several different Member States. Let's illustrate this infringement with a hypothetical example: a French resident who receives 60% of his professional income from Belgium and 40% from Luxembourg. Let's assume for the sake of argument that both Belgium and Luxembourg have a similar "75% rule". In such a scenario, the French resident (i) would not be able to benefit from the tax advantage in either Belgium or Luxembourg, as he would not meet the 75% rule in either country, and (ii) would not be able to benefit from the tax advantage in France either, as he would not have sufficient taxable income in his State of residence.

In short, a non-resident could be deprived of the tax advantages linked to his personal and family life if he is not sufficiently linked to the State of source of the income (for example, because the 75% rule is not met) and if he does not have sufficient income in his State of residence.

This restriction on the free movement of workers seemed quite obvious. It seemed so obvious that Belgium did not really challenge it during the proceedings before the ECJ.[4]

1.3. Court's decision

The Court held that by "*by refusing to allow the deduction of alimony payments from the taxable income of non-residents of Belgium who receive less than 75% of their professional income in Belgium and who cannot benefit from the same deduction in their Member State of residence because of the small amount of their taxable income in that State, the Kingdom of Belgium has failed to fulfil its obligations under Article 45 TFEU*".[5]

The mere fact that there is a 75% rule does not in itself violate the free movement of workers. What does lead to such a violation is, more precisely, that below this threshold, the 75% rule no longer offers any possibility of obtaining the tax advantage, even if the non-resident has not been able to benefit from a similar tax advantage in his State of residence.

Therefore, this 75% rule is in fact problematic only insofar as it implies an irrebuttable presumption that where this threshold is not reached in the source State, the State of residence is necessarily in a position to grant the relevant tax advantages.[6] This point had been raised by a number of tax scholars who stressed that the introduction of a quantitative threshold, without other mitigating measures or taking other circumstances into account, could not, on its own, guarantee that a taxpayer's personal and family situation would be taken into account in at least one Member State.[7]

It is only in this case that the CJEU considers that there is a discrimination and therefore a violation of the free movement of workers. It is therefore not enough to set a threshold above which a non-resident would be treated as a resident (e.g., the 75% rule) – it is also necessary to ensure that,

4. See, in particular, paras. 7, 13 and 14 of the judgment.

5. CJEU, 10 March 2022, Commission v. Belgium, C-60/21, para. 39 (free translation).

6. CJEU, 10 March 2022, Commission v. Belgium, C-60/21, para. 29. According to the CJEU, such a rule "*seems to be based on the presumption that, in all cases where that threshold is not reached, the taxpayer's Member State of residence is able to take account of all his personal and family circumstances*" (free translation).

7. F.-S. Meeûs & E. Traversa, *Les grands arrêts de la jurisprudence fiscale*, Bruxelles, Larcier, 2020, p. 359; P.J. Wattel, *Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances*, European Taxation, 2000, p. 210 (IBFD).

below this threshold, the taxpayer has not been deprived of this advantage in his State of residence (in particular, because his taxable income is too low in that State).

2. Observations

2.1. The State of residence is in principle in a better position to (and should therefore) take account of the family situation of its taxpayers...

It is true that the CJEU has consistently affirmed the principle that a resident taxpayer is not in principle comparable to a non-resident and that, as regards the latter, "*international tax law, and in particular the Model Double Taxation Treaty of the Organization for Economic Cooperation and Development (OECD), recognizes that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence*".[8]

This premise has often been criticised by tax scholars, in particular on the grounds that no positive rule of international law would require a State of residence to tax its residents globally, taking into account the personal and family situation of the taxpayer.[9]

It is nonetheless undeniable that the source State is in an *a priori* more uncomfortable factual situation when it comes to determining the overall situation of a taxpayer.[10] Most of the time, the source State has no information on the taxpayer's overall income or personal situation – in fact, most of the time, it only has information on the remuneration received on its territory.[11] It is also true that this partial information is not enough to determine a taxpayer's overall tax capacity.

In practice, however, nothing prevents the source State from completing this overview by requesting additional information, either from the taxpayer himself (for example, by asking him to file a more complete tax return),[12] or from the tax authorities of the State of residence. With regard to the latter possibility, we note that this is expressly what the CJEU recognised in the *Schumacker* precedent when it rejected administrative difficulties as a justification for restricting the free movement of persons. In this judgment, the CJEU considered that the mechanisms for exchanging information (in particular, the DAC) made it possible to obtain the relevant information to take into account the personal and family situation of a non-resident.[13]

8. CJEU, 14 February 1995, *Finanzamt Jöln-Altstadt v. Roland Schumacker*, C-279/93, para. 32.

9. F.-S. Meeûs & E. Traversa, *Les grands arrêts de la jurisprudence fiscale*, Bruxelles, Larcier, 2020, p. 358; P.J. Wattel, *Non-Discrimination à la Cour: the ECJ's (Lack of) Comparability Analysis in Direct Tax Cases*, European Taxation, 2015, p. 550; N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, Alphen aan den Rijn, Wolters Kluwer, 2012, especially *Part III: Non-discrimination in European tax law*, *Chapter 14: Case Law on the Comparability Test* (section 14.2.1.1.1); M. Mössner, *Source versus Residence - an EU Perspective*, Bulletin, 2006, p. 501; N. Mattsson, *Does the European Court of Justice Understand the Policy behind Tax Benefits Based on Personal and Family Circumstances?*, European Taxation, 2003, p. 186.

10. See also Opinion of Advocate General M. Wathelet, delivered on 7 September 2016, para. 27 (CJEU, 9 February 2017, *X v Staatssecretaris van Financiën*, C-283/15).

11. P.J. Wattel, *Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances*, European Taxation, 2000, p. 215.

12. P.J. Wattel, *Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances*, European Taxation, 2000, p. 215.

13. CJEU, 14 February 1995, *Finanzamt Jöln-Altstadt v. Roland Schumacker*, C-279/93, para. 45.

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2.2. … but the source States are sometimes also obliged to take account of the personal and family circumstances

2.2.1. A discrimination on *tax residency* is assimilated to a indirect discrimination on *nationality*

Article 45 of the TFEU prohibits "*any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment*" and Regulation 492/2011 contains provisions to implement the objectives set out in Articles 45 and 46 of the TFEU in the area of free movement of workers.[14] Article 7 of this Regulation states that "*a worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality*" and that "*he shall enjoy the same social and tax advantages as national workers*".

National tax systems typically make a distinction between residents and non-residents: the former, who have ties with their State of residence, are taxed on their worldwide income[15] whereas the latter are taxed only on the income they derive from the source State. A State will therefore tend to grant tax benefits linked to a taxpayer's personal and family situation only if the taxpayer is a resident of that State. Non-residents, on the other hand, who have no connection with a State other than the income they derive from it, are often deprived of tax benefits linked to their personal and family circumstances.

While Article 45 of the TFEU and Article 7 of Regulation 492/2011 prohibit discrimination on grounds of *nationality*, the alleged discrimination here is between residents and non-residents (and *not* between nationals and non-nationals). Nevertheless, the CJEU has always assimilated a discrimination based on residency to a discrimination based on nationality. According to the CJEU, a difference in treatment between residents and non-residents "*operate mainly to the detriment of nationals of other Member States*" since "*non-residents are in the majority of cases foreigners*".[16] According to the Court, a distinction based on residence leads to the same result as a distinction based on nationality.[17] In so doing, the CJEU assimilates the criterion of tax residency to the criterion of nationality, so that a difference in treatment on the basis of tax residency amounts to *indirect* discrimination on the basis of nationality.[18]

2.2.2. In principle, a non-resident is not comparable to a resident…

As is generally taught, discrimination involves either a difference in treatment in comparable situations or an identical treatment in different situations.[19]

The CJEU has consistently held, in numerous decisions, that the situation of a resident is not in principle comparable to that of a non-resident.[20] This conclusion is based on the finding that, as a matter of principle, residents are taxed on their worldwide income, whereas non-residents

14. Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, *O.J.*, 27 May 2011. The predecessor of this regulation is Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, *O.J.*, 19 October 1968.

15. With a few adjustments, notably provided for in double taxation agreements.

16. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 28; CJEU, 13 July 1993, The Queen and Inland Revenue Commissioners, ex parte: Commerzbank AG, C-330/91, para. 15; CJEU, 28 January 1992, Hanns-Martin Bachmann and Etat belge, C-204/90, para. 9; CJEU, 8 May 1990, Biehl and Administration des contributions du grand-duché du Luxembourg, C-175/88, para. 14.

17. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 26.

18. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 29.

19. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 30.

20. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 31; CJEU, 5 July 2005, D. v. Inspecteur van de Belastingdienst, C-376/03, para. 26; CJEU, 12 May 1998, Epoux Robert Gilly v. Directeur des services fiscaux du Bas-Rhin, C-336/96, para. 49. See also, regarding withholding taxes, K. Simader, *Withholding taxes and the Fundamental Freedoms*, Alphen aan den Rijn, Wolters Kluwer, 2013 (especially pp. 127 *et seq.*).

are taxed only on the income they derive from one State. According to the Court, it is therefore the State of residence that is better placed, for various reasons, to tackle "*the overall taxation of taxpayers, taking account of their personal and family circumstances*".[21] For example, the State of residence generally taxes all its worldwide income, which implies that the income of its residents is centralised – and declared – in that State. The State of residence also has all the information necessary to assess the overall taxpaying capacity of its residents.

In principle, therefore, residents and non-residents are in objectively different situations.

However, according to the CJEU, residents and non-residents may ultimately find themselves in a comparable situation. This is the case, in particular, when a taxpayer, although non-resident, derives most of his taxable income from one State (the source State) and very little income in his State of residence. In such circumstances, the CJEU considers that a difference in treatment would be discriminatory.[22] The *Schumacker* judgment illustrates this lesson.

It should be pointed out here that, while this ruling concerns the deduction of alimony payments, the lessons drawn here concern all deductions and advantages linked to taking into account a taxpayer's personal or family situation. Indeed, this is what the CJEU has always pointed out: this case law applies "*to all the tax advantages connected with the non-resident's ability to pay tax which are not granted either in the Member State of residence or in the Member State where a worker is employed*".[23]

Below, we review some of the relevant rulings. We have selected, at our own discretion, those cases which we considered to be the most relevant.[24]

2.2.3. *Schumacker*

The facts are as follows: a Belgian resident, Mr Schumacker, was working in Germany. At the time, German tax law provided that income tax for German residents was determined on the basis of their total income and their personal and family situation (certain deductions and tax reductions being applicable to them). Non-residents, such as Mr Schumacker, were excluded from these tax deductions and reductions.[25] In particular, the German tax system allowed for a *splitting* mechanism, according to which some of a taxpayer's income was allocated to his or her spouse, in order to mitigate the effect of progressive taxation.[26]

Although non-resident, Mr Schumacker's household derived all of its income from the remuneration received by Mr Schumacker in Germany.[27] Mr Schumacker therefore asked Germany to allow him to benefit from the *splitting* mechanism. The German tax authorities refused him this benefit on the grounds that it was not applicable to non-residents. After losing at first instance (*Finanzgericht*),

21. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 32. The CJEU refers, in particular, to the OECD Model Convention in concluding that "*it is in principle for the State of residence to tax the taxpayer globally, taking into account the factors inherent in his personal and family situation*".

22. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 36. See, as regards Article 49 TFEU (freedom of establishment), CJEU, 22 March 2007, *Raffaele Talotta v Belgian State*, C-383/05, para. 19.

23. CJEU, 9 February 2017, X v. Staatssecretaris van Financiën, C-283/15, para. 35; CJEU, 18 June 2015, Kieback, C-9/14, para. 27; CJEU, 19 July 2007, Lakebrink, C-182/06, para. 34.

24. Naturally, not all relevant cases will be mentioned. Some interesting cases will therefore be omitted, such as, the followings: CJEU, 9 February 2017, X v. Staatssecretaris van Financiën, C-283/15; CJEU, 18 June 2015, Kieback, -C9/14; CJEU, 10 May 2012, Commission v. Estonia, C39/10-; CJEU, 12 December 2002, de Groot, C385/00; CJEU, 12 May 1998, Gilly, C-336/96; CJEU, 11 August 1995, Wielockx, C-80/94;. For a synthetic picture in this respect, we recommend N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, Alphen aan den Rijn, Wolters Kluwer, 2012, especially *Part III: Non-discrimination in European tax law*, *Chapter 14: Case Law on the Comparability Test*.

25. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, paras. 10 and 11.

26. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 7.

27. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 15.

the tax authorities appealed to the Court of Appeal (*Bundesfinanzhof*). This court asked the CJEU, among other things, whether the German legislation was contrary to the free movement of workers.

After pointing out that non-residents are not, in principle, in a situation comparable to residents, the CJEU considered that, in the circumstances of this case, Mr Schumacker's situation was comparable to that of a German resident since all of his household income came from his remuneration in Germany (with no income in Belgium). Where a non-resident receives no significant income in the State of his residence and derives most of his taxable resources from an activity carried on in the State of employment, it cannot be claimed that such a non-resident is not comparable to a resident of the State of employment. In such a situation, a difference in treatment between Mr Schumacker and German residents could not be justified since Mr Schumacker's personal and family circumstances could not be taken into account either in the State of residence (in this case, Belgium) in the absence of sufficient taxable income, or in the State of source (in this case, Germany).

It was therefore a restriction on the free movement of workers.[28] Here, the Court fully followed the reasoning of the Advocate General in his Opinion.[29]

As for a potential justification for this discrimination, the CJEU rejected the argument based on the need to maintain the coherence of the tax system since there was no risk of that coherence being undermined (in particular, by a double tax advantage, received by the taxpayer both in his State of residence and in his State of employment).[30] The CJEU also rejected the administrative difficulties that would arise from the fact that the State of employment does not have access to all the information concerning non-resident taxpayers, on the grounds that the mechanisms for exchanging information made it possible to obtain the relevant information to take into account the personal and family situation of a non-resident.[31]

Interestingly, the CJEU also noted that Germany had provided, in its tax treaty with the Netherlands, that a Dutch resident who received at least 90% of his income in Germany was treated as a German resident and could, as such, benefit from the advantages normally reserved only for German residents.[32] Although the CJEU did not expressly say so, it already seemed to validate – or, at the very least, not to criticize – a system that reserves tax benefits for non-residents on condition that they receive at least a significant percentage (90%) of their income from the source State.

2.2.4. *Gschwind*

The Gschwind ruling came four years after the Schumacker ruling.[33] Following this latter judgment, the German legislator extended the *splitting* advantage to taxpayers resident in another Member State provided that (i) 90% of the couple's income was subject to income tax in Germany, or (ii) their income not subject to income tax in Germany did not exceed 24,000 Deutsche Marks. In short, Germany agreed to grant the tax advantage (*splitting*) provided that it received the lion's share of the taxable income. In these circumstances, Germany thought it had corrected the discrimination raised by the CJEU in the *Schumacker* ruling.

The facts giving rise to the judgment can be summarised as follows: Mr Gschwind is a Dutch resident who was gainfully employed in Germany, while his wife was gainfully employed in the Netherlands.

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28. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 38.

29. Opinion of Advocate General P. Léger, presented on 22 November 1994.

30. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, paras. 40 and 41.

31. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 45. The CJEU referred, in particular, to Directive 77/799/EEC, replaced by Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation repealing Directive 77/799/EEC, *OJEU*, 11 March 2011 (the "ACD").

32. CJEU, 14 February 1995, Finanzamt Jöln-Altstadt v. Roland Schumacker, C-279/93, para. 46.

33. CJEU, 14 September 1999, Frans Gschwind v. Finanzamt Aachent-Außenstadt, C-391/97.

The Gschwind couple's income subject to income tax in Germany amounted to around 58% of their total income (i.e., well below the 90% threshold), while their income not subject to income tax exceeded the absolute amount of 24,000 Deutsche Marks. In other words, the two above-mentioned criteria were not met, so that Germany again refused to allow the Gschwind couple to benefit from the *splitting* mechanism.

The Court of First Instance (*Finanzgericht*) essentially asked whether such a difference in treatment between residents and non-residents (for whom a threshold had to be applied in order to benefit from the tax advantage of *splitting*) was contrary to the free movement of workers.

Ironically, the Belgian State submitted observations to the CJEU, in which the Belgian State took the view that there was "*no objective reason to justify refusing to apply the splitting procedure to a non-resident couple on the ground that the couple's income from foreign sources exceeds a specific ceiling or a given percentage of the couple's total income*"[34] and that "*the 'splitting' method constitutes a method of determining the rate of tax based on the taxpaying capacity of the economic entity formed by the couple* [and that it] *must be applied under the same conditions to residents and non-residents since, since its purpose is not to grant a tax advantage linked to the personal or family situation of the taxpayer, there is no reason to fear that it could be cumulated with tax advantages granted in the State of residence*".[35]

Applying its comparability test, the CJEU held that Mr Gschwind could not be considered comparable to a German tax resident since he received only 58% of his income in Germany – unlike Mr Schumacker, who received all of his income from Germany.[36] The remaining 42% of the household taxable income was received in the Netherlands.

The CJEU concluded that "*by laying down a percentage threshold and an absolute threshold for income respectively taxable in Germany and not subject to German tax, the German legislation takes account specifically of the possibility of taking into consideration, on a sufficient tax base, of the personal and family circumstances of taxpayers in the State of residence. In the present case, given that nearly 42% of the total income of the Gschwinds is received in their State of residence* [(i.e., the Netherlands)]*, that State is in a position to take into account Mr Gschwind's personal and family circumstances according to the rules laid down by the legislation of that State, since the tax base is sufficient there to enable them to be taken into account*".[37]

In other words, Germany had done well to introduce quantitative thresholds above which non-residents would be assimilated to residents – below these thresholds, the CJEU saw no problem in refusing such assimilation (and the tax advantages that flowed from it). Indeed, since, in the main proceedings, the Netherlands was in a position to tax 42% of the couple's income (i.e., the income of Mr Gschwind's wife), that State was perfectly capable of granting the couple the tax advantages linked to their personal and family situations, so that Germany was right to refuse those same advantages under German law.[38]

As regards setting the *quantum of* the threshold, the Advocate General considered the 75% threshold recommended by the Commission in its 1993 recommendation (see below, section 2.3.1) and opined that the 90% threshold adopted by Germany was also appropriate for distinguishing between non-residents who can be assimilated to residents and non-residents who cannot.[39]

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34. CJEU, 14 September 1999, Frans Gschwind v. Finanzamt Aachent-Außenstadt, C-391/97, para. 17.

35. Opinion of Advocate General Damaso Ruiz-Jarabo Colomer, delivered on 11 March 1999, para. 15 (free translation).

36. Opinion of Advocate General Damaso Ruiz-Jarabo Colomer, delivered on 11 March 1999, para. 43.

37. CJEU, 14 September 1999, Frans Gschwind v. Finanzamt Aachent-Außenstadt, C-391/97, para. 28.

38. CJEU, 14 September 1999, Frans Gschwind v. Finanzamt Aachent-Außenstadt, C-391/97, para. 29 and 30.

39. "*I consider that the requirement to which the Court attaches in order to conclude that there is no objective difference in circumstances justifying unequal treatment between a resident and a non-resident, namely that the non-resident must receive the bulk of his income in the State of employment, is met both if the threshold is 90% and if it is 75% of the taxpayer's total income*" (Opinion of Advocate General D. Ruiz-Jarabo Colomer, submitted on 11 March 1999, para. 53

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The CJEU's conclusion was therefore unequivocal: "[Article 45 TFEU] *is to be interpreted as not precluding the application of a Member State's legislation under which resident married couples are granted favourable tax treatment such as that under the splitting procedure whilst the same treatment of non-resident married couples is made subject to the condition that at least 90% of their total income must be subject to tax in that Member State or, if that percentage is not reached, that their income from foreign sources not subject to tax in that State must not be above a certain ceiling, thus maintaining the possibility for account to be taken of their personal and family circumstances in the State of residence*".[40]

The last sentence of this conclusion is particularly relevant: the CJEU stated that, by introducing a quantitative threshold, Germany was preserving "*the possibility of taking account of their personal and family circumstances in their State of residence*".

2.2.5. *Renneberg*

In a third case,[41] the CJEU went even further. The facts are as follows: Mr Renneberg, a Belgian tax resident, owned a property in Belgium in which he resided. Mr Renneberg was an employee of the Maastricht local authority and received all of his professional income from the Netherlands.

As the owner of his home in Belgium, Mr Renneberg was liable for property tax. As this home was not rented out, Mr Renneberg wanted to deduct his negative property income corresponding to the difference between the rental value of the building and the mortgage interest paid (i.e., property losses) from his professional income taxable in the Netherlands.

The Dutch tax authorities refused to allow the said deduction of negative property income. The case was referred to the Supreme Court (*Hoge Raad der Nederlanden*), which essentially asked whether the prohibition on a non-Dutch resident deducting his property losses from professional income earned (and therefore taxable) in the Netherlands was contrary to the free movement of workers.

After noting that Dutch law provided for a difference in treatment between residents and non-residents, the CJEU emphasised that the Member States are free to allocate their respective tax powers by means of tax treaties, provided that such treaties do not infringe fundamental European freedoms.[42]

The CJEU noted that a Dutch resident could in fact carry forward foreign property losses to subsequent years, until such time as foreign property income arises (in which case it will be reduced by the foreign property losses carried forward).[43] The decision whether or not to grant this deduction is therefore not the result of the pure and simple application of the Belgian-Dutch tax treaty, but rather of a choice made by the legislator to grant an advantage to residents and deny it to non-residents.[44]

After noting the difference in treatment, the CJEU referred to the conclusions of the aforementioned case-law and confirmed that those conclusions apply in the main proceedings: Mr Renneberg, as a non-resident, is deprived of a tax advantage enjoyed by Dutch residents, even though Mr Renneberg receives all of his income from the Netherlands.[45]

(free translation)).

40. CJEU, 14 September 1999, Frans Gschwind v. Finanzamt Aachent-Außenstadt, C-391/97, para. 32.

41. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06.

42. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06, para. 49 and 50.

43. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06, para. 56.

44. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06, para. 56-58.

45. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06, paras. 65 and 66.

In the absence of taxable income in Belgium, Mr Renneberg was not in a position to claim property losses in his State of residence. It was therefore up to the State of employment (in this case, the Netherlands) to grant such a deduction[46] . Indeed, "*the mechanisms used to eliminate double taxation or the national tax systems which have the effect of eliminating or alleviating double taxation must, however, permit the taxpayers in the Member States concerned to be certain that, ultimately, all their personal and family circumstances will be duly taken into account, irrespective of how those Member States have allocated that obligation amongst themselves*".[47]

As a result, the Netherlands was obliged to grant the foreign property loss deduction to non-residents "*who receive all or almost all of their income in the Netherlands and who do not have significant income in their Member State of residence*".[48] The Netherlands' attempts to shift the problem did not convince the CJEU either.[49]

In the absence of any alleged justification, the non-deductibility of foreign property losses for a non-Dutch resident who nevertheless receives (almost) all of his income in the Netherlands violates the free movement of workers.

This doctrine has been the subject of numerous criticisms.[50] Notably, H. Vording explains that, by receiving the Dutch tax advantage for a property located in Belgium, Mr. Renneberg had his cake and eaten it too.[51] Indeed, according to him, the Dutch tax system provides certain incentives, in terms of income tax, for the acquisition of a home, which was presumably not the case in Belgium. Given this tax advantage, property prices were higher in the Netherlands (where the advantage was available) than in Belgium (where such advantage presumably did not exist). Mr Renneberg was therefore able to obtain the Dutch tax advantage for a property at a Belgian price. According to C. Barnard, this problem stems from the prism adopted by the CJEU. According to her, this double advantage is simply the result of an analysis based on the existence of a restriction where two tax systems are distinct – in this case, a resident could demand the most advantageous tax system while continuing to operate in the State that does not grant the same advantages.[52]

2.2.6. *Imfeld*

The Imfeld precedent[53] drove the nail in the coffin in favour of non-resident taxpayers by stating – in addition to the fact that they should have access, in their State of employment, to the tax advantages reserved for residents when they derive the essential part of their resources from that State – that the mere fact that they have also benefited from a tax advantage in their State of residence is not a reason, for the source State, to refuse a similar tax advantage.

The facts can be briefly summarised as follows: Mr Imfeld and Mrs Garcet were both Belgian residents. However, Mr Imfeld practised as a lawyer in Germany, from where he received all his income

46. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06, para. 68.

47. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06, para. 70.

48. CJEU, 16 October 2008, R.H.H. Renneberg v. Staatssecretaris van Financiën, C-527/06, para. 71.

49. The Netherlands argued that the difference in treatment was simply the result of differences in the domestic tax systems of the two countries (i.e, the Netherlands allowed mortgage interest to be deducted whereas Belgium did not) (see paras. 74-75 of the decision). The Netherlands also explained – somewhat contradictorily to the first argument – that there was a risk of double advantage (double taking into account of property losses in Belgium and the Netherlands) (paras. 76-78 of the decision).

50. G.T.K. Meussen, Renneberg: *ECJ Unjustifiably Expands Schumacker Doctrine to Losses from Financing of Personal Dwelling*, European Taxation, 2009, p. 185.

51. H. Vording, *Renneberg v Staatssecretaris van Financiën - the Problems of an Extended Schumacker Rule*, British Tax Review, 2009, 54, vol. 1, pp. 67-73.

52. C. Barnard, *The substantive law of the EU*, Oxford University Press, 5th ed., 2016, pp. 257-258.

53. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12. Although this judgment concerns the freedom of establishment (Mr Imfeld being a lawyer and therefore an independent provider of services), the conclusions of this judgment can be transposed *mutatis mutandis* to the free movement of workers.

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(he had no taxable income in Belgium). His wife, Mrs Garcet, was a salaried employee in Belgium.

Although they were married, the couple decided to file separate tax returns in Belgium. Mrs Garcet declared their two children to be her dependants and thus claimed the benefit of the increased tax-exempt bracket. However, Mr Imfeld had also benefited, in Germany, from an advantage for dependent children (exempt bracket).

Under the Belgian-German tax treaty, Mr Imfeld's income was taxable in Germany and exempt in Belgium.

The disputes arose in both Belgium and Germany: the Belgian tax authorities refused to tax the couple separately and imputed the tax benefits to Mr Imfeld alone (even though his income was exempt under the Belgium-Germany tax treaty), while the German tax authorities refused to allow Mr Imfeld to benefit from *splitting* on the grounds that the 90% rule (referred to in the *Gschwind* ruling) had not been met.

In the end, the couple could not *actually* benefit from the tax advantages in Belgium (because these were granted in priority to the spouse with the highest income, even if they were *ultimately* exempted by treaty) or benefit from the *splitting* advantage in Germany, because the 90% rule was not met.

The Court noted that, in this case, "*both in Germany and in Belgium account was taken, at least in part, of their personal and family circumstances*": on the one hand, Mr Imfeld benefited from the tax-exemption in Germany and, on the other, the couple benefited in Belgium from the tax-exempt bracket.[54]

However, this second advantage could not *effectively* be obtained since this tax-exempt portion was granted to the highest income earner in the household (Mr Imfeld) whose income was in any case exempted by convention.[55] Consequently, according to the Court, the couple "*suffered, as a couple, a disadvantage since they did not obtain the tax advantage resulting from application of the supplementary tax-free income allowance for dependent children to which they would have been entitled if they had earned all their income in Belgium or, at least, if the income earned by Ms Garcet in Belgium had been higher than that earned by her husband in Germany*".[56] According to the Court, this disadvantage constitutes a restriction on fundamental freedoms.[57]

While the Belgian State had put forward several justifications, the Court did not follow the argument that "*his personal and family circumstances were taken into account in Germany, so that the Kingdom of Belgium was completely free of any obligation in that regard*"[58] since "*it cannot be considered that the grant of that tax advantage in Germany might compensate for the loss of the tax advantage recorded by the applicants in the main proceedings in Belgium*".[59]

The Court concludes that, as a general rule, "*a Member State cannot rely on the existence of an advantage granted unilaterally by another Member State* [(i.e., Germany)]*, in this case the Member State in which Mr Imfeld works and earns all his income, to escape its obligations under the Treaty, in particular under the Treaty provisions on freedom of establishment*".[60]

The justification for the restriction put forward by the Belgian State did not convince the Court either.[61]

54. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12, para. 47.

55. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12, para. 48.

56. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12, para. 50.

57. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12, para. 51-53.

58. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12, para. 58.

59. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12, para. 60.

60. CJEU, 12 December 2013, Imfeld & Garcet v. Belgium, C-303/12, para. 61.

61. The Belgian State invoked the need to safeguard the balanced distribution of taxing power between Member States.

2.3. Genesis of the 75% rule

As stated above, the imposition by a quantitative threshold (below which no tax advantages shall be granted to non-residents) is not, by itself, contrary to EU law. In fact, it is interesting to note that the EU (especially, the Commission) has initiated the introduction of such 75% rule.

2.3.1. Initiatives of the European Commission

i. Proposal for a Directive of 1979

The European Commission was quick to assume its responsibilities in order to alleviate the tax obstacles facing workers in the European Union. In 1979, it put forward a "*proposal for a Council Directive of 13 December 1979 concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the Community*".[62] Already at that time, the Commission pointed out that "*residents, on the one hand, are taxable on their whole income, but, on the other hand, have their personal circumstances, and in particular their family responsibilities, taken into account, through deductions etc. The tax situation of non-residents is more circumscribed: they are taxable only on certain items on income from sources in the State of imposition but have a simplified tax system applied to those items. It may thus happen, where employed persons are being taxed as non-residents, in the country where they carry on their activity, that their personal circumstances are not taken into account, or not as much as if they were resident, while at the same time, because they have insufficient other income, their circumstances cannot be taken into account .in their country of residence (where, to avoid double taxation, their employment income is exempt)*".[63] On this basis, the Commission wanted to oblige Member States to grant tax advantages relating to personal and family circumstances to non-resident taxpayers "*only in the proportion that the net* [professional income] *bears to the total net income*".[64]

ii. Recommendation of 1993

Later on, while the *Schumacker* case was still pending before the CJEU, the European Commission decided to tackle the issue raised in that case by publishing a recommendation on 21 December 1993.[65] In this recommendation, the Commission has formulated a number of best practices for Member States, which it knows reserve tax advantages for residents only and which, in the absence of sufficient income in their country of residence, do not allow non-residents to benefit from any advantage linked to their personal or family situation.

Aware of the problem associated with residents of one Member State who have a job – from which they derive the majority of their income – in another Member State, the Commission has recommended that Member States should not subject non-residents (and their households) to higher taxation than their residents, provided that its professional revenues "*which are taxable in the Member State in which the natural person is not resident constitute at least 75 % of that person's total taxable income during the tax year*".[66]

62. Proposal for a Council Directive of 13 December 1979 concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the Community (COM(79)737) (the archives are available at https://archives.eui.eu).

63. Proposal for a Council Directive of 13 December 1979 concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the Community (COM(79)737), p. 2.

64. Article 7, §2, *in fine* of the proposal for a Council Directive of 13 December 1979 concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the Community (COM(79)737), p. 6.

65. Commission Recommendation of 21 December 1993 concerning the taxation of certain income obtained by non-residents in a Member State other than that of their residence, especially the explanatory memorandum, para. 6. This recommendation also inspired the Advocate General, who cites it explicitly in his Opinion (Opinion of Advocate General P. Léger, delivered on 22 November 1994, para. 73).

66. Article 2(2) of the Recommendation. However, Article 3 of the Recommendation sought to combat the "double granting of deductions or other tax advantages" by allowing Member States to refuse tax advantages to non-residents if they enjoyed "*identical or similar deductions or other advantages in the Member State* [of residence]".

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This 75% threshold was set by the Commission because it considered that "*the principle of equality of treatment* [...] *requires that persons receiving the items of income in question should not, where the preponderant part of their income is received in the country of activity*" and *that* "*it might reasonably be assumed that a person receives the preponderant part of his income in the country of activity where such income constitutes at least 75% of his total taxable income*".[67]

The explanatory memorandum states that "*a comparable situation is deemed to exist where the income received in the state of activity is at least 75% of the non-resident's total taxable income*"[68] and gives the following explanations:

> "*The Commission considers that treatment identical to that of residents is justified only where non-residents are in a situation comparable to that of residents. Such a situation is deemed to exist where a non-resident derives the preponderant part of his income (i.e. at least 75 % of his total taxable income) in the country of activity. In that case, the amount of income taxable in the country of residence is unlikely to be sufficient for the deductions and other reliefs provided for in that country's legislation to apply.*
>
> *Where, by contrast, the non-resident derives a large share of his income in his country of residence, it would not seem justified to require the Member State of activity to grant him the deductions applicable thereto. The 75 % threshold also offers the advantage that the Member State of activity might abstain from taking into account the income obtained outside the state (in applying progressivity), and the task of the tax administration would thus be made considerably easier.*
>
> *The Commission considers that this approach would solve virtually all the problems which non-residents encounter when their income is taxed in the country of activity.*
>
> *The general point should be made that an entirely fair and neutral treatment of all situations in this field is impossible under current circumstances. It would be possible only if income tax legislation were completely harmonized in the Community*".[69]

2.3.2. Belgian implementation

i. Belgian domestic law

Since a law of 22 December 1989, the deduction of alimony payments from non-resident taxable base was only possible if the beneficiary of the payments was a Belgian resident.[70] In addition, personal tax advantages were available to non-residents who had maintained a "*home base*" ("*foyer d'habitation*" in French) in Belgium throughout the taxable period.[71]

67. Recitals 7 and 8 of the recommendation.

68. Explanatory memorandum to the recommendation, para. 9.

69. Explanatory memorandum to the recommendation, para. 15.

70. Law of 22 December 1989 on tax provisions, *M.B.*, 29 December 1989, p. 21141. Article 149 of the ITC64, as inserted by article 314 of the aforementioned law of 22 December 1989, referring to article 71, §1, 3° of the ITC64 (applicable to personal income tax) and applicable from the 1991 tax year.

71. Article 149, §2, of the ITC64, as inserted by article 314 of the aforementioned law of 22 December 1989, referring to Title II, Chapter II, Section VI of the ITC64 (i.e. articles 71 and 72 of the ITC64). At the time, non-resident tax therefore made a distinction between two categories of taxpayers: on the one hand, people who had not established a *home base* in Belgium (i.e., most non-residents), and, on the other hand, non-residents who despite being non-residents had nevertheless temporarily established a *home base* in Belgium (this notion of "*home base*" having been borrowed by the Belgian legislator from the OECD). As the former were only subject to Belgian tax to a limited extent (i.e., only on certain Belgian-sourced incomes), Belgian tax law was, according to the legislator, not obliged to grant them deductions in relation to their personal or family situation, whereas for the latter (i.e., those who had maintained a *home base* in Belgium), Belgian tax law entitled them to the deductions available to residents. At the time, this legislative adoption caused quite a stir, since an action for annulment was brought before the Court of Arbitration against this provision (Belgian Constitutional Court, no. 34/91, 21 November 1991; see also Belgian Constitutional Court, no. 46/92, 18 June 1992). The applicants in the case had invoked multiple violations, including, in particular, a violation of the free movement of workers and the freedom of establishment. The Court noted that the distinction

A Law of 28 December 1992 then extended these personal tax advantages non-residents who did not maintain such a "home base" in Belgium but who (i) had carried on in Belgium for at least 9 full months during the taxable period the professional activity from which they derived remuneration subject to non-resident tax, and (ii) whose remuneration represented at least 75% of the total professional income of the non-resident taxpayer.[72] This law thus assimilated non-residents (*with no* home base in Belgium) to residents for the purposes of family and personal deductions, provided that they (i) derived at least 75% of their professional income in Belgium, and (ii) carried out their activity in Belgium for at least 9 months.

This 75% rule was introduced in order to avoid a double advantage with the State of residence of the taxpayer. The Belgian lawmaker considered that it was normally up to the State of residence of an individual taxpayer to take account of his family situation in order to grant him the relevant tax attributes (for example, deductions or exemptions for family expenses).[73] According to this view, a taxpayer's State of residence is, so to speak, his "*centre of gravity*".[74] By placing this responsibility exclusively on the shoulders of the State of residence, the Belgian State wished to prevent a taxpayer from benefiting cumulatively from two attributes (one in the State of residence, the other in the State of source of the income). As the Belgian lawmaker itself pointed out, however, this argument does not apply in the case of a taxpayer who derives his professional income (or pensions) exclusively (or almost exclusively) from Belgian sources. For this reason, it was decided to treat non-resident taxpayers in the same way as taxpayers with a "*home base*" in Belgium.

Objective thresholds still had to be set in order to determine whether a non-resident taxpayer had sufficient ties with Belgium to be said to "*receive exclusively (or almost exclusively) his professional income in Belgium*". It was on this occasion that the legislator proposed two cumulative criteria:

- a duration of the activity carried out in Belgium of at least 9 full months during a taxable period; and,
- the amount of income received in Belgium, which must represent at least 75% of total Belgian-source income.

The introduction of the 75% rule was justified precisely by the fact that, although it was necessary to depersonalise non-resident tax by refusing any personal tax advantages, this solution did not hold when the non-resident derived a large part of his income in Belgium.[75]

Unsurprisingly, these two new rules (9 months and 75%) were the subject of an action for annulment before the Constitutional Court.[76] However, as regards the 9-month rule, the Constitutional Court

introduced by the legislature between, on the one hand, pure and simple non-residents (who have not maintained a *home base* in Belgium) and, on the other hand, non-residents who have maintained a *home base* in Belgium, was based on an objective criterion and that it did not appear to be unrelated to the aim pursued by the legislature, namely to prevent a non-resident from being able to accumulate tax advantages both in Belgium and abroad. However, the Court considered that this distinction lacked reasonable justification when it also applied to non-residents who could not find themselves in a situation of cumulation (which the legislator had sought to prevent). The Court therefore annulled Articles 149 and 150 of the ITC64 insofar as they reserved tax benefits for non-resident pensioners who maintained a dwelling in Belgium. The parliamentary proceedings explain this assimilation in the following terms: "*It is up to the State of domicile, where the non-resident is subject to tax on his worldwide income as a whole, to grant similar deductions. It is therefore necessary to avoid such deductions duplicating those of the State of domicile.* [...] *These rules are waived where the non-resident temporarily establishes a dwelling in Belgium. In such cases, the stay in the country generally entails charges that reduce the taxpayer's ability to pay tax. His situation is therefore, in fact, comparable to that of a resident of the kingdom*" (*Doc.* (Senate), 1989-1990, No. 49-806/1, p. 85 (free translation)).

72. Law of 28 December 1992 on fiscal, financial and miscellaneous provisions, *M.B.*, p. 27830 (Article 11). This article was proposed in draft form by amendment no. 53 (*Parl. Doc.* (Ch.), 1992-1993, no. 48-717/3, p. 12).

73. *Doc. Parl.* (Ch.), Ord. sess. 1992-1993, No. 48-717/001, p. 6.

74. *Doc. Parl.* (Ch.), Ord. sess. 2012-2013, no. 53-2458/001, p. 50.

75. *Parl. Parl.* (Ch.), Ord. sess. 1992-1993, No. 48-717/1, p. 6. This passage concerns Article 244, §2 of the ITC but applies *mutatis mutandis* to Article 242, §1 of the ITC.

76. Belgian Constitutional Court, 26 April 1994, no. 34/94.

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quickly found that it was sufficiently justified and precise.[77] With respect to the 75% rule, the Constitutional Court also held that such a rule was relevant to achieving the objective pursued by the legislature (i.e., to determine the threshold above which a non-resident would be assimilated to a resident, giving the former the same deductions as the latter).[78] Faced with the argument that such a rule would create a discrimination,[79] the Court held that, given that the legislature must adopt rules which apply to a wide variety of cases, the Belgian Constitutional principles of equality and non-discrimination "*do not require the legislature to modulate the rule in question according to the income structure of the households concerned or to take account in all circumstances of the impact of the application of foreign legislation when it adopts provisions relating to situations which contain foreign elements*".[80]

This is how the 75% rule came about in Belgian domestic law – and how it was endorsed by the Belgian Constitutional Court.

ii. Infringement proceedings brought by the European Commission and legislative response

On 28 January 2010, the European Commission sent Belgium a reasoned opinion concerning the refusal to allow the deduction of alimony payments made by a non-resident to another non-resident.[81] The European Commission took the view that the *Schumacker* case law should give entitlement to the same deductions as for residents, without any additional limitation as to the residence of the recipient of the annuity. Refusing to allow the deduction of alimony payments when they are paid by a non-resident to another non-resident, even though they would have been deductible if they had been paid by a resident, is tantamount to violating the free movement of workers.

In response to these infringement proceedings,[82] Article 66 of the Law of 13 December 2012 recast Article 242 of the Belgian ITC to impose the 75% threshold as the sole criterion for entitlement to the deductions available to residents, even where alimony payments are made to non-residents.[83]

The legislator has also abolished the condition of maintaining a "*home base*" in Belgium.

Thus, if the taxpayer satisfied this 75% rule, all the deductions authorised by Article 104 of the Belgian ITC (including the deduction of alimony payments, even those paid to non-residents) became applicable. The parliamentary works referred to the *Schumacker* case law of the CJEU:

> "*This refers to the judgment of the European Court of Justice in the Schumacker case, according to which, as regards income tax, the situation of residents of the United Kingdom and that of non-residents are not, as a general rule, comparable (C-279/93, Schumacker, ECR 1995, I-225).*

77. The principle of equality and non-discrimination does not require the legislature to introduce a proportional rule rather than a threshold (Belgian Constitutional Court, 26 April 1994, no. 34/94, B.5.1 and B.5.2).

78. Belgian Constitutional Court, 26 April 1994, no. 34/94, B.6.2.

79. The alleged discrimination was between, on the one hand, a couple where both taxpayers receive modest incomes in Belgium and in another country (thus not fulfilling the 75% rule) and, on the other hand, a couple where only one taxpayer receives substantial income in Belgium (thus fulfilling the 75% rule).

80. Belgian Constitutional Court, 26 April 1994, no. 34/94, B.6.2. In this judgment, however, the Constitutional Court censured discrimination based on the nature of the employment (subordinate or self-employed), which prompted the legislator to withdraw all differences of treatment based on the nature of the employment by a law of 30 January 1996 (articles 6 to 9 of the law of 30 January 1996 amending various provisions relating to non-resident tax, *M.B.*, 30 March 1996).

81. Infringement procedure No INFR(2009)4006.

82. *Parl.* (Ch.), 2012-2013, No. 53-2458/003, p. 2.

83. This distinction between alimony payments made to a resident and those paid to a non-resident was removed on the grounds that "*certain double taxation conventions concluded by Belgium provide for a non-discrimination clause allowing the deduction of annuities paid by non-residents to non-residents.* […] *The refusal to grant the benefit of the deduction of alimony payments made to non-residents, which consists in treating less favourably non-resident taxpayers whose income is exclusively or almost exclusively obtained in Belgium compared with resident taxpayers, is tantamount to discrimination*" (*Parl. Doc.* (Ch.), 2012-2013, no. 53-2458/001, pp. 49-50).

> *This non-comparability of the situation of the inhabitants of the Kingdom and that of non-residents only exists insofar as the income received in the State of source by a non-resident constitutes only part of his global income, the centre of gravity of which is concentrated in his State of residence*".[84]

Following the *Schumacker* case law and the Commission recommendation, Belgium had therefore found the point at which a non-resident would be considered comparable to a resident: if the 75% rule was satisfied.[85]

Only if this 75% rule was not met was it still possible for the non-resident taxpayer to alternatively demonstrate that he had (i) maintained a "*home base*" in Belgium throughout the taxable period and (ii) made the alimony payments to a resident.

The criterion under (ii) has been removed in order to also allow the deduction of alimony payments even when the beneficiary of these payments is not a Belgian resident.

Following this legislative amendment, the European Commission officially closed the infringement proceedings initiated in 2009.[86]

Following this latest amendment, the legislator thought that it had finally implemented European law (and the *Schumacker* case law) correctly and was free of any reproach. Moreover, an opinion issued in March 2013 by the *Conseil supérieur des Finances*, commissioned by the Minister of Finance, made no mention of any possible breach of European law.[87]

2.3.3. CJEU case law

In its *Gschwind* ruling, the CJEU validated the condition that at least 90% of a non-resident's taxable income must come from the State of employment in order for the latter to grant him the same tax advantages as those available to residents.

In other words, as the Court likes to point out, non-residents are not in principle comparable to residents, unless the former derive the essential part of their taxable resources from the State of employment. The German State translated "*the essential part of their resources*" by the 90% rule – a rule that the Court validated in its *Gschwind* decision.

By introducing the 75% rule, the Belgian State therefore appeared *prima facie* to be much more generous than the German State. It is therefore quite natural – and legitimate, one might say – that some authors have seen the introduction of the 75% rule into Belgian law as a consecration of the *Schumacker* and *Gschwind* case law, thereby protecting Belgium from a breach of European law.

However, and as stated above (section 1.3), this 75% rule becomes problematic when it implies an irrebuttable presumption that where this threshold is not reached in the source State, the State of residence is necessarily in a position to grant the relevant tax advantages,[88] without any possibility for the non-resident taxpayers to demonstrate that this is not actually the case (e.g., because of lack of sufficient taxable income in its State of residence).

84. *Parl.* (Ch.), 2012-2013, No. 53-2458/001, p. 50.

85. *Parl.* (Ch.), 2012-2013, No. 53-2458/003, pp. 2-3.

86. The infringement procedure was officially closed on 27 September 2012 (INFR(2009)4006).

87. Belgian Federal Finances Council (*Conseil Supérieur des Finances*), *Avis relatif au régime fiscal des rentes alimentaires*, March 2013 (https://conseilsuperieurdesfinances.be/sites/default/files/publications/csf_fisc_2013_03.pdf).

88. CJEU, 10 March 2022, Commission v. Belgium, C-60/21, para. 29. According to the CJEU, such a rule "*seems to be based on the presumption that, in all cases where that threshold is not reached, the taxpayer's Member State of residence is able to take account of all his personal and family circumstances*" (free translation).

2.4. Fractional approach

A solution which has the merit of simplicity has been proposed by tax scholars: to provide that the tax advantages linked to the personal and family situation of a taxpayer would not fully be taken into account by one or other State (e.g., State of employment or State of residence) but by all the States in proportion to the income derived by the resident in that State (the so-called "*fractional approach*").[89]

Such a proportional solution would have the merit of simplicity and would be justified by the fact that personal and family expenses (household costs such as childcare and education) are not linked to a particular income but should rather be a burden on overall income as a whole.[90]

From a public finance point of view, such a measure would be justified by the fact that a Member State should not grant the totality (100%) of a tax advantage when a taxpayer is only taxed on a part (even if it is more than 75%) of his taxable income in that State.[91]

This solution was also defended by Advocate General Wathelet.[92] He claims that, in its ruling of 12 December 2002, the CJEU considered that, in the absence of uniformity of direct taxation within the EU, Member States are free to allocate taxing powers in cross-border situations by means of double tax treaties, provided however that the Member States guarantee "*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*".[93] The Advocate General therefore concluded that "*the only way in which the freedom of the Member States can be reconciled with the requirement to take the taxpayer's entire personal and family circumstances into account is to grant the advantage in question in proportion to the income taxed in each State of employment concerned*".[94]

The CJEU ended up endorsing the opinion of its Advocate General in unequivocal terms, ruling that the obligation to grant tax advantages is incumbent on "*any Member State of activity within which a self-employed person receives income enabling him to claim there an equivalent right of deduction, in proportion to the share of that income received within each Member State of activity*".[95]

3. Belgian domestic law changes of 2022

In December 2022, the Belgian legislator amended its domestic law to correct the breach of European law highlighted by the CJEU.

In a nutshell, the Belgian State has decided to allow the deduction of alimony payments (together with other personal tax advantages) in two cases:

89. F.-S. Meeûs and E. Traversa, *Les grands arrêts de la jurisprudence fiscale*, Bruxelles, Larcier, 2020, p. 359; P.J. Wattel, *Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances*, European Taxation, 2000, p. 214; H. Niesten, *Proportional Granting of Personal and Family Allowances Following AG Opinion in X v. Staatssecretaris van Financiën (Case C-283/15)*, European taxation, 2017, p. 99; H. Niesten, *Growing Impetus for Harmonization of Personal and Family Allowances: Current State of Affairs of the Schumacker-Doctrine after Imfeld and Garcet*, EC Tax Review, 2015-4, pp. 198-199.

90. P.J. Wattel, *Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances*, European Taxation, 2000, p. 215.

91. P.J. Wattel, *Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances*, European Taxation, 2000, p. 215.

92. Opinion of Advocate General M. Wathelet, presented on 7 September 2016, paras. 59 and 60 (CJEU, 9 February 2017, X v. Staatssecretaris van Financiën, C-283/15).

93. CJEU, 12 December 2002, De Groot v. Staatssecretaris van Financiën, C-385/00, para. 101. See also CJEU, 9 February 2017, X v Staatssecretaris van Financiën, C-283/15, para 47.

94. Opinion of Advocate General M. Wathelet, presented on 7 September 2016, para. 60 (CJEU, 9 February 2017, X v. Staatssecretaris van Financiën, C-283/15).

95. CJEU, 9 February 2017, X v Staatssecretaris van Financiën, C-283/15, para. 49.

- if the 75% rule is met (i.e., the non-resident taxpayer has earned at least 75% of his professional income in Belgium); or,
- if, and to the extent that, the non-resident taxpayer demonstrates that neither he nor his spouse was able to benefit from the corresponding deduction in his State of residence, situated in an EEA State, due to the small amount of his (or their) taxable income derived in that State and that this deduction cannot be carried forward to a subsequent taxable period, provided that the same non-resident taxpayer, nor his spouse, does not derive (almost) all of his taxable income from another EEA State.

It is this second possibility that was introduced in response to the CJEU's ruling of censure: it finally allows the non-resident taxpayer to rebut the presumption that its State of residence is able to taken account of his personal and family circumstances by granting him the related tax advantages.

This new option was introduced by article 28 of the law of 21 December 2022 containing various tax provisions.[96] This legislative amendment is a direct response to the above-mentioned judgment, insofar as it repeats, almost word for word, the operative part of that judgment.[97] This change entered into force as from 2023 assessment year.

4. Erosion of the tax residency

This judgment is in line with the case law of the CJEU since *Schumacker*. The residence criterion, once the main criterion for determining a taxpayer's direct tax regime, is now being eroded. In fact, since a non-resident who derives a large part of his income from the source State must be assimilated to a resident for the purposes of taking account of his personal and family circumstances, this criterion seems increasingly to be disappearing and giving way to the location of the taxable income (i.e., the source State). The CJEU therefore went to the end of its reasoning when it ruled that setting a mechanical threshold below which these benefits would always be refused was contrary to European law.

If the Belgian government is to be believed, no taxpayer was, in practice, in the situation criticised by the European Commission.[98] The fact remains, however, that these situations, even hypothetical ones, could have a major impact on greater harmonisation of direct taxation in Europe.

96. *M.B.*, 29 December 2022, p. 102555.

97. *Parl. Parl.* (Ch.), Ord. sess. 2022-2023, No. 55-3012/001, p. 15.

98. CJEU, 10 March 2022, Commission v. Belgium, C-60/21, para. 14.

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