

JUDGMENT OF THE COURT (Fifth Chamber)

13 November 2003

(Freedom to provide services - Lottery tickets - Amount won in a game of chance held in another Member State - Income tax - Tax on games of chance - Special regime in the Åland Islands)

In Case C-42/02,

REFERENCE to the Court under Article 234 EC by the Ålands förvaltningsdomstolen (Finland) for a preliminary ruling in the proceedings brought before that court by

Diana Elisabeth Lindman,

on the interpretation of Article 49 EC,

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, President of the Fourth Chamber, acting as President of the Fifth Chamber, D.A.O. Edward (Rapporteur) and P. Jann, Judges,

Advocate General: C. Stix-Hackl,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Ms Lindman, in person,
- the Finnish Government, by E. Bygglin, acting as Agent,
- the Belgian Government, by A. Snoecx, acting as Agent, and by P. Vlaemminck, avocat,
- the Danish Government, by J. Molde, acting as Agent,
- the Norwegian Government, by G. Hansson Bull and H. Klem, acting as Agents,
- the Commission of the European Communities, by R. Lyal and K. Simonsson, acting as Agents,
- the EFTA Surveillance Authority, by E. Wright and V. Kronenberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finnish Government, represented by E. Bygglin, the Belgian Government, represented by P. De Wael, acting as Agent, the Commission, represented by K. Simonsson, and the EFTA Surveillance Authority, represented by E. Wright, at the hearing on 23 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,
gives the following

Judgment

1.

By order of 5 February 2002, received at the Court on 15 February 2002, the Ålands förvaltningsdomstolen (Administrative Court, Åland) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 49 EC.

2.

That question was raised in the course of a dispute between Ms Lindman and the skatterättelsenämnden (Taxation Verification Committee) concerning its rejection of her appeal against her assessment to tax on an amount of money which she had won in a lottery held in Sweden.

Legal background

A - Community legislation

3.

Under the first paragraph of Article 49 EC:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited 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.

B - National legislation

4.

Under Article 1 of the lotteriskattelagen (552/1992) (Law on tax on games of chance), tax on games of chance is payable to the State in respect of games conducted in Finland. Under Article 2 of that law lotteries are games of chance. Article 3 provides that it is the lottery's organiser who is chargeable to the tax.

5.

By virtue of Article 85 of the inkomstskattelagen (1535/1992) (Income Tax Law), winnings from games of chance covered by Article 2 of the lotteriskattelagen shall not constitute income chargeable to tax It is clear from the file that the exemption applies only to games of chance covered by Article 2 of the lotteriskattelagen, which include only those organised in Finland.

C - The special regime in the Åland Islands

6.

By virtue of the Självstyrelselagen för Åland (1144/1991) (Åland Self-Government Law), the regulation of lotteries and other gambling falls within the legislative competence of the region of Åland. The holding of lotteries is subject to licence from the regional government the detailed rules of which are prescribed by the

landskapslagen om lotterier (Regional law on games of chance, *Ålands författningssamling* 10/1966). The organisation of games of chance is governed by that law. Licences to organise lotteries and gambling covered by Article 3 of the landskapslagen om lotterier may be granted by a public law association established by regional legislation. The receipts from the association's activities must be entered in the budget of the Åland region and used to promote and support projects of public utility or in the public interest, as well as those which can be regarded as benefiting the association's activities and objectives.

The dispute in the main proceedings and the question referred

7.

Ms Lindman, a Finnish national, resides in the commune of Saltvik, in the Åland Islands (Finland). On 7 January 1998, she won SEK 1 000 000 as a result of a lottery draw by the company AB Svenska Spel, which took place in Stockholm (Sweden). She had bought her winning ticket during a stay in Sweden.

8.

That lottery win was regarded as earned income chargeable to income tax for the year 1998 and was assessed to national tax payable to the Finnish State, to local tax payable to the municipality of Saltvik, to church tax for the benefit of the parish and to an additional sickness insurance premium levied under the sjukförsäkringslagen (Sickness insurance law).

9.

Ms Lindman appealed to the skatterättelsenämnden of Åland, to obtain rectification of the assessment against her. That appeal was rejected on 22 May 2000 on the ground that Article 85 of the inkomstskattelagen does not preclude the taxation in Finland of winnings from foreign lotteries.

10.

Ms Lindman then appealed to the Ålands förvaltningsdomstolen seeking reversal of the rejection by the skatterättelsenämnden, arguing that the assessment on the winnings in Sweden should be quashed, or, in the alternative, that the winnings should be taxed not as earned income, but as income from capital, which entails a lower tax rate.

11.

The Ålands förvaltningsdomstolen considers that the taxation, either as earned income or as income from capital, of winnings from games organised abroad may possibly be regarded as a special rule based on the place where the services were provided.

12.

Since it considered that an interpretation of Community law was needed before a decision could be given in the dispute before it, the Ålands förvaltningsdomstolen decided to stay proceedings and to refer to the Court for a preliminary ruling the following question:

Does Article 49 EC preclude a Member State from applying rules under which winnings from lotteries held in other Member States are regarded as taxable income of the winner chargeable to income tax, whereas winnings from lotteries held in the Member State in question are exempt from tax?

Substance

Observations submitted to the Court

13.

Ms Lindman asserts that the Finnish legislation is discriminatory, since, if she had resided in Sweden or if the amount at issue in the main proceedings had been won in a Finnish lottery, she would not have been charged income tax.

14.

The Finnish, Belgian, Danish and Norwegian Governments submit that the Finnish legislation is compatible with Article 49 EC. In that regard, they rely on the Court's case-law (Case C-275/92 *Schindler* [1994] ECR I-1039; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, and Case C-67/98 *Zenatti* [1999] ECR I-7289) to argue that the taxation of games of chance is only a specific aspect of the general regime governing games of chance, a field in which the Member States have a wide discretion. According to those governments, any restrictions are justified by overriding reasons in the public interest relating to combating the pernicious consequences of games of chance, since if winnings from foreign lotteries were exempt, the public would be encouraged to participate in them.

15.

More particularly, the Finnish Government contends that the reason for the taxation of winnings from games of chance organised outside Finland is the impossibility of taxing, in that Member State, foreign undertakings who offer gambling activities from abroad. Were it otherwise, taxpayers in Finland and the organisers of games of chance would share a tax advantage, regardless of whether the receipts were intended to fulfil objectives in the public interest in the State of origin or whether that State's legislation sought to take account of the objectives of consumer protection and prevention of social damage.

16.

The Commission and the EFTA Surveillance Authority submit that the taxation in a Member State of winnings from lotteries solely where they are organised in other Member States is contrary to Article 49 EC and cannot be justified on grounds of public interest.

17.

The Commission relies on the judgment in Case C-283/95 *Fischer* [1998] ECR I-3369 to argue that, in accordance with the principle of fiscal neutrality, a Member State may not treat a winner of a game of chance lawfully organised in another Member State less favourably than a winner who participated in a game organised in the first State.

The Court's reply

18.

As a preliminary point, it must be noted that, although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 28).

19.

With regard to the provisions of the EC Treaty relating to freedom to provide services, they apply, as the Court has already held concerning the organisation of lotteries, to an activity which consists in enabling users to participate, for a payment, in gambling (see *Schindler*, cited above, paragraph 19). Therefore, such an activity falls within the scope of Article 49 EC, provided that at least one of the providers is established in a Member State other than that in which the service is offered. It is therefore necessary to examine the case from the viewpoint of freedom to provide services.

20.

According to settled case-law, Article 49 EC prohibits not only any discrimination, on grounds of nationality, against a provider of services established in another Member State, but also any restriction on or obstacle to freedom to provide services, even if they apply to national providers of services and to those established in other Member States alike (see Case C-131/01 *Commission v Italy* [2003] ECR I-1659, paragraph 26).

21.

It is clear, in the main proceedings, that foreign lotteries are treated differently for tax purposes from, and are in a disadvantageous position compared to, Finnish lotteries. Under the *lotteriskattelagen*, only winnings from games of chance which are not licensed in Finland are regarded as taxable income, whereas winnings from games of chance organised in that Member State are not taxable income. The Finnish Government has also admitted that the existence of such legislation means that Finnish taxpayers prefer to participate in a lottery organised in Finland rather than a lottery taking place in another Member State.

22.

Contrary to that Government's submission, the fact that gaming providers established in Finland are subject to tax as organisers of gambling does not rid the Finnish legislation of its manifestly discriminatory character, since that tax is not analogous to the income tax charged on winnings from taxpayers' participation in lotteries held in other Member States.

23.

The Finnish Government, whilst admitting that the national legislation is discriminatory, contends that it is justified by overriding reasons in the public interest such as the prevention of wrongdoing and fraud, the reduction of social damage caused by gaming, the financing of activities in the public interest and ensuring legal certainty.

24.

The Norwegian Government cites also as justification the need to combat the damaging consequences of gambling addiction, which is a matter of public health. Thus, there are rehabilitation centres and other infrastructures for treating gamblers; gambling creates social problems, such as depriving of resources the families of gambling addicts, divorce, and suicide.

25.

In that regard, the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981).

26.

In the main proceedings, the file transmitted to the Court by the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, *a fortiori*, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member States.

27.

The reply, therefore, to the question referred must be that Article 49 EC prohibits a Member State's legislation under which winnings from games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable.

Costs

28.

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Ålands förvaltningsdomstolen by order of 5 February 2002, hereby rules:

Article 49 EC prohibits a Member State's legislation under which winnings from games of chance organised in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable.

Timmermans

Edward

Jann

Delivered in open court in Luxembourg on 13 November 2003.

R. Grass

V. Skouris

Registrar

President