Provisional text

JUDGMENT OF THE COURT (First Chamber)

9 February 2017 (*)

(Reference for a preliminary ruling — Tax legislation — Income tax — National of a Member State receiving income in that Member State and in a non-Member State, and residing in another Member State — Tax advantage to take account of his personal and family circumstances)

In Case C-283/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 22 May 2015, received at the Court on 11 June 2015, in the proceedings

X

v

Staatssecretaris van Financiën,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot (Rapporteur), C.G. Fernlund and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2016,

after considering the observations submitted on behalf of:

– X, by B. Dieleman, A.A.W. Langevoord and T.C. Gerverdinck, belastingadviseurs,

– the Netherlands Government, by M. Bulterman and M. Noort, acting as Agents, and by J.C.L.M. Fijen, expert,

– the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Austrian Government, by C. Pesendorfer, E. Lachmayer and F. Koppensteiner, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, M. Rebelo and J. Martins da Silva, acting as Agents,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, U. Persson, E. Karlsson, L. Swedenborg and N. Otte Widgren, acting as Agents,

– the United Kingdom Government, by M. Holt, acting as Agent, and by R. Hill, Barrister,

– the European Commission, by W. Roels and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of ‘the provisions of the FEU Treaty relating to free movement’.

2 The request has been made in proceedings between X and the Staatssecretaris van Financiën (the State Secretary for Finance) concerning the refusal by the Dutch tax authorities to permit X to deduct the ‘negative income’ arising from the dwelling owned by him and located in Spain.

Legal context

3 Article 2.3 of the Wet Inkomstenbelasting 2001 (the Dutch 2001 Income Tax Act; ‘the 2001 Act’) provides:

‘Income tax shall be charged on the following types of income, received by the taxpayer during the relevant calendar year:

(a) taxable income from employment or residence,

(b) taxable income from substantial shareholdings, and

(c) taxable income from savings and investments.’

4 Article 2.4 of the 2001 Act states:

‘1. Taxable income from employment or residence shall be determined:

(a) with respect to national taxpayers: according to the provisions of Chapter 3,

b) with respect to foreign taxpayers: according to the provisions of Section 7.2 ...’

5 Article 2.5 of the 2001 Act provides:

‘1. National taxpayers who spend only part of the calendar year in the Netherlands and foreign taxpayers who are resident in another Member State of the European Union or in the territory of a power determined by ministerial decree with which the Kingdom of the Netherlands has concluded a convention for the avoidance of double taxation and which provides for the exchange of information, who are liable to taxation in that Member State or in the territory of that power may elect to be subject to the tax regime applicable to national taxpayers laid down in this Act …

...’

6 Under Article 3.120(1) of the 2001 Act, a Netherlands resident is entitled to deduct ‘negative income’ arising from a dwelling which he owns and is situated in the Netherlands.

7 Under Article 7.1(a) of the 2001 Act, the tax is charged on taxable income received during the calendar year from employment or a dwelling in the Netherlands.

8 Under Article 7.2(2)(b) and (f) of the 2001 Act, taxable remuneration from work carried out in the Netherlands and, where relevant, taxable income arising from a dwelling in the Netherlands owned by the taxpayer are to be treated as taxable income from employment and a dwelling.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Under the 2001 Act, income tax payable by individuals in the Netherlands concerns not only income from work, but also income 'from residence'. Where that residence is 'owned', it is regarded as providing 'advantages' that are calculated as a percentage of the value of the dwelling. Against those 'advantages' can be set deductible expenses, including interest and costs arising from debts incurred in order to acquire the dwelling. If the amount of those expenses exceeds the value of the 'advantages', the taxpayer is in a situation of 'negative income'.

10 That was the situation, in 2007, of X, a national of the Netherlands, with respect to the dwelling owned by him and located in Spain.

11 In the course of the 2007 tax year, the income deriving from X's professional activity consisted of payments made by two companies in which he held majority shareholdings, one of which was established in the Netherlands, the other in Switzerland. The income from the Dutch source represented 60% of his total taxable income, while the income from the Swiss source represented 40% of that total. No income however was received in Spain, either in 2007 or in the four following years, after which X ceased to be resident in Spain.

12 In accordance with the applicable bilateral tax convention, the income from the Swiss source was taxed in Switzerland, and the income from the Netherlands source was taxed in the Netherlands.

13 As regards his taxation in the Netherlands, X initially elected to be treated in the same way as resident taxpayers, as provided for in Article 2.5 of the 2001 Act, the effect of which was that he had an unlimited tax liability in the Netherlands. Accordingly, the Dutch tax authorities took into consideration the 'negative income' relating to the dwelling located in Spain.

14 The total tax thus calculated was greater than that which X would have had to pay if he had not exercised the option of being treated in the same way as resident taxpayers, with consequent taxation in Switzerland with respect to the income received in that State, namely 40% of his total income, and if he had, in addition, been permitted to deduct in its entirety the 'negative income' arising from the dwelling owned by him and located in Spain.

15 Reconsidering his requested election, he challenged the tax notice before the Dutch courts, claiming that the provisions of EU law on free movement should be interpreted as meaning that a non-resident taxpayer may obtain the deduction of 'negative income' relating to the dwelling owned by him without being compelled for that purpose to elect to be treated in the same way as resident taxpayers.

16 After the Rechtbank te Haarlem (District Court of Haarlem, Netherlands) and the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam, Netherlands) dismissed his actions, X brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

17 The referring court is doubtful as to the scope of the case-law stemming from the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), given that, as opposed to the relevant facts of the case that gave rise to that judgment, X does not receive all or almost all his family income in a single Member State, other than that of his residence, which has the power to tax that income and which could, therefore, take account of his personal and family circumstances. X's situation is characterised by the fact that, when those circumstances were to be taken into account in calculating his income tax, he was resident in Spain, where he received no income, and he was receiving his income partly in the Netherlands, at 60%, and partly in Switzerland, at 40%.

18 In the opinion of the referring court, the judgments of 14 September 1999, *Gschwind* (C-391/97, EU:C:1999:409), of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750), and of 10 May 2012, *Commission* v *Estonia* (C-39/10, EU:C:2012:282), can be read as meaning that the Member State where an activity is carried out must always take account of the personal and family circumstances of the person concerned if the Member State of residence is not in a position to do so. That is the situation in the main proceedings, since X had no income in Spain in the tax year at issue.

19 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Must the provisions of the FEU Treaty relating to free movement be interpreted as precluding national legislation under which a European Union citizen who resides in Spain and whose work-related income is taxed in the amount of approximately 60% by the Netherlands and approximately 40% by Switzerland may not deduct from his work-related income, which is taxed in the Netherlands, his negative income arising from his dwelling in Spain, which is owned by him for his personal use, even if he receives such a low income in Spain, as his State of residence, that the abovementioned negative income could not have led to tax relief in the tax year in question in the State of residence?

(2) (a) If Question 1 is answered in the affirmative: must every Member State in which the European Union citizen earns part of his income take into account the full amount of the abovementioned negative income? Or does that obligation apply to only one of the States concerned in which work is carried out, and if so, to which? Or must each of the States in which work is carried out (not being the State of residence) allow part of that negative income to be deducted? In the latter case, how is that deductible part to be determined?

(b) In this regard, is the Member State in which the work is actually performed the decisive factor, or is the decisive factor which Member State has the power to tax the income earned thereby?

(3) Would the answer to the two questions set out under (2) be different if one of the States in which the European Union citizen earns his income is [the Swiss Confederation], which is not a Member State of the European Union and also does not belong to the European Economic Area?

(4) To what extent is it significant in this regard whether the legislation of the taxpayer’s country of residence (in this case, Spain) makes provision for the possibility of deducting mortgage interest relating to the taxpayer’s property and the possibility of offsetting the tax losses arising therefrom in the year in question against possible income earned in that country in later years?’

Consideration of the questions referred

The applicable freedom of movement

20 As a preliminary point, it must be noted that the referring court does not specify which freedom of movement should serve as the criterion for examination of national legislation such as that at issue in the main proceedings.

21 It is nonetheless apparent from documents in the file submitted to the Court that X controls and directs, by means of majority shareholdings, the activity of companies established in the Netherlands and in Switzerland, against the income from which he seeks to offset ‘negative income’ relating to the dwelling that he owns in Spain.

22 In accordance with settled case-law, the freedom applicable to a resident of a Member State, whatever his nationality, who has a shareholding in the capital of a company established in another Member State that gives him definite influence over that company’s decisions, and allows him to determine its activities, is freedom of establishment (judgment of 18 December 2014, *X*, C-87/13, EU:C:2014:2459, paragraph 21).

23 The national legislation at issue in the main proceedings must therefore be examined in the light of the provisions of Article 49 TFEU.

The first question

24 By its first question, the referring court seeks, in essence, to ascertain whether Article 49 TFEU must be interpreted as precluding a Member State, the tax legislation of which permits the deduction of

‘negative income’ relating to a dwelling, from refusing the benefit of that deduction to a self-employed non-resident where that person receives, within that Member State, 60% of his total income and does not receive, within the Member State where his dwelling is located, income that enables him to qualify for an equivalent right to deduct.

25 In order to answer that question, it must, first, be recalled that tax rules of national law must be consistent with EU law and, in particular, the freedoms guaranteed by the Treaties, including the freedom of establishment conferred by Article 49 TFEU (see, by analogy, judgment of 10 May 2012, *Commission* v *Estonia*, C-39/10, EU:C:2012:282, paragraph 47).

26 Taking into account ‘negative income’ relating to immovable property located in the Member State where a taxpayer has chosen to be resident for tax purposes forms a tax advantage linked to his/her personal situation, which is relevant to the assessment of his/her overall ability to pay tax (see, to that effect, judgment of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 19 and the case-law cited).

27 Accordingly, to the extent that the legislation of a Member State deprives non-resident taxpayers of the opportunity, that is open to resident taxpayers, to deduct such ‘negative income’, it treats the former less favourably than the latter.

28 The Court must, therefore, examine whether the residence criterion laid down by the legislation at issue in the main proceedings constitutes discrimination.

29 In that regard, it must be recalled that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 30, and of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 21).

30 In relation to direct taxes, the situations of non-residents and of residents are generally not comparable, because the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident’s personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he is habitually resident (see, inter alia, judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraphs 31 and 32, and of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 22).

31 Accordingly the Court held, in paragraph 34 of the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), that the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situations of residents and of non-residents, both from the point of view of the source of their income and their personal ability to pay tax or their personal and family circumstances (see, also, judgment of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 23).

32 There could be discrimination within the meaning of the FEU Treaty between residents and non-residents only if, notwithstanding their residence in different Member States, it was established that, having regard to the purpose and content of the national provisions in question, the two categories of taxpayers are in a comparable situation (see judgment of 14 September 1999, *Gschwind*, C-391/97, EU:C:1999:409, paragraph 26).

33 One such case is where a non-resident taxpayer receives no significant income in the Member State where he resides and obtains the major part of his taxable income from an activity performed in another Member State, and consequently the Member State of residence is not in a position to grant him the benefits that result from taking into account his personal and family circumstances (see, inter alia, judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 36; of

16 October 2008, *Renneberg*, C-527/06, EU:C:2008:566, paragraph 61, and of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 25).

34 In such a case, discrimination arises from the fact that the personal and family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the Member State of residence nor in the Member State of employment (judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 38; of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, paragraph 31; and of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 26).

35 In paragraph 34 of the judgment of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452), the Court explained that the scope of the case-law cited in paragraphs 27 to 32 of the present judgment extends 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 (judgment of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 27).

36 That scope can be transposed, in the context of freedom of establishment, to the tax advantages connected with the ability to pay which cannot be granted either in the Member State of residence or in the Member State where an activity is performed by a self-employed person (see, on the applicability of the case-law derived from the judgment of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, initially developed in the area of free movement of workers, to freedom of establishment, judgments of 11 August 1995, *Wielockx*, C-80/94, EU:C:1995:271; of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251, and of 28 February 2013, *Ettwein*, C-425/11, EU:C:2013:121).

37 Accordingly, having regard to such tax advantages, that are designed, under the specific rules of the national legislation at issue, to determine the ability of the taxpayer concerned to pay tax, such as the rules at issue in the main proceedings which tax the notional revenue derived from an owned dwelling and which in parallel permit the deduction of expenses relating to that dwelling, the mere fact that a non-resident may have received, within the Member State where his activity is performed, income on conditions more or less similar to those of the residents of that State is not sufficient to render his situation objectively comparable to the situation of the latter.

38 It is additionally necessary, in order to establish that such situations are objectively comparable, that, due to that non-resident's receiving the major part of his income outside the Member State of residence, the Member State of residence is not in a position to grant him the advantages which accrue from taking into account his aggregate income and his personal and family circumstances (see, by analogy, judgment of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 28).

39 Where the non-resident receives, within a Member State where he performs some of his activities, 60% of his total global income, it cannot be inferred that, for that reason alone, the Member State where he is resident will not be in a position to take account of his aggregate income and his personal and family circumstances. It would be otherwise only if it were established that the person concerned received, within the Member State where he was resident, either no income or income of so modest an amount that that State would not be able to grant him the advantages that would accrue from account being taken of his aggregate income and his personal and family circumstances.

40 Yet that seems to be the situation of X, since it is apparent from the documents in the file submitted to the Court that X did not, in the tax year at issue in the main proceedings, receive any income within the Member State where he was resident, namely the Kingdom of Spain.

41 Since X cannot have his personal and family circumstances taken into account either by that Member State or by that within which he receives 60% of the total of his income from his activities, namely the Kingdom of the Netherlands, it is clear that he is adversely affected by the existence of discrimination within the meaning of the case-law cited in paragraphs 27 to 32 of the present judgment.

42 That conclusion would not be invalidated if X were, in addition, to have received the remainder of his income in that year within a State other than the Kingdom of the Netherlands and the Kingdom of Spain. As stated by the Advocate General in points 47 to 53 of his Opinion, the fact that a taxpayer receives the major part of his income within not one but several States other than that where he is resident has no effect on the application of the principles deriving from the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31). What remains the decisive criterion is whether it is impossible for a Member State to take into account, for the calculation of tax, the personal and family circumstances of a taxpayer in the absence of sufficient taxable income, although such circumstances can otherwise be taken into account when there is sufficient income.

43 In the light of all the foregoing, the answer to the first question is that Article 49 TFEU must be interpreted as precluding a Member State, the tax legislation of which permits the deduction of 'negative income' relating to a dwelling, from refusing the benefit of that deduction to a self-employed non-resident where that person receives, within that Member State, 60% of his total income and does not receive, within the Member State where his dwelling is located, income that enables him to qualify for an equivalent right to deduct.

The second question

44 By its second question, the referring court seeks, in essence, to ascertain whether the injunction imposed by the answer to the first question concerns only the Member State within which 60% of the total income is received, or whether it also applies to any other Member State within which a non-resident taxpayer receives taxable income permitting him to claim an equivalent right of deduction, and on the basis of what allocation criterion. The referring court also asks whether the concept of 'Member State of activity' refers to a Member State within which an activity is actually performed, or to a Member State that has the power to tax the income from an activity.

45 As regards the second part of the second question, suffice it to state, by way of answer, that the objective underpinning the case-law referred to in the answer to the first question is that the personal and family circumstances of the taxpayer should be taken into account by granting a tax advantage, that is, reduced taxation. Consequently, the concept of 'Member State of activity', as it is envisaged in the present judgment, cannot be understood as other than a Member State that has the power to tax all or part of the income from the activity of a taxpayer, wherever the activity generating that income is actually performed.

46 As regards the first part of the second question, on the allocation between a number of Member States, classifiable as a 'Member State of activity', of the obligation that arises where the personal and family circumstances of the taxpayer are to be taken into account, that issue must be addressed by referring to the Court's settled case-law on the allocation by the Member States of their power to impose taxes (see, inter alia, judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 93 and the case-law cited).

47 It follows, in particular, that the freedom of the Member States, in the absence of unifying or harmonising measures adopted under EU law, to allocate among themselves their powers to impose taxes, in particular to avoid the accumulation of tax advantages, must be reconciled with the necessity that taxpayers of the Member States concerned are assured that, ultimately, all their personal and family circumstances will be duly taken into account, irrespective of how the Member States concerned have allocated that obligation amongst themselves. Were such reconciliation not to take place, the freedom of Member States to allocate the power to impose taxes among themselves would be liable to create inequality of treatment of the taxpayers concerned which, since that inequality would not be the result of disparities between the provisions of national tax law, would be incompatible with freedom of establishment (see, to that effect, judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraphs 70 and 77).

48 In the situation where a self-employed person receives his taxable income within a number of Member States, other than that where he is resident, that reconciliation can be achieved only by permitting him to submit a claim for his right to deduct 'negative income' to each Member State of activity where that

type of tax advantage is granted, in proportion to the share of his income received within each such Member State, it being his responsibility to provide to the competent national authorities all the information on his global income needed by them to determine that proportion.

49 The answer, consequently, to the second question is that the injunction imposed by the answer to the first question concerns 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. In that regard, a 'Member State of activity' is any Member State that has the power to tax such income from the activities of a non-resident as is received within its territory, irrespective of where the activities are actually performed.

The third question

50 By its third question, the referring court seeks, in essence, to ascertain whether the fact that the non-resident taxpayer concerned receives part of his taxable income not within a Member State, but within a non-Member State, has any effect on the answer given to the second question.

51 It must, in that regard, be recalled that as regards the obligation, stemming from the provisions of the FEU Treaty relating to freedom of establishment, not to discriminate against a self-employed person who performs a professional activity within a Member State other than that where he is resident, those provisions must be interpreted as meaning that all Member States are subject to that obligation. There can be no other interpretation in a situation such as that at issue in the main proceedings, with respect to a Member State within which a self-employed person residing in another Member State has performed part of his activities, while carrying out the remainder of his activities within a third State, even if the latter is not a Member State, but a non-Member State (see, by analogy, judgment of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 35).

52 The answer to the third question therefore is that the fact that the non-resident taxpayer concerned receives part of his taxable income not within a Member State, but within a non-Member State, is of no relevance to the answer to the second question.

The fourth question

53 By its fourth question, the referring court seeks to ascertain whether the preceding questions are to be answered differently if the national legislation of the Member State where the self-employed person is resident permits him to deduct, with respect to the tax payable in that Member State, mortgage interest relating to the dwelling that he owns and to set off tax losses that arise against income to be received in one or more future tax years.

54 It is apparent from the documents in the file submitted to the Court, confirmed on this point by the oral submissions made by X at the hearing, that X received no income in Spain either in 2007 or in the subsequent tax years. Accordingly, since he had no taxable income within the Member State where he was resident over those years, X could not, in any event, have made a claim to the Spanish tax authorities for a right of deduction in order for his personal and family circumstances to be taken into account.

55 The fourth question is consequently hypothetical, and therefore inadmissible (see judgment of 29 January 2013, *Radu*, C-396/11, EU:C:2013:39, paragraph 24).

Costs

56 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 (First Chamber) hereby rules:

1. **Article 49 TFEU must be interpreted as precluding a Member State, the tax legislation of which permits the deduction of 'negative income' relating to a dwelling, from refusing the benefit of that deduction to a self-employed non-resident where that person receives, within that Member State, 60% of his total income and does not receive, within the Member State where his dwelling is located, income that enables him to qualify for an equivalent right to deduct.**

2. **The injunction imposed by the answer to the first question concerns 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. In that regard, a 'Member State of activity' is any Member State that has the power to tax such income from the activities of a non-resident as is received within its territory, irrespective of where the activities are actually performed.**

3. **The fact that the non-resident taxpayer concerned receives part of his taxable income not within a Member State, but within a non-Member State, is of no relevance to the answer to the second question.**

[Signatures]

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* Language of the case: Dutch.