JUDGMENT OF THE COURT (Grand Chamber)

27 January 2009 (*)

(Free movement of capital – Income tax – Deduction of gifts to bodies recognised as charitable – Deduction restricted to gifts to national bodies – Gifts in kind – Directive 77/799/EEC – Mutual assistance by the competent authorities of the Member States in the field of direct taxation)

In Case C-318/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 9 July 2007, received at the Court on 11 July 2007, in the proceedings

Hein Persche

v

Finanzamt Lüdenscheid,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts (Rapporteur), J.-C. Bonichot and T. von Danwitz, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Kūris and E. Juhász, Judges,

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 17 June 2008,

after considering the observations submitted on behalf of:

– Finanzamt Lüdenscheid, by H. Brandenberg, Leitender Ministerialrat,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Greek Government, by S. Spyropoulos, Z. Chatzipavlou and I. Pouli, acting as Agents,

– the Spanish Government, by M. Muñoz Pérez, acting as Agent,

– the French Government, by J.-C. Gracia, G. de Bergues and J.-C. Niollet, acting as Agents,

– Ireland, by D. O'Hagan and G. Hogan, acting as Agents, assisted by E. Barrington, BL,

– the United Kingdom Government, by I. Rao and R. Hill, acting as Agents,

– the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

– the EFTA Surveillance Authority, by P. Bjørgan and I. Hauger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 October 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 56 EC to 58 EC.

2 The reference was made in proceedings between Mr Persche, a tax adviser established in Germany, and Finanzamt Lüdenscheid (District Tax Office, Lüdenscheid; 'the Finanzamt') regarding the deduction for tax purposes of a gift in kind donated to a body in Portugal recognised as being charitable.

Legal framework

Community legislation

3 Article 1(1) of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), ('Directive 77/799') provides:

'In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital …'

4 Article 2(1) of Directive 77/799 provides:

'The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the sought after result.'

National legislation

5 Under Paragraph 10b(1) of the German Law on Income Tax (Einkommensteuergesetz; 'the EStG'), taxpayers may deduct, from the total amount of their income, as exceptional deductible expenses up to certain limits, expenditure which promotes benevolent, church, religious or scientific charitable purposes, and purposes recognised as particularly worthy of support. Under Paragraph 10(b)(3) of the EStG, such right to deduct applies also to donations in kind.

6 Under Paragraph 49 of the Regulations implementing Income Tax (Einkommensteuer-Durchführungsverordnung; 'the EStDV'), donations are deductible for tax purposes only if the recipient

is a resident legal person governed by public law, a resident public office, a corporation, an unincorporated association or a fund listed in Paragraph 5(1)(9) of the Law on Corporation Tax (Körperschaftsteuergesetz; 'the KStG'). This latter provision defines all the bodies, that is to say the corporations, unincorporated associations and funds which are exempt from corporation tax, namely those which, in terms of their statutes and in the way they actually conduct their operations, pursue exclusively and directly charitable, benevolent or church purposes. However, Paragraph 5(2)(2) of the KStG provides that that exemption applies only to bodies established in Germany.

7 Paragraph 50(1) of the EStDV provides that, subject to special provisions relating to donations of up to EUR 100 in value, donations in the sense of Paragraph 10b of the EStG may be deducted only if supported by an official form completed by the recipient body. For the purposes of the donor's assessment to income tax, that form is sufficient evidence that the recipient of the gift satisfies the statutory requirements. Thus it is not for the tax authority responsible for assessing the donor to tax to check the recipient body's compliance with the requirements for entitlement to the exemption from corporation tax.

8 Paragraphs 51 to 68 of the German Regulations on Taxes (Abgabenordnung; 'the AO') define the purposes which a body must pursue and the manner in which those purposes must be pursued in order to benefit from the tax exemption.

9 Under Paragraph 52(1) and (2)(2) of the AO, a body carries on its activities for charitable purposes if its activities are intended to promote the interests of the general public, for example by supporting children or old people. In accordance with Paragraph 55(1)(1) and (5) of the AO, the body must act altruistically, which means, for example, that its assets must be used exclusively and immediately for purposes treated favourably by tax law and not for the benefit of its members. Under Paragraph 59 of the AO, such a body is entitled to tax advantages only if its statutes show that it pursues exclusively and directly purposes that satisfy the requirements of Paragraphs 52 to 55 of the AO.

10 Under Paragraph 63(3) of the AO, such a body is required to establish, by accounting regularly for its receipts and expenditure, that its activities are actually conducted with a view to fulfilling exclusively and directly purposes which are treated favourably by tax law. In the case of gifts in kind, the second sentence of Paragraph 50(4) of the EStDV requires the recipient body to retain documentary evidence of the value of the gift which it declares.

11 Under Paragraph 193 et seq. of the AO, whether the way a body actually conducts its operations complies with its statutes and whether its assets are used altruistically and immediately, can be verified by an on-the-spot inspection. If the body satisfies the requirements for entitlement to the tax exemption, it may issue donation certificates for the donations it receives, using the form prescribed for that purpose. If a body completes an incorrect donation certificate, whether deliberately or recklessly, it is liable, under the second sentence of Paragraph 10b(4) of the EStG, for the ensuing loss of tax revenue.

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

12 In his tax return for 2003, Mr Persche claimed the deduction, as an exceptional deductible expense, of a gift of bed-linen and towels, and also zimmer-frames and toy cars for children, which he made to the Centro Popular de Lagoa (Portugal, 'the centre') in a total value of EUR 18 180. The centre is a retirement home to which a children's home has been added, situated in an area where the appellant in the main proceedings owns a house.

13 Mr Persche enclosed with his tax return a document dated 31 July 2003 by which the centre confirmed receipt of that donation, and a declaration dated 21 March 2001 by the Director of the Faro (Portugal) District Centre for Solidarity and Social Security that in 1982 the centre was registered as a private social solidarity body with the General Directorate of Social Services and that it was accordingly entitled to all exemptions and tax benefits conferred by Portuguese law on charitable bodies. The appellant in the main proceedings submits that the original donation certificate is sufficient under Portguese law to entitle him to a deduction for tax purposes.

14 By its assessment for 2003, the Finanzamt refused the deduction claimed. It also rejected, as unfounded, the objection lodged against that assessment by the appellant in the main proceedings. The appeal which he brought before the Finanzgericht Münster (District Tax Court, Münster) was also unsuccessful. The appellant in the main proceedings subsequently lodged an appeal on a point of law before the Bundesfinanzhof.

15 In its order for reference, that court points out that the Finanzamt had to disallow the deduction of the gift in question since, under German law, the recipient of the gift was not established in Germany and the taxpayer had not provided a donation certificate in proper form. The referring court is uncertain, however, whether a gift of everyday consumer goods falls within the scope of application of Articles 56 EC to 58 EC and, if so, whether those articles preclude a Member State from allowing the deduction for tax purposes of such a gift only if the recipient is established in its national territory.

16 In that regard, the referring court observes that the Court of Justice acknowledged, in its judgment in Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, that it is for the Member States to determine what are the interests of the general public they wish to promote by granting tax benefits, relying on the view of the national court in that case that the promotion of those interests, within the meaning of Paragraph 52 of the AO, does not mean that such measures have to benefit German nationals or residents. However, in the main proceedings, the referring court states that, in German law, that view is disputed.

17 The national court then notes that, in paragraph 49 of its judgment in *Centro di Musicologia Walter Stauffer*, cited above, the Court held that a Member State cannot invoke the requirement for effective fiscal supervision to justify a refusal to grant an exemption to a foundation established in another Member State since the former Member State may always require the foundation to provide the relevant supporting evidence. In that regard, the national court points out that, according to the case-law of the Bundesverfassungsgericht, for reasons of equal tax treatment, a tax assessment cannot depend solely on a declaration of, and information provided by, the taxable person, and the declaration procedure must be supplemented by on-the-spot inspections.

18 Against that background, the national court is uncertain, first, whether the mutual assistance required by Directive 77/799 can constrain the authorities of the Member State in which the body in question is established to carry out an on-the-spot inspection and, secondly, even if that were possible, whether it would not be contrary to the principle of proportionality to require the German tax authorities, in circumstances such as those of the main proceedings, to carry out checks as to the nature of the recipient bodies in order to determine the deductibility for tax purposes of gifts made to them, whatever the value of those gifts.

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

‘1. Do donations [in kind] of everyday [consumer] goods by a national of a Member State to bodies which have their seat in a different Member State and, under the law of that Member State, are recognised as charitable, fall within the scope of the principle of free movement of capital (Article 56 EC)?

2. If question 1 is answered in the affirmative:

Having regard to the obligation of tax authorities to verify statements made by taxable persons and to the principle of proportionality (third paragraph of Article 5 EC), is it incompatible with the principle of free movement of capital (Article 56 EC) for the law of a Member State to confer a tax benefit on donations to charitable bodies only if the latter are resident in that Member State?

3. If question 2 is answered in the affirmative:

Does Directive 77/799 … impose an obligation on the tax authorities of Member States to obtain assistance from the administrative authorities of another Member State in order to verify facts which have occurred in that other Member State, or can the procedural rules of a taxable person’s home Member State require him to bear the burden of proof (objective burden of proof) in relation to facts which have occurred abroad?’

The questions referred for a preliminary ruling

The first question

20 By its first question, the national court asks, in essence, whether, where a taxpayer claims, in a Member State, the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the compass of the provisions of the EC Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods.

21 In their observations, the Finanzamt, the German, Spanish and French Governments, as well as Ireland maintain that those provisions cover only capital movements made for the purposes of an economic activity and not gifts made for altruistic motives to bodies which are not managed to enrich themselves and whose activities must not be profit-making. The Greek Government, for its part, submits that transfers, not made for the purposes of investment, of everyday consumer goods which do not constitute means of payment come exclusively within the scope of the free movement of goods.

22 The Commission of the European Communities and the EFTA Surveillance Authority submit, for their parts, that gifts in kind to charitable bodies established in a Member State other than that responsible for the taxation of the donor are covered by Articles 56 EC to 58 EC.

23 It is to be noted that Article 56(1) EC lays down a general prohibition on restrictions on the movement of capital between Member States.

24 In the absence of a definition in the Treaty of ‘movement of capital’ for the purposes of Article 56(1) EC, the Court has previously recognised the nomenclature annexed to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [an article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) as having indicative value, even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (Articles 67 to 73 of the EEC

Treaty were replaced by Articles 73B to 73G of the EC Treaty, now Articles 56 EC to 60 EC), subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive (see, in particular, Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 39; *Centrodi Musicologia Walter Stauffer*, paragraph 22; and Case C-11/07 *Eckelkamp* [2008] ECR I-0000, paragraph 38). Gifts and endowments are listed under Heading XI, entitled 'Personal capital movements' in Annex I to Directive 88/361.

25 Where a taxpayer of a Member State seeks the deduction for tax purposes of a sum reflecting the value of gifts to third persons resident in another Member State, it does not matter, in order to determine whether the national legislation in question is covered by the Treaty provisions on the movement of capital, whether the underlying gifts were made in money or in kind.

26 Indeed, the reference, under Heading XI in Annex I to Directive 88/361, to inheritances and legacies shows that, in order to determine whether the tax treatment by a Member State of certain transactions is covered by the provisions on the free movement of capital, there is no need to distinguish between transactions effected in money and those effected in kind. Thus, the Court has noted that inheritances consist in the transfer to one or more persons of assets left by a deceased person or, in other words, a transfer to the heirs of ownership of the various items of property and rights which make up those assets (see, particularly, *van Hilten-van der Heijden*, cited above, paragraph 42, and *Eckelkamp*, cited above, paragraph 39). It follows that national legislation can come within the compass of Articles 56 EC to 58 EC even if it concerns the transfer of assets which can include both sums of money and movable and immovable property.

27 Like the tax levied on inheritances, the tax treatment of gifts in money or in kind therefore comes within the compass of the Treaty provisions on the movement of capital, except in cases where the constituent elements of the transactions concerned are confined within a single Member State (see, to that effect, *Eckelkamp*, paragraph 39 and the case-law cited).

28 As regards the question whether, as the Greek Government argues, a gift of consumer goods should not rather come within the scope of the Treaty provisions on the free movement of goods, it must be noted that, according to well established case-law, in order to determine whether national legislation falls within the scope of one or other of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration (see, particularly, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22 and the case-law cited).

29 In that regard, it is sufficient to point out that the national legislation in question in the main proceedings excludes the deduction of gifts made to bodies established in other Member States irrespective of whether those gifts are made in money or in kind, and, in the case of gifts in kind, of the place of purchase of the goods donated. It is therefore not in the least apparent from the purpose of that legislation that it comes within the compass of the Treaty provisions on the free movement of goods rather than those on the free movement of capital.

30 Therefore, the answer to the first question referred is that, where a taxpayer claims, in a Member State, the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the compass of the provisions of the Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods.

The second and third questions

31 By its second and third questions, with which it is appropriate to deal together, the national court asks, in essence, whether Article 56 EC precludes legislation of a Member State which allows the benefit of a deduction for tax purposes only for gifts made in favour of charitable bodies established in that State, having regard to the fact that the tax authorities of that Member State must be able to verify the taxpayer's declarations and cannot be required to act in breach of the principle of proportionality. That court is uncertain, in that context, whether Directive 77/799 requires those tax authorities to have recourse to the assistance of the competent authorities of the recipient body's Member State of establishment to obtain the necessary information or whether, on the other hand, the said tax authorities may require the taxpayer himself to provide all the necessary evidence.

32 In that regard, the Finanzamt, the German, Spanish and French Governments, as well as Ireland and the United Kingdom Government, maintain that it is not contrary to the Treaty provisions on the free movement of capital that a Member State provides for the deduction for tax purposes of gifts only if they benefit bodies located in that State. First of all, national charitable bodies and those established abroad are not in a comparable situation for the purposes of Article 58(1)(a) EC. In addition, the restriction of tax advantages to gifts made to national charitable bodies is, in their submission, justified by the need to guarantee the effectiveness of fiscal supervision.

33 The German and United Kingdom Governments submit that, in the case of a gift by a taxpayer to a body established in another Member State, the Member State of taxation of the donor ('the donor's Member State') is not obliged to procure the information necessary to assess the donor to tax either by its own means or through the mechanism of mutual assistance under Directive 77/799.

34 The German Government, Ireland and the United Kingdom Government submit, that would, in any event, be contrary to the principle of proportionality to constrain the donor's Member State to verify compliance with the requirements imposed on charitable bodies, or to have it verified, for each gift made by a taxpayer to bodies situated in one or more other Member States, and that that is so whatever the value of the gift or gifts donated.

35 By contrast, the Commission and the EFTA Surveillance Authority submit that the national legislation in question in the main proceedings constitutes a restriction on the free movement of capital and cannot be justified by the need to safeguard the effectiveness of fiscal supervision.

36 In the Commission's submission, even if Directive 77/799 itself does not require a Member State to have recourse to the assistance of another Member State in order to inform itself of a fact, the evidence of which is in that other Member State, the former State would however be required, within the scope of application of Article 56 EC, to have recourse to the possibilities offered by that directive in order to exclude any less favourable treatment of cross-border situations as compared to purely internal situations. The EFTA Surveillance Authority, for its part, submits that, even if the taxpayer seeking a tax advantage can be required to provide the necessary evidence, the tax authorities cannot refuse that advantage because of doubts as to the authenticity of the information provided without having had recourse to the other means available to obtain or verify that information.

37 In the present case, the German legislation provides for the deduction for tax purposes of gifts to charitable bodies situated in Germany which satisfy the other requirements laid down by that legislation, whilst excluding that tax advantage for gifts to bodies established and recognised as charitable in another Member State.

38 As the Advocate General pointed out in paragraphs 47 and 48 of his Opinion, since the possibility of

obtaining a deduction for tax purposes can have a significant influence on the donor's attitude, the inability in Germany to deduct gifts to bodies recognised as charitable if they are established in other Member States is likely to affect the willingness of German taxpayers to make gifts for their benefit.

39 Such legislation constitutes, therefore, a restriction on the free movement of capital prohibited, as a rule, by Article 56 EC.

40 It is true that, under Article 58(1)(a) EC, Article 56 EC is without prejudice to the right of Member States to distinguish, in their tax law, between taxpayers who are not in the same situation with regard to the place where their capital is invested.

41 However, it is important to distinguish unequal treatment permitted under Article 58(1)(a) EC from arbitrary discrimination or disguised restrictions prohibited under Article 58(3) EC. Indeed, for national tax legislation such as that at issue in the main proceedings, which distinguishes between national bodies and those established in another Member State, to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or it must be justified by an overriding reason in the public interest, such as the need to safeguard effective fiscal supervision. In order to be justified, moreover, the difference in treatment must not go beyond what is necessary in order to attain the objective of the legislation in question (see, to that effect, *Centro di Musicologia Walter Stauffer*, paragraph 32 and the case-law cited).

The comparability of national bodies recognised as being charitable with those established in another Member State

42 The German, Spanish and French Governments, as well as Ireland and the United Kingdom Government point out that gifts to national bodies and those in favour of bodies established in another Member State are not comparable in the sense that the Member States concerned, first, may apply different concepts of benevolence as well as different requirements for recognition of acts of benevolence and, second, they are not in a position to monitor compliance with the requirements they impose other than in relation to national bodies. The German, Spanish and French Governments add that if a Member State abstains from levying certain tax revenue by exempting gifts made for the benefit of charitable bodies established in that State, that is because such bodies absolve that Member State of certain charitable tasks which it would otherwise have to fulfil itself using tax revenues.

43 At the outset, it is appropriate to point out that it is for each Member State to determine whether, in order to encourage certain activities recognised as being charitable, it will provide for tax advantages in favour of both public and private bodies which concern themselves with those activities and taxpayers who make them gifts.

44 Whilst it is lawful for a Member State to restrict the grant of tax advantages to bodies pursuing certain of its charitable purposes (see, to that effect, *Centro di Musicologia Walter Stauffer*, paragraph 57), a Member State cannot however restrict the benefit of such advantages only to bodies established in that State whose activities are thus capable of absolving it of some of its responsibilities.

45 Admittedly, by encouraging taxpayers, with the prospect of a tax deduction for gifts made to bodies recognised as charitable in support of their activities, a Member State encourages such bodies to develop charitable activities for which, usually, it would or could take responsibility itself. It is conceivable, therefore, that national legislation providing for a deduction for tax purposes of gifts for

the benefit of charitable bodies could encourage such bodies to substitute themselves for the public authorities in assuming certain responsibilities, and that such assumption could lead to a reduction of the expenses of the Member State concerned capable of compensating, at least partly, for its decreased tax revenues resulting from the right to deduct gifts.

46 However, it does not follow that a Member State can introduce a difference in treatment, in respect of the deduction for tax purposes of gifts, between national bodies recognised as being charitable and those established in another Member State on the grounds that gifts made for the benefit of the latter, even if their activities are among the purposes of the legislation of the former Member State, cannot lead to such budgetary compensation. It is settled case-law that the need to prevent the reduction of tax revenues is neither among the objectives stated in Article 58 EC nor an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty (see, to that effect, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 49, and *Centro di Musicologia Walter Stauffer*, paragraph 59; see, by analogy, as regards the freedom to supply services, Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56, and Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 77).

47 Conversely, it is permissible for a Member State, as part of its legislation relating to the deduction for tax purposes of gifts, to apply a difference in treatment between national bodies recognised as charitable and those established in other Member States if the latter bodies pursue objectives other than those advocated by its own legislation.

48 As the Court held in paragraph 39 of the judgment in *Centro di Musicologia Walter Stauffer*, it is not a requirement under Community law for Member States automatically to confer on foreign bodies recognised as having charitable status in their Member State of origin the same status in their own territory. Member States have a discretion in this regard that they must exercise in accordance with Community law. In those circumstances, they are free to define the interests of the general public that they wish to promote by granting benefits to associations and bodies which pursue objects linked to such interests in a disinterested manner and comply with the requirements relating to the implementation of those objects.

49 The fact remains that where a body recognised as having charitable status in one Member State satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, so that it would be likely to be recognised as having charitable status in the latter Member State, which it is a matter for the national authorities of that same Member State, including its courts, to determine, the authorities of that Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in that Member State (see, to that effect, *Centro di Musicologia Walter Stauffer*, paragraph 40; see, by analogy, as regards the freedom to provide services, *Schwarz and Gootjes-Schwarz*, cited above, paragraph 81).

50 Contrary to what the Governments which have submitted observations maintain in that regard, a body which is established in one Member State but satisfies the requirements imposed for that purpose by another Member State for the grant of tax advantages, is, in respect of the grant by the latter Member State of tax advantages intended to encourage the charitable activities concerned, in a situation comparable to that of bodies recognised as having charitable purposes which are established in the latter Member State.

The justification based on the need to safeguard the effectiveness of fiscal supervision

51 Contrary to what the Governments having lodged observations maintain, the exclusion of the deduction for tax purposes for gifts to bodies established and recognised as charitable in a Member other than the donor's Member State cannot be justified by the difficulty, for the donor's Member State, of verifying whether such bodies actually satisfy the statutory objectives for the purposes of its national legislation or by the necessity of monitoring the actual running of those bodies.

52 Admittedly, the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. However, for a restrictive measure to be justified, it must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (Case C-101/05 *A* [2007] ECR I-11531, paragraphs 55 and 56, and the case-law cited).

53 In that context, the Court has decided that the possibility cannot be excluded a priori that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the expenditure incurred in other Member States (see Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 20, and Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 25).

54 Nothing would prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting expenses provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested (see, to that effect, *Danner*, cited above, paragraph 50, and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 43).

55 In the light of the principles extracted by the Court in paragraph 48 of the judgment in *Centro di Musicologia Walter Stauffer*, before granting a tax exemption to a body established and recognised as having charitable status in another Member State, a Member State is authorised to apply measures enabling it to ascertain in a clear and precise manner whether the body meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report. Any administrative disadvantages arising from the fact that such bodies may be established in another Member State are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such bodies the same tax exemptions as are granted to national bodies of the same kind.

56 The same applies in the case of the taxpayer who claims a tax deduction in a Member State for a gift to a body established and recognised as charitable in another Member State, even if, in such circumstances, and contrary to what was the case in *Centro di Musicologia Walter Stauffer*, the taxpayer from whom the tax authorities have to obtain the necessary information is not the body which received the gift but, indeed, the actual donor.

57 Whilst it is true that, in contrast to such a recipient body, the donor does not himself have all the information necessary for the tax authorities to verify whether that body satisfies the conditions required by the national legislation for the grant of tax advantages, particularly those relating to the manner in which the funds paid are managed, it is usually possible, for a donor, to obtain from that body documents confirming the amount and nature of the gift made, identifying the objectives pursued

by the body and certifying the propriety of the management of the gifts which were made to it during previous years.

58 In that regard, declarations by a body which fulfils, in its Member State of establishment, the requirements of the law of that Member State for the grant of tax advantages, cannot be left out of consideration, particularly if that legislation makes the grant of tax advantages intended to encourage charitable activities subject to identical requirements.

59 As regards the administrative burden which the preparation of such documents may entail for the bodies concerned, it is sufficient to point out that it is for those bodies to decide whether they consider it opportune to invest resources in the establishment, distribution and possible translation of documents addressed to donors established in other Member States desirous of benefiting from tax advantages there.

60 Since nothing prevents the tax authorities of the Member State of taxation from requiring a taxpayer, wishing to obtain the deduction for tax purposes for gifts made for the benefit of bodies established in another Member State, to provide the relevant evidence, that Member State of taxation cannot invoke the need to safeguard the effectiveness of fiscal supervision to justify national legislation which absolutely prevents the taxpayer from producing such evidence.

61 Moreover, the tax authorities concerned may, pursuant to Directive 77/799, call upon the authorities of another Member State in order to obtain all the information that may be necessary to effect a correct assessment of a taxpayer's liability to tax (*Centro di Musicologia Walter Stauffer*, paragraph 50). That directive provides, with a view to preventing tax evasion, for the possibility of national tax authorities requesting information which they cannot obtain for themselves (Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 32).

62 Contrary to the submissions of Ireland and the United Kingdom Government, a request by the tax authorities of a Member State for information concerning a body established in another Member State, in order to determine whether a gift made to that body can benefit from a tax advantage, is by no means outside the scope of Directive 77/799. The information which Directive 77/799 allows the competent authorities of a Member State to request is in fact all the information which appears to them to be necessary in order to ascertain the correct amount of tax in relation to the legislation which they have to apply themselves (*Twoh International*, cited above, paragraph 36). The information required in order to supplement that which a taxpayer has provided to the tax authorities of a Member State in order to obtain a tax advantage constitutes information capable of enabling each competent authority of the Member States concerned to effect a correct assessment of the income tax in a particular case within the meaning of Articles 1(1) and 2(1) of Directive 77/799.

63 However, Directive 77/799 does not in any way affect the powers of the competent authorities of the donor's Member State to assess in particular whether the conditions to which that legislation subjects the grant of a tax advantage are fulfilled (see, to that effect, *Twoh International*, paragraph 36). Thus, as regards a body established and recognised as having charitable status in another Member State, the donor's Member State must allow identical tax treatment to that applied to gifts made to national bodies only if that body satisfies the requirements laid down by the legislation of that latter Member State for the grant of tax advantages, among which are the pursuit of objectives identical to those promoted by the tax law of that Member State. It is for the competent national authorities, including the national courts, to establish whether, under the rules of national law, compliance with the requirements imposed by the donor's Member State for the grant of the tax advantage in question has been proved.

64 Furthermore, Directive 77/799 does not require the donor's Member State to have recourse to the mechanism of mutual assistance under that directive each time that the information provided by that donor is not sufficient to establish whether the recipient body fulfils the conditions laid down by the national legislation for the grant of tax advantages.

65 Since Directive 77/799 provides for the possibility of national tax authorities requesting information which they cannot obtain for themselves, the Court has ruled that the use, in Article 2(1) of Directive 77/799, of the word 'may' indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State (*Twoh International*, paragraph 32).

66 Finally, a Member State cannot exclude the grant of tax advantages for gifts made to a body established and recognised as charitable in another Member State on the sole ground that, in relation to such bodies, the tax authorities of the former Member State are unable to check, on-the-spot, compliance with the requirements which their tax legislation imposes.

67 In fact, as the German Government explained at the hearing, even in relation to national charitable bodies, an on-the-spot inspection is not usually required since the monitoring of compliance with the conditions imposed by the national legislation is carried out, generally, by checking the information provided by those bodies.

68 In addition, where the Member State of establishment of the recipient body has a system of tax advantages intended to support the activities of charitable bodies, it will normally be sufficient for the donor's Member State to be informed by the other Member State, within the framework of mutual assistance under Directive 77/799, of the subject matter and detailed arrangements for the supervision to which such bodies are subject, for tax authorities of the Member State of taxation to be able to identify, with sufficient precision, the additional information which they need to verify whether the recipient body fulfils the conditions imposed by the national legislation for the grant of tax advantages.

69 Indeed, even if it proves difficult to verify the information provided by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, nothing prevents the tax authorities concerned refusing the deduction applied for if the evidence that they consider they need to effect a correct assessment of the tax is not supplied (see, to that effect, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 20; Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 95; and *A*, cited above, paragraph 58).

70 As regards charitable bodies in a non-member country, it must be added that it is, as a rule, legitimate for the Member State of taxation to refuse to grant such a tax advantage if, in particular, because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country (see, to that effect, *A*, paragraph 63).

71 In those circumstances, the argument of the German Government, Ireland and the United Kingdom Government must be rejected whereby it is contrary to the principle of proportionality to constrain the donor's Member State, when a taxpayer claims the benefit of a deduction for gifts which he has made to bodies established in another Member State, to verify or to have verified compliance with the conditions imposed on national charitable bodies.

72 Therefore, the answer to the second and third questions is that Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Where a taxpayer claims, in a Member State, the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the compass of the provisions of the EC Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods.**

2. **Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit.**

[Signatures]

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* Language of the case: German.