JUDGMENT OF THE COURT (Third Chamber)

12 February 2009 (*)

(Free movement of capital – Articles 56 EC and 58 EC – Inheritance tax – National rules not allowing inheritance tax in respect of capital claims, paid by an heir in one Member State, to be credited against inheritance tax payable in another Member State where the owner of the assets was resident at the time of death – Double taxation – Restriction – None)

In Case C-67/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 16 January 2008, received at the Court on 20 February 2008, in the proceedings

Margarete Block

v

Finanzamt Kaufbeuren,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh (Rapporteur), J.N. Cunha Rodrigues, J. Klučka and A. Arabadjiev, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2008,

after considering the observations submitted on behalf of:

– Ms Block, by S. Gorski, Rechtsanwalt,

– Finanzamt Kaufbeuren, by M. Stock, acting as Agent,

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

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

– the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

– the Polish Government, by M. Dowgielewicz, acting as Agent,

– the United Kingdom Government, by S. Ossowski, acting as Agent, assisted by S. Ford, Barrister,

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 56 EC and 58 EC relating to the free movement of capital.

2 The reference has been made in the course of proceedings between Ms Block, heir to a person deceased in Germany, and Finanzamt Kaufbeuren ('the Finanzamt') concerning the assessment of inheritance tax payable in respect of capital claims of the deceased against financial institutions in Spain.

Legal context

Community legislation

3 Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provides:

'1. Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.

2. Transfers in respect of capital movements shall be made on the same exchange rate conditions as those governing payments relating to current transactions.'

4 Among the capital movements listed in Annex I to Directive 88/361 are, under heading XI of that annex, personal capital movements, which include inheritances and legacies.

National legislation

5 Paragraph 1(1)(1) of the Law on inheritance and gift tax (Erbschaftsteuer- und Schenkungsteuergesetz), as applicable in 1999 (BGBl. 1997 I, p. 378; 'the ErbStG'), provides that inheritances are subject to that law as taxable transactions.

6 Paragraph 2(1)(1) of the ErbStG is worded as follows, under the heading 'Personal tax liability':

'(1) Liability to tax arises

1. in the cases referred to in Paragraph 1(1), points 1 to 3, to the entire estate where the deceased, at the date of death, the donor, at the time of making the gift, or the acquiror, on the date on which the tax arises, is a resident. The following are deemed to be residents:

(a) natural persons whose domicile or habitual residence is in Germany,

...'

7 Under the heading ‘Offsetting of foreign inheritance tax’, Paragraph 21(1) and (2) of the ErbStG provides:

‘(1) Where the foreign property of acquirors is subject, in a foreign country, to a foreign tax corresponding to German inheritance tax, the foreign tax set and payable by the acquiror, paid and not eligible for reduction, shall, in the cases referred to in the first point of Paragraph 2(1) and, in so far as the provisions of a double-taxation agreement do not apply, be offset, if an application is made for that purpose, against the German inheritance tax in so far as the foreign assets are also subject to German inheritance tax. …

(2) Foreign assets for the purposes of subparagraph (1) shall mean,

1. where the deceased was a resident at the date of his death, all assets of the type referred to in Paragraph 121 of the [Valuation Law (Bewertungsgesetz), as applicable in 1999 (BGBl. 1991 I, p. 230; ‘the BewG’)] which are situated in another State, as well as all rights of enjoyment attached to those assets;

2. where the deceased was not a resident at the date of his death, all assets, with the exception of domestic assets within the meaning of Paragraph 121 of the [BewG], as well as all rights of enjoyment attached to those assets.’

8 Under the heading ‘Domestic assets’, Paragraph 121 of the BewG is worded as follows:

‘Domestic assets include:

1. domestic agricultural and forestry assets;

2. domestic property assets;

3. domestic business assets, meaning assets used in connection with an industrial or commercial activity in Germany, where a permanent business establishment is maintained for that purpose in Germany, or where a permanent representative has been designated;

4. shares in capital companies, where the company’s registered office or central management is in Germany, and the shareholder, either alone or together with other parties connected to him within the meaning of Paragraph 1(2) of the Foreign Transaction Tax Law [Gesetz über die Besteuerung bei Auslandsbeziehungen (Außensteuergesetz)] … holds, either directly or indirectly, at least one tenth of the company’s initial or share capital;

5. inventions, utility models and layout designs not covered by point 3 which are registered in a national book or register;

6. economic assets not covered by points 1, 2 or 5 and which are at the disposal of a domestic industrial or commercial undertaking, in particular under a tenancy or lease;

7. mortgages, charges on land, rentcharges and other debts or rights where these are secured, directly or indirectly, on domestic immovable property, on rights equivalent to domestic immovable property, or on vessels registered in a national shipping register. Loans and debts in respect of which part debentures have been issued are excluded;

8. claims arising from participation in a commercial undertaking as a silent partner and from loans with profit participation, where the debtor's domicile or habitual residence, registered office or central management is in Germany;

9. rights of enjoyment attached to one of the assets referred to at points 1 to 8.'

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

9 Ms Block, who is resident in Germany, is the sole heir of a person who died in 1999 in Germany, where the deceased was last resident. The estate essentially consisted of capital assets, of which DEM 144 255 were invested in Germany, and the remainder – an amount equivalent to DEM 994 494 – with financial institutions in Spain. Ms Block paid inheritance tax in Spain in the amount of DEM 207 565 in respect of the latter assets.

10 In its notice of assessment of 14 March 2000, the Finanzamt fixed the inheritance tax payable by Ms Block in Germany without taking into consideration the inheritance tax paid in Spain. Ms Block lodged an objection to that notice of assessment, by which she applied for the inheritance tax paid in Spain to be credited against the inheritance tax to be paid in Germany and, therefore, for the amount in excess of the latter tax to be repaid to her.

11 By decision of 4 July 2003, the Finanzamt, in response to that objection, allowed the deduction of the Spanish tax liability as a liability of the estate, meaning the deduction of inheritance tax paid in Spain from the basis of assessment of inheritance tax payable in Germany. According to that decision, the taxable acquisition, after deduction of liabilities from legacies and a personal allowance, amounted to DEM 579 000, and the amount of inheritance tax to which that acquisition was subject was fixed at DEM 124 500 (EUR 63 655.84).

12 Having been seised of Ms Block's application – by which she requested that the inheritance tax paid in Spain be credited against the inheritance tax to be paid in Germany, instead of being deducted from the basis of assessment in the same way as a debt of the estate – the Finanzgericht (Finance Court) took the view that it was not possible to credit Spanish inheritance tax pursuant to Paragraph 21(1) of the ErbStG under Paragraph 21(2)(1), because capital claims against financial institutions in Spain do not fall within the scope of Paragraph 121 of the BewG. Those capital claims did not therefore constitute 'foreign assets' within the meaning of Paragraph 21(2)(1) of the ErbStG. According to the Finanzgericht, whilst double taxation would occur with respect to the capital claims at issue, it is not for the German tax authorities to subsidise other Member States.

13 An appeal on a point of law ('Revision') was brought before the Bundesfinanzhof (Federal Finance Court) which finds that, owing to the fact that there is no Community harmonisation concerning the meaning of 'foreign assets', Ms Block is subject to double taxation in so far as the Federal Republic of Germany applies the criterion of the residence of the creditor for the purposes of determining the amount of inheritance tax to be levied on capital claims, whereas the Kingdom of Spain applies that of the residence of the debtor.

14 The referring court queries whether such double taxation is contrary to Community law. If all the deceased's assets had been invested in Germany, only German inheritance tax would have been levied. Moreover, as regards the connection for taxation purposes, the criterion of the residence of the creditor is no less reasonable than that of the residence of the debtor, since the inherited assets belong to the

creditor.

15 Furthermore, on the assumption that such double taxation constitutes a restriction on the free movement of capital, the referring court queries whether it is justified under Article 73d(1)(a) of the EC Treaty (now Article 58(1)(a) EC), as interpreted in Declaration No 7 on Article 73d of the Treaty establishing the European Community, annexed to the EU Treaty (OJ 1992 C 191, p. 95), according to which '[t]he Conference affirms that the right of Member States to apply the relevant provisions of their tax law as referred to in Article 73d(1)(a) of this Treaty will apply only with respect to the relevant provisions which exist at the end of 1993. However, this Declaration shall only apply to capital movements between Member States and payments effected between Member States'. However, the provisions of Paragraph 21 of the ErbStG existed before 1993, since the promulgation in 1997 of the revised version of that law was not a constitutive act of the legislature constituting fresh publication.

16 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 the provisions of Article 73d(1)(a) and (3) of the EC Treaty (now Article 58(1)(a) and (3) EC) allow the crediting of Spanish inheritance tax against German inheritance tax to be precluded under Paragraph 21(1) and (2)(1) of the [ErbStG] in conjunction with Paragraph 121 of the [BewG] (category restriction) even in the case of inheritances which occurred in 1999?

(2) Is Article 73b(1) of the EC Treaty (now Article 56(1) EC) to be interpreted as meaning that the inheritance tax which another European Union Member State levies in respect of the inheritance, by an heir resident in Germany, of the capital claims of a testator last resident in Germany against credit institutions in that other Member State must be credited against German inheritance tax?

(3) In deciding which of the States involved has to avoid double taxation, is the justification for the different connecting factors in the national tax law systems relevant and, if so, is the connection to the residence of the creditor more justified than the connection to the registered office of the debtor?'

The questions referred for a preliminary ruling

17 By its questions, which should be examined together, the national court asks, essentially, whether Articles 56 EC and 58 EC must be interpreted as precluding the rules of a Member State, such as those at issue in the main proceedings, which, as regards the assessment of the inheritance tax payable by an heir resident in that Member State in respect of capital claims against a financial institution in another Member State, do not provide for inheritance tax paid in that other Member State to be credited against inheritance tax payable in the first Member State where the person whose estate is being administered was, at the date of death, residing in the first Member State.

18 According to settled case-law, Article 56(1) EC lays down a general prohibition on restrictions on movements of capital between Member States (Joined Cases C-463/04 and C-464/04 *Federconsumatori and Others* [2007] ECR I-10419, paragraph 19 and case-law cited).

19 In the absence of a definition in the Treaty of 'movement of capital' within the meaning of Article 56(1) EC, the Court has previously recognised the nomenclature which constitutes Annex I to Directive 88/361 as having indicative value, even if the latter was adopted on the basis of Articles 69 and 70(1) of

the EEC Treaty (after amendment, Articles 69 and 70(1) of the EC Treaty, repealed by the Treaty of Amsterdam), it being understood that, according to the third paragraph of the introduction to that annex, the nomenclature it contains is not exhaustive as regards the term 'movement of capital' (see, in particular, Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 39, and Case C-256/06 *Jäger* [2008] ECR I-123, paragraph 24).

20 In that regard, the Court – noting, in particular, that inheritances consisting in the transfer to one or more persons of assets left by a deceased person fall under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements' – has held that an inheritance, whether of money, immovable or movable property, is a movement of capital for the purposes of Article 56 EC, except in cases where its constituent elements are confined within a single Member State (see, in particular, Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 58; Case C-43/07 *Arens-Sikken* [2008] ECR I-0000, paragraph 30; Case C-11/07 *Eckelkamp* [2008] ECR I-0000, paragraph 39; and Case C-318/07 *Persche* [2009] ECR I-0000, paragraphs 30 and 31).

21 A situation in which a person resident in Germany at the date of death leaves to another person also resident in that Member State capital claims against a financial institution in Spain on which inheritance tax is levied both in Germany and in Spain is certainly not a situation purely internal to a Member State.

22 Consequently, the inheritance at issue in the main proceedings constitutes a movement of capital for the purposes of Article 56(1) EC.

23 It is necessary therefore to examine whether, as Ms Block claims, national rules such as those at issue in the main proceedings amount to a restriction on the movement of capital.

24 As regards inheritances, it is apparent from the case-law of the Court that the measures prohibited by Article 56(1) EC as being restrictions on the movement of capital include those the effect of which is to reduce the value of the inheritance of a resident of a State other than the Member State in which the assets concerned are situated and which taxes the inheritance of those assets (*van Hilten-van der Heijden*, paragraph 44; *Jäger*, paragraph 31; *Arens-Sikken*, paragraph 37; and *Eckelkamp*, paragraph 44).

25 It is, however, common ground that the national legislation at issue in the main proceedings – in so far as it determines the assessment of the inheritance tax payable by an heir who is resident in Germany in respect of the capital claims of a person who, at the time of her death, was also resident in Germany – provides for identical rules of taxation on inheritances, regardless of whether the debtor financial institution in respect of those claims is in Germany or in another Member State.

26 Ms Block maintains, however, that that national legislation restricts the free movement of capital, since all the assets of a person's estate which are situated in a Member State other than that in which that person was residing at the date of death do not necessarily give rise to a right to offset inheritance tax paid in that other Member State. Where, as in the main proceedings, the proprietor of those assets was resident in Germany at the time of death, the meaning of 'foreign assets' for the purposes of Paragraph 21 of the ErbStG, establishing an entitlement to such offsetting, does not – according to Paragraph 21(2)(1) – include certain assets, such as capital claims, even if in economic terms they are manifestly situated abroad. As a result of this there is an impediment, contrary to Article 56(1) EC, in that the risk of double taxation would deter investors as well as their heirs from investing in certain Member States.

27 In that regard, it should admittedly be noted that, as Ms Block submits, the fact that inherited assets such as capital claims are excluded in Germany from 'foreign assets' which, under national rules, establish an entitlement to have inheritance tax paid abroad credited against inheritance tax payable in Germany results – where the claims are against a financial institution in another Member State which has levied inheritance tax on those claims, in the present case, the Kingdom of Spain – in a higher tax burden than if those claims had been against a financial institution established in Germany.

28 However, as all the Governments that have submitted written observations to the Court, as well as the Commission of the European Communities, correctly submit, that fiscal disadvantage is the result of the exercise in parallel by the two Member States concerned of their fiscal sovereignty, which is demonstrated by the fact that one State, the Federal Republic of Germany, has decided to make capital claims subject to German inheritance tax where the creditor is resident in Germany, while the other, the Kingdom of Spain, has decided to make such claims subject to Spanish inheritance tax where the debtor is established in Spain (see, to that effect, Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraph 20, and Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 43).

29 In this respect, double taxation conventions such as those envisaged in Article 293 EC are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems referred to in the preceding paragraph (*Kerckhaert and Morres*, paragraph 21, and *Columbus Container Services*, paragraph 43).

30 Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. Consequently, apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level (see *Kerckhaert and Morres*, paragraph 22, and *Columbus Container Services*, paragraph 45).

31 It follows from this that, in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty and, in consequence thereof, to allow the inheritance tax paid in a Member State other than that in which the heir is resident to be deducted in a case such as that of the main proceedings (see, to that effect, *Columbus Container Services*, paragraph 51).

32 These considerations are not liable to be affected by the fact that, as Ms Block claimed in her written observations, Paragraph 21 of the ErbStG lays down more favourable offsetting rules where the person whose estate is being administered was, at the time of death, residing in a Member State other than the Federal Republic of Germany, inasmuch as Paragraph 21(2)(2) of the ErbStG defines 'foreign assets' in such cases more broadly than in a situation such as that of the applicant in the main proceedings.

33 Admittedly, as the German Government and the Commission confirmed at the hearing, where the person whose estate is being administered was, at the time of death, residing in a Member State other

than the Federal Republic of Germany, national rules provide – as regards the assessment of inheritance tax payable in Germany by a resident heir in respect of the capital claims of the deceased against a financial institution in that other Member State – for inheritance tax paid in that other Member State to be credited against those claims, since those claims are, in such cases, covered by the concept of 'foreign assets' under Paragraph 21(2)(2) of the ErbStG.

34 However, that difference in treatment, as regards the inheritance of a person who was not resident at the time of death, arises equally from the choice by the Member State concerned – made, according to the case-law cited in paragraphs 28 to 31 of this judgment, pursuant to the exercise of its fiscal sovereignty – of the place of residence of the creditor as a connecting criterion for the purposes of establishing the 'foreign' nature of the estate and, therefore, for the ability to offset in Germany inheritance tax paid in another Member State.

35 Furthermore, according to the settled case-law of the Court, the Treaty offers no guarantee to a citizen of the Union that transferring his residence to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage or not, according to circumstances (see, to that effect, Case C-365/02 *Lindfors* [2004] ECR I-7183, paragraph 34, and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45).

36 Accordingly, the answer to the questions referred is that Articles 56 EC and 58 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which – as regards the assessment of inheritance tax payable by an heir who is resident in that Member State in respect of capital claims against a financial institution in another Member State – does not provide for inheritance tax paid in that other Member State to be credited against inheritance tax payable in the first Member State where the person whose estate is being administered was, at the time of death, resident in the first Member State.

Costs

37 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 (Third Chamber) hereby rules:

Articles 56 EC and 58 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which – as regards the assessment of inheritance tax payable by an heir who is resident in that Member State in respect of capital claims against a financial institution in another Member State – does not provide for inheritance tax paid in that other Member State to be credited against inheritance tax payable in the first Member State where the person whose estate is being administered was, at the time of death, resident in the first Member State.

[Signatures]

* Language of the case: German.