JUDGMENT OF THE COURT (Second Chamber)

18 December 2014 (*)

(Reference for a preliminary ruling — Freedom of establishment — Tax legislation — Income tax — Non-resident taxpayer — Deductibility of costs relating to a historic building occupied by its owner — Costs not deductible in respect of a historic building solely on the ground that it is not listed in the State of taxation, whereas it is listed in the State of residence)

In Case C-87/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 1 February 2013, received at the Court on 21 February 2013, in the proceedings

Staatssecretaris van Financiën

v

X,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– X, by F. Engelen, S. Douma and G. Boulogne, acting as advisers,

– the Netherlands Government, by B. Koopman and M. Bulterman, acting as Agents,

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

– the Spanish Government, by A. Rubio González, acting as Agent,

– the French Government, by D. Colas and J.-S. Pilczer, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the United Kingdom Government, by S. Brighouse, acting as Agent, and R. Hill, Barrister,

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

after hearing the Opinion of the Advocate General at the sitting on 4 September 2014, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU and 63 TFEU.

2 The request has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and X relating to the refusal of the Netherlands tax authorities to deduct from that taxpayer's income certain costs related to the maintenance of his residence — a country house in Belgium protected under that Member State's legislation on historic buildings — solely on the ground that the country house is not protected under the Netherlands legislation on historic buildings.

Netherlands law

3 Article 2.5(1) of the Law on income tax 2001 (wet inkomstenbelasting 2001), in the version applicable to the dispute in the main proceedings ('the Law on income tax'), provides:

'Any domestic taxpayer who is resident in the Netherlands for only part of the calendar year and any foreign taxpayer who is resident in another Member State of the European Union, on the Netherlands islands of Bonaire, Sint Eustatius or Saba or in the territory of a country designated by ministerial decision with which the Netherlands has concluded an agreement for the avoidance of double taxation providing for the exchange of information, and who is liable to taxation in that Member State, on the Netherlands islands of Bonaire, Sint Eustatius or Saba or in the territory of that country, may opt for the tax regime which this Law lays down for domestic taxpayers. …'

4 As provided in Article 3.1 of the Law on income tax:

'1. Taxable income derived from work and a dwelling shall be the income from work and a dwelling reduced by any losses related to the work and dwelling (section 3.13).

2. Income derived from work and a dwelling shall be equal to the aggregate amount of:

a. the undertaking's taxable profit (section 3.2),

b. taxable salary (section 3.3),

c. taxable profit from other activities (section 3.4),

d. taxable periodic benefits and payments (section 3.5),

e. taxable income derived from the taxpayer's own dwelling (section 3.6),

f. negative expenditure in respect of income provision (section 3.8) and

g. negative personal deductions (section 3.9),

reduced by:

h. the deduction for no or low debt related to the taxpayer's own dwelling (section 3.6a),

i. expenditure in respect of income provision (section 3.7) and

j. personal deductions (chapter 6).'

5 It follows from what is stated in the order for reference that taxable income from the taxpayer's dwelling is determined at a flat rate, on the basis of a percentage of the dwelling's value.

6 Chapter 6 of the Law on income tax lays down, inter alia, specific rules relating to the deduction of costs related to a listed building. There is a right to deduct both for taxpayers' own dwellings and for listed buildings giving rise to income from savings and investments as referred to in chapter 5 of the Law, namely second homes and investment properties. On the basis of Article 6.31 of the Law on income tax, read in conjunction with Article 6.1(2)(g), in so far as costs relating to a listed building exceed a certain threshold, they may, subject to certain conditions, be taken into account as a personal deductible item. Those conditions do not relate to the individual taxpayer or his ability to pay tax. Where the listed building must be considered to be the taxpayer's own dwelling, that regime is intended to allow the deduction of maintenance costs up to the limit of the flat-rate sum referred to in the previous paragraph.

7 Article 6.2 of the Law on income tax, headed 'Taking account of personal deductions', is worded as follows:

'1. The personal deduction shall reduce income derived from work and a dwelling in the year, but not below zero.

2. If the personal deduction does not reduce income derived from work and a dwelling in the year, it shall reduce taxable income from savings and investments in the year, but not below zero.

3. If the personal deduction does not reduce income derived from work and a dwelling or taxable income from savings and investments in the year, it shall reduce income from a significant holding in the year, but not below zero.

4. When applying paragraphs 1 and 3, income derived from work and a dwelling and income from a significant holding in the year shall be determined without taking account of income to be retained.

5. In the event of reduction, expenditure relating to the specific maintenance costs referred to in Article 6.1(2)(d) shall be taken into account first of all.'

8 Article 6 of the Law on historic buildings 1988 (Monumentenwet 1988), in the version applicable to the dispute in the main proceedings ('the Law on historic buildings'), states:

'1. The minister shall keep a register of protected historic buildings for each municipality. He shall enter in the register the historic buildings which he has designated, in so far as no appeal has been lodged against the designation or if such an appeal has been dismissed.

2. The minister shall send a copy of any entry made in the register to the provincial executive and to the mayor and aldermen.

3. The copy sent to the mayor and aldermen shall be lodged with the secretariat of the municipality for consultation. Every citizen may go there and obtain a copy at his own cost.'

9 Article 7 of the Law on historic buildings provides:

'1. If the historic building is not situated in the territory of a municipality, Article 3(2) to (6), Article 4 and Article 6 shall not apply.

2. Before making a decision on a historic building referred to in paragraph 1, the minister shall hear the views of the Council.

3. The minister shall keep a national register in which he shall enter the historic buildings referred to in paragraph 1 that have been designated by him, in so far as no appeal has been lodged against the designation or if such an appeal has been dismissed. A copy of the entry shall be sent to the body which administers the area concerned and to the provincial executive if the historic building is situated in the territory of a province.'

10 Article 3 of the Law on historic buildings lays down the procedure for according property the status of a historic building in the following terms:

'1. The minister may on his own initiative accord a historic building the status of a protected historic building.

2. Before taking a decision in this regard, the minister shall consult the mayor and aldermen of the municipality in which the historic building is situated, and the provincial executive if the historic building is situated outside the built-up areas designated under the Law on Road Traffic 1994.

3. The minister shall notify persons designated in the basic registration of the land register as owners and as holders of restricted rights of the request for an opinion as referred to in paragraph 2.

4. The mayor and aldermen shall grant the interested parties referred to in paragraph 3 the opportunity to be heard and shall organise the consultation referred to in Article 2(2).

5. The mayor and aldermen shall give their opinion within five months, and the provincial executive within four months, following the sending of the request for an opinion as referred to in paragraph 2.

6. The minister shall take the decision, after hearing the views of the Council, within ten months following the date on which the request for an opinion was sent to the mayor and aldermen.'

11 Although the Law on historic buildings does not lay down a condition expressly requiring the historic building to be located in Netherlands territory, the referring court takes it as settled that that condition necessarily follows from the general scheme of the Law, as clarified by its drafting history.

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

12 X, a Netherlands national, moved in 2004 from the Netherlands to Belgium in order to live there in a country house owned by him.

13 That country house is protected in Belgium as a historic building. In the Netherlands, on the other hand, it is not entered in any of the registers referred to in Article 6 or Article 7 of the Law on historic buildings.

14 In the tax year at issue in the main proceedings, X performed in the Netherlands the duties of director of a company of which he was the sole shareholder. He did not receive any earned income in Belgium.

15 Having opted for the regime laid down for taxpayers resident in the Netherlands, he declared his income in that Member State while deducting therefrom the sum of EUR 18 140 in respect of maintenance and depreciation costs for the country house, which he had made his own dwelling for the purposes of the Netherlands Law on income tax.

16 X was subsequently the subject of a revised assessment in respect of that deduction on the ground of non-fulfilment of the condition laid down in Article 6.31(2) of the Law on income tax requiring the historic building to be entered in one of the registers referred to in Articles 6 and 7 of the Law on historic buildings.

17 Since the Rechtbank Breda (District Court, Breda) took the view that the right to deduct in question cannot be limited to historic buildings situated in the Netherlands, it upheld the action brought by X against that revised assessment. The Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) dismissed the appeal brought by the Netherlands tax authorities. The Staatssecretaris van Financiën appealed on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

18 It was in that context that the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law, in particular the rules on freedom of establishment and on free movement of capital, preclude a resident of Belgium who, at his request, is taxed in the Netherlands as a resident and who has incurred costs in respect of a country house, used by him as his own home, which is located in Belgium and is designated there as a legally protected historic building and village conservation area, from being unable to deduct those costs in the Netherlands for income tax purposes on the ground that the country house is not registered as a protected historic building in the Netherlands?

(2) To what extent is it important in that regard whether the person concerned may deduct those costs for income tax purposes in his country of residence, Belgium, from his current or future investment income by opting for a system of graduated taxation of that income?'

Consideration of the questions referred

19 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 49 TFEU and 63 TFEU must be interpreted as precluding legislation of a Member State under which, on the ground of protection of the national cultural heritage, costs relating to listed historic buildings may be deducted solely by owners of historic buildings situated in its territory.

20 It should be stated first of all that, even though both the free movement of capital and freedom of establishment may be affected, in the context of the main proceedings the questions as reformulated should be answered in the light of freedom of establishment.

21 Any resident of a Member State, whatever his nationality, who has a shareholding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities falls within the scope of Article 49 TFEU (see judgment in *N*, C-470/04, EU:C:2006:525, paragraph 27).

22 That is so in the case of X, who, in the tax year at issue in the main proceedings, took up residence in Belgium and managed in the Netherlands the affairs of the company incorporated under Netherlands law of which he was the sole shareholder.

23 According to settled case-law, Article 49 TFEU precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment that is guaranteed by the FEU Treaty (see, inter alia, judgment in *Attanasio Group*, C-384/08, EU:C:2010:133, paragraph 43 and the case-law cited).

24 It is clear that the legislation at issue in the main proceedings constitutes a restriction of freedom of establishment.

25 In situations such as that of X, who is not resident in the Netherlands but has opted for the residents' tax regime because he carries on all his activities in that Member State, that legislation results in a difference in treatment between taxpayers living in a historic building according to whether or not they live in national territory.

26 That difference in treatment is liable to deter taxpayers who live in a historic building situated in the territory of a Member State from carrying on their activities in another Member State.

27 There could, however, be discrimination for the purposes of the Treaty between residents and non-residents only if, notwithstanding their residence in different Member States, it were 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 in *Commission* v *Estonia*, C-39/10, EU:C:2012:282, paragraph 51).

28 The Court considers that not to be so in the main proceedings.

29 The purpose of the national legislation at issue in the main proceedings, as resulting in particular from the explanatory memorandum relating to the draft law that led to the Law on income tax, is to preserve and safeguard the cultural and historical heritage of the Netherlands, by means of a special right to deduct certain costs relating to listed historic buildings, including those serving as housing for their owners.

30 It was indeed in the light of that aim that the Kingdom of the Netherlands granted that right of deduction to taxpayers who own a listed historic building situated in the Netherlands even if they reside in another Member State, as is apparent from the written observations submitted by the Netherlands Government.

31 Accordingly, the fact that only owners of listed historic buildings situated in national territory are granted a tax advantage whose aim is to preserve the cultural and historical heritage of the Netherlands is inherent in the objective pursued by the national legislature.

32 The resulting difference in treatment therefore applies to categories of taxpayers who cannot be regarded as being in objectively comparable situations.

33 The position could be different only if the taxpayer were to establish that, although the historic building of which he is the owner is situated in the territory of a Member State other than the Kingdom of the Netherlands, it nevertheless forms part of the Netherlands cultural and historical heritage and that such a circumstance would render it capable of being protected under the Netherlands Law on historic buildings but for the fact that it is situated outside national territory.

34 In the light of the foregoing considerations, the answer to the questions referred is that Article 49 TFEU must be interpreted as not precluding legislation of a Member State under which, on the ground of protection of the national cultural and historical heritage, costs relating to listed historic buildings may be deducted solely by owners of historic buildings situated in its territory, provided

that that possibility is available to owners of historic buildings which may form part of the cultural and historical heritage of that Member State despite being located in the territory of another Member State.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Second Chamber) hereby rules:

Article 49 TFEU must be interpreted as not precluding legislation of a Member State under which, on the ground of protection of the national cultural and historical heritage, costs relating to listed historic buildings may be deducted solely by owners of historic buildings situated in its territory, provided that that possibility is available to owners of historic buildings which may form part of the cultural and historical heritage of that Member State despite being located in the territory of another Member State.

[Signatures]

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* Language of the case: Dutch.