Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 4 September 2014[1]

Case C-87/13

Staatssecretaris van Financiën
v
X

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Kingdom of the Netherlands))

(Tax legislation — Freedom of establishment — National income tax — Higher deduction for maintenance expenditure in the case of an owner-occupied historic building on national territory — Netherlands national who lives in a listed building in Belgium and engages in gainful activity in the Netherlands where he is subject to full taxation)

I – **Introduction**

1. The Kingdom of the Netherlands wishes to promote the conservation of its cultural heritage by means of tax measures. It therefore grants a higher tax deduction for the maintenance of historic buildings in the Netherlands.

2. The dispute in the main proceedings concerns a Netherlands national who lives in and maintains a building that is listed, but is in Belgium. Although his entire income is taxable in the Netherlands, he receives no tax incentive for the maintenance of the Belgian historic building as the Kingdom of the Netherlands wishes to support historic buildings in the Netherlands only. The Court will have to determine in the present proceedings whether this grant of support to the national cultural heritage only is consistent with the fundamental freedoms.

II – **Legal context**

3. Pursuant to Article 2.5(1) of the Wet inkomstenbelasting 2001, as amended in 2004 ('the Netherlands Law on income tax'), a resident of another Member State can decide to be treated in the Netherlands as a resident taxable person.

4. Under the Netherlands Law on income tax, tax is payable on income from dwellings owned by a taxable person, whether the dwellings are let out or occupied by the owner himself. Income from owner-occupied dwellings is set as a percentage of the dwelling's value.

1 — Original language: German.

5. Expenditure connected with an owner-occupied dwelling can be deducted to a limited extent from the income arising from the dwelling. In the case of a listed building, costs exceeding that limit can be claimed as a 'personal deduction'. This rule also applies to buildings that are let. Pursuant to Article 6.31 of the Netherlands Law on income tax, in order for the deduction to be granted the building must be listed in a register under Article 6 or 7 of the Monumentenwet 1988 ('the Netherlands Law on the protection of historic buildings'). These provisions are interpreted by the referring court as meaning that it is possible for a building to be registered only if it is in the Netherlands.

III – **Dispute in the main proceedings**

6. The dispute in the main proceedings concerns a Netherlands income tax assessment issued to X in respect of 2004.

7. X is a Netherlands national. In 2004 he moved home, leaving the Netherlands for a country house in Belgium. He is the owner of the country house, which, together with its surroundings, is protected under Belgian law as a historic building and village conservation area. X continued to work in the Netherlands as the managing director of a company of which is the sole shareholder. He has no income from work in Belgium.

8. X was, at his request, treated as a resident taxable person for the purposes of Netherlands income tax in 2004. In his tax declaration he claimed EUR 18 140 as a personal deduction in respect of maintenance costs and depreciation that related to the country house in Belgium. X could also have claimed those costs in the context of Belgian income tax by electing for a particular form of taxation. However, he refrained from doing so as it would not ultimately have been advantageous to his tax position.

9. The Netherlands tax authorities refused the personal deduction because the Belgian country house was not listed in a register under Article 6 or 7 of the Netherlands Law on the protection of historic buildings. X brought legal proceedings against that decision.

IV – **Proceedings before the Court of Justice**

10. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which the dispute has in the meantime been brought, considers it possible that EU law is infringed by the Netherlands provisions on the personal deduction for listed buildings. On 21 February 2013 it therefore referred the following questions to the Court pursuant to Article 267 TFEU:

'(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?'

11. The present case was initially joined with Case C-133/13 for the purposes of the procedure and judgment. Written observations on the joined cases were submitted in July 2013 by X, Q (a party to the main proceedings in Case C-133/13), the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the European Commission. The cases were subsequently disjoined.

V – **Legal assessment**

12. By the two questions, which I will answer together, the referring court seeks, in essence, to ascertain whether under EU law a national tax incentive for listed owner-occupied buildings can be limited to buildings on national territory. The referring court considers in particular that the Netherlands rules might be incompatible with freedom of establishment under Article 43 EC (see A below) and the free movement of capital under Article 56(1) EC (see B below).

A – *Freedom of establishment*

1. Restriction

13. Rules granting a tax incentive such as the Netherlands rules could restrict the freedom of establishment of a taxable person such as X.

14. X can in principle rely on freedom of establishment. As the managing director of a company of which he is the sole shareholder, he pursues an activity as a self-employed person within the meaning of Article 43(2) EC.[2] Nor is the application of freedom of establishment precluded by the fact that X, who pursues his activity in the Netherlands, is himself a Netherlands national. It is true that, according to the wording of the first sentence of Article 43(1) EC, only the establishment 'of nationals of a Member State in the territory of *another* Member State' is protected, which is not so in the case of the establishment of X, a Netherlands national, in the Netherlands. However, the Court has through its case-law extended the protective scope of freedom of establishment. Under that case-law, every citizen of the Union, irrespective of his nationality, falls within the scope of Article 43 EC in so far as he pursues a professional activity in a Member State other than that of residence.[3] That was so in X's case, as at the material time he was resident in Belgium and he carried out his company's business in the Netherlands.

15. Freedom of establishment can be restricted by any national rules which place non-residents at a disadvantage compared with residents.[4] By virtue of the Netherlands rules, a non-resident, in contrast to a resident, is unable to claim a personal deduction for expenditure connected with a listed building that he himself lives in. The fact that, as the Kingdom of the Netherlands points out, the Netherlands tax incentive also applies to properties that are not owner-occupied and in this respect residents and non-residents are treated in the same way does not affect this finding.

2 — See judgment in *Asscher* (C-107/94, EU:C:1996:251, paragraph 26).

3 — See judgment in *Commission* v *Germany* (C-152/05, EU:C:2008:17, paragraph 20); see, similarly, also judgment in *N* (C-470/04, EU:C:2006:525, paragraph 28); see, concerning freedom of movement for workers, judgment in *Renneberg* (C-527/06, EU:C:2008:566, paragraph 36 and the case-law cited).

4 — See, to this effect, inter alia, judgments in *Stanton and L'Étoile 1905* (143/87, EU:C:1988:378, paragraph 13); *Bosman* (C-415/93, EU:C:1995:463, paragraph 94); *Renneberg* (EU:C:2008:566, paragraph 43); and *Filipiak* (C-314/08, EU:C:2009:719, paragraph 58).

16. Contrary to the view of the Federal Republic of Germany, this adverse treatment of non-residents also restricts the exercise by a person such as X of his gainful activity protected by freedom of establishment, as the rules granting a tax incentive ultimately lead to a different tax burden on the income from the activity depending on whether X lives in a listed building in the Netherlands or in another Member State.

17. I consider this broad view of the concept of a restriction to be necessary as the Court has already held in another case that grant of a tax incentive only for owner-occupied dwellings that are on national territory restricts the freedom of movement for workers or freedom of establishment enjoyed by those persons who want to acquire a dwelling for their own occupation in another Member State. [5]

18. A restriction on freedom of establishment must therefore be found to exist in the present case.

19. According to the case-law such a restriction is permissible only if it relates to situations which are not objectively comparable (see 2 below) or if it is justified by an overriding reason in the public interest [6] (see 3 below).

2. Objective comparability of the situations

20. In the judgment in *Nordea Bank Danmark* the Court did not follow my suggestion that the test of the objective comparability of situations should no longer be examined. On the contrary, it appears again to attribute greater importance to this test in the field of tax legislation. [7]

21. In the present case, the question arises whether the situation of a taxable person whose owner-occupied listed building is in the Netherlands and whose income arising from the building is taxed there is objectively comparable with the situation of a taxable person whose owner-occupied listed building is located in another Member State but whose income arising from the building is likewise taxed in the Netherlands.

22. Two differences in those situations raise the issue of their objective comparability. First, one instance involves a resident, and the other a non-resident. Second, the building is protected as a historic building in one instance under Netherlands law, and in the other under Belgian law.

a) The taxpayers' different residence

23. As regards the different residence of the taxable persons being compared, reference should be made to the settled case-law according to which, in relation to income tax, resident and non-resident natural persons are in principle *not* in an objectively comparable situation. There are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax and the possibility of taking account of their personal and family circumstances. [8] Accordingly, the fact that a Member State does not grant to a non-resident certain tax advantages which it grants to a resident is not, as a rule, discriminatory. [9]

5 — Judgment in *Commission* v *Germany* (EU:C:2008:17, paragraphs 24 and 25).

6 — See, in particular, judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 23 and the case-law cited).

7 — See my Opinion in *Nordea Bank Danmark* (EU:C:2014:153, points 22 to 28) and the judgment in *Nordea Bank Danmark* (EU:C:2014:2087, paragraphs 23 and 24).

8 — See, inter alia, judgments in *Schumacker* (C-279/93, EU:C:1995:31, paragraphs 31 and 32); *Wielockx* (C-80/94, EU:C:1995:271, paragraph 18); *Gielen* (C-440/08, EU:C:2010:148, paragraph 43); and *Commission* v *Estonia* (C-39/10, EU:C:2012:282, paragraph 50).

9 — See, in particular, judgments in *Schumacker* (EU:C:1995:31, paragraph 34) and *Commission* v *Estonia* (EU:C:2012:282, paragraph 50).

24. The application of this principle laid down by the case-law is, however, limited, so that doubts may be entertained regarding its status as a principle. This is so because the Court simultaneously takes the view that discrimination must in any event be assumed to exist where, notwithstanding their residence in different Member States, residents and non-residents are in a comparable situation having regard to the purpose and content of the national provisions being examined. [10] Only such an approach to each specific case is also consistent with the settled case-law that the objective comparability of the situations must be examined having regard to the aim of the rules at issue. [11] Therefore the Court has also repeatedly required in addition, in particular in relation to tax advantages, that there must be an objective difference between the categories of residents and non-residents in order for it to be found that their situations are not objectively comparable. [12]

25. It follows that it must always be examined in the individual case on the basis of the national rules at issue whether the situations of residents and non-residents are comparable. A principle that this as a rule is not so can ultimately not be derived from the case-law.

b) The different law protecting historic buildings

26. In the present case, therefore, the situations might not be objectively comparable only because of the second difference, namely the fact that protection of the dwelling as a historic building is afforded under Netherlands law in a domestic instance but under Belgian law in the case of X.

27. According to the information provided by the referring court, the rules at issue on the tax deduction of certain costs inter alia for the maintenance of listed buildings have the aim of preserving the cultural heritage in the Netherlands.

28. In those circumstances, a Belgian historic building might not be objectively comparable with a Netherlands historic building, as the aim of the rules is only the promotion of the cultural heritage in the Netherlands.

29. Such an approach appears to me to be inappropriate, however.

30. It is true that the French Republic has correctly pointed out that the Court, in particular in *Persche*, has regarded the situations of a domestic and a foreign body in relation to a tax advantage as objectively comparable only if they both pursue the promotion of the very same interests of the general public. [13] Differentiation is accordingly possible if the foreign bodies pursue aims other than those of the national tax rules. [14]

31. The aim of national rules granting a tax incentive cannot, however, be defined purely domestically for the purpose of examining objective comparability. Otherwise every Member State would be free automatically to exclude cross-border situations by defining the aim of rules granting a tax incentive in purely national terms. The fact that rules are worded in purely national terms is, rather, the reason for assuming that a fundamental freedom is restricted. That wording in national terms cannot, at the second stage of examining the objective comparability of the situations, immediately again result in the restriction being permissible. Therefore, although the objective comparability of the situations must be examined in relation to the aim of national rules, that aim must, however, be defined while disregarding the wording in purely national terms contained in the rules granting the incentive.

10 — See judgments in *Gschwind* (C-391/97, EU:C:1999:409, paragraph 26) and *Commission* v *Estonia* (EU:C:2012:282, paragraph 51).

11 — See, in particular, judgments in *X Holding* (C-337/08, EU:C:2010:89, paragraph 22) and *SCA Group Holding and Others* (C-39/13, C-40/13 and C-41/13, EU:C:2014:1758, paragraph 28).

12 — See, inter alia, judgments in *Talotta* (C-383/05, EU:C:2007:181, paragraph 19); *Renneberg* (EU:C:2008:566, paragraph 60); and *Gielen* (EU:C:2010:148, paragraph 44).

13 — Judgment in *Persche* (C-318/07, EU:C:2009:33, paragraphs 48 to 50).

14 — Judgment in *Persche* (EU:C:2009:33, paragraph 47).

32. In the present case, this means that the situation of the non-resident X is objectively comparable with the situation of a resident if his building is also worthy of protection as cultural heritage. Since X's country house is protected as a historic building under Belgian law, this may be assumed to be so.

33. Contrary to the view of the French Republic, the situations are not precluded from being objectively comparable by the fact that the Belgian property is not subject to the Netherlands rules concerning the protection of historic buildings, and in particular not to the obligations and restrictions that they generally entail. First, Belgian law could very well contain comparable obligations owed by owners of Belgian properties. Second, the situations can also not be found not to be objectively comparable because a taxable person such as X may where appropriate comply voluntarily with the Netherlands rules concerning the protection of historic buildings.

c) Conclusion on the objective comparability of the situations

34. Therefore, in the present case, the situation of a taxable person whose owner-occupied listed building is in the Netherlands and whose income arising from the building is taxed there is objectively comparable with the situation of a taxable person whose owner-occupied listed building is located in another Member State but whose income arising from the building is likewise taxed in the Netherlands.

3. Overriding reason in the public interest

35. It remains to be examined whether rules granting a tax incentive in respect of historic buildings such as the Netherlands rules, which take into account solely historic buildings on national territory, are justified by an overriding reason in the public interest.

36. It should be made clear at the outset that justification cannot concern the question whether the Kingdom of the Netherlands may promote national historic buildings. That is so because this aim would in principle also be achieved if the Netherlands rules granting a tax incentive also applied to foreign historic buildings. The Kingdom of the Netherlands cannot counter this by stating that extending the tax incentive to foreign historic buildings would result in lower tax revenues, as it is settled case-law that the need to prevent the reduction of tax revenues is not an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty. [15]

37. Therefore, the only question which arises in the present case is whether a justification can be found for the fact that a Member State *limits* its tax incentive to national historic buildings.

38. In this context, the judgment in *Commission* v *Italy*, which has been cited by a number of parties to the proceedings, has only limited relevance. According to that judgment, conservation of the (national) historical and artistic heritage can constitute an overriding reason in the public interest justifying a restriction on the freedom to provide services. [16] However, that judgment concerned restrictions on the activity of foreign economic operators in the Member State in question — in the case in point, of tourist guides — on grounds of conservation of the national cultural heritage. The question whether a Member State's rules granting an incentive may be limited to the national cultural heritage did not arise.

15 — Judgment in *Commission* v *Austria* (C-10/10, EU:C:2011:399, paragraph 40 and the case-law cited).

16 — Judgment in *Commission* v *Italy* (C-180/89, EU:C:1991:78, paragraphs 19 and 20).

39. When answering that question it is, rather, of relevance that under the case-law the Member States can in principle determine themselves which interests of the general public they wish to promote by tax measures.[17] It is therefore for the Member States to define the aim that is pursued by rules granting a tax incentive.

40. In various judgments the Court has, however, not permitted the tax incentive to be limited to domestic situations, because the aim pursued by the incentive could also be achieved with foreign assistance. Thus, in *Petersen* it could not see why German development policy can be promoted only by undertakings established in Germany.[18] In the judgment on the German subsidy for owner-occupied dwellings, it regarded the objective of satisfying demand for housing as being just as easily attained if the acquisition of foreign owner-occupied dwellings is also promoted.[19] In several judgments on the deduction of gifts, the Court held, moreover, that a Member State cannot limit the promotion, by means of tax measures, of bodies pursuing certain objectives in the public interest to bodies resident on national territory.[20]

41. All those judgments were nevertheless ultimately concerned with the question of how the aim defined by the Member State can also be furthered with the assistance of economic agents who are resident in another Member State. In the present case, however, X, who is resident abroad, is not furthering the aim that is pursued by the Netherlands rules granting a tax incentive, as the maintenance expenditure claimed by him in the context of Netherlands taxation does not serve to maintain historic buildings in the Netherlands.

42. If under the case-law the Kingdom of the Netherlands can determine the aim of the incentive, the decision to promote only historic buildings located in the Netherlands results, in principle, in justification of the restriction on freedom of establishment in the present case.

43. All the same, the Member States cannot be entirely free under EU law to determine the aim of the incentive. This applies not only in respect of the prohibition of aid in Article 87(1) EC (now Article 107(1) TFEU). In the case of justification of a restriction on the fundamental freedoms too, the aim of the tax incentive must at least not be clearly protectionist in itself, as when tax rules have only the objective of promoting the economic activity of domestic undertakings or domestic goods.[21]

44. In the present case, however, the aim which the Member State pursues with the rules granting a tax incentive finds support in the Treaties and can therefore serve as justification for the restriction of a fundamental freedom. Article 30 EC (now Article 36 TFEU) contains in respect of the prohibition of quantitative restrictions between Member States a ground of justification for 'the protection of national treasures possessing artistic, historic or archaeological value'. Furthermore, the Community is required under Article 151(1) EC to contribute 'to the flowering of the cultures of the Member States, while respecting their national and regional diversity'. It is to be inferred from those provisions that the Treaties do place conservation of cultural heritage in a purely national context and the promotion of national culture is therefore a permissible aim in EU law.[22]

17 — See judgments in *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2006:568, paragraph 39); *Persche* (EU:C:2009:33, paragraph 48); and *Tankreederei I* (C-287/10, EU:C:2010:827, paragraph 30).

18 — Judgment in *Petersen* (C-544/11, EU:C:2013:124, paragraph 61).

19 — See judgment in *Commission* v *Germany* (EU:C:2008:17, paragraph 28).

20 — See judgments in *Persche* (EU:C:2009:33, paragraph 44) and *Commission* v *Austria* (EU:C:2011:399, paragraph 33).

21 — See, to this effect, also judgment in *Tankreederei I* (EU:C:2010:827, paragraph 32).

22 — See also judgment in *Centro di Musicologia Walter Stauffer* (EU:C:2006:568, paragraph 45), in the French and English versions.

45. In addition, according to the case-law the wish to ensure that there is a connection between the society of the Member State concerned and the recipient of a benefit can also constitute an objective consideration of public interest.[23] In the present case, that connection exists between the society of the Kingdom of the Netherlands and the cultural heritage of the Netherlands, the conservation of which is the aim of the rules granting the tax incentive. Since those rules do not seek to assist any individual as such, it is immaterial what ties X has to Netherlands society.

46. The restriction on freedom of establishment resulting from the Netherlands rules granting a tax incentive is therefore justified by the aim of conserving the national cultural heritage which it is permissible for an incentive to pursue. In the light of that aim, the exclusion of the promotion of the national cultural heritage of other Member States also does not go beyond what is necessary in order to achieve the aim pursued by the Netherlands tax incentive.

4. Conclusion

47. Freedom of establishment does not preclude limitation of a national tax incentive for listed owner-occupied buildings to buildings on national territory if the aim of the incentive is conservation of the national cultural heritage.

B – *Free movement of capital*

48. Irrespective of whether in the situation here the Netherlands rules granting a tax incentive also amount to a restriction of the free movement of capital under Article 56(1) EC, such a restriction would in any event be justified by the incentive's permissible aim of conserving the cultural heritage of the Netherlands. My reasoning above would then apply *mutatis mutandis*.

C – *Conclusion*

49. The abovementioned fundamental freedoms therefore do not preclude national rules such as those in the present case under which a tax incentive for listed owner-occupied buildings is limited to buildings on national territory.

VI – **Conclusion**

50. I therefore propose that the questions referred by the Hoge Raad der Nederlanden should be answered as follows:

Neither freedom of establishment under Article 43 EC nor the free movement of capital pursuant to Article 56(1) EC precludes national rules under which a resident of Belgium who, at his request, is taxed in the Netherlands as a resident and who has incurred expenditure 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 cannot deduct that expenditure 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.

23 — See judgment in *Gottwald* (C-103/08, EU:C:2009:597, paragraph 32 and the case-law cited).