JUDGMENT OF THE COURT (Second Chamber)

18 June 2015 (*)

(Reference for a preliminary ruling — Freedom of movement for workers — Tax legislation — Income tax — Income received in a Member State — Non-resident worker — Tax in the State of employment — Conditions)

In Case C-9/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 13 December 2013, received at the Court on 13 January 2014, in the proceedings

Staatssecretaris van Financiën

v

D.G. Kieback,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Kieback, by S. Douma, G. Boulogne, and N. Schipper, belastingadviseurs,

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

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

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

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

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

after hearing the Opinion of the Advocate General at the sitting on 5 March 2015

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 39 EC (now Article 45 TFEU).

2 The request has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and Mr Kieback concerning the refusal of the Netherlands tax authorities to deduct, for the purposes of determining the income received by Mr Kieback when he was in paid employment in the Netherlands, from 1 January to 31 March 2005, the expenses incurred during the same period for the reimbursement of a loan secured by a mortgage and taken out for the acquisition of a dwelling which he owns and which is located in Germany.

Legal context

3 In the Netherlands, Article 2.3 of the Law on income tax 2001 (Wet Inkomstenbelasting 2001, 'the Law of 2001') states:

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

(a) taxable income from employment or a dwelling,

(b) taxable income from a substantial interest in a company and

(c) taxable income from savings and investments.'

4 Article 2.4 of the Law of 2001 states:

'1. Taxable income from employment or a dwelling shall be determined:

(a) for national taxpayers: in accordance with the provisions laid down in Chapter 3,

(b) for foreign taxpayers: in accordance with the provisions laid down in Section 7.2 ...'

5 Under Article 2.5 of the Law of 2001:

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

...'

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

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

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

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

9 Mr Kieback is a German national. From 1 January to 31 March 2005, when he left to work in the United States, Mr Kieback worked in the Netherlands, but resided in Germany, where he possessed a dwelling as owner.

10 Had he continued in his employment in the Netherlands during the whole of 2015, he would have been able, despite being a non-resident in that Member State, to deduct the 'negative income' relating to his dwelling and resulting from the expenses incurred in relation to the loan taken out for its acquisition from the taxable income from his employment for that year provided that he had received, in that Member State, the major part of his income during that year.

11 Having established that Mr Kieback had received the major part of his income for 2005 in the United States, the Netherlands tax authorities taxed him on the income he

received in the Netherlands for that year, without taking account of the 'negative income' relating to his dwelling.

12 Following the rejection of the challenge brought before those authorities, Mr Kieback brought the case before the Rechtbank te Breda (District Court, Breda), which upheld his application. On appeal, the Gerechtshof te 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) upheld, on 23 March 2012, the decision given at first instance.

13 The Staatssecretaris van Financiën appealed on a point of law before the referring court on the basis that, in accordance with the Court's case-law, the granting to non-residents of tax advantages linked to personal and family circumstances, on the same footing as residents, is mandatory only if at least 90% of the worldwide income of the interested party is taxable in his State of employment and that that standard must be assessed on an annual basis in that State.

14 The referring court is uncertain whether, in circumstances such as those of the case in the main proceedings, in determining whether the taxpayer receives all or almost all of his income in the State of employment, it is not the situation that exists during the whole of the tax year that should to be taken into consideration, but solely the situation corresponding to the period in which the taxpayer resided in a Member State, namely the Federal Republic of Germany, and worked in another Member State, namely the Kingdom of the Netherlands. Although that approach seems to it to be the most logical, the referring court nevertheless harbours doubts in view of the Commission Recommendation 94/79/EC of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (OJ 1994 L 39, p. 22). Article 2(2) of that recommendation refers to the total taxable income of a calendar year.

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

'(1) Must Article 39 EC be interpreted as meaning that the Member State where a taxpayer engages in paid employment is, when charging income tax, to take the personal and family circumstances of the interested party into account in circumstances where (i) that taxpayer worked only for a part of the tax year in that Member State while living in another Member State, (ii) received all or almost all of his income in that State of employment, (iii) has left, in the course of the relevant year, to live and work in another State, and (iv) when the tax year is considered as a whole, he did not receive all or almost all of his income in the State of employment?

(2) Does it make a difference to the answer to the first question whether the State where the worker has gone to live and work during the course of the tax year is not an EU Member State?'

Consideration of the questions referred

16 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 39(2) EC must be interpreted as precluding a Member State, for the purposes of charging income tax on a non-resident worker who has pursued his occupational activity in that Member State during part of the year before leaving to pursue it in another country, from refusing to grant that worker a tax advantage which takes account of his personal and family circumstances, on the basis that, although he received all or almost all his income from that period in that Member State, that income does not form the major part of his taxable income for the entire year in question. The referring court also asks whether the fact that that worker left to pursue his occupational activity in a non-member State and not in another EU Member State may affect that interpretation.

17 As a preliminary point, it must be made clear, in the first place, that the referring court raises those questions on facts on which it is common ground that, unlike a non-resident such as Mr Kieback, a taxpayer residing in the Netherlands has the possibility of having negative income relating to a dwelling located in the Netherlands which he owns taken into account, even if, having left during the course of the year to reside in another country, that non-resident has not received, in the Netherlands, all or almost all his income from that year.

18 It is therefore common ground that, in the present case, the treatment reserved, under the applicable national law, for non-resident taxpayers is less favourable than that from which resident taxpayers benefit.

19 It is not disputed, in the second place, that taking into account 'negative income' relating to immovable property located in the Member State of residence of the taxpayer concerned forms, as the Advocate General noted in paragraph 29 of her Opinion, a tax advantage connected with that taxpayer's personal situation, which is relevant for the purposes of assessing his overall ability to pay tax (see, to that effect, judgments in *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, paragraph 34, and *Renneberg*, C-527/06, EU:C:2008:566, paragraphs 65 to 67).

20 Against that background, it should be recalled, in relation to less favourable treatment restricted to non-residents under the relevant national law, that, as set out in Article 39(2) EC, freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. In particular, the Court has held that the principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax (see, inter alia, judgments in *Schumacker*, C-279/93, EU:C:1995:31, paragraph 23, and *Sopora*, C-512/13, EU:C:2015:108, paragraph 22).

21 That being said, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations

(see, inter alia, judgments in *Schumacker*, C-279/93, EU:C:1995:31, paragraph 30, and *Talotta*, C-383/05, EU:C:2007:181, paragraph 18).

22 In relation to direct taxation, residents and non-residents are generally not in comparable situations because the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (see, inter alia, judgments in *Schumacker*, C-279/93, EU:C:1995:31, paragraphs 31 and 32, and *Grünewald*, C-559/13, EU:C:2015:109, paragraph 25).

23 Consequently, in paragraph 34 of the judgment in *Schumacker* (C-279/93, EU:C:1995:31), the Court held that 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, having regard to the objective differences between the situations of residents and non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (see, also, judgment in *Grünewald*, C-559/13, EU:C:2015:109, paragraph 26).

24 There could be discrimination within the meaning of the EC 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 *Gschwind*, C-391/97, EU:C:1999:409, paragraph 26).

25 Such is the case particularly where a non-resident taxpayer receives no significant income in his Member State of residence and derives the major part of his taxable income from an activity pursued in the Member State of employment, so that the Member State of residence is not in a position to grant him the advantages which follow from the taking into account of his personal and family circumstances (see, inter alia, judgments in *Schumacker*, C-279/93, EU:C:1995:31, paragraph 36; *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, paragraph 30; and *Renneberg*, C-527/06, EU:C:2008:566, paragraph 61).

26 In such a case, discrimination arises from the fact that the personal and family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the State of residence nor in the State of employment (judgements in *Schumacker*, C-279/93, EU:C:1995:31, paragraph 38; *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, paragraph 31; and *Renneberg*, C-527/06, EU:C:2008:566, paragraph 62).

27 In paragraph 34 of the judgment in *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452), the Court stated that the scope of the case-law arising from the

judgment in *Schumacker* extends to all the tax advantages connected with the non-resident's ability to pay tax which are granted neither in the State of residence nor in the State of employment (judgment in *Renneberg*, C-527/06, EU:C:2008:566, paragraph 63).

28 Thus, in relation to such tax advantages connected with a particular taxpayer's ability to pay tax, the mere fact that a non-resident has received, in the State of employment, income in the same circumstances as a resident of that State does not suffice to make his situation objectively comparable to that of a resident. It is additionally necessary, in order to establish that such situations are objectively comparable, that, due to that non-resident's receiving the major part of his income in the Member State of employment, the Member State of residence is not in a position to grant him the advantages which follow from taking into account his aggregate income and his personal and family circumstances.

29 When a non-resident leaves during the course of the year to pursue his occupational activity in another country, there is no reason to infer that, by sole virtue of that fact, the State of residence will not therefore be in a position to take the interested party's aggregate income and personal and family circumstances into account. Moreover, since, after leaving, the party concerned could have been employed successively or even simultaneously in several countries and been able to choose to fix the centre of his personal and financial interests in any one of those countries, the State where he pursued his occupational activity before leaving cannot be presumed to be in a better position to assess that situation with greater ease than the State or, as the case may be, the States in which he resides after leaving.

30 It could be otherwise only if it were the case that the interested party had received, in the Member State of employment that he left during the course of the year, the major part of his income and almost all his family income for the same year, since that State would then be in the best position to grant him the advantages determined by reference to his aggregate income and his personal and family circumstances.

31 In order to establish whether that is the case, all of the necessary information must be at hand for assessing a taxpayer's ability to pay tax in the aggregate, having regard to the source of his income and his personal and family circumstances. In order for such an assessment to be sufficiently relevant in that regard, the situation which must be taken into consideration must relate to the financial year in question in its entirety, since that period is generally accepted, in the majority of the Member States, as forming the basis for charging income tax, which is indeed the case in the Netherlands.

32 This rule must therefore apply, in particular, for the purposes of determining, from the aggregate family income received by the interested party, the proportion of that income which he received in the State of employment before leaving to pursue his occupational activity in another country.

33 Moreover, the same reasoning appears to have been applied when Recommendation 94/79 was adopted, Article 2(2) of which provides that the Member

States must not subject the income of non-resident natural persons to heavier taxation than the income of residents, where the income taxable in the Member State in which a natural person is not resident constitutes at least 75% of that person's total taxable income during the tax year.

34 It follows that a non-resident taxpayer who has not received, in the State of employment, all or almost all his family income from which he benefited during the year in question as a whole is not in a comparable situation to that of residents of that State so account does not require to be taken of his ability to pay tax charged, in that State, on his income. The Member State in which a taxpayer has received only part of his taxable income during the whole of the year at issue is therefore not bound to grant him the same advantages which it grants to its own residents.

35 That conclusion is not called into question by the fact that the party concerned left his employment in a Member State in order to pursue his occupational activity, not in another Member State, but in a non-member State. As regards the obligation that it lays down not to discriminate against a worker who has pursued an occupational activity in a Member State other than that of his residence, Article 39(2) EC must be interpreted as meaning that that obligation applies to each Member State. That is the case in a situation such as that at issue in the main proceedings, with regard to the Member State in which the worker, although residing in another Member State, pursued his activity before going to pursue it in another State, even if the latter is not a Member State, but a non-member State.

36 In the light of the above considerations, the answer to the questions raised is that Article 39(2) EC must be interpreted as not precluding a Member State, for the purposes of charging income tax on a non-resident worker who has pursued his occupational activity in that Member State during part of the year, from refusing to grant that worker a tax advantage which takes account of his personal and family circumstances, on the basis that, although he received, in that Member State, all or almost all his income from that period, that income does not form the major part of his taxable income for the entire year in question. The fact that that worker left to pursue his occupational activity in a non-member State and not in another EU Member State does not affect that interpretation.

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 (Second Chamber) hereby rules:

Article 39(2) EC must be interpreted as not precluding a Member State, for the purposes of charging income tax on a non-resident worker who has pursued his occupational activity in that Member State during part of the year, from refusing to

grant that worker a tax advantage which takes account of his personal and family circumstances, on the basis that, although he received, in that Member State, all or almost all his income from that period, that income does not form the major part of his taxable income for the entire year in question. The fact that that worker left to pursue his occupational activity in a non-member State and not in another EU Member State does not affect that interpretation.

[Signatures]

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* Language of the case: Dutch.