JUDGMENT OF THE COURT (Third Chamber)

23 February 2006 *

In Case C-513/03,

REFERENCE for a preliminary ruling under Article 234 EC by the Gerechtshof te 's-Hertogenbosch (Netherlands), made by decision of 5 November 2003, received at the Court on 8 December 2003, in the proceedings

Heirs of M.E.A. van Hilten-van der Heijden

v

Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, S. von Bahr (Rapporteur), A. Borg Barthet and U. Lõhmus, Judges,

* Language of the case: Dutch.

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 12 May 2005,

after considering the observations submitted on behalf of:

— the heirs of Mrs van Hilten-van der Heijden, by P. Kavelaars, belastingadviseur,

— the Netherlands Government, by H.G. Sevenster and S. Terstal, acting as Agents,

— the German Government, by A. Tiemann and M. Lumma, acting as Agents,

— the Commission of the European Communities, by R. Lyal and A. Weimar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 73c(1) and 73d(3) of the EC Treaty (now Articles 57(1) EC and 58(3) EC), which were in force on the date of Mrs van Hilten-van der Heijden's death.

2 That reference has been made in proceedings between the heirs of Mrs van Hilten-van der Heijden and the Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen (Inspector of the Netherlands Inland Revenue Service, Heerlen Foreign Individuals and Undertakings Section, hereinafter 'the Inspector') concerning inheritance taxes levied in the Netherlands on the deceased person's estate.

Legal framework

Community legislation

3 Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, which article was repealed by the Treaty of Amsterdam (OJ 1988 L 178, p. 5), entitled 'Nomenclature of the capital movements referred to in Article 1 of the Directive', states, in its introduction:

'In this Nomenclature, capital movements are classified according to the economic nature of the assets and liabilities they concern, denominated either in national currency or in foreign exchange.

The capital movements listed in this Nomenclature are taken to cover:

— all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers. The transaction is generally between residents of different Member States although some capital movements are carried out by a single person for his own account (e.g. transfers of assets belonging to emigrants),

— operations carried out by any natural or legal person ...,

— access for the economic operator to all the financial techniques available on the market approached for the purpose of carrying out the operation in question. For example, the concept of acquisition of securities and other financial instruments covers not only spot transactions but also all the dealing techniques available: forward transactions, transactions carrying an option or warrant, swaps against other assets, etc. ...,

— operations to liquidate or assign assets built up, repatriation of the proceeds of liquidation thereof ... or immediate use of such proceeds within the limits of Community obligations,

— operations to repay credits or loans.

This Nomenclature is not an exhaustive list for the notion of capital movements — whence a heading XIII-F, "Other capital movements — Miscellaneous". It should not therefore be interpreted as restricting the scope of the principle of full liberalisation of capital movements as referred to in Article 1 of the Directive.'

4 That nomenclature contains 13 different categories of capital movements. Under heading XI, entitled 'Personal capital movements', are:

'...

D. Inheritances and legacies

...'

5 On the occasion of the signature of the Final Act and Declarations of the Intergovernmental Conferences on the European Union, on 7 February 1992, the Conference of the Representatives of the Governments of the Member States

adopted, among others, a declaration on Article 73d of the Treaty establishing the European Community (OJ 1992 C 191, p. 99, hereinafter 'the Declaration on Article 73d of the Treaty') which is worded as follows:

'The 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.'

National legislation

6 Under Netherlands law, every estate is subject to tax. Article 1(1) of the Successiewet 1956 (1956 Law on Succession) of 28 June 1956 (Stb. 1956, No 362, hereinafter 'the SW 1956') draws a distinction on the basis of whether the deceased person whose estate is being administered resided in the Netherlands or abroad. That article states:

'In accordance with this law, the following taxes shall be levied:

1. Inheritance tax on the value of all the assets transferred by virtue of the law governing inheritance following the death of a person who resided in the Netherlands at the time of death.

...'

7 Article 3(1) of the SW 1956 provides:

'A Netherlands national who, having resided in the Kingdom, dies or makes a gift within 10 years after ceasing to reside there shall be deemed to have been resident in the Kingdom at the time of the death or of the making of the gift.'

8 The first paragraph of Article 2 of the Convention between the Swiss Confederation and the Kingdom of the Netherlands for the avoidance of double taxation with respect to inheritance taxes, signed at The Hague on 12 November 1951 (hereinafter 'the Convention'), provides:

'Immovable property ... shall be subject to inheritance taxes only in the State in which the property is situated. ...'

9 The first paragraph of Article 3 of the Convention states:

'Assets of the estate to which Article 2 does not apply ... shall be subject to inheritance taxes only in the State in which the deceased resided at the date of death.'

10 For the definition of 'residence' the second paragraph of Article 3 of the Convention refers to the provisions of the Convention between the Swiss Confederation and the Kingdom of the Netherlands for the avoidance of double taxation with respect to taxes on income and on capital, concluded on the same day.

11 On the occasion of the signing of the Convention certain declarations, which form an integral part thereof, were made by the Contracting States, one of which, in particular, relates to the said Article 3.

12 That declaration states:

'(1) Notwithstanding the provisions of the second paragraph of Article 3 of this Convention, the State of the deceased's nationality at the time of death may levy inheritance tax as if the deceased had been resident there at that time, provided that the deceased had in fact been so resident during the 10 years before death and was a national of that State at the time of ceasing to reside there; in such a case, so much of the tax as that State would not have levied if the deceased had not been a national of that State when ceasing to reside there, or at the time of death, shall be reduced by the amount of tax due in the other State by reason of residence.

(2) Paragraph 1 above shall not apply to persons who, at the time of their death, were nationals of the two States.'

13 Under Article 13 of the Besluit voorkoming dubbele belasting 1989 of 21 December 1989 (Stb. 1989, No 594) (1989 Decree preventing double taxation, hereinafter 'the Decree'):

'1. The estate of a deceased person who is, under Article 3(1) of the SW 1956, deemed to have been resident in the Netherlands at the time of death shall be entitled to relief from inheritance taxes to allow for the tax levied by another State

on the assets of that estate other than those referred to in Article 11 to the extent of similar taxes levied by another State on the total assets of the estate which would not have been taxed if the deceased had in fact been resident in the Netherlands at the time of death. ...

2. The amount of relief referred to in paragraph 1 shall be the lower of the following amounts:

(a) the amount of the taxes levied by other States;

(b) the amount which, in relation to the inheritance tax which would be due under the SW 1956 without applying this decree, corresponds precisely to the proportion between the overall value of the assets of the estate referred to in paragraph 1 of that article and the value of the total assets reduced by the value of an undertaking's own debts including debts arising from interests other than as shareholder and by the value of debts which are not an undertaking's own secured by charge over immovable property or an interest therein.'

The main proceedings and the questions referred for a preliminary ruling

14 Mrs van Hilten-van der Heijden died on 22 November 1997. Of Netherlands nationality, she had been resident in the Netherlands until the start of 1988, then in Belgium and, since 1991, in Switzerland.

15 Her estate included immovable property situated in the Netherlands, Belgium and Switzerland and investments in quoted securities in the Netherlands, Germany, Switzerland and the United States of America, as well as bank accounts opened at Netherlands and Belgian branches of banking institutions established in the European Union and managed by them.

16 Her heirs were assessed to inheritance tax calculated on the basis of Article 3(1) of the SW 1956. Those assessments were upheld by the Inspector after an appeal brought by four of the heirs.

17 The latter then brought an action against that decision before the Gerechtshof te 's-Hertogenbosch ('s-Hertogenbosch Regional Court of Appeal).

18 The national court observes, first, that reference to 'Inheritances and legacies' in heading XI of Annex I to Directive 88/361 shows that there was in the main proceedings a capital movement between a non-member State and the Member States.

19 Next, the national court states that, in a decision of 12 December 2002, it decided that Article 3(1) of the SW 1956 is a national measure which restricts the free movement of capital or makes it less attractive. As such, that provision hinders emigration because of the disadvantage, produced by the legal fiction which it contains, from the morrow of emigration if assets devolve on the heirs within 10 years. The Kingdom of the Netherlands levies inheritance and gift taxes in the 10 years following the emigration of Netherlands nationals if those taxes are lower abroad, although that Member State grants no refund or offsetting if higher inheritance taxes are levied abroad. According to that decision by the national court, Article 3(1) of the SW 1956 constitutes, therefore, a disguised restriction on cross-border inheritances.

20 In the same decision, the national court held in addition that Article 3(1) of the SW 1956 also constitutes arbitrary discrimination. Netherlands law discriminates between Netherlands nationals and nationals of other Member States, since Netherlands nationals can avoid the application of that provision only by renouncing their nationality. Furthermore, the same provision cannot be justified on overriding grounds of public interest, because the only reason for it is to prevent the Kingdom of the Netherlands losing inheritance taxes because of its nationals leaving the country.

21 However, it is not clear from the Court's case-law whether a provision such as that in question in the main proceedings comes within Article 73c(1) of the Treaty.

22 In addition, the national court questions whether the Declaration on Article 73d of the Treaty means that the legislation applicable to capital movements between Member and non-member States is not protected by Article 73d(1)(a) of the Treaty or whether that article still applies to capital movements between Member and non-member States and is therefore not limited to provisions existing in that respect at the end of 1993.

23 In the light of those considerations, the Gerechtshof te 's-Hertogenbosch decided to stay the proceedings and to refer the questions set out below to the Court for a preliminary ruling:

'(1) Does Article 3(1) of the SW [1956] constitute a permitted restriction within the meaning of Article [73c(1) of the Treaty]?

(2) Does Article 3(1) of the SW [1956] constitute a prohibited means of arbitrary discrimination or a disguised restriction on the free movement of capital within the meaning of Article [73d(3) of the Treaty] where applicable to a capital movement between a Member State and a non-member country having regard also to the Declaration on [Article 73d] of the Treaty establishing the European Community adopted on the occasion of the signature of the Final Act and Declarations of the Intergovernmental Conferences on the European Union of 7 February 1992?'

The questions referred

Preliminary observations

24 By its questions, the national court is asking, in essence, whether national legislation such as that in question in the main proceedings is within the scope of Article 73c(1) of the Treaty and/or within that of Article 73d(3) of the Treaty.

25 However, as is clear from the national court's decision itself and as is stated in all the observations submitted to the Court in this case, it is necessary, before considering those provisions of the EC Treaty, to establish whether such legislation constitutes a restriction on the movement of capital within the meaning of Article 73b of the EC Treaty (now Article 56 EC).

26 It is settled case-law that, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Community law to which the national court did not refer

in its questions (see, among others, Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 24, and Case C-153/03 *Weide* [2005] ECR I-6017, paragraph 25).

27 Therefore, it must be considered whether Article 73b of the Treaty is to be interpreted as meaning that it precludes legislation of a Member State, such as that in question in the main proceedings, under which the estate of a national of a Member State who dies within 10 years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that Member State, even though benefiting from relief in respect of inheritance taxes levied by other States.

Observations submitted to the Court

28 Mrs van Hilten-van der Heijden's heirs claim that Article 3(1) of the SW 1956 infringes Article 73b of the Treaty. They submit that there is indirect discrimination and possibly an indirect restriction in that, first, a distinction is drawn according to whether the person resided, before death, in the Netherlands and, second, that provision does not apply if the person who leaves the Netherlands has a nationality other than that of the Netherlands.

29 The Netherlands and German Governments submit that, before replies can be given to the questions referred, it must first be determined whether Article 73b of the Treaty precludes the legal fiction by which Article 3(1) of the SW 1956 establishes the place of residence.

30 In that regard, the Netherlands Government observes that, even as far as concerns inheritances, a movement of capital must always be involved. In the case of death, the estate is determined at the time of death and inheritance taxes are levied on that basis. As there has yet been neither a movement of capital, nor any transaction linked thereto, there could be no action involving the free movement of capital.

31 In addition, there is neither discrimination, nor any obstacle to the free movement of capital. There is no discrimination on grounds of nationality between the Netherlands nationals who remain in the Netherlands and those who emigrate therefrom. Furthermore, the position of a Netherlands national who leaves the Netherlands is different from that of a national of another Member State who leaves the Netherlands after having resided there.

32 It follows that Article 73b of the Treaty does not preclude the legal fiction by which Article 3(1) of the SW 1956 establishes the place of residence.

33 The German Government submits that Article 73b(1) of the Treaty does not apply to a provision such as Article 3(1) of the SW 1956, because such a provision does not adversely affect the free movement of capital.

34 The Commission of the European Communities observes that Article 3(1) of the SW 1956 makes no distinction based on the location of the estate, or any part thereof, at the time of the person concerned's death. That article therefore imposes no restrictions on the movement of capital from and to the Netherlands. Consequently, the free movement of capital guaranteed in Article 73b et seq. of the Treaty is not at issue in the main proceedings.

35 As regards the possible application of the provisions of that Treaty relating to the freedom of movement of persons and the freedom of establishment, the Commission points out that those provisions are limited to movement within the European Union.

Findings of the Court

36 It should be noted, at the outset, that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (see, in particular, Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, and Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 14).

37 Also, it must be borne in mind that Article 73b(1) of the Treaty gives effect to the free movement of capital between the Member States and between Member and non-member States. To that end, it provides, in the chapter of the Treaty entitled 'Capital and payments', that all restrictions on the movement of capital between Member States and between Member and non-member States are to be prohibited.

38 Therefore, it must, in the first place, be considered whether inheritances constitute movements of capital within the meaning of Article 73b of the Treaty.

39 In that regard, it must be observed that the Treaty does not define the terms 'movement of capital' and 'payments'. However, it is settled case-law that, inasmuch as Article 73b of the Treaty substantially reproduces the content of Article 1 of

Directive 88/361, and even if the latter was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (Articles 67 to 73 of the EEC Treaty were replaced by Articles 73b to 73g of the EC Treaty, now Articles 56 EC to 60 EC), the nomenclature of capital movements annexed thereto retains the same indicative value, for the purposes of defining the term 'movement of capital', as it did before their entry into force, subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive (see to that effect, among others, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 30).

40 Inheritances appear under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements'. As the Advocate General pointed out in point 53 of his Opinion, that heading mentions, particularly, operations by which the whole or part of a person's property is transferred during his lifetime, or after his death.

41 An inheritance consists of the transfer to one or more persons of the estate left by a deceased person or, in other words, a transfer to the deceased's heirs of the ownership of the various assets, rights, etc., of which that estate is composed.

42 It follows that an inheritance is a movement of capital within the meaning of Article 73b of the Treaty (see to that effect, also, Case C-364/01 *Barbier* [2003] ECR I-15013, paragraph 58), except in cases where its constituent elements are confined within a single Member State.

43 In the second place, it must be examined whether national legislation such as that in question in the main proceedings constitutes a restriction on the movement of capital.

44 In that regard, it follows from the case-law that the measures prohibited by Article 73b(1) of the Treaty, as being restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents to do so in other States or, in the case of inheritances, those whose effect 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 (see to that effect Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10; *Trummer and Mayer*, paragraph 26; Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19; and *Barbier*, paragraph 62).

45 National legislation such as that in question in the main proceedings, which provides that the estate of a national of a Member State who dies within 10 years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that Member State, while providing for relief in respect of the taxes levied in the State to which the deceased transferred his residence, does not constitute a restriction on the movement of capital.

46 By enacting identical taxation provisions for the estates of nationals who have transferred their residence abroad and of those who have remained in the Member State concerned, such legislation cannot discourage the former from making investments in that Member State from another State nor the latter from doing so in another Member State from the Member State concerned, and, regardless of the place where the assets in question are situated, nor can it diminish the value of the estate of a national who has transferred his residence abroad. The fact that such legislation covers neither nationals resident abroad for more than 10 years nor those who have never resided in the Member State concerned is irrelevant in that regard. Since it applies only to nationals of the Member State concerned, it cannot constitute a restriction on the movement of capital of nationals of the other Member States.

47 As regards the differences in treatment between residents who are nationals of the Member State concerned and those who are nationals of other Member States resulting from national legislation such as that in question in the main proceedings, it must be observed that such distinctions, for the purposes of allocating powers of taxation, cannot be regarded as constituting discrimination prohibited by Article 73b of the Treaty. They flow, in the absence of any unifying or harmonising measures adopted in the Community context, from the Member States' power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (see to that effect, as regards Article 48 of the EC Treaty (now, after amendment, Article 39 EC), Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 30, and, as regards Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Article 58 of the EC Treaty (now Article 48 EC), Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57).

48 Moreover, the Court has already had occasion to decide that, for the purposes of the allocation of powers of taxation, it is not unreasonable for the Member States to find inspiration in international practice and, particularly, the model conventions drawn up by the Organisation for Economic Cooperation and Development (OECD) (see *Gilly*, paragraph 31). As the Netherlands Government observed, the legislation in question in the main proceedings complies with the commentaries in the Model Double Taxation Convention concerning Inheritances and Gifts (Report of the Fiscal Affairs Committee of the OECD, 1982). It is clear from the commentaries on Articles 4, 7, 9A and 9B of that model that that type of legislation is justified by the concern to prevent a form of tax evasion whereby a national of a State, in contemplation of his death, transfers his residence to another State where the tax is lower. The commentaries state that double taxation is avoided by a system of tax credits and that, since prevention of tax evasion is justified only if the death occurs only a short time after the transfer of residence, the maximum permitted period is 10 years. The same commentaries state also that the scope can be extended to cover not only nationals of the State concerned but also residents who are not nationals of that State.

49 In that context, it must be observed that the mere transfer of residence from one State to another does not come within Article 73b of the Treaty. As the Advocate

General pointed out in point 58 of his Opinion, such a transfer of residence does not involve, in itself, financial transactions or transfers of property and does not partake of other characteristics of a capital movement as they appear from Annex I to Directive 88/361.

50 It follows that national legislation which would discourage a national who wishes to transfer his residence to another State, and thus hinder his freedom of movement, cannot for that reason alone constitute a restriction on the movement of capital within the meaning of Article 73b of the Treaty.

51 The reply to the questions referred must therefore be that Article 73b of the Treaty is to be interpreted as meaning that it does not preclude legislation of a Member State, such as that in question in the main proceedings, by which the estate of a national of that Member State who dies within 10 years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that State, while enjoying relief in respect of inheritance taxes levied by other States.

52 It follows that there is no need to reply to the questions referred for a preliminary ruling in so far as they relate to Articles 73c and 73d of the Treaty.

Costs

53 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:

Article 73b of the EC Treaty (now Article 56 EC) is to be interpreted as meaning that it does not preclude legislation of a Member State, such as that in question in the main proceedings, by which the estate of a national of that Member State who dies within 10 years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that State, while enjoying relief in respect of inheritance taxes levied by other States.

[Signatures]