JUDGMENT OF THE COURT (First Chamber)

18 March 2010 *

In Case C-440/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 12 September 2008, received at the Court on 6 October 2008, in the proceedings

F. Gielen

v

Staatssecretaris van Financiën,

THE COURT (First Chamber),

composed of A. Tizzano, President of Chamber, acting for the President of the First Chamber, E. Levits, A. Borg Barthet, M. Ilešič (Rapporteur) and J.-J. Kasel, Judges,

* Language of the case: Dutch.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 September 2009,

after considering the observations submitted on behalf of:

— Mr Gielen, by F.A. Engelen and S.C.W. Douma, belastingadviseurs,

— the Netherlands Government, by C. Wissels, C. ten Dam and M. Noort, acting as Agents,

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

— the Estonian Government, by L. Uibo, acting as Agent,

— the Portuguese Government, by C. Guerra Santos, L. Inez Fernandes and J. Menezes Leitão, acting as Agents,

— the Swedish Government, by A. Falk, acting as Agent,

— the Commission of the European Communities, by R. Lyal and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 43 EC.

2 The reference has been made in the context of a dispute between Mr Gielen and the Staatssecretaris van Financiën (State Secretary for Finance) in relation to income tax for 2001.

National legislation

3 Article 2.1(b) of the Law on income tax of 2001 (Wet op de Inkomstenbelastingen 2001; 'the Law of 2001') provides that natural persons who are not resident in the Netherlands but who receive income from that country are liable to income tax.

4 In accordance with Article 3.2 of the Law of 2001, taxable profit is the profit which the taxable person derives as a business operator from one or more undertakings, minus the self-employed person's deduction.

5 Under Article 3.76(2) of the Law of 2001, the amount of that deduction depends on the amount of the profit, determined in accordance with the table laid down in that provision, which operates degressively. The deduction amounts to EUR 6 084 for profit of less than EUR 11 745 and falls in stages to a minimum amount of EUR 2 984 for profits in excess of EUR 50 065.

6 In accordance with Article 3.76(1) of the Law of 2001, the right to the self-employed person's deduction is subject, inter alia, to an 'hours test'.

7 According to Article 3.6 of that law, the hours test corresponds to the provision during the calendar year of at least 1 225 hours of work for one or more undertakings from which the taxable person derives profit as a business operator.

8 In order to determine whether a non-resident taxable person satisfies that test, account is taken only of hours worked for the part of an undertaking operated in a permanent establishment in the Netherlands.

9 However, a non-resident taxable person who is subject to the tax regime of another Member State in which he is resident may opt, in accordance with Article 2.5(1) of the

Law of 2001, to be made subject to the regime applicable to resident taxable persons ('the option to be treated as a resident taxable person'). That provision, which does not require that the income of the non-resident taxable person be realised entirely or almost entirely in the Netherlands, is worded as follows:

'Domestic taxable persons who spend only part of the calendar year in the Netherlands and foreign taxable persons who are resident in another Member State of the European Union or in the territory of a power determined by ministerial decision with which the [Kingdom of the] Netherlands [has] concluded a convention for the avoidance of double taxation and the promotion of the exchange of information, who are liable to taxation in that Member State or in the territory of that power may opt to be made subject to the tax regime applicable to domestic taxable persons laid down in this Law…'

10 Under Articles 2 to 10 of the Decree implementing the Law of 2001 (Het Uitvoeringsbesluit Inkomstenbelasting 2001), an income tax reduction is granted to persons who choose to be treated as if they were resident taxable persons for the purposes of taxation of income elements which are not taxable in the Netherlands or which are taxable only at a limited rate.

11 According to Article 3 of that decree:

'1. The reduction on account of income elements from work and home ownership which are not taxable … in the Netherlands shall be equal to the amount of taxation which would have been owed, without application of Articles 2 to 10, under the Law on taxable income from work and home ownership, and stand in the same relation as

the sum total of non-taxable elements of the denominator income in the Netherlands stands vis-à-vis the denominator income.

…

5. "Denominator income" shall mean income from work and home ownership ...'

12 Article 9(1) of the Decree of 2001 for the prevention of double taxation (Besluit voorkoming dubbele belasting 2001) provides:

'Revenue which is foreign in that it derives from work or home ownership in another State is constituted by the sum total of income elements received by the taxable person as a result of work or home ownership in that State as:

(a) profit made in a foreign undertaking, that is to say, an undertaking or part of an undertaking which is managed with the assistance of a permanent establishment or a permanent representative in the territory of the other State;

…'

The case in the main proceedings and the question referred

13 Mr Gielen is a German resident who, together with two other persons, operates a glasshouse horticulture business in Germany. He set up a permanent establishment in the Netherlands where he cultivates ornamental plants on a contractual basis.

14 In 2001 he worked more than 1 225 hours for that business in Germany, whereas he worked less than 1 225 hours for the establishment in the Netherlands.

15 The Netherlands tax authorities accordingly took the view that Mr Gielen did not satisfy the 'hours test'. The Rechtbank Breda (District Court, Breda) confirmed that interpretation.

16 By contrast, the Gerechtshof te 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch) considered that such an application of that test would lead to discrimination prohibited under Article 43 EC since it would draw a distinction between resident taxable persons and non-resident taxable persons. According to the Gerechtshof te 's-Hertogenbosch, in the application of that test, resident taxable persons may be taxed on the basis of their profits, irrespective of where in the world those profits arose.

17 The Gerechtshof te 's-Hertogenbosch took the view that that distinction and that impediment were not justified by a difference in objective situation between non-resident and resident taxable persons, particularly since the self-employed person's deduction is directly related to the activity of taxable persons.

18 Mr Gielen appealed in cassation to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against the decision of the Gerechtshof te 's-Hertogenbosch. Mr Gielen considers that the fact of refusing him, as a non-resident taxable person, the right to the self-employed person's deduction constitutes discrimination which is prohibited under Article 43 EC.

19 The Hoge Raad der Nederlanden points out that discrimination for the purposes of Article 43 EC results from the fact that, for non-resident taxable persons, account is not taken of all of the hours which such persons spend working for their businesses, including the hours worked for an undertaking or establishment situated in another Member State.

20 However, that court is uncertain whether such discrimination can be avoided by the option to be treated as a resident taxable person. Under that option, the scale according to which non-resident taxable persons are taxed in the Netherlands where they opt to be taxed in the same way as resident taxable persons implies that a progressive tax rate is applied.

21 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 43 EC to be interpreted as meaning that it does not preclude the application of a provision in a Member State's tax legislation to profits which a national of another Member State (foreign taxable person) has derived from a part of his undertaking operated in the first Member State, if that provision, when interpreted in a particular way, indeed makes a distinction between domestic and foreign taxable persons which — in itself — is contrary to Article 43 EC, but the foreign taxable person concerned has had an opportunity to opt for treatment as a domestic taxable person and has not done so for reasons of his own?'

The question referred for a preliminary ruling

Admissibility

22 The German and Portuguese Governments express doubts as to whether it is possible for the Court to give a ruling on the question referred by the Hoge Raad.

23 According to the German Government, the tax regime at issue in the main proceedings does not, in substance, contain any form of discrimination which is prohibited under Article 43 EC, with the result that it is unnecessary to ask whether the discrimination could be remedied by the option to be treated as a resident taxable person. Consequently, it argues, the Court's answer to the question referred would serve no use for the purpose of resolving the dispute in the main proceedings.

24 The Portuguese Government claims primarily that the question referred depends on a particular interpretation of the national legislation at issue in the main proceedings.

25 It states that it is apparent from the decision to refer that Article 3.6 of the Law of 2001 could also be interpreted as meaning that, for the purposes of the deduction at issue in the main proceedings, for non-resident taxable persons, hours worked for an establishment situated in the Netherlands and those worked for an establishment situated in another Member State may be taken into account, which would make that provision compatible with Article 43 EC and render the answer to the question referred redundant.

26 Since the referring court could interpret the tax regime at issue in the main proceedings as not containing any form of discrimination which is contrary to Article 43 EC, the Portuguese Government takes the view that the question referred is

hypothetical and that, consequently, the Court's answer would not be binding on the national court.

27 In that regard, according to settled case-law, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 36, and Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 40).

28 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which a case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21; *Rüffler*, paragraph 37; and *Filipiak*, paragraph 41).

29 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Rüffler*, paragraph 38, and *Filipiak*, paragraph 42).

30 In that regard, it is apparent from the decision to refer that the dispute in the main proceedings and the question referred essentially concern the interpretation of Article 49 TFEU in relation to national legislation which may potentially be discriminatory

towards non-resident taxable persons in respect of a tax advantage, such as the deduction available to self-employed persons, even if non-resident taxable persons may take advantage of the option to be treated as resident taxable persons provided for in that legislation for the purposes of that tax advantage.

31 In addition, in order to answer that question, it is first necessary to assess whether the national legislation at issue in the main proceedings amounts to discrimination for the purposes of Article 49 TFEU; this is a question of European Union law, the interpretation of which is within the jurisdiction of the Court.

32 In the light of those findings, it does not appear obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, with the result that the objections of inadmissibility raised by the German and Portuguese Governments must be dismissed.

33 The reference for a preliminary ruling is consequently admissible.

Substance

34 By its question, which it is appropriate to examine in two parts, the Hoge Raad asks, in essence, whether Article 49 TFEU precludes national legislation which, in relation to the granting of a tax advantage, such as the self-employed person's deduction, is potentially discriminatory towards non-resident taxable persons, even though the latter may take advantage of the option to be treated as resident taxable persons provided for in that legislation in order to benefit from that tax advantage.

The discriminatory effects of the national legislation at issue in the main proceedings for the purposes of Article 49 TFEU

35 In order to answer the question referred, it is necessary to determine at the outset, as is also apparent from paragraph 31 above, whether the national legislation at issue in the main proceedings actually involves discrimination contrary to Article 49 TFEU.

36 It should be noted that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with European Union law (see, inter alia, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19 and the case-law cited).

37 It must also be noted that the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 26 and the case-law cited).

38 Furthermore, 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, *Schumacker*, paragraph 30, and Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 21).

39 In the present case, it is apparent from the documents in the file, first of all, that during 2001 Mr Gielen, who is resident in Germany, worked less than 1 225 hours for his establishment in the Netherlands, whereas he worked more than 1 225 hours for his establishment in Germany.

40 The Hoge Raad points out that, under the national legislation at issue in the main proceedings, a resident taxable business operator may include, for the purposes of calculation under the hours test which gives rise to the right to the self-employed person's deduction, both hours worked in another Member State and those worked in the Netherlands, whereas a non-resident taxable business operator can include only hours worked in the Netherlands in that calculation.

41 In addition, the Netherlands Government recognises in its written observations that this amounts to discrimination based on place of residence.

42 It must therefore be held that, with regard to satisfaction of the 'hours test' for the purposes of the self-employed person's deduction, the national legislation at issue in the main proceedings treats taxable persons differently depending on whether or not they are resident in the Netherlands. Such a difference in treatment risks operating primarily to the detriment of nationals of other Member States, since non-residents are most often non-nationals.

43 More specifically, the Court has indeed accepted, in cases relating to taxation of the income of natural persons, that the situation of residents and the situation of non-residents in a given Member State are not generally comparable, since 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 or the possibility of taking account of their personal and family circumstances (see, inter alia, Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 19 and the case-law cited, and Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 59).

44 However, the Court has made it clear that, in the case of a tax advantage which is not available to a non-resident, a difference in treatment as between the two categories of taxpayer may constitute discrimination for the purposes of the FEU Treaty

where there is no objective difference between those categories such as to justify different treatment in that regard (*Talotta*, paragraph 19 and the case-law cited, and *Renneberg*, paragraph 60).

45 The Hoge Raad points out that the self-employed person's deduction is not related to the personal capacity of taxable persons but rather to the nature of their activity. That deduction is granted to business operators whose main activity is running their business, which is demonstrated, inter alia, by satisfying the 'hours test'.

46 In so far as that deduction is granted to all taxable business operators who have satisfied that test, inter alia, it must be held that it is not relevant in that regard to make a distinction according to whether those business operators performed their work in the Netherlands or in another Member State.

47 Consequently, as was stated by the Advocate General in point 39 of his Opinion, for the purposes of the self-employed person's deduction, the situation of non-resident taxable persons is comparable to that of resident taxable persons (see, to that effect, Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 27, and Case C-346/04 *Conijn* [2006] ECR I-6137, paragraph 20).

48 In those circumstances, it must be concluded that national legislation which, for the purposes of a tax advantage, such as the self-employed person's deduction at issue in the main proceedings, uses an 'hours test' in such a way as to prevent non-resident taxable persons from including hours worked in another Member State risks operating primarily to the detriment of those taxable persons. Consequently, such legislation constitutes indirect discrimination on grounds of nationality for the purposes of Article 49 TFEU.

The option to be treated as a resident taxable person

49 That conclusion is not called into question by the argument that the option to be treated as a resident taxable person is capable of remedying the discrimination at issue.

50 It should be noted, at the outset, that the option to be treated as a resident taxable person provides non-resident taxable persons, such as Mr Gielen, with a choice between a discriminatory tax regime and one which is ostensibly not discriminatory.

51 It has, however, to be pointed out in that regard that such a choice is not, in the present case, capable of remedying the discriminatory effects of the first of those two tax regimes.

52 As the Advocate General stated, in essence, in point 52 of his Opinion, if such a choice were to be recognised as having the effect described, the consequence would be to validate a tax regime which, in itself, remains contrary to Article 49 TFEU by reason of its discriminatory nature.

53 In addition, as the Court has already had the opportunity to clarify, the fact that a national scheme which restricts the freedom of establishment is optional does not mean that it is not incompatible with European Union law (see, to that effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 162).

54 Consequently, the choice offered, in the dispute in the main proceedings, to non-resident taxable persons by means of the option to be treated as resident taxable persons does not serve to neutralise the discrimination established in paragraph 48 above.

55 It follows from all of the foregoing that Article 49 TFEU precludes national legislation which, in relation to the granting of a tax advantage, such as the self-employed person's deduction at issue in the main proceedings, is discriminatory towards non-resident taxable persons, even though those taxable persons may opt for the regime applicable to resident taxable persons in order to benefit from that tax advantage.

Costs

56 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 (First Chamber) hereby rules:

Article 49 TFEU precludes national legislation which, in relation to the granting of a tax advantage, such as the self-employed person's deduction at issue in the main proceedings, is discriminatory towards non-resident taxable persons, even though those taxable persons may opt for the regime applicable to resident taxable persons in order to benefit from that tax advantage.

[Signatures]