SUMMARY

ECJ 18 June 2015, case C-9/14 (Staatssecretaris van Financien - v - D.G. Kieback), Freedom of movement

Facts

Mr Kieback is a German national. In the first three months of 2005 he worked in Maastricht, The Netherlands, while living across the border in Aachen, Germany. He chose to be subject to the Dutch tax regime for non-residents. As a result, he was taxed only on his Dutch income. Initially, the Dutch tax authorities did not allow him to deduct from his Dutch income tax the interest he paid on the mortgage on his house in Germany. He challenged this refusal successfully in the Dutch courts, so in the end the fact that he was a non-resident taxpayer did not, in itself, stop him from being able to deduct his German mortgage interest. However, the Dutch tax authorities came up with a new argument to justify their refusal to allow such a deduction. They appealed to the Supreme Court on the basis of the following new facts.

National proceedings

On 1 April 2005, Mr Kieback moved to the U.S. The Dutch tax authorities took the position that they were not required to grant a non-resident taxpayer advantages that are not available to resident taxpayers. Resident taxpayers may only deduct mortgage interest where they receive all or almost all of their income over the whole tax year (January – December) in The Netherlands. Given that most of Mr Kieback's income in 2005 was generated in the U.S., he did not satisfy this requirement. The Supreme Court referred two questions to the ECJ.

ECJ's findings

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. 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 (§ 20-21).

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. 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 (§ 22-23).

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. 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. 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 (§ 24-26).

In Lakebrink (C 182/06), 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. 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 (§ 27-28).
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. 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. 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 (§ 29-31).
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 (§ 34).

Ruling

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.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-06-18
Case number: C-9/14