Case C-443/06

Erika Waltraud Ilse Hollmann

v

Fazenda Pública

(Reference for a preliminary ruling from the

Supremo Tribunal Administrativo)

(Direct taxation – Taxation of capital gains on immovable property – Free movement of capital – Basis of assessment – Discrimination – Cohesion of the tax system)

Judgment of the Court (Fourth Chamber), 11 October 2007

Summary of the Judgment

1. *Preliminary rulings – Jurisdiction of the Court – Limits*

(Art. 234 EC)

2. *Community law – Principles – Equal treatment – Discrimination on grounds of nationality*

(Arts 7 and 56 EC)

3. *Free movement of capital – Restrictions – Tax legislation*

(Art. 56 EC)

1. Although it is not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Article 234 EC, since the interpretation of such rules is a matter for the national courts, the Court does have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law.

(see para. 18)

2. Article 12 EC applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination. The Treaty lays down in Article 56 EC, in particular, a specific rule of non?discrimination in relation to the free movement of capital.

(see paras 28-29)

3. Article 56 EC must be interpreted as precluding national legislation which subjects capital gains resulting from the transfer of immovable property situated in a Member State, where that transfer is made by a resident of another Member State, to a tax burden greater than that which would be applicable for the same type of transaction to capital gains realised by a resident of the State in which that immovable property is situated.

Such legislation constitutes a restriction on the movement of capital prohibited by Article 56 EC, in

that it has the effect of making the transfer of capital less attractive for non-residents by deterring them from making investments in immovable property in the Member State concerned and, as a result, from carrying out transactions related to those investments such as selling immovable property.

Where: (i) the taxation in question concerns only one of the categories of income received by taxable persons, whether they are resident or non-resident; (ii) it concerns both categories of taxable persons; and (iii) the Member State in which the taxable income arises is the Member State concerned, there is no difference in situation capable of justifying the unequal tax treatment in respect of the taxation of capital gains between those two categories of taxable persons.

(see paras 39-40, 50, 53-54, 61, operative part)

JUDGMENT OF THE COURT (Fourth Chamber)

11 October 2007 (*)

(Direct taxation – Taxation of capital gains on immovable property – Free movement of capital – Basis of assessment – Discrimination – Cohesion of the tax system)

In Case C?443/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Supremo Tribunal Administrativo (Portugal), made by decision of 28 September 2006, received at the Court on 27 October 2006, in the proceedings

Erika Waltraud Ilse Hollmann

v

Fazenda Pública,

intervening party:

Ministério Público,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis (Rapporteur), R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 June 2007,

after considering the observations submitted on behalf of:

– Mrs Hollmann, by M.A. Torres, advogado,

– the Portuguese Government, by L.I. Fernandes, Â.S. Neves and J. M. Leitão, acting as Agents,

– the Commission of the European Communities, by R. Lyal and M. Afonso, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 18 EC, 39 EC, 43 EC and 56 EC.

2 The reference was made in the context of a dispute between Mrs Hollmann and the Portuguese tax authorities regarding her income tax assessment for 2003.

Legal context

3 Article 10 of the Personal Income Tax Code (*Código do Imposto sobre o Rendimento das Pessoas Singulares*), approved by Decree-Law No 442/88 of 30 November 1988, in the version resulting from Decree?Law No 198/2001 of 3 July 2001 (*Diário da República* I, Series A, No 152 of 3 July 2001) ('the CIRS'), provides:

'1. Capital gains are any gains realised, other than those regarded as business or professional income, capital income or income from immovable property, arising from:

(a) the transfer for valuable consideration of rights *in rem* in immovable property or from the use of any private assets for the purposes of the business or professional activities pursued on an individual basis by the owner of such assets;

…

4. A gain that is subject to IRS [personal income tax] shall be made up of:

(a) the difference between the realisation value and the acquisition value, less any part that may be treated as capital income, in the cases referred to at (a), (b) and (c) in paragraph 1;

…'

4 Under Article 13(1) of the CIRS, individuals who reside in Portuguese territory and those who, although not residing in that territory, obtain income there are subject to tax on personal income.

5 Article 15(1) and (2) of the CIRS states that individuals who reside in Portuguese territory are taxed on their entire income, including income obtained abroad, whereas non-residents are taxed only on income obtained in Portuguese territory.

6 It is apparent from the provisions of Article 18 of the CIRS that income relating to immovable property situated in Portuguese territory, including capital gains resulting from the disposal of that

property, is to be regarded as income obtained in that territory.

7 Article 43(1) and (2) of the CIRS, as amended by Law No 109 B of 27 December 2001 (*Diário da República* I, Series B, No 298 of 27 December 2001), provides:

‘1. The amount of income classified as capital gains is represented by the balance of the difference between capital gains and capital losses occurring in the same year, determined in accordance with the following articles.

2. The balance referred to in the foregoing subparagraph, in respect of disposals made by residents as provided for in Article 10(1)(a), (c) and (d), whether positive or negative, shall be taken into account as to only 50% of its amount.

…’

8 As regards residents, taxable income results from the accumulation of the different categories of income received each year subject to a progressive rate.

9 For non-residents, Article 72(1) of the CIRS lays down a special proportional rate of 25% which applies to the total amount of income relating to capital gains on immovable property.

The dispute in the main proceedings and the question referred

10 Mrs Hollmann has resided in Germany since the time of the facts in the case in the main proceedings.

11 Following the death of her husband, in 1998 Mrs Hollmann inherited immovable property situated in Portugal. She was taxed on the basis of tax on inheritance and donations on the value of that asset.

12 In 2003 Mrs Hollmann sold the immovable property in question and made a capital gain of EUR 619 757.46 corresponding to the difference between the amount of that sale and the asset value subject to tax on inheritance and donations.

13 In her notice of income tax assessment for 2003 the competent tax authorities took account of the total amount of the capital gains realised by Mrs Hollmann to determine her net taxable income, adding that sum to her other taxable income in Portugal.

14 According to the tax authorities, the applicant in the main proceedings was not entitled to rely on the favourable tax provisions of Article 43(2) of the CIRS on the ground that she was residing in a Member State of the European Union which was not Portugal.

15 Mrs Hollmann challenged that notice of assessment before the Tribunal administrativo e fiscal de Loulé (Administrative and Tax Court, Loulé). Her action having been dismissed she brought an appeal against that judgment.

16 In those circumstances the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 43(2) of the … CIRS …, which limits the incidence of the tax to 50% of capital gains realised by persons residing in Portugal, infringe Articles 12 [EC], 18 [EC], 39 [EC], 43 [EC] and 56 [EC] … by excluding from that limitation capital gains realised by a person residing in another Member State of the European Union?’

The question referred

Admissibility

17 The Portuguese Government and the Commission have raised doubts about the admissibility of the question referred by reason of its formulation by the referring court.

18 In that regard, it is appropriate to recall that, according to settled case?law, even though it is true that it is not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Article 234 EC since the interpretation of such rules is a matter for the national courts, the Court does have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law (see Joined Cases C?338/04, C?359/04 and C?360/04 *Placanica and Others* [2007] ECR I?0000, paragraph 37, and Case C?295/05 *Asociación Nacional de Empresas Forestales* [2007] ECR I?0000, paragraph 29 and the case?law cited).

19 In addition, under equally settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, 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 questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is bound, in principle, to give a ruling (see, inter alia, *Asociación Nacional de Empresas Forestales*, paragraph 30, and Case C?470/03 *AGM?COS.MET* [2007] ECR I?0000, paragraph 44).

20 In the present case, on a literal reading of the question referred for a preliminary ruling by the national court, that question invites the Court of Justice to give a ruling on the compatibility with Community law of a provision of national law such as Article 43(2) of the CIRS.

21 Nevertheless, although the Court of Justice cannot answer the question as it is formulated by the referring court, there is nothing preventing it from giving the latter a useful answer to that question by supplying it with guidance as to the interpretation of Community law which will enable the referring court to give a ruling itself on the compatibility with Community law of the tax provisions in dispute.

22 Therefore, by its question, the national court asks the Court essentially whether it is contrary to Articles 12 EC, 18 EC, 39 EC, 43 EC and 56 EC for national legislation, such as that in dispute in the main proceedings, to subject capital gains arising from the transfer of immovable property situated in a Member State, where that transfer is made by a resident of another Member State, to tax which is higher than that which would be applicable for the same operation to capital gains realised by a resident of the State in which that immovable property is situated.

The principles and freedoms applicable

23 In its question the national court refers to Articles 12 EC, 18 EC, 39 EC, 43 EC and 56 EC.

24 The question thus arises as to whether a non?resident taxable person in a situation similar to Mrs Hollmann’s may rely on those provisions.

25 As regards Article 39 EC and 43 EC, it is apparent from the decision to refer that Mrs Hollmann sold her immovable property situated in Portugal, the transaction which gave rise to the

taxation in dispute in the case in the main proceedings, neither with the aim of carrying out a professional activity in the territory of the Community nor with a view to establishing herself in a Member State other than Germany to carry out an economic activity.

26 In relation to Article 18 EC, there is no evidence in that decision to support the conclusion that the applicant in the case in the main proceedings sold her immovable property with a view to exercising the right which she is granted under that provision.

27 Consequently, in the light of the facts set out by the referring court, Mrs Hollmann cannot rely on Articles 18 EC, 39 EC and 43 EC in the present case (see, to that effect, Case C?345/05 *Commission* v *Portugal* [2006] ECR I?10633, paragraph 15 and the case?law cited).

28 It is apparent from the case?law that Article 12 EC applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination (see, inter alia, Joined Cases C?397/98 and C?410/98 *Metallgesellscahft and Others* [2001] ECR I?1727, paragraph 38, and Case C?422/01 *Skandia and Ramstedt* [2003] ECR I?6817, paragraph 61).

29 The Treaty lays down in Article 56 EC, in particular, a specific rule of non?discrimination in relation to the free movement of capital (Case C?222/04 *Cassa di Risparmio di Firenze* [2006] ECR I?289, paragraph 99).

30 In the light of the above findings it must therefore be determined whether a taxpayer such as Mrs Hollmann can rely on the provisions of Article 56 EC.

31 In that regard, it can be inferred from the case?law that a transaction concerning the liquidation of an investment in real property, such as that at issue in the case in the main proceedings, constitutes a capital movement (see, to that effect, Case C?222/97 *Trummer and Mayer* [1999] ECR I?1661, paragraph 24).

32 Accordingly, therefore, such a transaction falls within the scope of Article 56 EC and it is thus on that basis that the question referred by the national court needs to be examined.

The free movement of capital

33 As a preliminary point, it should be observed that, according to settled case-law, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (see, inter alia, Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 19; Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, paragraph 15; and Case C?157/05 *Holböck* [2007] ECR I?0000, paragraph 21).

34 In addition, Article 56 EC prohibits all restrictions on the movement of capital between Member States, subject to the justifications laid down in Article 58 EC.

35 In that regard, it should be pointed out that the combined provisions of the CIRS lay down, in the case of capital gains realised when transferring for valuable consideration immovable property situated in Portugal, tax rules which differ depending on whether the taxable persons reside in that Member State or not.

36 Thus, under Article 43(2) of the CIRS the amount of capital gains realised by residents when transferring immovable property situated in Portugal is to be taken into account as to only 50% of its amount. By contrast, for non-residents, the CIRS provides that the full amount of capital gains realised in the case of the transfer of that property is subject to tax.

37 It follows that, under the relevant provisions of the CIRS, the basis of assessment for capital gains realised is not the same for residents and non-residents. Thus, for the sale of the same immovable property situated in Portugal non-residents are, in relation to the realisation of capital gains, subject to a tax which is higher than that applied to residents and are consequently in a less favourable position than the latter.

38 Although a non-resident is taxed at a rate of 25% on a basis which represents the total amount of the capital gains realised, the taking into account of only half of the basis of capital gains realised by a resident enables the latter to benefit systematically from a tax which is lower in that respect regardless of the tax rate applicable to the whole of his income since, according to the observations made by the Portuguese Government, income tax of residents is subject to a progressive rate, the highest step of which is 42%.

39 Consequently, the effect of national legislation such as that in dispute in the case in the main proceedings is to make the transfer of capital less attractive for non-residents by deterring them from making investments in immovable property in Portugal and, and a result, from carrying out transactions related to those investments such as selling immovable property.

40 In those circumstances, it must be found that the laying down of a basis of assessment of 50% applicable only to capital gains realised by taxable persons residing in Portugal and not to those realised by non?resident taxable persons constitutes a restriction on the movement of capital prohibited by Article 56 EC.

41 However, it must be considered whether that restriction may be justified on any of the grounds provided for in Article 58(1) EC.

42 It is clear from that provision, read in conjunction with Article 58(3) EC, that Member States may provide for a distinction to be made in their national legislation between resident and non-resident taxpayers, provided that such a distinction does not amount to a form of arbitrary discrimination or a disguised restriction on the free movement of capital.

43 As has already been found in paragraphs 36 to 38 of this judgment, Article 43(2) of the CIRS essentially lays down unequal tax treatment between residents and non-residents by imposing different bases of assessment in the case of capital gains realised when transferring immovable property situated in Portugal.

44 However, unequal treatment permitted under Article 58(1)(a) EC must be distinguished from arbitrary discrimination prohibited under Article 58(3) EC.

45 According to the case-law, for a national fiscal provision such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the public interest (see *Manninen*, paragraphs 28 and 29; Case C-512/03 *Blanckaert* [2005] ECR I-7685, paragraph 42; and Case C?265/04 *Bouanich* [2006] ECR I?923, paragraph 38).

46 In the light of the case?law cited in the above paragraph, it must, first, be examined whether the different income tax treatment depending on whether the capital gains resulting from the transfer of immovable property situated in Portugal are realised by residents or non-residents concerns situations which are not objectively comparable.

47 In that regard, the Portuguese Government submits that the two categories of taxable

persons are in different situations which makes the different treatment perfectly justifiable. The limitation of the basis of assessment to 50% can apply only to residents since they are subject to a progressive tax rate on their entire income. By contrast, non-residents are taxed only on the income which they receive in Portuguese territory. In other words, the mechanism laid down in a national law, such as that in dispute in the case in the main proceedings, is intended not to penalise residents who, contrary to non-residents, are subject to a progressive tax.

48 In addition, it considers that the different tax treatment resulting from the application of a different basis of assessment to non-residents and residents must be interpreted in conjunction with the general income tax system applicable to residents and non-residents.

49 By that argument, the Portuguese Government submits that a different basis of assessment for non-residents, in the case of realisation of capital gains, is justified in the light of the income tax system and in particular in the light of the different tax rates applicable to residents and non-residents. For the former, taxable income results from the accumulation of different categories of income, thus including capital gains received each year, subject to a progressive rate, whereas for non-residents the CIRS lays down a special proportional rate.

50 In the case in the main proceedings it should be noted, first, that the taxation of the capital gains resulting from the transfer of immovable property concerns only one of the categories of income received by taxable persons, whether they are resident or non-resident; second, it concerns both categories of taxable persons; and third, the Member State in which the taxable income arises is the Republic of Portugal in both cases.

51 In that regard, it is particularly important to point out, as is apparent from paragraph 38 of this judgment, that the taking into account of only half of the basis of capital gains realised by a resident, together with the fact that the tax levied on that resident’s income is subject to a progressive rate, the highest step of which is 42%, results, in the same taxable circumstances for a non-resident, in heavier taxation of the latter.

52 In those circumstances, the claim made by the Portuguese Government in the present case cannot be accepted.

53 It follows from the above that, objectively speaking, there is no difference in situation capable of justifying the unequal tax treatment in respect of the taxation of capital gains between two categories of taxable persons. Consequently, Mrs Hollmann’s situation is comparable to that of a resident.

54 It follows that national legislation, such as that at issue in the case in the main proceedings, establishes unequal tax treatment to the disadvantage of non-residents in so far as it permits, in the case of realisation of capital gains, heavier taxation and therefore a tax burden greater than that borne by residents in an objectively comparable situation.

55 As regards, second, the justification based on overriding reasons in the public interest, the Portuguese Government alleges that it is necessary to maintain the coherence of the national tax system.

56 It is apparent from the case?law that the need to maintain the coherence of a tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. However, for an argument based on such reasoning to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (Case C?471/04 *Keller Holding* [2006] ECR I?2107, paragraph 40, and Case C?347/04 *Rewe Zentralfinanz* [2007] ECR I?0000, paragraph 62 and the case?law cited).

57 In the present case, the Portuguese Government submits that account needs to be taken of the purpose and logic of the tax system on the realisation of capital gains resulting from the transfer of immovable property. In that regard, the tax system in question seeks to avoid penalising residents, in the context of the taxation of capital gains, by applying a progressive rate in their regard. Essentially there is a direct link, for residents, between the tax advantage resulting from the reduction by half of the taxation of capital gains and the progressive tax rate applicable to all their income.

58 As is apparent from paragraph 38 of this judgment, the tax advantage granted to residents, consisting of a reduction of half of the tax basis of capital gains, in any event outweighs the consideration for that advantage, namely, the application of a progressive rate to the taxation of their income.

59 Consequently, there can be no direct link between the tax advantage and the offsetting of that advantage by a particular tax levy.

60 Consequently, it must be found that the restriction resulting from the tax legislation in dispute in the main proceedings cannot be justified by the need to ensure the cohesion of the tax system.

61 In the light of the foregoing considerations, the answer to the question referred must be that Article 56 EC is to be interpreted as precluding national legislation, such as that in dispute in the main proceedings, which subjects capital gains resulting from the transfer of immovable property situated in a Member State, in this case Portugal, where that transfer is made by a resident of another Member State, to a tax burden greater than that which would be applicable for the same type of transaction to capital gains realised by a resident of the State in which that immovable property is situated.

Costs

62 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 (Fourth Chamber) hereby rules:

Article 56 EC must be interpreted as precluding national legislation, such as that in dispute in the main proceedings, which subjects capital gains resulting from the transfer of immovable property situated in a Member State, in this case Portugal, where that transfer is made by a resident of another Member State, to a tax burden greater than that which would be applicable for the same type of transaction to capital gains realised by a resident of the State in which that immovable property is situated.

[Signatures]

* Language of the case: Portuguese.