JUDGMENT OF THE COURT (First Chamber)

7 November 2013 (*)

(Reference for a preliminary ruling – Articles 63 TFEU and 65 TFEU – Free movement of capital – Tax legislation of a Member State which does not allow deduction of the loss on the sale of immovable property situated in another Member State from the gain on the sale of securities in the Member State of taxation)

In Case C?322/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 23 June 2011, received at the Court on 28 June 2011, in the proceedings brought by

K,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet and E. Levits (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 10 January 2013,

after considering the observations submitted on behalf of:

– K, by M. Tiusanen, asianajaja,

– the Finnish Government, by H. Leppo and S. Hartikainen, acting as Agents,

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

– the Swedish Government, by A. Falk and K. Petkovska, acting as Agents,

– the United Kingdom Government, by C. Murrell, acting as Agent, and by K. Bacon, Barrister,

– the European Commission, by I. Koskinen, R. Lyal and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 63 TFEU and 65 TFEU.

2 The request has been made in proceedings brought by K., who has full liability to income tax

in Finland, concerning the refusal of the Finnish tax authorities to allow him to deduct losses he sustained on the sale of immovable property in France from income charged to tax in Finland.

Legal context

Finnish law

3 Paragraph 45, first subparagraph, of Law 1992/1535 on income tax (Tuloverolaki (1992/1535)), of 30 December 1992, in the version in force at the material time, that is to say, during the 2004 tax year ('the Income Tax Law') provides that the gain made on the transfer of property is taxable income from capital.

4 Paragraph 50 of the Income Tax Law was worded as follows:

'A loss arising on the transfer of property may be deducted from any gain made on the transfer of property in the tax year in which the loss was suffered and the three following tax years, and account shall not be taken of it in determining any capital gains deficit.'

5 Paragraph 6 of Law 1995/1552 on the avoidance of international double taxation (Kansainvälisen kaksinkertaisen verotuksen poistamisesta annettu laki (1995/1552), 'the Law on the avoidance of double taxation') is worded as follows:

'Income received in a foreign State, in respect of which Finland has, in an international convention, waived its taxing rights, shall be regarded as taxable income of a natural person … The proportion corresponding to the part of the income exempted on the basis of the source and type of income shall, however, be deducted from the taxpayer's income tax (progressive exemption method). In calculating the income received from a foreign State, expenditure and interest connected with the acquisition or preservation of the income shall be deducted, unless elsewhere provided otherwise. Expenditure and interest shall not, however, be deductible in so far as they exceed the amount of income received from the foreign State … Deduction shall be carried out by reference to the various future taxes.'

6 The referring court explains that in Finland the taxation of income from capital is proportional. In accordance with the second subparagraph of Paragraph 124(2) of the Income Tax Law, the rate of tax applied in 2004 to income from capital was 29%.

The double taxation convention

7 In accordance with Article 6(1) and (2) of the Convention between the Government of the French Republic and the Government of the Republic of Finland for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and capital, signed in Helsinki on 11 September 1970 ('the France-Finland Convention'), income deriving from immovable property is taxable in the Contracting State in which the property is situated.

8 Article 13(1) of the France-Finland Convention provides that gains arising on the disposal of immovable property are taxable in the Contracting State in which the property is situated.

9 Article 23 of the France-Finland Convention provides as follows:

'Double taxation shall be avoided as follows:

1. …

2. As regards Finland:

(a) Income and property other than that referred to below in point (b) of this paragraph shall be exempt from the Finnish taxes referred to in Article 2(3)(b), where that income or property may be taxed in France under this convention.

...

(c) Notwithstanding the provisions of points (a) and (b) of this paragraph, Finnish tax on the part of income which is taxable in Finland under this convention may be calculated at the rate of tax corresponding to the total amount of taxable income in accordance with Finnish tax legislation.'

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

10 In 2004 K sold an immovable property in France which he had acquired in 2001. He declared, on that account, a loss of EUR 172 623. According to K's declaration, he did not receive any income in France from which he could have deducted that loss; nor did he have any other property in France in 2004, which would have allowed him, on a transfer of the latter property, to offset that loss. However, in the same tax year (2004), K made gains in Finland, on the sale of securities, which were taxable in Finland and from which he sought to deduct the loss on the sale of the French immovable property. K does not carry on any professional or trade activity which is connected with the immovable property or the securities.

11 The local tax office (Verovirasto) took the view that K was not entitled to deduct the losses arising on the sale of the immovable property in France from the income he received in Finland from his moveable assets.

12 Following the rejection, on 13 April 2006, by the Lounais-Suomen verotuksen oikaisulautakunta (Board of appeal for taxation for South-West Finland) of K's claim that he should be able to deduct the loss, K brought proceedings before the Turun hallinto-oikeus (Turku Administrative Court). As that action was also dismissed by a decision of 31 October 2007, K brought an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court).

13 K submits that, if his action were not upheld, the non-deductibility of the loss sustained would become definitive, since he has full liability to income tax in Finland and does not have any other income or assets in France. Non-deductibility of that kind would, so he argues, amount to an infringement of the principles of freedom of establishment and the free movement of capital, which could not be justified by the allocation of the power to impose taxes between the Member States.

14 According to K, deduction of the loss on the sale of immovable property in France from the gains made on the sale of shares in Finland does not jeopardise the exercise of parallel powers of taxation. He argues that it follows from the Court's case-law, in particular from Case C?446/03 *Marks & Spencer* [2005] ECR I?10837, paragraph 40, and Case C?347/04 *Rewe Zentralfinanz* [2007] ECR I?2647, paragraph 69, that the fact that the Republic of Finland does not charge tax on a gain resulting from the sale of immovable property located in France is not sufficient in itself to justify a rule that only losses related to immovable property in Finland may be deducted.

15 Nor, in K's submission, can preventing the double deduction of losses be relied on as justification, since K does not own property in France, does not carry on business there and does not receive any income there.

16 The referring court states that a person who has full liability to income tax in Finland may deduct there a loss incurred on the sale of immovable property situated in Finland, in accordance

with the detailed rules laid down by the Income Tax Law, but may not deduct a loss incurred on the sale of immovable property situated in France. The referring court explains that in a case similar to the one before it now, the decision was taken not to allow losses on the sale of immovable property situated in another Member State to be deducted from income taxable in Finland; however, that case was decided before delivery of the judgments of the Court of Justice in Case C?414/06 *Lidl Belgium* [2008] ECR I?3601, and Case C?157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I?8061.

17 Moreover, the referring court considers that the present case can be distinguished from *Lidl Belgium* and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* by the fact that the loss sustained by K is not connected with any professional or trade activity carried on through a permanent establishment in another Member State. An activity carried on in that context generally continues over a period of time so that it may reasonably be expected that it will eventually generate income from which the loss may be deducted anew. In such a situation it is thus not certain that the loss will be definitive and there is a risk of double deduction of losses. Conversely, where a taxpayer has no source of income in another Member State from which the loss could be deducted, the situation is different as regards the finality of the loss, even if the French tax system were also to afford a possibility of deducting the loss arising on the sale of property from the income of subsequent years. In a situation such as that in issue in the main proceedings, in which there is no connection to a professional or trade activity, it cannot be assumed that the taxpayer will subsequently receive income in the State in which the property is situated, from which the loss can be deducted anew.

18 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Articles 63 TFEU and 65 TFEU be interpreted as precluding national legislation under which a person who is fully liable to income tax in Finland cannot deduct a loss incurred on the transfer of immovable property situated in France from gains, taxable in Finland, made on the transfer of shares, whereas a person who is fully liable to income tax in Finland may on certain conditions deduct a loss on the transfer of equivalent immovable property situated in Finland from gains on transfer?'

The question referred for a preliminary ruling

19 By its question, the referring court is asking, in essence, whether Articles 63 TFEU and 65 TFEU preclude national tax legislation such as that at issue in the main proceedings, which does not allow a taxpayer who resides in the Member State concerned and is fully liable to income tax there to deduct the losses arising on the transfer of immovable property situated in another Member State from the income from moveable assets which is taxable in the first Member State, although that would have been possible, on certain conditions, if the immovable property had been situated in the first Member State.

The existence of a restriction

20 The Court has consistently held that, in the absence of a definition in the FEU Treaty of 'movement of capital' within the meaning of Article 63(1) TFEU, the nomenclature which constitutes Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (an article repealed by the Treaty of Amsterdam) retains an indicative value, even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (after amendment, Articles 69 and 70(1) of the EC Treaty, repealed by the Treaty of Amsterdam), it being understood that, according to the third paragraph of the introduction to that annex, the nomenclature which it contains is not exhaustive as regards the notion of movement of

capital (see, inter alia, Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, paragraph 22 and the case-law cited; Case C?67/08 *Block* [2009] ECR I?883, paragraph 19; and Case C?35/08 *Busley and Cibrian Fernandez* [2009] ECR I?9807, paragraph 17).

21 Among the capital movements listed in Annex I to Directive 88/361, under heading II entitled ‘Investments in real estate’, are investments in real estate abroad by residents.

22 Concerning the existence of restrictions on the movement of capital within the meaning of Article 63(1) TFEU, it should be borne in mind that the measures prohibited by that provision include those which are liable to discourage non-residents from making investments in a Member State or to discourage that Member State’s residents from doing so in other States (see Case C?370/05 *Festersen* [2007] ECR I?1129, paragraph 24; Case C?101/05 *A* [2007] ECR I?11531, paragraph 40; Case C?377/07 *STEKO Industriemontage* [2009] ECR I?299, paragraph 23; *Busley and Cibrian Fernandez*, paragraph 20).

23 National measures liable to prevent or limit the acquisition of immovable property situated in another Member State may be deemed to constitute such restrictions (see, to that effect, *Busley and Cibrian Fernandez*, paragraph 21).

24 As regards the tax rules at issue in the main proceedings, Paragraph 50, first subparagraph, of the Income Tax Law provides that resident taxpayers may deduct the loss incurred on the transfer of a moveable or immovable asset from the gain made on the sale of another moveable or immovable asset during the tax year in which the loss is suffered and the three following tax years.

25 However, that deductibility is a tax advantage which is granted, in the case of immovable property, only when the losses derive from the transfer of immovable property situated in the Member State in which the taxpayer is resident, but not when the property is situated in another Member State.

26 In accordance with Paragraph 6, first subparagraph, of Law 1995/1552, losses incurred in another Member State are not deductible in so far as they exceed the amount of income received in that State.

27 A resident taxpayer therefore may not deduct losses incurred on the transfer of property situated in another Member State from gains made on the transfer of securities which are taxable in Finland.

28 Accordingly, the tax situation of a resident taxpayer who has full liability to income tax in Finland and who makes a loss on the sale of a property situated in another Member State is less favourable than that of a taxpayer who makes a loss on the sale of property situated in Finland.

29 Contrary to what is maintained by the Finnish Government, the fact that it is impossible for a taxpayer who is resident in one Member State to deduct losses incurred on the sale of a property situated in another Member State from profits that are taxable in the first Member State is not the result of the exercise in parallel by the two Member States concerned of their powers of taxation.

30 In the present case, the Republic of Finland has chosen, on the one hand, to allow resident taxpayers to deduct losses made on the transfer of one asset from gains made on the transfer of another asset and, on the other hand, to limit the extent to which such losses may be taken into account, and in particular not to allow losses incurred in another Member State to be offset against gains which are taxable in Finland.

31 Such a difference in treatment on the basis of the place where the immovable property is

situated is liable to deter a taxpayer from investing in immovable property in another Member State and therefore constitutes a restriction on the free movement of capital, prohibited in principle by Article 63 TFEU.

32 It is, however, necessary to examine whether such a restriction on the free movement of capital may be justified in the light of the provisions of the FEU Treaty.

Justification for the restriction on the free movement of capital

33 According to Article 65(1)(a) TFEU, ‘the provisions of Article 63 [TFEU] shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested’.

34 In so far as Article 65(1)(a) TFEU is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. Accordingly, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (see Case C?11/07 *Eckelkamp and Others* [2008] ECR I?6845, paragraph 57; Case C?510/08 *Mattner* [2010] ECR I?3553, paragraph 32; and Joined Cases C?436/08 and C?437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I?305, paragraph 56).

35 Indeed, the derogation provided for in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) TFEU ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63’ (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 57).

36 The differences in treatment authorised by Article 65(1)(a) TFEU must thus be distinguished from discrimination prohibited by Article 65(3). It is clear from the Court’s case-law that, for national tax legislation such as that at issue in the main proceedings to be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment which it prescribes must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 58 and the case-law cited).

37 In that regard, the Finnish and German Governments and the European Commission submit that the situation of a taxpayer who has invested in immovable property in another Member State is objectively different from that of a taxpayer who has made such an investment in his State of residence.

38 According to the Finnish Government, the legislation at issue in the main proceedings is based on the symmetrical tax treatment of income and losses, deduction being allowed solely for losses related to income taxable in Finland. They maintain that it is therefore not contrary to European Union law for resident taxpayers who have made investments in immovable property in another Member State which generate income that is taxable solely in that other Member State, in accordance with the allocation of powers of taxation agreed upon in the double taxation convention, to be treated differently from resident taxpayers who have made investments in immovable property in their Member State of residence which generate income that is taxable in that Member State.

39 The German Government submits that the owner of immovable property situated on national territory and the owner of immovable property situated in another Member State are in situations

which are not objectively comparable, inasmuch as the first owner will be subject to national tax, whilst the second owner will be taxed in the other Member State, since, where there is a double taxation convention, the profits and losses arising on the transfer of immovable property are subject exclusively to the tax jurisdiction of the Member State in which the property concerned is situated.

40 The Commission argues that in circumstances such as those of the case before the referring court, it cannot be maintained that, so far as the deductibility of loss on the transfer of immovable property is concerned, the Finnish owners of a property situated in France or in Finland are in comparable situations. It submits that French tax law, unlike Finnish tax law, does not even recognise the principle of such deductibility, so that the Finnish State’s refusal to allow deduction is justified by that difference in situation.

41 As regards, in the first place, the arguments of the Finnish and German Governments which seek to show that the allocation of the power to tax income from immovable property, as it results from a double taxation convention, renders the situation of a taxpayer who has made an investment in another Member State different from that of a taxpayer who has made an investment in his Member State of residence, it should be recalled that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define the criteria for taxing income and assets with a view to eliminating double taxation, by means of conventions if necessary (Case C?290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I?9461, paragraph 54; Case C?374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I?11673, paragraph 52; Case C?231/05 *Oy AA* [2007] ECR I?6373, paragraph 52; and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 48).

42 Article 6(1) of the France-Finland Convention confers on the Member State in which the immovable property is situated power to tax the income which the property generates for the taxpayer. Provision is also made in Article 13(1) of that convention for gains made on the disposal of immovable property to be taxable in the Contracting State in which the property is situated.

43 However, as the referring court points out, the France-Finland Convention allows the Republic of Finland to apply a progressive exemption method in eliminating double taxation. Thus, Article 23(2)(c) of the convention provides that Finnish tax may be calculated on income taxable in Finland under the convention at the rate of tax corresponding to the total amount of such income in accordance with Finnish tax legislation.

44 It appears from the explanations of the referring court and from those given by K and the Finnish Government at the hearing that, although the France-Finland Convention allows income that is taxable in France to be taken into account in the calculation of the tax on income that is taxable in Finland in order to apply progressive taxation, that option is not exercised in relation to income from capital assets which is taxed at a fixed rate.

45 It none the less follows from that option that, since the France-Finland Convention, according to which it is the Member State on whose territory an immovable asset is situated which taxes the income generated by that asset, does not preclude the taking into account of income related to an asset situated in France in the calculation of the tax of a taxpayer residing in Finland, that choice also cannot preclude a loss sustained by that taxpayer from being taken into account in the context of the sale of that asset.

46 Consequently, the fact that the France-Finland Convention confers the power to tax on the Member State in which the property is situated does not necessarily mean that the situation of such a taxpayer is different, as regards the taking into account of income (including negative income) in the Member State of residence, from the situation of a taxpayer all of whose income

arises within the Member State of residence.

47 Nor, in the second place, does the fact, alluded to by the Commission, that the Member State in which the immovable property is situated does not provide for a right to deduct losses arising on the sale of a property render the situation of a taxpayer any different as regards the legislation of his State of residence, since, as has been stated in paragraphs 30 and 45 of the present judgment, the decision not to take such losses into account is the result of the choice made by the taxpayer’s Member State of residence and the France-Finland Convention does not preclude such losses from being taken into account.

48 It follows that the difference in treatment, so far as concerns the possibility of deducting losses sustained on the sale of immovable property, cannot be justified by a difference in situation related to the place where the property concerned is situated.

49 It therefore remains to be ascertained whether the restriction at issue in the main proceedings may be justified by overriding reasons in the public interest, which the various governments that have submitted observations to the Court and the Commission have invoked and which relate to the need to safeguard the balanced allocation of the power to impose taxes between the Republic of Finland and the French Republic, the need to prevent losses being taken into account twice, the need to prevent tax evasion and the need to ensure the cohesion of the Finnish tax system.

50 In the first place, it should be recalled that the balanced allocation of the power to impose taxes between the Member States, which has been invoked by all the Governments which have submitted observations and by the Commission, is a legitimate objective recognised by the Court (see, inter alia, Case C?371/10 *National Grid Indus* [2011] ECR I?12273, paragraph 45; and Case C?18/11 *Philips Electronics UK* [2012] ECR, paragraph 23), which may make it necessary to apply to the economic activities of taxpayers established in one of those Member States only the tax rules of that State in respect of both profits and losses (see, to that effect, *Marks & Spencer*, paragraph 45; *Oy AA*, paragraph 54; and *Lidl Belgium*, paragraph 31).

51 That objective, as the Court has already stated, is designed, inter alia, to safeguard the symmetry between the right to tax profits and the right to deduct losses (see *Lidl Belgium*, paragraph 33; and *Philips Electronics UK*, paragraph 24), in particular in order to prevent taxpayers from choosing freely the Member State in which profits are to be taxed or losses are to be deducted (see, to that effect, *Oy AA*, paragraph 56; and *Lidl Belgium*, paragraph 34).

52 In the case before the referring court, if the France-Finland Convention were to be disregarded, the Republic of Finland would have the right to tax the profits made by a taxpayer residing in Finland from the sale of a property situated in France.

53 However, the result of applying the France-Finland Convention in conjunction with the Finnish tax legislation is that the Republic of Finland does not exercise any tax powers over the profits deriving from the transfer of immovable property situated in France, as those profits are neither taxed nor otherwise taken into account in Finland.

54 If it were accepted that losses incurred on the sale of immovable property situated in another Member State must be deductible in the Member State in which the taxpayer resides, regardless of the allocation of taxing powers agreed between the Member States, that would effectively allow the taxpayer to choose freely the Member State in which the taking into account of those losses is most advantageous from the tax perspective (see, to that effect, *Lidl Belgium*, paragraph 34).

55 That being so, as the Advocate General in essence states in point 40 of his Opinion, the refusal to allow deduction of losses arising from the sale of immovable property situated in France permits the symmetry between the right to tax profits and the right to deduct losses to be safeguarded. The measure also contributes to the objective of ensuring a balanced allocation of the power to impose taxes between the Member States.

56 As regards, in the second place, the justification relating to the need to prevent losses being taken into account twice, which is put forward by the German and Swedish Governments, the Court has accepted that the Member States must be able to prevent that danger (see *Marks & Spencer*, paragraph 47; *Rewe Zentralfinanz*, paragraph 47; and *Lidl Belgium*, paragraph 35).

57 However, in circumstances such as those underlying the dispute in the main proceedings, there appears to be no danger of a taxpayer deducting the same loss twice.

58 As the Advocate General has noted in point 32 of his Opinion, losses incurred in France on an immovable property situated there cannot be deducted either from overall income or from a gain realised on the sale of another asset.

59 In the third place, according to the Swedish and United Kingdom Governments, the Finnish legislation at issue in the main proceedings is intended to guard against the risk of tax avoidance which would be created by the possibility of transferring between two Member States losses in income incurred by a natural person, given that such a possibility could result in such losses being transferred to the Member State in which their deductibility for tax purposes is the most advantageous.

60 In that regard, it follows from the Court's case-law that the mere fact that a resident taxpayer purchases a property situated in another Member State, which he subsequently sells at a loss, cannot provide a sound basis for a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, by analogy, Case C?436/00 *X and Y* [2002] ECR I?10829, paragraph 62; Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 50; Case C?524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I?2107, paragraph 73; Case C?105/07 *Lammers & Van Cleeff* [2008] ECR I?173, paragraph 27; Case C?330/07 *Jobra* [2008] ECR I?9099, paragraph 37; and Case C?318/10 *SIAT* [2012] ECR, paragraph 38).

61 In order for a national measure restricting a freedom of movement guaranteed by the Treaty to be justified by the need to combat tax evasion and avoidance, the specific objective of that restriction must be to prevent conduct consisting in the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on the national territory (see, to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 55, *Test Claimants in the Thin Cap Group Litigation*, paragraph 74; and *SIAT*, paragraph 40).

62 As regards the relevance of such justification with regard to circumstances such as those in issue in the case before the referring court, suffice it to observe that the Finnish tax legislation which is applicable in that case is not specifically intended to prevent wholly artificial arrangements from benefitting from a tax advantage but is directed, generally, at any situation in which the losses derive from immovable property in another Member State.

63 Consequently, the need to prevent tax avoidance and evasion cannot justify the tax legislation at issue in the main proceedings.

64 In the fourth place, the Finnish and German Governments submit that the Finnish legislation at issue in the main proceedings is justified by the need to ensure the cohesion of the tax system, a fundamental principle of which is the symmetrical tax treatment of profits and losses. In Finland employment income and capital income are dealt with separately. The former is taxed progressively since taxation of employment income takes particular account of the taxpayer's personal situation, whilst income from capital is, for its part, taxed at a single rate. It follows that, where a double taxation convention confers power to tax that income from capital on another Member State, that income is wholly exempt from tax in Finland and has no impact on the Finnish tax rate or tax base. There is therefore a direct link in the Finnish system between the non-taxation of profits and the non-deductibility of losses.

65 It should be recalled that the Court has already accepted that the need to preserve the cohesion of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty (Case C?204/90 *Bachmann* [1992] ECR I?249, paragraph 21; Case C?318/02 *Manninen* [2004] ECR I?7477, paragraph 42; *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 43; Case C?250/08 *Commission* v *Belgium* [2011] ECR I?12341, paragraph 70; Case C?253/09 *Commission* v *Hungary* [2011] ECR I?12391, paragraph 71; and Case C?35/11 *Test Claimants in the FII Group Litigation* [2012] ECR, paragraph 57).

66 However, according to settled case-law, for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (*Commission* v *Belgium*, paragraph 71 and the case-law cited), with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (Case C?418/07 *Papillon* [2008] ECR I?8947, paragraph 44; Case C?303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I?5145, paragraph 72; and *Test Claimants in the FII Group Litigation*, paragraph 58).

67 As has been stated in paragraphs 52 and 53 of the present judgment, if the France-Finland Convention were to be disregarded, the Republic of Finland would have the right to tax the gains made by a taxpayer residing in Finland from the sale of property situated in France. However, the result of applying the France-Finland Convention in conjunction with the Finnish tax legislation is that gains deriving from the transfer of immovable property situated in France escape all form of taxation in Finland, as they are neither taxed nor otherwise taken into account there.

68 That being so, in providing that a resident taxpayer who incurs a loss on the sale of a property situated in France cannot make use of that loss in Finland, the Finnish system reflects a logic of symmetry (see, to that effect, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 42; *Commission* v *Belgium*, paragraph 73; and *Commission* v Hungary, paragraph 74).

69 Having regard to the objective pursued by the rules at issue in the main proceedings, a direct link thus exists, in the case of the same taxpayer and the same tax, between, on the one hand, the tax advantage granted, namely the taking into account of losses generated by a capital investment, and, on the other, the taxation of returns on that investment.

70 In that context, it should be borne in mind that those two conditions – specifically, the same taxpayer and the same tax – have been considered sufficient by the Court to establish that such a link exists (see, inter alia, Case C?35/98 *Verkooijen* [2000] ECR I?4071, paragraph 58; *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 42; *Commission* v *Belgium*, paragraph 76; and *Commission* v *Hungary*, paragraph 77).

71 The Court therefore finds that legislation such as that at issue in the main proceedings may be justified by overriding reasons in the public interest pertaining to the need to safeguard the

balanced allocation of the power to impose taxes between the Member States and to ensure the cohesion of the Finnish tax system and that it is appropriate for attaining those objectives.

72 None the less, it must still be ascertained whether that legislation goes beyond what is necessary in order to attain those objectives, the requirements of which may, as the Court has already stated, coincide (see, to that effect, *National Grid Indus*, paragraph 80).

73 The referring court is unsure in that regard of the significance which should be accorded to the fact that the loss sustained is not linked to a professional or trade activity carried on through a permanent establishment in another Member State and that, since the taxpayer no longer has any sources of income in the Member State in question from which he could deduct that loss, the loss could be definitive.

74 In that regard, K argued before the referring court that the requirements of the principle of proportionality are not met where a loss becomes definitive.

75 It must be recalled that the Court has already held that a measure under which a resident parent company is denied the possibility of deducting from its taxable profit losses incurred in another Member State by a subsidiary established in the latter Member State, whilst the losses of a resident subsidiary may be deducted, or under which, in the context of a merger, a parent company established in a Member State is denied the possibility of deducting from its taxable income the losses of the merged subsidiary, which is established in another Member State, may be justified by the need to preserve the allocation of the power to impose taxes between the Member States and to prevent the risk of losses being used twice and of tax avoidance (see, to that effect, *Marks & Spencer*, paragraphs 44 to 51; and Case C?123/11 *A* [2013] ECR, paragraphs 40 to 46), but goes beyond what is necessary to attain the essential part of the objectives pursued in a situation in which the non-resident subsidiary has exhausted the possibilities available in its Member State of residence of having the losses taken into account (see, to that effect, *Marks & Spencer*, paragraph 55; and *A*, paragraph 49).

76 However, in a situation such as that in issue in the main proceedings, a taxpayer such as K cannot be regarded, irrespective of the considerations of fact set out by the referring court, to have exhausted the possibilities available in the Member State in which the property is situated of having the losses taken into account.

77 Since the Member State in which the property is situated does not provide for the possibility of losses incurred on the sale of the property being taken into account, such a possibility has never existed.

78 In such circumstances, if it were accepted that the Member State in which the taxpayer resides must nevertheless allow losses on immovable property to be deducted from taxable profits in that Member State, that would effectively oblige the latter to bear the adverse consequences arising from the application of the tax legislation adopted by the Member State in which the property is situated.

79 According to the Court’s case-law, a Member State cannot be required to take account, for the purposes of applying its tax law, of the possible adverse consequences arising from particularities of legislation of another Member State applicable to a property situated in the territory of that State which belongs to a resident in the first State (see, by analogy, Case C?298/05 *Columbus Container Services* [2007] ECR I?10451, paragraph 51; Case C?293/06 *Deutsche Shell* [2008] ECR I?1129, paragraph 42; and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 49).

80 The free movement of capital cannot be understood as meaning that a Member State is required to adjust its tax rules on the basis of those of another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a taxpayer as to investment abroad may be to the taxpayer's advantage or not, according to circumstances (see, by analogy, *Deutsche Shell*, paragraph 43; and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 50).

81 Consequently, when the legislation of the Member State in which the property is situated does not provide for losses incurred on the sale of the property to be taken into account, the considerations of fact mentioned by the referring court and by K which indicate that the loss could be definitive are of no relevance as regards the proportionality of the restrictive measure at issue in the main proceedings.

82 In view of all the foregoing, the tax rules at issue in the main proceedings must be considered not to go beyond what is necessary to attain the objectives which they pursue.

83 The answer to the question referred is therefore that Articles 63 TFEU and 65 TFEU do not preclude national tax legislation such as that at issue in the main proceedings, which does not allow a taxpayer who resides in the Member State concerned and is fully liable to income tax there to deduct the losses arising on the transfer of immovable property situated in another Member State from the income from moveable assets which is taxable in the first Member State, although that would have been possible, on certain conditions, if the immovable property had been situated in the first Member State.

Costs

84 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:

Articles 63 TFEU and 65 TFEU do not preclude national tax legislation such as that at issue in the main proceedings, which does not allow a taxpayer who resides in the Member State concerned and is fully liable to income tax there to deduct the losses arising on the transfer of immovable property situated in another Member State from the income from moveable assets which is taxable in the first Member State, although that would have been possible, on certain conditions, if the immovable property had been situated in the first Member State.

[Signatures]

* Language of the case: Finnish.