

**Case C-394/20**

**Request for a preliminary ruling**

**Date lodged:**

18 August 2020

**Referring court:**

Finanzgericht Düsseldorf (Germany)

**Date of the decision to refer:**

20 July 2020

**Applicant:**

XY

**Defendant:**

Finanzamt V

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[...]

**FINANZGERICHT DÜSSELDORF (Finance Court, Düsseldorf)**

[...]

**O R D E R**

In the case of

XY

– Applicant –

[...]

v

Finanzamt V (V Tax Office)  
[...]

– Defendant –

concerning

inheritance tax

the 4th Chamber [...]

[...]

ordered as follows on 20 July 2020:

The proceedings are stayed.

A request for a preliminary ruling on the following questions is made to the Court of Justice of the European Union:

Must Articles 63(1) and 65 of the Treaty on the Functioning of the European Union (TFEU) be interpreted as precluding national legislation of a Member State on the levying of inheritance tax which provides that, for the calculation of the tax, the allowance to be set against the taxable value in the case of an acquisition of land situated in that Member State is lower where the deceased and the heir had their place of residence or habitual residence in another Member State at the time of the death of the deceased than the allowance that would have been applicable if at least one of them had had his or her place of residence or habitual residence in the first Member State at that time?

Must Articles 63(1) and 65 TFEU be interpreted as precluding national legislation of a Member State on the levying of inheritance tax which provides [**Or. 2**] that, for the calculation of the tax, debts arising from reserved portions in the case of an acquisition of land situated in that Member State are not deductible where the deceased and the heir had their place of residence or habitual residence in another Member State at the time of the death of the deceased, whereas those debts would have been fully deductible from the value of the inheritance if at least the deceased or the heir had had his or her place of residence or habitual residence in the first Member State at the time of the death of the deceased?

This order is not open to appeal. [**Or. 3**]

### **G r o u n d s :**

#### **I.**

1. The applicant is an Austrian national and has lived in Austria since 2014. She is the daughter of the deceased E, who was also an Austrian national and lived in Austria.
2. The deceased was the owner of three developed pieces of land in the town of F and one piece of undeveloped land in the town of G.

3. The deceased named the applicant as his sole heir in a will drawn up by him. He allocated a reserved portion to his wife Ef and his son S. The deceased died in Austria on 12 August 2018.
4. After the death of the deceased, the applicant as sole heir undertook, in a reserved portion agreement, to pay Ef and S the amounts of EUR 1 700 000 and EUR 2 850 000, respectively, in order to settle their claims to a reserved portion. In her inheritance tax return submitted to the defendant tax office, she applied to have 43% of the debts arising from the reserved portions, being a total of EUR 1 956 500, deducted from the value of her inheritance as debts under the succession. She arrived at this amount by calculating that the immovable property in Germany subject to German inheritance tax, with a value of EUR 4 970 000 as determined by her, constituted 43% of the value of the entirety of the assets forming part of the estate, EUR 11 592 598.10. She calculated the value of the assets not subject to German inheritance tax (capital assets and a piece of land in Spain) at EUR 6 622 598.10.
5. The defendant tax office set the amount of inheritance tax payable by the applicant at EUR 642 333. In so doing, it charged tax only in respect of the pieces of land situated in Germany. It refused to deduct the reserved portions as debts under the succession, because they were not economically connected with the aforementioned pieces of land. Furthermore, when calculating the inheritance tax set, instead of taking account of an allowance of EUR 400 000 per se for children of the deceased as provided for pursuant to point 2 of Paragraph 16(1) of the Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance and gift tax, 'ErbStG') [Or. 4], it took account only of an allowance, reduced by a partial amount of EUR 228 511, of EUR 171 489, by reference to Paragraph 16(2) ErbStG.
6. By her action, the applicant seeks to have the inheritance tax reduced to EUR 227 181. She submits that she is entitled to the full allowance of EUR 400 000 provided for in point 2 of Paragraph 16(1) ErbStG. Paragraph 16(2) ErbStG is, in her submission, contrary to EU law. It is also contrary to EU law not to allow the reserved portions payable by her to be deducted as debts under the succession at least proportionately to the amount of EUR 1 956 500 calculated by her.
7. The defendant tax office submits the following: Pursuant to Paragraph 16(2) ErbStG, the allowance provided for in point 2 of Paragraph 16(1) ErbStG is to be reduced by a partial amount. Pursuant to the second sentence of Paragraph 10(6) ErbStG, the reserved portions to be paid by the applicant cannot be deducted as debts under the succession because they are not economically connected with individual assets forming part of the estate.

## II.

8. The following provisions of the German Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance and gift tax, ‘ErbStG’) in the version published on 27 February 1997 [...], as last amended by Article 4 of the Law of 23 June 2017 [...] are relevant to the ruling on the questions referred:
9. Paragraph 1 – Taxable events
  1. Inheritance (or gift) tax shall apply to
    - (1) acquisitions on death;
    - (2) gifts *inter vivos*;
    - ...
10. Paragraph 2 – Personal liability to tax **[Or. 5]**
  1. Liability to tax arises
    - (1) in the cases referred to in Paragraph 1(1), points 1 to 3, in relation to the entirety of the devolved assets (unlimited tax liability), where the deceased, at the date of his death, the donor, at the date of making the gift, or the acquirer, at the date of the chargeable event (Paragraph 9), is a resident. The following persons are regarded as residents:
      - (a) natural persons whose place of residence or habitual residence is in Germany,
      - (b) German nationals who have resided abroad continuously for not more than five years without a permanent residence in Germany,
      - ...
    - (3) in all other cases, in relation to devolved assets which are domestic assets within the meaning of Paragraph 121 of the Bewertungsgesetz [Law on valuation] (limited tax liability).
    - ...
11. Paragraph 3 – Acquisitions on death
  1. Acquisitions on death include
    - (1) an acquisition by way of inheritance ..., by legacy ... or on the basis of an asserted claim to a reserved portion (Paragraph 2303 et seq. of the Bürgerliches Gesetzbuch [Civil Code]);
12. Paragraph 9 – Chargeability of tax

1. Tax shall become chargeable

(1) in the case of acquisitions on death, on the death of the deceased, ...

13. Paragraph 10 – Taxable acquisition

1. Taxable acquisitions include the enrichment of the acquirer, unless it is exempt ... In the cases referred to in Paragraph 3, enrichment includes the amount which results when the debts under the succession that are deductible pursuant to subparagraphs 3 to 9 ... are deducted from the value of the entirety of the devolved assets ... to the extent that they are subject to taxation under this Law ...  
**[Or. 6]**

5. Unless otherwise provided for in subparagraphs 6 to 9, the following are deductible from the acquisition as debts under the succession:

- (1) the debts of the deceased ...;
- (2) debts arising from legacies, obligations and asserted reserved portions and claims for compensation in relation to the inheritance ...

6. Debts and charges are, in so far as they are economically connected with assets that are not subject to taxation according to this Law, non-deductible. If the taxation is limited to individual assets (Paragraph 2(1), point 3 ...), only the debts and charges that are economically connected with those assets shall be deductible.

14. Paragraph 15 – Tax classes

1. According to the personal relationship between the recipient and the deceased or donor, the following three tax classes are distinguished:

Tax class I:

- (1) the spouse and the partner,
- (2) the children and stepchildren, ...

15. Paragraph 16 – Allowances

1. In the cases of unlimited tax liability provided for in Paragraph 2(1), point 1, and Paragraph 2(3), the following acquisitions shall remain exempt from tax

- (1) those of the spouse and of the partner in the amount of EUR 500 000;
- (2) those of children for the purposes of tax class I.2, and of children of deceased children for the purposes of tax class I.2, in the amount of EUR 400 000;

...

2. In the cases of limited tax liability provided for in Paragraph 2(1), point 3, the amount of the allowance provided for in subparagraph 1 shall be reduced by a partial amount. This partial amount **[Or. 7]** shall be equal to the ratio of the sum of the values of the assets acquired at the same time and not subject to limited tax liability and the devolved assets not subject to limited tax liability which have been accrued by the same person within ten years to the value of the total assets accrued by the same person within ten years. The earlier acquisitions shall be deemed to have their earlier value.

16. Paragraph 37 – Application of this Law

...

14. ... Paragraph 16(1) and (2) in the version applicable on 25 June 2017 shall apply to acquisitions in respect of which the tax becomes chargeable after 24 June 2017.

17. In addition, the following provision of the Bewertungsgesetz (Law on valuation, 'BewG'), in the version published on 1 February 1991 [...], as last amended by Article 2 of the Law of 4 November 2016 [...], is relevant:

Paragraph 121 – Domestic assets

Domestic assets include:

1. domestic agricultural and forestry assets;
2. immovable property within Germany; ...

18. In terms of civil law, the following provisions of the Allgemeines Bürgerliches Gesetzbuch (General Civil Code, 'ABGB') for the entirety of the German hereditary lands of the Austrian Monarchy [...], as last amended by Article 6 of the Federal Law published on 13 November 2017 [...], are relevant:

19. Paragraph 756.

The reserved portion shall be the share of the value of the deceased's assets that is to be distributed to the person entitled to a reserved portion.

20. Paragraph 757. **[Or. 8]**

The issue and the spouse or registered partner of the deceased shall be entitled to a reserved portion.

21. Paragraph 759.

The reserved portion to which each person having a right to a reserved portion shall be entitled shall correspond to one half of that to which he would be entitled according to intestate succession.

22. Paragraph 761.
- (1) The reserved portion shall be paid in cash ...
23. Paragraph 764.
- (1) The right to the reserved portion is to be met by the estate and, once the heirs are in possession of the estate, by the heirs ...
24. Paragraph 765.
- (1) The person entitled to a reserved portion shall acquire the entitlement for himself and his successors upon the death of the deceased.
- (2) The person entitled to the reserved portion shall not be able to claim the reserved portion in pecuniary form until one year after the death of the deceased.
25. Paragraph 778.
- (1) At the request of a person entitled to a reserved portion, the entire estate shall be precisely described and estimated in order to determine the reserved portion.
- (2) The estimate must be based on the date of death of the deceased. The person entitled to a reserved portion shall be entitled to statutory interest until the reserved portion has been paid.
26. Furthermore, the following provisions of the German Bürgerliches Gesetzbuch (Civil Code, 'BGB') in the version published on 2 January 2002 [...] are relevant:
27. Paragraph 2303 – Persons entitled to a reserved portion; Amount of the reserved portion [Or. 9]
- (1) If a descendant of the deceased is excluded from the succession by a disposition of property upon death, he may demand the reserved portion from the heir. The reserved portion amounts to one half of the value of the share of the inheritance on intestacy ...
28. Paragraph 2311 – Value of the estate
- (1) The reserved portion shall be calculated on the basis of the content and value of the estate at the time of inheritance ...
- (2) The value shall, to the extent necessary, be determined by estimate. A valuation carried out by the deceased shall not be authoritative.

### III.

29. The present Chamber stays the action pending before it [...] and requests the Court of Justice of the European Union (CJEU) to deliver a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU) on the questions set out in the operative part of the present order. The outcome of the action depends on the answers to those questions.
30. The present Chamber has doubts as to whether Paragraph 16(2) ErbStG is compatible with Article 63(1) in conjunction with Article 65 TFEU.
31. In response to the judgment of the Court of Justice of 8 June 2016 in Case C-479/14 (ECLI:EU:C:2016:412), the German legislature introduced a revision in Paragraph 16(2) ErbStG. Pursuant to that provision, for acquisitions for which the tax becomes chargeable after 24 June 2017 (Paragraph 37(14) ErbStG), the allowance under Paragraph 16(1) ErbStG is to be reduced by a partial amount to be calculated in accordance with the second and third sentences of Paragraph 16(2) ErbStG.
32. The present Chamber has doubts as to whether this revision is compatible with Articles 63 and 65 TFEU, as interpreted by the Court of Justice. The Court of Justice has already ruled that the disadvantage to the acquirer of the inheritance resulting from the reduced allowance of (at the time) only EUR 2 000 pursuant to Paragraph 16(2) ErbStG in the version of Article 1 of the Gesetz zur Reform des Erbschaftsteuer- und Bewertungsrechts (Law reforming the rules on inheritance tax and valuation) of 24 December 2008 (BGBl. I, p. 3018) in cases of [Or. 10] limited tax liability (point 3 of Paragraph 2(1) ErbStG) cannot be justified by the need to preserve the coherence of the German tax system (CJEU, judgment of 17 October 2013, Case C-181/12, ECLI:EU:C:2013:662, paragraph 61). Furthermore, in infringement proceedings concerning Paragraph 16(2) ErbStG, old version, the Court of Justice ruled that there is no justification for different treatment of acquirers in cases of unlimited and limited tax liability (CJEU, judgment of 4 September 2014, Case C-211/13, ECLI:EU:C:2014:2148, paragraph 49 et seq). In addition, in points 84 and 85 of his opinion of 12 June 2013 in Case C-181/12 (ECLI:EU:C:2013:384), Advocate General Mengozzi stated that, in cases of limited tax liability, the acquirer must be entitled to the full tax allowance under point 1 of Paragraph 16(1) ErbStG. Advocate General Mengozzi rejected a reduction of that allowance, even though, according to the Chamber's statements in paragraph 16 of its order for reference of 2 April 2012, on which Case C-181/12 is based, arithmetically, the granting of approximately 62% of the allowance would also have been conceivable.
33. The present Chamber has doubts as to whether the second sentence of Paragraph 10(6) ErbStG is compatible with Article 63(1) in conjunction with Article 65 TFEU.
34. The present dispute concerns a case of limited tax liability, because neither the deceased nor the applicant had their place of residence or habitual residence in

Germany at the time of the death of the deceased (first sentence of point 3 of Paragraph 2(1) ErbStG). The defendant tax office therefore charged tax only in respect of the immovable property in Germany (point 2 of Paragraph 121 BewG).

35. The effect of the second sentence of Paragraph 10(6) ErbStG in the present case is that the applicant cannot deduct from her inheritance the debts to be met by her in respect of the reserved portions of her mother and brother as debts under the succession pursuant to point 2 of Paragraph 10(5) ErbStG. The reason for this is that, pursuant to the second sentence of Paragraph 10(6) ErbStG, in cases of limited tax liability in which the taxation is limited to individual assets (point 3 of Paragraph 2(1) ErbStG), only the debts and charges that are economically connected with those assets are to be deductible. **[Or. 11]**
36. According to the case-law of the German Bundesfinanzhof (Federal Finance Court, 'BFH'), an economic connection as required by the first and second sentences of Paragraph 10(6) ErbStG exists only if the debts or charges can be attributed to certain assets forming part of the estate. The calculation of the reserved portion on the basis of the value of the estate (Paragraph 2311 BGB) does not establish an economic connection, but, at best, a legal connection between the obligation to pay the reserved portion and the assets forming part of the estate [...].
37. The Chamber is of the opinion that, in the present case, the same applies to the reserved portion to which the applicant's mother and brother are entitled under Austrian law. These claims cannot be attributed to a specific asset forming part of the estate either. Rather, pursuant to Paragraph 756 ABGB, the reserved portion is merely a share in the value of the deceased's assets that is to be distributed to the person entitled to a reserved portion. Pursuant to Paragraph 759 ABGB, the amount for the person entitled to the reserved portion corresponds to one half of that to which he would be entitled according to intestate succession. Pursuant to the first sentence of Paragraph 761(1) ABGB, the reserved portion must be paid in cash, as a rule.
38. Accordingly, the effect of the second sentence of Paragraph 10(6) ErbStG in the present case is that the applicant cannot even deduct a partial amount of the reserved portions to be met by her in respect of her mother and brother as debts under the succession pursuant to point 2 of Paragraph 10(5) ErbStG. If the deceased or the applicant had had their place of residence or habitual residence in Germany at the time of the death of the deceased and there was therefore a case of unlimited tax liability (point 1(a) of Paragraph 2(1) ErbStG), the applicant could deduct the reserved portions of her mother and brother from her inheritance as debts under the succession pursuant to point 2 of Paragraph 10(5) ErbStG without restriction.
39. The present Chamber takes the view that it is doubtful that this difference in treatment between those resident in Germany and those not resident in Germany can be reconciled with Article 63(1) in conjunction with Article 65 TFEU by the

second sentence of Paragraph 10(6) of the ErbStG. The Court of Justice has **[Or. 12]** already ruled, in relation to inheritances, that the measures prohibited by Article 63(1) TFEU, as being restrictions on the movement of capital, include those whose effect is to reduce the value of the inheritance of a resident of a State other than the Member State in which the assets concerned are situated and which taxes the inheritance of those assets (CJEU, judgment of 23 February 2006, Case C-513/03, ECLI:EU:C:2006:131, paragraph 44; of 17 October 2013, Case C-181/12, ECLI:EU:C:2013:662, paragraph 23; and of 26 May 2016, Case C-244/15, ECLI:EU:C:2016:359, paragraph 28). On this basis, it is impermissible, when taxing an inheritance, to make a distinction between persons who, at the time of their death, were residing in the Member State concerned and those who, at the time of their death, were not, for instance by means of rules on the limited deductibility of debts (CJEU, judgments of 11 December 2003, Case C-364/01, ECLI:EU:C:2003:665, paragraph 76; of 11 September 2008, Case C-11/07, ECLI:EU:C:2008:489, paragraph 46; of 11 September 2008, Case C-43/07, ECLI:EU:C:2008:490, paragraph 38).

[...]