Case C-670/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

9 November 2021

Referring court:

Finanzgericht Köln (Germany)

Date of the decision to refer:

2 September 2021

Applicant:

BA

Defendant:

Finanzamt X

Subject matter of the main proceedings

Inheritance tax – Calculation – National legislation under which immovable property located in a third country is to be taken into account at its full value, whereas, by contrast, immovable property located within the national territory, in a Member State of the European Union or in a State of the European Economic Area is to be taken into account at only 90% of its value – Compatibility with Article 63 et seq. TFEU

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Are Articles 63(1), 64 and 65 TFEU to be interpreted as precluding national legislation of a Member State on the levying of inheritance tax which, for the purposes of calculating inheritance tax, provides that developed immovable

property forming part of personal assets which is located in a third country (in this case: Canada) and is let for residential purposes is to be taken into account at its full value, whereas immovable property forming part of personal assets which is located within the national territory, in a Member State of the European Union or in a State of the European Economic Area and is let for residential purposes is to be taken into account at only 90% of its value in the calculation of inheritance tax?

Provisions of international law referred to

Agreement between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and Certain Other Taxes, the Prevention of Fiscal Evasion and the Assistance in Tax Matters ('the 2001 Double Taxation Agreement between Germany and Canada'), in particular Article 26(4)

Provisions of European Union law relied on

TFEU, in particular Articles 63(1), 64 and 65

Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the [EC] Treaty (article repealed by the Treaty of Amsterdam)

Provisions of national law relied on

Erbschaftsteuer- und Schenkungsteuergesetz (Law on inheritance and gift tax) in the version of the Gesetz zur Reform des Erbschaftsteuer- und Bewertungsrechts (Law reforming the rules on inheritance tax and valuation; 'the ErbStG 2009') of 24 December 2008, in particular Paragraph 13c

Succinct presentation of the facts and procedure in the main proceedings

1 The deceased, who died in 2016, left immovable property in Canada, amongst other things, to the applicant, his son. The immovable properties located in Canada are let for residential purposes and form part of the applicant's personal assets. During his lifetime, the place of residence of the deceased was in Germany, where the applicant also resided at the time of succession. The applicant accepted the legacy.

2 The applicant requested that the immovable property in Canada be taxed at only 90% of its value in accordance with Paragraph 13c(1) of the ErbStG 2009. The defendant tax office refused that request. The action brought before the referring court challenges that refusal.

Succinct presentation of the reasoning in the request for a preliminary ruling

3 In accordance with Paragraph 13c(1) of the ErbStG 2009, under certain conditions, immovable property is to be taken into account at only 90% of its value in the calculation of inheritance tax. That provision is not applicable to immovable property located in Canada for the sole reason that it applies solely to immovable property located within the national territory, in a Member State of the European Union or in a State of the European Economic Area (point 2 of Paragraph 13c(3) of the ErbStG 2009). Therefore, immovable property located in a third country must always be taken into account at its full value, even if it meets the other requirements of Paragraph 13c.

4 This could constitute a restriction on the movement of capital, which is impermissible under Article 63(1) TFEU.

5 The Court has already held that inheritances consisting in the transfer to one or more persons of assets left by a deceased person come under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements', and that an inheritance, including one of immovable property, is a movement of capital for the purposes of Article 63 TFEU (in relation to Article 56 EC: judgment of 15 October 2009, *Fernandez*, C-35/08, EU:C:2009:625, paragraph 18; in relation to Article 63 TFEU: judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 20).

6 In accordance with Article 63(1) TFEU, all measures which are likely to discourage non- residents from making investments in a Member State or third country or to discourage residents of that Member State or third country from doing so in other States are prohibited (see judgment of 22 January 2009, *Steko Industriemontage*, C-377/07, EU:C:2009:29, paragraph 23). The referring court takes the view that those measures also include those which may discourage taxpayers from retaining assets located in another Member State or a third country.

7 A measure that restricts the free movement of capital by reducing the value of the estate because the inheritance tax is higher due to the fact that the assets are located in a third country would therefore appear to constitute a restriction that is prohibited in principle.

8 It is unclear whether such a restriction on the free movement of capital is permitted under the standstill clause in Article 64(1) TFEU or can be justified under Article 65 TFEU.

9 Article 64(1) TFEU would not appear to be applicable to the advantage in Paragraph 13c of the ErbStG 2009, as that advantage did not yet exist on 31 December 1993. It was first introduced into the German legal system in 2009, with effect from 1 January 2009.

10 Under Article 65(1)(a) TFEU, Article 63 TFEU is without prejudice to the rights 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.

11 According to the case-law of the Court, in so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. 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 (judgments of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 40, of 11 September 2008, *Eckelkamp*, C-11/07, EU:C:2008:489, paragraph 57, of 11 September 2008, *Arens-Sikken*, C-43/07, EU:C:2008:490, paragraph 51, and of 22 April 2010, *Mattern*, C-510/08, EU:C:2010:216, paragraph 32). 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 paragraph 1 of that article are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 TFEU (judgments of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 41, of 11 September 2008, *Eckelkamp*, C-11/07, EU:C:2008:489, paragraph 58, and of 22 April 2010, *Mattern*, C-510/08, EU:C:2010:216, paragraph 33).

12 In order for national tax rules which, for the purposes of calculating inheritance tax, distinguish according to whether the assets are located within the national territory, in a Member State of the European Union, in a State of the European Economic Area or in a third country to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must relate to situations which are not objectively comparable or must be justifiable by overriding reasons in the public interest (settled case-law, see judgments of 30 June 2016, *Feilen*, C-123/15, EU:C:2016:496, and of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662).

13 The referring court considers that the situation in the present case, which relates to immovable property located in a third country, is objectively comparable to a situation in which the immovable property is located within the national territory or in a Member State of the European Union. The situations differ only with regard to the location of the immovable property. However, the mere fact that the assets are located abroad does not appear to justify less favourable tax treatment (see, *mutatis mutandis*, judgment of 22 April 2010, *Mattern*, C-510/08, EU:C:2010:216, paragraph 38). That is particularly true given that, in the case of unlimited tax liability, immovable property located in third countries outside the EEA is covered in the same way in the context of taxable acquisitions under Paragraph 10(1) of the ErbStG 2009. The referring court takes the view that, if the legislature places the acquirers of those assets on the same footing as acquirers of domestic and/or EEA assets, it may not treat the acquirers differently in the

context of that taxation as regards the reduced value taken into account for immovable property.

14 It also appears to be unclear whether the restriction is justified under Article 65(1)(b) TFEU, in particular to prevent infringements of national law and regulations in the field of taxation, since, under Article 26(4) of the 2001 Double Taxation Agreement between Germany and Canada, the exchange of information between Germany and Canada can take place in respect of all taxes imposed in a Contracting State. The referring court is unable to see whether that exchange of information gives rise to any difficulties.

15 Nor is it able to discern any overriding reasons in the public interest within the meaning of Article 65(2) TFEU, which would objectively justify a restriction.