



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 7 September 2016¹

Case C-283/15

X

v

Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Income tax — Equal treatment — Income taxed in several Member States — Fiscal advantage — Judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31))

I – Introduction

1. The present request for a preliminary ruling, submitted to the Court by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), concerns the applicability of the case-law initiated by the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), in a novel situation. The main proceedings are characterised by the fact that the taxpayer receives an income in his State of residence which is so low that he is unable to benefit in that State from a tax reduction relating to his personal and family circumstances and that his other income is taxed in *a number of* States of which he is not a resident.

II – Legal framework

2. The treatment for tax purposes of residents and non-residents in the Netherlands is governed by the Income Tax Act 2001 (Wet Inkomstenbelasting 2001, ‘the 2001 Act’).

3. Under Article 2.3 of the 2001 Act:

‘Income tax shall be levied on the following incomes received by the taxpayer during the calendar year in question:

- (a) taxable income from employment or a dwelling,
- (b) taxable income from a substantial interest in a company and
- (c) taxable income from savings and investments.’

¹ — Original language: French.

4. Article 2.4 of the 2001 Act states:

‘1. Taxable income from employment or a dwelling shall be determined:

- (a) for national taxpayers: according to the provisions of Chapter 3,
- (b) for foreign taxpayers: according to the provisions of Section 7.2 ...’

5. According to Article 2.5 of the 2001 Act:

‘1. National taxpayers who spend only part of the calendar year in the Netherlands and foreign taxpayers who are resident in another Member State of the European Union or in the territory of a power determined by ministerial decree with which the Kingdom of the Netherlands has concluded a convention for the avoidance of double taxation and which provides for the exchange of information, who are liable to taxation in that Member State or in the territory of that power may elect to be made subject to the tax regime applicable to national taxpayers laid down in this Act ...

...’

6. Under Article 3.120(1) of the 2001 Act, a Netherlands resident is entitled to deduct ‘negative income’ from a dwelling which he owns and which is situated in the Netherlands.

7. Article 7(1)(a) of the 2001 Act states, moreover, that tax is to be levied on taxable income in respect of which is taxable on account of employment and a dwelling in the Netherlands which is received during the calendar year.

8. Article 7.2(2)(b) and (f) of the 2001 Act states, in addition, that taxable earnings in respect of employment carried out in the Netherlands and, where appropriate, taxable income from a dwelling owned by the taxpayer in the Netherlands are to form part of the taxable income in respect of employment and a dwelling.

III – The facts of the main proceedings

9. X is a Netherlands national who in 2007 lived in Spain, where he owned a dwelling which was his own dwelling for the purposes of 2001 Act (‘the own dwelling’), in respect of which he was required to pay interest charged on a mortgage loan.

10. In the Netherlands, under the 2001 Act, income tax is charged on income from employment but also on income ‘from a dwelling’. Where the dwelling is owned by the taxpayer, it gives rise to tax advantages (calculated as a percentage of its value) which are reduced by the deductible costs pertaining to those advantages (including interest on a mortgage loan). If the amount of the mortgage interest exceeds the amount of the advantages, the taxpayer’s income will be deemed to be ‘negative’. That was the case for X in 2007.

11. During that year the income from X’s occupation consisted in sums paid to him by two companies in which he held a majority shareholding; one was established in the Netherlands and the other in Switzerland. The income from the Netherlands source represented 60% of his total taxable income and the income from the Swiss source represented 40%. He received no income in Spain.

12. Under the relevant bilateral conventions, the income from the Netherlands source was taxed in the Netherlands and the income from the Swiss source was taxed in Switzerland.

13. In the Netherlands, X initially elected to be treated as a resident taxpayer as provided for in Article 2.5 of the 2001 Act, which has the effect that the taxpayer is subject to an unlimited tax obligation in the Netherlands. On that basis, the Netherlands tax authorities took into consideration the negative income associated with the ‘own dwelling’ in Spain.

14. In fact, the total tax thus calculated was higher than the tax that X would have had to pay if he had not elected to be treated as a resident taxpayer (which would have had the consequence that he would have been taxed in Switzerland in respect of the income received in that State, or 40% of his total income) and if, in addition, he had been allowed to deduct in full the negative income from the ‘own dwelling’.

15. X withdrew his request to elect and challenged the tax demand before the Netherlands courts, maintaining that the provisions of EU law on freedom of movement should be interpreted as meaning that they allowed non-resident taxpayers to claim deduction of the negative income associated with their own dwelling without thereby being required to elect to be treated as residents.

16. Following the dismissal of his application by the Rechtbank te Haarlem (District Court, Haarlem, the Netherlands) and by the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam, the Netherlands), X lodged a plea on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

17. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) is uncertain as to the scope of the principle established in *Schumacker*,² in the light of the fact that, unlike the factual situation in the case giving rise to that judgment, Mr X does not receive (wholly or almost exclusively) his family income in a single other Member State which would be competent to impose tax on that income and which would thus be able take his personal and family circumstances into account.

18. According to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the judgments of the Court of 14 September 1999, *Gschwind* (C-391/97, EU:C:1999:409); of 10 May 2012, *Commission v Estonia* (C-39/10, EU:C:2012:282); and of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750) might be read as meaning that the State in which the activity is carried out must always take account of the personal and family circumstances of the person concerned where the State of residence is not in a position to do so.

19. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay proceedings and to request the Court to give a preliminary ruling.

IV – The request for a preliminary ruling and the proceedings before the Court

20. By decision of 22 May 2015, received at the Court on 11 June 2015, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to refer the following questions to the Court for a preliminary ruling under Article 267 TFEU:

- ‘(1) Must the provisions of the Treaty relating to freedom of movement be interpreted as precluding national legislation under which a European Union citizen who resides in Spain and whose work-related income is taxed in the amount of approximately 60% by the Netherlands and approximately 40% by Switzerland may not deduct his negative income arising from his residence in Spain, which is for his personal use, from his work-related income which is taxed in the Netherlands, even if he receives such a low income in Spain, as his State of residence, that the abovementioned negative income in the year in question could not have led to tax relief in the State of residence?’

² — Judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31).

- (2) (a) If Question 1 is answered in the affirmative: must every Member State in which the European Union citizen earns part of his income then take into account the full amount of the abovementioned negative income? Or does that obligation apply to only one of the States concerned in which work is carried out, and if so, to which? Or must each of the States in which work is carried out (not being the State of residence) allow part of that negative income to be deducted? In the latter case, how is that deductible part to be determined?
- (b) In this regard, is the Member State in which the work is actually performed the decisive factor, or is the decisive factor which Member State has the power to tax the income earned thereby?
- (3) Would the answer to the two questions set out under (2) be different if one of the States in which the European Union citizen earns his income is Switzerland, which is not a Member State of the European Union and also does not belong to the European Economic Area ((EEA), 'the EEA')?
- (4) To what extent is it significant in this regard whether the legislation of the taxpayer's country of residence (in this case, Spain) makes provision for the possibility of deducting mortgage interest relating to the taxpayer's property and the possibility of offsetting the tax losses arising therefrom in the year in question against possible income earned in that country in later years?

21. Written observations have been submitted by X, by the Netherlands, Belgian, German, Austrian, Portuguese, United Kingdom and Swedish Governments, and by the European Commission. Apart from the Belgian and Portuguese Governments, all presented argument at the hearing on 29 June 2016.

V – Assessment

A – *Preliminary observation on the applicable freedom of movement*

22. The referring court does not mention the description of the services giving rise to X's income or, consequently, the freedom of movement by reference to which the Netherlands legislation should be examined.

23. The Austrian, Swedish and United Kingdom Governments nonetheless maintain that it is appropriate, on the face of it, to apply Article 49 TFEU and the freedom of establishment which it enshrines, since it is apparent from the request for a preliminary ruling that X controls and directs the activities of the Netherlands and Swiss companies concerned through majority shareholdings. He is therefore self-employed. That analysis seems relevant.

24. As those majority shareholdings preclude the applicability of free movement of capital, it is sufficient to bear in mind that the Court has already had the opportunity to confirm that the solution applied in the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), in relation to freedom of movement for workers must be applied to the self-employed.³

³ — See in particular, to that effect, judgments of 11 August 1995, *Wielockx* (C-80/94, EU:C:1995:271); of 27 June 1996, *Asscher* (C-107/94, EU:C:1996:251); and also, more recently, of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraph 47).

B – First question

25. By its first question, the referring court asks, in essence, whether the State of employment is required to grant a tax advantage available for residents to a non-resident who receives in that State 60% of his total work-related income, it being understood that that taxpayer cannot benefit from that advantage in the State in which he lives, as he does not receive sufficient income there.

1. The principles applicable in direct taxation matters

26. The Court has consistently held that the Member States' competence in relation to taxation must be exercised consistently with EU law⁴ and more particularly with the Treaty provisions on freedom of movement. The Member States must therefore avoid any direct discrimination by reason of nationality or covert discrimination,⁵ by reason of the taxpayer's residence, the residence criterion generally being decisive in tax matters.

27. All discrimination assumes that comparable situations are treated differently. However, the Court has held that residents and non-residents are not as a rule in comparable situations. The income received in the territory of a State by a non-resident is in most instances only a part of that person's total income, which is concentrated at his place of residence. A non-resident's personal ability to pay tax is more easily assessed by the State of residence, since that is the place where the taxpayer's personal and financial interests are centred.⁶

28. However, in the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), the Court held that an exception to that rule arose where a non-resident taxpayer received no significant income in his State of residence and obtained the major part of his taxable income from an activity performed in the State of employment, with the result that the State of residence was not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances⁷ ('the *Schumacker* exception').

29. The Court has also held, moreover, that the possibility for the taxpayer to deduct from his taxable income the 'negative income' relating to immovable property in his Member State of residence forms a tax advantage connected with his personal situation.⁸

30. It therefore remains to be determined whether X's case is covered by the *Schumacker* exception, in other words whether his situation as a non-resident is comparable with the situation of a resident.

2. The conditions of comparability of situations

31. All the Governments which have lodged written observations take the view that EU law does not preclude legislation such as that in the case at issue in the main proceedings, because the fact that a non-resident receives 60% of his income in the State of employment does not mean that his situation is comparable to that of a resident.

4 — See in particular, to that effect, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21); of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 29); of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraph 18); and also of 22 October 2014, *Blanco and Fabretti* (C-344/13 and C-367/13, EU:C:2014:2311, paragraph 24).

5 — See, to that effect, judgment of 14 September 1999, *Gschwind* (C-391/97, EU:C:1999:409, paragraph 20).

6 — See in particular, to that effect, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 32); of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750, paragraph 90); and also of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 22).

7 — See in particular, to that effect, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 36); of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452, paragraph 30); of 16 October 2008, *Renneberg* (C-527/06, EU:C:2008:566, paragraph 61); and also of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 25).

8 — See, to that effect, judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 19).

32. In paragraph 36 of the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), the Court held that the situations were, exceptionally, comparable ‘in a case such as this one where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment, *with the result that* the State of his residence is not in a position to grant him the benefits from the taking into account of his personal and family circumstances’.⁹

33. Three conditions must therefore be satisfied in order for the situations of a resident and a non-resident to be comparable within the meaning of the *Schumacker* exception. Two of those conditions concern the State of residence, while the third condition concerns the State of employment. Where the three conditions are satisfied, the State of employment is required to grant to both non-residents and residents the same tax advantages connected with their personal and family circumstances.

(a) *The conditions linked with the State of residence*

34. The two conditions are linked in the sense that the second flows from the first: the taxpayer must not receive significant income in his State of residence, with the consequence that that State is not in a position to grant him the advantages resulting from the taking into account of his personal and family circumstances.

35. In application of international tax law,¹⁰ those advantages must, in principle, be granted by the State of residence. Accordingly, the fact that the taxpayer does not receive sufficient income in that State has the consequence that his personal and family circumstances will not be taken into account by any State if the principle that it is for the State of residence to assess that situation is applied.¹¹

(b) *The condition linked to the State of employment*

36. Very logically, the Court also requires that the non-resident taxpayer ‘obtains the major part of his taxable income from an activity performed in the State of employment’.¹²

37. In that case, therefore, as the Court explains in paragraph 38 of the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), ‘in the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence, discrimination arises from the fact that *his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment*’.¹³

38. In fact, ‘there is no objective difference between the situations of such a non-resident and a resident engaged in comparable [employment or self-employment], such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer’s personal and family circumstances’.¹⁴

9 — Emphasis added.

10 — See judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 32).

11 — This was also the starting point of the reasoning of Advocate General Léger in his Opinion in *Schumacker* (C-279/93, EU:C:1994:391, point 66).

12 — Judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 36).

13 — Emphasis added. See also, to that effect, judgments of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452, paragraph 31); of 16 October 2008, *Renneberg* (C-527/06, EU:C:2008:566, paragraph 62); and also of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 26).

14 — Judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 37).

39. As will be seen, the requirement that the major part of the income is received in the State of employment is closely connected with the fact that the taxpayer has no significant income in his State of residence.

40. As Advocate General Léger explained in his Opinion in *Schumacker* (C-279/93, EU:C:1994:391), ‘only an appraisal of the facts ... will make it possible to determine the threshold as from which the income in the State of residence is *sufficient* for the personal circumstances of the person concerned to be taken into account by the tax authorities of that State. Only the residents of that State who have not reached that threshold can be placed on the same footing as residents of the State of employment where they receive the major part of their income’.¹⁵

41. The judgments of 14 September 1999, *Gschwind* (C-391/97, EU:C:1999:409) and of 10 May 2012, *Commission v Estonia* (C-39/10, EU:C:2012:282) reveal, in that regard, the importance, when determining the comparability of the situations, of the criterion relating to the ability of the State of residence or the State of employment to take the personal and family responsibilities into consideration.

42. In the judgment of 14 September 1999, *Gschwind* (C-391/97, EU:C:1999:409), the Court observed that, ‘given that nearly 42% of the total income of the Gschwinds is received in their State of residence, that State is in a position to take into account Mr Gschwind’s personal and family circumstances according to the rules laid down by the legislation of that State, since the tax base is sufficient there to enable them to be taken into account’.¹⁶ In those circumstances, the situation of a non-resident married couple where one of the spouses works in the State of taxation in question was not deemed to be comparable with that of a resident married couple.

43. On the other hand, in the judgment of 10 May 2012, *Commission v Estonia* (C-39/10, EU:C:2012:282), the Court began by stating that, where nearly 50% of the total income of the person concerned is received in his Member State of residence, ‘that State should *in principle* be able to take into account his ability to pay tax’.¹⁷ Nonetheless, the Court added that ‘however, in a case such as that of the complainant, who because of the modest amount of worldwide income is not taxable in the Member State of residence, under that State’s tax legislation, *that State is not in a position to take into account the ability to pay tax and the personal and family circumstances of the person concerned*’.¹⁸ The Court concluded that, in such circumstances, the refusal of the Member State in which the income in question was received (in that particular case a retirement pension) to grant an allowance provided for under its tax legislation penalised non-resident taxpayers simply because they had exercised the freedoms of movement guaranteed by the Treaty.

44. The third condition is further illustrated in the judgment of the Court of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406). In paragraph 28 of that judgment, the Court held that ‘the mere fact that a non-resident has received, in the State of employment, income in the same circumstances as a resident of that State *does not suffice* to make his situation objectively comparable to that of a resident. *It is additionally necessary*, in order to establish that such situations are objectively comparable, *that*, due to that non-resident’s receiving the major part of his income in the Member State of employment, *the Member State of residence is not in a position to grant him the advantages which follow from taking into account his aggregate income and his personal and family circumstances*’.¹⁹

¹⁵ — Point 76.

¹⁶ — Paragraph 29. That means, *a fortiori*, that the fact of receiving almost 60% of his income in one State — as X does in the Netherlands in the present case — allows, in principle, that State to take into account the personal and family circumstances of the taxpayer in question.

¹⁷ — Paragraph 54. Emphasis added.

¹⁸ — Paragraph 55. Emphasis added.

¹⁹ — Emphasis added. Furthermore, as in this instance, ‘the fact that that worker left to pursue his occupational activity in a non-member State and not in another EU Member State does not affect that interpretation’ (judgment of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, operative part).

45. It necessarily follows from the foregoing that, in a situation in which there is no taxable income in the Member State of residence, discrimination could arise if the taxpayer's personal and family circumstances were not taken into account either in the Member State of residence or in the Member State of employment.²⁰

46. In the present case, X undeniably satisfies the first two conditions: he receives no taxable income in Spain; and that State of residence is therefore unable to grant him the tax advantages linked with his personal and family circumstances. As regards the third condition, it is clear that he receives the major part (and indeed all) of his work-related income *elsewhere* than in the State of residence, namely 60% in the Netherlands and 40% in Switzerland.

3. The comparability of the situations where several States of employment are involved

47. I do not believe that the fact that the taxpayer receives the major part of his income in *several* States of employment has an impact on the application as a matter of principle of the *Schumacker* exception.

48. In fact, the decisive criterion is that it is impossible for a State to take the taxpayer's personal and family circumstances into account because he does not have sufficient taxable income, whereas those circumstances can be taken into account *elsewhere* by reason of an adequate source of income.

49. Although the Court has thus far envisaged only a single State of employment when examining the comparability of the situations, that is solely because of the factual background to the requests for a preliminary ruling submitted to it, since, from a theoretical viewpoint, the fact that there are a number of States of employment does not alter the parameters of the analysis.

50. To my mind, moreover, that interpretation finds confirmation in the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), and the subsequent decision in the judgment of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750).

51. In the judgment in *de Groot*, the Court expressly recognised that the Member States are free 'to alter, by way of bilateral or multilateral agreements for the avoidance of double taxation, that correlation between the total income of residents and residents' general personal and family circumstances to be taken into account by the State of residence'.²¹ However, the Court was careful to point out that those mechanisms must 'permit the taxpayers in the States concerned to be certain that, as the end result, all their personal and family circumstances will be duly taken into account, irrespective of how those Member States have allocated that obligation amongst themselves, in order not to give rise to inequality of treatment which is incompatible with the Treaty provisions on the freedom of movement for workers and in no way results from other disparities between the national tax laws'.²²

52. It is therefore not precluded that a taxpayer's personal and family circumstances is taken into account by a number of Member States, provided that in each of those States the income is sufficient to enable those circumstances to be taken into account. Again, the only requirement is that those circumstances are taken into account in their entirety, whether by one or by several Member States.

20 — See, to that effect, judgment of 10 May 2012, *Commission v Estonia* (C-39/10, EU:C:2012:282, paragraph 53) and, for an application of the principle, judgment of 1 July 2014, *Wallentin* (C-169/03, EU:C:2004:403, paragraphs 17 and 18).

21 — Judgment of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750, paragraph 99).

22 — Judgment of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750, paragraph 101).

53. Indeed, would it not be paradoxical if a citizen of the Union who exercises one of the fundamental freedoms guaranteed by the Treaties in two Member States did not benefit from the *Schumacker* exception, when a citizen who has exercised that freedom in only one Member State would benefit from it? it is sufficient to imagine that Mr Schumacker, residing in Belgium, worked half-time in Germany and half-time in the Netherlands. Would the exception not have applied?

4. *Intermediate conclusion*

54. In the light of the foregoing considerations, I therefore consider that the provisions of the Treaty on freedom of movement preclude national legislation under which a citizen of the Union whose work-related income is taxed in the amount of approximately 60% by a Member State in which he does not reside and approximately 40% by a third State may not deduct from his work-related income taxed by the first Member State the negative income relating to the immovable property in the State of residence, in which he has no significant income or has only such a low income that tax relief cannot be granted in that State.

55. Since I propose that the first question be answered in the affirmative, it is appropriate to address the other questions submitted by the referring court.

C – *Second question*

56. The second questions concerns, in essence, whether the obligation to grant the taxpayer the tax advantages linked to his personal circumstances is borne by a single Member State or by each State of activity, and in what proportion. The referring court also wonders whether the Member State of activity must be understood as the State in which the activity is in fact performed or as the State which is competent to tax the income from the activity.

57. First of all, since it is a question of taking a taxpayer's personal and family circumstances into account for the purpose of granting him a tax advantage, the 'State of activity' can only be a State which is competent to impose taxes on the taxpayer. It is not possible for a State to take an individual's personal and family circumstances into account if that individual does not have any taxable income in that State.

58. Next, as regards the apportionment of that taking into account, the answer must again be sought in the objective underlying the body of case-law initiated by the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31). It is a question of ensuring that the taxpayer's personal and family circumstances are taken into account.

59. Indeed, in the absence of unifying or harmonising measures in EU law the Member States remain competent to determine the criteria for taxation of income with a view to eliminating double taxation, where appropriate by means of conventions.²³ From the same aspect, the Court has also held that it was open to the Member States to take into consideration the tax advantages which might be granted by another Member State imposing tax. However, that possibility is permitted 'provided that, irrespective of how those Member States have allocated that obligation amongst themselves, their taxpayers are guaranteed that, *as the end result, all their personal and family circumstances will be duly taken into account*'.²⁴

23 — See in particular, to that effect, judgment of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750, paragraph 93 and the case-law cited).

24 — Judgment of 12 December 2013, *Imfeld and Garcet* (C-303/12, EU:C:2013:822, paragraph 79). Emphasis added.

60. It therefore appears to me that the only way in which the freedom of the Member States can be reconciled with the requirement to take the taxpayer's entire personal and family circumstances into account is to grant the advantage in question in proportion to the income taxed in each State of employment concerned.²⁵

61. That solution is not only consistent with the objectives of the fundamental freedoms pursued by the Treaties, but it also protects the sovereignty of the Member States in relation to direct taxation. The allocation between the Member States of the power to impose taxes is thus preserved.

62. I note, moreover, that that solution also finds favour in the literature in which the scenario of a number of States of employment has been examined.²⁶

63. To my mind, the answer to the second question submitted by the referring court should therefore be that, where a taxpayer has no significant income in his State of residence, which for that reason cannot grant him the tax advantages associated with his personal and family circumstances, each Member State in which an activity is performed and which is competent to tax the income from that activity must, by taking the taxpayer's personal and family circumstances into account, authorise the deduction of the negative income such as that at issue in the present case in proportion to the income which it taxes, provided that the income in that State is sufficiently large to grant him the advantages at issue.²⁷

D – Third question

64. By its third question, the referring court asks, in essence, whether the answer to the preceding question is different where the non-resident receives part of his taxable income in the territory of a third State, which, moreover, is not a member of the EEA.

65. The impact of performing an activity in a third State on the examination of the compatibility of the situation against the criteria identified by the Court in the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), has already been examined by the Court.

66. In the case giving rise to the judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406), the taxpayer in question was a German national who lived in Germany and worked in the Netherlands, but who had left to work in the United States for three months.

67. In its judgment, the Court observed that a non-resident taxpayer who has not received, in the State of employment, all or almost all his family income from which he benefited during the year in question as a whole is not in a comparable situation to that of residents of that State. The Court inferred that the Member State in which a taxpayer had received only part of his taxable income during whole of

25 — Indeed, that solution had been supported by the Netherlands Government in the case giving rise to the judgment of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750) and the Court had expressly rejected it (see paragraph 98 of that judgment). However, the issue in that case was the partial taking into account by the Member State of residence, when the taxpayer had received sufficient income in that State for his personal and family circumstances to be taken into account. The Court was therefore logically and pertinently able to reject the argument by relying on the principle that the taxpayer's personal ability to pay, when all of his income and his personal and family circumstances were taken into account, may be more easily assessed in the place which is the centre of his personal and economic interests, that is to say, in general, the place of his normal residence.

26 — See, to that effect, Niesten, H., 'Growing Impetus for Harmonisation of Personal and Family Allowances: Current State of Affairs of the Schumacker-Doxtrine after Imfeld and Garcet', *EC Tax Review*, 2015-4, pp. 185 to 201, in particular pp. 198 and 199. According to the author, 'The rationale legis of the fractional taxation of non-residents, i.e., the proportional grant of the benefits in the source States, therefore seems fair and consistent' (p. 198). See also Wattel, P.J., 'Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice', *European Taxation*, 2000, pp. 210 to 223, in particular p. 222.

27 — In no case can the *Schumacker* exception give rise to a negative tax or to a tax refund on the basis that the income is insufficient.

the year at issue was not bound to grant him the same advantages which it granted to its own residents.²⁸ In addition, the Court considered that that conclusion was not called into question by the fact that the party concerned had left his employment in a Member State in order to pursue his occupational activity, not in another Member State, but in a non-member State.²⁹

68. The answers to be given to the first and second questions are therefore not different where one of the States in which the taxpayer receives his income is not a Member State of either the European Union or the EEA.

69. For the sake of completeness, as regards, more particularly, Swiss Confederation, I am of the view that the shared obligation to take the taxpayer's personal and family circumstances into account would apply to that State.

70. In fact, that constitutes an application of the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), where there are several States of activity. That judgment precedes the signature of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6; 'the Agreement'). Consequently, in accordance with Article 16(2) of the Agreement, account must be taken of that case-law.³⁰

E – Fourth question

71. By the fourth question, the referring court asks whether the fact that the legislation of the Member State of residence (in this instance the Kingdom of Spain) allows a resident taxpayer to deduct the mortgage interest relating to his own dwelling and to offset the tax losses arising therefrom during the year in question against possible income received in that State in a number of later years has an impact on the questions to be given to the preceding questions.

1. The hypothetical nature of the fourth question

72. I observe that, in the case at issue in the main proceedings, it is apparent from the request for a preliminary ruling that X would have been unable to benefit from such an advantage in Spain after 2007.³¹

73. The question therefore appears to be hypothetical. Consequently, it is inadmissible.³²

28 — See judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 34).

29 — See judgment of 18 June 2015, *Kieback* (C-9/14, EU:C:2015:406, paragraph 35 and operative part).

30 — The Court confirmed the application of the *Schumacker* case-law in the context of the Agreement in the judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121). In the case giving rise to that judgment, the Federal German Republic refused the benefit of joint taxation with the use of the 'splitting' procedure to spouses who were nationals of that State and were taxed in that State on the ground that they lived in Switzerland. The Court held that, in the light of the judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31); of 11 August 1995, *Wielockx* (C-80/94, EU:C:1995:271); and of 27 June 1996, *Asscher* (C-107/94, EU:C:1996:251), no contracting party could rely on the possibility of drawing a distinction between taxpayers who are not in comparable situations in order to refuse that advantage to a couple in Mr and Mrs Ettwein's situation (judgment of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraph 48)). The Swiss Federal Court also confirmed the application of the *Schumacker* case-law in a judgment of 26 January 2010 (Joined Cases 2C.319/2009 and 2C.321/2009). See, in that regard, Heuberger, R., and Oesterhelt, St., 'Swiss Salary Withholding Tax Violates Free Movement of Persons Agreement with the European Union', *European Taxation*, 2010, pp. 285 to 294.

31 — In his written observations and at the hearing on 29 June 2016, X confirmed the information for the financial years before 2007, and also for the financial years 2007 to 2011. He also stated that after 2011 he has no longer been considered a Spanish resident. That information was not disputed by any of the interveners in the proceedings.

32 — See, to that effect, judgment of 29 January 2013, *Radu* (C-396/11, EU:C:2013:39, paragraph 24).

74. However, if the Court did not share that interpretation of the question, since the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred in its request for a preliminary ruling to the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763), and since the Kingdom of Belgium and the United Kingdom of Great Britain and Northern Ireland have commented on that point in their written observations, I shall also address the question, in the alternative.

2. In the alternative, the lack of impact of the possibility of deferring the tax advantage

75. In the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763), the Court held that the legislation which prevented a parent company from deducting losses incurred by a non-resident subsidiary, where that subsidiary had exhausted the possibilities available in its State of residence of having the losses taken into account for the period concerned or for future periods, was contrary to EU law.

76. The analogy is tempting. However, I do not think that it is relevant.

77. First of all, as the Commission states in its written observations, the answer given by the Court in the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763) concerns the imputation of losses and not, as in the present case, the deduction of costs. More specifically, I note that in the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), the exception authorised by the Court relates only to the advantages associated with the taxpayer's personal and family circumstances, which are very different from those at issue in the case giving rise to the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763). In addition, that judgment applies to a specific legal arrangement, namely an arrangement involving two legal persons which are separate but linked by their shareholding. The present case concerns one and the same taxpayer.

78. Next, it is established that a Member State cannot rely on the existence of a tax advantage granted unilaterally by another Member State in order to escape its obligations under the Treaty.³³

79. Next, I observe that, along the same lines, the Court has recently extended the established principle that the unfavourable consequences of the parallel exercise of the Member States' powers to impose taxation did not necessarily constitute restrictions prohibited by the FEU Treaty to the favourable consequences of the exercise of such powers.

80. In the judgment of 12 December 2013, *Imfeld and Garcet* (C-303/12, EU:C:2013:822), the Court rejected the argument of the Estonian Government, which sought to avoid the risk of a double advantage by applying by analogy the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763). According to the Court, the possibility of a double advantage would in any event be only the result of the parallel application of the national tax laws in question.³⁴

81. That said, as I have already pointed out above, the Court leaves the Member States concerned the freedom to take into consideration the tax advantages which may be granted by another Member State imposing tax, provided that all the taxpayer's personal and family circumstances are duly taken into account.³⁵

33 — See, to that effect, judgment of 12 December 2013, *Imfeld and Garcet* (C-303/12, EU:C:2013:822, paragraph 61).

34 — See, to that effect, judgment of 12 December 2013, *Imfeld and Garcet* (C-303/12, EU:C:2013:822, paragraph 78).

35 — See, to that effect, judgment of 12 December 2013, *Imfeld and Garcet* (C-303/12, EU:C:2013:822, paragraph 79).

82. In that regard, the presence of more than one Member State is not such as to render obsolete the case-law of the Court according to which any administrative difficulties in obtaining the necessary information may be adequately overcome as a result of the mutual administrative assistance provided for in Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.³⁶

83. In addition, it should also be borne in mind that, in that context, there is nothing to prevent the tax authorities concerned from requiring of the taxpayer himself the proof which they deem necessary in order to assess whether or not to grant the requested deduction.³⁷

84. Last, I shall conclude by stating that the application of the *Schumacker* exception in the case in the main proceedings requires nothing of the State of employment other than to apply its national law to the proportion of the income received in its national territory.

85. Accordingly, it follows from the foregoing considerations that the fact that the legislation of the taxpayer's State of residence allows him to deduct the negative income from his dwelling from any income in later years has no impact on the answers to the first three questions.

VI – Conclusion

86. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

- (1) The provisions of the Treaty on freedom of movement preclude national legislation under which a European Union citizen whose work-related income is taxed in the amount of approximately 60% by a Member State in which he does not reside and approximately 40% by a third State may not deduct from his work-related income taxed by the first State of employment the negative income relating to immovable property in the State of residence in which he has no significant income or such a low income that tax relief cannot be granted in that State.
- (2) Where a taxpayer has no significant income in his State of residence, which for that reason cannot grant him the tax advantages associated with his personal and family circumstances, each Member State in which an activity is performed and which is competent to tax the income from that activity must, by taking into account the taxpayer's personal and family circumstances, authorise the deduction of the negative income, such as that at issue in the present case, in proportion to the income which it taxes, provided that the income in that State is sufficiently large to grant him the advantages in question.
- (3) The answers to the first and second questions for a preliminary ruling are not different where one of the States in which the taxpayer receives his income is not a Member State of either the European Union or the European Economic Area.

36 — OJ 2011 L 64, p. 1. See, to that effect, judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 45), and also judgment of 28 October 1999, *Vestergaard* (C-55/98, EU:C:1999:533, paragraph 26) and, in the literature, Niesten, H., 'Growing Impetus for Harmonisation of Personal and Family Allowances: Current State of Affairs of the Schumacker-Docctrine after Imfeld and Garcet', *EC Tax Review*, 2015-4, pp. 185 to 201, in particular p. 194; Wattel, P.J., 'Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice', *European Taxation*, 2000, pp. 210 to 223, in particular p. 222.

37 — See in particular, to that effect, judgments of 28 October 1999, *Vestergaard* (C-55/98, EU:C:1999:533, paragraph 26); of 11 October 2007, *ELISA* (C-451/05, EU:C:2007:594, paragraph 95); and also of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 100) and, in the literature, Wattel, P.J., 'Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice', *European Taxation*, 2000, pp. 210 to 223, in particular p. 222; Cloer, A., and Vogel, N., 'Swiss Frontier Worker Can Claim the Benefits of Schumacker: The ECJ Decision in *Ettwein* (Case C-425/11)', *European Taxation*, 2003, pp. 531 to 535, in particular p. 534.

(4) The fourth question is inadmissible.

In the alternative, the fact that the legislation of the taxpayer's State of residence allows the negative income from the personal dwelling to be deducted from any income in later years has no impact on the answer to be given to the first three questions.