Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 December 2011 [1]

Case C-498/10

X

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Freedom to provide services — Obligation on the resident recipient of a service to withhold tax at source from remuneration if the service provider is resident in another Member State — Discrimination — Restriction — Grounds of justification — Effective collection and recovery of tax — Directive 76/308)

I – Introduction

1. The present case again raises the question whether the taxation of non-resident service providers by means of taxation at source, in which the resident recipient of services is required to deduct the tax from the remuneration and to pay it to the tax authority, is compatible with the freedom to provide services.

2. The question arises in the context of friendly matches played in the Netherlands by two British football clubs against a Netherlands football club at the latter's invitation. The Netherlands football club omitted to withhold tax at source from the remuneration which it paid to the British clubs for their participation in the games, as it was required to do under Netherlands law. The tax authority is now demanding from it the back payment of the tax. The Netherlands club argues, however, that the withholding of tax at source infringes the freedom to provide services, since the obligation to withhold tax at source applies only if the visiting football club is established in another country, whereas a football club established in the Netherlands would have had to deal with its tax affairs itself.

3. The request for a preliminary ruling referred to the Court of Justice by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) in this connection provides the Court with an opportunity to clarify its past case-law on the withholding of tax at source, as reflected in particular in the judgments in *FKP Scorpio Konzertproduktionen* [2] and *Truck Center*.[3] In so doing, it has also to take into account the fact that in the present case, unlike the aforementioned cases, instruments for obtaining assistance with the cross-border recovery of tax were available under European Union (EU) law.

1 — Original language: German.

2 — Judgment in Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461.

3 — Judgment in Case C-282/07 *Truck Center* [2008] ECR I-10767.

II – Legislative background

4. The background to the present case in EU law is formed by the legislation on the freedom to provide services and by Directive 76/308,[4] as amended by Directive 2001/44 ('Directive 76/308').[5] As the dispute in the main proceedings concerns the assessment of the lawfulness of tax recovery notices for the fiscal years 2002 and 2004, the answer to the reference for a preliminary ruling should still be based on the provisions of the Treaties in the version of the Amsterdam Treaty, in particular Article 49 EC, and not Article 56 TFEU. Provisions of the Netherlands Law on Wages Tax and of a double taxation convention are also relevant.

A – *National law*

5. Under Article 1 of the Wet op de loonbelasting 1964 (Law on Wages Tax; 'Wet LB 1964'), a direct tax, known as wages tax, is levied on, inter alia, 'foreign companies.' Under Article 5b(1) of the Wet LB 1964 – in so far as is relevant to the main proceedings – a 'foreign company' is a group of natural persons or legal persons, in the main not resident or established in the Netherlands, where the members of the group, individually or jointly, under a short-term agreement, engage professionally in a branch of sport in the Netherlands.

6. Under Article 8a(1)(a) of the Wet LB 1964, the person with whom the appearance on a stage or field of play is agreed, provided that he or she also pays the fee, is required to withhold wages tax. Under Article 35h(1) of the Wet LB 1964, that tax amounts to 20%.

7. If, however, the match is agreed with a 'domestic company,' the person who pays the fee is under no obligation to withhold wages tax at source, since a domestic company is subject to corporation tax on the fee received, which constitutes part of its profits. In the years concerned, 2002 and 2004, the corporation tax rate was 34.5%, the rate for any taxable amount up to EUR 22 689 being 29%.

B – *The Double Taxation Convention between the Netherlands and the United Kingdom*

8. Article 17(1) of the Convention of 7 November 1980 between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains ('the DTC') provides, in summary, that income derived by entertainers and athletes from their personal activities in the Netherlands may be taxed in that country. Under Article 17(2), that is also the case where that income accrues, not to the entertainer or athlete, but to another (legal) person.

9. Article 22 of the DTC provides for the possibility of the tax withheld from the fee in the Netherlands to be set off against the tax on the fee fixed and payable in the United Kingdom.

4 — Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18). This directive was codified by Council Directive 2008/55/EC of 26 May 2008 (OJ 2008 L 150, p. 28), which was repealed and replaced by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1).

5 — Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC (OJ 2001 L 175, p. 17).

III – Facts of the case and the questions referred

10. X is a professional football club established in the Netherlands. In July 2002 and March 2004, X agreed to play friendly matches against two professional football clubs established in the United Kingdom ('the British clubs'). In connection with those matches, which took place in the Netherlands in August 2002 and August 2004, X paid the British clubs EUR 133 000 and EUR 50 000 respectively. The British clubs did not pass those fees on to their players.

11. As X had neither withheld nor paid wages tax in respect of those fees, it received from the Netherlands tax authority tax recovery notices for EUR 26 050 and EUR 9 450 (20% of the fees, after deduction of certain costs). X successfully appealed against those notices at first instance. At second instance, however, the club was largely unsuccessful and therefore lodged appeals in cassation with the Hoge Raad der Nederlanden, essentially claiming that the Netherlands withholding tax in question is incompatible with the freedom to provide services.

12. The Hoge Raad der Nederlanden requests the Court of Justice to give a ruling on the following questions:

'1. Must Article 56 TFEU be interpreted as meaning that a restriction on the freedom to provide services exists if the recipient of a service, provided by a service provider established in another Member State, is obliged under the legislation of the Member State where the service recipient is established and where the service is provided, to withhold tax on the remuneration payable for that service, whereas that withholding obligation does not exist in relation to a service provider who is established in the same Member State as the service recipient?

2(a). If the answer to the previous question has the effect that legislation which provides for the imposition of tax by a service recipient hinders the freedom to provide services, can such a hindrance then be justified by the need to ensure that taxes are levied and collected from foreign companies whose stay in the Netherlands is short and which are difficult to monitor, with the result that the implementation of the taxing powers allocated to the Netherlands becomes problematic?

2(b). In that case, is it relevant that the legislation was later amended for situations such as the one at issue here, in the sense that the tax was unilaterally waived because it proved incapable of being simply and efficiently applied?

3. Does the rule go beyond what is necessary given the opportunities for mutual assistance in the recovery of taxes presented in particular by Directive 76/308/EEC?

4. In answering the foregoing questions, is it relevant that the tax which is payable on the remuneration in the Member State where the service recipient is established can be set off against tax which is payable on that remuneration in that other Member State?'

13. X, the Netherlands, Belgian, German, French, Italian, Swedish and United Kingdom Governments and the European Commission took part in the proceedings before the Court of Justice, the Belgian, French, Italian and United Kingdom Governments submitting only written observations.

IV – Assessment

A – *The first question referred*

14. In its first question the Hoge Raad der Nederlanden asks whether a restriction on the freedom to provide services exists if the recipient of a service, provided by a service provider established in another Member State, is obliged under the legislation of the Member State in which the service recipient is established and in which the service is provided, to withhold tax on the remuneration agreed for that service, whereas that obligation does not exist in relation to a service provider who is established in the same Member State as the service recipient.

15. By participating in the friendly matches in the Netherlands for remuneration, the British clubs provided for X services within the meaning of Article 49 et seq. EC.[6] As the freedom to provide services is for the benefit of both providers and recipients of services,[7] X can rely on those provisions.

16. Under the Wet LB 1964, X was required to withhold at source and pay wages tax because the British clubs were established in another country. As it did not do so, the tax is being recovered from it. If X had arranged the friendly matches with domestic clubs, it would not have been affected by that obligation and liability. The cross-border use of services is therefore associated with additional obligations and liability risks vis-à-vis the tax authority.

1. The applicable test: discrimination or restriction?

17. According to settled case-law, any national rules which make the provision of services between Member States more difficult than the provision of services purely within one Member State constitute a restriction of the freedom to provide services, which is prohibited in principle.[8] In this respect, it is sufficient for the rule in question to be likely to make the exercise of that freedom less attractive.[9]

18. So far as the withholding of tax at source in respect of cross-border services is specifically concerned, the Court of Justice ruled in the judgment in *FKP Scorpio Konzertproduktionen* that the obligation on the recipient of a service to withhold the tax from the remuneration paid to a service provider established in another Member State and the possible liability of the recipient of the service for the tax may discourage undertakings from calling on service providers established in other Member States.[10] That obligation and possible liability constitute a restriction of the freedom to provide services, which is, in principle, prohibited.[11] It was only at a subsequent stage of its examination that the Court of Justice reached the conclusion that that restriction was justified by the need to ensure the effective collection of income tax.[12]

6 — See judgments in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73, and Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 27 et seq.

7 — Judgments in Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 35, *FKP Scorpio Konzertproduktionen*, cited in footnote 2, paragraph 32, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 51, and Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 85.

8 — Judgments in Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 33, Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 67, and Case C-56/09 *Zanotti* [2010] ECR I-4517, paragraph 42.

9 — Judgments in Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, paragraphs 32 and 39 et seq., Case C-287/10 *Tankreederei I* [2010] ECR I-14233, paragraph 15, and *Football Association Premier League*, cited in footnote 7, paragraph 85.

10 — Judgment in *FKP Scorpio Konzertproduktionen*, cited in footnote 2, paragraph 33.

11 — Ibid., paragraph 34.

12 — Ibid., paragraph 35.

19. However, in view of the judgment in *Truck Center* [13] concerning the freedom of establishment, which was delivered two years later, the Hoge Raad der Nederlanden expresses doubts as to whether the Court of Justice would make the same assessment today or whether it has not taken a different line in the meantime. According to the judgment in *Truck Center*, a restriction of the freedom of establishment does not exist when the difference in the treatment of domestic and foreign companies consists in the application of different taxation methods depending on whether those companies are established in the source State or in another Member State.

20. *Truck Center* concerned a national arrangement under which the interest on a loan paid by a resident company to a non-resident recipient company is subject to tax at source, whereas such interest is subject (only) to corporation tax in the case of a resident recipient company.

21. In that case, the Court of Justice essentially considered whether that application of different taxation arrangements constituted discrimination based on the location of the registered offices of companies. Although it emphasised that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must also be regarded as restrictions, [14] the Court did not go into any greater depth. Rather, it described at length why the situations were not comparable. [15] Before concluding that there was no 'restriction' on the freedom of establishment, it stated that the difference in treatment resulting from the tax legislation did not necessarily procure an advantage for resident recipient companies. [16]

22. Different approaches were thus adopted in the examinations that led to the judgments in *FKP Scorpio Konzertproduktionen* and *Truck Center*. In the former, a restriction test was carried out in which the mere existence of discrimination against a cross-border situation vis-à-vis a domestic situation leads to the assumption of a restriction on the fundamental freedom which is prohibited in principle. In the latter, on the other hand, a discrimination test was essentially undertaken, in which it was the comparability of the situations which led to the assumption of discrimination which is prohibited in principle.

23. From this it cannot be inferred, however, that the judgment in *Truck Center* represents a departure from the judgment in *FKP Konzertproduktionen* or, generally, a change of case-law. It is rather a matter of both approaches being found in case-law for some considerable time, apparently without its having been explained exactly what the relationship is between them. [17] Historically, at any rate, the restriction test is the more recent approach. In particular, the Court of Justice regarded, even after the judgment in *Truck Center*, national tax arrangements as constituting a restriction, prohibited in principle, on the freedom to provide services if the treatment of a cross-border situation is less advantageous than that of a domestic situation. [18]

24. Despite the difference of approach, both judgments reach the conclusion that the taxation at source, which in each case is applicable only to cross-border situations, is admissible under EU law. It should be emphasised in this respect that in both judgments the Court of Justice recognised the State's need for effective tax coverage and tax collection. In the former judgment, however, it did so only at

13 — Cited in footnote 3.

14 — Ibid., paragraph 33.

15 — Ibid., paragraphs 41 to 48.

16 — Ibid., paragraph 49.

17 — See my Opinion in Case C-222/07 *UTECA* [2009] ECR I-1407, at point 77, and the case-law cited therein, and Kokott/Ost, *Europäische Grundfreiheiten und nationales Steuerrecht*, EuZW 2011, pp. 496, 497 et seq.

18 — Judgments in *X and Passenheim-van Schoot*, cited in footnote 9, paragraphs 32 and 39 et seq., *Zanotti*, cited in footnote 8, paragraph 42 et seq., and *Tankreederei I* cited in footnote 9, paragraph 15 et seq.

the level of justification, having already confirmed the existence of a restriction which was prohibited in principle.[19] In the latter judgment, by contrast, it considered that aspect in the context of comparability and thus treated it as a precondition for the existence of discrimination or a restriction.[20]

25. The situation in the present case has far more parallels with *FKP Scorpio Konzertproduktionen* than with *Truck Center*. As in *Scorpio*, the present case concerns a difference in the treatment of residents depending on whether they have recourse to the services of a resident or non-resident service provider. In such a situation it must be asked whether the difference in treatment constitutes discrimination against a resident who has recourse to a cross-border service. If that is the case, the freedom to provide services is subject to a restriction which is prohibited in principle.

26. By contrast, the judgment in *Truck Center* focused on the question whether the situations of residents and non-residents receiving interest from a domestic source are comparable. Proceeding on the basis of the finding that the situations of residents and non-residents are not, as a rule, comparable,[21] the Court of Justice concluded that their situations with respect to taxation at source were not in fact objectively comparable.

27. It must be pointed out, moreover, that the basic provisions of the former EC Treaty and now of the TFEU concerning the freedom of establishment, the freedom to provide services and the free movement of capital[22] refer primarily to restriction and not to discrimination.[23]

28. That being so, I consider the restriction test preferable in the present case. However, that test must not be confused with the more general restriction test which the Court of Justice uses in areas other than tax law and in which it assumes there to be a restriction even if there is no unequal treatment, provided that the national arrangement is liable to render the exercise of a fundamental freedom less attractive.[24] So broad an approach must be rejected in principle in the area of tax law, since it would mean that, in the final analysis, all duties, no matter what kind, would have to be examined against EU law.[25] However, EU law offers no guarantee to a citizen of the EU that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may or not be to the citizen's advantage in terms of taxation, depending on the circumstances.[26]

29. The tax-law restriction test used here differs from a discrimination test which also includes cases of factual discrimination essentially with respect to the duty to state one's case and the burden of proof: in principle, discrimination against cross-border situations under tax law requires justification.

19 — Judgment in *FKP Scorpio* Konzertproduktionen, cited in footnote 2, paragraph 3 et seq.

20 — Judgment in *Truck Center*, cited in footnote 3, paragraphs 41 to 48.

21 — Ibid., paragraph 38, and the case-law cited therein.

22 — See the first paragraph of Article 43 EC, the first paragraph of Article 49 EC and 56(1) EC and the first paragraph of Article 49 TFEU, the first paragraph of Article 56 TFEU and 63(1) TFEU.

23 — See also my Opinion in *UTECA*, cited in footnote 17, at point 77.

24 — Judgments in Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11, *Liga Portuguesa de Futebol Profissional and Bwin International*, cited in footnote 7, paragraph 51, and Joined Cases C-372/09 and C-373/09 *Peñarroja Fa* [2011] ECR I-1785, paragraph 50.

25 — See my Opinions in Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, at point 62, and in Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, at points 48 to 53, and Kokott/Ost, cited in footnote 17, p. 498.

26 — Judgments in Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45, and Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 76.

2. Application of the restriction test to the present case

30. In the present case there is no question that the obligation to withhold tax and the associated liability risks may render the use of services provided on a cross-border basis less attractive to the resident recipient than the use of the services of resident providers who must deal with their tax affairs themselves.

31. The Netherlands Government maintains, however, that any administrative burden on the recipient is unlikely in itself to lead to the assumption that there is a restriction on the freedom to provide services. An overall view should, rather, be taken of the cross-border service as such. As any burden on the recipient in the present case is offset by a substantial easing of the administrative burden on the service provider, and, furthermore, the tax rate is lower than in purely domestic situations, there is no restriction.

32. An approach of that nature, however, constitutes an inadmissible reduction of the scope of the freedom to provide services, since it fails to recognise that the recipient and the provider of services are two distinct legal entities, each with its own interests. Each must therefore be able to take advantage of the freedom to provide services if its rights are impaired. That would not be guaranteed, however, if the existence of a restriction were to be denied solely because the measure which is a burden on one contractual partner (in this case, X) is to the advantage of the other (in this case, the British clubs). Rather, by analogy with case-law according to which a fiscal disadvantage which infringes a fundamental freedom cannot be regarded as compatible with EU law because of the possible existence of other advantages, when it is considered, in a situation such as the present one, whether a restriction exists, the consideration of any advantages to the service provider must be rejected.[27] These cannot be deemed relevant until a later stage, when proportionality is considered.

33. In the present case, then, the existence of a restriction on the freedom to provide services, which is prohibited in principle, must be confirmed in keeping with settled case-law on the freedom to provide services and, in particular, with the judgment in *FKP Scorpio Konzertproduktionen*.

3. Existence of a further restriction due to higher taxation?

34. A further restriction might exist if the domestic tax burden on non-resident service providers was in effect higher than that on resident service providers, thus if, in other words, the tax at source resulted in a higher tax being levied than the tax to be paid by domestic service providers.[28] Although the Hoge Raad der Nederlanden referred to the various tax rates in its decision to refer, it did not mention the possibility of different levels of taxation in its questions or single them out for discussion at any other point. However, as various participants in the proceedings before the Court of Justice have addressed this issue at greater length, a number of brief comments are called for.

35. It should first be remembered that the rate of tax at source in the tax years in question was 20% of the fee. In the recovery notices addressed to X, that tax rate was applied to the fees which it paid only 'after deduction of certain expenses.' During the oral proceedings the Netherlands Government declared that any wages paid by a club to its players from a fee of that kind did not constitute deductible costs in that sense.

27 — Judgments in Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 53, Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 97, and Case C-284/09 *Commission* v *Germany* [2011] ECR I-9879, paragraph 71.

28 — Judgment in Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 55; see also the judgment in *Commission* v *Germany*, cited in footnote 27, paragraph 94, and my Opinion in *Truck Center*, cited in footnote 3, at point 66.

36. Even though the definition of 'foreign company' in the relevant Netherlands tax legislation appears to be much broader and may, in particular, include not only the foreign club but also all foreign players taking part in the match, the decision to refer cites only the British clubs as the service providers with whom the matches were arranged and to whom the fees were paid. As these fees were, moreover, not passed on to the players, there is something to be said – in the present case at least – for regarding only the British clubs themselves as service providers and, in that capacity, as subject to 'wages tax.'

37. Subject to closer examination by the referring court, it therefore seems consistent for the level of the withholding tax at issue to be measured against the level of corporation tax which a 'domestic company' would have had to pay, rather than against the income tax which have been applicable to resident players. The determinant rate of corporation tax, according to information provided by the referring court, was 29% up to a taxable amount of EUR 22 689 and otherwise 34%.

38. In purely nominal terms, the withholding tax rate is thus well below the corporation tax rate. However, a mere comparison of nominal rates does not in itself allow the conclusion that, in effect, the flat-rate taxation of foreign service providers is actually lower than the corporation tax which a 'domestic company' would have had to pay. Those participating in the proceedings before the Court of Justice thus came to quite different conclusions. This is a matter which must ultimately be clarified by the referring court. In doing so, it must take into account in particular the extent to which operating expenses may be deducted before the application of the appropriate tax rate. [29]

4. Answer to the first question referred

39. Regardless of the conclusion drawn by the referring court on the level of the tax burden, the answer to the first question referred must, in any event, be that it is a restriction on the freedom to provide services, which is prohibited in principle, for the recipient resident of one Member State of a service provided in that Member State to withhold tax from the agreed remuneration if the service provider is resident in another Member State, whereas he would not be under that obligation if the service provider was resident in the same Member State.

B – *The second question referred*

40. Secondly, the referring court wishes to know whether such a restriction may be justified by the need to guarantee the levying and collection of taxes in the case of foreign service providers whose stay in the Netherlands is short and which are difficult to monitor. It claims that it is evident from the legislative material that the Netherlands legislature also introduced the withholding tax for that reason.

41. In *FKP Scorpio Konzertproduktionen* the Court of Justice recognised effective tax recovery as being a compelling reason in the general interest which may justify a restriction on the freedom to provide services. The retention of tax at source and the liability rules supporting it constitute, in the Court's view, a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and of ensuring that the income concerned does not escape taxation in the State of residence and the State in which the services are provided. They are, moreover, a proportionate means of recovering the tax due to the State of taxation. [30] In *Truck Center*, too, the Court recognised the need of the State levying the tax at source for effective tax recovery. [31]

29 — For the consideration of certain operating expenses required by EU law, see the judgments in *Gerritse*, cited in footnote 28, paragraph 55, *FKP Scorpio Konzertproduktionen*, cited in footnote 2, paragraph 49, and Case C-345/04 *Centro Equestre de Lezíria Grande* [2007] ECR I-1425, paragraph 23.

30 — Judgment in *FKP Scorpio Konzertproduktionen*, cited in footnote 2, paragraphs 35 to 38.

31 — Judgment in *Truck Center*, cited in footnote 3, paragraph 47 et seq.

42. The fact that in those cases, unlike the present one, Directive 76/308, dealing with assistance in recovery, was not yet applicable to direct taxes [32] does not alter the fundamental legitimacy of that ground for justification, but must be taken into account in the context of the third question referred on the subject of proportionality.

43. It should therefore be noted that the taxation at source here under discussion is based on an acknowledged compelling reason in the general interest and that it is, in principle, likely to achieve its intended objective.

44. The referring court also asks in this context whether it is relevant in this respect that, in situations such as the one at issue here, the tax has in the meantime been unilaterally waived because it has proved incapable of being collected in a simple and efficient manner. 'Foreign companies' with whose country of registration a double taxation convention has been concluded have, after all, been excluded from taxation at source since an amendment to the legislation in 2007.

45. The decision of the national legislature to forego entirely the taxation of income earned in the Netherlands in cases in which a double taxation convention has been concluded with the country in which the service provider is established does not, however, call into question the appropriateness of taxation at source as an efficient means of collecting tax. Above all, it does not allow the conclusion to be drawn that taxation at source has no advantages for the tax authority over the direct taxation of non-resident service providers. It is, rather, more a matter of weighing up the situation, in which the Member State concerned is entitled to some latitude in its assessment and which is far more complex than it would seem to be. Thus, according to the submission of the Netherlands Government, that amendment was made in an effort to increase the attractiveness of the Netherlands for top athletes.

46. The answer to the second question referred should therefore be that the restriction on the freedom to provide services by reason of the taxation at source here at issue may be justified by the need to levy and collect tax from foreign service providers whose stay in the Netherlands is short and who are difficult to monitor. The fact that, in situations such as the present one, collection of the tax has in the meantime been waived is irrelevant in this respect.

C – *The third question referred*

47. The referring court would like to know, thirdly, whether, in view in particular of the opportunities for mutual assistance with enforcement presented by Directive 76/308/EEC, the tax at source in question goes beyond what is necessary.

48. In order for a restrictive measure to be justified it must, according to settled case-law, comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary to attain that objective. [33]

32 — In *FKP Scorpio Konzertproduktionen*, cited in footnote 2, paragraph 36, the Court made an explicit reference to this fact. For *Truck Center* see my Opinion in that case, cited in footnote 3, paragraph 41.

33 — Judgments in Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 58, *X and Passenheim-van Schoot*, cited in footnote 9, paragraph 47, and Case C-97/09 *Schmelz* [2010] ECR I-10465, paragraph 58.

49. Directive 76/308 establishes common rules on mutual assistance in order to ensure the recovery of certain sovereign claims.[34] The assistance provided ranges from the provision of any information which would be useful in the recovery,[35] through the notification of documents,[36] to the enforcement of foreign claims which are to be directly recognised by the enforcing State and to be treated, in principle, like its own.[37]

50. The purpose of the directive was to eliminate obstacles to the establishment and functioning of the common market resulting from the territorial limitation of the scope of application of national provisions relating to recovery.[38] Prior to the adoption of the directive it was not possible to enforce in one Member State a claim for recovery substantiated by a document drawn up by the authorities of another Member State.[39]

51. With a view to affording better protection to the financial interests of the Member States and to the neutrality of the internal market in view of the development of tax evasion, the scope of the directive, having initially been limited in essence to certain levies and duties, was extended to include certain taxes, including income tax.[40]

52. Even though the directive thus made the cross-border pursuit of tax claims possible, neither its intentions nor its power should be overestimated.

53. It could not completely replace the taxation at source of service providers resident abroad if only because a request for assistance could not be made if the total amount of the relevant claim or claims was less than EUR 1 500.[41] The directive thus made no claim whatsoever to replace that method of collecting tax.

54. It also became evident that the success rate of the assistance granted under the directive left a great deal to be desired. In its proposal for what was to become Directive 2010/24[42] and in its report of 4 April 2009[43] for the years 2005 to 2008, the Commission notes that the amounts actually recovered amounted to only approximately 5% of the amounts in respect of which recovery assistance had been requested.

55. Although the Member States cannot in principle rely on deficiencies in the cooperation between their tax authorities in order to justify restrictions on fundamental freedoms,[44] that situation and the conclusions drawn from it by the EU legislature in its adoption of Directive 2010/24 show that Directive 76/308 did not provide for the equivalent of taxation at source as a means of levying and collecting tax.

34 — Judgment in Case C-233/08 *Kyrian* [2010] ECR I-177, paragraph 34; see also the judgments in Case C-470/04 *N* [2006] ECR I-7409, paragraph 53, and Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 37.

35 — Article 4 of the directive.

36 — Article 5 of the directive.

37 — Articles 6 to 8 of the directive.

38 — Recitals 1 to 3 in the preamble to the directive; see also the judgment in *Kyrian*, cited in footnote 34, paragraph 3.

39 — Recital 1 in the preamble to the directive.

40 — Recitals 1 to 3 in the preamble to Directive 2001/44.

41 — Article 25(2) of Commission Directive 2002/94/EC of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EC (OJ 2002 L 337, p. 41) and Article 20(2) of Commission Directive 77/794/EEC of 4 November 1977 laying down detailed rules for implementing certain provisions of Directive 76/308/EEC (OJ 1977 L 333, p. 11).

42 — Commission proposal of 2 February 2009 for a Council directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (COM(2009)28 final), p. 2.

43 — Report from the Commission to the Council and the European Parliament on the use of the provisions on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (COM(2009)451 final), point 2.4.

44 — See my Opinion in *N*, cited in footnote 34, at point 114.

56. Contrary to the submissions by various governments, taxation at source is not required simply as a means of gaining knowledge of the taxable event in the case of a foreign service provider who stays in a Member State only briefly and possibly on only one occasion. For that, it would be sufficient to oblige the domestic recipient of the service to make an appropriate statement to the tax authority.

57. However, it must be acknowledged, with an eye to Directive 76/308 at least, that the Member States have a legitimate interest in ensuring that the tax is levied and collected by means of taxation at source.

58. It must also be borne in mind in the present context that refraining from levying a tax at source could be compensated for only by means of the direct collection of the tax from the foreign service provider. Although the restriction here at issue would then no longer exist, direct collection might, as various governments have pointed out, impose a serious burden on the foreign service provider in that he might have to submit a tax return in what was for him a foreign language and to cope with a tax system with which he was not familiar. As that might deter the foreign service provider from providing services in another Member State, it might in effect be even more difficult for the service recipient to take advantage of foreign services.

59. Quite apart from the considerable additional administrative burden which the cross-border recovery of tax would entail for the tax authorities, in the event of the many individual ad hoc services provided, collecting tax directly from the foreign service provider would not, therefore, necessarily constitute a less severe means than collection at source. [45]

60. The answer to the third question referred should therefore be that, with account taken of the opportunities for assistance with enforcement presented by Directive 76/308, the taxation at source here at issue does not go beyond what is necessary, provided that the restriction on the freedom to provide services consists solely in the taxation at source as such and not in a higher tax liability.

D – *The fourth question referred*

61. With its fourth question, the referring court seeks to establish whether it is relevant to the answers to Questions 1 to 3 that the tax payable on the remuneration in the Member State in which the service recipient is established can be set off against tax determined and payable on that remuneration by the foreign service provider in that other Member State.

62. As the restriction on the freedom to provide services identified in the present case consists in the obstruction of the service recipient in the exercise of that freedom by the obligation imposed on him to withhold tax at source and to pay it to the tax authorities and by the associated liability risks, it is basically irrelevant to the answers to the previous questions whether the service provider is able to set off the tax owed in the Netherlands against his tax liability in his home country.

63. It is only if the referring court comes to the conclusion that taxation at source results in higher taxation than the corporation tax applicable to domestic service providers, and the freedom to provide services is therefore subject to an additional restriction, that the ability to set off the tax will be relevant.

64. The referring court points in this context to the judgment in *Amurta*, [46] in which the Court of Justice did not exclude the possibility of a Member State succeeding in ensuring compliance with its obligations under EU law through the conclusion of a convention for the avoidance of double taxation with another Member State. Although, as various parties to the proceedings have remarked, that

45 — See also my Opinion in *Truck Center*, cited in footnote 3, at point 45 et seq.

46 — Judgment in Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 79.

judgment concerns the prevention of economic double taxation, whereas the present proceedings concern, at best, juridical double taxation, which current EU law does not require the Member States to eliminate,[47] the comments made by the Court seem to me to be applicable, since here, too, the question is ultimately whether the collection of excess tax in one Member State can be compensated for by means of a set-off in another Member State.

65. However, such compensation can satisfy the requirements of EU law only if application of the Convention allows the effects of the difference in treatment under national legislation to be completely neutralised.[48] That presupposes, in particular, that the compensation in the country of residence is granted even if the foreign income is liable to no, or less, tax there. It must therefore be granted regardless of the form of the tax levied on income by the country of residence. It is for the referring court to consider whether the DTC satisfies those requirements.

66. The answer to the fourth question should therefore be that it is irrelevant to the answers to Questions 1 to 3 whether the foreign service provider is able to set off the tax for which he is liable in the Member State of the service recipient against the tax which he owes in his own Member State, provided that the restriction on the freedom to provide services consists solely in the taxation at source as such and not in a higher tax liability.

V – Conclusion

67. I therefore propose that the Court of Justice give the following answers to the questions submitted by the Hoge Raad der Nederlanden:

1. A restriction on the freedom to provide services, which is prohibited in principle, occurs where the resident recipient of a service provided in his Member State is required to withhold tax at source from the agreed remuneration in the case where the service provider is resident in another Member State, whereas he would be subject to no such obligation if the service provider were resident in the same Member State.

2. That restriction on the freedom to provide services may be justified by the need to ensure the levying and collection of taxes from foreign service providers whose stay in the Netherlands is only short and who are difficult to monitor. It is irrelevant in this respect that the collection of tax is now waived in that Member State in situations such as that in the present case.

3. Even if account is taken of the opportunities for assistance with enforcement under Directive 76/308, the taxation at source here at issue does not go beyond what is necessary, provided that the restriction on the freedom to provide services consists solely in the taxation at source as such and not in a higher tax liability.

4. For the answers to Questions 1 to 3, it is irrelevant whether the foreign service provider is able to set off the tax owed in the service recipient's Member State against the tax owed in his own Member State, provided that the restriction on the freedom to provide services consists solely in the taxation at source as such and not in a higher tax liability.

47 — Judgments in Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraphs 20 to 24, Case C-128/08 *Damseaux* [2009] ECR I-6823, paragraph 25 et seq., and Case C-487/08 *Commission* v *Spain* [2010] ECR I-4843, paragraph 56.

48 — Judgments in Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraphs 37 to 39, and *Commission* v *Spain*, cited in footnote 47, paragraphs 59 to 64.