22 November 2013
nr. 13/01154

Judgment

concerning the cassations appeal of [X] living at [Z] (hereafter: the interested party) against the judgment of the regional court of Gelderland of 29 January 2013, nr. AWB 12/5955, concerning an assessment for inheritance tax.

1 Proceedings before the courts deciding about the facts

An assessment for inheritance tax has been filed to the interested party in respect of his inheritance from the estate of [A], deceased in 2011.

Applying article 7:1a of the General Act on Administrative Law (Awb), the interested party filed a direct appeal to the regional court against this assessment.

The regional court rejected the appeal against this assessment. The judgment of the regional court has been attached tot his judgment.

2 Proceedings in cassation

The interested party filed a cassations appeal against this judgment of the regional court. The notice of appeal has been attached tot his judgment and forms part of it.

The Secretary of State of the Exchequer has filed a notice of defence.

The Advocate-General R.L.H. IJzerman gave his opinion on 30 September 2013 and concluded that the cassations appeal should be declared well-founded.

The Secretary of State has responded in writing to the opinion of the Advocate-General.

3. Evaluation of the complaints

3.1.1. On 1 July 2011 [A.] (hereafter: the de cuius) died. His heirs are his two children, one of them the interested party and his spouse.

3.1.2. The estate does not include enterprise assets (ondernemingsvermogen) within the meaning of the facility for enterprise succession (hereafter: the facility) within the meaning of chapter IIIA of the Succession Act.

3.2.1. Before the Regional Court (rechtbank) the issue was whether the interested party could nonetheless invoke the facility on the ground of a violation of the prohibition of

discrimination contained in Article 26 of the International Covenant on Civil and Political Rights ('the Covenant') and Article 14 of the Convention, or the right to the peaceful enjoyment of possessions as laid down in Article 1 of Protocol No. 1 to the Convention.

3.2.2. The Regional Court held that it was plainly apparent from the drafting history of the facility that its intention was to forestall liquidity problems in enterprises as a result of the imposition of inheritance or gift tax (recht van successie of schenking) and that, in view of this intention, enterprise assets and non-enterprise assets were not to be seen as similar cases. In addition, the Regional Court held that, if similar cases or disproportionate unequal treatment of unequal cases there be, the interested party could not rely on the principle of equality (gelijkheidsbeginsel) because there existed an objective and reasonable justification for the distinction made by the legislature, namely the encouragement of entrepreneurship, so that according to the Regional Court the legislature has not overstepped its wide margin of appreciation.

3.3.1. In considering the points of appeal directed against the Regional Court's ruling the points of departure must be the following. Article 26 of the Covenant and Article 14 of the Convention, taken together with Article 1 of Protocol No. 1 to the Convention, do not forbid each and every unequal treatment of equal cases, but only those which must be considered discrimination because a reasonable and objective justification is absent. This means that there is discrimination only if the distinction made lacks a legitimate aim or if there is no reasonable relationship of proportionality between the measure making the distinction and the aim sought to be realised thereby (see Burden v. the United Kingdom [GC], no. 13378/05, § 60, ECHR 2008). In this connection it is worth noting that, for the purpose of applying the said treaty provisions, in the field of taxation the Contracting States enjoy a wide margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, and in the affirmative, whether an objective and reasonable justificiation exists nonetheless to make different provision for those cases (see, inter alia, Giuliana Galeotti Ottieri Della Ciaja and six others v. Italy (dec.), no. 46757/99, 22 June 1999, and Burden, cited above, § 60). If it does not concern a distinction based on a person's inborn characteristics such as sex, race and ethnic origin then the legislature's decision should be respected, unless it is without reasonable foundation (compare, inter alia, Stec and Others v. the United Kingdom [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI, and Carson and Others v. the United Kingdom, no. 42184/05, §§ 73 and 80, 4 November 2008). The latter eventuality cannot readily be assumed to exist. The distinction must be of such a nature that the legislature's

choice is manifestly without reasonable foundation (see Stummer v. Austria [GC], no. 37452/02, § 89, ECHR 2011, with further references).
The same applies with regard to the prohibition of discrimination enshrined in Article 1 of Protocol No. 12 to the Convention. It appears from the Explanatory Report to this Protocol (paragraph 18) that its drafters intended the meaning of the term discrimination used therein to be the same as that of the identical expression used in Article 14 (see Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009).
The case-law of the European Court of Human Rights referred to above will guide the Supreme Court. Article 53 of the Convention leaves to the domestic legislature the freedom to offer a more far-reaching protection of human rights than that given by the provisions of the Convention and its Protocols. In contrast, it follows from the provisions of the Netherlands Constitution, in particular Article 94, that the Netherlands legislature may decline to apply statutory provisions on the ground of discrimination only if such application is irreconcilable with provisions of treaties prohibiting discrimination that are binding on all persons. As regards the prohibition of discrimination enshrined in Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention the Netherlands courts cannot assume such irreconcilability to exist based on an interpretation of the term discrimination as used therein that would lead to more far-reaching protection than may be assumed based on the case-law of the European Corut of Human Rights on those provisions (see the Supreme Court's judgment of 10 August 2001, no. R00/132R, ECLI:NL:HR:2001:ZC3598, Netherlands Law Reports (Nederlandse Jurisprudentie, 'NJ' 2002, no. 278).
3.3.2. Pursuant to the Succession Act a tax is levied on everything obtained by inheritance or gift, the goods in issue being assessed according to the value attributable to them in economic interaction (economisch verkeer). These characteristics of obtention and value in economic interaction, which are relevant to the imposition of gift and inheritance tax, are found in the case of obtention of assets (vermogensbestanddelen) belonging to the de cuius's or giver's [enterprise assets, defined in terms of domestic tax law] as they are in the case of obtention of other assets. In the context of the levying of gift and inheritance tax, the obtention of assets having a value in economic interaction must therefore be considered, for the purpose of the application of the above-mentioned treaty provisions, as similar situations, regardless of whether these assets are to be considered enterprise assets or not. A difference in treatment between the obtention of enterprise assets and assets of a different nature therefore requires justification.

3.3.3. In view of the above, the question arises whether there is an objective and reasonable justification for the difference in treatment found.

3.3.4. Initially a measure had been taken within the framework of enterprise succession issues consisting only of a settlement in cases where the continued existence of an enterprise was jeopardised by payment of gift or inheritance tax consequent on the obtention of assets of that enterprise. Starting in 1998 an arrangement has additionally been made in the Tax Collection Act 1990 (Invorderingswet 1990) providing for a conditional exoneration in an amount of 25 per cent of the tax relating to any enterprise assets obtained. This was done within the framework of the tax reduction operation (lastenverlichting) of 1998 aimed at strengthening the structure of the economy. In justification of this facility, which amounted in effect to a partial exemption, the Government pointed out that 'the inheritance tax due [could] lead to financial problems capable of affecting the continuity of the enterprise. ... From the standpoint of the general socioeconomic interest (een algemeen social-economisch belang) ... it is undesirable that an enterprise transferred by inheritance should be forced to close down or forcibly sold even though the operating results do not so necessitate, resulting in a loss of employment opportunity and economic diversity.' It is remarked in addition that the arrangement proposed was intended to 'contribute to the continuity of family-owned businesses' (Parliamentary Documents, Lower House of Parliament (Kamerstukken II) 1997-98, 25 688, no. 3, p. 7).

3.3.5. Starting from 2002 this arrangement was made part of the Succession Act 1956 in slightly changed form, based also on a report by the Moltmaker working party [a working party set up to make proposals for the modernisation of inheritance tax law] (...). In addition, starting in that year it was provided in section 21(4) of the Succession Act 1956 that the value of enterprise assets should henceforth be determined including transferable goodwill. ... At the same time the facility was raised to 30 per cent of the tax relating to the enterprise assets obtained. In connection with this raise, it was also pointed at the time that 'the financial means that can be liberated ... in accordance with the priorities of Cabinet policy [are] used to stimulate entrepreneurship' (Parliamentary Documents, Lower House of Parliament 2001-02, 28 015, no. A, p. 20). The Government observed in addition: 'The existence of a facility for enterprise succession, with the attendant inherent unequal treatment of assets, finds its justification in the general interest involved in the continuity of enterprises (Parliamentary Documents, Lower House of Parliament 2001-02, 28 015, no. 6, p. 22).

3.3.6. In 2004 the Minister of Finance commissioned a report entitled 'The transfer of enterprises, continuity through the tax system' (Bedrijfsoverdracht, continuiteit door

fiscaliteit), in which it was reported, among other things, that the existing exemption in the enterprise succession facility of 30 per cent of the enterprise assets was felt to be insufficient to prevent liquidity problems. This led to a bill to raise the facility to 50 per cent. In the course of the parliamentary discussions of that bill the Government remarked: 'The existence of a facility for enterprise succession, with the attendant inherent unequal treatment of assets, finds its justification in the general interest involved in the continuity of enterprises. There is no violation of the principle of equality provided that the form in which the facility is cast is appropriate to the intended aim and the facility is no greater than necessary to achieve the aim chosen. It cannot be determined precisely how generous the facility may be in this connection, already because it is a generic facility and the enterprises to which it will apply are diverse in nature' (Parliamentary Documents, Lower House of Parliament 2004-05, 29 767, no. 14, p. 38). Legislative amendments raised the exemption percentage to 60 per cent starting in 2005 and 75 per cent starting in 2007.

3.3.7. Starting in 2010 the enterprise succession facility was altered on a number of points. Not only was the percentage of the exemption raised, but a number of provisions were adopted to limit the facility to 'genuine cases of enterprise succession' (reële bedrijfsoverdrachten). In order to justify the change in the percentage of the exemption, the Government pointed out 'the importance of unimpeded continuation of economic activity' (het belang van de onbelemmerde voortzetting van de economische bedrijvigheid) (Parliamentary Documents, Lower House of Parliament 2008-09, 31 930, no. 3, p. 5). ... As to the proposed increase [of the facility] to 90 per cent, the Deputy Minister of Finance remarked, among other things: 'We have received signals indicating that there are bottlenecks (knelpunten). These are caused by the fact that the value of commercial goodwill is taken into account in calculating the value of enterprise assets. Succession tax is to be paid on future profits. ... Enterprises have indicated several times in my direction, but also in the media that this really caused problems. ... The fact remains, however, that enterprises can encounter liquidity problems, as a result of which certain parts of a family enterprise that have been in the hands of the enterprise for decades might have to be sold off. The Cabinet considers that undesirable, because family-owned businesses contribute to stability and increased employment opportunity. ... It is true that the criterion 90 per cent is an arbitrary choice to meet a need of family-owned businesses that is generally felt in society (maatschappelijk gevoeld belang van familiebedrijven).' (Parliamentary Documents, Lower House of Parliament 2008-09, 31 930, no. 40, p. 46).

A legislative amendment raised the percentage of the exemption to 100 per cent for an obtention valued at up to one million

euros per objective enterprise and 83 per cent for enterprise assets over and above that amount. The intention was to allow small and medium-sized businesses to profit from the exemption more than big business.

3.3.8. It follows from the legislative history set out in paragraphs 3.3.4 through 3.3.7 above that the legislator called the facility into existence because, among other reasons, the levying of inheritance and gift tax consequent on the obtention of enterprise assets can cause liquidity problems, in particular also as a result of the taxation of (non-liquid) goodwill, which may endanger the continuity of enterprises. The legislature has, in so doing, had particular regard to the interest of unimpeded continuation of the activities of family-owned businesses within entrepreneurial circles (binnen de kring van de ondernemer). Such continuation would be capable of contributing to the maintenance and increase of employment opportunity, the conservation of economic diversity, and stability.

In creating and developing the facility the legislature has also intended to stimulate entrepreneurship.

These are legitimate aims as referred to above in paragraph 3.3.1.

3.3.9. The next question is whether the measures taken go no further than is necessary to achieve these in themselves justified aims, that is, to the point that there is no longer a reasonable relationship of proportionality between these measures (the facility) and the aim sought to be realised thereby. In this connection it is argued in particular that the repeated increase of the percentage of the exemption is not supported by any proper investigation of the need therefor.

3.3.10. In the legislative drafting history set out in paragraphs 3.3.4 through 3.3.7 reference is made several times to reports submitted in which it is urged to raise the percentages of the exemption because the existing facility was felt not to be sufficient. In so far as the argument is that the distinction is not based on proper investigations it therefore fails.

3.3.11 The reports referred to admittedly contain signals and desires expressed in practice, but they do not demonstrate any thorough empirical investigation into the extent of the problems posited. Neither do those reports and the legislature's other arguments give any clear indications as to why precisely an increase of the percentage of the exemption would solve those problems. It does not follow, however, that the facility as applicable in the year here in issue lacks reasonable foundation. The prohibition of discrimination does not go so far as to permit a measure that differentiates between equal or relevantly similar situations in view of a problem experienced in practice only if the existence and the extent of that problem and the effectiveness of the solution

chosen have been empirically established. In view of its margin of appreciation, the tax legislature (fiscale wetgever) may also base such a distinction on assumptions regarding the problem and the effectiveness of the solution chosen for it, unless these assumptions are so far-fetched that it is manifestly unreasonable to base the distinction on them (see the Supreme Court's judgment of 7 June 2000, no. 34793, ECLI:NL:HR:2000:AA6124, Beslissingen in Belastingzaken (Reports of Decisions in Taxation Cases, "BNB") 2000, no. 374).

3.3.12 By providing the facility here in issue the legislature has wished to offer a solution for the bottlenecks in enterprise succession cases noted in practice. In as much as the legislature has based itself on assumptions regarding the need and effectiveness of the measures to be taken it cannot be said that these assumptions are so far-fetched that they are manifestly unreasonable. There are indications that in a considerable proportion of cases in which the facility applies there are no liquidity problems. That is not to say, however, that the legislature could not base itself on the assumption that in cases of inheritance and gift of enterprise assets without the facility here in issue an impediment to the unchanged continuation of economic activity within the circle of the de cuius or the giver might arise. Also in other respects there is no reason to hold that that assumption is manifestly unreasonable. The legislature has chosen, also for reasons of practicability, to adopt a generic measure in the form of the facility here in issue. It cannot be denied that the facility contributes to a solution of the liquidity problems referred to in the cases in which they arise, and therefore contributes to the intended continuation of business activity. Moreover, the facility is not intended solely for that, but is also intended to stimulate entrepreneurship more generally.

3.3.13 The considerations set out in paragraph 3.3.12 above lead the Supreme Court to conclude that the facility as applicable in the year here in issue and also in other years is based on a choice of the tax legislature that cannot be said to be manifestly without reasonable foundation. Accordingly, [by creating the facility] the legislature has not overstepped the limits, referred to in paragraph 3.3.1 above, of its margin of appreciation. Consequently, the obtention of enterprise assets is not favoured above the obtention of other assets in such a way as to constitute discrimination as described in paragraph 3.3.1 above."

4 Costs of the proceedings

The interested party has declared that he will not claim compensation of the costs of the proceedings, because an agreement has been reached with the Secretary of State of the Exchequer about the compensation for this test case.

5 Decision

The Supreme Court declares the cassations appeal unfounded.

This judgment has been made by a chamber composed of the vice president M.W.C. Feteris as chairman, and the judges C. Schaap, M.A. Fierstra, R.J. Koopman en Th. Groeneveld, in the presence of the deputy registrar F. Treuren, and has been pronounced publicly on 22 November 2013.