62010CJ0578
JUDGMENT OF THE COURT (Third Chamber)

26 April 2012 (*1)

?Articles 18 EC and 56 EC — Motor vehicles — Use in a Member State of a borrowed private motor vehicle which is registered in another Member State — Taxation of that vehicle in the first Member State on its first use on the national road network'

In Joined Cases C-578/10 to C-580/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decisions of 12 November 2010, received at the Court on 6, 8 and 9 December 2010 respectively, in the proceedings

Staatssecretaris van Financiën

v

L.A.C. van Putten (C-578/10),

P. Mook (C-579/10),

G. Frank (C-580/10),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, T. von Danwitz and D. Šváby, Judges.

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

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the Netherlands Government, by C.M. Wissels and J. Langer, acting as Agents,

—

the Finnish Government, by J. Heliskoski, acting as Agent,

—

the European Commission, by D. Maidani, L. Lozano Palacios and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 December 2011,

gives the following

Judgment

1

This reference for a preliminary ruling concerns the interpretation of Articles 18 EC and 56 EC.

2

The references were made in the course of proceedings brought by the Staatssecretaris van Financiën (Secretary of State for Finance, ‘the Staatssecretaris’) against Mrs van Putten, Mr Mook and Mrs Frank respectively concerning tax assessment notices sent to them in relation to their failure to pay the tax on cars and motorcycles (‘vehicle tax’) when briefly using such vehicles made available to them free of charge by natural persons resident in other Member States.

Legal context

European Union law

3

Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) provides:

‘Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.’

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The capital movements referred to in Annex I to Directive 88/361 encompass, under heading XI of that Annex, personal capital movements, which include loans, gifts and inheritances.

National law

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Article 1(1) of the Netherlands Law on tax on cars and motorcycles (Wet op de belasting van personenauto’s en motorrijwielen 1992, Stb. 1992, No 709, ‘the 1992 Law’) provides that vehicle tax is to be levied on such private motor vehicles.

6

Under Article 1(2) and (5) of the 1992 Law, vehicle tax is due on registration of the vehicle in the Netherlands vehicle register. However, when a car or motorcycle which is not registered in the Netherlands is made available to a natural or legal person residing or established in the Netherlands, the tax is due on first use of that motor vehicle on the road network in the Netherlands within the meaning of that law.

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Article 5(2) of the 1992 Law provides that, in the case of unregistered cars or motorcycles, the person liable for vehicle tax is the person who has the motor vehicle at his disposal.

8

Under Article 9(1) of the 1992 Law, the rate of that tax for a car amounts to 45.2% of the net list price of the vehicle, subject to the reductions and surcharges referred to in that article. That price is the sale price recommended by the manufacturer or importer to the dealer, less value added tax.

9

For new cars, the net list price is that which applied at the beginning of the day on which a registration number was issued in respect of the car in the Netherlands. For used cars, the net list price is that which applied when the car was first used, whether in or outside the Netherlands.

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On first use on the road network in the Netherlands of a car or motorcycle not registered in the Netherlands which is at the disposal of a natural person resident or a legal person established in the Netherlands, the national legislation at issue in the main proceedings provides for the application of the net list price for used cars for the purposes of payment of vehicle tax.

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In charging vehicle tax on used cars, account is taken of the length of time for which the vehicle has been used and is reduced by a certain percentage. Until 1 February 2007, vehicle tax was chargeable as a one-off payment without any possibility of a refund even if, after a certain length of time, the car ceased to be used on the road network in the Netherlands.

The actions in the main proceedings and the questions referred for a preliminary ruling

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Mrs van Putten and Mr Mook are Dutch nationals. Mrs Frank is a German national. They were all resident in the Netherlands at the time of the facts at issue in the main proceedings.

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In the course of checks, officers of the Belastingdienst (tax authority) established that the defendants in the main proceedings were using cars registered in other Member States on the road network in the Netherlands without having paid vehicle tax. Accordingly, they were advised that, on a subsequent check they might be issued with an assessment notice for the payment of that tax.

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On a subsequent check the defendants in the main proceedings were stopped and found to be in the same situation again.

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Assessment notices were therefore sent to them, amounting to EUR 5955 for Mrs van Putten, EUR 1859 for Mr Mook and EUR 6709 for Mrs Frank. The Belastingdienst rejected the appeal by the persons concerned. It took the view that the defendants in the main proceedings had used their vehicle within the meaning of Article 1(5) of the 1992 Law, so that, on that first use, vehicle tax was due at the rate and on the full basis of assessment referred to in Article 9 of that law. Moreover, as the notices pre-dated 1 February 2007, the tax was collected from the defendants in

the main proceedings without the length of use of those vehicles having been taken into account.

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As the actions brought by each of the defendants in the main proceedings were held to be unfounded, they appealed to the Gerechtshof te ’s-Hertogenbosch (Court of appeal, ’s-Hertogenbosch). That court upheld their claims and, accordingly, annulled the decisions of the Belastingdienst and the assessment notices. According to that court those notices constituted an unjustified obstacle to the right to move and reside freely within the territory of a Member State set out in Article 18 EC.

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The Staatssecretaris brought an appeal before the referring court against the decision of the Gerechtshof te ’s-Hertogenbosch in each of the cases. Essentially, it held that all the relevant aspects of the situations at issue in the main proceedings occurred within a single Member State, the Netherlands, so that the case does not fall within the scope of Article 18 EC.

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The referring court points out that the Court of Justice has already had occasion to rule on the compatibility of vehicle tax with European Union law, but in connection with situations in which the principles relied on are freedom of movement for workers, freedom of establishment or freedom to provide services.

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However, the disputes in the main proceedings concern natural persons resident in the Netherlands who used, in the Netherlands and for private purposes, a car registered in another Member State which was made available for no consideration by natural persons resident in that other Member State who were family members or friends.

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In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings in all three cases and to refer the following questions to the Court of Justice for a preliminary ruling:

In Case C-578/10:

‘In the light of Article 18 EC (now Article 21 TFEU), does Community law govern a situation in which a Member State levies a tax on the first use on the road network in its territory of a vehicle which is registered in another Member State, has been borrowed from a resident of that other Member State and has been driven by a resident of the first Member State in the territory of that Member State?’

In Case C-579/10:

‘In the light of Article 18 EC (now Article 21 TFEU), does Community law govern a situation in which a Member State levies a tax on the first use on the road network in its territory of a vehicle which is registered in another Member State, has been borrowed from a resident of that other Member State and has been driven for private purposes by a resident of the first Member State between those two Member States?’

In Case C-580/10:

‘In the light of Article 18 EC (now Article 21 TFEU), does Community law govern a situation in which a Member State levies a tax on the first use on the road network in its territory of a vehicle which is registered in another Member State, has been borrowed from a resident of that other Member State and has been driven for private purposes in the territory of the first Member State by a person who is a resident of that Member State but a national of the other Member State?’

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By order of the President of the Court of 1 February 2011, Cases C-578/10 to C-580/10 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred for a preliminary ruling

Preliminary observations

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By its questions, which should be considered together, the referring court essentially asks whether, in the light of Article 18 EC, European Union law covers a situation in which a Member State levies a tax on the first use on the national road network of a motor vehicle by one of its residents, which has been driven either only on national territory or on that territory and that of another Member State, where that vehicle, which is registered in another Member State, has been loaned by a resident of the latter State.

23

In that regard, even though, formally, the national court has limited its questions to the interpretation of Article 18 EC, that does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see, to that effect, Case C-251/06 ING. AUER [2007] ECR I-9689, paragraph 38 and the case-law cited).

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The questions referred must be resolved in the light of all the provisions of the Treaty and of secondary legislation which may be relevant to the problem (see Case 137/84 Mutsch [1985] ECR 2681, paragraph 10).

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Moreover, it must be observed that, according to the referring court, the full amount of the tax at issue in the main proceedings was charged to the defendants without any account being taken of the actual duration of the use of the motor vehicles on the road network in the Netherlands and without the defendants having been able to invoke any right to exemption from or reimbursement of that tax.

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Therefore, the questions referred must be understood as seeking to know whether European Union law must be interpreted as meaning that it precludes legislation of a Member State which

requires its residents who have borrowed a car registered in another Member States from a resident of that State, to pay in full, on first use of that vehicle on the national road network, a tax normally due on registration of a vehicle in the first Member State, without any account being taken of the duration of the use of that vehicle on that road network and without the persons concerned being able to invoke any right to exemption or reimbursement.

Free movement of capital

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As regards the provisions of European Union law which may be applicable to the circumstances of the cases in the main proceedings, it must be observed that, in those cases, the charging of tax is the result, not of the fact that the defendants in the main proceedings have exercised their right to freedom of movement, but of the fact that, as residents, they have used a car registered in another Member State and loaned to them on the road network in the Netherlands.

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With regard to a loan agreed between citizens residing in different Member States, the scope of Article 56 EC must first be considered. In that connection, it is settled case-law that, in the absence of a definition in the Treaty of ‘movement of capital’ for the purposes of Article 56(1) EC, the nomenclature annexed to Council Directive 88/361/EEC has indicative value, even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (Articles 67 to 73 of the EEC Treaty were replaced by Articles 73B to 73G of the EC Treaty, now Articles 56 EC to 60 EC), subject to the qualification, contained in the introduction to the nomenclature, that the list set out there does not define exhaustively the concept of movements of capital (see, inter alia, Case C-318/07 Persche [2009] ECR I-359, paragraph 24 and the case-law cited; Case C-182/08 Glaxo Wellcome [2009] ECR I-8591, paragraph 39; Case C-35/08 Busley and Cibrian Fernandez [2009] ECR I-9807, paragraph 17, and Case C-25/10 Missionswerk Werner Heukelbach [2011] ECR I-497, paragraph 15).

29

Thus, the Court has held that inheritances and gifts, which fall under heading XI of Annex I to Directive 88/361, entitled ‘Personal Capital Movements’, constitute movements of capital within the meaning of Article 63 TFEU, except in cases where their constituent elements are confined within a single Member State (see Case C-450/09 Schröder [2011] ECR I-2497, paragraph 26 and the case-law cited). The same applies to ‘loans’ which fall within the same heading of Annex I to that directive.

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In situations such as those at issue in the main proceedings it is common ground that the constituent elements of the legal relationship between the owner of the motor vehicle and the user of that vehicle are not confined to a single Member State even though the national provision at issue is addressed only to the residents of the Netherlands. Vehicle tax must be paid by the residents of that Member State who use a motor vehicle on the national road network, even though the use is of short duration and in the context of a loan, free of charge, between those residents and residents of other Member States of vehicles also registered in other Member States.

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In addition it must be verified whether the legal relationship at issue in each of the cases in the

main proceedings, in other words the loan of a motor vehicle free of charge for cross-border use, can be deemed to be a movement of capital within the meaning of Article 56 EC and, in particular, a loan falling within heading XI of Annex I to Directive 88/361.

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In that regard, it must first be held that ‘loans’ fall under that heading, without determining whether those loans are for consideration or free of charge or what their particular purpose is.

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Next, as regards gifts, the Court has already had occasion to hold that, in order to determine whether the tax treatment by a Member State of certain transactions is covered by the provisions on the free movement of capital, there is no need to distinguish between transactions effected in money and those effected in kind (see Persche, paragraph 26).

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Finally, it is apparent from the inclusion of inheritances and legacies under heading XI of Annex I to Directive 88/361 that the fact that a transaction is free of charge does not, in itself, prevent it being deemed a movement of capital within the meaning of Article 56 EC.

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In addition, the loan of a motor vehicle for use free of charge constitutes a benefit which represents a specific economic value, corresponding to the cost of use of a hire car of the same type and for the same period.

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It follows that, as the Advocate General pointed out in point 31 of her Opinion, the cross-border lending of a vehicle free of charge constitutes a capital movement within the meaning of Article 56 EC.

Whether there is any restriction on the free movement of capital and the possible justification for such restriction

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First of all, it should be noted that, apart from certain exceptions not relevant to the main proceedings, taxation of motor vehicles has not been harmonised at European Union level. The Member States are thus free to exercise their powers of taxation in that area provided that they do so in compliance with European Union law (see Case C-451/99 Cura Anlagen [2002] ECR I-3193, paragraph 40; Case C-464/02 Commission v Denmark [2005] ECR I-7929, paragraph 74; Joined Cases C-151/04 and C-152/04 Nadin and Nadin-Lux [2005] ECR I-11203, paragraph 40; judgment of 23 February 2006 in Case C-232/03 Commission v Finland, paragraph 46; order in Case C-242/05 van de Coevering [2006] ECR I-5843, paragraph 23; order of 22 May 2008 in Case C-42/08 Ilhan, paragraph 17, and order in Case C-364/08 Vandermeir [2008] ECR I-8087, paragraph 22).

38

Pursuant to the 1992 Law, vehicle tax is due in respect of cars or motorcycles not registered in the Netherlands which are made available to a person resident in that Member State from the moment

of their first use on the road network in the Netherlands. The person liable to the tax is the person who actually has the vehicle at his disposal.

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As the essential element of a loan is the option of using the goods loaned, it must be observed that the national legislation at issue in the main proceedings, by requiring residents of the Netherlands to pay a tax on first use of a vehicle registered in another Member State on the road network in the Netherlands, including where that vehicle was loaned free of charge by a resident of another Member State, results in the taxation of cross-border loans free of charge of motor vehicles.

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On the other hand, loans of a motor vehicle for use free of charge are not subject to that tax where the vehicle is registered in the Netherlands. Such a difference, or at least apparent difference, in treatment according to the State in which the loaned vehicle is registered is, therefore, liable to make such cross border capital movements less attractive, by dissuading residents of the Netherlands from accepting loans offered by residents of another Member State of a vehicle registered in that State. Measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of that provision (see Case C-478/98 Commission v Belgium [2000] ECR I-7587, paragraph 18 and the case-law cited).

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Such national legislation therefore constitutes a restriction on the free movement of capital for the purposes of Article 56(1) EC.

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However, the question whether there is actually such a difference of treatment must be examined and, if there is, whether it is none the less compatible with the provisions of the Treaty concerning free movement of capital.

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According to the case-law of the Court the principle of non-discrimination, whether it has its basis in Article 12 EC or Articles 39 EC, 43 EC or 56 EC, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way (see, to that effect, Case C-155/09 Commission v Greece [2011] ECR I-65, paragraph 68 and the case-law cited).

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Accordingly, it must first be considered whether, in circumstances such as those of the disputes in the main proceedings, the situation of a resident of the Netherlands who uses on the road network in the Netherlands a vehicle registered in that Member State made available to him free of charge is objectively comparable to that of a resident of the Netherlands who uses, on the same conditions, a vehicle registered in another Member State. Even if such a situation is comparable, it must be examined, secondly, whether they were treated equally or, if they were treated differently, whether the difference was justified by an overriding reason in the general interest and, finally, whether the measure at issue is consistent with the principle of proportionality.

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In that connection, while it is true that the owners of vehicles registered in the Netherlands have already paid vehicle tax when the vehicle was entered on the vehicle register in the Netherlands, the fact none the less remains that, as a rule, those vehicles are intended to be used essentially in that Member State on a permanent basis or that they are, in fact, used in that way.

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The Court has already held that a Member State may impose a registration tax on a motor vehicle registered in another Member State where that vehicle is intended to be used essentially in the first Member State on a permanent basis or where it is, in fact, used in that manner (see, to that effect, Cura Anlagen, paragraph 42; Commission v Denmark, paragraphs 75 to 78; Nadin and Nadin-Lux, paragraph 41; and Commission v Finland, paragraph 47, and the orders in van de Coevering, paragraph 24, and Vandermeir, paragraph 32).

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However, if those conditions are not satisfied, the connection with one Member State of the vehicle registered in another Member State is weaker, so that another justification for the restriction in question is necessary (see Commission v Denmark, paragraph 79; Commission v Finland, paragraph 48; and orders in van de Coevering, paragraph 26, and Vandermeir, paragraph 33).

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According to the order for reference the defendants in the main proceedings had to pay the full amount of the vehicle tax, as the amount was calculated without any account being taken of the duration of the use of the vehicles concerned and without the users of those vehicles having been able to invoke any right to exemption or reimbursement. However, it is not apparent from the documents submitted to the Court that those vehicles are intended to be used essentially in the Netherlands on a permanent basis or that they are, in fact, used in that way.

49

It is therefore the task of the national court to assess the duration of the loans at issue in the main proceedings and how the loaned vehicles have in fact been used (see the order in van de Coevering, paragraph 25).

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Thus, if the vehicles at issue in the main proceedings, which are not registered in the Netherlands, are intended to be used essentially in the Netherlands on a permanent basis or if they are, in fact, used in that way, there is not actually a difference in the treatment of a person who resides in the Netherlands and uses such a vehicle free of charge and a person who uses a vehicle registered in that Member State on the same conditions, since the latter vehicle, which is also intended to be used essentially in the Netherlands on a permanent basis, was already subject to vehicle tax on its first registration in the Netherlands.

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In those circumstances, the charging of vehicle tax on first use on the road network in the Netherlands of vehicles which are not registered in the Netherlands, is justified in the same way as the tax due on the registration of the vehicle in the Netherlands, mentioned in paragraph 46 of the

present judgment, is, provided that the tax takes account, as appears to be required by the 1992 Law, of the depreciation of the vehicle at the time of that first use.

52

On the other hand, as is apparent from paragraph 47 of the present judgment, if the vehicles at issue in the main proceedings were not intended to be used essentially in the Netherlands on a permanent basis or were not, in fact, used in that way, there would be a difference in treatment between the two categories of persons mentioned in paragraph 50 of the present judgment and the charging of the tax concerned would not be justified. In such circumstances, the connection of those vehicles with the Netherlands would be insufficient to justify the charging of a tax normally due on registration of a vehicle in the Netherlands.

53

Even if such a difference in treatment might, in some circumstances, be justified by an overriding reason in the general interest, it is also necessary for the tax to comply with the principle of proportionality (see, to that effect, the order in van de Coevering, paragraph 27 and the case-law cited).

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Since, on the one hand, it is not apparent from the order for reference that, in the disputes in the main proceedings, it has been established that the vehicles in question are intended to be used essentially in the Netherlands on a permanent basis or that they are, in fact, used in that way and, on the other hand, neither the referring court nor the Netherlands Government has put forward other overriding reasons in the general interest to justify the restriction at issue, it must be held that Article 56 EC must be interpreted as meaning that it precludes legislation of a Member State which requires residents who have borrowed a vehicle registered in another Member State from a resident of that State to pay, on first use of that vehicle on the national road network, the full amount of a tax normally due on registration of a vehicle in the first Member State, without taking account of the duration of the use of that vehicle on that road network and without that person being able to invoke a right to exemption or reimbursement where that vehicle is neither intended to be used essentially in the first Member State on a permanent basis nor, in fact, used in that way.

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Since the cases in the main proceedings fall within the scope of Article 56 EC, it is not necessary to rule on the interpretation of Article 18 EC.

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In the light of the foregoing, the answer to the questions referred is that Article 56 EC must be interpreted as meaning that it precludes legislation of a Member State which requires residents who have borrowed a vehicle registered in another Member State from a resident of that State to pay, on first use of that vehicle on the national road network, the full amount of a tax normally due on registration of a vehicle in the first Member State, without taking account of the duration of the use of that vehicle on that road network and without that person being able to invoke a right to exemption or reimbursement where that vehicle is neither intended to be used essentially in the first Member State on a permanent basis nor, in fact, used in that way.

Costs

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Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 56 EC must be interpreted as meaning that it precludes legislation of a Member State which requires residents who have borrowed a vehicle registered in another Member State from a resident of that State to pay, on first use of that vehicle on the national road network, the full amount of a tax normally due on registration of a vehicle in the first Member State, without taking account of the duration of the use of that vehicle on that road network and without that person being able to invoke a right to exemption or reimbursement where that vehicle is neither intended to be used essentially in the first Member State on a permanent basis nor, in fact, used in that way.

[Signatures]

(*1) Language of the case: Dutch.