CONFEDERATION FISCALE EUROPEENNE

Opinion Statement ECJ-TF 4/2017 on the decision of 9 February 2017 of the Court of Justice of the EU in Case C-283/15, *X ("pro-rata personal deductions")*, concerning personal and family tax benefits in multi-state situations

Prepared by the CFE ECJ Task Force

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This Opinion Statement has been prepared by the CFE ECJ Task Force[1]. It concerns Case C-283/15, X, in which the First Chamber of the Court of Justice of the European Union (ECJ) delivered its judgment on 9 February 2017[2]. In general terms, the Court followed the Opinion of Advocate General Wathelet of 7 September 2016.[3]

The case concerned tax legislation permitting the deduction of 'negative income' relating to a dwelling. The issue was whether the fundamental freedoms must be interpreted as precluding a Member State from refusing the benefit of that deduction to a self-employed non-resident in circumstances where that person receives 60% of his total income within that Member State, and 40% within a non-Member State. Therefore, he does not receive income that enables him to qualify for an equivalent right to deduct, within the Member State where his dwelling is located.

Having recognised that the freedom of establishment applies to the case, the First Chamber confirmed the right of that person to a deduction of 'negative income' relating to his dwelling. Subsequently, it held that a self-employed person can claim an equivalent right of deduction in any Member State of activity within which that person receives income, in proportion to the share of that income received within each Member State of activity.

A 'Member State of activity' is any Member State that has the power to tax such income from the activities of a non-resident as is received within its territory, irrespective of where the activities are actually performed.

Finally, the Court stated that the fact that the non-resident taxpayer concerned receives part of his taxable income within a third country rather than a Member State, is not relevant.

I. Background and Issues

1. The Court's decision in *X*[4] adds another judgment to the extensive body of case-law on the *Schumacker* doctrine, which, however, has not dealt with the situation in which a taxpayer earns income in several source States. By expanding that doctrine to multi-state situations, the judgment in *X* obliges all source Member States to grant personal and family benefits on a pro-rata basis in the absence of sufficient taxable income in the taxpayer's residence State.

2. The case concerned the year 2007: X is a non-resident national of the Netherlands who owns a dwelling located in Spain, his only State of residence.[5] In the taxable year at issue he derived income from professional activities from two companies in which he holds majority shareholdings, one of which is established in the Netherlands and the other in Switzerland. The income from the Dutch source represented 60% of his total taxable income, and the income from the Swiss source 40%. In accordance with the applicable bilateral tax conventions, the income from the Swiss source was taxed in Switzerland and the income from the Netherlands source in the Netherlands.[6] He did not receive any income

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[2] ECLI:EU:C:2017:102.

[3] ECLI:EU:C:2016:638.

[4] The ECJ Task Force notes the increasing number of "X" or similarly anonymised cases, with two – C-283/15 and C-317/15 – even decided in the same month. This makes it hard to identify the specific case and for this reason we suggest also to refer to the technical matter it addresses, e.g., "pro-rata personal deductions" in the present case.

[5] NL: ECJ, 9 Feb. 2017, C-283/15, X, ECLI:EU:C:2017:102, para. 10, ECJ Case Law IBFD.

[6] *X* (C-283/15), para. 12.

taxable in Spain, in 2007 or in the four following years, after which X ceased to be resident in Spain.[7]

3. Under the Dutch *Wet inkomstenbelasting 2001* (Personal Income Tax Act 2001; PITA 2001), taxable income for residents does not only include income from work, but also notional income from a primary dwelling that is owned by the taxpayer. The gross income from residence is calculated as a percentage of the value of the dwelling. From that gross notional income expenses may be deducted, including interest and costs arising from debts incurred in order to acquire the dwelling. If the amount of those expenses exceeds the value of the "advantages", the taxpayer is in a situation of so-called "negative income". Under Dutch rules, this notional income can only be negative or zero. This can be off-set against other income or will increase losses available for carry forward. Generally, non-residents do not have this negative notional income.

4. As regards the fundamental freedoms in such a situation, the Dutch courts acknowledge the ECJ's case law that "negative income" relating to immovable property located in the Member State of which a taxpayer is a resident forms a tax advantage linked to his personal situation, which is relevant to the assessment of his overall ability to pay.[8]

5. Therefore, in the current case, the *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands) had doubts as to the scope of the *Schumacker* case-law,[9] because X did not receive all, or almost all, of his family income in a single Member State, other than that of his residence, which has the power to tax that income and which could, therefore, take account of his personal and family circumstances. The Court's decisions in *Gschwind*,[10] *de Groot*[11] and *Commission v. Estonia*[12] can be read, in the opinion of the referring *Hoge Raad der Nederlanden*, as meaning that the Member State where an activity is carried out must always take account of the personal and family circumstances of the person concerned if the Member State of residence is not in a position to do so.[13]

6. The Supreme Court's preliminary questions were:

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

   (2) (a) If Question 1 is answered in the affirmative: must every Member State in which the European Union citizen earns part of his income take into account the full amount of the abovementioned negative income? Or does that obligation apply to only one of the States concerned in which work is carried out, and if so, to which? Or must each of

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[7] *X* (C-283/15), para. 11.

[8] Based on, e.g., LU: ECJ, 18 July 2007, C‑182/06, État du Grand Duchy of Luxemburg v Hans Ulrich Lakebrink and Katrin Peters-Lakebrink, EU:C:2007:452, ECJ Case Law IBFD; NL: ECJ, 16 Oct. 2008, C-527/06, R. H. H. Renneberg v Staatssecretaris van Financiën, EU:C:2008:566, paras 64-71, ECJ Case Law IBFD; and NL: ECJ, 18 June 2015, C-9/14, Staatssecretaris van Financiën v D.G. Kieback, EU:C:2015:406, para. 19, ECJ Case Law IBFD; see also X (C-283/15), para. 26.

[9] Starting with DE: ECJ, 14 Feb. 1995, C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, EU:C:1995:31, ECJ Case Law IBFD.

[10] DE: ECJ, 14 Sept. 1999, C-391/97, *Frans Gschwind v Finanzamt Aachen-Außenstadt*, EU:C:1999:409, ECJ Case Law IBFD.

[11] NL: ECJ, 12 Dec. 2002, C-385/00, *F.W.L. de Groot v Staatssecretaris van Financiën*, EU:C:2002:750, ECJ Case Law IBFD.

[12] EE: ECJ, 10 May 2012, C-39/10, *European Commission v Republic of Estonia*, EU:C:2012:282, ECJ Case Law IBFD.

[13] *X* (C-283/15), paras 17-18.

the States in which work is carried out (not being the State of residence) allow part of that negative income to be deducted? In the latter case, how is that deductible part to be determined?

(b) In this regard, is the Member State in which the work is actually performed the decisive factor, or is the decisive factor which Member State has the power to tax the income earned thereby?

(3) Would the answer to the two questions set out under (2) be different if one of the States in which the European Union citizen earns his income is [the Swiss Confederation], which is not a Member State of the European Union and also does not belong to the European Economic Area?

(4) To what extent is it significant in this regard whether the legislation of the taxpayer's country of residence (in this case, Spain) makes provision for the possibility of deducting mortgage interest relating to the taxpayer's property and the possibility of offsetting the tax losses arising therefrom in the year in question against possible income earned in that country in later years?"

II. The Judgment of the Court of Justice

7. While the Dutch Supreme Court did not identify a specific freedom, the Court decided that this case falls under the freedom of establishment (Article 49 TFEU),[14] and subsequently added that the *Schumacker*-doctrine, which was initially developed in the area of free movement of workers (Article 45 TFEU), can be transposed to that freedom as well.[15]

8. In substance, the Court then established that to the extent the legislation of a Member State deprives non-resident taxpayers of the opportunity that is open to resident taxpayers, to deduct negative income relating to immovable property in the State of residence ("negative income"), it treats non-residents less favourably than residents. Subsequently, it must be assessed whether this different treatment constitutes discrimination.[16]

9. The Court held that in respect of the tax advantage of taking into account "negative income", the mere fact that a non-resident may have received, within the Member State where his activity is performed, income on conditions more or less similar to those of the residents of that State is not sufficient to render his situation objectively comparable to the situation of the latter. In addition, it is necessary that, as a result of the non-resident's receiving the major part of his income outside the Member State of residence, that State is not in a position to grant him the advantages which accrue from taking into account his aggregate income and his personal and family circumstances.[17]

10. Furthermore, the Court held that where a non-resident receives, within a Member State where he performs some of his activities, 60% of his total global income, it cannot be inferred, for that reason alone, that his Member State of residence will not be in a position to take account of his aggregate income and his personal and family circumstances. The Court held it would differ only if it were established that the person concerned received, within his State of residence, either no income or income of so modest an amount that that State would not be able to grant him the advantages that would accrue from account being taken of his aggregate income and his personal and family circumstances. The Court stated that this appeared exactly to "*be the situation of X, since it is apparent from the documents in the file submitted to the Court that X did not, in the tax year at issue in the*

[14] *X* (C-283/15), paras. 20-23.

[15] See *X* (C-283/15), para. 36, referring to NL: ECJ, 11 Aug. 1995, C-80/94, *G. H. E. J. Wielockx v Inspecteur der Directe Belastingen*, EU:C:1995:271, ECJ Case Law IBFD; NL: ECJ, 27 June 1996, C-107/94, *P. H. Asscher v Staatssecretaris van Financiën*, EU:C:1996:251, ECJ Case Law IBFD; and DE: ECJ, 28 Feb. 2013, C-425/11, *Katja Ettwein v Finanzamt Konstanz*, EU:C:2013:121, ECJ Case Law IBFD.

[16] *X* (C-283/15), paras 27 et seq.

[17] *X* (C-283/15), paras 37-38.

main proceedings, receive any income within the Member State where he was resident, namely the Kingdom of Spain".[18]

11. The Court also clarified that this conclusion would not be invalidated if X were, in addition, to have received the remainder of his income in that year within a State other than the Netherlands and Spain. The fact that a taxpayer receives the major part of his income within several States other than that where he is resident as opposed to just one, has no effect on the application of the principles deriving from the *Schumacker* case-law. For the Court, *"the decisive criterion is whether it is impossible for a Member State to take into account, for the calculation of tax, the personal and family circumstances of a taxpayer in the absence of sufficient taxable income, although such circumstances can otherwise be taken into account when there is sufficient income*."[19]

12. As a result, the Court answered the first question so that

> "*Article 49 TFEU must be interpreted as precluding a Member State, the tax legislation of which permits the deduction of 'negative income' relating to a dwelling, from refusing the benefit of that deduction to a self-employed non-resident where that person receives, within that Member State, 60% of his total income and does not receive, within the Member State where his dwelling is located, income that enables him to qualify for an equivalent right to deduct*."[20]

13. In relation to the second question, the Court held that the personal and family circumstances of a taxpayer should be taken into account by granting a tax advantage in the form of reduced taxation. Consequently, the concept of a "Member State of activity" cannot be understood as one other than a Member State that has the power to tax all or part of the income from the activity of a taxpayer, wherever the activity generating that income is actually performed.[21]

14. The Court also stated that the freedom of the Member States to allocate among themselves their powers to impose taxes, and in particular to avoid the accumulation of tax advantages must be reconciled with the necessity that taxpayers of the relevant Member States concerned are assured that, ultimately, all their personal and family circumstances will be duly taken into account. This should be the case irrespective of how the Member States concerned have allocated that obligation amongst themselves. If such reconciliation does not to take place, the freedom of Member States to allocate the power to impose taxes amongst themselves would be liable to create inequality of treatment of the taxpayers concerned which would be incompatible with freedom of establishment. That inequality would not be the result of disparities between the provisions of national tax law.[22]

15. In the situation where a self-employed person receives his taxable income within a number of Member States, other than his State of residence, that reconciliation can be achieved only by permitting him to submit a claim for his right to deduct 'negative income' to each Member State of activity where that type of tax advantage is granted, in proportion to the share of his income received within each such Member State. The taxpayer is responsible for providing the competent national authorities all the information on his global income required by them to determine that proportion.[23]

16. Hence, the Court answered the second question so

> "*that the injunction imposed by the answer to the first question concerns any Member State of activity within which a self-employed person receives income enabling him to*

[18] *X* (C-283/15), paras 39-41.
[19] *X* (C-283/15), para. 42.
[20] *X* (C-283/15), ruling 1 and para. 43.
[21] *X* (C-283/15), para. 45.
[22] *X* (C-283/15), para. 47.
[23] *X* (C-283/15), para. 48.

claim there an equivalent right of deduction, in proportion to the share of that income received within each Member State of activity. In that regard, a 'Member State of activity' is any Member State that has the power to tax such income from the activities of a non-resident as is received within its territory, irrespective of where the activities are actually performed."[24]

17. The Court then held that the provisions of the freedom of establishment oblige all Member States not to discriminate against a self-employed person who performs a professional activity within a Member State other than his State of residence. This obligation also applies if the taxpayer carries out the remainder of his activities within a third State, even if the latter is not a Member State.[25]

18. Therefore, the Court answered the third question so that

"[t]he fact that the non-resident taxpayer concerned receives part of his taxable income not within a Member State, but within a non-Member State, is of no relevance to the answer to the second question".[26]

19. Finally, the Court found that the last question on the effect of the (potential) deductions in Spain is inadmissible, because it is a hypothetical question.[27] Hence – unlike AG Wathelet[28] – the Court did not substantively address the question of the relationship of the *Schumacker*-based consideration of a taxpayer's negative rental income with the limits to cross-border loss relief following from, e.g., *Marks & Spencer*.[29]

III. Comments

III.1. Grey, instead of black and white

20. With this important judgement, the Court further develops its *Schumacker* case-law to multi-state situations from which a number of taxpayers will benefit.[30] This evolution does, of course, not only apply in the context of the free movement of workers (Art. 45 TFEU), for which the *Schumacker* line of case-law was initially developed, but also with regard to the freedom of establishment (Art. 49 TFEU)[31] and the free movement of capital (Art. 63 TFEU).[32] It will also be relevant in respect of the freedom to provide services (Art. 56 TFEU).

21. The Court continues the starting-point that, in general, it is for the taxpayer's State of residence to take into account his personal and family circumstances,[33] which is also in line

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[24] *X* (C-283/15), ruling 2 and para. 49.

[25] *X* (C-283/15), paras 51-52, referring, by analogy, to *Kieback* (C-9/14), para. 35.

[26] *X* (C-283/15), ruling 3 and para. 52.

[27] *X* (C-283/15), para. 55.

[28] Opinion of Advocate General Wathelet, 7 Sept. 2016, C-283/15, *X*, EU:C:2016:638, paras 71 et seq., ECJ Case Law IBFD.

[29] UK: ECJ, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, ECJ Case Law IBFD.

[30] This development may also be relevant for the interpretation and application of the EU-Switzerland agreement. Indeed, as AG Wathelet noted, the interpretation in *X* "constitutes an application of the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), where there are several States of activity. That judgment precedes the signature of the Agreement between the European Community and its [Member States], of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in on 21 June 1999 (OJ 2002 L 114, p. 6; 'the Agreement'). Consequently, in accordance with Article 16(2) of the Agreement, account must be taken of that case-law" (see Opinion of AG Wathelet, 7 September 2016, C-283/15, X, EU:C:2016:638, para. 70 with further references in footnote 30). The Court did, however, not address the question if that pro-rata application of the *Schumacker*-doctrine may also be invoked against Switzerland.

[31] See *X* (C-283/15), para. 36, referring to *Wielockx* (C-80/94), *Asscher* (C-107/94), and C-425/11, *Ettwein* (C-425/11).

[32] NL: ECJ (Grand Chamber), 5 July 2005, C-376/03, *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, EU:C:2005:424, paras. 24 et seq., ECJ Case Law IBFD.

[33] See, *inter alia*, *Schumacker* (C-279/93), paras 31 and 32; *Kieback* (C-9/14), para. 22; *X* (C-283/15), para. 30.

with the OECD Model Tax Convention on Income and Capital.[34] It is, moreover, settled case law since *Schumacker* that resident and non-resident individuals are, as a general rule, non-comparable with regard to the personal and family circumstances.[35] The scope of the case-law arising from the judgment in *Schumacker* extends to all the tax advantages connected with the non-resident's ability to pay tax that are granted neither in the State of residence nor in the State of employment.[36] This so-called "subjective ability to pay" is obviously viewed from an European angle (without regard to the qualification under domestic law[37]) and includes personal and family tax benefits, such as spousal splitting,[38] tax rate benefits for retirement income,[39] the zero-rate bracket[40] or tax-free allowance,[41] and the deduction of childcare costs,[42] but also extends to the effects of negative rental income on progressivity[43] and – as in the present case – the tax base.[44] However, it needs, to be distinguished from the Court's case law with regard to income-related expenses ("expenditure linked directly to the income of a person"[45]) i.e. the "objective ability to pay", in cases such as *Gerritse*[46] and *Scorpio*,[47] where comparability of non-resident and resident taxpayers is not in doubt when the source State exercises its taxing right over the respective income.

22. This notion of non-comparability of taxpayers with regard to their personal and family circumstances has limits however. Indeed, the Court decided that the situations of residents and non-residents can be, by exception, comparable in situations where the Member State of residence is not in a position to grant tax advantages connected to its resident's personal and family circumstances.[48] In *Schumacker*, the Court established two (seemingly) cumulative criteria for such comparability i.e. *(1)* that a person does not have significant taxable annual income in the Member State of residence (so that the income is insufficient to take into account personal and family circumstances) *and (2)* that the taxpayer earns the major part of his taxable annual income from an activity in another (Member) State,[49]

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[34] See Art. 24(3) OECD Model Tax Convention on Income and Capital (2014) and the OECD Commentary (2014) on Art. 18 para. 1, Arts 23A and B, paras 41-42, and Art. 24 paras 8, 36.

[35] See *Schumacker* (C‑279/93), paras 31 and 32, and *X* (C-283/15), para. 30.

[36] *Lakebrink and Peters-Lakebrink* (C‑182/06), para. 34; *Kieback* (C-9/14), para. 27.

[37] See conversely, e.g., DE: ECJ, 6 July 2006, C-346/04, *Robert Hans Conijn v Finanzamt Hamburg-Nord*, EU:C:2006:445, ECJ Case Law IBFD, where the Court has treated expenses for tax advise as income-related expenses (and applied the *Gerritse* approach), whereas such expenses were deemed to be personal under German domestic law.

[38] *Schumacker* (C‑279/93); *Gschwind* (C-391/97); LU: ECJ, 16 May 2000, C-87/99, *Patrick Zurstrassen v Administration des contributions directes*, EU:C:2000:251, ECJ Case Law IBFD; see also DE: ECJ, 25 January 2007, C-329/05, *Finanzamt Dinslaken v Gerold Meindl*, EU:C:2007:57, ECJ Case Law IBFD.

[39] FI: ECJ, 9 Nov. 2006, C-520/04, *Pirkko Marjatta Turpeinen*, EU:C:2006:703, ECJ Case Law IBFD.

[40] SE: ECJ, 1 July 2014, C-169/03, *Florian W. Wallentin v Riksskatteverket*, EU:C:2004:403, ECJ Case Law IBFD; see also DE: ECJ, 12 June 2003, C-234/01, *Arnoud Gerritse v Finanzamt Neukölln-Nord*, EU:C:2003:340, ECJ Case Law IBFD.

[41] *D* (C-376/03), paras. 24 et seq.

[42] BE: ECJ, 12 Dec. 2013, C‑303/12, *Guido Imfeld and Nathalie Garcet v État belge*, EU:C:2013:822, ECJ Case Law IBFD.

[43] Lakebrink and Peters-Lakebrink (C‑182/06).

[44] *Renneberg* (C-527/06).

[45] See for that terminology, e.g., *Conijn* (C-346/04), para. 20.

[46] *Gerritse* (C-234/01).

[47] DE: ECJ, 3 Oct. 2006, C‑290/04, *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel*, EU:C:2006:630, ECJ Case Law IBFD.

[48] *Schumacker* (C‑279/93), paras 36–38; *De Groot* (C-385/00), para. 89; *Wallentin* (C-169/03), paras 17–18; *Kieback* (C-9/14), paras 24–35; ECJ, 19 Nov. 2015, C-632/13, *Skatteverket v Hilkka Hirvonen*, ECLI:EU:C:2015:765, para. 31, ECJ Case Law IBFD; and *X* (C-283/15), paras 32–38.

[49] See, e.g., *Schumacker* (C‑279/93), para. 36, and also, e.g., *D* (C-376/03), paras. 28 et seq.

which was often understood to be a "strict" limit of approximately 75%[50] or 90%[51] of world-wide income. However, it should also be noted that these percentages were included in the domestic tax laws concerned and that the Court left room for other approaches.[52] Those cumulative criteria were also reiterated in more recent decisions, such as the 2013 case of *Imfeld and Garcet*.[53] From subsequent case law it is also clear that the State of residence's ability to take personal and family circumstances into account is to be determined under the legislation of that State.[54] Therefore, if the State of residence exempts certain income from taxation and hence cannot grant personal and family benefits, the source State is not relieved from its *Schumacker*-obligation.[55] (A different perspective needs to be taken, however, if the residence State does not impose a certain tax at all, e.g., a wealth tax, in which case the Court focused on the overall wealth of the taxpayer.[56])

23. This means, however, that the starting-point remains that the Member State of residence is primarily responsible for accounting for the personal and family circumstances of its residents. If in that Member State sufficient taxable income is earned for doing so, the situation of this taxpayer in the Member State where the activity is performed, is not comparable to the situation of a resident of that State. However, strongly encouraged by the opinion of Advocate General Wathelet,[57] the Court refined its *Schumacker* case law by accepting that, if the taxable income in the Member State of residence is insufficient to take into account the personal and family circumstances, the situation of a non-resident taxpayer in the Member State of activity i.e. the source State, is comparable to that of a resident of that Member State.

24. The second *Schumacker*-criterion i.e. that the taxpayer earns the major part of his taxable annual income from an activity in another (Member) State,[58] is therefore effectively abolished and negative conflicts of competence avoided: *X* makes clear that the criterion of having obtained the "major part" or "almost all" of the non-resident's taxable income from an activity performed in another Member State does not mean that this income must satisfy a certain threshold if it is otherwise impossible for the taxpayer's Member State of residence to take into account his personal and family circumstances in the absence of sufficient taxable income in that State. In that case, any taxable income in other (Member) States of activity is sufficient. Moreover, in this context, it does not matter that the non-resident taxpayer receives a remainder of his income in the year concerned within a State – a Member State or a third State – other than the Member State of activity concerned and the Member State of residence. While this focus became evident in *X*, already previous cases pointed in this direction: In *Kieback*, for example, the Court had referred to the classical *Schumacker*-situation as a mere example and made an effective causal (and not

[50] For the approach in Estonia, e.g., *Commission* v *Estonia* (C-39/10), para. 18, and more generally for a 75% threshold Art. 2(2) of the Commission's recommendation of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than in which they are resident, [1994] OJ L 39/22.

[51] Based on, e.g., *Gschwind* (C-391/97), para. 32; see also explicitly, e.g., *D* (C-376/03), para. 30 ("The Court has thus allowed a Member State to make grant of a benefit to non-residents subject to the condition that at least 90% of their worldwide income must be subject to tax in that State".)

[52] See, e.g.,*Gschwind* (C-391/97), para. 32: "It follows from the foregoing that Article 48(2) of the Treaty is to be interpreted as not precluding the application of a Member State's legislation under which resident married couples are granted favourable tax treatment such as that under the splitting procedure whilst the same treatment of non-resident married couples is made subject to the condition that at least 90% of their total income must be subject to tax in that Member State or, if that percentage is not reached, that their income from foreign sources not subject to tax in that State must not be above a certain ceiling, thus maintaining the possibility for account to be taken of their personal and family circumstances in the State of residence."

[53] *Imfeld and Garcet* (C‑303/12), para. 44.

[54] See, e.g., *Commission* v *Estonia* (C-39/10), para. 53.

[55] *Wallentin* (C-169/03).

[56] See *D* (C-376/03), paras. 24 et seq.

[57] AG Opinion in *X* (C-283/15).

[58] See, e.g., *Schumacker* (C‑279/93), para. 36.

cumulative) connection between the situations in the residence and the source States,[59] and in *Commission v. Estonia* the Court put an obligation on the source State to grant its personal and family tax benefits even though only approximately 50% (and not "almost all") of the income was earned there.[60]

25. The effect of that comparability is, in general, that the source Member State has to grant non-discriminatory treatment: It has to grant the non-resident taxpayer the same personal and family benefits it grants its own residents (at least proportionally[61]), i.e., the personal and family benefits its legislation provides.[62] Hence, the effect and nature of potential benefits may greatly vary from State to State; in an extreme case, therefore, where the source State does not provide any personal and family benefits at all for its own residents, there would equally be no benefits available for taxpayers in *Schumacker* or *X* positions.

III.2. Relationship with *De Groot* and *Kieback*

26. It may also be noted that *X* is compatible with *De Groot*.[63] In the latter case, the Court decided that several Member States of employment could release the State of residence from the obligation to take the taxpayer's personal and family circumstances into account. That is only possible if it is *not* necessary for the taxpayer's aggregate annual income to reach a minimum threshold of 90% earned in a Member State other than his Member State of residence. Therefore, the idea that the phrase "a major part" of the income must be interpreted as a 90%-threshold, as such, should not be deemed to have been adopted, despite the fact the Court in *Gschwind* specifically used that threshold.[64] If the 90% threshold were, indeed, a hard criterion on its own, a taxpayer's personal and family circumstances may not always taken into account. Such a result would be inconsistent with the ability-to-pay principle, the direct-benefit principle, the open-market economy with free competition, the efficient allocation of production factors, tax neutrality, the establishment of a level playing field, international tax neutrality, capital and labour import neutrality, and origin-based taxation. Such a condition would hamper the development of the internal market. Therefore, the refinement given by the Court in its *X* decision matches perfectly with its role as a protector of the establishment of the internal market.

27. However, *X* rests uneasy with *Kieback*, which related not to proportions of annual income in various countries but rather to timing proportions and the taxpayer's change of residence. In *Kieback*, the Court has held that no discrimination arises in the case of successively or simultaneous employed activities in several countries after a change of residence, because the Member State where the non-resident taxpayer pursued his activity before leaving is not in a better position than his new state of residence to assess his personal and family circumstances.[65] A Member State from which, during only a part of the taxable year, a part (but not the major part) of his annual income is received is not bound to grant the same advantages as granted to residents.[66] The result in *X* contrast strongly with the result in the *Kieback* case: Mr. Kieback's "negative income" from his owner-occupied house located in Germany over the period 1 January until 31 March 2005 could not be taken into account in any of the States involved. In 2005, he left for the United

[59] See *Kieback* (C-9/14), para. 25, noting that comparability "is the case particularly where a non-resident taxpayer receives no significant income in his Member State of residence and derives the major part of his taxable income from an activity pursued in the Member State of employment, so that the Member State of residence is not in a position to grant him the advantages which follow from the taking into account of his personal and family circumstances".

[60] Commission v Estonia (C-39/10).

[61] See *infra* Chapter III.3. of this Opinion Statement.

[62] See also, e.g., *X* (C-283/15), para. 48.

[63] *De Groot* (C-385/00), paras 100, 102.

[64] *Gschwind* (C-391/97), para. 32.

[65] *Kieback* (C-9/14), para 29.

[66] *Kieback* (C-9/14), paras 30-34.

States to reside and work there. Until 31 March 2005, he lived in Germany and worked as an employee in the Netherlands. The "negative income" could not be taken into account in the United States (no tax jurisdiction during the period concerned), not in Germany (no income), and not in the Netherlands (non-resident status). If Mr. Kieback had been a Dutch resident, he would have been entitled to fully deduct this amount from his employment income during the period from 1 January until 31 March 2005.[67] The *X* decision could be a reason to reconsider *Kieback*, because the Court may have overlooked the fact that the tax liability in the United States only started on 1 April 2005. In general, a State does not take into account any income, positive or negative, that is received in the period before tax liability commences. As a consequence, it is more than likely that Mr. Kieback was not able to take into account, in the United States, the "negative income" from his home in Germany received during the period 1 January 2005 to 31 March 2005.

III.3. Effect: pro-rata allocation

28. In the situation where not taking into account the personal and family circumstances of a non-resident taxpayer constitutes discrimination, the Court decides that Member States must permit a non-resident taxpayer to take into account his personal and family circumstances on a pro-rata basis i.e. grant the personal and family tax benefits "in proportion to the share of that income received within each Member State of activity".[68] The latter notion – "Member State of activity" – is to be understood from a tax perspective: It is not necessarily the State in which the taxpayer's income-generating activity is actually performed, but rather "any Member State that has the power to tax such income from the activities of a non-resident as is received within its territory".[69] This approach should be supported: Only States that can and may tax the income of a taxpayer under their domestic tax laws respectively tax treaties can grant tax advantages connected with the non-resident taxpayer's personal and family circumstances. If a State cannot or may not tax his income, it simply cannot take into account the taxpayer's personal and family circumstances for tax purposes.

29. As the Court has decided in *X*, the obligation to take into account a taxpayer's personal and family circumstances is "in proportion to the share of that income received within each Member State of activity" and hence does not fall on only one of the source Member States concerned in which taxable income is earned (e.g., the State where most of the income is earned). Indeed, all of the relevant states contribute to the taxpayer's ability to pay taxes; in each of those states, the taxpayer benefits from the state's infrastructure to create his wealth. The taxpayer competes in all of those states in an open market. From those perspectives, the Court is right in obliging them all to take into account the taxpayer's personal and family circumstances, and not just one of them. However, the fraction of benefits to be granted should logically not be determined by reference to the portion of worldwide income that *may be taxed* in any given State, but by reference to the portion that State *actually imposes a tax on*. Furthermore, the Court did not establish a complete system of "fractional taxation" under which each Member State (including the State of residence) grants benefits only in proportion to its share of the taxable income (even though Member States could establish such a system[70]), but rather imposes a pro-rata obligation on source Member States if – and only if[71] – the residence Member State cannot grant personal and family benefits.

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[67] See Art. 3.1 PITA 2001.
[68] *X* (C-283/15), paras 44 et seq.
[69] *X* (C-283/15), para. 45.
[70] *De Groot* (C-385/00), paras 100-101.
[71] See *supra* para. 23 of this Opinion Statement.

30. As previously noted[72], where the *pro-rata* system applies, each source Member State has to apply its own system of taking into account personal and family circumstances in a non-discriminatory manner,[73] irrespective of whether this is done through a personal allowance, a deduction, a tax credit, a general lower tax rate or any other form of relief. From a more technical perspective, however, the question arises as to how the "proportional" taking into account of personal and family circumstances should be accomplished. This issue was not very explicitly addressed in *X*. A practical approach is that each of the relevant States in which any of the non-resident taxpayer's taxable income is earned should take a part of the taxpayer's personal and family circumstances into account, if the domestic tax system does so for a resident taxpayer. For example, if at taxpayer's personal and family circumstances are taken into account by means of a deduction from his taxable income, the personal allowances can be taken into account in proportion of the taxable source State income to the aggregate annual taxable income earned in each State (i.e., worldwide income) before benefits are granted. Moreover, as "income" is not defined by EU law, each source Member State needs to calculate the amounts of (domestic and worldwide) "income" in accordance with its own tax laws. In multi-state situations, therefore, there is likely not one fraction but rather multiple fractions that may vary according to the domestic income definitions of the source States involved. As a consequence, the sum of the fractions calculated by each source Member State may also not add up to 100 per cent, suggesting the possibility of an "incomplete" granting of benefits overall. However, that result will be purely the consequence of different income definitions, which are a textbook example of a disparity that the fundamental freedoms are unable to address.

31. For a Member State to apply the *pro-rata* approach in accordance with *X*, it needs information about the taxpayer's income in other Member States and also third countries, in order to assess the taxpayer's worldwide income (the denominator in the fraction). That problem is not entirely new and existed already in classical two-state Schumacker situations (where it had to be established in the source State that the "major part" or "almost all" of the non-resident's taxable income was earned there, i.e., demonstrating that no significant taxable income was earned anywhere else). The issue may become even more nuanced in multi-state situations. Instead of focusing exchange of information between Member States, however, the Court merely stated that it is the taxpayer's responsibility "*to provide to the competent national authorities all the information on his global income needed by them to determine that proportion*".[74]

32. The Court also acknowledged the interest of Member States "*to avoid the accumulation of tax advantages*".[75] Therefore, any source Member State in which only a part of the taxpayer's aggregate annual income is earned, need and should *not* take into account the full amount of that taxpayer's personal and family circumstances (e.g., negative rental income). If the full amount were to be allowed as a deduction, a substantial risk of double deduction (or a "double dip") would exist. Such a double dip would also not be in line with the core ideas of the Internal Market.[76]

33. However, implementing such an approach and avoiding granting isolated "advantages" to non-residents (e.g., personal and family tax benefits) without the corresponding "disadvantages" that residents face (e.g., progressivity based on worldwide income) will pose certain challenges for domestic legislators. While such "disadvantages" under residence-

[72] See *supra* Chapter III.1. of this Opinion Statement.

[73] See also *X* (C-283/15), para. 48 (noting that the taxpayer may "submit a claim for his right to deduct 'negative income' to each Member State of activity where that type of tax advantage is granted, in proportion to the share of his income received within each such Member State").

[74] *X* (C-283/15), para. 48.

[75] *X* (C-283/15), para. 47.

[76] *De Groot* (C-385/00), paras 100–102; see also *X* (C-283/15), para. 47.

based taxation are certainly not a good reason to deny non-residents (proportionate) personal and family tax benefits,[77] the Court's decisions in *Gielen*[78] and *Hirvonen*[79] seem to imply that an option granted to non-residents to be taxed like residents (with the corresponding personal and family tax benefits) is not in itself sufficient to comply with the fundamental freedoms. Indeed, in *X* the taxpayer had initially exercised such an election but withdrew it subsequently in light of the ensuing heavier taxation,[80] but that does not seem to have had any effect on the Court's holding. It would, however, be strange that offering an option to be treated as a resident is not sufficient to comply with EU law, as it is neither in the interest of taxpayers nor of tax administrations to always require all non-residents from other Member States to declare their worldwide income to the source State just to comply with *Schumacker* and *X* (and, e.g., tax them under a progression scheme).

IV. The Statement

34. The *Confédération Fiscale Européenne* welcomes the pro-rata approach to personal and family deductions developed by the *X* judgment. In doing so, the Court contributes to the establishment of the internal market. Indeed, the pro-rata approach satisfies an open market economy with free competition, an efficient allocation of production factors, tax neutrality, a level playing field, international tax neutrality, the ability-to-pay principle, the direct benefit principle, and origin-based taxation.

35. The *Confédération*, however, also notes that the implementation of *X* will pose a number of technical and policy issues for domestic legislators that have not yet been addressed by the Court. These include the calculation of the relevant proportions of income and possible mechanisms to avoid "cherry picking" by non-residents.

[77] See specifically *De Groot* (C-385/00), paras 70-71.

[78] NL: ECJ, 18 March 2010, C-440/08, *F. Gielen v Staatssecretaris van Financiën*, EU:C:2010:148, paras 50 et seq., ECJ Case Law IBFD.

[79] *Hirvonen* (C-632/13), para. 42.

[80] See *X* (C-283/15), para. 14, where it is noted that based on the taxpayer's option to be treated in the same way as resident taxpayers "[t]he total tax thus calculated was greater than that which X would have had to pay if he had not exercised the option of being treated in the same way as resident taxpayers, with consequent taxation in Switzerland with respect to the income received in that State, namely 40% of his total income, and if he had, in addition, been permitted to deduct in its entirety the 'negative income' arising from the dwelling owned by him and located in Spain."