Comments on N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo (Case C-470/04 of 7 September 2006), European Parliament v. Council (Case C-540/03 of 27 June 2006) and Tas-Hagen and Tas (Case C-192/05 of 26 October 2006)

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1. Do We Still Need Rules – Part I?

Case C-470/04, N., 7 September 2006; EC law provision interpreted: Article 43 EC

Facts: In 1997, Mr N., a Dutch citizen, transferred his residence from the Netherlands to the United Kingdom. He was then the sole shareholder of several companies whose management was at the same date transferred in Curaçao. The taxation authorities issued a tax notice on his declared taxable income for 1997. He obtained a deferment of payment of the amount claimed. In accordance with the national legislation in force, such deferment was made subject to the provision of security. Following the Court of Justice’s judgment in de Lasteryrie du Saillant,1 the competent Secretary of State expressed the view that the requirement that security be provided before approval of the deferment of payment could no longer be maintained, so that N.’s security was regarded as released. Before the national judge, N. mainly argued that the very principle of a tax based on the system established by the Dutch legislation where the taxable event is the transfer of residence of a Netherlands resident to another Member State is incompatible with EC law. Since 2002, N. has been running a farm in the United Kingdom.

Question: Is such taxation compatible with Article 18 or, alternatively, 43 EC?

Reply: “1. A Community national, such as the applicant in the main proceedings, who has been living in one Member State since the transfer of his residence and who

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*) Views expressed are purely personal to the author.

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holds all the shares of companies established in another Member State, may rely on Article 43 EC.

2.3. [...]"

Comments: The judgment echoes that in the Ritter-Coulais case relating to Article 39 EC, to which the Court expressly refers. N. deserves the same criticisms. And more. Indeed, in her opinion, AG Kokott thoroughly explained why Article 43 EC cannot apply to Mr N.

Lasteyrie du Saillant, the judgment which triggered the change of attitude of the Dutch authorities, concerned French provisions governing the taxation of certain capital gains in the event of a transfer of tax residence outside France. M. Lasteyrie du Saillant is a French national who moved his residence to Belgium and then claimed he was discriminated against in France as regards taxation because of this change of residence. To support his conclusion that Article 43 EC was applicable, AG Mischo simply said that in his written submissions to the Court the applicant wrote that he moved his residence to Belgium "in order to pursue his professional activity there" (§ 18). In its judgment, the Court noted that "the referring court appears to have concluded that Article [43] of the Treaty applies to the dispute before it" (§ 41). Such reasoning to "justify" the application of Article 43 EC leaves the reader perplexed, as it means that the Court delegates to a national judge the power to answer the purely Community law question of the personal scope of one of its core provisions.

In her opinion in N., AG Kokott concluded that Article 43 EC is not applicable to Mr N. Some of her arguments seem relevant, some are less convincing. Firstly, she rightly argues that

the tax was assessed when Mr N. moved his (private) residence. One cannot conclude from the Court’s definition cited above that this event falls within the scope of application of freedom of establishment (§ 32).

The reasoning is sufficient to conclude that the freedom of establishment enshrined in Article 43 EC cannot be applied to someone who moved his residence, as a citizen, to another Member State. It is stating the obvious to recall that freedom of establishment was never meant by the authors of the Treaty to cover the situation of Mr N. and that it never meant that in the Court’s jurisprudence. Other arguments put forward by the AG are a bit puzzling. Indeed, she argues that

the scope of application of freedom of establishment would certainly be engaged if Mr N. influenced the management of the undertaking’s business more than as a mere shareholder from his residence in the United Kingdom (§ 35).

1) The purely fiscal aspects of the ruling will not be discussed here.