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Judgment of the Court (Sixth Chamber) of 14 October 1999. - Georges Vander Zwalmen and Elisabeth Massart v Belgian State. - Reference for a preliminary ruling: Cour d'appel de Bruxelles - Belgium. - Officials and other servants of the European Communities - Personal income tax - Taxation of the spouse of a Community official. - Case C-229/98.

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Keywords

Privileges and immunities of the European Communities - Officials and servants of the Communities - Exemption from national taxes of remuneration paid by the Communities - Scope - Tax on the income of natural persons - Whether permissible

(Protocol on the Privileges and Immunities of the European Communities, Art. 13)

Summary

$$Article 13 of the Protocol on the Privileges and Immunities of the European Communities does not preclude a Member State, which grants tax relief to households with a single income and to those with two incomes, the second of which is less than a certain index-linked sum, from refusing that benefit to households in which one spouse is an official or other servant of the European Communities where his salary exceeds that amount.

The reason for exclusion from the benefit is not the fact of being a Community official in receipt of an income in excess of the index-linked sum, but stems from the general condition, which applies without discrimination to spouses, one of whom is an official, as it does to any other taxpayer, regarding the amount of income giving entitlement to the benefit at issue.

Parties

In Case C-229/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Cour d'Appel, Brussels, for a preliminary ruling in the proceedings pending before that court between

Georges Vander Zwalmen,

Élisabeth Massart

and

Belgian State

on the interpretation of Article 13 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965,

THE COURT

(Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, P.J.G. Kapteyn (Rapporteur) and G. Hirsch, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Vander Zwalmen and Mrs Massart, by X. Leurquin and M. Marlière, of the Brussels Bar,

- the Belgian Government, by J. Devadder, General Adviser in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, assisted by B. van de Walle de Ghelcke, of the Brussels Bar,

- the Commission of the European Communities, by É. Mennens, Principal Legal Adviser, and H.P. Hartvig, Legal Adviser, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Vander Zwalmen and Mrs Massart, of the Belgian Government and of the Commission at the hearing on 4 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 25 March 1999,

gives the following

Judgment

Grounds

1 By judgment of 12 June 1998, received at the Court on 26 June 1998, the Cour D'Appel (Court of Appeal), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 13 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (`the Protocol').

2 That question was raised in proceedings between Mr Vander Zwalmen and Mrs Massart, and the Belgian State.

The legal background

Community law

3 Article 13 of the Protocol provides:

`Officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission.

They shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities.'

National law

4 The Law of 7 December 1988 making changes regarding income tax and taxes assimilated to stamp tax (Moniteur Belge of 16 December 1988) introduced separate taxation for the earned income of each spouse. Article 4(1) of that law provides that, `[w]here only one of the spouses receives earned income, a portion [called "the marital allowance"] shall be attributed to the other spouse. That portion shall be equal to 30% of such income, subject to a maximum of BEF 270 000.' Article 4(2) states that, `[w]here the earned income of one of the spouses ... is less than 30% of the aggregate earned income of both spouses, there shall be attributed to that spouse a portion of the earned income of the other spouse which, together with his own earned income, enables him to attain 30% of that total, subject to a maximum of BEF 270 000'.

5 It is clear from the order for reference that, by introducing the marital allowance, the Belgian legislature sought to provide fiscal support for marriage, families and children and to make an extra effort in favour of households with modest incomes. The measure benefits single-income households and is intended to recognise the value of a spouse's work in the home; it is also beneficial to households with two incomes where one is relatively low.

6 The introduction of the marital allowance means that a portion of the income of the spouse who receives the higher earned income is attributed to the spouse who has no earned income or only a modest earned income. That portion is 30%, subject to an index-linked maximum of BEF 270 000. By creating that separate fund in respect of the second spouse, subject to a separate levy, the application of the rules on the existence of an exempted portion and on progressive tax rates means that the system of the marital allowance leads to tax relief for the couple viewed as an economic unit. Assessing the total earned income of one of the spouses would result in a higher levy than adding together the separate levies on the 70% and the attributed 30% of that earned income.

7 At first, `the spouse with no earned income' was interpreted for the purposes of the Law of 7 December 1988 as meaning `the spouse with no earned income subject to Belgian tax'. The public authorities and the tax administration accepted, therefore, that international civil servants who did not enjoy the tax-domicile exception and were thus subject in principle to personal income tax in Belgium, but whose income was exempt under international conventions, without reservation as to

progressive tax rates, were also entitled to the marital allowance.

8 In 1990, the legislature, having realised that it had never been its intention to grant the benefit of the marital allowance to international civil servants such as Community officials whose income is exempt from tax in Belgium without reservation as to progressive tax rates, removed that benefit for that category of persons.

9 Article 21 of the Law of 28 December 1990 concerning various fiscal and non-fiscal provisions (Moniteur Belge of 29 December 1990) supplemented Article 1 of the Law of 7 December 1988 by adding the following paragraph: `[t]here shall also be regarded as separate taxpayers those taxpayers whose spouses receive earned income which is exempt under a convention and is not taken into account for calculation of the tax levied on the other income of the household, as regards any amount in excess of BEF 270 000'.

10 Since that time, Belgian tax law has, in principle, treated spouses, one of whom is a Community official receiving earned income in excess of BEF 270 000 which is exempt under a convention, no longer as spouses, but as separate taxpayers. That classification means that the benefit of the marital allowance can no longer be taken into account when they are assessed for tax, and so the spouse who is not an official is taxed on the basis of his entire earned income.

11 In 1992, the various provisions concerning income tax were incorporated without amendment into the 1992 Income Tax Code (Moniteur Belge of 30 July 1992), Articles 87, 88 and 128 of which provide as follows:

Article 87

`Where the assessment is made in the name of both spouses and only one of them receives earned income, a portion thereof shall be attributed to the other spouse.

That portion shall be equal to 30% of such income, subject to a maximum of BEF 270 000.'

Article 88

`Where the assessment is made in the name of both spouses and the earned income of one spouse is less than 30% of the aggregate earned income of both spouses, there shall be attributed to that spouse a portion of the earned income of the other spouse which, together with his own earned income, enables him to attain 30% of that total, subject to a maximum of BEF 270 000.'

Article 128

`For the application of this section and calculation of the tax, married persons shall be regarded not as spouses but as separate taxpayers:

...

4. where a spouse receives earned income which is exempt under a convention and is not taken into account for calculation of the tax levied on the other income of the household, as regards any amount in excess of BEF 270 000.

In such cases, there shall be two distinct levies and the amount of tax shall be determined, for each of the persons concerned, on the basis of his own income and that of his children which is available to him by operation of law.'

12 The sum of BEF 270 000 was, by indexation, raised to BEF 288 000 for the tax year 1992 and to BEF 297 000 for the tax year 1993 and thereafter.

The main proceedings

13 Mr Vander Zwalmen is subject in Belgium to personal income tax. His wife is an official at the Commission of the European Communities and is resident for tax purposes in Belgium. It is not disputed that her earned income is, under Article 13 of the Protocol, entirely exempt in Belgium from income tax, without reservation as to progressive tax rates.

14 For the tax years 1991 and 1992, the benefit of the marital allowance was not granted to the spouses Vander Zwalmen on the ground that, under the fiscal provisions of the Law of 28 December 1990, they could no longer be regarded as spouses, but had to be treated as separate taxpayers. Two separate assessments were therefore made and the tax was determined, for each of them, on the basis of their own income and of that of the children which was available to them by operation of law.

15 In 1992 and 1993, Mr Vander Zwalmen lodged a complaint against the amounts assessed as payable in respect of personal income tax and additional taxes. He claimed that the tax had been determined in breach of Article 13 of the Protocol, on the ground that his exclusion from the benefit of the marital allowance led to an indirect levy on his wife's exempted income. On 22 May 1995, the Regional Director for direct taxation, Brussels II, dismissed his complaint. Mr Vander Zwalmen then brought an action against that decision before the Cour d'Appel, Brussels.

16 Before that court, the applicants claimed that, by treating spouses, one of whom is an official of the European Communities with earned income in excess of BEF 270 000 which is exempt under a convention and is not taken into account for the calculation of the tax on the other income of the household, as separate taxpayers and by imposing a distinct levy on each of them on the basis of their own income and any income of their children that is available to them by operation of law, the legislature was imposing taxation, under Article 21 of the Law of 28 December 1990, on a part of the income exempted by convention and was thus infringing Article 13 of the Protocol.

17 In those circumstances, the Cour d'Appel, Brussels, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

`Must Article 13 of the Protocol on the Privileges and Immunities of the European Communities be interpreted as:-

(1) prohibiting the Member States, under fiscal legislation applicable to personal tax, from creating, for the taxation of married couples and their children, a distinct category of taxpayers by reason of the fact that one of them is a European official, receiving as such earned income which is exempted under a convention, without reservation as to progressive rates of tax, and from making for that category two separate assessments whereby the tax is determined for each of them on the basis of his own income and that of his children which is available to him by operation of law, whilst at the same time, where appropriate, each remains jointly and severally liable for the tax debt of the household (see Article 295 of the 1964 Income Tax Code and Article 394 of the 1992 Income Tax Code), whereas, for married couples in which one spouse does not receive taxable earned income or receives insignificant earned income, under national law the assessment is made in the name of both spouses, and, with the exception of earned income, the income of the spouses is aggregated with the income of the spouse who receives more, and, where the income of a spouse is less than 30% of the aggregate earned income of both spouses, there is attributed to him a portion of the earned income of the other spouse which, together with his own earned income, enables him to attain 30% of that income, subject to a maximum of BEF 270 000 (indexed), which may result, by virtue of the progressive nature of tax rates, in a reduction of the

tax payable by the spouses?

(2) prohibiting a Member State from refusing, by recourse to the separate taxation described under No 1, the benefit of the marital allowance for the spouse of a European official, with the exception of those who declare that they receive earned income which is exempted under a convention, without reservation as to progressive rates of taxation, of less than BEF 270 000 (indexed), who does not receive non-exempted income of a sufficient amount for the benefit of the marital allowance to be totally offset by the tax due by virtue of the aggregation of the spouses' income and the progressive nature of the tax rates?'

The first part of the question referred

18 By the first part of its question, the national court is asking in substance whether Article 13 of the Protocol precludes a Member State, which grants tax relief to households with a single income and those with two incomes, the second of which is less than the index-linked sum of BEF 270 000, from refusing that benefit to households in which one spouse is an official or other servant of the European Communities where his salary exceeds that amount.

19 First, it is clear from the case-file in the main proceedings that the benefit of the marital allowance was not refused to the spouse who is an official, who has not been subjected to any direct levy on her exempted income, but to her spouse, who is not an official, whose subjection to Belgian tax law has not been questioned.

20 According to the applicants in the main proceedings, the refusal, and the resulting levy, amount, on the other hand, to imposing indirect taxation on Community income which is exempted from it under Article 13 of the Protocol, in that it results in a higher levy for the couple viewed as an economic unit.

21 In that regard, it should be borne in mind that Article 13 of the Protocol is not restricted to national taxes based directly on the salaries, wages and emoluments paid by the Communities to their officials and other servants, but that the exemption also covers any indirect taxes (see Case 6/60 Humblet v Belgian State [1960] ECR 559, 578; Case 260/86 Commission v Belgium [1988] ECR 955, paragraph 10; and Case C-333/88 Tither [1990] ECR I-1133, paragraph 12).

22 The national court raises the question whether the prohibition of any indirect taxes prevents the remuneration of officials of the European Communities from being taken into consideration, in whatever way, by the fiscal legislation of the Member States, since that remuneration must be totally ignored from the point of view of domestic tax law, as if it did not exist.

23 For that purpose, it is necessary to examine the scope of the notion `exempt from national taxes', as laid down in Article 13 of the Protocol.

24 According to settled case-law, Article 13 of the Protocol restricts the Member States' sovereignty in fiscal matters, since it precludes any national tax, regardless of its nature and the manner in which it is levied, which is imposed directly or indirectly on officials or other servants of the Communities by reason of the fact that they are in receipt of remuneration paid by the Communities, even if the tax in question is not calculated by reference to the amount of that remuneration (Commission v Belgium, cited above, paragraph 10; Tither, paragraph 12; and Case C-263/91 Kristoffersen v Skatteministeriet [1993] ECR I-2755, paragraph 14).

25 Although Community law precludes an official from being taxed more heavily in respect of his non-exempted income because he receives a salary from the Community (Humblet, p. 579), Article 13 of the Protocol does not, however, require Member States to grant officials the same subsidies that are paid to beneficiaries determined in accordance with the relevant national provisions. That article merely requires that, whenever such persons are subject to certain taxes,

they are able to enjoy any tax advantage normally available to taxable persons, so as to prevent those persons from being subject to a greater tax burden (Tither, paragraph 15), without thereby requiring special treatment.

26 It follows that the conditions of entitlement to a tax advantage must apply without discrimination between persons entitled under Community officials and other taxpayers (see, to that effect, Case 7/74 Brouerius van Nidek v Inspecteur der Registratie en Successie [1974] ECR 757, paragraph 14). To the extent that officials satisfy the conditions laid down by national legislation, they must be able to enjoy the tax advantages prescribed in that legislation; consequently, Article 13 of the Protocol precludes the refusal of the right to such an advantage merely on the ground of classification as an official who is not subject to personal tax (Commission v Belgium, cited above, paragraph 12).

27 It is clear, however, from the provisions applicable in the main proceedings that Belgian fiscal legislation makes the grant of the benefit of the marital allowance subject to the objective condition that the spouse of the taxable person has no earned income, or a low earned income, subject to an index-linked maximum of BEF 270 000. In the case of higher earned income, the benefit of the marital allowance cannot be granted and the spouses will be subject to the system of separate taxation on their incomes.

28 Even though the Belgian legislature introduced in 1990 a fiction according to which spouses must be treated as separate taxpayers where one of them receives earned income exempted under the Protocol which is in excess of BEF 270 000, that does not, as such, amount to introducing an additional condition contrary to Article 13 of the Protocol. The reason for exclusion from the benefit is not the fact of being a Community official in receipt of an income in excess of BEF 270 000, but stems from the general condition, which applies without discrimination to spouses, one of whom is an official, as it does to any other taxpayer, regarding the amount of income giving entitlement to the benefit at issue. If that condition were fulfilled, the spouse of the Community official could, therefore, where appropriate, just like any other person subject to Belgian tax law, benefit from that tax advantage.

29 The answer to the first part of the question must therefore be that Article 13 of the Protocol does not preclude a Member State, which grants tax relief to households with a single income and to those with two incomes, the second of which is less than the index-linked sum of BEF 270 000, from refusing that benefit to households in which one spouse is an official or other servant of the European Communities where his salary exceeds that amount.

The second part of the question referred

30 By the second part of its question, the national court is asking in substance whether the tax implications of the status of separate taxpayer, on the one hand, and of that of spouse, on the other, must be compared when examining the lawful or unlawful nature of the classification as a separate taxpayer in the present case.

31 In the light of the answer given to the first part of the question, it is no longer necessary to answer this part of the question.

Decision on costs

Costs

32 The costs incurred by the Belgian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on

costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the question referred to it by the Cour d'Appel, Brussels, by judgment of 12 June 1998, hereby rules:

Article 13 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 does not preclude a Member State, which grants tax relief to households with a single income and to those with two incomes, the second of which is less than the index-linked sum of BEF 270 000, from refusing that benefit to households in which one spouse is an official or other servant of the European Communities where his salary exceeds that amount.