JUDGMENT OF THE COURT (Sixth Chamber)

19 November 2015 (*)

(Reference for a preliminary ruling — Freedom of movement for persons — Equal treatment — Income tax — Revenue of non-resident taxpayers subject to taxation at source — Exclusion of any tax deduction related to the taxpayer's personal circumstances — Justification — Possibility for non-resident taxpayers to opt for the regime applicable to resident taxpayers and to benefit from the relevant tax deductions)

In Case C?632/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), made by decision of 25 November 2013, received at the Court on 3 December 2013, in the proceedings

Skatteverket

v

Hilkka Hirvonen,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, acting as President of the Chamber, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Skatteverket, by T. Wallén,

– Ms Hirvonen, in person,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, U. Persson, K. Sparrman, L. Swedenborg and C. Hagerman, acting as Agents,

– the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

– the Danish Government, by C. Thorning and M. Wolff, acting as Agent,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Spanish Government, by L. Banciella Rodríguez-Miñón and A. Rubio González, acting as Agents,

– the Netherlands Government, by M. Bulterman and M. de Ree, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, J. Martins da Silva and M. Rebelo, acting as Agents,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by W. Roels and J. Enegren, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU.

2 The request has been made in proceedings between the Skatteverket (Tax Board) and Ms Hirvonen and concerns the refusal by the Skatteverket to grant her tax advantages on her income tax for 2005.

Legal context

3 By virtue of the Law (1999:1229) on income tax (inkomstskattelagen (1999:1229); 'the inkomstskattelagen'), a taxpayer who is resident in Sweden is subject to unlimited tax liability, meaning that tax is payable in that Member State on all income which he or she obtains, both inside and outside Sweden.

4 In that regard, under the inkomstskattelagen, income is divided into earned income, namely employment income of different types, and income from capital, which type of income is taxed separately. When calculating the taxable income, deductions are to be made for the costs of obtaining and retaining the taxable revenue. In addition, basic tax relief and certain other allowances may also be granted depending on the circumstances of the person concerned.

5 Taxable earned income is subject to communal and State income tax. The rate of communal income tax is proportional and varies, depending on the municipality or region, between 29 and 34%. On average it is slightly above 30%.

6 The State income tax is progressive and varies between 20 and 22%. That tax is levied on taxable income when it exceeds a certain level. A State tax of 30% is levied from the taxable income from capital.

7 If, on calculation of the income from capital, there is a deficit, tax relief of 30% is granted on that part of the deficit which does not exceed SEK 100 000 and of 21% on the remaining deficit.

8 For their part, non-resident taxpayers have, as a rule, limited tax liabilities in Sweden, since their employment income is taxed at source at a definitive taxation rate of 25% ('the taxation at source regime'), under the Law (1991:586) on special taxation of non-resident persons (lagen (1991:586) om särskild inkomstskatt för utomlands bosatta; 'the special income tax law').

9 For non-resident taxpayers, there is no right to a deduction allowances either for the costs of obtaining and retention of the revenue or for personal costs. However, the rate of the special income tax is lower than that applicable to the income taxation of resident taxpayers ('the ordinary taxation regime'). Since the levy of tax is final, the non-resident taxpayer no longer has to declare

his income. According to the referring court, the purpose of taxation at source is to make things easier for the taxpayer and at the same time to simplify the administration for the Skatteverket.

10 Under Paragraph 5 of the special income tax law, taxable income includes, inter alia, a salary or equivalent benefit arising from employment or a work experience contract in Sweden. However, the tax obligation under that law does not apply to either income from an independent economic activity carried out in Sweden or income from capital, which is dealt with under the ordinary taxation regime.

11 Remuneration in the form of pensions and sickness benefit which are paid on the basis of social insurance legislation are taxable, when they exceed a certain threshold, under the fourth indent of the first subparagraph of Paragraph 5 of the special income tax law. Part of the remuneration is, however, exempt from taxation. That exemption, which was introduced to prevent the tax in certain cases being higher than the tax on pensions for those who are subject to unlimited taxation, has been designed so that it corresponds to the highest allowance in the ordinary taxation regime.

12 Since 2005, following the judgment in *Wallentin* (C?169/03, EU:C:2004:403), non-resident taxable persons may opt to have their taxable income taxed under the ordinary taxation regime instead of under the taxation at source regime. When they opt for the first of those regimes, those persons are granted allowances for the costs of obtaining and retention of the revenue. If they have obtained all or nearly all their income in Sweden, they also have the right to certain other tax incentives, such as the possibility of deducting, on certain conditions, the interest costs on loans which cannot be deducted in the State of residence.

The main proceedings and the question referred for a preliminary ruling

13 Ms Hirvonen moved to Finland during 2000 after having worked in Sweden all her working life. All her income comes from Sweden in the form of a pension, an annuity and sickness benefit. During the year at issue in the main proceedings, she declared, in Finland, apart from living expenses, only expenses related to the interest paid on a housing loan (‘the interest costs’).

14 Under the Convention between Sweden and Finland for the avoidance of double taxation, in the version applicable to the main proceedings, income obtained in Sweden is taxable only in that country. Since Ms Hirvonen did not earn any income in Finland, she was not able to set off her interest costs against income tax in that State.

15 For its part, for 2005, the Skatteverket taxed Ms Hirvonen’s income in accordance with the special income tax law, without granting her any deduction for her interest costs.

16 Ms Hirvonen, who had opted not to have her income taxed under the ordinary taxation regime, since that regime would have resulted in a higher tax burden than that under the taxation at source regime, even taking into account the deduction of her interest costs, contested that decision before the länsrätten i Stockholms län (County Administrative Court, Stockholm), claiming that she should receive a deduction in respect of her interest costs under the taxation at source regime. That court dismissed the action.

17 The Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm), before which Ms Hirvonen appealed against the decision of the länsrätten i Stockholms län (County Administrative Court, Stockholm), on the basis of EU law, granted her the right to the deduction sought. The Skatteverket then appealed against that judgment before the referring court.

18 Before that court, the Skatteverket argues that the deduction of the interest paid on a

housing loan is possible only under the ordinary taxation regime, for which non-resident taxpayers may opt. The Court of Justice has confirmed the lawfulness of such a right to choose in its judgment in *Gerritse* (C?234/01, EU:C:2003:340). In addition, the situation in the main proceedings is not, in the view of the Skatteverket, comparable to that which gave rise to the judgment in *Gielen* (C?440/08, EU:C:2010:148). The purpose and objective of taxation at source, which is recognised as a fundamental principle of international tax law, namely to ease the burden on the taxpayer and to simplify the task of the administration, instituted by the special income tax law, precludes the possibility of deducting expenses and costs incurred.

19 The referring court does, however, see certain points of convergence between the main proceedings and the case which gave rise to the judgment in *Gielen* (C?440/08, EU:C:2010:148) since, in the latter case, the Court held that the fact that a non-resident taxpayer was able to opt for the taxation regime of resident taxpayers rather than being subject to that applicable to non-resident taxpayers cannot remove the discriminatory nature of a specific tax advantage. None the less, that court notes that, unlike the facts of the case which gave rise to the judgment in *Gielen* (C?440/08, EU:C:2010:148), the main proceedings concern a tax advantage which is not specific and that, in Sweden, a non-resident taxpayer may choose between 'two entirely different regimes' for the taxation of his income.

20 In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 45 TFEU preclude provisions in a Member State's legislation which mean that a person resident in another Member State — who receives all or almost all his income from the first Member State — can choose between two entirely different regimes of taxation, that is to say, either to be taxed at source at a lower tax rate but without the right to such tax relief as is applicable under the ordinary income tax regime, or to be taxed on his income under the latter regime and thus be able to benefit from the tax relief in question?'

Consideration of the question referred

21 As a preliminary point, it must be borne in mind that, in accordance with the case-law of the Court, retired persons such as Ms Hirvonen, who leave the Member State in which they have spent all their working life to reside in another Member State may benefit, where their situation is not covered by the freedom of movement guaranteed by Article 45 TFEU, from the right to freedom of movement as a citizen of the European Union under Article 21 TFEU (see, to that effect, judgment in *Turpeinen*, C?520/04, EU:C:2006:703, paragraphs 16 to 23).

22 It is therefore appropriate to assess Ms Hirvonen's situation in the light of Article 21 TFEU.

23 With regard to the taxation of employment income in Sweden, it is clear from the file that non-resident taxpayers may choose between two different taxation regimes.

24 In principle, their tax is levied at source at the rate of 25%. The basis of that levy is the taxpayer's entire gross income. Where the gross income is made up of pensions, a part thereof is exempted from taxation, the amount of that exemption corresponding to the highest allowance which resident taxpayers may receive in a similar situation. In the taxation at source regime, there is no right to particular deductions such as those available to residents under the ordinary taxation regime.

25 However, under the right of choice which they have, non-resident taxpayers may opt for the ordinary taxation regime and, accordingly, benefit from the deductions related to their personal and

family circumstances. In particular, that regime allows the deduction of interest paid on a housing loan where that cannot be deducted in the State of residence.

26 In that regard, it is apparent from the file that, in the main proceedings, Ms Hirvonen, who opted for the taxation at source regime, nevertheless is seeking to benefit from the possibility of deducting her interest costs, despite the fact that, under national law, that possibility is available only under the ordinary taxation regime.

27 Accordingly, in those particular circumstances, the question referred by the referring court must be understood as asking, in essence, whether the fact that, under the legislation, non-resident taxpayers, who obtain the majority of their income from the source State and who have opted for the taxation at source regime, are refused the grant of the same personal deductions as those granted to residents under the ordinary procedure of establishing the taxation basis, constitutes discrimination contrary to Article 21 TFEU.

28 In that regard, it should be noted that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with EU law (see, inter alia, judgment in *Gielen*, C?440/08, EU:C:2010:148, paragraph 36 and the case-law cited).

29 It must also be noted that the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, inter alia, judgment in *Gielen*, C?440/08, EU:C:2010:148, paragraph 37 and the case-law cited).

30 In accordance with the settled case-law of the Court, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, judgments in *Schumacker*, C?279/93, EU:C:1995:31, paragraph 30, and *Gschwind*, C?391/97, EU:C:1999:409, paragraph 21).

31 In that regard, it is also clear from the case-law of the Court that, in relation to direct taxes, the situations of residents and of non-residents in a State are generally not comparable, because the income received in the territory of a State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident’s personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (judgment in *Wallentin*, C?169/03, EU:C:2004:403, paragraph 15 and the case-law cited).

32 Thus, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (judgment in *Wallentin*, C?169/03, EU:C:2004:403, paragraph 16 and the case-law cited).

33 The Court has held, however, that the position is different in a case in which the non-resident receives no significant income in his State of residence and obtains the major part of his taxable income from an activity pursued in another State, with the result that the State of residence is not in a position to grant him the advantages resulting from the taking into account of his personal and family circumstances (judgment in *Wallentin*, C?169/03, EU:C:2004:403, paragraph 17 and the case-law cited).

34 In the case of a non-resident who receives the major part of his income in a Member State

other than that of his residence, discrimination arises from the fact that the personal and family circumstances of that non-resident are taken into account neither in the State of residence nor in the State of employment irrespective of the different rates applicable under laws such as those at issue in the main proceedings, namely the special income tax law and the inkomstskattelagen (judgment in *Wallentin*, C?169/03, EU:C:2004:403, paragraph 17).

35 In accordance with the case-law of the Court, that applies to all the tax advantages connected with the non-resident's ability to pay tax which are not taken into account either in the State of residence or in the State of employment (see, to that effect, judgment in *Lakebrink and Peters-Lakebrink*, C?182/06, EU:C:2007:452, paragraph 34) and also, *mutatis mutandis*, in a situation where a retirement pension constitutes the taxable income (judgment in *Turpeinen*, C?520/04, EU:C:2006:703, point 29).

36 In the present case, at the time material to the main proceedings, Ms Hirvonen did not receive any taxable income in her State of residence, a retirement pension from her professional activities in Sweden, in particular, constituting her income. It is, accordingly, in principle, for that Member State to take account of Ms Hirvonen's personal and family circumstances.

37 It must be pointed out that it is apparent from the order for reference that the Kingdom of Sweden guarantees, under the special income tax law, which adapts the taxation of non-resident taxpayers by providing, inter alia, for a single rate lower than that applied to resident taxpayers, that non-residents are not treated more disadvantageously than residents.

38 Thus, also under that decision, non-resident taxpayers are subject, if they opt for taxation of their income under the taxation at source regime, to a tax burden which is, as a general rule, lighter than that on resident taxpayers with comparable incomes.

39 It is exactly that factor which distinguishes the facts of the main proceedings from the specific facts of the case which gave rise to the judgment in *Gielen* (C?440/08, EU:C:2010:148).

40 In that case, where the compatibility with EU law of a tax advantage likely to be detrimental mainly to non-resident taxpayers was at issue, the question was whether the fact that it was possible for those taxpayers to opt for the tax regime of resident taxpayers could remove the discriminatory nature of that advantage.

41 Answering that question in the negative, the Court explained that the option to choose between a discriminatory tax regime and one which is ostensibly not discriminatory is not capable of remedying the discriminatory effects of the first of those two tax regimes. A finding to the contrary would have the consequence of validating a tax regime which, in itself, remains contrary to Article 49 TFEU by reason of its discriminatory nature. The Court has previously stated that the fact that a national scheme which restricts the freedom of establishment is optional does not mean that it is not incompatible with EU law (judgment in *Gielen*, C?440/08, EU:C:2010:148, paragraphs 50 to 53).

42 The Court thus concluded that the choice offered to non-resident taxpayers by means of the option to be treated as resident taxpayers does not serve to neutralise the discrimination within the meaning of Article 49 TFEU (judgment in *Gielen*, C?440/08, EU:C:2010:148, paragraph 54).

43 By contrast, in the main proceedings, while it is true that it is open to non-resident taxpayers to opt for the ordinary taxation regime, primarily intended for resident taxpayers, it is apparent from the file before the Court that the taxation at source regime is overall more favourable than the ordinary taxation regime and requires less effort from non-resident taxpayers than that required of resident taxpayers.

44 A difference in treatment between non-resident and resident taxpayers, consisting in the fact that it subjects the income of non-residents to a definitive tax at the single rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, is compatible with EU law provided that the single rate is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance (see, to that effect, judgment in *Gerritse*, C?234/01, EU:C:2003:340, paragraph 53 et seq.).

45 In the main proceedings, it is apparent from the file before the Court that Ms Hirvonen would have paid higher taxes if she had opted to be treated like a resident taxpayer and thus to be subject to the ordinary taxation regime. That is why she opted for the taxation at source regime, governed by the special income tax law. Since she benefited from more advantageous taxation than that which would have been applied to her had she opted for the ordinary taxation regime, Ms Hirvonen cannot in addition claim a tax advantage which would have been granted to her under the ordinary taxation system.

46 The refusal to grant the personal deduction at issue in the main proceedings must, as the Skatteverket points out in its observations, in circumstances such as those of the main proceedings, rather be accepted as an element inherent to that regime, since it seeks both to simplify the task of the administration and ease the burden on the non-resident taxpayer. Thus, when a non-resident taxpayer opts for that regime, the Skatteverket no longer has to collect the tax from that taxpayer, so that it is not necessary for it to have a precise overview of the personal or family circumstances of that person. At the same time, that taxpayer is no longer required to cooperate, in that he is not required to submit a tax return in Swedish for the income which he obtains in Sweden and, in consequence, is not required to make himself familiar with the tax system of a Member State other than his Member State of residence.

47 Accordingly, it must be held that it complies with the essence of the taxation at source regime that all the expenses actually incurred by a taxable person cannot be taken into consideration under that type of taxation, given that the tax is taken from the authority paying national benefits in the source State. As a general rule, that authority is not required to take account of certain expenses and taking account of all expenses would run counter to the simplification sought by that regime.

48 Accordingly, the refusal by national legislation, such as that at issue in the main proceedings, to grant non-resident taxpayers the possibility of particular deductions is irrelevant as regards any disregard of EU law by that legislation, provided that those taxpayers are not subject to an overall tax burden greater that that placed on resident taxpayers and persons in a similar situation to them whose circumstances are comparable to those of non-resident taxpayers.

49 It follows from all the foregoing that, in matters of taxation of income, the refusal to grant non-resident taxpayers who obtain the majority of their income from the source State and who have opted for the taxation at source regime the same personal deductions as those granted to resident taxpayers under the ordinary taxation regime, does not constitute discrimination contrary to Article 21 TFEU where the non-resident taxpayers are not subject to an overall tax burden greater than that placed on resident taxpayers and on persons in a similar situation whose circumstances are

comparable to those of non-resident taxpayers.

Costs

50 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 (Sixth Chamber) hereby rules:

In matters of taxation of income, the refusal to grant non-resident taxpayers, who obtain the majority of their income from the source State and who have opted for the taxation at source regime, the same personal deductions as those granted to resident taxpayers under the ordinary taxation regime does not constitute discrimination contrary to Article 21 TFEU where the non-resident taxpayers are not subject to an overall tax burden greater than that placed on resident taxpayers and on persons in a similar situation whose circumstances are comparable to those of non-resident taxpayers.

[Signatures]

* Language of the case: Swedish.