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Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

24 October 2018(*)

(Reference for a preliminary ruling — Freedom of movement for workers — Income received in a Member State other than the Member State of residence — Bilateral convention for the avoidance of double taxation — Allocation of powers of taxation — Member State of residence's power to tax — Connecting factors)

In Case C?602/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), made by decision of 3 October 2017, received at the Court on 19 October 2017, in the proceedings

Benoît Sauvage,

Kristel Lejeune

v

État belge,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Second Chamber, acting as President of the Sixth Chamber, C.G. Fernlund (Rapporteur), and S. Rodin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Sauvage and Ms Lejeune, by M. Gustin, avocat,

– the Belgian Government, by P. Cottin, J.-C. Halleux and C. Pochet, acting as Agents,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, L. Zettergren and A. Alriksson, acting as Agents,

– the European Commission, by N. Gossement and C. Perrin, 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 Mr Benoît Sauvage and Ms Kristel Lejeune, on the one hand, and the Belgian tax authorities, on the other, regarding those authorities' decision to tax the portion of Mr Sauvage's remuneration from Luxembourg relating to his employment and corresponding to the days on which he actually carried out his activity as an employed person outside Luxembourgish territory.

Legal context

The Belgium-Luxembourg Convention

3 The Convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation and for the settling of certain other questions with respect to taxes on income and capital, and the final protocol relating thereto, signed in Luxembourg on 17 September 1970, as amended by the supplementary agreement signed at Brussels on 11 December 2002 ('the Belgium-Luxembourg Convention'), provides in Article 15(1) and (3):

'1. Without prejudice to the provisions of Articles 16, 18, 19, and 20, salaries, wages and other similar remuneration that a resident of a Contracting State receives in respect of employment shall be taxable only in that State unless the employment is pursued in the other Contracting State. If the employment is pursued there, such remuneration as is derived therefrom may be taxed in that other State.

...

3. By way of derogation from paragraphs 1 and 2 and subject to the condition referred to in paragraph 1, remuneration in respect of employment pursued on board a ship, an aircraft or a railway or road vehicle used for international traffic, or on board a boat used in respect of internal navigation for the purpose of international traffic, are regarded as relating to an activity pursued in the Contracting State in which the place of effective management of that company is situated and are taxable in that State.'

4 Article 23(2)(1) of that Convention, which sets out the method for avoiding the double taxation of income from Luxembourg received by Belgian residents, is worded as follows:

'Income earned in Luxembourg — with the exception of the income referred to in subparagraphs 2 and 3 — and capital situated in Luxembourg, which are taxable in that State under the preceding articles, shall be exempt from tax in Belgium. That exemption shall not limit Belgium's right to take the income and capital thus exempted into account when determining the rate of tax.'

5 According to point 8 of the final protocol to that Convention:

'For the purposes of Article 15(1) and (2), employment is pursued in the other Contracting State when the activity on account of which the salaries, wages and other remuneration are paid is in fact performed in that other State, that is to say, when the employee is physically present in that other State to pursue that activity.'

Belgian law

6 Article 3 of the Income Tax Code 1992 provides:

‘Residents of the Kingdom shall be liable to personal income tax.’

7 Article 5 of that code provides:

‘Residents of the Kingdom shall be liable to individual income tax on all their taxable income covered by this code, even if part of that income has been generated or received abroad.’

8 Article 155 of the code states:

‘Income exempted under international conventions for the avoidance of double taxation shall be taken into account for the purposes of calculating tax, but the tax shall be reduced according to the proportion of the overall income represented by the exempted income …’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Mr Sauvage and Ms Lejeune are resident in Belgium, where they are subject to personal income tax on their worldwide income. Mr Sauvage is employed in a company established in Luxembourg. His position as a financial consultant means that he has to go on brief missions and attend meetings on behalf of his employer outside Luxembourg.

10 For the tax years 2007 to 2009, Mr Sauvage declared his salary as taxable income in Belgium, but he also declared all of that income as exempt from income tax, subject to the maintenance of progressive rates of tax.

11 Following a check on the place of performance of Mr Sauvage’s employment, the Belgian tax authorities adjusted the taxable bases relating to those three tax years. They held that, by virtue of Article 15(1) of the Belgium-Luxembourg Convention, the part of the remuneration relating to Mr Sauvage’s employment in Luxembourg which corresponded to the days on which he was actually carrying out his activity as an employed person outside Luxembourg was taxable in Belgium.

12 Mr Sauvage and Ms Lejeune appealed against the decisions of that authority affecting them. Following the rejection of those appeals by the tax authorities, the applicants brought an action before the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), by which they challenged the authorities’ interpretation of Article 15(1) of that Convention.

13 Before that court, Mr Sauvage and Ms Lejeune argued, primarily, that Article 15(1) must be interpreted as meaning that a limited number of occasional business trips did not restrict the exclusive power of taxation of the State of the source of the income, since the activity concerned was pursued mostly in that State and the services provided outside that State were part of the paid employment in Luxembourg. In the alternative, Mr Sauvage and Ms Lejeune claimed that the freedom of movement of workers and the freedom to provide services guaranteed by the FEU Treaty had been infringed.

14 The referring court states, in essence, that the tax scheme in question deters Belgian residents in circumstances such as those of Mr Sauvage from accepting jobs in a Member State other than the Kingdom of Belgium which entail missions abroad. However, where a Belgian resident is employed on board a means of transport used in international traffic by a company with its place of effective management in Luxembourg, Article 15(3) of the Belgium-Luxembourg

Convention provides that all his income relating to such employment is exempt from tax in Belgium, even when the activity in respect of which such income is paid is carried out outside Luxembourg.

15 In those circumstances the Tribunal de première instance de Liège (Court of First Instance, Liège) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 15(1) of the [Belgium-Luxembourg] Convention, interpreted (i) as allowing a restriction on the power of taxation of the source State in respect of the remuneration of an employee residing in Belgium and performing his activity for a Luxembourgish employer in proportion to the activity performed on Luxembourgish territory, (ii) as allowing a power of taxation to be attributed to the State of residence in respect of the amount of remuneration relating to the activity performed outside Luxembourgish territory, (iii) as requiring the employee to be permanently and every day physically present at the seat of his employer when it is not disputed that he regularly travels there as the result of a judicial assessment, conducted with flexibility, on the basis of objective and verifiable evidence and (iv) as requiring courts and tribunals to evaluate the existence and relevance of the services provided there and elsewhere, day by day, with a view to establishing a proportion over 220 business days, infringe Article 45 [TFEU] in that it constitutes a tax hindrance which discourages cross-border activities and breaches the general principle of legal certainty in that it does not provide for a stable and secure regime of exemption of the entirety of the remuneration received by a Belgian resident employed by an employer whose place of effective management is situated in the Grand Duchy of Luxembourg and places him at risk of double taxation of all or part of his income and subjects him to an unpredictable, legally uncertain regime?'

Consideration of the question referred

16 As a preliminary point, it should be noted that the Belgian Government argues that it is not for the Court of Justice to rule on the conformity of national law or conventional law with EU law. According to that government, the Court may, however, provide the national courts with the elements of interpretation of EU law that will enable them to resolve the legal problems before them.

17 In that connection, it must be stated that the Court admittedly does not have jurisdiction, under Article 267 TFEU, to rule on a possible infringement, by a contracting Member State, of provisions of bilateral conventions entered into by the Member States, which are designed to eliminate or to mitigate the negative effects of the coexistence of national tax regimes. Nor may the Court examine the relationship between a national measure and the provisions of a double taxation convention, such as the bilateral tax convention at issue in the main proceedings, since that question does not fall within the scope of the interpretation of EU law (judgment of 16 July 2009, *Damseaux*, C?128/08, EU:C:2009:471, paragraph 22).

18 However, when a tax scheme under a convention for the avoidance of double taxation forms part of the legal framework applicable to a case and has been presented as such by the national court, the Court must take it into account in order to give an interpretation of EU law which will be of use to the national court (judgment of 19 January 2006, *Bouanich*, C?265/04, EU:C:2006:51, paragraph 51).

19 In the present case, the tax scheme under the Belgium-Luxembourg Convention forms part of the legal framework applicable to the main proceedings and has been presented as such by the national court. Therefore, in order to provide an interpretation of EU law which will be of use to the national court, it is necessary to take it into account.

20 As regards the tax treatment that arises from the Belgium-Luxembourg Convention, it should be pointed out that the question referred is based on the premiss that, under that agreement, the exemption from Belgian tax of the income from Luxembourg of a Belgian resident relating to employment in Luxembourg is conditional upon the physical presence of that resident in Luxembourg. Thus, if the activity in respect of which such income is paid is actually carried out outside that State, the taxation of the related income is a matter for the Kingdom of Belgium.

21 Therefore, it must be considered that, by its question, the referring court asks, in essence, whether Article 45 TFEU must be interpreted as precluding a tax scheme of a Member State under a tax convention for the avoidance of double taxation, such as that at issue in the main proceedings, which makes the exemption of the income of a resident, which arises in another Member State and relates to employment in that State, subject to the condition that the activity in respect of which the income is paid is actually carried out in that Member State.

22 According to settled case-law, in the absence of unifying or harmonising measures for the elimination of double taxation at EU level, the Member States retain competence for determining the criteria for taxation on income and capital with a view to eliminating double taxation by means, inter alia, of international agreements. In that context, the Member States are free to determine, in the framework of bilateral conventions for the avoidance of double taxation, the connecting factors for the purpose of allocating powers of taxation (judgment of 12 December 2013, *Imfeld and Garcet* , C?303/12, EU:C:2013:822, paragraph 41 and the case-law cited).

23 To that end, it is not unreasonable for the Member States to use the criteria followed in international tax practice (see, to that effect, judgments of 12 May 1998, *Gilly*, C?336/96, EU:C:1998:221, paragraph 31, and of 16 July 2009, *Damseaux*, C?128/08, EU:C:2009:471, paragraph 30 and the case-law cited).

24 However, the allocation of powers of taxation mentioned in paragraph 22 of this judgment does not allow Member States to apply measures contrary to the freedoms of movement guaranteed by the FEU Treaty. As far as concerns the exercise of the power of taxation so allocated by bilateral conventions for the avoidance of double taxation, the Member States must comply with EU rules and, more particularly, observe the principle of equal treatment (judgments of 12 December 2002, *de Groot*, C?385/00, EU:C:2002:750, paragraph 94, and of 12 December 2013, *Imfeld and Garcet*, C?303/12, EU:C:2013:822, paragraph 42 and the case-law cited).

25 In the present case, it should be noted that, in order to prevent the same income from employment in Luxembourg being taxed both in the State of residence of the employee, namely the Kingdom of Belgium, and in the source State of that income, namely the Grand Duchy of Luxembourg, Article 15 of the Belgium-Luxembourg Convention — essentially reproducing the provisions of the Model Tax Convention on Income and on Capital drawn up by the Organisation for Economic Cooperation and Development — allocates powers of taxation, as regards that income, between those two Contracting States.

26 In this context, the Court finds, first, that it is apparent from the documents before it that the income of a Belgian resident relating to employment in Luxembourg, where the activity in respect of which such income is paid is actually carried out outside Luxembourg, is not subject to a different treatment from income relating to employment in Belgium. Thus, it appears that the

alleged disadvantage is linked (i) to the choice of the States party to the Belgium-Luxembourg Convention of a connecting factor as regards the allocation of their powers of taxation with respect to the employment income in question and (ii) to the more favourable tax treatment to which taxable employment income is subject in Luxembourg, rather than to a less favourable tax treatment of that income by the Kingdom of Belgium.

27 As has been stated in paragraph 22 of this judgment, Member States are free to determine the connecting factors for the purpose of allocating powers of taxation. Consequently, the mere fact that it has been decided to make the taxing power of the State of the source of the income dependent on the physical presence of a resident in the territory of that State does not constitute discrimination or different treatment prohibited by virtue of the free movement of workers (see, to that effect, judgment of 12 May 1998, *Gilly*, C?336/96, EU:C:1998:221, paragraph 30).

28 Moreover, the objective of a convention for the avoidance of double taxation is to prevent the same income from being taxed in each of the contracting parties to that convention; it is not to ensure that the tax to which the taxpayer is subject in one contracting State is no higher than that to which he or she would be subject in the other contracting State (judgment of 19 November 2015, *Bukovansky*, C?241/14, EU:C:2015:766, paragraph 44 and the case-law cited). Therefore, a less favourable tax treatment, which stems from the allocation of powers of taxation between the Kingdom of Belgium, as the State of residence of the taxpayer, and the Grand Duchy of Luxembourg, as the State of the source of the employment income concerned, and from the differences existing between the tax schemes of those two States, cannot be regarded as constituting discrimination or a difference in treatment prohibited by virtue of the free movement of workers.

29 Secondly, the fact that income relating to employment in Luxembourg, which is paid to a Belgian resident and corresponds to those days on which the activity that gave rise to the payment of that income was actually carried out outside Luxembourg, is subject to tax in Belgium cannot be regarded as treating that resident less favourably than a Belgian resident employed in Belgium, who, either on an occasional or regular basis, actually carries out his activity outside Belgium: the employment income of the latter is taxed by Belgium in its entirety, whereas the income of the former is taxed by that State only in so far as the activity which gave rise to the payment of such income has actually been carried out outside Luxembourg.

30 Thirdly, it cannot be said that a Belgian resident, who is employed in Luxembourg and whose employment is, on either an occasional or regular basis, effectively exercised outside that State is treated less favourably than a Belgian resident in employment in Luxembourg whose presence in Luxembourg is essential and who, consequently, only pursues his activity as an employed person in the territory of that State. Indeed, both of those residents benefit from the exemption laid down by the Belgium-Luxembourg Convention and the Belgian national legislation so far as concerns their income relating to days on which their employment is actually performed in Luxembourg.

31 As the referring court has stated, Article 15(3) of the Belgium-Luxembourg Convention provides that income of a Belgian resident from employment on board a means of transport used in international traffic by a company with its place of effective management in Luxembourg is exempt from tax in Belgium, even where the activity which gave rise to the payment of such income was not actually carried out in Luxembourg. By contrast, a resident of Belgium in a situation such as that of Mr Sauvage is taxed in Belgium if the activity which gave rise to the payment of the income concerned is not actually carried out in Luxembourg.

32 It should be noted in that regard that the fact of choosing different connecting factors depending on whether or not the employment is characterised by high mobility at international

level cannot be regarded as constituting discrimination or a difference in treatment prohibited by virtue of the free movement of workers. First, as follows from paragraph 22 of this judgment, that choice falls, in the absence of unifying or harmonising measures designed to eliminate double taxation at EU level, to the Member States concerned, and, moreover, is in accordance with international tax practice. Second, residents in employment entailing a high level of mobility at international level, because of the very nature of that employment, are not, in any event, in a situation that is objectively comparable to that of a resident in a situation such as that of Mr Sauvage.

33 Finally, the mere fact that the right to a tax advantage is contingent upon the taxpayer providing evidence that the conditions for that right are met, or the fact that there may be a degree of uncertainty as to the determination of the tax burden at the beginning of a tax year, cannot, of themselves, constitute an obstacle within the meaning of EU law.

34 Indeed, in the first place, it is inherent in the principle of the fiscal autonomy of Member States that they determine the evidence that must be provided and the material and formal conditions which must be respected to obtain a tax advantage (see, to that effect, judgments of 30 June 2011, *Meilicke and Others*, C?262/09, EU:C:2011:438, paragraph 37, and of 9 October 2014, *van Caster*, C?326/12, EU:C:2014:2269, paragraph 47).

35 Member States’ tax authorities are thus entitled to require the taxpayer to provide the evidence that they consider necessary for a correct application of the tax and for the purpose of determining whether the conditions for a tax advantage provided for by the tax scheme concerned are fulfilled and, consequently, whether that advantage must be granted (see, to that effect, judgments of 30 June 2011, *Meilicke and Others*, C?262/09, EU:C:2011:438, paragraph 45, and of 9 October 2014, *van Caster*, C?326/12, EU:C:2014:2269, paragraph 52).

36 In the second place, as the results of a tax year can, in principle, be determined only at the end of the tax year concerned, the fact that it is not possible to predict the final tax burden of a tax year with certainty at the start of that year is inherent in tax systems.

37 In the light of the foregoing considerations, the answer to the question referred is that Article 45 TFEU must be interpreted as meaning that it does not preclude a tax scheme of a Member State under a tax convention for the avoidance of double taxation, such as that at issue in the main proceedings, which makes the exemption of the income of a resident which arises in another Member State and relates to employment in that State subject to the condition that the activity in respect of which the income is paid is actually performed in that State.

Costs

38 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:

Article 45 TFEU must be interpreted as meaning that it does not preclude a tax scheme of a Member State under a tax convention for the avoidance of double taxation, such as that at issue in the main proceedings, which makes the exemption of the income of a resident which arises in another Member State and relates to employment in that State subject to the condition that the activity in respect of which the income is paid is actually performed in that State.

[Signatures]

* Language of the case: French.