Reports of Cases

Case C-241/14

Roman Bukovansky
v
Finanzamt Lörrach

(Request for a preliminary ruling from the Finanzgericht Baden-Württemberg)

(Reference for a preliminary ruling — Taxation — 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 — Relationship between that agreement and bilateral agreements on double taxation — Equal treatment — Discrimination on grounds of nationality — National of a Member State of the European Union — Frontier workers — Income tax — Allocation of fiscal sovereignty — Connecting factor for tax purposes — Nationality)

Summary — Judgment of the Court (Third Chamber), 19 November 2015

International agreements — EC-Swiss Agreement on the free movement of persons — Equal treatment — Bilateral agreement on double taxation concluded between Switzerland and a Member State granting that Member State the power to tax the employment income of a taxpayer from that Member State who does not have Swiss nationality, but having transferred his residence from that Member State to Switzerland whilst retaining his place of employment in the Member State — Agreement granting Switzerland the power to tax the employment income of a Swiss national who is in an analogous situation — Lawfulness

(EC-Swiss Agreement on the free movement of persons, Art. 2 and Annex I, Art. 9)

The principles of non-discrimination and of equal treatment, set out in Article 2 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, and in Article 9 of Annex I to that agreement, must be interpreted as not precluding a bilateral agreement on double taxation, concluded between the Swiss Confederation and a Member State, under which the power to tax the employment income of a taxpayer from that Member State who does not have Swiss nationality, although he has transferred his residence from that Member State to Switzerland, whilst retaining his place of employment in the Member State concerned, is vested in the State in which that income originates, namely that Member State, whereas the power to tax the employment income of a Swiss national who is in an analogous situation is vested in the new State of residence, in this case the Swiss Confederation.

Although, under Article 21(1) of the Agreement on the Free Movement of Persons, the provisions of bilateral agreements on double taxation are not affected by those of that Agreement, Article 9 of Annex I to that Agreement, entitled ‘Equal treatment’, provides however, in paragraph 2, a specific rule intended to provide the employed person and the members of his family with the same tax concessions and welfare benefits as those available to national employed persons and members of their

families. In that context, it should be recalled that the Court has already held that, with regard to tax concessions, the principle of equal treatment, laid down in that provision, may also be claimed by a worker who is a national of a Contracting Party, having exercised his right to free movement, with regard to his State of origin.

Hearing requests for a preliminary ruling on the question of whether the agreements on double taxation concluded between the EU Member States must be compatible with the principle of equal treatment and, in general, with the freedoms of movement guaranteed by primary EU law, the Court has held that the Member States are free to determine the connecting factors for the allocation of fiscal sovereignty in such agreements, but are obliged, in exercising the power of taxation thus allocated, to observe that principle and those freedoms.

Consequently, where, in such an agreement, the criterion of nationality appears in a provision which is intended to allocate fiscal sovereignty, such differentiation based on nationality cannot be regarded as constituting prohibited discrimination.

That case-law must apply by analogy to the relationship between the Agreement on the Free Movement of Persons and agreements on double taxation concluded between the Member States and the Swiss Confederation.

As is clear from the preamble and from Articles 1(d) and 16(2) of that Agreement, the latter is intended to achieve, in favour of EU nationals and those of the Swiss Confederation, the free movement of persons on the territory of the Contracting Parties to that agreement based on the rules applying in the European Union, the terms of which must be interpreted in accordance with the case-law of the Court of Justice.

Admittedly, Article 21 of the Agreement on the Free Movement of Persons provides that agreements on double taxation between the EU Member States and the Swiss Confederation are not affected by the provisions of that agreement. However, that article cannot have a scope that conflicts with the principles underlying the legislation of which it is part. Article 21 cannot therefore be understood as allowing the EU Member States and the Swiss Confederation to undermine the attainment of the free movement of persons by depriving, in the exercise of fiscal sovereignty as allocated by their bilateral agreements on double taxation, Article 9(2) of Annex I to that Agreement of its effectiveness.

(see paras 34, 36-41, 48, operative part)