JUDGMENT OF THE COURT (Third Chamber)

3 April 2008 *

In Case C-103/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Tribunal des affaires de sécurité sociale de Paris (France), made by decision of 30 January 2006, received at the Court on 22 February 2006, in the proceedings

Philippe Derouin

v

Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales de Paris - Région parisienne (Urssaf de Paris — Région parisienne),

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues, J. Klučka (Rapporteur) and P. Lindh, Judges,

* Language of the case: French.

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2007,

after considering the observations submitted on behalf of:

— Mr Derouin, by P. Langlois and E. Piwnica, avocats,

— the Union pour le recouvrement des cotisations de sécurité sociale and d'allocations familiales de Paris — Région parisienne (Urssaf de Paris — Région parisienne), by J.-J. Gatineau, avocat,

— the French Government, by G. de Bergues and O. Christmann, acting as Agents,

— the United Kingdom Government, by V. Jackson, acting as Agent, assisted by S. Moore, barrister,

— the Commission of the European Communities, by G. Rozet and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 October 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 307/1999 of 8 February 1999 (OJ 1999 L 38, p. 1, 'Regulation No 1408/71').

2 The reference has been made in the context of proceedings between Mr Derouin and the Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales de Paris - Région parisienne (Urssaf de Paris — Région parisienne) (Social Security and Family Allowance Contribution Collection Office, Paris — Paris Region) ('the Urssaf'), concerning the tax base for the General Social Contribution and the Social Debt Repayment Contribution ('the CSG' and 'the CRDS', respectively) payable by Mr Derouin.

Legal context

Community legislation

3 Article 2(1) of Regulation No 1408/71 states that that regulation is to apply to 'employed or self-employed persons and to students who are or have been subject

to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors'.

4 Article 13 of the regulation states:

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

…

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;

…'

5 Article 14a of the same regulation states:

'Article 13(2)(b) shall apply subject to the following exceptions and circumstances:

…

(2) A person normally self-employed in the territory of two or more Member States shall be subject to the legislation of the Member State in whose territory he resides if he pursues any part of his activity in the territory of that Member State …

…'

6 Article 14d(1) of Regulation No 1408/71 states:

'The person referred to in … Article 14a(2), (3) and (4) … shall be treated, for the purposes of application of the legislation laid down in accordance with these provisions, as if he pursued all his professional activity or activities in the territory of the Member State concerned.'

National legislation

7 The CSG was introduced by Finance Law No 90-1168 of 29 December 1990 (JORF of 30 December 1990, p. 16367), the relevant provisions of which were inserted at Articles L. 136-1 and following of the Code de la sécurité sociale ('the Social Security Code').

8 Article L. 136-1 of the Social Security Code states:

'A social contribution on employment income and substitute income shall be introduced and levied on:

(1) Natural persons who are considered to be resident in France for the purposes of assessment to income tax and are covered, on whatever ground, by a compulsory French sickness insurance scheme;

(2) State agencies, local authorities and their public undertakings of an administrative nature which perform their tasks or are entrusted with missions outside France, in so far as their income is taxable in France and they are covered, on whatever ground, by a compulsory French sickness insurance scheme.'

9 The CRDS was introduced by Article 14-1 of Order No 96-50 of 24 January 1996 on repayment of the social debt (JORF of 25 January 1996, p. 1226), which states:

'A contribution on employment income and substitute income mentioned in Articles L. 136-2 to L. 136-4 of the Social Security Code, except foreign source income referred to in Article 15-III(1) below, received from 1 February 1996 until the termination of the missions provided for in Article 2 by natural persons designated in Article L. 136-1 of the same code shall be introduced.

That contribution shall be levied on the income referred to and in the conditions provided for in Articles L. 136-2 to L. 136-4 and in Article L. 136-8-III of the Social Security Code.'

10 The Convention between the United Kingdom of Great Britain and Northern Ireland and France for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at London on 22 May 1968, ('the Double Taxation Convention'), states in Article 1:

'1 The taxes which are the subject of this Convention are:

…

(b) in France:

the income tax, the corporation tax, including any withholding tax, prepayment (*précompte*) or advance payment with respect to the aforesaid taxes …

2 This Convention shall also apply to any identical or substantially similar future taxes which are imposed in addition to, or in place of, the existing taxes by either Contracting State or by the Government of any territory to which this Convention is extended … The competent authorities of the Contracting States shall notify to each other any changes which have been made in their respective taxation laws.'

11 It is apparent from the written observations submitted by the French Government that the Double Taxation Convention will be repealed from the entry into force of a

new convention for the avoidance of double taxation concluded on 28 January 2004 between the two Member States concerned. That new convention expressly mentions the CSG and the CRDS among the '[t]axes which are the subject of [that latter convention]'.

The main proceedings and the question referred for a preliminary ruling

12 It is apparent from the order for reference that Mr Derouin:

— resides in France, where he practises as a lawyer in a self-employed capacity and is a partner in Linklaters, a partnership governed by English law ('the partnership'). Linklaters has its head office in the United Kingdom, but also has offices in other Member States, including France, where it has a office in Paris ('the Paris office');

— is registered at the Paris Court of Appeal (France) as an avocat and at the same time with the Supreme Court of England and Wales (United Kingdom) as a Registered Foreign Lawyer;

— performs all his work as a lawyer for the Paris office;

— is remunerated by receiving a share of the profits made by the partnership;

— is resident for tax purposes in France and is taxed in that Member State and in each country where the partnership is established on his share of the results of each office;

— is covered by a compulsory sickness insurance scheme in France and is registered with the Urssaf as a self-employed person.

13 The Urssaf calculated family allowance contributions and the CSG and the CRDS claimed from Mr Derouin on the occupational income he derives from working at the Paris office and on his share of profits made by the partnership's other offices. It is apparent from details provided during the oral procedure that Urssaf claimed from Mr Derouin payment of the CSG and the CRDS for different periods relating to the years from 2000 to 2005.

14 Mr Derouin paid the family allowance contributions thus calculated on the whole of his occupational income (including, therefore, United Kingdom source income), but brought proceedings before the Tribunal des affaires de sécurité sociale de Paris (Social Security Court for Paris) challenging payment of CSG and CRDS contributions calculated on his United Kingdom source income on the grounds that they are not social security contributions but taxes and that, since United Kingdom source income is taxed in the United Kingdom under the Double Taxation Convention, only income taxable in France can be subject to the CSG and the CRDS.

15 The Urssaf contends, on the contrary, that the contributions are social security contributions, that they fall within the scope of Regulation No 1408/71, and that they must therefore be calculated on the whole of Mr Derouin's income, whether earned in the United Kingdom or in France.

16 In order to obtain clarification in that regard, the Tribunal des affaires de sécurité sociale de Paris, by order of 12 April 2005, sought an opinion from the Cour de Cassation (Court of Cassation) on whether the CSG and the CRDS should be regarded as taxes for the purposes of the Double Taxation Convention.

17 The Cour de Cassation gave its opinion on 2 September 2005 in the following terms: 'It is necessary to refer to the Court of Justice of the European Communities the question whether Regulation No 1408/71 … must be interpreted as precluding a convention such as the [Double Taxation Convention] from providing that income received in the United Kingdom by self-employed persons resident in France and covered by social insurance in that State is excluded from the tax base for [CSG] and [CRDS] levied in France.'

18 Considering that, for the resolution of the dispute, it was necessary to know whether the application of the provisions of the Double Taxation Convention to the CSG and the CRDS infringed Communities rules, the Tribunal des affaires de sécurité sociale de Paris decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Regulation 1408/71 … to be interpreted as precluding a convention, such as the [Double Taxation Convention] from providing that income received in the United Kingdom by workers resident in France and covered by social insurance in that State is excluded from the base on which the [CSG] and the [CRDS] levied in France are assessed?'

The question referred for a preliminary ruling

19 The question referred seeks, essentially, to determine whether a Member State whose social security legislation is applicable pursuant to Regulation No 1408/71 is free to

determine the tax base for contributions such as the CSG and the CRDS or whether, on the contrary, the regulation requires the Member State to include in the tax base for such contributions income earned in another Member State, without being able to forgo levying those contributions on the income.

20 In that regard, it must be borne in mind that the objective of Regulation No 1408/71, as stated in the second and fourth recitals in the preamble, is to ensure free movement of employed and self-employed persons within the European Community, while respecting the special characteristics of national social security legislation. To that end, as is clear from the fifth, sixth and tenth recitals, that regulation upholds the principle of equality of treatment of workers under the various national legislation and seeks to guarantee the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement. The system put in place by Regulation No 1408/71 is merely a system of coordination, concerning inter alia the determination of the legislation applicable to employed and self-employed persons who make use, under various circumstances, of their right to freedom of movement (Case C-493/04 *Piatkowski* [2006] ECR I-2369, paragraphs 19 and 20, and Case C-50/05 *Nikula* [2006] ECR I-7029, paragraph 20).

21 Concerning, first, the applicability of Regulation No 1408/71 to a person in a situation such as Mr Derouin's, it is apparent from the order for reference and from all the observations submitted to the Court that his status is that of a self-employed migrant worker, resident in France and carrying on self-employed activity in France and the United Kingdom, and accordingly he falls under the regulation, pursuant to Article 14a(2) thereof. It follows that the person concerned is, in accordance with that provision, exclusively subject to the French legislation. The United Kingdom Government moreover confirmed at the oral hearing that it does not levy any social security contributions on income received by the person concerned on its territory.

22 Concerning, second, the applicability of Regulation No 1408/71 to the CSG and the CRDS, the Court has held that those contributions fall within the scope of that regulation. The Court essentially found that it could not agree with the proposition that, since the CSG and the CRDS are really to be categorised as taxes, they fall outside the scope of the regulation. It added that the fact that a levy is categorised as a tax under national legislation does not mean that, as regards that regulation, that same levy cannot be regarded as falling within its scope (see, to that effect, Case C-34/98 *Commission* v *France* [2000] ECR I-995, paragraphs 33 and 34, and Case C-169/98 *Commission* v *France* [2000] ECR I-1049, paragraphs 31 and 32). Moreover, it should be noted that the question referred by the national court assumes that the contributions at issue fall within the scope of Regulation No 1408/71.

23 In addition, the Court held that Community law does not detract from the power of the Member States to organise their social security systems (see Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 100 and the case-law cited).

24 Concerning more specifically the determination of the tax base for social contributions, according to settled case-law, in the absence of harmonisation at Community level, it is for the legislation of the Member State concerned to determine the income to be taken into account when calculating those contributions (see, to that effect, *Nikula*, paragraph 24 and the case-law cited).

25 It is, however, essential, when the Member State concerned exercises that power, that it comply with Community law (see, to that effect, in particular, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 34, and Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 39). The power of Member States is thus not unlimited, since they are, in particular, required to respect the spirit and the principles of Regulation No 1408/71, including the single State principle applicable to social secu-

rity, to ensure that a person is not penalised for exercising his right to free movement and to satisfy themselves that the system thus created does not deprive that person of social protection.

26 Thus, it follows, from all the case-law cited at paragraphs 23 to 25 above that, since Regulation No 1408/71 is a means of coordination and not of harmonisation, Member States have the power to determine the tax base for contributions such as the CGS and the CRDS.

27 As a result, as Community law now stands, a Member State is entitled to forgo, unilaterally or in the context of tax treaty such as the Double Taxation Convention, the inclusion in the tax base for contributions such as the CSG and the CRDS of income earned in another Member State by a resident self-employed person in a situation such as that of the applicant in the main proceedings. Although it is established that no provision of Regulation No 1408/71 prohibits a Member State from calculating the amount of the social contributions of a resident on the basis of his total income (see, to that effect, *Nikula*, paragraph 31), clearly no provision of that regulation requires it to do so.

28 In that regard, it must be noted that, contrary to the arguments put forward at the oral hearing by Urssaf, the United Kingdom Government and the Commission of the European Communities, to the effect that the doctrine derived from the judgment in Case C-249/04 *Allard* [2005] ECR I-4535 obliges Member States as a matter of principle, to include in the tax base for social contributions income earned by persons in a situation such as Mr Derouin's, that doctrine is not capable of being applied to such a situation.

29 On the facts of *Allard*, the Member State of residence of the person concerned chose to include in the tax base for social contributions all the income earned by him both on its territory and on that of another Member State, as it was authorised to do so by Regulation No 1408/71. Given the context, the Court held that, in accordance with the national legislation applicable pursuant to the conflict of law rules of that regulation, the social contributions payable by the person concerned should be calculated taking into account his total income.

30 Therefore, the solution adopted by the Court in the judgment in Allard cannot be applied in a context such as that in the case in the main proceedings, where the exclusion of the foreign source income from the tax base for social contributions concerned results from the provisions of the applicable national law.

31 It must, however, be stated that the exclusion from the tax base for social security contributions of a worker's foreign source income cannot affect the worker's right to receive all of the benefits provided for that the applicable legislation. It is for the national court to determine whether such is actually the case in the situation at issue in the main proceedings.

32 Having regard to all of the foregoing, the answer to the question referred must be that Regulation No 1408/71 is to be interpreted as meaning that it does not preclude a Member State whose social legislation is alone applicable to a resident self-employed worker, from excluding from the tax base for contributions such as the CSG and the CRDS income earned by the worker in another Member State, by application, in particular, of a convention for the avoidance of double taxation with respect to taxes on income.

Costs

33 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 (Third Chamber) hereby rules:

Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 307/1999 of 8 February 1999, is to be interpreted as meaning that it does not preclude a Member State whose social legislation is alone applicable to a resident self-employed worker, from excluding from the tax base for contributions such as the General Social Contribution and the Social Debt Repayment Contribution income earned by the worker in another Member State, by application, in particular, of a convention for the avoidance of double taxation with respect to taxes on income.

[Signatures]