Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

14 March 2019*

(Reference for a preliminary ruling — Freedom of movement for workers — Equal treatment — Income tax — Legislation for the avoidance of double taxation — Pension received in a Member State other than that of residence — Method of calculating the exemption in the Member State of residence — Loss of part of the benefit of certain tax advantages)

In Case C-174/18,

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 8 February 2018, received at the Court on 5 March 2018, in the proceedings

Jean Jacob,

Dominique Lennertz

v

État belge,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, E. Juhász and C. Vajda (Rapporteur), 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:

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

– the European Commission, by W. Roels and N. Gossement, acting as Agents,

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

gives the following

* Language of the case: French.

Judgment

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

2 The request has been made in proceedings between, on the one hand, Mr Jean Jacob and Ms Dominique Lennertz, a couple residing in Belgium, and, on the other hand, État belge (the Belgian State) regarding the taking into account, in the calculation of the couple's joint tax liability in Belgium, of the pension received by Mr Jacob in another Member State, which is exempt from tax in Belgium but included in the basis of assessment for the granting of certain tax advantages, with the result that Mr Jacob and Ms Lennertz are deprived of part of the advantages to which they would have been entitled were that income not taken into account.

Legal context

The 1970 Convention

3 Paragraph 3 of Article 18 (headed 'Pensions') of 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 wealth, signed on 17 September 1970, in the version applicable to the facts in the main proceedings ('the 1970 Convention'), provides as follows:

'... pensions and other similar income paid in Luxembourg to a Belgian resident shall not be taxable in Belgium if those payments relate to contributions, allowances or insurance premiums paid into a supplementary pension scheme by the beneficiary or on his behalf, or contributions by his employer to an internal scheme, and if those contributions, allowances, insurance premiums or employer's contributions have actually been taxed in Luxembourg.'

4 Article 23(2)(1) of the 1970 Convention provides:

'So far as concerns Belgian residents, double taxation shall be avoided in the following manner:

1. 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 its tax rate.'

Belgian law

5 Article 131 of the code des impôts sur le revenu de 1992 (Income Tax Code 1992), in the version applicable to the facts in the main proceedings ('the CIR 1992'), governs tax-free allowances.

6 Tax reductions granted in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire as well as charitable donations are governed, respectively, by Articles 145/1, 145/21, 145/24, 145/31 and 145/33 of the CIR 1992.

7 Article 155 of that code provides:

'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 same procedure shall apply for:

— income exempt under other international treaties or agreements, in so far as they provide for a "subject to progressivity" clause;

…

Where joint taxation is determined, the reduction shall be calculated by reference to the total net income of each taxpayer.'

8 Following the judgment of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750), the Kingdom of Belgium adopted Circular No CI.RH.331/575.420 of 12 March 2008, providing for a reduction in tax for income which is exempted under an international convention, in addition to the reduction provided for in Article 155 of the CIR 1992 ('the 2008 Circular').

9 The 2008 Circular states in its introduction:

'1. In the Belgian tax system, tax advantages linked to the personal and family circumstances of the taxpayer … are applied both to Belgian income and to foreign income. If the personal and family circumstances in question have not been taken into account abroad, a part of those advantages is lost.

The Netherlands applied a system of exemption subject to progressivity similar to that practised in Belgium. In its judgment [of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750), the Court] held, however, that that practice was contrary to the legislation on the freedom of movement for persons in the [European Union].

Belgium was requested by the European Commission to bring the Belgian tax provisions relating to the application of the system of exemption subject to progressivity … into conformity with the obligations under Articles 18, 39, 43 and 56 EC …

The following approach has been adopted: in cases where the personal and family circumstances of the taxpayer have not been taken into account abroad, a reduction in tax for income earned abroad will be granted in addition to the reduction provided for under [Article 155 of the CIR 1992].

That additional reduction will only be granted, however, if the total of the tax calculated using the method of exemption subject to progressivity provided for in [Article 155 of the CIR 1992], together with tax due abroad on the exempt income, exceeds the tax which would have been payable if that income had been entirely earned in Belgium and the related taxes had been payable in Belgium.

That reduction is to correspond to the difference between, on the one hand, Belgian income tax (calculated using the method of exemption subject to progressivity, as provided for in [Article 155 of the CIR 1992]), together with tax of the same nature payable on income earned abroad, and, on the other hand, the tax which would have been payable if that income had been earned entirely in Belgium and the related taxes had been payable in Belgium.

In order to calculate the amount of the additional reduction, it is therefore necessary to calculate the tax which would have been payable if the income had been earned entirely in Belgium and the related taxes had been payable in Belgium.

2. Pending an amendment of the Belgian legislation in the manner described above, that reduction will have to be applied under the conditions and within the limits laid down in this circular.

…'

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

10 In the joint tax declaration made by the applicants in the main proceedings in respect of the 2013 tax year, Mr Jacob mentioned that he receives two pensions, namely one from Belgium in the amount of EUR 15 699.57 and one from Luxembourg in the amount of EUR 14 330.75. Those two pensions were supplemented by Mr Jacob's declared income from immovable property in the amount of EUR 1 181.60, thus making his total income EUR 31 211.92.

11 With regard to Mr Jacob, the Belgian tax authorities calculated, on the basis of his total income, including the pension from Luxembourg which is exempt from taxation in Belgium under the 1970 Convention, a basic tax of EUR 11 448.36 corresponding to a tax rate of close to 36.68%. Tax reductions were applied to this amount, first, in the amount of EUR 3 032.46 in respect of tax-free allowances, long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire as well as charitable donations, and, second, in the amount of EUR 1 349.45 in connection with replacement income, pension income and early retirement income. The resulting reduced basic tax, namely EUR 7 066.45 was, subsequently, reduced in connection with exempt income earned abroad by the amount of EUR 3 220.14, in proportion to the share of the Luxembourg pension in the total income, which resulted in principal tax in the amount of EUR 3 846.31.

12 The applicants in the main proceedings challenged that calculation, noting that the reduction of EUR 3 220.14 granted in connection with exempt income earned abroad does not correspond to 36.68% but to 22.47% of the pension received from Luxembourg, with the result that the latter was subject, ultimately, to a net tax rate of 14.21% instead of being exempt from tax in Belgium in accordance with the 1970 Convention. According to Mr Jacob, in order to respect the exemption of his Luxembourg pension, it would have been necessary to apply to it, directly after the calculation of the basic tax, a reduction rate of 36.68%, which would have reduced the basic tax, before the application of the tax reductions, by EUR 5 256.44, which would have led, ultimately, to a principal amount of tax of EUR 1 810.01 instead of EUR 3 846.31.

13 In rejecting that claim by decision of 25 September 2014, the Belgian tax authorities noted that, in accordance with Article 155 of the CIR 1992, income exempted under international conventions for the prevention of double taxation is to be taken into account for the purposes of calculating tax, it being understood that the tax is to be reduced in proportion to the overall income represented by the exempted income, after application of the tax reductions. Those authorities also maintained that the applicants in the main proceedings did not satisfy the conditions set out in the 2008 Circular in order to qualify for tax relief in connection with foreign income, granted in addition to the reduction provided for by Article 155.

14 The tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), before which an action was brought against the decision of the Belgian tax authorities, made a request for a preliminary ruling to the Court. The Court, by order of 29 November 2016, *Jacob and Lennertz* (C-345/16, not published, EU:C:2016:911), rejected that request on the basis of Article 53(2) of its Rules of Procedure as being manifestly inadmissible, as that request did not meet the requirements laid down in Article 94 of those rules by reason of shortcomings with regard to the factual and legal context of the case.

15 The referring court then submitted a second request for a preliminary ruling to the Court to address those shortcomings, invoking, inter alia, the judgment of 12 December 2013, *Imfeld and Garcet* (C-303/12, EU:C:2013:822).

16 In the light of that judgment, the referring court takes the view that it is required to guarantee the actual benefit of the tax advantage to which the taxpayer is entitled owing to his personal and family circumstances, regardless of the manner in which the Member States have shared between them the

obligation to ensure that those tax advantages are taken into account in their entirety. The referring court states that the exemption method provided for in the 1970 Convention requires the Member State of residence to exempt fully from tax pensions which, in accordance with that convention, may be taxed only in the Member State of its source, the 'subject to progressivity' clause in that convention meaning that exempt foreign income may be taken into account only for the purpose of determining the rate of tax applicable to other income that is taxable in Belgium. However, because of the method of calculating the taxes of the applicants in the main proceedings, those applicants lose part of the benefit of the tax advantages to which they are entitled and the foreign income of Mr Jacob, which is in principle exempt, is affected fiscally.

17 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 for a preliminary ruling:

'Is it contrary to Article 39 [TEU] for the Belgian tax system, in Article 155 of the [CIR 1992] and regardless of whether or not [the 2008 Circular] is applied, to have the effect that the Luxembourg pensions of the applicant Mr Jacob, which are exempt from tax pursuant to Article 18 of the [1970 Convention], are taken into account for the purpose of calculating the tax payable in Belgium and used as the basis of assessment for the granting of tax advantages provided for under the [CIR 1992], even though they should not form part of that basis by reason of their total exemption as provided for in [that convention], and that those advantages, such as the tax-free allowance and tax reductions in respect of long-term savings, costs paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire, and charitable donations made by the applicant Mr Jacob, are partly lost, reduced or granted to a lesser extent than if both applicants had income earned in Belgium, which, for its part, is taxable in Belgium and is not exempt and may thus absorb the tax advantages in their entirety?'

Consideration of the question referred

The freedom applicable to the situation of the applicants in the main proceedings

18 The referring court refers, in its question, to Article 39 TEU, while mentioning in the grounds of its order for reference both the freedom of establishment and the freedom of movement for workers.

19 However, as the Court has held, it is not thereby precluded from providing the national court with all those elements for the interpretation of EU law which may be of assistance in adjudicating on the case pending before it, whether or not that national court has specifically referred to them in its question (see, to that effect, inter alia, judgments of 21 February 2006, *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraph 29, and of 23 April 2009, *Rüffler*, C-544/07, EU:C:2009:258, paragraph 57).

20 The referring court does not state, however, whether Mr Jacob receives his Luxembourg pension in respect of salaried or non-salaried occupational activities carried out in Luxembourg.

21 According to settled case-law, freedom of establishment for nationals of one Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons (see, inter alia, judgments of 28 January 1986, *Commission* v *France*, 270/83, EU:C:1986:37, paragraph 13; of 29 April 1999, *Royal Bank of Scotland*, C-311/97, EU:C:1999:216, paragraph 22; and of 1 October 2009, *Gaz de France — Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 54). By contrast, any national of the European Union who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed

in a Member State other than that of his residence comes within the scope of Article 45 TFEU (see, inter alia, judgments of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 76, and of 28 February 2013, *Petersen*, C-544/11, EU:C:2013:124, paragraph 34).

22 In that regard, if the Luxembourg pension received by Mr Jacob results from a salaried activity, it is, indeed, Article 45 TFEU concerning the freedom of movement for workers which is relevant. If, on the other hand, Mr Jacob carried out non-salaried activity in Luxembourg, it would be the freedom of establishment provided for in Article 49 TFEU which would apply. It is for the referring court to confirm which provision of the FEU Treaty is applicable.

23 Even if the Court examines the question referred by reference to the freedom of movement for workers, it should be noted that the application of the freedom of establishment to the case in the main proceedings would not in any way affect the substance of the Court's reply, which would be transposable *mutatis mutandis*.

The question referred

24 By its question the referring court asks, in essence, whether Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect of depriving a couple resident in that State — one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation — of part of the benefit of the tax advantages granted by the Member State of residence.

25 It must be recalled from the outset that, in accordance with settled case-law, although the Member States are at liberty, in the framework of bilateral agreements for the avoidance of double taxation, to determine the connecting factors for the purposes of allocating powers of taxation, that allocation of powers of taxation does not allow them to apply measures that are contrary to the freedoms of movement guaranteed by the Treaty. As far as concerns the exercise of the power of taxation thus allocated by bilateral conventions to prevent double taxation, the Member States must comply with EU rules (see, inter alia, judgments of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraphs 93 and 94; of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraphs 41 and 42; and of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 66) and, more particularly, observe the principle of equal treatment (see, to that effect, judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 94).

26 It should also be recalled that, according to the Court's case-law, it is, in principle, a matter for the Member State of residence to grant the taxpayer all the tax advantages relating to his personal and family circumstances, because that State is, as a rule, best placed to assess the taxpayer's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, since that is where his personal and financial interests are centred (see, inter alia, judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 32; of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, paragraph 34; of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 43; and of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 55).

27 The Court has also ruled that the Member State of residence cannot cause a taxpayer to forfeit part of his tax-free allowance and his personal tax advantages because, during the year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account (judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 110).

28 It is in the light of these principles that it is necessary to examine whether the loss in part of the benefit of tax advantages such as those at issue in the main proceedings, as a result of the application of national legislation, is contrary to Article 45 TFEU.

29 The Belgian tax legislation at issue in the main proceedings provides that exempted income earned abroad is first of all included in the tax base which is used to determine the tax rate applicable to Belgian income that is not exempt, the base tax being calculated on the basis of that tax base. Tax reductions in connection with the tax-free allowance, long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire and charitable donations are then applied to the base tax. It is only once those reductions have been applied that the base tax is reduced in proportion to the share of the total income that the exempted foreign income represents, in accordance with Article 155 of the CIR 1992.

30 It should be noted that the inclusion of exempt foreign income in the calculation of the Belgian tax rate, in the calculation of Belgian tax and in the tax base for the granting of tax advantages comes within the Kingdom of Belgium's freedom to choose how to organise its tax system on the basis of the principle of fiscal autonomy and cannot be considered to be contrary to the free movement of workers provided that the effects of such inclusion does not amount to discriminatory treatment contrary to EU law (see, to that effect, judgment of 6 December 2007, *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraph 53). Such an inclusion does not, of itself, prevent ensuring the effective exemption of that income in accordance with EU law, where relevant by means of subsequent compensation.

31 However, by applying tax reductions on a base that includes both non-exempt income from Belgium and exempt foreign income, and by deducting from the tax the share representing the latter in the total amount of income forming the taxable base only subsequently, Belgian tax legislation is liable, as the Belgian Government itself acknowledged in its written observations, to make taxpayers, such as the applicants in the main proceedings, lose part of the tax advantages that would have been granted to them in full had all of their income come from Belgium and if the tax reductions had thus been applied only to that income, or had the 2008 Circular applied to the tax advantages at issue.

32 It is clear from the case-law cited in paragraph 26 above that it is indeed for the Kingdom of Belgium, as the Member State in which the applicants in the main proceedings are resident, to grant the latter all the tax advantages connected with their personal and family circumstances. The Belgian Government maintains in this regard that, with the exception of the tax reductions in respect of the tax-free allowance, the other tax reductions at issue are not linked to the notion of 'personal and family circumstances' of the applicants in the main proceedings and must therefore not be considered, following the example of the Belgian authorities' interpretation of that notion in the 2008 Circular, to be personal tax advantages the unrelieved loss of which, as a result of the exemption of the foreign income and the inapplicability of the 2008 Circular, would be prohibited by Article 45 TFEU.

33 In the first place, it must be noted that the tax reductions in respect of the tax-free allowance are, as the Belgian Government acknowledged in its written observations, recognised by the Court's case-law as advantages linked to the taxpayer's personal and family circumstances, as is clear from paragraph 27 above.

34 It follows that, in that connection, the Belgian tax legislation does not comply with that case-law.

35 In the second place, as regards the question of whether the other tax reductions at issue in the main proceedings, namely the tax reductions in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire and charitable donations, may be regarded as linked to the personal and family circumstances of the applicants in the main proceedings, it is important, as a preliminary matter, to set out the context in which that concept arises.

36 In that regard, it follows from the case-law cited in paragraph 26 above, and in particular from the judgment of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452), that the Member State of residence must assess, for the purpose of granting potential tax advantages, the taxpayer's personal ability to pay tax as a whole.

37 The interpretation proposed by the Belgian Government, namely that the tax advantages linked to personal and family circumstances should be understood restrictively as advantages which pursue a social objective by guaranteeing the taxpayer a minimum subsistence income that is not subject to tax and which thus meet a social need, cannot be upheld.

38 In particular, contrary to the arguments put forward by the Belgian Government in its written observations, such an interpretation cannot be inferred from the judgment of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452). In that judgment, the Court ruled that the refusal by the Member State in which the taxpayer carries out a salaried activity to take into account, for the purpose of establishing the tax rate applicable to the income of that taxpayer resident in another Member State, negative rental income relating to property not personally occupied by that taxpayer and located in that other Member State was contrary to the free movement of workers referred to in Article 39 EC, when the Member State of residence is unable to grant the taxpayer advantages resulting from the taking into account of his personal and family situation. By taking into account such negative rental income the Court opted for a broad meaning of the notion of 'personal and family situation' without reference to any social purpose.

39 In those circumstances, in order to determine whether the applicants in the main proceedings were unduly deprived of the full benefit of tax reductions linked to their personal and family situation, other than the reduction in respect of the tax-free allowance, it is necessary to ascertain whether those advantages are linked to their personal ability to pay tax.

40 In that regard, it must be considered that tax reductions such as those at issue in the main proceedings, namely reductions in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire as well as charitable donations, are designed, principally, to encourage taxpayers to spend and make investments which necessarily have an impact on their ability to pay taxes.

41 As a result, such tax reductions may be considered to be linked to the personal and family situation of the applicants in the main proceedings, in the same way as the tax reductions in respect of the tax-free allowance.

42 It follows that the applicants in the main proceedings have, as a couple, suffered a disadvantage in so far as they have not benefited in full from the tax advantages to which they would have been entitled if they had both received all of their income in Belgium.

43 The legislation at issue in the main proceedings thus establishes a difference in tax treatment between EU-citizen couples residing in the Kingdom of Belgium according to the source of their incomes — a difference which is liable to discourage those citizens from exercising the freedoms guaranteed by the Treaty, and, in particular, the free movement of workers guaranteed by Article 45 TFEU (see, to that effect, judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 51).

44 It is settled case-law that a measure which is liable to hinder the free movement of workers enshrined in Article 45 TFEU can be permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be appropriate for ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain that objective (see, by analogy, judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 64 and the case-law cited).

45 In the present case, however, no justification has been put forward by the Belgian Government nor contemplated by the referring court.

46 In the light of the foregoing, the answer to the question referred is that Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect of depriving a couple resident in that State, one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation, of part of the benefit of the tax advantages granted by the Member State of residence.

Costs

47 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 (Ninth Chamber) hereby rules:

Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect of depriving a couple resident in that State, one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation, of part of the benefit of the tax advantages granted by the Member State of residence.

[Signatures]