JUDGMENT OF THE COURT (Third Chamber)

28 February 2013 (*)

(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 – Equal treatment – Self-employed frontier workers – Nationals of a Member State of the Union – Business income received in that Member State – Transfer of residence to Switzerland – Refusal of a tax advantage in that Member State because of the transfer of residence)

In Case C-425/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Baden-Württemberg (Germany), made by decision of 7 July 2011, received at the Court on 16 August 2011, in the proceedings

Katja Ettwein

v

Finanzamt Konstanz,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as the President of the Third Chamber, K. Lenaerts, E. Juhász (Rapporteur), T. von Danwitz and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 4 July 2012,

after considering the observations submitted on behalf of:

– Mrs Ettwein, by T. Picker, Steuerberater,

– Finanzamt Konstanz, by N. Rogall, acting as Agent,

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

– the Spanish Government, by A. Rubio González, acting as Agent,

– the European Commission, by W. Mölls and T. Scharf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 October 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the relevant provisions 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, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6, 'the Agreement').

2 The request has been made in proceedings between Mrs Ettwein, a German national, and the Finanzamt Konstanz (Tax Office, Konstanz) concerning the Finanzamt's refusal to apply to her and her spouse, also of German nationality, because of the transfer of their residence to Switzerland, a tax advantage provided for by German legislation in the case of joint taxation of spouses.

Legal context

The Agreement

3 According to the second sentence of the preamble, the contracting parties are '[r]esolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community'.

4 Under Article 1(a) and (d) of the Agreement, its objective is inter alia to accord nationals of the Member States of the European Community and the Swiss Confederation a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the contracting parties, and to accord them the same living, employment and working conditions as those accorded to nationals.

5 Article 2 of the Agreement, 'Non-discrimination', provides:

'Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

6 Article 4, 'Right of residence and access to an economic activity', reads as follows:

'The right of residence and access to an economic activity shall be guaranteed … in accordance with the provisions of Annex I.'

7 Article 11, 'Processing of appeals', provides in paragraph 1:

'The persons covered by this Agreement shall have a right of appeal to the competent authorities in respect of the application of the provisions of this Agreement.'

8 Article 16, 'Reference to Community law', reads as follows:

'1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.

2. In so far as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.'

9 Article 21, 'Relationship to bilateral agreements on double taxation', provides in paragraph

2:

‘No provision of this Agreement may be interpreted in such a way as to prevent the Contracting Parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their place of residence.’

10 Annex I to the Agreement deals with the free movement of persons, and Chapter II of that annex contains provisions on employed persons. Article 9 of that chapter, ‘Equal treatment’, provides:

‘1. An employed person who is a national of a Contracting Party may not, by reason of his nationality, be treated differently in the territory of the other Contracting Party from national employed persons as regards conditions of employment and working conditions, especially as regards pay, dismissal, or reinstatement or re-employment if he becomes unemployed.

2. An employed person and the members of his family referred to in Article 3 of this Annex shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.

…’

11 Chapter III of Annex I deals with ‘Self-employed persons’.

12 Article 12 of Chapter III, ‘Rules regarding residence’, provides in paragraph 1:

‘A national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity (hereinafter referred to as a “self-employed person”) shall receive a residence permit valid for a period of at least five years from its date of issue, provided that he produces evidence to the competent national authorities that he is established or wishes to become so.’

13 Article 13 of that chapter, ‘Self-employed frontier workers’, provides:

‘1. A self-employed frontier worker is a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day or at least once a week.

2. Self-employed frontier workers shall not require a residence permit.

…’

14 Under Article 15 of that chapter, ‘Equal treatment’:

‘1. As regards access to a self-employed activity and the pursuit thereof, a self-employed worker shall be afforded no less favourable treatment in the host country than that accorded to its own nationals.

2. The provisions of Article 9 of this Annex shall apply mutatis mutandis to the self-employed persons referred to in this Chapter.’

15 Chapter V of Annex I is devoted to ‘Persons not pursuing an economic activity’. Article 24 of that chapter, ‘Rules regarding residence’, provides in paragraph 1:

‘A person who is a national of a Contracting Party not pursuing an economic activity in the state of

residence and having no right of residence pursuant to other provisions of this Agreement shall receive a residence permit valid for at least five years provided he proves to the competent national authorities that he possesses for himself and the members of his family:

(a) sufficient financial means not to have to apply for social assistance benefits during their stay;

(b) all-risks sickness insurance cover.

…'

German legislation

16 The relevant provisions are those of the Law on income tax (Einkommensteuergesetz, 'the EStG'), in the version published on 19 October 2002 (BGBl. 2002 I, p. 4212), as amended on 20 December 2007 (BGBl. 2007 I, p. 3150).

17 Paragraph 1 of the EStG provides:

'1. Natural persons who have a permanent residence or their usual place of residence in Germany are subject to unlimited income tax liability. …

…

3. At their request, natural persons who do not have a permanent residence or their usual place of residence in Germany are also treated as subject to unlimited income tax liability, in so far as they receive income in Germany within the meaning of Paragraph 49. This applies only if at least 90% of their income during the calendar year is subject to German income tax …

…'

18 Paragraph 1a(1) of the EStG reads as follows:

'For nationals of a Member State of the European Union or of a State to which the Agreement on the European Economic Area applies ['the EEA Agreement'] who … are to be treated as subject to unlimited income tax liability under Paragraph 1(3), for the purposes of … the first sentence of Paragraph 26(1) the following applies:

…

1. … It is a condition that the recipient has his permanent residence or usual place of residence in the territory of another Member State of the European Union or of a State to which the [EEA Agreement] applies.

…

2. a not permanently separated spouse with no permanent residence or usual place of residence in Germany is, on request, treated as subject to unlimited income tax liability for the purposes of the first sentence of Paragraph 26(1). The second sentence of indent 1 applies by analogy. In the application of the third sentence of Paragraph 1(3), the income of both spouses must be taken into account and the basic allowance … doubled.'

19 Paragraph 26(1) of the EStG gives not permanently separated spouses who are subject to unlimited income tax liability or are to be treated as such the right to choose between separate taxation in accordance with Paragraph 26a and joint taxation in accordance with Paragraph 26b.

20 Paragraph 26b of the EStG, ‘Joint taxation of spouses’, provides:

‘Where spouses are taxed jointly, the income received by the spouses is aggregated and attributed to the spouses jointly, and, unless provided otherwise, the spouses are then treated jointly as one taxpayer.’

21 Paragraph 32a of the EStG, ‘Income tax scale’, provides in paragraph 5:

‘In the case of spouses who are assessed jointly to income tax under Paragraphs 26 and 26b, the income tax according to the scale … is twice the amount of tax which arises for half their jointly taxable income under subparagraph 1 (the “splitting” procedure).’

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

22 Mr and Mrs Ettwein both work on a self-employed basis, Mrs Ettwein as a business consultant and her husband as an artist. They receive all their income in Germany. On 1 August 2007 Mr and Mrs Ettwein, who until then resided in Lindau (Germany), transferred their residence to Switzerland. They continued, however, to carry on their business activities in Germany and to receive almost all their income in Germany.

23 With a view to the calculation of tax on their income for the 2008 tax year, Mr and Mrs Ettwein requested, as in previous tax years, to be taxed jointly, that is, by the ‘splitting’ method, stating that they had not obtained any taxable income in Switzerland.

24 In an initial tax notice the Finanzamt Konstanz allowed their request. On 1 December 2009, however, it cancelled that notice, on the ground that the favourable ‘splitting’ arrangement, which is granted on the basis of the personal and family situation of the spouses, should not be applied to them because their residence was neither in the territory of a Member State of the European Union nor in that of a State party to the EEA Agreement. By a tax notice of 22 March 2010, the Finanzamt consequently subjected Mr and Mrs Ettwein to the separate taxation arrangement. The administrative complaint against that notice was unsuccessful, and Mrs Ettwein brought proceedings for annulment before the Finanzgericht Baden-Württemberg.

25 That court considers that Mr and Mrs Ettwein are ‘self-employed frontier workers’ within the meaning of Article 13(1) of Annex I to the Agreement, since they are German nationals resident in Switzerland, work on a self-employed basis in the territory of the Federal Republic of Germany, and return from their place of business to their place of residence every day. In accordance with Article 9(2) in conjunction with Article 15(2) of Annex I to the Agreement, self-employed frontier workers enjoy the same tax and social security advantages in the territory of the State in which they pursue their activity as self-employed nationals. The referring court is inclined to consider that the fact that Mr and Mrs Ettwein were refused the benefit of the ‘splitting’ method solely because they are resident in Switzerland is contrary to those provisions of the Agreement.

26 In the opinion of the referring court, that conclusion is consistent with the principles laid down by the relevant case-law of the Court on freedom of establishment and freedom of movement for workers, freedoms which are also included in the Agreement. It follows from that case-law that the principle of non-discrimination, which applies also in tax matters, prohibits not only overt discrimination on grounds of nationality but also all forms of covert discrimination.

27 The national court observes that it is in principle for the State of residence to tax the taxpayer in full, taking account of the specific features of his personal and family situation. Where, however, he is taxed in full in the State which is the source of his income because he receives

almost all his income there, that State cannot refuse to take account of his personal and family situation where that is not possible in the State of residence. According to the Court's case-law, the 'splitting' method forms part of the personal and family situation which must be taken into account in such a case (Case C-279/93 *Schumacker* [1995] ECR I-225, and Case C-107/94 *Asscher* [1996] ECR I-3089).

28 Consequently, in that court's view, the situation of Mr and Mrs Ettwein, which could not be taken into account in the State of residence, Switzerland, because they have no income there, must be taken into account in Germany for the purpose of calculating tax, so as not to produce discrimination compared to couples resident in Germany who receive their income in Germany and are in the same personal and family situation as Mr and Mrs Ettwein.

29 Having regard to those considerations, the Finanzgericht Baden-Württemberg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of the [Agreement], in particular Articles 1, 2, 11, 16 and 21 thereof and Articles 9, 13 and 15 of Annex I thereto, to be interpreted as precluding the benefit of joint taxation with the use of the "splitting" procedure from being refused to spouses residing in Switzerland who are subject to taxation in the Federal Republic of Germany on their entire taxable income?'

Consideration of the question referred

30 It must be observed that, according to the legislation at issue in the main proceedings, the 'splitting' procedure is a tax advantage for spouses subject to income tax in Germany where the income received by one of them is markedly higher than that received by the other. As the Court has found, the system was introduced to mitigate the progressive nature of the income tax scales. It consists in aggregating the total income of the spouses and then notionally attributing 50% of it to each of them and taxing it accordingly. If the income of one spouse is high and that of the other low, 'splitting' levels out their taxable amounts and palliates the progressive nature of the income tax scales (*Schumacker*, paragraph 7).

31 However, under that legislation, the system applies only if the spouses have their permanent or usual residence either in German territory or in the territory of another Member State of the European Union or a State to which the EEA Agreement applies. That agreement does not apply to the Swiss Confederation.

32 In order to give an answer to the referring court's question, the Court must examine, first, whether a situation such as that of Mr and Mrs Ettwein falls within the scope of the Agreement.

33 The argument of the German Government and the European Commission that the Agreement applies solely where there is discrimination on grounds of nationality, in other words where nationals of one contracting party are treated unequally in the territory of the other contracting party compared to nationals, must be rejected at the outset. It is possible that nationals of a contracting party may also claim rights under the Agreement against their own country, in certain circumstances and in accordance with the provisions applicable (see, inter alia, Case C-257/10 *Bergström* [2011] ECR I-13227, paragraphs 27 to 34).

34 With respect to the circumstances of the main proceedings and the provisions of the Agreement that may be applicable, it must be noted that, in accordance with its wording, Article 13(1) of Annex I to the Agreement is applicable to the situation of Mr and Mrs Ettwein. They are nationals ‘of a Contracting Party’, namely the Federal Republic of Germany, are resident in the territory ‘of a Contracting Party’, namely the Swiss Confederation, and pursue a self-employed activity in the territory ‘of the other Contracting Party’, namely the Federal Republic of Germany.

35 In that provision a distinction is drawn between the place of residence, situated in the territory of one contracting party, and the place where a self-employed activity is pursued, which must be in the territory of the other contracting party, regardless of the nationality of the persons concerned. Consequently, by virtue of that provision, Mr and Mrs Ettwein must be categorised as ‘self-employed frontier workers’ for the purposes of applying the Agreement, it being moreover common ground that they return every day from the place of their business activity to their place of residence.

36 The Court cannot accept the argument of the German Government and the Commission that the concept of ‘self-employed frontier worker’ is comprehended within that of ‘self-employed person’ under Article 12(1) of Annex I to the Agreement. While a ‘self-employed frontier worker’ is also a ‘self-employed person’ in so far as he pursues a self-employed activity, the concept of ‘self-employed frontier worker’ is defined by separate provisions which differ from the concept of ‘self-employed person’ defined in Article 12(1).

37 It must be observed here that, as may be seen from Article 13(1) of Annex I to the Agreement, a ‘self-employed frontier worker’ does not require a residence permit in order to pursue a self-employed activity, contrary to the rule for a ‘self-employed person’ in Article 12 of Annex I. The latter provision, as is apparent from its title and a reading of its content as a whole, was introduced solely in order to regulate residence.

38 The fact that the contracting parties devoted a separate provision of the Agreement to self-employed frontier workers emphasises the special situation of that category of self-employed persons and denotes an intention to facilitate their movement and mobility.

39 That conclusion is also borne out by Article 24(1) of Annex I to the Agreement, which lays down a right of residence, namely the right of nationals of one contracting party to establish their residence in the territory of the other contracting party regardless of the pursuit of an economic activity. It is frontier workers, such as Mr and Mrs Ettwein, in particular who must be able to benefit fully from that right, while maintaining their economic activity in their country of origin.

40 It must therefore be concluded that the situation of Mr and Mrs Ettwein falls within the scope of the Agreement.

41 As Mr and Mrs Ettwein are ‘self-employed frontier workers’ within the meaning of Article 13(1) of Annex I to the Agreement, the principle of equal treatment stated in Article 15(1) of that annex applies to them also (see Case C-506/10 *Graf and Engel* [2011] ECR I-9345, paragraph 23 and the case-law cited), the ‘host country’ within the meaning of the latter provision being, in their situation, the Federal Republic of Germany.

42 Moreover, in accordance with Article 15(2) of Annex I, the provisions of Article 9 of that annex are to apply mutatis mutandis to self-employed frontier workers. It is apparent from Article 9(2) of the annex that the principle of equal treatment extends also to tax concessions.

43 It follows from that application mutatis mutandis that a self-employed frontier worker enjoys,

in the host country, the same tax advantages as self-employed persons pursuing their activity in that country and residing there.

44 Account must nevertheless also be taken of Article 21(2) of the Agreement, under which no provision of the Agreement may be interpreted in such a way as to prevent the contracting parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their place of residence.

45 That provision thus allows different treatment, in tax matters, of resident and non-resident taxpayers, but only where they are not in a comparable situation.

46 According to the Court's case-law, in relation to income tax, the taxpayer's personal ability to pay tax, as a result of taking into account all his income and his personal and family circumstances, can be assessed most easily in his State of residence, in which the major part of his income will normally be concentrated, and from that point of view the situations of residents and non-residents are as a general rule not comparable (*Schumacker*, paragraphs 32 to 34, and *Asscher*, paragraph 41). The Court has pointed out, 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 (*Schumacker*, paragraph 36).

47 The Court has held that a non-resident taxpayer – employed or self-employed – who receives all or almost all of his income in the State in which he pursues his business activity is objectively in the same situation, as regards income tax, as a resident of that State who pursues comparable activities there. Those two categories of taxpayers are, in particular, in comparable situations with regard to the taking into account of their personal and family circumstances. Such taking into account is not possible in the State of residence of frontier workers such as Mr and Mrs Ettwein, since they do not receive income there (see, to that effect, *Schumacker*, paragraphs 37 and 38; *Asscher*, paragraphs 42 and 43; and Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 20).

48 In the light of that case-law, Article 21(2) of the Agreement cannot be relied on by a contracting party in order to refuse spouses who pursue their business activities in that State, receive all their income there and are subject to unlimited liability to income tax there the tax advantage, linked to their personal and family situation, consisting in the application of the 'splitting' method, on the sole ground that the spouses' place of residence is located in the other contracting party.

49 Consequently, by refusing that tax advantage because of the place of residence of the taxpayers, the legislation at issue in the main proceedings is contrary to Article 13(1) of Annex I to the Agreement in conjunction with Articles 15(2) and 9(2) of the Agreement.

50 Moreover, the objective of the Agreement is inter alia, in accordance with Article 1(a), to accord nationals of the Member States of the European Union and the Swiss Confederation a right of residence in the territory of the contracting parties.

51 That conclusion is also in keeping with the case-law of the Court according to which the freedom of movement for persons which, according to the second sentence in the preamble to the Agreement, the contracting parties are resolved to bring about between them on the basis of the rules applying in the European Union would be impeded if a national of a contracting party were to be placed at a disadvantage in his country of origin solely for having exercised his right of movement (*Bergström*, paragraphs 27 and 28).

52 In the light of the foregoing, the answer to the question referred is that Article 1(a) of the Agreement and Articles 9(2), 13(1) and 15(2) of Annex I to the Agreement must be interpreted as precluding legislation of a Member State which refuses the benefit of joint taxation with the use of the ‘splitting’ method, provided for by that legislation, to spouses who are nationals of that State and subject to income tax in that State on their entire taxable income, on the sole ground that their residence is situated in the territory of the Swiss Confederation.

Costs

53 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:

Article 1(a) 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, signed in Luxembourg on 21 June 1999, and Articles 9(2), 13(1) and 15(2) of Annex I to that Agreement must be interpreted as precluding legislation of a Member State which refuses the benefit of joint taxation with the use of the ‘splitting’ method, provided for by that legislation, to spouses who are nationals of that State and subject to income tax in that State on their entire taxable income, on the sole ground that their residence is situated in the territory of the Swiss Confederation.

[Signatures]

* Language of the case: German.