

JUDGMENT OF THE COURT (Seventh Chamber)

11 September 2014 (*)

(Reference for a preliminary ruling — Income tax — Legislation for the avoidance of double taxation — Taxation of income from immovable property received in a Member State other than the Member State of residence — Method of exemption with maintenance of progressivity in the Member State of residence — Difference in treatment between immovable property situated in the Member State of residence and in another Member State)

In Case C-489/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the hof van beroep te Antwerpen (Belgium), made by decision of 3 September 2013, received at the Court on 10 September 2013, in the proceedings

Ronny Verest,

Gaby Gerards

v

Belgische Staat,

THE COURT (Seventh Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents,
- the French Government, by G. de Bergues and J.-S. Pilczner, acting as Agents,
- the European Commission, by A. Cordewener and W. Roels, 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 63 TFEU and Article 65 TFEU.

2 The request has been made in proceedings between Mr Verest and Ms Gerards and the Belgische Staat concerning the tax treatment, in Belgium, of immovable property situated in France.

Legal context

3 Paragraph 1 of Article 7 of the Income Tax Code 1992 (code des impôts sur les revenus 1992; 'the ITC 92') provides:

'1. Income from immovable property shall be:

1° in the case of immovable property that is not rented out:

(a) in respect of property situated in Belgium:

– the cadastral income, in the case of immovable property which has not been built on, material and equipment which are immovable by nature or by the use to which they are put or dwellings of the kind referred to in Article 12(3);

– the cadastral income increased by 40%, where other property is concerned;

(b) in respect of property situated abroad: the rental value;

...'

4 Article 13 of the ITC 92 states:

'As regards the rental value, the rent and the rental benefits of immovable property, net income shall mean the amount of the gross income reduced, for the costs of maintenance and repair, by:

– 40% in the case of immovable property which has been built on and in the case of material and equipment which are immovable by nature or by the use to which they are put ...

...'

5 Article 155 of the ITC 92 provides:

'Income exempted under international conventions for the prevention 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.

...'

6 Article 3(1) of the Convention between France and Belgium for the prevention of double taxation and making provision for rules on mutual legal and administrative assistance on taxation of income, signed in Brussels on 10 March 1964 ('the convention for the prevention of double taxation') is worded as follows:

'Income deriving from immovable property, including accessories and the farm implements and livestock of agricultural and forestry undertakings, is taxable only in the contracting State in which that property is situated.'

7 Paragraphs 2 and 4 of Article 19 A of the convention for the prevention of double taxation state:

‘Double taxation shall be avoided as follows:

As regards Belgium:

...

2. Income other than that referred to in paragraph 1 above shall be exempt from the Belgian taxes referred to in paragraph 3 A of Article 2 of this Convention where the taxation of that income is exclusively allocated to France.

...

4. Notwithstanding the foregoing provisions, the Belgian taxes covered by this Convention may be calculated, on income taxable in Belgium in accordance with the Convention, at the rate corresponding to aggregate taxable income under Belgian law.’

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

8 According to the order for reference, the appellants in the main proceedings live in Belgium, where their income is subject to tax. Following the purchase of immovable property in France in August 2004, they submitted a tax declaration in 2005 to which adjustments were made by the Belgian tax authorities. Those adjustments were contested by the appellants, who brought an action before the rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp).

9 Following the dismissal of their action, the appellants in the main proceedings lodged an appeal with the hof van beroep te Antwerpen (Court of Appeal, Antwerp).

10 According to the hof van beroep te Antwerpen, the dispute before it concerns the tax treatment in Belgium of immovable property situated in France. It observes in this connection that, under the convention for the prevention of double taxation, income from immovable property is taxable only in the State in which the property is situated. That exemption is, for the Kingdom of Belgium, coupled with maintenance of progressivity, pursuant to which income from immovable property of property situated in France may be taken into account when calculating the tax rate applicable to income taxable in Belgium.

11 The hof van beroep te Antwerpen also observes that, where property situated in Belgium is not rented out, income from that property is determined on the basis of cadastral income and that a notional immovable property income is established in a similar manner in France. However, in accordance with Article 7 of the ITC 92, income from immovable property that is not rented out, but situated in a State other than Belgium, would be determined on the basis of its rental value alone. Belgian cadastral income and French cadastral income are comparable, but cadastral income is, as a general rule, lower than rental value.

12 In the light of those considerations, the hof van beroep te Antwerpen decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 56 of the EC Treaty preclude the taxation in one Member State, on a basis other than its local cadastral income, of immovable property situated in another Member State which is not rented out, in particular where, as in the present case, the local cadastral income is determined in a similar way to the Belgian cadastral income from Belgian immovable property?’

Consideration of the question referred

The scope of the question

13 Under the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 31 and the case-law cited).

14 Accordingly, in order to be able to give the referring court a useful answer, the national rule at issue in the main proceedings must be assessed in its factual and legal context, as it is set out in the order for reference.

15 It is common ground that, in the case in the main proceedings, what is at issue is the tax treatment of income from immovable property that is not rented out acquired in France by Belgian residents, the appellants in the main proceedings. Under the convention for the prevention of double taxation concluded between those two Member States, the immovable property income relating to that property is to be taxed in France alone. However, a clause, ‘on maintenance of progressivity’, allows the Belgian authorities to take account of that income for the purpose of determining the tax rate applicable to income taxable only in Belgium.

16 In addition, the referring court observes that the detailed rules for determining the income deriving from buildings that are not rented out differ according to whether the property is situated in Belgium or in another Member State. Thus, the order for reference states that, in the case in the main proceedings, income from immovable property situated in France that is not rented out is determined on the basis of the rental value, the amount of which is higher than the cadastral income from a comparable property situated in Belgium.

17 In the light of the foregoing, it is therefore necessary to determine whether Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, which, when a progressivity clause contained in a convention for the prevention of double taxation is applied, lays down that, in order to establish the tax rate on income, income derived from immovable property situated in another Member State that is not rented out is to be determined on the basis of its ‘rental value’, whereas income derived from such property but situated in the first Member State is to be determined on the basis of its ‘cadastral income’ and the latter is, generally, lower than the ‘rental value’.

The existence of a restriction on the free movement of capital

18 First of all, it should be recalled that, in accordance with settled case-law, in the absence of unifying or harmonising measures adopted by the European Union, 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 conventions. In that context, the Member States are free to determine the connecting factors for the allocation of fiscal jurisdiction in bilateral conventions for the avoidance of double taxation (judgment in *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 41 and the case-law cited).

19 However, that allocation of fiscal jurisdiction does not allow Member States to apply measures contrary to the freedoms of movement guaranteed by the FEU Treaty. As regards the exercise of the power of taxation so allocated by bilateral conventions to prevent double taxation, the Member States must comply with EU rules (judgment in *Imfeld and Garcet*, EU:C:2013:822, paragraph 42).

20 It follows that, subject to the freedoms of movement guaranteed by the Treaty being respected, a Member State is free to lay down, with a view to the taxation of the income of natural persons, methods of assessment of income from immovable property of property that is not rented out that differ according to whether the property is situated in that Member State or in another Member State.

21 In this connection, it should be recalled that the measures prohibited by Article 63(1) TFEU as restrictions on the movement of capital, include those which are likely to discourage residents of one Member State from making investments in immovable property in other Member States (judgment in *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 44).

22 In a situation such as that in the case in the main proceedings, it is common ground that all of the income from immovable property of Belgian residents is taken into account when determining the tax rate to be applied to their income taxable in Belgium. It is also common ground that the income from immovable property that is not rented out situated in Belgium is determined on the basis of the cadastral income, the amount of which is lower than the rental value used in order to determine the income from such property situated in another Member State.

23 It is for the referring court to ascertain whether the taxable income of Belgian residents who own immovable property situated in a Member State other than Belgium that is not rented out is therefore liable to be subject to a higher rate of tax than that applicable to the income of Belgian residents who have a comparable property in Belgium.

24 If that were the case, legislation such as that at issue in the main proceedings would constitute a difference in treatment likely to dissuade Belgian residents from making immovable property investments in Member States other than Belgium, which is such as to give rise to a restriction on the free movement of capital, prohibited, in principle, by Article 63 TFEU.

The existence of a justification for the restriction on the free movement of capital

25 Under Article 65(1)(a) TFEU, Article 63 TFEU is to be without prejudice to the right of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

26 In so far as Article 65(1)(a) TFEU is a derogation from the freedom of movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the State in

which they invest their capital is automatically compatible with the Treaty (see judgment in *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 55 and the case-law cited).

27 Indeed, the derogation provided for by Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) TFEU 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63' (see judgment in *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, paragraph 56).

28 The differences in treatment authorised by Article 65(1)(a) TFEU must thus be distinguished from discrimination prohibited by Article 65(3) TFEU. It is clear from the case-law of the Court that, if a national tax rule is to be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment which it prescribes must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (see judgment in *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, paragraph 57).

29 First, in the dispute in the main proceedings, it is common ground that under the convention for the prevention of double taxation as applied in Belgium, income from immovable property of property situated in France is not taxed in Belgium, whereas income from immovable property of property situated in Belgium is included in the basis of assessment. However, that convention allows the Belgian authorities to take account of income from immovable property of property situated in France for the purpose of determining, in accordance with the 'maintenance of progressivity' provided for by the convention, the tax rate applicable to income taxable in Belgium.

30 It is apparent from the case-law of the Court that the exemption method with 'maintenance of progressivity' serves to ensure that the income of a taxpayer that is exempt in the Member State of residence may nevertheless be taken into account by that Member State for the purpose of applying the rule of progressivity when calculating the amount of tax on the taxpayer's remaining income (see, to that effect, judgment in *Asscher*, C-107/94, EU:C:1996:251, paragraph 47).

31 The objective of such a rule is to prevent, in the Member State of residence, a lower rate of tax being applied to the taxable income of a taxpayer who is the owner of immovable property situated in another Member State than the rate applicable to the income of taxpayers who are the owners of comparable properties in the Member State of residence.

32 In the light of that objective, the situation of taxpayers who have acquired immovable property in the Member State of residence is comparable to that of taxpayers who have acquired such a property in another Member State.

33 Secondly, it must be noted that the Belgian government has not put forward any public interest objective capable of providing justification.

34 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, in so far as it is liable to lead, when a progressivity clause contained in a convention for the prevention of double taxation is applied, to a higher rate of tax on income merely because the method for determining income from immovable property results in income deriving from immovable property that is not rented out situated in another Member State being assessed at a higher amount than income from such property situated in the first Member State. It is for the referring court to ascertain whether that is in fact the effect of the legislation at issue in the dispute in the main proceedings.

Costs

35 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 (Seventh Chamber) hereby rules:

Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, in so far as it is liable to lead, when a progressivity clause contained in a convention for the prevention of double taxation is applied, to a higher rate of tax on income merely because the method for determining income from immovable property results in income deriving from immovable property that is not rented out situated in another Member State being assessed at a higher amount than income from such property situated in the first Member State. It is for the referring court to ascertain whether that is in fact the effect of the legislation at issue in the dispute in the main proceedings.

[Signatures]

* Language of the case: Dutch.