JUDGMENT OF THE COURT (First Chamber)

28 February 2013 (*)

(Freedom to provide services – Freedom of movement for workers – Legislation of a Member State allowing exemption from taxation on income received for work carried out in another State in the context of development aid – Conditions – Establishment of the employer within the national territory – Refusal where the employer is established in another Member State)

In Case C-544/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Rheinland-Pfalz (Germany), made by decision of 18 March 2011, received at the Court on 24 October 2011, in the proceedings

Helga Petersen,

Peter Petersen

v

Finanzamt Ludwigshafen,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Berger, A. Borg Barthet, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2012,

after considering the observations submitted on behalf of:

– Mrs Petersen and Mr Petersen, by R. Sturm, Rechtsanwalt,

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

– the European Commission, by W. Mölls 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 56 TFEU.

2 The request has been made in proceedings between Mrs and Mr Petersen and the Finanzamt (Tax Office) Ludwigshafen concerning the latter’s refusal to grant an income tax

exemption in respect of Mr Petersen's income from activity carried out in Benin in the context of a development aid project financed by the Danish International Development Agency.

Legal context

3 Under Paragraph 1(1) of the Einkommensteuergesetz (Law on Income Tax), in the version applicable to the facts in the main proceedings (BGBl. 2002 I, p. 4215), natural persons who have their place of permanent residence or usual abode in Germany are subject there to tax on the entirety of their income.

4 Under Paragraph 34c(1) and (5) of that Law:

'(1) Where taxpayers with unlimited tax liability pay a tax on their foreign income in the State in which that income originates which is equivalent to the German tax on income, the foreign tax which has been charged and (minus the amount of any entitlement to a reduction) paid shall be offset against the amount of German income tax for which they are liable in respect of income received in that State;

…

(5) The upper tax authorities of the *Länder* or the tax authorities designated by them may, with the agreement of the Federal Ministry of Finance, grant a partial or full rebate of the income tax on foreign income, or fix a lump sum where this is deemed appropriate for economic reasons or if the application of point 1 of this Paragraph proves particularly difficult.'

5 On 31 October 1983, the German Federal Ministry of Finance published a Notice concerning the tax treatment of employee income for overseas work (BStBl. 1983 I, p. 470) ('the Notice from the Ministry of Finance'), which is addressed to the upper tax authorities of the *Länder* and provides that income which an employee receives from an employer established in Germany in the context of a current employment relationship in respect of activity carried out in another State supported by that scheme is to be exempt from income tax.

6 Pursuant to Point 4 of the first subparagraph of Title I of that Notice, activity carried out in the context of German public development aid which is part of technical or financial cooperation on behalf of suppliers, producers or service providers established in Germany is included in the category of activity supported by that scheme.

7 The first subparagraph of Title II of the Notice from the Ministry of Finance provides that the activity must be carried on, uninterrupted, for at least three months in any of the States with which the Federal Republic of Germany has not signed a double taxation agreement covering employee income.

8 However, the employee income which is thus exempt is, pursuant to Title IV of the Notice from the Ministry of Finance, taken into account in the progressive application of the tax. Under that provision, the rate of tax applied to taxable income is to be the rate which would be applicable if the exempt employee income were to be included in the calculation of the tax.

9 The first subparagraph of Point 1 of Title VI of the Notice from the Ministry of Finance, which relates to procedural rules, provides that refraining from levying tax using the withholding tax procedure, which leads to a certificate of exemption being issued, must be requested, either by the employer or the employee, from the tax office of the place in which the employer's establishment is located. Under that same subparagraph, it is not necessary to prove that, in the State in which an activity is carried on, a tax on the income from that activity is collected which is equivalent to the

German tax on income. The second subparagraph of Point 1 of Title VI of that Notice provides that, if it is convincingly shown that the conditions specified in Titles I and II of that Notice are met, the certificate of exemption may be issued as long as it is possible for the employer to amend the withholding tax. Under Point 2 of Title VI of that Notice, where the refraining from the levying of withholding tax has not yet been effected, the employee must request it from the tax office of his place of residence.

10 Article 15 of the Agreement of 22 November 1995 between the Federal Republic of Germany and the Kingdom of Denmark for the prevention of double taxation in the field of income and wealth taxes and inheritance and gift taxes, and concerning assistance in tax matters (BGBl. 1996 II, p. 2565) provides, in essence, that the income received in the course of employment by a resident of one of the Contracting States is taxable only in the State of residence, unless that employment is carried on in the other State. In the latter case, income received from employment is taxable in that other State.

11 No double taxation agreement has been concluded between the Federal Republic of Germany and the Republic of Benin.

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

12 Since November 1991, the Petersens, applicants in the main proceedings, have owned an apartment situated in Ludwigshafen (Germany) where they and their daughter have been officially resident since 1 February 1992. Since 1984, Mr Petersen, who is a Danish national, has owned a holiday home situated in Helsinge (Denmark).

13 Mr Petersen was employed by the undertaking Hoffmann A/S, established in Glostrup (Denmark). In the context of that work, he was seconded to Benin for a period of three years starting on 15 January 2002 to assist with a project financed by the Danish International Development Agency. That work was part of a development aid project. Mr Petersen’s income for that work totalled DKK 449 200, that is, approximately EUR 60 200, for 2003.

14 In January 2002, Mr Petersen’s employer requested an exemption from the Helsinge tax authority in respect of the income paid to Mr Petersen during his secondment to Benin. That authority indicated that, with effect from 15 January 2002, that income would not be taxed.

15 For 2003, the Petersens asked the German tax authority to apply the joint assessment scheme to their income tax and stated that their place of residence was situated in Ludwigshafen. They claimed that the income received by Mr Petersen from a Danish employer for his work in Benin should not be subject to income tax in Germany and that, under Article 15 of the Double Taxation Agreement of 22 November 1995 between the Federal Republic of Germany and the Kingdom of Denmark, the latter alone was entitled to tax that income.

16 In the alternative, the Petersens requested a tax exemption in respect of that income, submitting that, in such circumstances, income deriving from employment activity carried out in another State in the context of development aid activity for an employer established in Denmark was exempt from income tax under the Notice from the Ministry of Finance.

17 In its assessment notice for 2003, the Finanzamt Ludwigshafen made the entirety of Mr Petersen’s income subject to income tax and fixed the amount of that tax at EUR 29 718.

18 After the rejection of their complaint against that assessment notice, the applicants in the main proceedings brought an action before the Finanzgericht Rheinland-Pfalz (Finance Court of the *Land* of Rheinland-Pfalz (Rhineland-Palatinate)).

19 First of all, that court notes that, according to its assessment of the facts and of the applicable law, the income in question, received by Mr Petersen, is in principle subject to income tax in Germany.

20 Next, the Finanzgericht Rheinland-Pfalz points out that, since Mr Petersen cannot claim the tax advantage provided for in the Notice from the Ministry of Finance, as his employer is not a 'resident' within the terms of that Notice and the activity carried on by the applicant in the main proceedings and his employer is not linked to German public development aid, the applicant is subject to a heavier tax burden than that to which a resident worker carrying on a similar activity on behalf of a resident employer would be subject.

21 Lastly, the Finanzgericht Rheinland-Pfalz holds that the activities of the employer of the applicant in the main proceedings come within the scope of Article 56 TFEU and that the national legislation at issue in the main proceedings may constitute an unjustified restriction of the freedom of an employer established in another Member State to provide services. According to that court, the higher tax burden placed on an employee in a situation such as that of the applicant in the main proceedings makes his activities less economically attractive when compared with those of employees who are resident in Germany and have concluded similar employment contracts with undertakings which are established in Germany and operate in the context of development aid. An employer from another Member State cannot compensate for that tax disadvantage except by paying a higher gross salary, which would lead that employer to hire employees who are resident and taxed in its own State and would thus affect its ability to recruit skilled workers in another Member State. Employees with the same qualifications would confine themselves to seeking employment relationships exclusively within their Member State of residence.

22 In those circumstances the Finanzgericht Rheinland-Pfalz decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a legal provision compatible with Article 49 EC … if it makes a tax exemption for income of an employee who is taxable in Germany dependent on the employer being established in Germany, but does not provide for such exemption if the employer is established in another … Member State?'

The question referred for a preliminary ruling

Preliminary observations

Relevant freedom of movement

23 According to settled case-law, in 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 question referred to it (see, inter alia, Case C-286/05 *Haug* [2006] ECR I-4121, paragraph 17; Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 46; and Case C-157/10 *Banco Bilbao Vizcaya Argentaria* [2011] ECR I-13023, paragraph 18).

24 Similarly, it is also settled case-law that, in order to provide a useful reply to the court which

has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of European Union law to which the national court did not refer in its questions (see, inter alia, Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 24; Case C-153/03 *Weide* [2005] ECR I-6017, paragraph 25; Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 26; and *Banco Bilbao Vizcaya Argentaria*, cited above, paragraph 19).

25 By its question, the referring court asks whether Article 56 TFEU should be interpreted as precluding national legislation of a Member State pursuant to which income received in respect of employment activity by a taxpayer who is resident in that Member State and has unlimited tax liability is exempt from income tax if the employer is established in that Member State, but is not so exempt if that employer is established in another Member State.

26 The German Government and the European Commission, however, contend that the case in the main proceedings cannot be examined in the light of Article 56 TFEU. The Commission thus argues that a provision of national law which is intended to limit the benefit of an exemption to taxpayers whose employer is established in the Member State in question must be examined in the light of freedom of movement for workers. According to the German Government, by contrast, freedom of movement for workers is also irrelevant inasmuch as the applicant in the main proceedings carried on the activity in question in a third State.

27 Accordingly, it is first necessary to determine whether and, if so, to what extent national legislation such as that at issue in the main proceedings is capable of affecting the exercise of the freedom to provide services and the freedom of movement for workers.

28 It follows from settled case-law that, in order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the TFEU, the purpose of the legislation concerned must be taken into consideration (see Case C-233/09 *Dijkman and Dijkman-Lavaleije* [2010] ECR I-6649, paragraph 26 and the case-law cited).

29 In the case in the main proceedings, the national legislation is intended to grant, under certain conditions, a tax advantage relating to the remuneration received by an employee from his employer. The introduction to the Notice from the Ministry of Finance states that the income which an employee receives from an employer established in Germany for an activity carried out in another State supported by the scheme established by that Notice is exempt from income tax.

30 First, it must be noted that, for the purposes of Article 45 TFEU, any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’. According to the case-law of the Court, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration (see, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15).

31 Second, it should be noted that the first paragraph of Article 57 TFEU provides that services are to be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Furthermore, it follows from the case-law of the Court that the provisions relating to the freedom to provide services are connected to activities carried out by independent service providers (see, to that effect, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 7).

32 It follows that legislation which is intended to tax an employee who provides services for and

under the direction of an employer in return for remuneration, and who is therefore engaged in an employment relationship which is characterised by subordination and the payment of remuneration in return for services rendered, such as – subject to the findings of the referring court – the legislation at issue in the main proceedings, falls within the scope of those provisions of the Treaty which relate to freedom of movement for workers.

33 Assuming that such legislation has restrictive effects on the freedom of employers established in another Member State to provide services, such as those evoked by the referring court or by the applicants in the main proceedings, which result in preferential treatment for employers established in Germany over those established in another Member State concerning the recruitment of qualified staff who can be seconded to development aid projects in another State, such effects would be the unavoidable consequence of any restriction on freedom of movement for workers and thus do not justify an independent examination in the light of Article 56 TFEU.

Applicability of Article 45 TFEU

34 It should be borne in mind that 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 come within the scope of Article 45 TFEU (see, to that effect, Case C-385/00 *de Groot* [2002] ECR I-11819, paragraph 76 and the case-law cited).

35 Moreover, it is settled case-law that all the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by European Union nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place such nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 16; Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 37; and *de Groot*, cited above, paragraph 77).

36 Even if, according to their wording, the rules on freedom of movement for workers are intended, in particular, to secure the benefit of national treatment in the host State, they also preclude the State of origin from obstructing the freedom of one of its nationals to accept and pursue employment in another Member State (see, to that effect, *Terhoeve*, paragraphs 27 to 29, and *de Groot*, paragraph 79).

37 By analogy, the rules on freedom of movement for workers also preclude the Member State of residence of a taxable European Union national from obstructing the freedom of that national to accept and pursue employment in another Member State, even in a situation where that Member State is that resident’s Member State of nationality.

38 However, the German Government argues that Article 45 TFEU cannot be relied on in the dispute in the main proceedings, as the applicant in the main proceedings carried on the activity in question in a third State, and that no adequate link exists between the two Member States in question. For the purposes of applying European Union law, an employee who carries on an activity in the context of development aid focused entirely in a third State cannot be considered to be simultaneously or even chiefly carrying on cross-border activity within the European Union.

39 In that regard, it must be stated that the Court has already had occasion to point out that, where a case concerns a national of a Member State who is an employee of a company established in another Member State, in principle such a case comes within the scope of the provisions of European Union law on the free movement of workers (see, to that effect, Case 237/83 *Prodest* [1984] ECR 3153, paragraph 5).

40 The Court has also ruled that the provisions of European Union law on the free movement of workers apply in judging all legal relationships in so far as those relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the European Union (see, to that effect, *Prodest*, cited above, paragraph 6).

41 Provisions of European Union law may apply to professional activities pursued outside the territory of the European Union as long as the employment relationship retains a sufficiently close link with the European Union (see, to that effect, inter alia, *Prodest*, cited above, paragraph 6; Case 9/88 *Lopes da Veiga* [1989] ECR 2989, paragraph 15; and Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraph 14). That principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of European Union law, on the other (Case C-214/94 *Boukhalfa* [1996] ECR I-2253, paragraph 15).

42 In a situation such as the one at issue in the case in the main proceedings, a link of that kind exists due to the fact that a European Union citizen, who is resident in a Member State, has been engaged by an undertaking established in another Member State on whose behalf he carries on his activities. In addition, according to the applicant in the main proceedings, and subject to the findings of the referring court on that point, the employment contract between him and his employer – an undertaking situated in Denmark – has been concluded under Danish law. Moreover, as the German Government points out, and subject to the findings of the referring court, Mr Petersen is covered by social insurance in Denmark and the account into which his salary is paid in situated in that Member State.

43 The fact that the applicant in the main proceedings carried on his activity in the context of development aid focused entirely in a third State cannot undermine the links to European Union law listed in the preceding paragraph, which are sufficient to allow the applicant in the main proceedings to rely on Article 45 TFEU in a situation such as that at issue in the main proceedings.

Existence of a restriction

44 The opportunity provided by the legislation at issue in the main proceedings for a resident taxpayer to be exempt from income tax constitutes a tax advantage.

45 That advantage is granted only when a taxpayer residing in Germany is employed by an employer established in that Member State; it is not granted when that taxpayer is employed by an employer established in another Member State.

46 By establishing a difference in treatment for employees' income in this way, depending on the Member State in which their employer is established, the national legislation at issue in the main proceedings is liable to dissuade those employees from accepting work from an employer established in a Member State which is not the Federal Republic of Germany and thus constitutes a restriction on the free movement of workers, which is in principle forbidden by Article 45 TFEU.

47 A measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding

reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose (see Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 38, and Case C-461/11 *Radziejewski* [2012] ECR, paragraph 33).

48 The German Government argues that the legislation at issue in the main proceedings is justified, first, by the need to ensure the effectiveness of fiscal supervision.

49 According to the German Government, first, since the activities are carried on for a body which has its registered office in another Member State, it would be difficult for the German tax authorities to ascertain whether the conditions for a possible tax exemption are met, since, unlike situations involving bodies operating in the context of German public development aid which have their registered office in Germany, those tax authorities are unable directly to approach the authorities responsible for development aid in that other Member State. Second, provisions of secondary legislation concerning administrative assistance in tax matters cannot be invoked in respect of checks to be carried out in third States.

50 In that regard, the Court has already held that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty (see, inter alia, Case C-101/05 *A* [2007] ECR I-11531, paragraph 55, and Case C-318/10 *SIAT* [2012] ECR, paragraph 36).

51 However, a Member State cannot rely on the fact that it may be impossible to seek cooperation from another Member State in conducting inquiries or collecting information in order to justify a refusal to grant a tax advantage. There is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they require in order to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (see Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 95).

52 It cannot be ruled out, as a matter of principle, that the taxpayer may be in a position to provide relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, whether he satisfies the requirements for receiving the tax advantage in question (see, to that effect, Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 20; Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 25; *ELISA* , cited above, paragraph 96; and *A*, cited above, paragraph 59).

53 In the case in the main proceedings, it is apparent from the Notice from the Ministry of Finance, in particular from Title VI thereof, which contains procedural rules, that, in order to receive the tax advantage at issue in the main proceedings, the taxpayer must provide the competent authority with suitable documents establishing that the conditions for being granted the tax exemption are met. It is for the employee to prove that the employer is established in Germany, that that employer is carrying on development aid activity and that he himself has a contract of employment in respect of uninterrupted activity for a period of at least three months in a State with which the Federal Republic of Germany has not signed a double taxation agreement.

54 Contrary to the suggestion made by the German Government, it appears that, under the national legislation in question, no checks need to be made with the authorities responsible for development aid, whether in Germany or in another Member State, which would be likely to create difficulties for the German tax authorities.

55 It is true that the Court has also ruled that, where the legislation of a Member State makes

the grant of a tax advantage dependent on the satisfaction of requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third State, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that third State is not under any obligation pursuant to a convention or agreement to provide information, it proves impossible to obtain such information from that State (*A*, cited above, paragraph 63, and Case C-318/07 *Persche* [2009] ECR I-359, paragraph 70). The framework for cooperation between the competent authorities of the Member States established by Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) and Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799 (OJ 2011 L 64, p. 1) does not exist between those authorities and the competent authorities of a third State where that State has not entered into any undertaking of mutual assistance (Case C-48/11 *A* [2012] ECR, paragraph 35).

56 However, it is clear from the Notice from the Ministry of Finance that it is not necessary to provide evidence that the activity carried on in the third State is subject there to tax which is comparable to the German tax on income.

57 Accordingly, the legislation at issue in the main proceedings does not appear to make the grant of a tax advantage dependent on satisfying requirements compliance with which can be verified only by obtaining information from the competent authorities of a third State.

58 It follows that the restriction at issue in the main proceedings cannot be justified by the need to ensure the effectiveness of fiscal supervision.

59 Second, the German Government argues that the tax advantage provided for by the national legislation at issue in the main proceedings pursues development-policy objectives, by enabling development aid organisations to benefit from lower labour costs. According to the German Government, the Member States must remain free specifically to promote in a targeted manner, by means of tax advantages and in accordance with their own priorities, activities in the context of the public cooperation of each Member State in the field of development. The fiscal incentive created by the national legislation at issue in the main proceedings is necessary in order to implement those objectives and the Federal Republic of Germany would not have sufficient means to honour its own commitments if it were also obliged to encourage the activities of organisations headquartered in other Member States.

60 In that regard, it is sufficient to state that the question submitted to the Court of Justice by the referring court concerns only the condition relating to the undertaking being established in Germany.

61 In its arguments relating to the pursuit of German development-policy objectives, the German Government does not explain why only those undertakings that are established in Germany may be deemed capable of pursuing activities aimed at achieving those objectives.

62 Under those circumstances, the answer to the question referred is that Article 45 TFEU must be interpreted as precluding national legislation of a Member State pursuant to which income received for employment activities by a taxpayer who is resident in that Member State and has unlimited tax liability is exempt from income tax if the employer is established in that Member State, but is not so exempt if that employer is established in another Member State.

Costs

63 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 (First Chamber) hereby rules:

Article 45 TFEU must be interpreted as precluding national legislation of a Member State pursuant to which income received for employment activities by a taxpayer who is resident in that Member State and has unlimited tax liability is exempt from income tax if the employer is established in that Member State, but is not so exempt if that employer is established in another Member State.

[Signatures]

** Language of the case: German.