JUDGMENT OF THE COURT (First Chamber)

8 September 2005 *

In Case C-288/04,

Reference for a preliminary ruling under Article 234 EC from the Unabhängiger Finanzsenat, Außenstelle Wien (Austria), made by decision of 28 June 2004, received at the Court on 6 July 2004, in the proceedings

AB

v

Finanzamt für den 6., 7. und 15. Bezirk,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, K. Schiemann, E. Juhász (Rapporteur) and M. Ilešič, Judges,

* Language of the case: German.

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the observations submitted on behalf of:

— the Austrian Government, by H. Dossi, acting as Agent,

— the French Government, by G. de Bergues and C. Jurgensen-Mercier, acting as Agents,

— the Portuguese Government, by L. Fernandes and M. Mesquita Palha, acting as Agents,

— the Commission of the European Communities, by H. Krämer and C. Ladenburger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 13 and 16 of the Protocol on the Privileges and Immunities of the European Communities,

originally annexed to the Treaty establishing a Single Council and a Single Commission of the European Communities, signed on 8 April 1965, then, by virtue of the Treaty of Amsterdam, to the EC Treaty ('the Protocol').

2 The reference was made in the course of proceedings between AB, a local member of staff assigned to the Representation of the European Commission in Vienna, and the Finanzamt für den 6., 7. und 15. Bezirk (the competent Austrian tax authority, 'the Finanzamt') concerning AB's liability to national income tax.

Law

Community law

3 Under Article 28(1) of the Treaty establishing a Single Council and a Single Commission of the European Communities, then, following the entry into force of the Treaty of Amsterdam, under Article 291 EC, the Community is to enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol.

4 Under Article 13 of the Protocol:

'Officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and the procedure laid down by the Council, acting on a proposal from the Commission.

They shall be exempted from national taxes on salaries, wages and emoluments paid to them by the Communities.'

5 Article 16 of the Protocol provides:

'The Council shall, acting on a proposal from the Commission and after consulting the other institutions concerned, determine the categories of officials and other servants of the Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 shall apply, in whole or in part.

The names, grades and addresses of officials and other servants included in such categories shall be communicated periodically to the governments of the Member States.'

6 It is stated in the first paragraph of Article 18 of the Protocol that the privileges, immunities and facilities are to be accorded to officials and other servants of the Communities solely in the interests of the Communities.

7 On the basis of Article 16 of the Protocol the Council adopted Regulation (Euratom, ECSC, EEC) No 549/69 of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply (OJ, English Special Edition 1969(I), p. 119). Under Article 2 of that regulation:

'The provisions of the second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the Communities shall apply to the following categories:

(a) persons coming under the Staff Regulations of Officials or the Conditions of Employment of Other Servants of the Communities, including those who receive the compensation provided for in the case of retirement in the interests of the service, with the exception of local staff'.

8 Articles 2 and 3 of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition 1968(I), p. 30) determine the Staff Regulations of Officials of the European Communities ('the Staff Regulations') and the Conditions of Employment of Other Servants of the European Communities ('the CEOS').

9 In accordance with Article 1 thereof, the CEOS apply to all members of staff engaged under contract by the Communities, such servants being temporary staff, auxiliary staff, local staff or special advisers.

10 Article 4 of the CEOS is worded as follows:

'Local staff for the purposes of these conditions of employment are staff engaged according to local practice for manual or service duties, assigned to posts not included in the list of posts appended to the section of the budget relating to each institution and paid from the total appropriations for the purpose under that section of the budget. By way of exception, staff engaged to perform executive duties at the

Press and Information Offices of the Commission of the European Communities may also be regarded as local staff.

In places of employment outside the Community countries, staff engaged for duties other than those mentioned in the first paragraph which, in the interests of the service, could not be assigned to an official or servant having another capacity within the meaning of Article 1, may be regarded as local staff.'

11 Article 79 of the CEOS provides:

'Subject to the provisions of this Title, the conditions of employment of local staff, in particular:

(a) the manner of their engagement and termination of their contract;

(b) their leave; and

(c) their remuneration

shall be determined by each institution in accordance with current rules and practice in the place where they are to perform their duties.'

12 According to Article 80 of the CEOS, the institution shall be responsible for the employer's share of the social security contributions under current regulations in the place where the servant is to perform his duties.

13 Article 81 of the CEOS provides:

'1. Any dispute between the institution and a member of the local staff serving in a Member State shall be submitted to the competent court in accordance with the laws in force in the place where the servant performs his duties.

2. Any dispute between the institution and a member of the local staff serving in a third country shall be submitted to an arbitration board under the conditions defined in the arbitration clause contained in the servant's contract.'

14 Finally, under Article 236 EC 'the Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment: [of other Servants]'.

Tax legislation and national case-law

15 The Bundesabgabenordnung (Federal Tax Code) provides that the tax authorities are entitled to resolve tax questions, not on the basis of the formal classification of the facts, but according to their actual content. Paragraph 21(1) provides that, in the assessment of questions on tax law, the true economic content from an economic point of view and not the external appearance of the facts is to be decisive.

16 Likewise, in accordance with the settled case-law of the Verwaltungsgerichtshof (Supreme Court in administrative and fiscal matters), the tax authorities are entitled to classify a contract on the basis of its true content.

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

17 The documents before the Court show that AB, the applicant in the main proceedings, who is German, has been employed as a local member of staff by the Commission since 1982. He entered the service at the Commission's Permanent Representation to the International Organisations in Geneva (Switzerland). In 1987 he was transferred to the Representation of the Commission in Vienna and, since the accession of Austrian Republic to the Communities on 1 January 1995, he has been assigned to the Commission Representation in Vienna. Under a contract of 1 July 1994, which entered into force on 1 May 1994, he was engaged as a local member of staff for an indefinite period for design, planning and monitoring duties as a press attaché there and subsequently at the Representation of the European Commission in Vienna, with the grade Category I/Step 35.

18 According to the national court, from January 1995 until March 1998 the applicant carried out duties which went beyond those laid down in the first subparagraph of Article 4 of the CEOS for local staff, who may not be entrusted with duties within Categories I and II corresponding to Categories A and B of the Staff Regulations. It is also apparent from the file that, by addendum of 4 July 1997, the applicant's contract of employment was amended with his consent and it was graded as Category III/Step 35, which corresponds to Category C in the Staff Regulations.

19 Until the end of 1994 the person concerned was not subject to national income tax because he occupied a post at a 'privileged institution', according to Austrian law. The issue arose from 1 January 1995, the date of accession of the Austrian Republic to the Communities. On 5 May 2000, the Finanzamt issued income tax notices for 1995 to 1998 and a notice of advance payment for income tax for 2000. The person concerned contested those notices before the Unabhängiger Finanzsenat (Independent Tax Chamber), arguing that the duties that he had actually undertaken did not correspond to the duties assigned to local staff by Community law.

20 The order for reference further shows the applicant to be arguing that, on the strength of the duties he carries out, he should have been engaged not as a local staff member but as a temporary or auxiliary staff member within the meaning, respectively, of Articles 8 to 50a or 51 to 78 of the CEOS, and benefit from the provisions of Article 13 of the Protocol exempting him from national income tax on salaries, wages and emoluments paid by the Communities. Therefore, in accordance with the Bundesabgabenordnung and with the case-law of the Verwaltungsgerichtshof, the Finanzamt should have examined the true nature of his duties and not have subjected him to liability for national income tax, since those duties correspond to duties falling within Category A of the Staff Regulations normally carried out by temporary or auxiliary members of staff who are liable to Community tax.

21 The Finanzamt takes the view that it is for the Community institution concerned to determine the conditions of employment of its members of staff. That view is shared by the Unabhängiger Finanzsenat, which considers that the conditions of employment of a member of staff derive exclusively from the contract of employment concerned. The applicant could or ought, therefore, to have submitted the legality of his contract of employment to the judicial review of the Court.

22 Taking the view that the abovementioned case-law of the Verwaltungsgerichthof might lead to the person concerned being exempt from tax both at national and

Community level, the Unabhäbgiger Finanzsenat Außenstelle Wien decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the first paragraph of Article 13 of the Protocol ... preclude the taxation in the Member States of the salaries, wages and emoluments which the Communities pay to their officials and other servants only if the European Communities exercise their right of taxation?

2. Does the second paragraph of Article 16 of the Protocol ... preclude the taxation in the Member States of the salaries, wages and emoluments which the Communities pay to their officials and other servants only if those officials or other servants are listed in a communication within the meaning of that article, and does a communication forwarded on the basis of that article automatically entitle the tax authorities of the Member State to exercise the national right of taxation in respect of officials and other servants not listed in that communication and thus in respect of those servants whom the European Communities regard as local staff?'

The questions referred for a preliminary ruling

23 Since the two questions referred are closely linked, it is appropriate to examine them together.

24 Those questions, placed in the legal and factual context set out above, indicate that the national court is unsure whether, for the purposes of applying Articles 13 and 16

of the Protocol, the decision of a Community institution defining the status of one of its members of staff and determining his conditions of employment is binding on the national administrative and judicial authorities, so that those authorities cannot independently classify the employment relationship in question.

25 Articles 11 of the Staff Regulations and of the CEOS, in the versions in force both before and after 1 May 2004 (the date on which the new Staff Regulations entered into force), provide that the official or servant is to carry out his duties and conduct himself 'solely with the interests of the Communities in mind, he is to neither seek nor take instructions from any government, authority, organisation or person outside his institution'.

26 Article 2 of the Staff Regulations and Article 6 of the CEOS, in the versions applicable both before and after 1 May 2004, also enshrine the principle of the functional autonomy of the Community institutions as to their choice of officials and servants, providing that each institution is to determine the authorities within it which are to exercise the powers conferred by the Staff Regulations on the appointing authority or who are empowered to conclude contracts of employment with other servants.

27 The institutional and functional autonomy is guaranteed, inter alia, by assigning immunities and privileges necessary for the performance of the tasks of the Community institutions on the basis of overriding provisions, namely the Protocol. Thus, it is provided in the Protocol that certain categories of officials and other servants of the institutions, to be determined by the Council alone on the proposal of the Commission and after consultation with the other institutions, are subject, for the benefit of the Communities, to a tax on salaries, wages and emoluments paid by them and are, in parallel, exempt from national taxes on those salaries, wages and emoluments (Articles 13 and 16 of the Protocol).

28 It is clear from those principles and from the legal framework set out above that the Community institutions have a wide margin of discretion and autonomy as regards the creation of posts for officials, the choice of the official or servant in order to fill the post created, and as regards the nature of the employment relationship with the servant, subject to the provisions of the Staff Regulations and the CEOS, and according to the funds available.

29 In the same way, as the Advocate General pointed out in point 16 of his Opinion, the Council alone is competent, on the basis of Article 16 of the Protocol, to determine the scope *ratione personae* of the tax system laid down in Article 13.

30 The autonomy of the Community institutions is also underlined by the fact that, in accordance with Article 79 of the CEOS, the conditions of employment of local staff and, in particular, the detailed rules for their engagement are laid down by the Community institution concerned. Since the words 'the manner of their engagement' in the provision in question, includes the determination of the conditions of employment of the servants concerned, the text under consideration is designed to prevent the determination of those conditions by non-Community bodies.

31 That conclusion is confirmed by the case-law of the Court, according to which the conferment of the status of official or servant may only reside in a formal act of the institution concerned and cannot be based on a decision of a national legal or administrative authority. That would constitute an encroachment on the autonomy of the Community institutions (Case 65/74 *Porrini and Others* [1975] ECR 319, paragraph 15 and point 2 of the operative part, and Case 232/84 *Tordeur and Others* [1985] ECR 3223, paragraphs 27 and 28).

32 The legal status of officials and temporary and auxiliary staff, on the one hand, and that of local staff, on the other, are fundamentally different in nature. While posts for officials, temporary staff and auxiliary staff are governed exclusively by Community law and the disputes to which those relationships may give rise fall within the exclusive jurisdiction of the Community courts, the contracts of employment of local staff are subject to hybrid rules, comprising Community and national sources, and the disputes to which those contracts of employment may give rise fall within the jurisdiction of the national courts. Finally, local staff do not enjoy the exemption from national tax on salaries, wages and emoluments paid by the Communities.

33 The conditions of employment for temporary and auxiliary staff are largely the same as those for officials. Both temporary and auxiliary staff are essentially subject to the same requirements concerning their engagement, have the same rights and obligations as those laid down for officials in Articles 11 to 25 of the Staff Regulations, are subject to the same rules concerning the duration and hours of work, enjoy essentially the same rights as regards leave and, finally, on account of the fact that they are governed by the same rules, may use the same system of legal remedies before the Community courts.

34 In accordance with the case-law of the Court, given the incompatibility between the conditions of employment for officials, temporary and auxiliary staff on the one hand and those for local staff on the other, the transition from being a local member of staff to a post as an official, temporary or auxiliary member of staff automatically terminates the previous employment relationship, and, conversely, the resumption of the previous activities would constitute a new employment and not the continuation of the previous employment relationship (Case 105/80 *Desmedt* [1981] ECR 1701, paragraph 15 and operative part). Thus, if the applicant's employment relationship could be regarded as that of a temporary or auxiliary staff member, that employment relationship would have to be classified as a new employment, which, in accordance with the judgments in *Porrini* and *Tordeur*, would exclude the possibility of such a new employment having arisen from the action of a body other than a Community one.

35 Therefore, the classification of 'local member of staff' conferred on a person by the competent authority of a Community institution and the nature of the employment relationship defined in the contract of employment of the servant in question cannot be challenged on the basis of an independent assessment of a national administrative or judicial authority. To recognise such a right would effectively grant a national authority the power to intervene in the sphere of autonomy of the Community institutions and to define the nature of the contract of engagement of one of their servants, which would constitute an encroachment within the meaning of the case-law cited in paragraph 31 of this judgment.

36 In the context of effective judicial protection enjoyed by the member of staff in question, it must of course be open to him to challenge the classification of his conditions of employment under the provisions of the CEOS. However, such a power must be exclusively reserved for the Community courts, since review of the legality of a decision of the competent authority of a Community institution conferring the status of official or servant and determining, by the conclusion of the contract relating thereto, the nature of the latter's employment relationship, cannot fall within the jurisdiction of a national court.

37 The national courts retain jurisdiction, in accordance with Article 81 of the CEOS, to hear disputes concerning the conditions of employment of a local member of staff, as provided by Article 79 of the CEOS. However, the act of a Community institution determining the conditions of employment of one of its servants cannot be challenged before those courts.

38 It should be observed, finally, that the system established by the Protocol, according to which, for the benefit of the Communities, its officials and some of its servants are subject only to a Community tax, is designed solely to strengthen the autonomy of the Community institutions and can neither promote nor have as its effect the exemption of other servants from taxation laid down by the tax law of the place of employment.

39 In the light of the foregoing considerations, the answer to the questions referred must be that, for the purposes of applying Articles 13 and 16 of the Protocol, the decision of a Community institution defining the status of one of its servants and determining his conditions of employment is binding on national judicial and administrative authorities, so that they cannot make an independent classification of the employment relationship in question.

Costs

40 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 of Justice (First Chamber) hereby rules:

For the purposes of applying Articles 13 and 16 of the Protocol on the Privileges and Immunities of the European Communities, the decision of a Community institution defining the status of one of its servants and determining his conditions of employment is binding on national judicial and administrative authorities, so that they cannot make an independent classification of the employment relationship in question.

[Signatures]