JUDGMENT OF THE COURT (Fifth Chamber)

28 July 2011 (*)

(Protocol on the Privileges and Immunities of the European Communities – Article 14, first paragraph – Determination of the domicile for tax purposes of the spouse of a European Union official – National legislation under which a person who has lived abroad for three years is no longer regarded as resident in the country and thus no longer subject to general tax liability)

In Case C-270/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 27 May 2010, received at the Court on 31 May 2010, in the proceedings brought by

Lotta Gistö,

THE COURT (Fifth Chamber),

composed of J.-J. Kasel (Rapporteur), President of the Chamber, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the Estonian Government,, by M. Linntam, acting as Agent,

– the European Commission, by I. Koskinen, D. Martin and M.-I. Martínez del Peral, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the first paragraph of Article 14 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 (JO 1967, 152, p. 13) and subsequently, by virtue of the Treaty of Amsterdam, to the EC Treaty (‘the Protocol’).

2 The reference has been made in proceedings brought by Mrs Gistö seeking to determine whether,

for the 2007 tax year, she was subject to general or only limited liability to income tax in Finland.

Legal context

European Union law

3 Article 13 of the Protocol was worded as follows:

‘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 by the Communities.’

4 The first paragraph of Article 14 of the Protocol provided:

‘In the application of income tax, wealth tax and death duties and in the application of conventions on the avoidance of double taxation concluded between Member States of the Communities, officials and other servants of the Communities who, solely by reason of the performance of their duties in the service of the Communities, establish their residence in the territory of a Member State other than their country of domicile for tax purposes at the time of entering the service of the Communities, shall be considered, both in the country of their actual residence and in the country of domicile for tax purposes, as having maintained their domicile in the latter country provided that it is a member of the Communities. This provision shall also apply to a spouse, to the extent that the latter is not separately engaged in a gainful occupation, and to children dependent on and in the care of the persons referred to in this Article.’

National law

5 The first subparagraph of Paragraph 9 of the Law on income tax (Tuloverolaki, 1992/1535) of 30 December 1992 provides:

‘A person who is obliged to pay tax on the basis of income is:

(1) a person who resided in Finland in the tax year, a Finnish corporation, a joint venture and the estate of a deceased person, on income received there and elsewhere (general tax liability),

(2) a person who was not resident in Finland in the tax year and a foreign corporation, on income received there (limited tax liability).’

6 The first subparagraph of Paragraph 11 of that law reads as follows:

‘A person is regarded as resident in Finland if he has his real dwelling and home there or if he stays there continuously for over six months, in which case a temporary absence does not prevent the stay from being regarded as continuous. A Finnish national, however, is regarded as resident in Finland even if he does not stay there continuously for over six months, until three years have passed from the end of the year during which he left the country, unless he shows that he did not have essential links with Finland in the tax year. Unless shown otherwise, a Finnish national is not regarded as resident in Finland after that period.’

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

7 Mrs Gistö, a Finnish national, settled in Luxembourg with her family in the spring of 2003, when her husband started working as a translator at the European Parliament. Mr and Mrs Gistö have resided in Luxembourg since then.

8 In 2007 Mrs Gistö was on child-care leave from her job as a kindergarten teacher in Turku (Finland) and had no separate gainful occupation in Luxembourg. In Finland she owns various securities and several investment properties, which she leases.

9 To determine whether, for the 2007 tax year, she still had general income tax liability in Finland, Mrs Gistö applied to the Keskusverolautakunta (Central Tax Commission), a body of the tax administration which may, on application by a taxpayer, make binding preliminary decisions on tax matters. In the preliminary decision made on Mrs Gistö's application, the Keskusverolautakunta found that she was still domiciled for tax purposes in Finland pursuant to Article 14 of the Protocol, and that she was therefore generally liable to income tax there, as she did not carry on a separate gainful occupation in Luxembourg.

10 Mrs Gistö appealed against that decision to the Korkein hallinto-oikeus (Supreme Administrative Court).

11 That court states that a decision in the case in accordance with the Protocol would have the effect of subjecting Mrs Gistö to less favourable tax treatment as a result of being established in Luxembourg, since she would still have general tax liability in Finland, whereas under national legislation she could enjoy limited tax liability there from the 2007 tax year.

12 In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 14 of the Protocol to be interpreted in [Mrs] Gistö's case as meaning that, in accordance with the provisions of the Protocol, her domicile for tax purposes in 2007 is still Finland, or is the effect of the Protocol in this case that ultimately, however, the provisions of the domestic legislation of the Member State decide the question of general liability to tax in a Member State, in this case Finland?'

Consideration of the question referred

13 By its question the national court asks essentially whether the first paragraph of Article 14 of the Protocol must be interpreted as meaning that the spouse of a person who, solely because that person enters the service of the European Union, establishes his residence in the territory of a Member State other than his Member State of domicile for tax purposes at the time when that person entered the service of the European Union is regarded as having maintained his domicile for tax purposes in the latter Member State if he is not separately engaged in a gainful occupation.

14 In order to answer that question, it should be observed that Articles 13 and 14 of the Protocol establish a division of fiscal powers between the European Union and the Member State in which the official or other servant had his domicile for tax purposes before entering the service of the European Union (see Case C-263/91 *Kristoffersen* [1993] ECR I-2755, paragraph 9, and Case C-88/92 *X* [1993] ECR I-3315, paragraph 11).

15 Under Article 13 of the Protocol, officials and other servants of the European Union are liable to a tax for the benefit of the Union on the salaries, wages and emoluments paid to them by the Union,

and those payments are exempt from national taxes (see *Kristoffersen*, paragraph 10).

16 Under the first paragraph of Article 14 of the Protocol, in the application inter alia of income tax, officials and other servants of the European Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their State of domicile for tax purposes at the time of entering the service of the Union are to be considered, both in the Member State of their actual residence and in the State of domicile for tax purposes, as having maintained their domicile in the latter State provided that it is a member of the European Union (see *Kristoffersen*, paragraph 11, and *X*, paragraph 9).

17 It follows that, pursuant to the first paragraph of Article 14 of the Protocol, the Member State of origin, in which the domicile of the official or other servant is maintained for tax purposes, remains in principle competent to tax all income, other than salaries, wages and emoluments paid to them by the European Union, of those persons and to subject them to income tax even if they are not actually resident there (see, to that effect, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 31). What constitutes income tax within the meaning of the first paragraph of Article 14 of the Protocol must be determined according to the criteria of the national law applicable (see *Kristoffersen*, paragraph 12).

18 Moreover, according to the case-law, the division of powers established by Article 14 of the Protocol would be compromised if an official or other servant had the free choice of his domicile for tax purposes (see *X*, paragraph 12).

19 Since, in accordance with the second sentence of the first paragraph of Article 14 of the Protocol, the tax provisions of the Protocol apply also to the spouse of an official or other servant of the European Union if the spouse is not separately engaged in a gainful occupation, the determination of the spouse's domicile for tax purposes also cannot depend on the wishes of the person concerned.

20 It follows that, in a situation such as that at issue in the main proceedings, the Member State in which the domicile for tax purposes of the person concerned was situated before her spouse entered the service of the European Union retains the power to tax all her income other than salaries, wages and emoluments paid by the European Union, to the extent that she is not separately engaged in a gainful occupation.

21 That interpretation does not contradict the principle of equal treatment, as it is settled case-law that, from the tax point of view, officials and other servants of the European Union and their spouses, in so far as the spouse is not separately engaged in a gainful occupation in the Member State in which the official or other servant performs his duties in the service of the European Union, cannot be regarded as being in the same situation as a migrant worker who becomes established in a Member State other than his State of origin (see, to that effect, *Schilling and Fleck-Schilling*, paragraph 29).

22 In the light of the above considerations, the answer to the referring court's question is that the first paragraph of Article 14 of the Protocol must be interpreted as meaning that the spouse of a person who, solely because that person enters the service of the European Union, establishes his residence in the territory of a Member State other than his Member State of domicile for tax purposes at the time when that person entered the service of the European Union is regarded as having maintained his domicile for tax purposes in the latter Member State if he is not separately engaged in a gainful occupation.

Costs

23 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 (Fifth Chamber) hereby rules:

The first paragraph of Article 14 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 and subsequently, by virtue of the Treaty of Amsterdam, to the EC Treaty, must be interpreted as meaning that the spouse of a person who, solely because that person enters the service of the European Union, establishes his residence in the territory of a Member State other than his Member State of domicile for tax purposes at the time when that person entered the service of the European Union is regarded as having maintained his domicile for tax purposes in the latter Member State if he is not separately engaged in a gainful occupation.

[Signatures]

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* Language of the case: Finnish.