Anonymised version

Case C-241/20

Request for a preliminary ruling

Date lodged:

5 June 2020

Referring court:

Tribunal de première instance du Luxembourg (Belgium)

Date of the decision to refer:

1 April 2020

Applicant:

BJ

Defendant:

État belge

JUDGMENT of 1 APRIL 2020

[…]

The tribunal de première instance du Luxembourg (Court of First Instance of Luxembourg, Belgium) […] has given the following judgment:

In the proceedings:

BJ, […] ARLON, […]

applicant, […]

v

L'ETAT BELGE (the Belgian State), […]

defendant, […]

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[…]

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[…] [Matters of national procedure]

I. Facts and background to the case

BJ, a Belgian resident for tax purposes, pursued his professional activity during the 2006, 2007, 2008, 2009 and 2010 tax years in the Grand **[Or. 2]** Duchy of Luxembourg, where he owns an apartment which is leased to a natural person who does not pursue any professional activity in the rented property, but uses it exclusively as his principal residence.

In addition, BJ owns two buildings in Belgium, namely his own dwelling and an apartment leased to a natural person who uses it exclusively as his principal residence.

With regard to his earned income for the tax years at issue, BJ has been subject to the Convention préventive de la double imposition entre la Belgique et le Grand-Duché de Luxembourg (Convention for the avoidance of double taxation between Belgium and the Grand Duchy of Luxembourg) ('the CPDI-GDL'), more specifically Article 15(1) thereof, which provides that 'without prejudice to the provisions of Articles 16, 18, 19 and 20, salaries, wages and other similar remuneration that a resident of a Contracting State receives in respect of employment shall be taxable only in that State unless the employment is pursued in the other Contracting State. If the employment is pursued there, such remuneration as is derived therefrom may be taxed in that other State'.

It is not disputed that BJ fulfils the conditions in order to be taxed on his earned income of Luxembourg origin in the Grand Duchy of Luxembourg.

Moreover, BJ's rental income of Luxembourg origin was subject, during the tax years at issue, to Article 6(1) of the CPDI-GDL, which provides that: '*income deriving from immovable property is taxable in the Contracting State in which the property is situated*.'

In accordance with Article 23(2) of the CPDI-GDL, '*so far as concerns residents of Belgium, double taxation shall be avoided in the following manner: 1. Income earned in Luxembourg — with the exception of the income referred to in subparagraphs 2 and 3 — and capital situated in Luxembourg, which are taxable in that State under the preceding articles, shall be exempt from tax in Belgium. That exemption shall not limit Belgium's right to take the income and capital thus exempted into account when determining its tax rate.*'

According to Article 155 of the Code belge des impôts sur les revenus (Belgian Income Tax Code) 1992 ('the C.I.R. 1992'), income exempted under international conventions for the avoidance of double taxation is to be taken into account for the purposes of calculating tax, but the tax is to be reduced according to the proportion of the overall income represented by the exempted income.

For the years at issue, the amount of the reduction in tax for foreign income which is exempted under the CPDI-GDL, to which BJ is entitled on the basis of the maintenance of progressivity provided for in Article 155 of the C.I.R. 1992, was calculated by the BELGIAN STATE, after decreasing the tax determined in accordance with Article 130 of the C.I.R. 1992 by:

– the tax reduction in respect of tax-free allowances (for income subject to personal income tax) (Article 131 of the C.I.R. 1992);

– a tax reduction for long-term savings (premiums paid under an individual life insurance contract) (Article 145(1) of the C.I.R. 1992); **[Or. 3]**

– a tax reduction for costs incurred in energy savings (Article 145(24) of the C.I.R. 1992).

The amounts of those tax reductions are not disputed and nor is it disputed that BJ fulfils the legal conditions for obtaining them.

It is only subsequently that the tax authorities grant the reduction in tax for foreign income which is exempted in an amount proportional to the share of exempt foreign income in the total taxable income pursuant to Article 155 of the C.I.R. 1992.

It is therefore the order in which those categories of reductions are applied which BJ criticises, since the method of calculation adopted by the authorities means that some reductions based on personal and family circumstances are lost, as compared to the method whereby those reductions are applied after the reduction for exempt foreign income referred to in Article 155 of the C.I.R. 1992.

Instead of benefiting from all the reductions in the tax payable in Belgium, those reductions are lost in proportion to the exempt foreign income.

According to BJ, the method of calculating the tax debt used by the authorities does not allow him, in the present case, to benefit fully from all the tax advantages to which he is entitled under Belgian tax law.

This follows expressly from Circular RH.331/575.420 (AFER No 8/2008): '*In the Belgian tax system, tax advantages linked to the personal or family circumstances of the taxpayer (deduction of maintenance payments, crediting of tax-free allowance supplements for dependent children, etc.) are applied both to Belgian income and to foreign income. If the personal or family circumstances in question have not been taken into account abroad, a part of those advantages is lost.*'

In the present case, most of those tax advantages have been lost, since those reductions have only very slightly reduced the tax on the income of Belgian origin.

After his claims were rejected by the administrative authority, BJ lodged applications initiating proceedings before the Court of First Instance.

Those applications were declared admissible by the Court of First Instance, which […] joined the cases […].

II. Claims of the parties

BJ requests that the Court of First Instance:

- primarily,
    - o declare the application admissible and well-founded;
    - o and consequently, **[Or. 4]**
        - ■ cancel and/or reduce proportionately the tax assessments made against him […];
        - ■ order a recalculation of those assessments in strict accordance with the CPDI-GDL [and] EU law, […];
        - ■ order the BELGIAN STATE to reimburse to him all the sums wrongly received on account of the cancelled or reduced assessments, together with default interest;
        - ■ order the BELGIAN STATE to pay the costs […].
- in the alternative,
    - o refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

[…] **[Or. 5]** […] [Questions identical to those in the operative part]

The BELGIAN STATE requests that the Court of First Instance:

- primarily,
    - o […];
- in the alternative,
    - o declare that there is no need to refer BJ's proposed questions to the Court of Justice of the European Union for a preliminary ruling;

- o declare the application partially well founded as regards the assessment of income of Luxembourg origin deriving from immovable property, and unfounded as to the remainder;

- o order BJ to pay the costs.

III. Analysis

1. Subject matter of the dispute

[…] **[Or. 6]** […] [Determination of the tax years on which the court considers that it is necessary to adjudicate]

2. Infringement of Article 45 TFEU

By decision of 2 May 2019, the Court of First Instance, after examining in its deliberations the judgment of the Court of Justice of 14 March 2019, *Jacob and Lennertz* (C-174/18), ordered the reopening of oral proceedings in order to allow the parties to exchange arguments on the impact of that judgment on BJ's situation.

In the case which gave rise to the judgment in *Jacob and Lennertz*, the referring court asked, in essence, whether Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in the case brought before the Court of First Instance by BJ, namely the Convention for the avoidance of double taxation concluded between Belgium and the Grand Duchy of Luxembourg and Articles 131, 145(1), 145(21), 145(24), 145(31) and 145(33) and 155 of the C.I.R. 1992, which has the effect of depriving a couple resident in that State — one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation — of part of the benefit of the tax advantages granted by the Member State of residence.

The Court of Justice recalls that, according to the Court's case-law, it is, in principle, a matter for the Member State of residence to grant the taxpayer all the tax advantages relating to his personal and family circumstances, because that State is, as a rule, best placed to assess the taxpayer's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, since that is where his personal and financial interests are centred (paragraph 26).

The Court of Justice goes on to point out that the Member State of residence cannot cause a taxpayer to forfeit part of his tax-free allowance and his personal tax advantages because, during the year in question, he also received income in

another Member State which was taxed in that State without his personal and family circumstances being taken into account (paragraph 27).

The Court of Justice observes that by applying tax reductions on a base that includes both non-exempt income from Belgium and exempt foreign income, and by deducting from the tax the share representing the latter in the total amount of income forming the taxable base only subsequently, Belgian tax legislation is liable, as the Belgian Government itself acknowledged in its written observations, to make taxpayers, such as Mr Jacob and Ms Lennertz, lose part of the tax advantages that would have been granted to them in full had all of their income come from Belgium **[Or. 7]** and if the tax reductions had thus been applied only to that income, or had the 2008 Circular applied to the tax advantages at issue (paragraph 31).

The Court of Justice held that it is indeed for the Kingdom of Belgium, as the Member State in which Mr Jacob and Ms Lennertz are resident, to grant the latter all the tax advantages connected with their personal and family circumstances and that the tax reductions in respect of the tax-free allowance are recognised by the Court's case-law as advantages linked to the taxpayer's personal and family circumstances (paragraphs 32 and 33 of the judgment). In the second place, as regards the question whether the other tax reductions at issue in the main proceedings, namely the tax reductions in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire and charitable donations, may be regarded as linked to the personal and family circumstances, the Court of Justice explains that it follows from the judgment of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452), that the Member State of residence must assess, for the purpose of granting potential tax advantages, the taxpayer's personal ability to pay tax as a whole. In that regard, it considered that tax reductions such as those at issue in the main proceedings, namely reductions in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire as well as charitable donations, are designed, principally, to encourage taxpayers to spend and make investments which necessarily have an impact on their ability to pay taxes. As a result, such tax reductions may be considered to be linked to the personal and family situation of Mr Jacob and Ms Lennertz, in the same way as the tax reductions in respect of the tax-free allowance. It follows that Mr Jacob and Ms Lennertz have, as a couple, suffered a disadvantage in so far as they have not benefited in full from the tax advantages to which they would have been entitled if they had both received all of their income in Belgium (paragraphs 40 to 42 of the judgment).

The Court of Justice concludes from this that the legislation at issue in the main proceedings thus establishes a difference in tax treatment between EU-citizen couples residing in the Kingdom of Belgium according to the source of their incomes — a difference which is liable to discourage those citizens from

exercising the freedoms guaranteed by the Treaty, and, in particular, the free movement of workers guaranteed by Article 45 TFEU.

➢ *BJ's position*

BJ takes the view that the judgment in *Jacob and Lennertz* supports his argument and confirms that the method of calculation used by the BELGIAN STATE is unlawful, since all the tax reductions under consideration in the judgment apply both to earned income and to replacement income.

BJ recalls that his main complaint is that he has not been granted the full reductions to which he claims to be entitled, unlike other resident taxpayers with exclusively local income. **[Or. 8]**

He does not complain that he was refused them altogether, since the Belgian tax authorities, on their own initiative, granted all of them to him in accordance with the C.I.R. 1992 without deeming his local income to be 'insubstantial' or 'insignificant'.

He notes that the BELGIAN STATE disputes not that the judgment of the Court of Justice of 14 March 2019 in *Jacob and Lennertz* actually requires it to calculate the tax as requested by BJ, but that it does so in his particular case because his income of Belgian origin is too low.

He points out that the BELGIAN STATE relies on the judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31), while acknowledging that Mr Schumacker received no income in his State of residence. He explains that the same was true in the case giving rise to the judgment of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452), since it was concerned with negative income from immovable property.

BJ maintains, in the present case, that he receives and declares income of Belgian origin which is sufficiently significant for Belgian law to apply to him in the same way as to any other resident.

The judgments in *Schumacker* and *Lakebrink and Peters-Lakebrink* concern cases in which the Member State of residence was not in a position to grant the advantages provided for by tax law, whereas in the case of BJ it was mathematically possible to grant the advantages, though this was not done.

Finally, BJ explains that the case-law on the significance of the income in the State of residence concerns proceedings brought by workers against States of employment, and he claims that the Court of Justice recently confirmed that there has never been any question of allowing the State of residence to be exempted from its obligations where, 'mathematically', it was in a position to fulfil them. 'What remains the decisive criterion is whether it is impossible for a Member State to take into account, for the calculation of tax, the personal and family circumstances of a taxpayer in the absence of sufficient taxable income, although

such circumstances can otherwise be taken into account when there is sufficient income' (judgment of the Court of Justice, 9 February 2017, *X* v *Staatssecretaris van Financien*, C-283/15, ECLI:EU:C:2017:102).

➢ *Position* of the BELGIAN STATE

The BELGIAN STATE maintains that the specific features of the dispute between it and BJ make it impossible to apply unchanged the findings in the judgment in *Jacob and Lennertz*.

According to the BELGIAN STATE, in the *Jacob and Lennertz* case, even though Mr Jacob was a Belgian resident and received income of Luxembourg origin, by no means did he derive almost all of his income from the Grand Duchy of Luxembourg. In the joint tax declaration in respect of the relevant tax year, Mr Jacob had mentioned two pensions, namely one from Belgium in the amount of EUR 15 699.57 and one from Luxembourg in the amount of EUR 14 330.75. Those two pensions were supplemented by Mr Jacob's declared income from immovable property **[Or. 9]** in the amount of EUR 1 181.60, thus making his total income EUR 31 211.92.

According to the BELGIAN STATE, it is therefore not surprising that in such a case, and in the light of the previous case-law which it cites (judgments of the Court of Justice of 12 December 2002, *de Groot*, C-385/00; of 12 December 2013, *Imfeld and Garcet*, C-303/12; and of 22 June 2017, *Bechtel*, C-20/16), the Court of Justice held that it was for Belgium, the country of residence of Mr Jacob and Ms Lennertz, to grant the taxpayer the tax advantages linked to his personal and family circumstances.

According to the BELGIAN STATE, the situation is different where, as in the present case, the Belgian resident derived almost all of his income from the Grand Duchy of Luxembourg.

Although the BELGIAN STATE does not dispute that it is, in principle, a matter for the Member State of residence to grant all the advantages relating to his personal circumstances, that obligation could nevertheless be imposed on the State of employment where the taxpayer derives almost all or all of his taxable income from employment in that State and where he has no significant income in his State of residence (judgment of the Court of Justice of 14 February 1995, *Finanzamt Koeln-Altstadt* v *Schumacker*, C-279/93), which is the situation in the case between the BELGIAN STATE and BJ.

The BELGIAN STATE observes that, while it is true that Mr Schumacker did not receive any income in his State of residence, whereas BJ receives in his State of residence an income which it describes as very small, [1] the rule in *Schumacker*

[1] The BELGIAN STATE gives the example of the 2006 tax year, for which BJ declares a total amount of EUR 66 396.78, including exempted earned income of Luxembourg origin of

also applies where a person receives taxable income in his State of residence but that income is not significant ('almost all', *Schumacker* judgment, paragraph 36). In the present case, BJ's Belgian income was not significant.

The BELGIAN STATE explains that its argument is confirmed in the judgment of the Court of Justice of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06), which concerns German residents working exclusively in the Grand Duchy of Luxembourg and having as income of German origin only (negative) income relating to immovable property.

The BELGIAN STATE further explains that Member States may modify the obligation which is, in principle, imposed on the State of residence in conventions for the avoidance of double taxation, in such a way that the State of residence can be released by way of an international agreement from its obligation to take into account in full the personal and family situation of taxpayers residing in its territory who work partially abroad (judgment of the Court of Justice of 12 December 2012, *de Groot*, C-385/00, paragraph 99). **[Or. 10]**

The State of residence may also be released from that obligation if it finds that, even in the absence of a convention, one or more of the States of employment, with respect to the income taxed by them, grant advantages based on the personal and family circumstances of taxpayers who do not reside in the territory of those States but receive taxable income there (*de Groot* judgment, paragraph 100).

The BELGIAN STATE explains that the Court of Justice, in the *de Groot* judgment, answered the question referred for a preliminary ruling to the effect that Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes rules such as those at issue in the main proceedings — irrespective of whether or not they are laid down in a convention for the avoidance of double taxation — whereby a taxpayer forfeits, in the calculation of the income tax payable by him in his State of residence, part of the tax-free amount of that income and of his personal tax advantages because, during the year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account.

The BELGIAN STATE maintains that, in the present case, the Grand Duchy of Luxembourg took BJ's personal circumstances into account when calculating the Luxembourg tax for the 2006 to 2009 tax years, since the Convention for the avoidance of double taxation in fact contains a specific provision concerning consideration in the State of employment of the personal and family circumstances of a taxpayer resident in the other State.

Article 24(4) of the CPDI[-GDL] in fact expressly provides that 'a natural person, resident in Belgium, who, in accordance with Articles 7 and 14 to 19, is liable to

EUR 58 235.78 and exempted Luxembourg income from immovable property of EUR 6 600.00, leaving an amount of EUR 1 561 taxable at the full rate in Belgium.

tax in Luxembourg on more than 50 per cent of his earned income shall, at his request, be taxed in Luxembourg, in respect of income taxable in that State in accordance with Articles 6, 7 and 13 to 19 of the Convention, at the average rate of tax which, taking into account his circumstances and family responsibilities and the total of his income generally, would apply to him if he were a resident of Luxembourg'. It is apparent from the Luxembourg income tax returns for the relevant years that tax liability was determined in accordance with Article 24(4) of the CPDI[-GDL].

Therefore, the Grand Duchy of Luxembourg has, in fact, fulfilled its obligations under the Convention for the avoidance of double taxation.

According to the BELGIAN STATE, this distinguishes the present case from those which gave rise to the judgments in *Imfeld and Garcet* and *Bechtel*, in that the conventions for the avoidance of double taxation in question did not impose on the Member State of employment any obligation to take into account the personal and family circumstances of taxpayers residing in the other Member State party to the convention.

The BELGIAN STATE takes the view that BJ is seeking to benefit in both Luxembourg and Belgium from all the tax advantages relating to his personal and family circumstances. **[Or. 11]**

However, the case-law of the Court of Justice does not require that those circumstances be taken into account twice. The crucial element is the necessity that taxpayers of the Member States concerned are assured that, ultimately, all their personal and family circumstances will be duly taken into account, irrespective of how the Member States concerned have allocated that obligation amongst themselves.

Those are the considerations which led the Cour d'appel de Liège (Court of Appeal of Liège, Belgium) to hold, in its judgment of 28 February 2017, concerning the 2004, 2005 and 2006 tax years, that it does not follow from Articles 18, 45 and 49 of the Treaty on the Functioning of the European Union that, where a taxpayer's income is, on the basis of a double taxation agreement, taxed partly in the State in which he is resident and partly in the State in which the activity as an employed person is pursued, the taxpayer is still entitled fully to offset against the tax of the State of residence the tax deductions for childcare and service vouchers to which he would have been entitled had the [income] been fully taxed in the State of residence.

Finally, the BELGIAN STATE bases its argument on the fact that, in the judgment of 9 February 2017, *X* v *Netherlands* (C-283/15, paragraph 48), the Court of Justice held that in the situation where a self-employed person receives his taxable income within a number of Member States, other than that where he is resident, that reconciliation can be achieved only by permitting him to submit a claim for his right to deduct 'negative income' to each Member State of activity

where that type of tax advantage is granted, in proportion to the share of his income received within each such Member State, it being his responsibility to provide to the competent national authorities all the information on his global income needed by them to determine that proportion.

The BELGIAN STATE infers from this that the Court of Justice therefore implicitly recognises that it suffices that all the personal and family circumstances of an individual be taken into account in principle, even if, because of disparities between the tax systems of the Member States, that individual has, as a matter of fact, been unable to obtain all the tax advantages which he could have obtained had he received all his income in a single State.

➢ *Court of First Instance's analysis*

BJ has brought several cases before the Court of First Instance seeking to challenge the implementation by the Belgian tax authorities of Article 155 of the C.I.R. 1992 — the exemption subject to progressivity — as regards the calculation of the tax reductions for long-term savings and for costs incurred in energy savings and as regards the calculation of the tax-free allowance.

At issue is the tax liability of BJ in Belgium, the State in which he was resident in the 2006, 2007, 2008, 2009, 2010 and 2011 tax years.

The Court of First Instance notes that the percentage of worldwide income declared by BJ in Belgium evolved over the years at issue as follows: **[Or. 12]**

Tax year	Total taxable income	Income of Belgian origin (net)	Income of Luxembourg origin (net)	Percentage of Belgian income in the total
2007	63 633.37 EUR	4 093.60 EUR	59 539.77 EUR	6.44%
2008	66 413.40 EUR	5 296.20 EUR	61 117.20 EUR	8.00%
2009	65 281.88 EUR	4 548.24 EUR	60 733.64 EUR	7.00%
2010	75 893.89 EUR	4 957.95 EUR	70 935.94 EUR	6.50%
2011	80 599.20 EUR	5 604.43 EUR	74 994.77 EUR	7.00%

Undeniably, the proportion of BJ's total income which originated in Belgium, his State of residence, is limited, though it differs from one year to the next.

In its judgment of 14 March 2019, *Jacob and Lennertz*, the Court of Justice answered the question referred by the national court to the effect that Article 45 TFEU must be interpreted as precluding the application of Belgian tax legislation, identical to that at issue in the present case, which has the effect of depriving a couple resident in that State, one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation, of part of the benefit of the tax advantages granted by the Member State of residence.

The BELGIAN STATE and BJ disagree as to whether or not the issue of the separation of his income between that of Luxembourg origin and that of Belgian origin, in this case the fact that his income of Belgian origin is insignificant, both quantitatively and proportionately, has an impact on the obligations of Belgium as the State of residence.

There consequently remains a difficulty relating to the interpretation of Article 45 TFEU which justifies the Court of First Instance making a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

It is necessary to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

[…] **[Or. 13]** […] [Questions identical to those in the operative part]

IV. Costs

[…]

ON THOSE GROUNDS,

THE COURT OF FIRST INSTANCE,

[…]

By interim order, rules that it is necessary to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

‘*1. Does Article 45 TFEU preclude rules such as those at issue in the main proceedings — irrespective of whether or not they are laid down in a convention for the avoidance of double taxation — whereby a taxpayer forfeits, in the calculation of the income tax payable by him in his State of residence, part of the tax-free amount of that income and of his other personal tax advantages (such as a tax reduction for long-term savings, that is to say, premiums paid under an individual life insurance contract, and a tax reduction for costs incurred in energy savings) because, during the year in question, he also received income in another Member State which was taxed in that State?* **[Or. 14]**

2. If the answer to the first question is in the affirmative, does that answer remain in the affirmative if the income received by the taxpayer in his State of residence is neither quantitatively nor proportionately significant but that State is nevertheless in a position to grant him those tax advantages?

3. If the answer to the second question is in the affirmative, does that answer remain in the affirmative if, under a Convention for the avoidance of double taxation between the State of residence and the other State, the taxpayer has enjoyed in that other State, in respect of income taxable in that other State, personal tax advantages under the tax legislation of that other State but those tax

advantages do not include certain tax advantages to which the taxpayer is in principle entitled in the State of residence?

4. If the answer to the third question is in the affirmative, does that answer remain in the affirmative if, notwithstanding the latter difference, the taxpayer obtains in that other State a tax reduction in an amount at least equivalent to that which he has lost in his State of residence?

5. Are the answers to the questions the same in the light of Articles 63(1) and 65(1)(a) of the Treaty on the Functioning of the European Union in relation to rules such as those at issue in the main proceedings — irrespective of whether or not they are laid down in a convention for the avoidance of double taxation — whereby a taxpayer forfeits, in the calculation of the income tax payable by him in his State of residence, part of the tax-free amount of that income and of his other personal tax advantages (such as a tax reduction for long-term savings, that is to say premiums paid under an individual life insurance contract, and a tax reduction for costs incurred in energy savings) because, during the year in question, he also received rental income in respect of a property owned by him in another Member State which was taxed in that State?'.

[…]