

Case C-380/23 [Monmorieux]¹**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

16 June 2023

Referring court:

Tribunal de première instance du Luxembourg (Belgium)

Date of the decision to refer:

14 June 2023

Applicant:

UN

Defendant:

État belge, represented by the Minister for Finance

I. Facts and main proceedings:

- 1 UN, a Belgian national, was domiciled in France, in the border area, and worked in Belgium, in the border area. Having claimed, for the 2008 to 2014 tax years, the specific tax regime for cross-border workers provided for in the Convention for the avoidance of double taxation between Belgium and France ('the DTC'), he was taxed in France on income of Belgium origin.
- 2 The Belgian tax authority took the view that UN had been wrong to claim eligibility for the special regime for the tax years concerned, since his only permanent residence was in Belgium. It had levied Belgian tax on the income earned during those tax years, adding a penalty of 50%.
- 3 UN contests the automatic taxation of his income by Belgium and seeks to establish the liability of the Belgian State. On those two grounds, he referred the case to the tribunal de première instance (Court of First Instance, Belgium) on 14 July 2016. At the same time, as a precautionary measure, he applied for the

¹ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

mutual agreement procedure as provided for in Article 24 of the DTC, with a view to remedying the double taxation of his income.

- 4 On 30 August 2017, the Belgian tax authority informed him of the decision taken by the Belgian and French tax authorities, in the following terms:

‘Since the taxation by Belgium of that income for the years in question is recognised by both States as legitimate, the French tax authorities wish to proceed without undue delay with the rebate of the tax unduly collected by them on that income.

However, to do that, it is essential that your client withdraws all administrative and judicial appeals against the Belgian taxes in question such that they became final.

...

I wish to draw your attention to the fact that in the event of refusal of that agreement and/or in the absence of withdrawal of all appeals, the Belgian and French authorities would be forced to terminate the mutual agreement procedure, with the aggravating circumstance of the risk of the double taxation being maintained on that income.’

- 5 By judgment of 13 March 2019, the Court of First Instance annulled the additional 50% tax imposed for the 2008 to 2014 tax years and rejected the claim for the remainder, while reserving the right to rule on the liability action against the Belgian State.
- 6 The Court of First Instance is now examining that liability action and refers the three questions set out below to the Court of Justice for a preliminary ruling.

II. Legal framework

Provisions of European Union law relied on

- 7 Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’) provides:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

8 Article 45(1) TFEU provides:

‘Freedom of movement for workers shall be secured within the Union.’

9 Lastly, Article 19(1) TEU provides:

‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’

Convention between France and Belgium for the avoidance of double taxation

10 Article 24(3) of the DTC provides:

‘Where a resident of one of the Contracting States considers that taxes which have been or are to be assessed against him or her have resulted or will result in double taxation inconsistent with the provisions of the Convention, he or she may, without prejudice to the exercise of his or her rights of complaint and appeal under the domestic laws of either State, submit to the competent authorities of the State in which he or she is resident a written application, with a statement of grounds, for review of the said taxes.

That application must be submitted within six months of the date of notification or collection at source of the second tax. If the application is upheld by the authorities to which it is submitted, those authorities shall come to an agreement with the competent authorities of the other Contracting State with a view to the avoidance of double taxation.’

III. The essential arguments of the parties in the main proceedings

1. Position of the applicant

11 UN submits that the Belgian State is infringing his rights of defence and his fundamental rights by forcing him to choose between pursuing his action before the Belgian courts and being eligible for the mutual agreement procedure, in this case the restitution of the French tax paid for the tax years at issue.

12 In his view, the institution of a mutual agreement procedure is without prejudice to the taxpayer’s domestic rights of appeal. The Belgian State is depriving him of his fundamental right to submit fully and freely to the courts the dispute between him and the tax authority, even though the tax authorities of the two States

recognise that double taxation exists contrary to the DTC. UN argues that he has incurred significant administrative penalties which are of a coercive nature and claims that the choice left to him infringes his rights of defence.

- 13 UN also considers that the fact of terminating the mutual agreement procedure without allowing him to submit observations and without awaiting the outcome of the judicial proceedings constitutes a violation of his rights of defence and of Article 6 of the European Convention on Human Rights and Fundamental Freedoms. The resulting loss he incurs is equal to the amount of tax paid in France, which the mutual agreement procedure causes him to forfeit permanently. UN also notes that, according to Article 13 of the Belgian Constitution, ‘no one can be separated, against his will, from the judge that the law has assigned to him’.

2. Position of the Belgian State

- 14 The Belgian State recalls that the mutual agreement procedure provided for by the DTC allows the taxpayer to request that the Belgian and French tax authorities enter into a direct dialogue to find a solution to the double taxation. This is not a mandatory phase for the taxpayer or an appeal within the meaning of the Code judiciaire (Judicial Code).
- 15 The words ‘without prejudice to the exercise of his rights of complaint and appeal under the domestic laws of either State’ in the DTC simply mean that this procedure does not affect the taxpayer’s right to lodge a complaint and right of appeal under the domestic laws of each country. The mutual agreement procedure is independent of the remedies available under the national laws of the States.
- 16 Moreover, bringing a legal action against taxes established in Belgium has no suspensory effect on the continuation of the mutual agreement procedure. The litigation procedure, in which the taxpayer plays an active role, takes place as provided for by the Code des impôts sur les revenus 1992 (Income Tax Code 1992) and the Judicial Code, whereas the mutual agreement procedure provided for by the DTC takes place between two States; in principle the taxpayer is not involved in discussions between the competent authorities. In the present case, a solution to avoid double taxation has been found and the Belgian tax authority has informed the taxpayer, specifying that the enforcement of the agreement is subject to his withdrawal of any domestic litigation proceedings: this practice seeks to avoid any conflict between the outcome of the domestic procedure and that of the mutual agreement procedure, and is unobjectionable according to recent domestic case-law. The OECD also permits it, since in its commentary on Article 25 of the Model Tax Convention it states that: ‘45. ... there may be a pending suit by the taxpayer on an issue, or else the taxpayer may have preserved the right to take such domestic law action, yet the competent authorities might still consider that an agreement can be reached. In such cases, it is, however, necessary to take into account the concern of a particular competent authority to avoid any divergences or contradictions between the decision of the court and the mutual agreement that

is being sought, with the difficulties or risks of abuse that these could entail. In short, therefore, the implementation of such a mutual agreement should normally be made subject:

- to the acceptance of such mutual agreement by the taxpayer, and
- to the taxpayer's withdrawal of the suit at law concerning those points settled in the mutual agreement' (OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2014*, OECD Publishing, p. 414).

VI. Succinct presentation of the reasoning in the request for a preliminary ruling

- 17 The question that arises in the present case is whether the enforcement of the amicable settlement reached with the French tax authority (the restitution of French tax) can be contingent on the taxpayer's unconditional withdrawal of his legal action in Belgium.
- 18 The referring court holds that it is not unlawful for a person who is automatically taxed in Belgium after having paid income tax in France to challenge that taxation before the Belgian court. Indeed, the income tax claimed in Belgium will generally be four or even five times higher than the French tax calculated on the same income, and that basic tax, which is much higher, will be further increased by penalties of 50% of the tax claimed.
- 19 Moreover, although the applicant is requesting that the Contracting States consult each other under the mutual agreement procedure provided for in Article 24 of the DTC, it is primarily for the purpose of ending the double taxation.
- 20 The referring court is uncertain whether the Belgian State is complying with Articles 19 TEU, 45 TFEU and Article 47 of the Charter when it makes the restitution of French tax contingent on the withdrawal of the application brought before the Belgian court under the provisions of the DTC and domestic law, whereas, according to the fixed policy of the Belgian tax authority, the taxpayer does not have access to the administrative documents relating to the mutual agreement procedure and, in any event, cannot determine whether his tax situation has actually been examined by the tax authorities of the two Contracting States.
- 21 The referring court notes that the Commission d'accès aux documents administratifs (Committee on Access to Administrative Documents) takes the view that the refusal of the tax authorities to grant access to the file when a request for access to documents relating to a mutual agreement procedure on the basis of a double taxation convention is addressed to it is contrary to Article 32 of the Constitution and Articles 4 and 6 of the loi du 11 avril 1994 relative à la publicité de l'administration (law of 11 April 1994 on disclosure of information by the administration).

- 22 The referring court considers that the dispute concerns the free movement of workers, since UN submitted that he resided in France and paid income tax there. As a reminder, it has been consistently held that, whilst direct taxation falls within their competence, the Member States must nonetheless exercise that competence consistently with European Union law.¹ Thus, although the Member States are at liberty, in the framework of bilateral agreements for the avoidance of double taxation, to determine the connecting factors for the purposes of allocating powers of taxation, that allocation of powers of taxation does not allow them to apply measures that are contrary to the freedoms of movement guaranteed by the Treaty. As far as concerns the exercise of the power of taxation thus allocated, the Member States must comply with EU rules.² Therefore, where they are bound by bilateral conventions for the avoidance of double taxation, Member States are obliged to respect the general principles of EU law and the fundamental rights of EU citizens.
- 23 The referring court recalls that Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, enshrines the right to an effective remedy before a tribunal for every person whose rights and freedoms guaranteed by Union law are infringed.³
- 24 It follows that in certain cases, where there is evidence that both supports and undermines the applicant's case, the applicant may be justified in seeking to convince a court of the substance of his or her argument while retaining a legitimate interest in recovering the foreign tax should it not be examined by the court.
- 25 Added to this is the fact that taxation in Belgium is accompanied by penalties for fraud (intention to avoid taxation), increasing the taxation from 50% to 200%, which Article 6 of the European Convention on Human Rights has long defined as criminal. However, the Cour constitutionnelle (Constitutional Court, Belgium) and the Cour de Cassation (Court of Cassation, Belgium) have recognised that the Belgian taxpayer has the right to apply to the court for a review of the proportionality of the administrative penalty of a coercive nature and to be eligible for suspension. The principle of proportionality, as a general principle of EU law, requires Member States to employ means which, while enabling them effectively to attain the objective pursued by national legislation, cause the least possible

¹ See, to that effect, judgment of 23 January 2014, *Commission v Belgium* (C-296/12, EU:C:2014:24, paragraph 27 and the case-law cited).

² See, to that effect, judgments of 14 March 2019, *Jacob and Lennertz* (C-174/18, EU:C:2019:205, paragraph 25 and the case-law cited), and of 24 October 2019, *État belge* (C-35/19, EU:C:2019:894).

³ Judgments of 27 June 2013, *Agrokonsulting-04* (C-93/12, EU:C:2013:432, paragraph 59), and of 2 March 2021, *A.B. and Others* (Appointment of judges to the Supreme Court – Appeal) (C-824/18, EU:C:2021:153, paragraph 87 and the case-law cited).

detriment to the principles laid down by EU legislation.⁴ However, in the present case, there is no risk of double non-taxation if the tax authorities of the two States suspend the examination of the applicant's situation under the mutual agreement procedure until the national judicial proceedings lead to a final decision by the Belgian courts, so as not to deprive the applicant of the restitution of the French tax.

V. Questions referred for a preliminary ruling

26 The referring court therefore requests the Court of Justice of the European Union to answer the following questions by a preliminary ruling:

‘1. Does Article 24 of the Convention between France and Belgium for the avoidance of double taxation and the establishment of rules of reciprocal administrative and legal assistance with respect to taxes on income, signed at Brussels on 10 March 1964, ratified by the law of 14 April 1965, interpreted as meaning that a Belgian citizen who claims to be resident for tax purposes in France – which is, however, contested by the Belgian tax authority – and who, as a precautionary measure, has applied for the mutual agreement procedure in order to recover the tax paid in France, who is required by the Belgian and French tax authorities, in order to have the right to the restitution of that tax, to withdraw unconditionally the judicial proceedings brought before the Belgian courts principally to challenge his being automatically taxed in Belgium, infringe Article 19 of the Treaty on the European Union, Article 45 of the Treaty on the Functioning of the European Union and Article 47 of the Charter of Fundamental Rights of the European Union, in conjunction with the principle of proportionality, in so far as he or she would permanently forfeit the right to the restitution of French tax if he or she were to pursue his or her principal challenge to being taxed in Belgium before the Belgian ordinary court?

2. If the answer to the first question is in the negative, does the answer remain the same if, in order to recover the tax paid in France, the applicant, by withdrawing his or her legal action challenging the taxation in Belgium, also loses the right to an effective judicial review of the administrative penalties of a coercive nature, which the European Convention on Human Rights defines as criminal and which increase the amount of tax, thereby losing the right to review the proportionality of the penalty and apply for a suspension, modes of customising the penalty that are recognised by both the Constitutional Court and the Court of Cassation?

⁴ See, to that effect, judgments of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraph 32 and the case-law cited); of 14 October 2021, *Finanzamt N and Finanzamt G (Communication of the allocation decision)* (C-45/20 and C-46/20, EU:C:2021:852, paragraph 62 and the case-law cited); of 8 December 2022, *BTA Baltic Insurance Company* (C-769/21, EU:C:2022:973); and of 22 December 2022, *Shell Deutschland Oil* (C-553/21, EU:C:2022:1030).

3. If the answer to the first two questions is in the negative, does the answer remain the same if there is an administrative policy whereby the applicant is refused access to documents relating to the mutual agreement procedure between the two Contracting States, which refusal has repeatedly been deemed contrary to Article 32 of the Constitution and Articles 4 and 6 of the law of 11 April 1994 on disclosure of information by the administration by the Commission for Access to Administrative Documents and by the Conseil d'État (Council of State, Belgium)?'

WORKING DOCUMENT