

Case C-15/22

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:

6 January 2022

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

13 July 2021

Applicant and appellant on a point of law:

RF

Defendant and respondent in the appeal on a point of law:

Finanzamt G

Subject matter of the main proceedings

National administrative practice of exempting salary paid in respect of an activity in the field of development assistance from taxation, provided that the activity is financed using funds from German authorities, while salary paid in respect of such an activity financed using EU funds is subject to taxation – compatibility with EU law

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Are Article 4(3) of the Treaty on European Union and Article 208 in conjunction with Article 210 of the Treaty on the Functioning of the European Union to be interpreted as precluding a national administrative practice according to which tax is not waived in cases where a development cooperation project is financed by the

European Development Fund, while salary that a worker earns from a current employment relationship in respect of an activity associated with German official development assistance within the framework of technical or financial cooperation that is financed to at least 75% by a Federal Ministry responsible for development cooperation or else by a state-owned private development assistance association is, in certain conditions, exempted from taxation?

Provisions of EU law relied on

The second sentence of Article 3(5) TEU and Article 4(3) TEU

Article 4(3) TFEU and Article 208 TFEU, in conjunction with Article 210 TFEU

Provisions of national law relied on

Einkommensteuergesetz (German Law on income tax; ‘the EStG’), specifically Paragraph 34c, point 5

Auslandstätigkeitserlass (Edict on employment abroad; ‘the ATE’) (letter from the Federal Ministry of Finance of 31 October 1983, Federal Tax Gazette (Bundessteuerblatt; ‘the BStBl’) 1983 I p. 470)

Succinct presentation of the facts and procedure in the main proceedings

- 1 In the period from 12 April 2009 to 31 October 2012, the applicant and appellant in the appeal on a point of law (‘the applicant’) was employed as a project manager by a development assistance association having its registered office in Germany. She worked in Africa under the Micro-Projects Programme on a fixed-term contract of employment lasting the duration of the project. During that period, the applicant’s place of residence and centre of interests was in Germany, while her place of employment was in Africa.
- 2 As the project was not funded by Germany, but rather by the European Development Fund, the defendant tax office charged the applicant’s salary to income tax. Since her objection and action before the Finanzgericht (Finance Court, Germany) were unsuccessful, the applicant now seeks to have her salary exempted from income tax by way of her appeal on a point of law before the referring court.

Succinct presentation of the reasoning in the request for a preliminary ruling***Assessment on the basis of national law***

- 3 Under national law, the applicant is not entitled to have her salary exempted from income tax pursuant to Paragraph 34c, point 5 of the EStG, in conjunction with the ATE.
- 4 Under Paragraph 34c, point 5 of the EStG, the German tax authorities may waive the German income tax due on foreign income where this is economically expedient. According to the case-law of the German courts, this condition is satisfied only if the tax relief serves the purposes of German foreign trade.
- 5 Paragraph I, point 4 of the ATE states that, inter alia, activities carried out abroad for a national contractor in connection with German official development assistance within the framework of technical or financial cooperation enjoy an exemption from tax. The defendant tax office interpreted the phrase ‘German official development assistance’ as referring only to development assistance measures that are funded directly from the German budget. This interpretation is not only possible, but, in view of the aforementioned purpose of Paragraph 34c, point 5 of the EStG, it is also obvious and in no way arbitrary.

Compatibility with EU law

- 6 It is questionable as to whether Article 4(3) TEU and Article 208 in conjunction with Article 210 TFEU give rise to an obligation to include development assistance measures financed using the European Development Fund – and thus only indirectly from the German budget – under Paragraph 34c, point 5 of the EStG, in conjunction with the ATE.
- 7 The applicant claims that the principle of sincere cooperation set out in Article 4(3) TEU and the obligation of the European Union and the Member States to coordinate their development policy (the second sentence of Article 3(5) TEU) give rise to an obligation to include projects financed using EU funds, and therefore only partially and indirectly using German funds.
- 8 While it is true that the principle of sincere cooperation set out in Article 4(3) TEU obliges the Union and the Member States, in full mutual respect, to assist each other in carrying out the tasks provided for by the Treaties (judgment of 5 December 2017, *Germany v Council*, C-600/14, EU:C:2017:935, paragraph 105), Article 4(3) TFEU explicitly states that, in the area of technological development, inter alia, the Union has competence to carry out activities; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. In this regard, it is evident that Germany may adopt its own development assistance measures in consideration of their ‘economic expediency’ from a German perspective, provided that this does not compromise or adversely affect the objectives of EU development policy.

- 9 Nor should an obligation to include projects financed by the Union from the point of view of the principle of sincere cooperation follow from the judgment of 16 December 2004, *My*, C-293/03, EU:C:2004:821. The present case differs from the one that gave rise to that judgment in so far as there should be no EU law comparable to the Staff Regulations of Officials of the European Communities under which Germany could be obliged, in a sufficiently precise and unconditional manner, to include projects financed by the Union in the support measures for which Germany is itself competent under Article 4(3) TFEU. Therefore, the applicant should not be entitled to a subjective right, based on the obligation of sincere cooperation, to have projects financed by the Union included in the benefits under Paragraph 34c, paragraph 5, of the EStG, in conjunction with the ATE.
- 10 In the view of the referring court, such a right does not follow from Article 4(4) TFEU, in conjunction with the second sentence of Article 208(1) TFEU, or the first and third sentences of Article 210(1) TFEU. Article 4(4) TFEU also explicitly states that, although the competence of the Union in the field of development cooperation does extend to carrying out activities and conducting a common policy, the exercise of that competence does not result in Member States being prevented from exercising their own competence in this area. Although EU policy and the policy of the Member States in the field of development cooperation do complement and reinforce one another in this way (the second sentence of Article 208(1) TFEU) and an obligation to coordinate and provide support does follow from the first and third sentences of Article 210(1) TFEU, this should not result in Germany being denied the possibility of carrying out its own activities in the area of development policy in support of German foreign trade.
- 11 Nothing different should follow from the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ L 317, 15.12.2000, p. 3-353). It is not reasonable to assume that, by ratifying the agreement, the German legislature could at the same time have also decided that the development cooperation work, namely the micro-projects based on that agreement, was (also) expedient for (German) economic reasons. This is quite evident when one considers that the activities carried out on the basis of the agreement are precisely not those of German development policy; even though the share of financing Germany pays to the European Development Fund is significant, those funds ultimately come from the German budget, and are then indirectly used to finance the activities under the agreement. In any event, the agreement should not give rise to a subjective right on the part of a worker employed on a development assistance project covered by the agreement but residing in Germany to have his or her employment income exempted from taxation in Germany.
- 12 The judgment of 28 February 2013, *Petersen*, C-544/11, EU:C:2013:124 does not support any other conclusion. Although in that judgment the Court held that Article 45 TFEU (freedom of movement for workers) 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, it does not follow from this that Germany is obliged to include projects financed using EU funds, because, in the present case, no worker or employer is placed in a less favourable position in connection with their origin in another EU country. In any event, in so far as the ATE is liable to dissuade workers from taking up employment with an employer who manages a development assistance project financed using EU funds rather than national funds, this does not constitute a prohibited restriction to the fundamental rights of freedom of movement for workers or the freedom to provide services.

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