Anonymised version

Case C-141/24

Request for a preliminary ruling

Date lodged:

23 February 2024

Referring court:

Tribunal judiciaire de Nanterre (France)

Date of the decision to refer:

10 January 2024

Applicant:

TJ

Defendant:

Direction régionale des finances publiques d'Ile de France et de Paris

TRIBUNAL JUDICIAIRE DE NANTERRE

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CIVIL DIVISION

1st Chamber

JUDGMENT DELIVERED ON
10 January 2024

…

APPLICANT

TJ
…
92100 BOULOGNE-BILLANCOURT

…

DEFENDANT

DIRECTION REGIONALE DES FINANCES PUBLIQUES D'IDF ET DE PARIS

…

75075 PARIS CEDEX 02

…

SUMMARY OF THE DISPUTE

1 By letter dated 19 December 2019, the Direction régionale des finances publiques d'Ile-de-France et de Paris (Regional Directorate of Public Finances for Paris and Ile-de-France) sent TJ, pursuant to Article L.23 C of the Livre des Procédures Fiscales (Book on Tax Procedures), a request for information and evidence concerning assets held abroad in two bank accounts … opened with UBS bank in Luxembourg, concerning the years 2010 to 2014.

TJ responded by letter dated 20 February 2020, providing information on his situation.

2 By letter of 13 March 2020, the Direction régionale des finances publiques d'Ile-de-France et de Paris, considering that response to be insufficient, gave formal notice to the applicant to provide the requested details within thirty days of the date of receipt of that letter … [irrelevant detail].

3 By letter dated 5 October 2020, the Direction régionale des finances publiques d'Ile-de-France et de Paris issued a proposed correction involving the taxation at 60% of the sum of EUR 1 147 856, the total and maximum balance of the assets held in the two aforementioned bank accounts opened with UBS Luxembourg between 2010 and 2014, specifically on 31 December 2010, in accordance with Article 755 of the Code général des impôts (General Tax Code).

By letter dated 13 October 2020, TJ provided various documents and statements from UBS Luxembourg in an attempt to establish that the sums in question were acquired during a time-barred period.

4 In its reply dated 12 November 2020, the Direction régionale des finances publiques d'Ile-de-France et de Paris confirmed the notified assessment, taking the view that, although the sums may have been acquired during a time-barred period, the origin of the sums had to be established.

On 15 December 2020, the additional tax was assessed for a principal amount of inheritance tax of EUR 688 714.

5 TJ lodged a complaint on 30 December 2020, which was rejected by the tax authorities on 30 June 2020.

6 A new demand for payment dated 26 July 2021 was issued for the same principal amount of inheritance tax (EUR 688 714).

7 By instrument of a judicial officer of 9 August 2021, TJ summoned the Direction régionale des finances publiques d'Ile-de-France et de Paris to appear before the Court of Nanterre, in proceedings for annulment of the decision to reject the complaint of 30 June 2020 and for full relief in respect of the inheritance tax of EUR 688 714 demanded and any default interest, surcharges and ancillary penalties.

8 **In the final form of order sought, served on the Direction régionale des finances publiques d'Ile-de-France et de Paris on 10 October 2022, TJ claims that the Court should:**

- annul the decision rejecting the claim made against the Direction régionale des finances publiques d'Ile-de-France et de Paris dated 30 June 2020;

- order full relief in respect of the inheritance tax of EUR 688 714 demanded and any default interest, surcharges and ancillary penalties;

In the alternative, in the event that there is any doubt as to the compatibility with European law of Article L.23 C of the Livre des Procédures Fiscales and Article 755 of the Code général des impôts,

- … [request to make a reference for a preliminary ruling to the Court of Justice of the European Union, worded in a similar manner to the first question set out in the operative part];

- order provisional enforcement;

In the further alternative, in the event that the Court confirms all or part of the taxation at issue,

- rule out the provisional enforcement of the decision to be delivered pursuant to Article 514-1 of the Code of Civil Procedure, in order to avoid causing serious and irremediable harm to the applicant pending a final decision on the question of law which he raises;

In any event,

- order the Direction régionale des finances publiques d'Ile-de-France et de Paris to pay EUR 10 000 under Article 700 of the Code of Civil Procedure and to pay all the costs.

9 TJ submits that the tax authorities' decision to reject his claim constitutes an infringement of the freedom of movement of capital guaranteed by Article 63(1) of the Treaty on the Functioning of the European Union and should be annulled on that ground alone.

In support of that claim, he refers to a judgment of the Court of Justice of the European Union of 27 January 2022 (CJEU, 27 Jan. 2022, Case C-788/19), which

held to be contrary to the free movement of capital a Spanish tax provision which he considers to be similar to those set out in Article L.23 C of the Livre des Procédures Fiscales and Article 755 of the Code général des impôts, on the ground that they *de facto* extend indefinitely the limitation period on action by the tax authorities in relation to sums held in an undeclared foreign bank account.

He argues that the position of the tax authorities, which consists in applying '*punitive taxation*' at a rate of 60% on assets acquired more than ten years before it carried out its inspection, on the grounds that those authorities are not satisfied with the evidence provided as to the origin of those assets and the manner in which they were acquired, results in the tax authorities no longer having to comply with the ten-year limitation period provided for under Article L.181-0 A of the Livre des Procédures Fiscales, which already derogates from the general limitation period of three years as from registration of the instrument, although neither Article L.23 C of the Livre des Procédures Fiscales nor Article 755 of the Code général des impôts provides that the specific case of taxation under Article L.23 C of the Livre des Procédures Fiscales is an exception to the rules on limitation periods.

Lastly, he explained that, in this particular case, he acquired the assets in question 30 years ago, when he was living in Georgia, and that it was clearly impossible at present to find any banking records of his activities in Georgia before 1991, given the length of time since the events in question, on the one hand, and the political and administrative chaos which Georgia has experienced since the fall of the Berlin Wall in 1989, on the other. In those circumstances, the requirement to prove the origin of sums acquired more than thirty years ago is tantamount, in his view, to an outright denial of the rights of defence of a taxpayer.

Consequently, TJ considers it necessary, in the event that any doubt remains on the part of the Court as to the compatibility with European law of Article L.23 C of the Livre des Procédures Fiscales and Article 755 of the Code général des impôts, to make a reference to the Court of Justice of the European Union for a preliminary ruling on this point.

10 **In the final form of order sought, served on TJ on 3 February 2023, the Direction régionale des finances publiques d'Ile-de-France et de Paris contends that the Court should:**

– dismiss all TJ's claims;

– confirm the additional taxes;

– confirm the rejection decision of 30 June 2021;

– order TJ to pay all the costs of the proceedings.

11 In the first place, the tax authorities state that the procedure provided for in Article L.23 C of the Livre des Procédures Fiscales forms part of the fight against tax

evasion, an objective of general interest recognised as having a constitutional nature by the Conseil constitutionnel (Constitutional Council). It therefore aims to encourage taxpayers to comply with their tax declaration obligations and to demonstrate transparency towards the administration, in order to contribute to better citizenship in tax matters. They also explain that that procedure does not constitute a sanction or penalty but is intended solely to establish and assess tax.

In the second place, the tax authorities argue that it follows from the combined provisions of Article 755 of the Code général des impôts and Article 71 of the Livre des Procédures Fiscales that the chargeable event for duties on donation and succession referred to in the first of those provisions is the absence of a response or a failure to provide a sufficient response to the requests for information or evidence provided for in Article L.23 C of the Livre des Procédures Fiscales within the periods prescribed in that article, so that in this case, in so far as the request for information was made on 19 December 2019 and the period for recalculation by the authorities began on 24 September 2020, their action was not time-barred on that date under Article L.181-0 A of the Livre des Procédures Fiscales.

Finally, the tax authorities state that, in the judgment cited by the claimant, the Court of Justice of the European Union criticised the absence of a limitation period arising from the mechanism laid down, as well as the fact that the penalties and fines were disproportionate to those imposed for similar infringements. According to those authorities, on the one hand, failure to fulfil the legal obligations laid down in Articles 1649 A, 1649 AA and 1649 AB of the Code général des impôts, which leads to application of the disputed taxation scheme, is subject to rules on limitation periods and, on the other hand, failure to fulfil the legal obligations laid down in Articles 1649 A, 1649 AA and 1649 AB of the Code général des impôts does not give rise to any penalty in this case, since the mechanism provided for seeks only to establish the basis of assessment for a tax, while the 60% taxation imposed pursuant to Article 755 of the Code général des impôts is not subject to default interest or to tax penalties. It concludes from this that the French scheme for taxing foreign assets therefore strikes a fair balance between compliance with the obligations under Community law and the public interest objective of combating international tax evasion.

12 …

13 … [procedural details]

STATEMENT OF REASONS

A) European Union law

14 According to Article 63(1) of the Treaty on the Functioning of the European Union: '*Within the framework of the provisions set out in this Chapter, all*

restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.

Article 65 of the Treaty on the Functioning of the European Union also provides that:

(1) The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

...

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.'

15 According to the settled case-law of the Court of Justice of the European Union, measures imposed by a Member State which are such as to discourage, prevent or limit the opportunities of investors from that State to invest in other States constitute restrictions on the movement of capital within the meaning of Article 63(1) of the Treaty on the Functioning of the European Union (CJEU, 26 September 2000, *Commission* v *Belgium*, C-478/98, paragraph 18; CJEU, 23 October 2007, *Commission* v *Germany*, C-112/05, paragraph 19; CJEU, 26 May 2016, *NN (L) International*, C-48/15, paragraph 44).

16 On 23 October 2019, the European Commission brought before the Court of Justice of the European Union an action for a declaration that the Kingdom of Spain had failed to fulfil its obligations in providing for consequences of failure to comply with an obligation to declare overseas assets or rights by means of 'Form 720' which were disproportionate in the light of the objective pursued by the Spanish legislation.

The European Commission argued that the system established in the Kingdom of Spain:

- provided that failure to comply with the obligation to provide information in respect of overseas assets and rights or the late submission of 'Form 720' resulted in the classification of those assets as 'unjustified capital gains' without the possibility of pleading expiry of the limitation period;

- automatically imposed a proportional fine of 150% in the event of failure to fulfil the obligation to provide information in respect of overseas assets and rights or late submission of 'Form 720', in addition to flat-rate fines which are more severe than the penalties laid down by the general rules on penalties for similar infringements.

17 In its judgment of 27 January 2022 (CJEU, 27 Jan. 2022, Case C-788/19), the Court of Justice of the European Union states that:

– the need to guarantee the effectiveness of fiscal supervision and the objective of preventing tax evasion and avoidance are among the overriding reasons in the public interest capable of justifying the imposition of a restriction on the freedoms of movement (see, inter alia, CJEU, 11 June 2009, *X and Passenheim-van Schoot*, C-155/08 and C-157/08, paragraphs 45 and 46; CJEU, 15 September 2011, *Halley*, C-132/10, paragraph 30);

– with regard to capital movements, Article 65(1)(b) of the Treaty on the Functioning of the European Union provides moreover that Article 63 of the Treaty on the Functioning of the European Union is to be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation;

– the mere fact that a resident taxpayer has assets or rights outside the territory of a Member State cannot give rise to a general presumption of tax evasion and avoidance (see, in particular, CJEU, 11 March 2004, *de Lasteyrie du Saillant*, C-9/02, paragraph 51; CJEU, 7 November 2013, *K*, C-322/11, paragraph 60), so that a provision which presumes the existence of fraudulent behaviour on the sole ground that the conditions laid down therein are satisfied, without giving the taxpayer any opportunity to rebut that presumption, goes, in principle, beyond what is necessary in order to achieve the objective of combating tax evasion and avoidance (see, in particular CJEU, 3 October 2013, *Itelcar*, C-282/12, paragraph 37 and the case-law cited);

– although it is for the Member States, in the absence of harmonisation in EU law, to choose the penalties which appear to them to be appropriate for failure to comply with the obligations laid down by their national legislation in the field of direct taxation, they are, however, required to exercise that power in accordance with EU law and its general principles, and, consequently, in accordance with the principle of proportionality (see, in particular CJEU, 12 July 2001, *Louloudakis*, C-262/99, paragraph 67 and the case-law cited);

– the fundamental requirement of legal certainty precludes, in principle, public authorities from being able to make indefinite use of their powers to put an end to an unlawful situation (see, by analogy in the field of competition, judgment of 14 July 1972, *Geigy* v *Commission*, 52/69, paragraph 21);

– whilst the national legislature may introduce an extended limitation period with the aim of ensuring the effectiveness of fiscal supervision and combating tax

evasion and avoidance connected with the concealment of overseas assets, provided that that period does not go beyond what is necessary to attain those objectives, having regard, inter alia, to the mechanisms for the exchange of information and administrative assistance between Member States (see judgment of 11 June 2009, *X and Passenheim-van Schoot*, C-155/08 and C-157/08, EU:C:2009:368, paragraphs 66, 72 and 73), the same is not true concerning the introduction of mechanisms amounting, in practice, to extending indefinitely the period during which taxation may take place or reversing a limitation period which has already expired.

18 The Court of Justice of the European Union therefore requires compliance with the principle of proportionality between the need to guarantee the free movement of capital between Member States and between Member States and third countries, as provided for by Article 63 of the Treaty on the Functioning of the European Union, and the need to guarantee the effectiveness of fiscal supervision and the objective of preventing tax evasion and avoidance.

19 In that particular case, the Court of Justice of the European Union held that:

– by providing that the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets and rights located abroad entails the taxation of undeclared income corresponding to the value of those assets as ‘unjustified capital gains’, with no possibility, in practice, of benefiting from limitation;

– by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to a proportional fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights, which may be applied concurrently with flat-rate fines, and

– by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to flat-rate fines the amount of which is disproportionate to the penalties imposed in respect of similar infringements in a purely national context and the total amount of which is not capped,

the Kingdom of Spain failed to fulfil its obligations under Article 63 of the Treaty on the Functioning of the European Union and Article 40 of the EEA Agreement.

B) National law and case-law

20 Under the second paragraph of Article 1649 A of the Code général des impôts, natural persons, associations and non-commercial companies domiciled or established in France are required to declare, together with their income tax return, details of any accounts opened, held, used or closed abroad.

Article L.23 C of the Livre des Procédures Fiscales provides that where the obligation laid down in the second paragraph of Article 1649 A of the Code général des impôts has not been complied with at least once in the preceding ten years, the tax authorities may, independently of a procedure for the review of an individual's tax affairs, ask the natural person subject to that obligation to provide, within a period of sixty days, any information or evidence as to the origin and manner of acquisition of the assets held in the account or life insurance policy.

If the person concerned does not provide an adequate response to the requests for information or evidence, the authorities give that person formal notice to complete his or her response within thirty days and specify the additional information required.

According to Article L.71 of the Livre des Procédures Fiscales, if the person concerned does not respond or fails to provide an adequate response to the requests for information or evidence provided for in Article L.23 C within the periods prescribed in that article, he or she is to be automatically taxed as provided for in Article 755 of the Code général des impôts, which provides that assets in an account held abroad, within the meaning of the second paragraph of Article 1649 A, or held in an endowment contract or a similar type of investment entered into abroad, within the meaning of Article 1649 AA, and the origin and manner of acquisition of which have not been established under the procedure laid down in Article L.23 C of the Livre des Procédures Fiscales are to be deemed to constitute, in the absence of proof to the contrary, assets acquired by donation or succession which are subject, on the date of expiry of the periods provided for in Article L.23 C., to duties on donation and succession at the highest rate set out in table 111 of Article 777, that is to say at the rate of 60% applicable to gifts made between relatives beyond the 4th degree and between non-relatives.

Those taxes are calculated on the basis of the highest value, to the knowledge of the tax authorities, of the assets held in the account or contract over the ten years preceding the request for information or evidence provided for in Article L.23 C of the Livre des Procédures Fiscales, less the value of the assets for which evidence of origin and manner of acquisition have been provided.

Article L.181-0 A of the Livre des Procédures Fiscales provides that, by way of exception to the first paragraph of Article L.180 and Article L.181, the authorities' right to recalculate the taxes and duties referred to therein may be exercised until the end of the tenth year following the year in which the chargeable event for those taxes or duties occurred where they are based on the assets or rights referred to in Articles 1649 A, 1649 AA and 1649 AB of the Code général des impôts, unless the date when the taxes or duties relating to the corresponding assets or rights becomes chargeable has been adequately indicated in the document registered or submitted for formal purposes or, with respect to the tax on real property wealth, by the declaration and schedules referred to in Article 982 of that code.

21 In a judgment of 16 December 2020, the Commercial Chamber of the Court of Cassation stated that the chargeable event corresponds to the date of expiry of the periods provided for in Article L.23 C of the Livre des Procédures Fiscales and constitutes the starting point for the ten-year limitation period set out in Article L.181-0 A of the Livre des Procédures Fiscales (Com., 16 Dec. 2020, No 18-16.801).

22 …

23 … [national case-law on the constitutionality of the combined provisions of Article L.23 C of the Livre des Procédures Fiscales and Article 755 of the Code général des impôts]

C) Questions referred for a preliminary ruling which are necessary to resolve the dispute

24 It is apparent from the foregoing that the aforementioned provisions allow the taxpayer to rebut the presumption that assets held abroad, which have not been declared in accordance with the procedure set out in Article L.23 C of the Livre des Procédures Fiscales, and the origin and manner of acquisition of which have not been established, at the end of a procedure of prescribed exchanges with the tax authorities, [constitute assets acquired by donation or succession which are subject to duties on donation and succession at the highest rate] and, in addition, that the authorities' assessment of the evidence submitted to them is subject to judicial review in the event of a challenge by the taxpayer.

25 Moreover, the scheme provided for in Article L.23 C of the Livre des Procédures Fiscales and Article 755 of the Code général des impôts is intended not to penalise a taxpayer domiciled in France for tax purposes and holding assets abroad, who has failed to fulfil his obligation to declare information, by applying a punitive rate but to establish the basis of assessment for a tax and to settle the tax by applying to him or her, in the absence of satisfactory evidence as to the origin and manner of acquisition of the disputed assets, the highest rate, under the general law, of the scale of duties on donation and succession.

26 Furthermore, failure to comply with the declaratory obligation is punishable by the imposition of the fine provided for Article 1736(IV) of the Code général des impôts or in Article 1766 thereof (a fine of EUR 1 500 per undeclared account or advance, increased to EUR 10 000 if the account is located in a State or territory that has not entered into an administrative assistance agreement with France to combat tax evasion and avoidance, which allows access to banking information).

27 In those various respects, the French scheme does not give rise to the objections raised against the system established in the Kingdom of Spain, which was the subject matter of the judgment of the Court of Justice of the European Union of 27 January 2022 (CJEU, 27 Jan. 2022, Case C-788/19), brought by the European Commission.

28 However, the Court observes that the legislature introduced an extended limitation period of ten years, derogating from the ordinary law, which, although it does not appear, by virtue of its duration, to go beyond what is necessary to achieve the intended objectives, nevertheless allows the authorities, in that it has as its starting point the date of expiry of the periods provided for in Article L.23 C of the Livre des Procédures Fiscales, in other words a starting point which is unrelated to the date of acquisition of the assets held abroad and the years in respect of which the taxation of those amounts was normally due, to ask the taxpayer to provide evidence as to the origin and manner of acquisition of those assets, including where he or she acquired them more than ten years before implementation of the procedure provided for in Article L.23 C of the Livre des Procédures Fiscales, that is to say during a time-barred period and without any time limit.

It therefore raises the issue of the impact which the non-applicability of limitation periods resulting from that scheme has on the principle of free movement of capital guaranteed by Article 63 of the Treaty on the Functioning of the European Union, as interpreted by the Court of Justice of the European Union, in particular in its judgment of 27 January 2022 (CJEU, 27 Jan. 2022, Case C-788/19).

29 The Court is therefore required to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

… [wording of the questions, reproduced in the operative part]

ON THOSE GROUNDS

The Court, … [procedural details]

Having regard to Article 267 of the Treaty on the Functioning of the European Union,

Asks the Court of Justice of the European Union to give a preliminary ruling on the following questions:

Question No 1: Must the principle of the free movement of capital guaranteed by Article 63 of the Treaty on the Functioning of the European Union be interpreted as meaning that it permits the automatic taxation, as provided for in Article 755 of the Code général des impôts, of assets held abroad which have not been declared in accordance with the procedure provided for in Article L.23 C of the Livre des Procédures Fiscales, and the origin and manner of acquisition of which have not been established, although it results in the non-applicability of limitation periods where the taxpayer establishes that he or she acquired those assets during a time-barred period?

Question No 2: If the answer to that question is in the negative, must it be inferred from this that any correction procedure based on the aforementioned

provisions must be annulled, even if, in the case under review by the tax authorities, the non-applicability of limitation periods does not arise?

… [stay of proceedings, procedural details]