Council of State, 3rd and 8th Subsections combined, 17/12/2010, 316144, Unpublished in the Lebon Digest

FULL TEXT

Council of State - 3rd and 8th Subsections Combined

No. 316144

Not included in the Lebon collection

Reading from Friday, December 17, 2010

President

Mr. Martin

Rapporteur

Ms. Anne Egerszegi

Public rapporteur

Ms. Cortot-Boucher Emmanuelle

Lawyer(s)

SCP WAQUET, FARGE, HAZAN

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

Having regard to the summary appeal and the supplementary memorandum, registered on 13 May and 13 August 2008 at the Registry of the Litigation Division of the Council of State, submitted on behalf of Mr. Jean-Bernard B, residing at ... and Mrs. A, wife of B, residing at ...; Mr. B and Mrs. A, wife of B, request the Council of State:

1) to set aside the judgment no. 05BX02412 of 10 March 2008 by which the Administrative Court of Appeal of Bordeaux dismissed their appeal against the judgment of 25 October 2005 of the Administrative Court of Bordeaux insofar as it dismissed their application for relief from the additional income tax assessments to which they were subject for the years 1995, 1996, 1998, 1999 and 2000, and social security contributions relating to the years 1998 to 2000, as well as the corresponding penalties;

2) deciding the case on its merits, to allow their appeal;

3) to order the State to pay the sum of €10,000 pursuant to Article L. 761-1 of the Code of Administrative Justice;

Having regard to the other documents in the file;

Having regard to the tax treaty between the Government of the French Republic and the Government of the Gabonese Republic of April 21, 1966, and the amendment of October 2, 1986;

Having regard to the General Tax Code and the Book of Tax Procedures;

Having regard to the Code of Administrative Justice;

After hearing in open court:

- the report of Ms. Anne Egerszegi, Master of Requests,

- the submissions of SCP Waquet, Farge, Hazan, counsel for Mr. B and Ms. A,

- the submissions of Ms. Emmanuelle Cortot-Boucher, Public Rapporteur;

The floor having been given again to SCP Waquet, Farge, Hazan, counsel for Mr. B and Ms. A;

Considering that it appears from the documents in the file submitted to the lower court judges that Mr. and Mrs. B were subject to two contradictory examinations of their personal tax situation, which respectively covered the years 1995 and 1996 and the years 1998, 1999 and 2000; that during these audits, it was noted that the income tax returns filed by the taxpayers for the years 1995 and 1996 at the Arcachon tax center were not completed and that, with regard to the years 1998 to 2000, no return had been filed despite formal notices; that the responses provided to the requests for justification addressed to them for the years 1995 and 1996, on the basis of Article L. 16 of the Book of Tax Procedures, having been deemed insufficient, Mr. and Mrs. B were taxed ex officio, on the basis of Article L. 69 of the same book, on the basis of sums mentioned as credits to their bank and postal accounts, the origin of which was regarded as unjustified; that with regard to the years 1998 to 2000, the procedure of ex officio taxation was also implemented, on the basis of Article L. 66 of the Book of Tax Procedures; that Mr. B and Mrs. A, wife of B, are appealing to the Court of Cassation against the judgment of March 10, 2008, of the Administrative Court of Appeal of Bordeaux, which dismissed their appeal against the judgment of the Administrative Court of Bordeaux of October 25, 2005, insofar as it dismissed their application for relief from the additional income tax assessments to which they were subject for the years 1995, 1996, 1998, 1999, and 2000, and social security contributions relating to the years 1998 to 2000, as well as the corresponding penalties;

Regarding joint taxation:

Considering that, according to paragraph 4 of Article 6 of the General Tax Code: Spouses are subject to separate taxation: / a. When they have separate property and do not live under the same roof; / b. When, being in the process of legal separation or divorce, they have been authorized to have separate residences; / c. When, in the event of abandonment of the marital home by one or the other spouse, each has separate income.

Considering that the court noted that the taxpayers were not separated in terms of property during the tax years in dispute, that no court decision authorized them to reside separately, and that it was not argued that one of the spouses had abandoned the marital home; that even assuming that, as they argued, one of the spouses had resided abroad during the years in question, the court could legally rely on the aforementioned provisions of Article 6 of the General Tax Code to deduce from the facts that it has sovereignly established, that Mr. and Mrs. B should be subject to a single tax on their taxable income in France, in accordance with the assessment rules applicable to it;

Regarding tax residency:

With regard to domestic law:

Considering that, according to Article 4 A of the General Tax Code: Persons whose tax residency is in France are liable for income tax on all of their income. / Those whose tax residency is located outside France are liable for this tax only on their French-source income; that, according to Article 4 B of the same code: 1. The following are considered to have their tax residency in France within the meaning of Article 4 A: / a. Persons who have their home or principal residence in France; / b. Those who carry out a professional activity in France, whether salaried or not, unless they can prove that this activity is carried out there on an ancillary basis; / c. Those who have the center of their economic interests in France (...); that, for the application of the provisions of subparagraph a of paragraph 1 of the aforementioned Article 4 B, the home is understood to be the place where the taxpayer normally resides and has the center of their family interests, without taking into account temporary stays elsewhere due to professional requirements or exceptional circumstances; that the place of the taxpayer's principal residence can only determine their tax domicile if they do not have a home;

Considering that, after noting that Mr. B's wife and the couple's three children, two of whom were dependent on Mr. and Mrs. B until the end of 1999, lived permanently in Gironde, in a residence owned by the taxpayers, the court, which did not misrepresent the facts or the evidence in the file, was able, without error of law, to rule that, even though he also had an apartment in Gabon where he carried out his professional activity and regardless of the duration of his stays in that country, Mr.B had his home in France within the meaning of the aforementioned provisions of Article 4 B of the General Tax Code and should, consequently, be regarded as fiscally domiciled in France;

With regard to the Franco-Gabonese tax treaty:

Considering, firstly, that according to Article 2 of the Franco-Gabonese tax treaty of April 21, 1966: 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. However, this term does not include any person who is liable to tax in that Contracting State only in respect of income from sources within that Contracting State or of capital situated therein. / 2. Where, by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, his status shall be determined as follows: / a. That individual shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him; a. If the person has a permanent home in both Contracting States, they shall be deemed to be a resident of the Contracting State with which their personal and economic relations are closer (centre of vital interests); / b. If the Contracting State in which this person has their centre of vital interests cannot be determined, or if they do not have a permanent home in either Contracting State, they shall be deemed to be a resident of the Contracting State in which they habitually reside; / c. If this person habitually resides in both Contracting States or in neither of them, they shall be deemed to be a resident of the Contracting State of which they are a national (...); that it follows from these provisions that, when a person falling within their scope has a permanent home in both France and Gabon, they are taxable in the one of these two States where they also have the center of their vital interests, or, if this center is not located in either of them, in the one where they habitually reside; that it also follows from these provisions that any residence which a person has at their disposal on a permanent basis is, for them, within the meaning of the convention, a permanent home;

Considering that the court, which did not distort the facts, could deduce, without committing an error of law, from the possession of a house in Gironde where his wife and three children resided, as well as from the rental of an apartment in Paris, that Mr. B had a permanent home in France;

Secondly, considering that, without misrepresenting the evidence submitted to it, Mr. and Mrs. B owned two houses in France as well as a plot of land and two parking spaces, that Mrs. B and the couple's children lived in one of these houses, that the properties they did not occupy provided them with rental income, that they also had several bank accounts in France jointly or separately, that Mr. B frequently went to Paris where he had an apartment which he rented out, and inferring from all the facts thus noted that Mr. B had the center of his vital interests in France within the meaning of point (a) of paragraph 2 of Article 2 of the Franco-Gabonese tax convention and consequently, the status of resident of France for the application of this convention, the court did not commit an error of law;

On the merits of the adjustments:

Considering, firstly, that according to Article 23 of the Franco-Gabonese tax treaty: 1. Income derived by a resident of a Contracting State from a liberal profession or other independent activities of a similar nature shall be taxable only in that State unless that person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a base, then the portion of income attributable to that base may be taxed in that other State. / 2. For the purposes of this Article, liberal professions include, in particular, scientific, artistic, literary, teaching or pedagogical activities, as well as the activities of physicians, lawyers, architects or engineers; that under the terms of Article 25 of the same convention: Income not mentioned in the preceding articles shall be taxable only in the Contracting State of which the recipient is a resident, unless such income is attributable to the activity of a permanent establishment which the recipient has in the other Contracting State;

Considering that, in ruling that the taxpayers, who argued before it that the sums in dispute came from transfers made by Mr. B from the bank accounts he had in Gabon and on which were deposited the remuneration received for his activities as a consultant in that country, did not establish either the origin or the nature of the credits appearing on these accounts, and in concluding that they could not claim the benefit of the aforementioned stipulations of Articles 23 and 25 of the Franco-Gabonese tax convention, the court, which made a sovereign assessment of the documents in the file submitted to it free from distortion, did not commit an error of law;

Secondly, considering that the court ruled that the taxpayers, who argued before it that the bank credits on which they were automatically taxed originated in particular from account-to-account transfers, loan transactions and the deposit of cancelled checks, did not establish this; however, it appears from the documents in the file submitted to the lower court judges that the sum of 200,000 francs, credited to Crédit Lyonnais account 4988 Y on April 2, 1999, corresponds to a transfer from Crédit Lyonnais account 765575 P, which was verified by the tax authorities; furthermore, the amounts of 9,000 francs and 30,000 francs credited to Crédit Lyonnais account no. 4988 Y on November 19 and December 6, 1999, correspond to the deposit of checks that were cancelled; that, with regard to these sums alone, the court distorted the evidence in the file;

On the application of penalties:

Considering that, in ruling that it was incumbent upon the applicants to establish the actual sending of their income tax returns for the years 1998 to 2000, and in inferring from the absence of any justification for such sending, that the application against them of the penalty provided for in Article 1728 of the General Tax Code was justified, the court did not commit an error of law;

Considering that it follows from all of the above that Mr. B and Mrs. A, wife of B, are only entitled to request the annulment of the judgment insofar as it deems justified the taxation, as income of undetermined origin, of the sum of 239,000 francs for the year 1999;

On the submissions seeking the application of the provisions of Article L. 761-1 of the Code of Administrative Justice:

Considering that, in the circumstances of this case, it is appropriate to apply the provisions of this article and to order the State to pay Mr. B and Mrs. A, wife of B, the sum of 1,500 euros; DECIDES

: Article 1: The judgment of the Bordeaux Administrative Court of Appeal of March 10, 2008, is quashed insofar as it upholds the taxation, as income of undetermined origin, of the sum of 239,000 francs for the year 1999. Article 2: The case is referred back, within the limits of the cassation defined in Article 1, to the Bordeaux Administrative Court of Appeal. Article 3: The State shall pay Mr. B and Mrs. A, wife of B, the sum of 1,500 euros pursuant to Article L. 761-1 of the Code of Administrative Justice. Article 4: The remaining claims in the appeal of Mr. B and Mrs. A, wife of B, are dismissed. Article 5: This decision shall be notified to Mr.B and Mrs. A wife of B and to the Minister of Budget, Public Accounts, Civil Service and State Reform, Government Spokesperson.