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Preface

In recent years, the European Court of Justice (ECJ) has had to deal with more and more cases concerning direct taxation. This growing amount of case law is driven by the increased willingness of national courts to approach the ECJ through preliminary rulings as well as by the fact that the European Commission seems to be more and more willing to initiate infringement procedures against EU Member States. As all these cases are of great interest for academics as well as practitioners, they need to be analyzed carefully.

The conference, “Recent and Pending Cases at the ECJ on Direct Taxation” was held in Vienna on 20 to 22 November 2014. A large number of experts on European and international tax law accepted our invitation to attend the conference and took part in the discussions. At the conference, cases in the field of direct taxation now pending before or recently decided by the ECJ were presented by experts from the respective countries. These national reporters provided insights into the national as well as the European background of the cases. Their presentations were the basis for further lively discussions among the international participants. Possible consequences of the pending cases, future ECJ decisions and future trends in the ECJ’s case law were discussed and analyzed in detail. The results of the conference are published in this book.

The conference would not have been possible without the City of Vienna to whom we would like to express our thanks. In addition, we would like to warmly thank the authors who contributed to the conference by presenting cases from their countries and actively participating in the discussions. Furthermore, these individuals supported the entire project and the publication of this book by committing themselves to a strict time schedule. We are also grateful to the Linde publishing house for its cooperation and the quick realization of the book’s publication. Linde has generously agreed to include this book in its catalogue.

Our particular thanks go to Renée Pestuka for the smooth organization of the conference, to Eleanor Campbell, who edited and polished the texts of the authors, and to Alexander Zeiler, who supported us in deciding on the structure of the conference and in the preparation and publication of this book.

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ECJ Pending Cases from Austria – F.E. Familienprivatstiftung Eisenstadt and Finanzamt Linz

*Claus Staringer*¹

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¹ The author wishes to thank Mag. Jasmin Kollmann, BA (Institute for Austrian and International Tax Law at WU) for her help on the footnotes.

Portugal: Exit Taxes on Individuals and Transfer of a Permanent Establishment

Ana Paula Dourado

- I. Introduction
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I. Introduction

The pending infringement procedure against Portugal, regarding exit taxation of individuals, was formally initiated in 2009 (Infringement Procedure/14/1635, 29 October 2009). A procedural dispute between the Commission and the Portuguese Government delayed the whole process and the infringement procedure has now been renumbered as IP 14/50. Taking into account further developments in the case law of the European Court of Justice, it is herein claimed that it is *acte clair* that the Portuguese legislation is incompatible with the fundamental freedoms, namely, with the free movement of workers, freedom of establishment and free movement of citizens of a Member State of the European Union. The following paragraphs of this contribution will attempt to substantiate this position.

II. Facts of the Case

According to Article 10 § 9 a) of the Portuguese Personal Income Tax Code (PITC), the transfer of residence, if the taxpayer has benefited from tax neutrality upon a previous exchange of shares, gives rise to the inclusion of the capital gains or losses in the shareholder's taxable income and corresponding tax in the calendar year when the transfer of residence occurs. In contrast, a resident shareholder who has exchanged shares and kept his residence in Portuguese territory is only taxed if there has been an additional cash payment and as long as the value of the received shares corresponds to the value of the transmitted shares.

The Portuguese legislation at issue concerns only the taxation of income which has already been realized and of which the tax authorities have knowledge.¹ The purpose of the legislation is to avoid deferring taxation of income already obtained by taxpayers who no longer reside in Portugal and who may lose all links with the Portuguese authorities. Such a situation will arguably, both for legal and factual situations, render it difficult or prevent the recovery of tax.

The above mentioned regime was inspired by the Spanish regime that was declared to be incompatible with Articles 18 (free movement of citizens), 39 (free movement of workers) and 43 (freedom of establishment) of the TFEU, in case C-269/09, ECJ of 12 July 2012 (European Commission v. Kingdom of Spain).² However, the action was dismissed in so far as it concerned infringement of Articles 28 (free movement of workers) and 31 (free movement of establishment) of the EEA Agreement.

The Portuguese Republic actively intervened in the observations to that case and in the arguments put forward therein as justifications for a restrictive treatment, however, with the exception of the infringement of the EEA Agreement, those justifications were rejected by the Court mainly on the basis of the non-proportionality of the restrictive measures.

¹ Cf., identically, ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 158.

² See fn. 1.

III. The Fundamental Freedoms at Stake

The Portuguese tax regime at issue must first be examined in the light of Articles 45 and 49 TFEU. The Portuguese exit tax is an obstacle to the freedom of workers and the freedom of establishment: according to paragraph 53 of the *Commission v. Kingdom of Spain* case, "rules which preclude or deter a national of a member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned".³ The same reasoning applies to measures which prohibit, impede or render less attractive the exercise of the freedom of movement.⁴

The transfer of residence outside Portuguese territory in connection with the free movement of workers (Article 45 TFEU) or freedom of establishment (Article 49 TFEU) triggers taxation of capital gains at an earlier stage than occurs for taxpayers who continue to reside in Portugal.⁵

The ECJ, in the *Commission v. Kingdom of Spain* case, considered that such a difference in treatment is capable of placing persons who transfer their residence abroad at a financial disadvantage.⁶ In the aforementioned case, the ECJ moreover decided that there was a clear disadvantage in terms of cash flow, that this was a restriction on the freedom of establishment and that the different treatment could not be explained by an objective difference between domestic and cross border situations.⁷

It is expected that the ECJ will cross-refer to this *Commission v. Kingdom of Spain* case and use the same arguments in the case under analysis.

IV. Justifications for the Restrictions

It must be examined whether the measures can be justified by overriding reasons in the public interest, and if the measures are proportionate in attaining that objective and do not go beyond what is necessary to attain the objective pursued.⁸ First, it requires to be determined whether the restrictive measures are necessary

³ ECJ 11 September 2007, C-318/05 *Commission/Germany* [2007] ECR I -06957, para 115; ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 53.

⁴ ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 54.

⁵ ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 57.

⁶ ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 57 and by analogy: ECJ 11. March 2004, C-9/02, *Lasteyrie du Saillant* [2004] ECR I-02409, para 46 and ECJ 7 September 2006, C-470/04, *N* [2006] ECR I-07409, para 35.

⁷ ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 60; ECJ 29 November 2011 C-371/10, *National Grid Indus BV* [2011] ECR I-12273, para 38.

⁸ Inter alia, ECJ 17 January 2008, C-152/05, *Commission/Germany*, [2008] ECR, I-00039, para 26; ECJ 29 November 2011 C-371/10, *National Grid Indus BV* [2011] ECR I-12273, para. 42; ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 62.

to assure the effective recovery of tax debts, the balanced allocation of taxing rights and the need to preserve the coherence of the tax system.⁹

Regarding the need to ensure effective recovery of the tax debt, the ECJ has recognized that that need could justify a restriction on a fundamental freedom.¹⁰ In this context, it could be argued that non-taxation of income already obtained by a taxpayer that will lose all links with the Portuguese authorities renders difficult or prevents the recovery of the tax¹¹ and that the instruments for cooperation have proved manifestly inadequate for the purposes of ensuring effectiveness of the tax system¹²: it can be difficult to trace the taxpayer (tax debtor) and it is not always the case that taxpayers not resident in Portugal receive income in Portugal or have a significant portion of their assets in Portugal.¹³ In other words, the instruments for administrative cooperation and mutual assistance between Member States of the EU have arguably proven manifestly inadequate.¹⁴

However, the ECJ has already replied to that argument and considered that the EU cooperation mechanisms are sufficient to enable the Member State of origin to recover the tax debt in another Member State.¹⁵ Moreover, the assistance required of the host Member State will concern only the recovery of the debt claim and not the definitive establishment of the amount of the tax charged.¹⁶ In this context, Article 5 (1) of the 2010/24 EU Directive on Mutual Assistance for the Recovery of Claims provides that at the request of the applicant authority, the requested authority shall provide any information which is foreseeably relevant to the applicant authority in the recovery of its claims. Moreover, at the request of the applicant authority, the requested authority shall recover claims which are the subject of an instrument permitting enforcement in the applicant Member State (Art. 10 of the aforementioned Directive).

The ECJ conceded that cross-border recovery of a tax debt is normally more difficult than recovery within the national territory,¹⁷ but it was clear when stating this, that Member States should not rely on the difficulties in obtaining the information required or on the shortcomings of cooperation between their tax authorities in order to justify a restriction of the fundamental freedoms.¹⁸ Moreover, the obligation to pay immediately and in full, a tax of a determined amount on in-

9 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 63.

10 ECJ 3 October 2006 C-290/04, *Scorpio* [2006] ECR I-09461, para 35.

11 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 65.

12 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 66.

13 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 65.

14 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 66.

15 ECJ 29 November 2011 C-371/10, *National Grid Indus BV* [2011] ECR I-12273, para 78; ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 68.

16 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 69.

17 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 74.

18 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 72.

come already realized goes beyond what is necessary and it is therefore disproportionate.¹⁹

Regarding the argument on allocation of taxing rights, such a justification can be accepted where the rules at issue are intended to prevent behaviour capable of jeopardizing the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory.²⁰ The aforementioned justification is not applicable to the case at hand, because in the latter, there is no risk of double taxation since it is not the determination of the tax debt at the time of the transfer of residence which is at issue, but the immediate recovery of that tax debt.²¹

The need to preserve coherence of the national tax system is not a valid justification either, because this is not an issue of determination of the tax debt at the time of transfer of residence but of immediate recovery of that tax debt.²² Moreover, there is no direct link between the tax advantage represented by the possibility of charging income to a number of tax periods and the offsetting of that advantage by some kind of tax charge.²³ In conclusion, the legislation is disproportionate as a means of ensuring effective recovery of the tax.²⁴

V. The Grounds of Challenge Alleging Infringement of the EEA Agreement

If there is no agreement providing for mutual assistance in respect of the levying or the recovery of taxes, the obligation on taxpayers who transfer their residence abroad, to include any income not yet charged to tax in the tax base for the last year in which they were treated as resident taxpayers does not go beyond what is necessary to attain the objective of ensuring the effectiveness of fiscal supervision and the prevention of tax avoidance.²⁵

19 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, paras 74 and 75.

20 ECJ 13 December 2005, C-446/03, *Marks & Spencer*, [2005] ECR I-10837, para 46; ECJ 29 March 2007, C-347/04, *Rewe Zentralfinanz* [2007] ECR I-02647, para 42; ECJ 29 November 2011 C-371/10, *National Grid Indus BV* [2011] ECR I-12273, para 46; ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 77.

21 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 81.

22 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, paras 86 and 81.

23 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 87.

24 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 90. See recent developments in the ECJ 23 January 2014, C-164/12, *DMC* [2014] EU:C:2014:20, para 69: "Consequently, the answer to the second question is that the national legislation of a Member State which provides for the immediate taxation of unrealised capital gains generated in its territory does not go beyond what is necessary to attain the objective of the preservation of the balanced allocation of the power to impose taxes between Member States, provided that, where the taxable person elects for deferred payment, the requirement to provide a bank guarantee is imposed on the basis of the actual risk of non-recovery of the tax".

25 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, paras 98–99.

VI. Article 38 § 1 a) of the Same Personal Income Tax Code

Article 38 § 1 a) of the same PITC also provides that, the transfer to a company of assets and liabilities related to an economic or professional activity carried out by a natural person is exempt if the legal person is a Portuguese resident, whereas the transfer is taxed if the legal person has its seat or place of effective management abroad.

The ECJ has already decided on the incompatibility of similar exit taxes with the freedom of establishment under the corporate income tax code (CITC), namely when the CITC taxed a permanent establishment on ceasing its activities in Portugal or when the permanent establishment transferred its Portuguese located assets to another Member State (also an infringement procedure).²⁶ That infringement procedure against Portugal had to do with the taxable base of the corporation for the financial year which included any unrealized capital gains in respect of the company's assets, whereas the unrealized capital gains from purely domestic transactions were not included in the taxable base; moreover, the shareholders were subject to tax on the difference between the company's net assets (valued at the time of the transfer at market prices) and the acquisition cost of their participation in that company

In its judgment, the ECJ basically followed the reasoning of the *National Grid Indus* case²⁷: freedom of establishment is applicable to transfers of activities of a company from Portuguese territory to another Member State, irrespective of whether the company in question transfers its registered office and its effective management outside Portuguese territory or whether it (partially or totally) transfers assets of a permanent establishment that is situated in Portuguese territory to another Member State (see paragraph 23 of the infringement procedure under analysis).

According to the ECJ, in the *Commission v. Portugal* case C-38/10, articles 76 A and 76 B of the CITC entailed obstacles to the freedom of establishment given that, in the case of partial or total transfer to another Member State of the assets of a permanent establishment in Portuguese territory of a company not resident in Portugal, such a company is penalized financially, compared to the treatment of a similar company which maintains its activities in Portuguese territory and which transfers assets within Portuguese territory.²⁸

26 ECJ 6 September, C-38/10, *Commission/Portugal* [2012] EU:C:2012:521.

27 ECJ 29 November 2011 C-371/10, *National Grid Indus BV* [2011] ECR I-12273.

28 See ECJ 6 September, C-38/10, *Commission/Portugal* [2012] EU:C:2012:521; paras 27–29. Opinion of AG Mengozzi delivered on 28 June 2012, C-38/10, *Commission/Portugal* [2012] EU:C:2012:521, points 55, 94 to 99 and 111.

In contrast to the Advocate General's Opinion, the ECJ decided that taxation on the cessation of activity related to a Portuguese permanent establishment (Article 76 B(a) of the CITC) did not entail a restriction on the freedom of establishment, because the treatment was not discriminatory.²⁹ As the Portuguese Republic pointed out, Article 43 of the CITC also provides for a Portuguese company to be taxed on unrealized capital gains relating to assets unrelated to the company's economic activity.

However, Article 38 § 1 a) of the PITC, unlike Article 43 of the CITC, is discriminatory: as mentioned above, the transfer to a company of assets and liabilities related to an economic or professional activity by a natural person is exempt if the legal person is a Portuguese resident, whereas the transfer is taxed if the legal person has its seat or place of effective management abroad.

VII. Justification and Its Proportionality

It must be assessed whether the measures can be justified by overriding reasons in the public interest, and if the measures are proportionate for attaining that objective and do not go beyond what is necessary to attain the objective pursued.³⁰

It must also be determined whether the restrictive measures are necessary to assure the effective recovery of tax debts, the balanced allocation of taxing rights and the need to preserve the coherence of the tax system.³¹

Following *National Grid Indus* again, the ECJ considered in the *Commission v. Portuguese Republic* case (C-38/10), that Article 49 TFEU precluded immediate recovery of tax on unrealized capital gains relating to assets of a company transferring its place of effective management to another Member State at the point in time when the transfer occurred.³² However, if national legislation granted a choice to the company transferring its place of effective management to another Member State, between immediate payment of the amount of tax and deferred payment of the amount of tax, even if the latter implied the payment of interest, the measure would be proportionate:³³ “[the] deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, would constitute a measure less harmful to freedom of establishment than the measures at issue in the main proceedings”.³⁴

29 See C-38/10, *Commission/Portugal* [2012] EU:C:2012:521, paras 87–100.

30 See paragraph 4 above and case-law cited.

31 ECJ 12 July 2012, C-269/09, *Commission/Spain* [2012] EU:C:2012:439, para 63.

32 ECJ 29 November 2011 C-371/10, *National Grid Indus BV* [2011] ECR I-12273, paras 73 and 86.

33 C-38/10, *Commission/Portugal* [2012] EU:C:2012:521, paras 31 and 32.

34 C-38/10, *Commission/Portugal* [2012] EU:C:2012:521, para 32. See also ECJ 29 November 2011 C-371/10, *National Grid Indus BV* [2011] ECR I-12273, para 73. See also, ECJ 23 January 2014, C-164/12, *DMC* [2014] EU:C:2014:20.

VIII. Final remarks

Assuming that the current pending case is *acte clair* and that the ECJ will decide it by reasoned opinion, the question may now be raised as to whether any amendments to the PITC, eliminating a restrictive exit tax on individuals, may foresee the payment of interest.

If so, the meaning of “interest in accordance with the applicable national legislation”, will have to be discussed, namely the comparable domestic situation to which interest is applicable.³⁵

³⁵ See the discussion in van den Hurk et al, *Final Settlement Taxes for Companies: Transfer of Seats, Interest Charges, Guarantees and Step-Ups in Value*, Bulletin For International Taxation, (2013) p. 257, esp. 261–262.

The Hirvonen, the Pensioenfonds Metaal en Technie and the X AB v Skatteverket Cases

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