



28.9.2012

NOTICE TO MEMBERS

Subject: Petition 0210/2012 by A. G. (British), on the alleged application of restrictive tax measures on non-resident citizens in Portugal when acquiring property outside their national territory.

1. Summary of petition

The petitioner complains that the Portuguese tax authorities do not respect Article 10(a) of the Portuguese Income Tax Act, which exempts capital gains resulting from the disposal of immovable property intended for the use by the taxpayer as their permanent abode from income tax if, within 36 months from the date of sale, the sum from the sale, less any settlement for a mortgage on the property, is reinvested in acquiring another immovable property to be used solely for the same purpose, and which is located in Portuguese territory or the territory of another Member State. In the opinion of the petitioner, the Portuguese authorities use restrictive and disproportionate measures when such a property is acquired outside of Portuguese territory. One of these restrictive measures is communications are not sent to parties when they are not resident in the country, requiring them to have a representative in Portugal to receive communications. The petitioner considers this situation to be an obstacle to the free movement of people in the European Union.

2. Admissibility

Declared admissible on 15 June 2012. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 28 September 2012

Tax treatment of capital gains resulting from the disposal of immovable property

Under the previous Portuguese tax legislation, tax relief in respect of personal income tax on

capital gains resulting from the disposal of immovable property was only available if the capital gains were reinvested in immovable property located in Portugal.

In 2003 the Commission took the position that the legislation at issue constituted a restriction on the free movement of persons and capital and opened an infringement procedure against Portugal. As a result, the Commission decided on 14 December 2004 to refer the above case to the European Court of Justice.

On 26 October 2006, the Court of Justice of the European Communities gave judgment in the case¹. The judgment reads as follows:

"Declares that, by maintaining in force fiscal provisions, such as Article 10(5) of the Personal Income Tax Code, making entitlement to exemption from tax on capital gains arising from the transfer for valuable consideration of real property intended for the taxable person's own and permanent residence or for that of a member of his family subject to the condition that the gains realised should be reinvested in the purchase of real property situated in Portuguese territory, the Portuguese Republic has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC, and under Articles 28 and 31 of the European Economic Area Agreement of 2 May 1992"

In February 2008, the Portuguese authorities informed the Commission that, by *Decreto-Lei* n.º 361/2007 of 2 November 2007², the relevant article of the Portuguese Personal Income Tax law (article 10 (5) of the CIRS) was amended. Thus, the above-mentioned tax relief is not only available if the capital gains are reinvested in Portugal but also if they are reinvested in another Member State of the EU or of the European Economic Area (in the latter case, only when there is an agreement on exchange of information in the tax area in place).

Obligation to appoint a fiscal representative

As regards communication between non-resident tax payers in Portugal and the tax authorities, the PT legislation, in force till the end of 2011, obliged them to appoint a fiscal representative in PT. The representative was the contact person between non-resident taxpayers and the PT tax authorities and for that reason the authorities might have refused to correspond with the citizen in France. According to the then article 130 of the CIRS (Código do Imposto sobre o rendimento das pessoas singulares, Tax Law on the income of natural persons), non-residents that obtained Portuguese source income subject to taxation in Portugal, had to appoint a fiscal representative to represent them before the Portuguese tax authorities and to guarantee the fulfillment of their fiscal duties.

The Commission decided in July 2007 to open an infringement procedure as it considered that this obligation was incompatible with the free movement of persons and the free movement of capital as guaranteed by Articles 21 and 63 of the Treaty on the functioning of the EU. The Commission understands that the aim of this requirement was to guarantee payment of taxes and prevent tax evasion. These are recognised requirements of public interest. However, the Commission was of the opinion that a general obligation imposed on non-residents to appoint

¹ Case C-345/05 Commission v. Portugal

² Published in the *Diário da República*, 1 serie – N.º211- 2 Novembro de 2007

a fiscal representative goes beyond what is necessary to ensure these objectives and thus impedes the free movement of persons and the free movement of capital. As there was not a satisfactory reaction to the reasoned opinion sent on 27 June 2008, the European Commission decided on 19 February 2009, to refer the matter to the European Court of Justice.

On 5 May 2011, the European Court of Justice to a large extent followed the Commission's view and declared that "by adopting and maintaining in force Article 130 of the Personal Income Tax Code (Código do Imposto sobre o Rendimento das Pessoas Singulares), which requires non-residents to appoint a tax representative in Portugal if they are in receipt of income requiring the submission of a tax return, the Portuguese Republic has failed to fulfil its obligations under Article 56 EC".

Before the end of 2011 Portugal amended article 130 of the CIRS in order to comply with the ruling of the European Court of Justice.

Nevertheless, it should be noted that the decision of the EU's Court of Justice has no automatic or immediate impact on the rights of individual complainants, since the Court procedure does not serve to resolve individual cases. The decision of the Court merely obliges the Member State to amend its tax rules in line with EU law. National courts and administrative bodies are primarily responsible for ensuring that the authorities of the Member States comply with EU law in individual cases. Therefore, citizens are advised to seek redress from national administrative or judicial authorities, following national procedures.

The cross-border service of documents within the European Union

The cross-border service of documents within the European Union is facilitated by Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. This Regulation seeks to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States. The Regulation applies between all Member States of the European Union including Denmark which confirmed its intention to implement the content of the Regulation by means of a declaration. The Regulation provides for different ways of transmitting and serving documents: transmission through transmitting and receiving agencies, transmission by consular or diplomatic channels, service by postal services and direct service.

However, Article 1 (Scope) stipulates that "This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. It shall not extend in particular to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of state authority (acta iure imperii)."

Due to the inapplicability of Regulation 1393/2007 and the lack of any other European legislation related to the service of notices within the domain of direct taxation, the best option for the petitioner, if he has not already done so, is to approach the Portuguese Ombudsman (Provedor de Justiça). The online form may be found on <http://www.provedor->

jus.pt/queixa.htm