

JUDGMENT OF THE COURT (Second Chamber)

26 October 2006

(Failure of a Member State to fulfil obligations – Tax legislation – Conditions for exemption of capital gains arising on the transfer for valuable consideration of real property – Articles 18 EC, 39 EC and 43 EC – Articles 28 and 31 of the Agreement establishing the European Economic Area – Cohesion of the tax system – Housing policy)

In Case C-345/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 September 2005,

**Commission of the European Communities**, represented by R. Lyal and M. Afonso, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Portuguese Republic**, represented by L. Fernandes and J. Menezes Leitão, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris, G. Arestis (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: P. Léger,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 March 2006,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

- 1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by maintaining in force fiscal provisions 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, 43 EC and 56(1) EC, and under Articles 28, 31 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement').

## **Legal context**

### *The EEA Agreement*

2 Article 6 of the EEA Agreement provides:

'Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.'

3 Article 28 of the EEA Agreement provides:

'1. Freedom of movement for workers shall be secured among EC [European Community] Member States and EFTA [European Free Trade Association] States.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

- (a) to accept offers of employment actually made;
- (b) to move freely within the territory of EC Member States and EFTA States for this purpose;
- (c) to stay in the territory of an EC Member State or an EFTA State for the purposes of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
- (d) to remain in the territory of an EC Member State or an EFTA State after having been employed there.

...'

4 Article 31(1) of the EEA Agreement is worded as follows:

'Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State

in the territory of any other of these States. This shall also apply to the setting-up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected ...’.

*National legislation*

5 Article 10 of the Código do Imposto sobre o Rendimento das Pessoas Singulares (Personal Income Tax Code), approved by Decree-Law No 442/88 of 30 November 1988, in the version resulting from Decree-Law No 198/2001 of 3 July 2001 (*Diário da República* I, Series A, No 152 of 3 July 2001) (‘the CIRS’), provides:

‘1. Capital gains are any gains realised, other than those regarded as business or professional income, capital income or income from immovable property, arising from:

(a) the transfer for valuable consideration of rights in rem in immovable property or from the use of any private assets for the purposes of the business or professional activities pursued on an individual basis by the owner of such assets;

...

3. Gains shall be deemed to have arisen at the time when any of the acts referred to in paragraph 1 is effected, without prejudice to the provisions set out in the following subparagraphs:

(a) in the case of an agreement to sell or exchange, the gain shall be deemed to arise at the time when the transfer takes place or possession is taken of the goods which are the subject of the contract;

(b) in cases where private assets are used for the purposes of the business or professional activities pursued on an individual basis by the owner of such assets, the gain shall be deemed to arise only upon the subsequent transfer for valuable consideration of the assets in question or upon the occurrence of another event giving rise to the settling of the accounts under similar conditions.

4. A gain that is subject to IRS [personal income tax] shall be made up of:

(a) the difference between the realisation value and the acquisition value, less any part that may be treated as capital income, in the cases referred to at (a), (b) and (c) in paragraph 1;

...

5. Gains arising from the transfer for valuable consideration of immovable property intended for the taxable person’s own and permanent residence or for that of a member of his family shall be exempt from tax subject to the following conditions:

- (a) that, within a period of 24 months from the date of completion of the transfer, the proceeds of that transfer are reinvested in the purchase of another property or of a plot of land for the construction of a property, or in the construction, extension or conversion of another property intended exclusively for the same purpose, provided that it is situated in Portuguese territory;
  - (b) that the proceeds of the transfer are used for the purposes of the purchase referred to in subparagraph (a), provided that the transfer was effected within the previous 12 months;
  - (c) in order for the provisions in subparagraph (a) to apply, the taxable person must demonstrate his intention to reinvest the proceeds, even if only in part, by declaring in his tax return for the year in which the transfer took place the sum he intends to reinvest;
  - (d) in cases where a different sum is invested from that declared in accordance with subparagraph (c), the taxable person shall submit a further tax return stating the sum actually reinvested as soon as is reasonably possible following the expiry of the 24 month period referred to in subparagraph (a).
6. The exemption referred to in paragraph 5 shall not be granted where:
- (a) in the case of reinvestment in the purchase of another property, the purchaser is not using that property for the purposes of his residence or for that of a member of his family after the time-limit for reinvesting the proceeds has expired;
- ...’

### **The pre-litigation procedure**

- 6 As it was of the view that the Portuguese system of taxation for capital gains arising on the transfer for valuable consideration of real property, and in particular Article 10(5) of the CIRS, infringes the Portuguese Republic’s obligations under Articles 18 EC, 39 EC, 43 EC and 56(1) EC, and under Articles 28, 31 and 40 of the EEA Agreement, the Commission, by letter dated 20 February 2003, gave that Member State formal notice to submit its observations.
- 7 The Portuguese authorities disputed the Commission’s claims, arguing that the contested provisions of the CIRS did not constitute a restriction on fundamental freedoms, that those provisions were not discriminatory and that, in any event, they were justified by overriding reasons of public policy and, more specifically, by the need to protect the right to accommodation or to maintain the coherence of the national tax system.
- 8 Since it was not convinced by the Portuguese authorities’ arguments, on 9 July 2004, the Commission issued a reasoned opinion in which, firstly, it reiterated its argument that the Portuguese tax legislation relating to the conditions for exemption of capital gains arising on the transfer for valuable consideration of real property is contrary to the freedom for movement of persons and the free movement of capital and, secondly,

called upon the Portuguese Republic to adopt the measures necessary to comply with that opinion within a period of two months from its notification.

- 9 Since, in their reply to that reasoned opinion, the Portuguese authorities maintained their position that the national legislation, which is justified by social policy objectives, is not inconsistent with Community law, the Commission decided to bring the present action.

### **The action**

- 10 It must be borne in mind at the outset that, according to the settled case-law of the Court, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (see Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).
- 11 It is necessary to examine whether, as submitted by the Commission, the provisions in Portuguese legislation relating to the taxation of capital gains arising on the transfer for valuable consideration of real property, and in particular Article 10(5) of the CIRS, constitute restrictions on the freedom of movement for persons and the free movement of capital laid down in Articles 18 EC, 39 EC, 43 EC and 56(1) EC, and in Articles 28, 31 and 40 of the EEA Agreement.

#### *The freedom of movement for persons*

- 12 In connection with this complaint, the Commission submits, firstly, that the Portuguese Republic has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC.
- 13 Article 18 EC, which sets out in general terms the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 43 EC with regard to freedom of establishment (Case C-470/04 *N* [2006] ECR I-0000, paragraph 22) and in Article 39 EC with regard to freedom of movement for workers.
- 14 It is therefore necessary to consider, firstly, whether Articles 39 EC and 43 EC preclude national legislation such as Article 10(5) of the CIRS which makes entitlement to exemption from capital gains tax arising on 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.
- 15 The provisions of the EC Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see Case C-464/02 *Commission v Denmark* [2005] ECR I-7929, paragraph 34 and the case-law cited).
- 16 Provisions 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 therefore

constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 25, and *Commission v Denmark*, paragraph 35).

- 17 It is clear from the case-law of the Court that, even if, according to their wording, the rules on freedom of movement for workers are directed, in particular, at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also preclude the State of origin from obstructing the freedom of one of its nationals to accept and pursue employment in another Member State (Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 79).
- 18 The same applies to the provisions relating to freedom of establishment. According to the same case-law, even though, according to their wording, those provisions are directed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 42, and Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 30).
- 19 In the present case, the Portuguese Republic maintains that Article 10(5) of the CIRS does not constitute a disadvantage for taxpayers wishing to transfer their residence outside Portuguese territory. In its view, that provision encapsulates a form of ad hoc tax relief by derogating from the general rule on the taxation of capital gains. Accordingly, the Commission's claim that such a provision violates Articles 39 EC and 43 EC is unfounded.
- 20 That argument must be rejected. Even if Article 10(5) of the CIRS does not prevent a person liable to income tax in Portugal from pursuing employment in another Member State or generally exercising his right of establishment, that provision is none the less likely to restrict the exercise of those rights by having, at the very least, a deterrent effect on taxable persons wishing to sell their real property in order to settle in a Member State other than the Portuguese Republic.
- 21 It is clear that a taxable person who decides to sell property that he owns in Portugal and uses as his own residence in order to transfer his residence to another Member State and to purchase a new property there for the purposes of his accommodation is, in the context of the exercise of the rights conferred by Articles 39 EC and 43 EC, subject to more unfavourable tax treatment than that enjoyed by a person who maintains his residence in Portugal.
- 22 That difference in treatment in relation to the taxation of capital gains may affect the estate of a taxable person who wishes to transfer his residence outside Portugal and, as a consequence, is likely to deter him from proceeding with such a transfer.
- 23 It follows that, by making entitlement to exemption from capital gains tax arising on 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 provisions of the CIRS, and in particular Article

10(5) of that code, are likely to impede freedom of movement for workers and freedom of establishment, as guaranteed by Articles 39 EC and 43 EC.

- 24 According to well-established case-law, however, national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make them less attractive may nevertheless be allowed if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain it (*De Lasteyrie du Saillant*, paragraph 49, and *N*, paragraph 40).
- 25 The Portuguese Republic maintains that the fact that the property transferred and the property purchased by way of reinvestment of the proceeds of sale of the former property perform exactly the same function means that Article 10(5) of the CIRS is justified for reasons pertaining to the cohesion of the tax system. There is a direct correlation, for the same tax and the same taxpayer, between the tax advantage and the tax treatment thereof.
- 26 It should be noted, firstly, that the Portuguese Republic's contentions cannot alter the fact that a property purchased in a Member State other than that republic could just as easily be used as his own and permanent residence by a taxpayer who previously resided in Portugal. Secondly, contrary to what the Portuguese authorities essentially maintain, in a situation where that property is purchased with the proceeds of sale of the property used by the taxpayer as his residence in Portugal, that purchase replaces the property transferred and, as far as the latter's estate is concerned, fulfils the same function as the asset initially owned.
- 27 Furthermore, it is clear from an examination of Article 10(5) of the CIRS that, contrary to the argument put forward by the Portuguese Republic, the alleged link between the tax advantage granted to the taxpayer and tax treatment of that advantage is questionable. There can be no capital gains tax thereon in the future unless such gains are realised. Also, as long as the person concerned purchases a new property as his residence in Portugal, he can always rely on the exemption provided for in Article 10(5) of the CIRS.
- 28 In those circumstances, it is not possible for the Portuguese authorities to maintain that there is a direct link between the tax advantage provided for in that national measure and the offsetting of that advantage by a particular tax levy.
- 29 Admittedly, the Court has recognised that the need to maintain the cohesion of a tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. However, for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, to that effect, *Keller Holding*, paragraph 40 and the case-law cited), which is not the case here.
- 30 It follows from the above that the argument that the national legislation on the taxation of increases in value of real property is objectively justified by the need to maintain the cohesion of the tax system cannot be accepted.

- 31 The Portuguese Republic also maintains that Article 10(5) of the CIRS is intended to ensure that the taxpayer's own residence and that of his family are protected and maintained and, therefore, guarantees that individual a right to accommodation, which is a constitutional right.
- 32 Even if it were possible to invoke such an argument to justify restricting the freedom of movement for persons, the requirement to reinvest in Portuguese territory imposed by Article 10(5) of the CIRS goes beyond what is necessary to attain the intended objective in any event.
- 33 If the objective of that national provision is to guarantee the right to accommodation, that objective could be attained without there being any need to impose a requirement to reinvest in national territory.
- 34 The Portuguese Republic submits, none the less, that the effect of removing the requirement to reinvest capital gains in national territory would be indirectly to finance the housing policy of other Member States.
- 35 Even if it were justified, that argument cannot demonstrate that the contested provision is necessary to attain the objective pursued. On the contrary, the objective of guaranteeing a right to accommodation referred to at paragraph 31 above is just as easily attained if the taxpayer elects to transfer his residence to another Member State rather than retaining it in Portugal. Consequently, in the light of that objective, whether the housing policy in other Member States may be indirectly financed thereby, as alleged, is irrelevant.
- 36 As it has not been established that the national legislation in question, namely Article 10(5) of the CIRS, is justified by overriding reasons of public interest, it must be concluded that such legislation is inconsistent with Articles 39 EC and 43 EC.
- 37 Lastly, with regard to persons who are not economically active, the same conclusion applies, for the same reasons, to the complaint relating to Article 18 EC.
- 38 The Commission claims, secondly, that the Portuguese Republic has failed to fulfil its obligations under Articles 28 and 31 of the EEA Agreement, relating to freedom of movement for workers and freedom of establishment.
- 39 As stated in Article 6 of the EEA Agreement, in so far as they are identical in substance to the corresponding rules of the Treaty and to acts adopted in application of the Treaty, the provisions of the Agreement are, in their implementation and application, to be interpreted in conformity with the relevant rulings of the Court given prior to the date of signature of that Agreement.
- 40 Furthermore, both the Court of Justice and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly (*Keller Holding*, paragraph 48 and the case-law cited).

- 41 It is to be noted that the rules prohibiting restrictions on freedom of movement and freedom of establishment laid down in Articles 28 and 31 of the EEA Agreement are identical to those established by Articles 39 EC and 43 EC.
- 42 The Commission's action must accordingly be considered to be well founded as far as the complaint alleging infringement of the rules on freedom of movement for persons in the EEA Agreement is concerned.
- 43 It must therefore be held that, by maintaining in force fiscal provisions, such as Article 10(5) of the CIRS, 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 EEA Agreement.

*The free movement of capital*

- 44 In addition, the Commission seeks a declaration from the Court that the Portuguese Republic has failed to fulfil its obligations under Article 56(1) EC and Article 41 of the EEA Agreement.
- 45 Since the contested legislation runs counter to the provisions of the Treaty and the EEA Agreement on freedom of movement for persons, there is no need for a separate examination of that legislation in the light of Article 56(1) EC and Article 41 of the EEA Agreement (see, by analogy, Case C-483/99 *Commission v France* [2002] ECR I-4781, paragraph 56).

**Costs**

- 46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for the Portuguese Republic to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. 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;**
- 2. Orders the Portuguese Republic to pay the costs.**

[Signatures]