

TAX LAW

NON RESIDENTS TAX REPRESENTATION

THE EUROPEAN UNION COURT OF JUSTICE, WHICH HAS CONSIDERED THE DUTY IMPOSED BY THE PORTUGUESE STATE TO NON RESIDENT INDIVIDUALS TO APPOINT A TAX REPRESENTATIVE “AS A RESTRICTION TO THE CAPITAL MOVEMENTS”.

On May 5, 2011, was issued a decision, by the European Union Court of Justice, which has considered the duty imposed by the Portuguese State to non resident individuals to appoint a tax representative *“as a restriction to the capital movements”*.

In fact, the Portuguese State, foresees in nr. 1, article 130 of the IRS Code that *“non residents earning income subject to IRS, (...) must for tax purposes, appoint an individual or corporate entity with residence or registered offices located in Portugal to represent them before the Portuguese Tax Authorities and guarantee the compliance (...)”*.

In light of such duty imposed by the Portuguese State, on July 18, 2007, the European Commission has notified the same in order for the Portuguese State to harmonise the internal legislation with the community law, since it has considered the *“duty imposed to the non resident to appoint a tax representative resident in Portugal capable of being incompatible with the community law and with the EEA Agreement”* establishing the free movement of persons and capital principle.

The Portuguese State, against the interpretation of the Commission, decided to maintain the wording of article 130 of the IRS Code, arguing that the disposition in cause was not incompatible with *“the freedoms recognised by the EU Treaty and by the EEA Agreement”*, and that this disposition only envisages to guarantee the effective compliance of the formalities imposed to the taxpayers (resident and non resident) that are away from the Portuguese territory, as well as guarantee the efficiency of the tax controls and tax evasion fight.

Upon the opposition of the Portuguese State to amend the legislation, the Commission decided to file an action against Portugal for the State non compliance - Free movement of capital.

The European Court of Justice, after analysing the arguments raised by the Commission and the Portuguese State, concluded that *“the duty foreseen in article 130 of the IRS Code is a restriction to the capital movements”*; since it is *“unarguable that to impose to the taxpayers in cause a duty to appoint a tax representative, article 130 of the IRS Code im-*

NON RESIDENTS TAX REPRESENTATION (CONTINUATION)

poses them a duty to develop actions and, of, in practice, bear the remuneration cost of such representative. Such duties are a burden for such taxpayers, capable of dissuade them to invest capital in Portugal and, inter alia, to perform investments on real estate. Thus the referred duty must be considered as a restriction to the free movement of capital, forbidden, in principle, by articles 56 nr 1, EC and 40 of the EEA Agreement”.

The European Union Court of Justice has considered that the argument raised by the Portuguese State, concerning the need to guarantee the efficiency of the tax controls and the tax evasion fight within the scope of the IRS is not valid, since the same supersedes what is need to reach such goal.

The Commission also considers that it is not yet demonstrated that the mechanisms of mutual assistance by the Member States competent tax authorities, in the field of direct taxation, that are available to the Portuguese Republic in accordance with Directive 77/779, are insufficient to reach such goal.

The decision issued within the scope of the present case is binding and susceptible of being invoked by the European Union citizens in a dispute before the Portuguese State. Therefore, and since the jurisprudence from the European Union Court of Justice is binding, the Portuguese State must eliminate the disposition imposing to non resident individuals the duty to appoint a tax representative, from its tax legislation.

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