Case C-267/09

European Commission

v

Portuguese Republic

(Failure of a Member State to fulfil obligations – Free movement of capital – Articles 56 EC and 40 of the EEA Agreement – Restrictions – Direct taxation – Non-resident taxpayers – Obligation to appoint a tax representative)

Summary of the Judgment

1. *Free movement of capital – Restrictions – Tax legislation – Income tax – National legislation requiring non-resident taxpayers to appoint a tax representative*

(Art. 56 EC; Council Directive 77/799)

2. *International agreements – Agreement on the European Economic Area – Free movement of capital – Restrictions – Tax legislation – Income tax – National legislation requiring non-resident taxpayers to appoint a tax representative*

(EEA Agreement, Art. 40; Council Directives 77/799 and 2008/55)

1. Although ensuring the effectiveness of fiscal supervision and the prevention of tax avoidance may constitute an overriding requirement of general interest capable of justifying a restriction of the exercise of the fundamental freedoms guaranteed by the Treaty, such justification can be accepted only if the legislation is aimed at wholly artificial arrangements the objective of which is to circumvent the tax laws, which precludes any general presumption of tax evasion. A general presumption of tax avoidance or tax evasion cannot justify a fiscal measure which compromises the objectives of the Treaty. An obligation to appoint a tax representative imposed on all non-resident taxpayers who are required to submit a tax return imposes in respect of an entire category of taxpayers, solely by reason of the fact that they are not residents, a presumption of tax avoidance or tax evasion which cannot on its own justify the compromising of the objectives of the Treaty.

Such an obligation constitutes a restriction of the free movement of capital laid down in Article 56 EC which could not be regarded as justified, for it goes beyond what is necessary to achieve that objective and it has not been established that the mechanisms of mutual assistance in the field of direct and indirect taxation available to the Member States under Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation are not sufficient for the attainment of that objective.

Consequently, a Member State which maintains in force tax legislation which requires non-residents to appoint a tax representative in that Member State if they are in receipt of income requiring the submission of a tax return, has failed to fulfil its obligations under Article 56 EC.

(see paras 38, 42-43, 53, 61, operative part 1)

2. If restrictions on the free movement of capital between nationals of States party to the

Agreement on the European Economic Area must be assessed in the light of Article 40 of and Annex XII to that agreement, those stipulations have the same legal scope as those of the substantially identical provisions of Article 56 EC. However, the case-law concerning restrictions of the exercise of freedom of movement within the Union cannot be transposed in its entirety to movements of capital between Member States and non-member countries, for such movements take place in a different legal context.

Consequently, although the obligation to appoint a tax representative imposed on non-residents by the legislation of a Member State constitutes an unjustified restriction in the light of Article 56 EC, that does not mean that such a restriction cannot be justified in the light of Article 40 of the EEA Agreement.

Since, first, the framework of cooperation between the competent authorities of the Member States established by Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and by Directive 2008/55 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures does not exist between those authorities and the competent authorities of a non-Member State when the latter has not entered into any undertaking of mutual assistance and, second, the agreements linking the Member State in question with States belonging to the EEA which are not Member States of the Union do not include sufficient mechanisms for the exchange of information to verify and monitor the returns submitted by taxable persons residing in those States, the obligation to appoint a tax representative, in so far as it concerns taxpayers residing in States party to the EEA Agreement which are not Members of the Union, does not go beyond what is necessary to achieve the objective of ensuring the effectiveness of fiscal supervision and preventing tax avoidance.

(see paras 51-52, 54-57)

JUDGMENT OF THE COURT (Fourth Chamber)

5 May 2011 (*)

(Failure of a Member State to fulfil obligations – Free movement of capital – Articles 56 EC and 40 of the EEA Agreement – Restrictions – Direct taxation – Non-resident taxpayers – Obligation to appoint a tax representative)

In Case C?267/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 15 July 2009,

European Commission, represented by R. Lyal and G. Braga da Cruz, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes, acting as Agent,

defendant,

supported by:

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent,

intervener,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: M. Calot Escobar,

having regard to the written procedure,

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 by the Court that, by adopting and maintaining in force Article 130 of the Personal Income Tax Code (Código do Imposto sobre o Rendimento das Pessoas Singulares, 'CIRS') which requires non-resident taxpayers to appoint a tax representative in Portugal, the Portuguese Republic has failed to fulfil its obligations under Articles 18 EC and 56 EC and the corresponding articles 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 40 of the EEA Agreement provides:

'Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in [the European Union] Member States or [the European Free Trade Association (EFTA)] States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.'

3 Annex XII to the EEA Agreement, entitled 'Free movement of capital', makes reference to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5). Under Article 1(1) of that directive, capital movements are classified in accordance with the nomenclature in Annex I to that directive.

National legislation

4 Article 130 of the CIRS reads as follows:

‘Representatives

1. Non-residents in receipt of income subject to [income tax] and residents who leave the national territory for more than six months are required, for the purposes of taxation, to appoint a natural or legal person, resident or established in Portugal, authorised to represent them in dealings with the Directorate-General for Taxation and to ensure their compliance with their obligations as regards taxation.

2. The appointment referred to in paragraph 1, which is to be made in the context of the declaration of commencement of operations, of amendments or of tax registration, must expressly mention the acceptance of the representative.

3. In the event of failure to comply with the provisions of paragraph 1, and regardless of the sanctions applicable to the case, the notifications provided for by the present code will not be sent, without prejudice to the possibility of taxable persons’ taking cognisance of matters which concern them by approaching the competent authority.’

5 Decree-Law No 463/79 of 30 November 1979, in the version applicable to this case, provides in Articles 2 and 3:

‘Article 2

1. For the purposes of allocation of a tax identification number, all natural persons in receipt of income subject to tax, even if exempt from payment of that tax, are required to register with a tax office or a taxpayers’ assistance centre. For that purpose, they shall submit a form completed in accordance with Model No 1, together with Model No 3 in the case of appointment of a tax representative by a non-resident taxpayer …

…

Article 3

…

5. As regards non-resident taxable persons in receipt on Portuguese territory only of income subject to deduction of tax at source, the registration referred to in Article 2(1) shall be effected by tax consultants on presentation of a standard form which is to be adopted by decree of the Minister of Finance.’

6 That standard form was adopted by Decree No 21 305/2003 (*Diário da República* Series II, No 256, of 5 November 2003, p. 16 629), which specifies that the document is intended exclusively for registration for the purposes of allocation of a tax identification number to non-resident entities whose income on Portuguese territory is subject only to deduction of tax at source and does not concern entities which, although non-resident, have a legal obligation to obtain a tax registration number. The same decree provides, moreover, that registration by entities which are required to deduct tax at source is mandatory.

7 Circular No 14/93 of 31 May 1993 of the Directorate-General for Taxation provides in paragraph 4:

‘Appointment of a tax representative is not mandatory where a non-resident is in receipt on Portuguese territory only of income subject to deduction at source, provided that the receipt of such income does not give rise to ancillary obligations which he must comply with.’

Pre-litigation procedure

8 On 18 July 2007 the Commission sent a letter of formal notice to the Portuguese Republic in which it maintained that the obligation imposed on non-residents to appoint a tax representative resident in Portugal might be incompatible with Community law and the EEA Agreement. The Commission took the view that the provisions in question could prove to be discriminatory and constitute a breach of Articles 18 EC and 56 EC and the corresponding articles of the EEA Agreement.

9 By letter of 18 October 2007 the Portuguese Republic disputed those claims.

10 On 26 June 2008 the Commission sent a reasoned opinion to the Portuguese Republic, requesting that the necessary measures for compliance be taken within a period of two months from the date of receipt of the opinion.

11 By letter of 11 February 2009 the Portuguese Republic replied to that reasoned opinion, stating that, in its view, the provisions of Article 130 of the CIRS were not incompatible with the freedoms granted by the EC Treaty and the EEA Agreement and were justified by overriding requirements of general interest, which included the objective of ensuring the effectiveness of fiscal supervision and the prevention of tax avoidance.

12 As it was not satisfied with that reply, the Commission decided to institute these proceedings.

The action

Arguments of the parties

13 The Commission maintains that Article 130 of the CIRS lays down a general obligation to appoint a tax representative, both on non-residents in receipt of income subject to income tax and on residents who leave Portugal for more than six months. This general, unequivocal rule does not exempt from the obligation non-residents in receipt only of income subject to deduction of tax at source. The exception which, according to the Portuguese Republic, applies to that category of non-residents cannot be inferred from the regulations relied on by that Member State, namely Decree-Law No 463/79 and Decree No 21 305/2003. There is provision for such an exception only in a circular which, given its position in the hierarchy of norms, cannot take precedence over the clear provisions of Article 130 of the CIRS.

14 Moreover, for non-residents in receipt in Portugal of income requiring the submission of a tax return, the obligation to appoint a tax representative is, the Commission argues, contrary to the principle of freedom of movement for persons and capital in so far as it is discriminatory and disproportionate to the aim pursued of ensuring the effectiveness of fiscal supervision and the prevention of tax avoidance. Not only does this obstacle to taxpayers’ freedom of choice lead in practice in most cases to the imposition of a financial burden on non-residents, but the procedure adopted is excessive in the light of the aim pursued given that it could equally well be achieved by recourse to Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of

claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28), and to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1, 'Directive 77/799').

15 As regards the situation of taxable persons resident in non-Member States or States belonging to the European Economic Area (EEA) which are not Members of the Union, the Commission observes, first, that the agreements concluded between the Kingdom of Norway and the Republic of Iceland already permit the exchange of information in tax matters and, second, that the legislative provisions in question were applicable, in the light of Union law, only in cases where those taxable persons reside in a country which has not concluded a double taxation agreement with the Portuguese Republic providing for such exchange of information.

16 The Commission also asserts that Article 18 EC can be relied on effectively in the present case and that that article makes no distinction between citizens who are economically active and those who are not. The obligation laid down by Article 130 of the CIRS which does not concern only economically active persons therefore discriminates against all persons who exercise, even if only temporarily, their right to freedom of movement within the Community enshrined in Article 18 EC.

17 The Portuguese Republic challenges the admissibility of part of the Commission's argument. In its reply the Commission presented its ground of challenge regarding non-residents subject to deduction of tax at source in a vague and incoherent manner. Moreover, in maintaining in that reply that Article 130 of the CIRS discriminates not only against non-residents but against all persons who have exercised their freedom of movement, the Commission raised a new plea in the course of proceedings, contrary to the provisions of Article 42(2) of the Rules of Procedure of the Court. Furthermore, it did not formulate its grounds of challenge against the EEA Agreement coherently and intelligibly, in that it did not specify the articles of the Agreement to which it referred, whereas the agreement contained no provisions corresponding to Article 18 EC.

18 Essentially, as regards non-resident taxpayers in receipt on Portuguese territory only of income subject to deduction of tax at source, the Portuguese Republic maintains that the Commission may not rely on the wording of Article 130 of the CIRS alone in order to establish the alleged failure to fulfil obligations, as that provision, as it has been interpreted and applied in practice, does not lay down an obligation for such taxpayers to appoint a tax representative.

19 The consequence of the simplified registration procedure laid down by Decree-Law No 463/79 and by Decree No 21 305/2003 which is applicable to such taxpayers is that, where the undertakings which act as 'tax consultants' make the deduction at source themselves and are liable for it, and in the absence of any other ancillary obligation, those taxpayers have no obligation to appoint a tax representative.

20 Second, as regards non-residents in receipt in Portugal of income requiring the submission of a tax return, the Portuguese Republic points out that, given that the objective of Article 130 of the CIRS is to ensure the completion of the formalities required of taxpayers living away from Portugal, that measure is not discriminatory because it applies on the same terms to residents and to non-residents. Moreover, since the national rules do not provide that the position of tax representative should be remunerated, such remuneration is alien to the tax legislation at issue. The Commission may not therefore infer the existence of a financial burden and has thus provided no evidence of the alleged failure to fulfil obligations.

21 The Portuguese Republic also maintains that, in the circumstances envisaged in Article

58(1) EC, Article 130 of the CIRS is intended to ensure the effectiveness of fiscal supervision and the prevention of tax avoidance, which are overriding requirements of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty. The obligation of representation thus does not go beyond what is necessary in that regard and Directive 77/799, relied on by the Commission, is irrelevant as regards the taxpayer's fulfilment of that obligation. Moreover, having regard to the role of tax representative, required only to fulfil ancillary obligations of a procedural nature, such as the submission of tax returns and the receipt of notifications, the Commission cannot effectively rely on Directive 2008/55, which concerns the recovery of tax, which is not in any way involved in the work done by that representative.

22 The Portuguese Republic adds that the Commission cannot effectively rely on Article 18 EC either, as it covers only persons who are not economically active, who are not concerned by Article 130 of the CIRS. Finally, as regards the States party to the EEA Agreement, the case-law on the restrictions on the exercise of freedom of movement cannot be applied by analogy in its entirety, as the framework of cooperation established by Directive 77/799 does not, in any event, exist in this context.

23 In its statement in intervention, the Kingdom of Spain contends that the action should be dismissed on the same grounds as those relied on by the Portuguese Republic, while emphasising that the Commission did not adduce evidence of the alleged failure to fulfil obligations as regards non-residents whose income is subject to deduction of tax at source, which failure, being based on its own interpretation of the national law at issue, is purely theoretical.

24 As regards the other non-residents, the Commission, according to the Kingdom of Spain, cannot rely on Article 18 EC because it does not establish that the national measure at issue applies to persons who are not economically active. Moreover, that measure is neither discriminatory, because the situation of non-residents is not comparable to that of residents, nor disproportionate in view of the objective pursued, which cannot be achieved by the directives relied on by the Commission, which, moreover, are in the process of being amended because of their ineffectiveness. Furthermore, the Commission has adduced no evidence of the incompatibility with the Treaties of the implementation of the Portuguese law on capital movements to or from third countries. Finally, the directives on cooperation and assistance are not applicable in relations with States party to the EEA Agreement.

Findings of the Court

Admissibility

25 It follows from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that the application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a claim (see, inter alia, Case C?343/08 *Commission* v *Czech Republic* [2010] ECR I?0000, paragraph 26).

26 By the present action the Commission, according to the terms of its application, seeks a declaration that the Portuguese Republic has failed to fulfil its obligations under Articles 18 EC and 56 EC and the corresponding articles of the EEA Agreement.

27 In this case it must be observed, first, that it is clear from the pleas in law and the arguments

put forward in the Commission's application that the Commission criticises the Portuguese Republic for maintaining in force legislative provisions which are alleged to be contrary to the principle of freedom of movement enshrined in the articles of the EC Treaty and the EEA Agreement cited.

28 Second, as regards the argument concerning the EEA Agreement, it must be observed that it is true that the application was a little unclear in that respect in confining itself, having pleaded a breach of Articles 18 EC and 56 EC, to observing that there was a breach of the 'corresponding articles' of that agreement. However, it is common ground, first, that the Commission made clear in its reply that it intended to rely on breach of Article 40 of that agreement alone. Second, and in any event, it must be observed that, as is apparent from paragraph 59 of the defence of the Portuguese Republic, it is clear that the latter cannot reasonably be in any doubt that the Commission's ground of challenge regarding the EEA Agreement in fact referred to Article 40 of that agreement. Accordingly, the Portuguese Republic was in a position to avail itself of its right to defend itself.

29 Third, although the Portuguese Republic maintains that the arguments presented by the Commission in its reply render its reasoning incoherent and uncertain, that assessment relates to the question whether the argument is well founded and does not call into question the admissibility of the action, since the grounds of challenge put forward are clear.

30 Finally, in raising, in its reply, the discriminatory nature of the disputed measure also as regards residents who exercise their right to freedom of movement temporarily, the Commission confined itself to replying to the argument submitted in its defence by the Portuguese Republic alleging that the appointment of a tax representative was required of both residents and non-residents. That response cannot, therefore, be analysed as a new plea of the Commission.

31 It is apparent from the foregoing considerations that the present action must be declared admissible.

The alleged failure to fulfil obligations

32 It must be considered whether, as the Commission maintains, Article 130 of the CIRS constitutes a restriction on the free movement of capital provided for by Article 56 EC and Article 40 of the EEA Agreement, and on the freedom of movement for persons, provided for by Article 18 EC.

– Breach of Article 56(1) EC

33 It is common ground that Article 130 of the CIRS lays down an obligation to appoint a tax representative both for non-residents in receipt of income subject to income tax and for residents who leave Portugal for more than six months. As to the question whether a rule of that nature is such as to cover situations falling within the scope of Article 56 EC, it must be observed that the Portuguese Republic does not dispute that the obligation laid down by Article 130 of the CIRS applies in the case cited by the Commission of capital movements related to investments in immovable property.

34 According to settled case-law, capital movements include investments in immovable property on the territory of a Member State by non-residents, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC, that nomenclature retaining the same indicative value for the purposes of defining the notion of capital movements (see Case C-370/05 *Festersen* [2007] ECR I-1129, paragraph 23, and Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 59).

35 Accordingly, Article 130 of the CIRS falls within the scope of both Article 56(1) EC, which prohibits, generally, restrictions on capital movements between the Member States, and Article 40 of the EEA Agreement, which contains an identical prohibition as regards relations between the States party to that agreement, whether they are Members of the European Union or of EFTA (see, as regards the latter article, Case C-72/09 *Établissements Rimbaud* [2010] ECR I-0000, paragraph 21).

36 Consequently, it must be considered whether the obligation laid down in Article 130 of the CIRS constitutes a restriction on capital movements.

37 In that regard it cannot be disputed that, in obliging the taxpayers in question to appoint a tax representative, Article 130 of the CIRS requires them to take action and, in practice, to bear the cost of remunerating that representative. Such constraints create for those taxpayers a difficulty liable to discourage them from investing capital in Portugal and, in particular, from investing in property. It follows that that obligation must be regarded as a restriction on the free movement of capital which is generally prohibited by Article 56(1) EC and Article 40 of the EEA Agreement.

38 However, by arguing that the aim pursued by the obligation to appoint a tax representative is to ensure the effectiveness of fiscal supervision and the prevention of tax avoidance in the context of income tax for natural persons, the Portuguese Republic is relying on an overriding requirement of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty, and the Commission does not dispute that (see, inter alia, *ELISA*, paragraph 81; Case C-101/05 *A* [2007] ECR I?11531, paragraph 55, and Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-5093, paragraph 45).

39 According to the Commission, the requirement laid down by the national legislation at issue is, however, disproportionate in view of the objective pursued, since the mechanisms offered both by Directive 2008/55 and by Directive 77/799 are sufficient for the achievement of that objective.

40 As regards Directive 77/799, it must be recalled that, under the combined provisions of Article 1(1), (3), and (4) thereof, the competent authorities of the Member States are to exchange any information which may enable them to effect a correct assessment of income taxes in particular. Article 2 of Directive 77/799 provides that this exchange of information is to occur at the request of the competent authority of the Member State concerned. As is clear from Article 3 of that directive, the competent authorities of the Member States are also to exchange information without prior request, automatically, in respect of certain categories of cases referred to in the directive or even, in accordance with Article 4 thereof, spontaneously. Lastly, Article 11 of Directive 77/799 states that the provisions of the directive are not to impede the fulfilment of any wider obligations to exchange information which might flow from other legal acts (*ELISA*, paragraphs 39, 40 and 42).

41 The Portuguese Republic maintains, however, that it may submit a request for information under Article 2 of Directive 77/799 only if it has sufficient information at its disposal beforehand, which would entail the presence of a tax representative resident in Portugal of whom the tax

authorities could require directly and in person the completion of all the relevant obligations as to tax returns on behalf of the non-resident taxpayer.

42 In that regard it must be recalled that, in accordance with settled case-law, the prevention of tax evasion can be accepted as justification only if the legislation is aimed at wholly artificial arrangements the objective of which is to circumvent the tax laws, which precludes any general presumption of tax evasion. Consequently, a general presumption of tax avoidance or tax evasion cannot justify a fiscal measure which compromises the objectives of the Treaty (*ELISA*, paragraph 91 and the case-law cited).

43 In so far as it particularly concerns all non-resident taxpayers in receipt in Portugal of income requiring the submission of a tax return, the obligation to appoint a tax representative imposes in respect of an entire category of taxpayers, solely by reason of the fact that they are not residents, a presumption of tax avoidance or tax evasion which cannot on its own justify the compromising of the objectives of the Treaty by such an obligation.

44 Furthermore, where taxable items have been concealed from the tax authorities of a Member State and they have no evidence allowing them to initiate an investigation, it does not appear that the obligation to appoint a tax representative would, in itself, lead to the disclosure of such evidence and make good the alleged insufficiency of the mechanisms for the exchange of information under Directive 77/799.

45 Thus, it is not established that, in the event that a taxpayer who is not resident in Portugal fails to fulfil his obligations concerning tax returns and the tax due proves not to have been paid, the mechanisms of mutual assistance between the competent tax authorities of the Member States, relied on by the Commission and as provided for in the field of direct taxation by Directive 77/799, are not sufficient for the effective recovery of tax. There is therefore no need to ascertain whether the same is true of the mechanisms provided for as regards recovery of those taxes by Directive 2008/55, even if it were applicable *ratione temporis* in the present case.

46 It follows that the obligation to appoint a tax representative goes beyond what is necessary to achieve the objective of preventing tax evasion and that, consequently, the Commission's assertion that such an obligation constitutes an unjustified restriction on the free movement of capital provided for by Article 56 EC is well founded.

47 Moreover, the obligation to appoint a tax representative is not an appropriate or necessary measure to deal with the 'practical problem' identified by the Portuguese Republic, which lies in the fact that it is impossible to have direct contact with non-resident taxpayers because of the physical distance between them and the administrative bodies concerned, which slows down the operation of those bodies. With modern communication methods, it is possible to oblige non-resident taxpayers to give an address in another Member State for all notifications from the Portuguese tax authorities. As the Commission points out, in cases where the physical presence of the taxpayer is essential, it is sufficient to give him the option of being represented by a tax representative, rather than imposing a general obligation.

48 On the other hand, it must be found that, as the Portuguese Republic maintains, the obligation to appoint a tax representative laid down by Article 130 of the CIRS in order, as that article states, to represent non-residents in dealings with the Directorate-General for Taxation and to ensure their compliance with their obligations as regards taxation is not imposed on taxpayers in receipt only of income subject to deduction of tax at source, who do not have to submit a tax return.

49 It is common ground that, under the combined provisions of Article 3(5) of Decree-Law No

463/79 and Decree No 21 305/2003, tax consultants, which are the entities which deduct the tax, pay the tax due on income subject to such deduction in the name and for the account of those taxpayers. They are required, in that capacity, to register with the tax authorities themselves and thus already represent those taxpayers in dealings with those authorities and accordingly complete the formalities as regards tax returns in relation to that income. The Commission may not, therefore, effectively maintain that such an arrangement is only apparent from circular No 14/93, which, given its legal status, does not allow the taxpayers concerned to ascertain clearly their position as regards the obligation laid down by Article 130 of the CIRS. Accordingly, the failure to fulfil obligations found in paragraph 46 of this judgment in the light of the provisions of Article 56 EC cannot be considered to be established as regards those non-residents in receipt only of income subject to deduction of tax at source.

– Breach of Article 40 of the EEA Agreement

50 One of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the abovementioned Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA (see Opinion 1/92 of 10 April 1992, [1992] ECR I?2821). It is for the Court in that context to ensure that the rules of the EEA Agreement which are identical in substance with those of the Treaty are interpreted in a uniform manner within the Member States (Case C?452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I?9743, paragraph 29, and Case C-540/07 *Commission* v *Italy* [2009] ECR I?10983, paragraph 65).

51 It follows that, if restrictions on the free movement of capital between nationals of States party to the EEA Agreement must be assessed in the light of Article 40 of and Annex XII to that Agreement, those stipulations have the same legal scope as those of the substantially identical provisions of Article 56 EC (Case C?521/07 *Commission* v *Netherlands* [2009] ECR I-4873, paragraph 33, and *Commission* v *Italy*, paragraph 66).

52 Consequently, and for the reasons set out when examining the Commission's action in the light of Article 56(1) EC, the obligation to appoint a tax representative which the Portuguese legislation imposes on non-residents constitutes a restriction on the free movement of capital within the meaning of Article 40 of the EEA Agreement.

53 It must, however, be held that, as is apparent from paragraphs 43 to 46 of the present judgment, that restriction could not be regarded as justified in the light of Article 56 EC by the overriding requirement of general interest of ensuring the effectiveness of fiscal supervision and the prevention of tax avoidance, since it goes beyond what is necessary to achieve that objective and given that it has not been established that the mechanisms of mutual assistance between the competent tax authorities of the Member States in the field of direct taxation available to the Portuguese Republic under Directive 77/799 are not sufficient for the achievement of that objective.

54 None the less, as the Court has already held, the case-law concerning restrictions on the exercise of freedom of movement within the Union cannot be transposed in its entirety to movements of capital between Member States and non-member countries, since such movements take place in a different legal context (see *A*, paragraph 60, and *Commission* v *Italy*, paragraph 69).

55 In this case, it should first be noted that the framework of cooperation between the competent authorities of the Member States established by Directive 77/799 does not exist

between the latter and the competent authorities of a non-Member State when the latter has not entered into any undertaking of mutual assistance.

56 In that regard, in confining itself, in its reply to the observations submitted by the Spanish Government in its statement in intervention in support of the forms of order sought by the Portuguese Republic, to mentioning in a very general way the agreements linking it to the States belonging to the EEA which were not Members of the Union, the Commission failed to establish that those agreements actually included sufficient mechanisms for the exchange of information to verify and monitor the returns submitted by taxable persons residing in those States.

57 Accordingly, it must be considered that, in so far as it concerns taxpayers residing in States party to the EEA Agreement which are not Members of the Union, the obligation to appoint a tax representative does not go beyond what is necessary to achieve the objective of ensuring the effectiveness of fiscal supervision and preventing tax avoidance.

58 The action must therefore be dismissed in so far as it claims infringement by the Portuguese Republic of its obligations under Article 40 of the EEA Agreement.

– Breach of Article 18 EC

59 In addition, the Commission seeks a declaration from the Court that the Portuguese Republic has failed to fulfil its obligations under Article 18 EC.

60 Since the provisions of the Treaty and the EEA Agreement on the free movement of capital preclude the contested legislation, there is no need for a separate examination of that legislation in the light of Article 18 EC concerning freedom of movement for persons (see, by analogy, Case C-345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 45).

61 It follows from all the foregoing considerations that it must be declared that by adopting and maintaining in force Article 130 of the CIRS 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.

Costs

62 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. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

63 In this dispute, account must be taken of the fact that the Commission’s grounds of challenge regarding taxpayers in receipt only of income subject to deduction of tax at source and to the requirements of the EEA Agreement have not been upheld.

64 Therefore, the Portuguese Republic must be ordered to pay three-quarters of the costs, and the Commission to pay the remaining quarter.

65 Under the first subparagraph of Article 69(4) of those rules Member States which intervene in the proceedings are to bear their own costs. The Kingdom of Spain must accordingly bear its own costs.

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

1. **Declares 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;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Portuguese Republic to pay three-quarters of the costs. Orders the Commission to pay the remaining quarter;**

4. **Orders the Kingdom of Spain to pay its own costs.**

[Signatures]

* Language of the case: Portuguese.