Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

12 July 2012*

(Failure of a Member State to fulfil obligations — Articles 18 EC, 39 EC and 43 EC — Articles 28 and 31 of the EEA Agreement — Tax legislation — Transfer abroad of a taxpayer's residence — Obligation to include any income not yet charged to tax in the tax base for the preceding tax year — Loss of the advantage to be gained by deferring the tax debt)

In Case C-269/09,

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

European Commission, represented by R. Lyal and F. Jimeno Fernández, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent, with an address for service in Luxembourg,

defendant,

supported by:

Federal Republic of Germany, represented by M. Lumma and C. Blaschke, and by K. Petersen, acting as Agents, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by C. Wissels and M. de Ree, acting as Agents,

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

interveners

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, M. Ilešič, E. Levits and M. Berger (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: M. Ferreira, Principal Administrator,

* Language of the case: Spanish.

having regard to the written procedure and further to the hearing on 29 June 2011,

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 claims that the Court should declare that the Kingdom of Spain has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement'), by adopting and maintaining in Article 14 of Law 35/2006 on personal income tax and amending in part the laws on the taxation of corporations, of the income of non-residents and of wealth (Ley 35/2006 del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no residentes y sobre el Patrimonio) of 28 November 2006 (BOE No 285 of 29 November 2006, p. 41734, and BOE No 57 of 7 March 2007, p. 9634 (corrigendum)), a provision under which taxpayers who transfer their residence abroad must include, in the tax base for the last tax year in which they were treated as resident taxpayers, any income not yet charged to tax.

Spanish legal context

2 Article 14(1) of Law 35/2006, which governs the temporal aspects of the manner in which taxable income is to be taken into account, sets out the following general rule:

'The income and the costs determining the income to be included in the tax base shall be charged to the corresponding tax period, in accordance with the following criteria:

(a) Labour income and income from capital are chargeable to the tax period during which they are payable to their recipients;

(b) Business income is chargeable in accordance with the legislation relating to the taxation of corporations, without prejudice to specific provision established by law;

(c) Capital gains and capital losses are chargeable to the tax period during which the change in capital took place.'

3 Article 14(2) of that law lays down a series of special rules on the temporal periods to which various types of income are chargeable.

4 Article 14(3) of that law provides:

'Where the person concerned loses his status as taxpayer as a result of a change in residence, all his income which has not yet been charged to a tax period must be included in the tax base corresponding to the last tax period for which an income tax return must be filed, in accordance with the conditions laid down by law and, where appropriate, in return for a complementary self-assessment without any penalty, or interest charged for late payment or tax surcharge.'

Pre-litigation procedure

5 On the view that the national legislation relating to the tax treatment of an individual transferring his residence to a place outside Spain infringed Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the EEA Agreement, the Commission sent a letter of formal notice to the Kingdom of Spain on 29 February 2008 in which it stated, inter alia, that that discriminatory treatment penalises persons who wish to leave that Member State as compared with those who remain there, in so far as the former are required to pay the tax at the time of the transfer and do not have the option of deferring payment.

6 In its reply of 7 May 2008, the Kingdom of Spain outlined the reasons why it considered that the rules in question did not constitute an infringement of the EC Treaty or of the EEA Agreement.

7 Not being persuaded by the arguments submitted by the Kingdom of Spain, the Commission sent a reasoned opinion to that Member State on 17 October 2008, allowing it a period of two months within which to adopt the measures necessary to comply with that opinion.

8 In a letter of 18 December 2008, the Kingdom of Spain in essence repeated the arguments already submitted in its previous communication.

9 Not being satisfied with that reply, the Commission brought the present action.

10 By order of 25 November 2009, the President of the Court granted the Federal Republic of Germany, the Kingdom of the Netherlands and the Portuguese Republic leave to intervene in the present case, in support of the form of order sought by the Kingdom of Spain.

The action

Arguments of the parties

11 The Commission submits that the Spanish legislation at issue places at a financial disadvantage natural persons who transfer their residence abroad by imputing to the tax base for the last tax year in which those persons were resident the income still to be charged to tax. Those persons are accordingly required to pay the tax at the time when they transfer their residence while taxpayers who retain their residence in Spanish territory are not under such an obligation. Consequently, that legislation allows discriminatory treatment, whereas the same rule should be applied irrespective of whether the individual retains his residence in Spanish territory.

12 The Commission bases its arguments, in substance, on the principles set out in Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, admitting nevertheless that, on the facts, that case differs from the present case.

13 At the outset, the Commission states — in reply to the argument that the restrictions to which the Spanish legislation at issue is likely to give rise are, in any event, very slight — that it is settled case-law that any national measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or to render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty, constitutes a restriction.

14 Finding that that legislation therefore constitutes an obstacle to freedom of movement for workers and to the freedom of establishment, the Commission concedes that it could, in principle, be justified by reasons relating to the public interest, reflecting the need to ensure the effective recovery of tax and to preserve the allocation of the power to impose taxes. However, according to the Commission, that legislation is not proportionate.

15 In that connection, the Commission argues, first, that the effectiveness of the national tax system cannot be threatened in so far as there are other appropriate instruments by which it may be ensured, such as Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17) ('Directive 76/308'), 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 and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30) ('Directive 77/799'), and 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).

16 As regards the inadequacy, alleged by the Kingdom of Spain, of those EU legislative instruments for the purposes of ensuring that the tax systems function effectively, the Commission submits that it is for the Member States to adopt the necessary measures to ensure the effective implementation of those directives and to correct certain deficiencies which may be found in the practical application of the mutual assistance system. On the other hand, Member States cannot adopt measures which, like the national legislation at issue, lead to discrimination.

17 In response to the argument that the Commission itself has acknowledged that the EU legislative instruments are ineffective, the Commission submits that, to substantiate that argument, the Kingdom of Spain merely quoted isolated passages from the explanatory memorandum attached to the proposal of 2 February 2009 for a Council Directive concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, (COM(2009) 28 final). Explaining the reasons for that proposal, the Commission maintains that the aim was to introduce a series of improvements and not to seek adoption of a new system of assistance, which — the Commission submits — is also the position as regards the legislation on the exchange of information. In addition, the Commission disputes the inferences drawn by the Kingdom of Spain from that proposal, inter alia as regards the amount of debt actually recovered in relation to the total amount for which claims were made.

18 Secondly, the Commission maintains, without disputing the right of the Member States to apply their tax legislation to income received in their territory even where the taxpayer has transferred his activities to another Member State, that preserving the balanced allocation of the powers of taxation does not warrant variation of the rules applicable to taxpayers solely because they have transferred their residence abroad.

19 In that connection, the Commission expresses doubts as regards the relevance in the present case of Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, given that, in the case which gave rise to that judgment, there was no transfer of the taxpayer's residence to another Member State, and of Case C-403/03 *Schempp* [2005] ECR I-6421, inter alia on the basis that, in that case, the transfer of residence did not give rise to a different tax treatment of the taxpayer and there was no interference with the freedom of movement or of establishment.

20 In the same way, the Commission challenges the reference made to Case C-470/04 *N* ([2006] ECR I-7409), given that, in that case, the Court accepted that the tax debt could be determined at the time when residence was transferred, which it regards as legitimate, unlike the legislation at issue in the present case, under which that debt must also be paid.

21 In that context, the Commission also contests all the arguments put forward in support of applying the case-law laid down in Case C-282/07 *Truck Center* [2008] ECR I-10767, drawing attention, inter alia, to the different nature of the taxation at issue in the case which gave rise to that judgment.

22 Thirdly, as regards the supposed loss of links between the taxpayer and the Spanish tax authorities upon the transfer abroad of the taxpayer's residence, the Commission does not accept that the taxpayer loses all links with those authorities and that, accordingly, because of that transfer, the payment of any tax debt can no longer be demanded through enforcement action or other coercive measures.

23 Moreover, in response to the argument that the taxpayer transferring his residence abroad has the option of deferring payment of the tax by providing certain guarantees, which are not in any event more restrictive than those required of the taxpayer who remains in Spain, the Commission points out that the latter is automatically entitled to defer payment of the tax without having to conform to the requirements imposed on the taxpayer transferring his residence to another Member State.

24 So far as concerns the application of the legislation at issue to States which are party to the EEA agreement without being members of the European Union, the Commission states that, although the directives referred to in paragraph 15 above are not applicable to those States, its reasoning is also valid where a convention for the avoidance of double taxation has been concluded, containing a clause on the exchange of information. Furthermore, the Commission states that where, in view of the lack of any mechanism equivalent to those provided for under those directives, there is no direct means of recovering a tax debt, the taxpayer concerned may nevertheless have assets in Spain to which it is possible to apply coercive or enforcement measures.

25 First, the Kingdom of Spain, supported in this connection by the Portuguese Republic, contends that the legislation at issue is not a restriction of the fundamental freedoms invoked by the Commission and objects to the application of *de Lasteyrie du Saillant* to the present case, arguing that that legislation does not concern the taxation of unrealised capital gains but of income which has already been realised.

26 In this respect, the Kingdom of Spain and the Portuguese Republic also contend, on one hand, that, under the legislation at issue, the taxpayer transferring his residence for tax purposes is not made liable for tax on income which has not yet been realised and which he does not therefore have available.

27 On the other hand, they argue that, given that that legislation provides only for income already acquired in Spain to be taken into account early, and not for the payment of a tax on future income, it cannot in any case lead to double taxation. Consequently, such legislation cannot have a negative influence on a person's decision to exercise his freedom of movement, or of residence or of establishment.

28 Secondly, the Kingdom of Spain — supported by all the Member States intervening in the proceedings — contends that, even if the legislation at issue constitutes a restriction on the freedoms relied upon by the Commission, it is justified by objectives in the public interest which seek to ensure the balanced allocation between the Member States of the powers of taxation, the effective recovery of tax and the coherence of the Spanish tax system.

29 As regards the preservation of a balanced allocation of the powers of taxation, the Kingdom of Spain argues that *N* is relevant for the purposes of the analysis of the legislation at issue, since it has the same objective as that pursued by the Netherlands legislation under consideration in the case which gave rise to that judgment.

30 So far as concerns ensuring the recovery of tax, the Kingdom of Spain argues that the aim of the legislation at issue is to avoid deferring taking into account income already obtained by the taxpayers who, no longer residing in Spain, thus lose all links with the Spanish tax authorities.

31 In that connection, the Kingdom of Spain first refers to the settled case-law according to which, in relation to direct taxes, the situation of residents and the situation of non-residents are not, as a rule, comparable. Secondly, it emphasises the fact that resident taxpayers are directly subject to the supervision of the tax authorities of the Member State concerned, which can thus ensure that the taxes are compulsorily recovered. On the other hand, in the case of non-residents, recovery of taxes would require, on any view, the assistance of the tax authorities of the other Member State.

32 In those circumstances, it is obvious that the loss of the status of Spanish resident by a taxpayer entails, for the Spanish authorities, legal and factual limitations rendering difficult or preventing the recovery of tax debts and the exercise of their powers of recovery.

33 In that context, the Kingdom of Spain contends that the domestic mechanisms and the EU cooperation mechanisms are not on the same footing. Accordingly, it cannot be denied that a provision which aims specifically to eliminate the main difficulties of recovery where the debtor is a non-resident tax-payer can be justified, even where it is possible to use a cooperation mechanism. Furthermore, the Kingdom of Spain, supported inter alia by the Federal Republic of Germany, contends that that position was conceded by the Court in *Truck Center*.

34 As regards the arguments which relate to the objective of ensuring the coherence of the tax system, the Kingdom of Spain — supported on this point, inter alia, by the Portuguese Republic — contends that the loss, for the taxpayer transferring his residence abroad, of links with the national tax authorities justifies the application of separate legislation to that taxpayer and the removal of the advantage represented by the deferred payment of tax.

35 Thirdly, the Kingdom of Spain — supported by the Federal Republic of Germany and the Portuguese Republic — contends that the legislation at issue is proportionate to the objectives pursued, since Directives 76/308, 77/799 and 2008/55 have proved manifestly inadequate to ensure the effectiveness of the tax system, as has been conceded on a number of occasions, inter alia in the *travaux préparatoires* for legislative measures, not only by the Commission but also by the European Economic and Social Committee and by the Council of the European Union. Those institutions have thus admitted that the existing instruments for mutual assistance are too weak and require comprehensive reform.

36 The Spanish Government — relying on the communication from the Commission to the Council, Parliament and European Economic and Social Committee, entitled 'Exit taxation and the need for co-ordination of Member States' tax policies', of 19 December 2006 (COM(2006) 825 final), and on the Council Resolution of 2 December 2008 on coordinating exit taxation (OJ 2008 C 323, p. 1) — contends that, since the probability of recovering, by means of the mutual assistance system, the tax debts of a taxpayer who has transferred his residence outside Spain is slight, if not inexistent, such a recovery entails administrative costs which are manifestly disproportionate.

37 The Kingdom of Spain denies that there are less restrictive means than those implemented by the national legislation at issue. The position adopted by the Commission admittedly concedes to the Member State of exit a right to impose tax, but denies it effective mechanisms by which to recover the tax.

38 The Federal Republic of Germany first points out that the legislation at issue does not relate, either directly or indirectly, to the taxpayer's nationality. Since that legislation does not draw a distinction between resident and non-resident taxpayers, the only distinction made in it relates to the transfer of residence to another Member State. Although it is possible that such legislation may have an effect on

the exercise of the rights attaching to the fundamental freedoms relied upon in the present case, any restrictions to which that legislation leads are limited, given that it concerns only the taxation of income which has already been realised and that the resulting tax debt corresponds to a sum which the debtor has already received.

39 Secondly, being of the opinion that the limited restrictions on the fundamental freedoms are, in any event, justified, the Federal Republic of Germany argues, in respect of the argument concerning the need to ensure the effective recovery of the tax, that *FKP Scorpio Konzertproduktionen* is applicable in the present case.

40 Although the Court found in *N* that it was appropriate to use the mutual administrative assistance provided for under Directives 76/308 and 77/799, the Federal Republic of Germany contends that the mutual assistance system can be held to prevail only where it provides for a comparable power of recovery, which is not the position in the present case, and that using that system is precluded where the possibility of implementing such assistance exists only in theory.

41 In that context, the Federal Republic of Germany contests the Commission's arguments that the current difficulties are attributable to the shortcomings of the Member States as regards the transposition into national law of, inter alia, Directive 76/308; in its opinion, the Commission is arguing generally in favour of an unconditional obligation on the Member States to use the EU instruments. However, the Court has held, in Case C-318/07 *Persche* [2009] ECR I-359, that the Member States are not required to use the EU mechanisms where they do not believe that that procedure will be successful.

42 The Federal Republic of Germany also contends that abandoning the national legislation at issue would in some circumstances allow the taxpayer wholly to avoid paying a tax. This would be all the more likely where the taxpayer has transferred his residence to a non-Member State, since the EU legislative instruments do not apply in that case. The legislation at issue should consequently be retained in order to ensure effective recovery of the tax.

43 The Kingdom of the Netherlands, which agrees with all the arguments put forward by the Kingdom of Spain, also contends that the Commission has not sufficiently shown that the legislation at issue infringes Articles 28 and 31 of the EEA Agreement.

44 The Kingdom of the Netherlands argues in this connection that, in view of the mutual assistance measures provided for under Directives 76/308, 77/799 and 2008/55, the Commission's argument, according to which the Spanish authorities have less restrictive means at their disposal in order to ensure the effectiveness of the tax system by using those measures, is ineffective *ab initio* in so far as those directives are not applicable to the States party to the EEA agreement which are not members of the European Union.

45 Since the Kingdom of Spain has not concluded a bilateral treaty with the Kingdom of Norway, or the Republic of Iceland or the Principality of Liechtenstein, providing for mutual assistance in respect of the levying or recovery of taxes where a taxpayer transfers his residence to one of those States, the Spanish authorities have no means of establishing effective cooperation with the authorities of those States. Accordingly, since the Kingdom of Spain is unable to take measures for the recovery of tax debts where the taxpayer concerned does not voluntarily pay those debts, it cannot be disputed that the tax measure at issue is proportionate.

46 The Portuguese Republic adds that this case must be analysed in the light of the principles devolving from the judgment in *N* and that, as regards the justification concerning the need to ensure effective recovery of the tax, challenges the application to the present case of the case-law according to which

it is permissible for the Member States to require a taxpayer claiming a tax advantage to provide supporting evidence, so that those Member States can carry out the necessary checks, given that this case does not concern the grant of such an advantage.

Findings of the Court

47 First of all, it should be recalled that, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must none the less exercise that competence consistently with EU law (see, inter alia, Case C-155/09 *Commission* v *Greece* [2011] ECR I-65, paragraph 39; Case C-10/10 *Commission* v *Austria* [2011] ECR I-5389, paragraph 23; Case C-250/08 *Commission* v *Belgium* [2011] ECR I-12341, paragraph 33; and Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraph 42).

48 It is therefore necessary to examine whether the national legislation at issue, concerning personal income tax, which obliges taxpayers who transfer their residence abroad to include any income not yet charged to tax in the tax base for the last tax year in which they were treated as resident taxpayers, constitutes a restriction on the freedom of movement for persons enshrined in Articles 18 EC, 39 EC and 43 EC and in Articles 28 and 31 of the EEA Agreement.

The grounds of challenge relating to infringement of the Treaty provisions

49 In respect of the grounds of challenge relating to the infringement of Articles 18 EC, 39 EC and 43 EC, it should be recalled that Article 18 EC, which sets out in general terms the right of every citizen of the European Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC with regard to freedom of movement for workers and in Article 43 EC with regard to freedom of establishment (see Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraph 18; *Commission* v *Greece*, paragraph 41; and *Commission* v *Hungary*, paragraph 44).

50 Consequently, the tax regime at issue must be examined first in the light of Articles 39 EC and 43 EC before being examined in the light of Article 18 EC so far as concerns persons moving from one Member State to another Member State in order to settle there for reasons not connected with the pursuit of an economic activity.

– The existence of restrictions of Articles 39 EC and 43 EC

51 The Treaty provisions on freedom of movement for persons are intended to facilitate the pursuit by citizens of the European Union of occupational activities of all kinds throughout the European Union and they preclude measures which might place those citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see Case C-152/05 *Commission* v *Germany*, paragraph 21; *Commission* v *Greece*, paragraph 43; and *Commission* v *Hungary*, paragraph 46).

52 Even though those provisions, according to their wording, 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, it is important to state that, in that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order to pursue an economic activity there (see, to that effect, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 95, and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 44).

53 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 therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (see, inter alia, Case C-318/05 *Commission* v *Germany* [2007] ECR I-6957, paragraph 115).

54 Furthermore, it is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of movement must be regarded as restrictions on that freedom (see, as regards the freedom of establishment, Case C-442/02 *Caixa Bank France* [2004] ECR I-8961, paragraph 11, and Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 36).

55 Consequently, in contrast to the contentions of the Federal Republic of Germany and the Portuguese Republic, even a restriction on freedom of movement for persons which is of limited scope or minor importance is prohibited by Articles 39 EC and 43 EC (see, concerning the freedom of establishment, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 21; Case C-34/98 *Commission* v *France* [2000] ECR I-995, paragraph 49; and *de Lasteyrie du Saillant*, paragraph 43).

56 In the present case, even though Article 14(3) of Law 35/2006 does not forbid a taxpayer resident in Spain to exercise his right to freedom of movement, that provision is capable none the less of restricting the exercise of that right by exerting, at the very least, a deterrent influence on taxpayers wishing to settle in another Member State.

57 Under the national legislation at issue, the transfer of residence outside Spanish territory, in connection with the exercise of the rights secured by Articles 39 EC and 43 EC, triggers an obligation for the taxpayer to pay tax before taxpayers who continue to reside in Spain are required to do so. That difference in treatment is capable of placing persons who transfer their residence abroad at a financial disadvantage by providing that the income still to be charged to tax has to be included in the tax base for the last tax year in which those persons were resident (see, by analogy, *Lasteyrie du Saillant*, paragraph 46, and *N*, paragraph 35).

58 Admittedly, as the Kingdom of Spain, the Federal Republic of Germany, the Kingdom of the Netherlands and the Portuguese Republic state, the Spanish legislation at issue concerns only the taxation of income which has already been realised and of which the tax authorities have knowledge. Accordingly, the person liable for the tax debt is not subject to an additional tax at the time of transferring his residence. He is merely deprived of an advantage which may facilitate the payment of that debt.

59 However, it cannot be denied that the withdrawal of that advantage constitutes a clear disadvantage in terms of cash-flow. In this connection, the Court has repeatedly held that the exclusion of a cash-flow advantage in a cross-border situation where it is available in an equivalent domestic situation is a restriction on the freedom of establishment (see, to that effect, inter alia, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraphs 44, 54 and 76; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 36 to 38; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 32; and Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 29).

60 As it is, that difference in treatment cannot be explained, in the present case, by an objective difference of situation. From the point of view of legislation of a Member State designed to tax realised income, the situation of a person transferring his residence to another Member State is similar to that of a person maintaining his residence in the former Member State, as regards the taxation of the income already realised in that Member State before the transfer of residence (see, by analogy, *National Grid Indus*, paragraph 38).

61 It must therefore be held that the measure at issue in the main proceedings is liable to obstruct the exercise of the freedoms laid down in Articles 39 EC and 43 EC.

– Justification for the restrictions

62 According to well-established case-law, national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, that they are appropriate for attaining that objective and that they do not go beyond what is necessary to attain the objective pursued (see, inter alia, Case C-152/05 *Commission* v *Germany*, paragraph 26; *Commission* v *Greece*, paragraph 51; *Commission* v *Hungary*, paragraph 69; and *National Grid Indus*, paragraph 42).

63 It is accordingly necessary to determine whether the difference in treatment, arising as a result of the legislation at issue, as between persons wishing to transfer their residence to another Member State and those who remain in Spain can be justified by overriding reasons in the public interest, such as those put forward by the Kingdom of Spain and the Member States intervening in support of the forms of order sought by it, namely the effective recovery of tax debts, the balanced allocation between the Member States of powers of taxation and the need to preserve the coherence of the tax system.

64 As regards the justification relating to the need to ensure effective recovery of the tax debt, it should first be stated that the Court has recognised that that need could justify a restriction on the fundamental freedoms (see, to that effect, *FKP Scorpio Konzertproduktionen*, paragraph 35).

65 The Kingdom of Spain contends, inter alia, in this connection that the aim of the legislation at issue is to avoid deferring taking into account income already obtained by taxpayers who, no longer residing in Spain, thus lose all links with the Spanish tax authorities, a situation which, for both legal and factual reasons, renders difficult or prevents the recovery of the tax. In many cases, it is very difficult to trace the tax debtor. Moreover, the Kingdom of Spain disputes the Commission's assertion that taxpayers not resident in Spain are often paid income in that Member State or have a significant proportion of their assets there.

66 According to the Kingdom of Spain, therefore, the legislation at issue is proportionate to the objective pursued, since the instruments for administrative cooperation and mutual assistance between Member States of the European Union have proved manifestly inadequate for the purposes of ensuring the effectiveness of the tax system.

67 The Commission admits that the immediate recovery of the tax debt, at the time of the transfer of the taxpayer's residence to another Member State, may theoretically be justified by the public interest in the need to ensure the effective recovery of tax debts. However, it argues that that measure goes beyond what is necessary in order to attain that objective and that it must accordingly be regarded as disproportionate, since the Member States can use the mechanisms provided for under Directives 76/308, 77/799 and 2008/55.

68 In this connection, it must be stated that — contrary to the contentions of the Kingdom of Spain, the Federal Republic of Germany, the Kingdom of the Netherlands and the Portuguese Republic — the cooperation mechanisms existing at EU level between the authorities of the Member States are sufficient to enable the Member State of origin to recover the tax debt in another Member State (see, to that effect, *National Grid Indus*, paragraph 78).

69 It should be recalled to that effect that, since the tax debt is definitively determined at the time when the taxpayer transfers his residence to another Member State, the assistance required of the host Member State will concern only the recovery of that debt, and not the definitive establishment of the amount of tax charged.

70 Article 4(1) of Directive 2008/55 provides that '[a]t the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim'. That directive thus enables the Member State of origin to obtain information from the competent authority of the host Member State on the transfer of the residence of an individual to that Member State, in so far as the information is necessary to enable the Member State of origin to recover a tax debt which existed already at the time of that transfer.

71 Moreover, Directive 2008/55 — and, in particular, Articles 5 to 9 thereof — provides the authorities of the Member State of origin with a framework for cooperation and assistance under which provision is also made for the recognition of instruments and the adoption of precautionary measures, which enables them subsequently actually to recover the tax debt in the host Member State (see, to that effect, *National Grid Indus*, paragraph 78).

72 It should also be noted, in this connection, that it is possible that the instruments for cooperation referred to above may not always function in an efficient and satisfactory manner in practice. However, the Member States should not be able to rely on the possible 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 secured by the Treaty (see, to that effect, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 33).

73 In that context, the Member States intervening in support of the form of order sought by the Kingdom of Spain refer to *Truck Center*, in which the Court, in the light of the possibility of compulsory recovery, approved, inter alia, the application to non-resident taxpayers of a different technique for taxation than that applied to resident taxpayers, namely, taxation at source.

74 Even if it is conceded that cross-border recovery of a tax debt is normally more difficult than compulsory recovery within the national territory, the present case does not concern a straightforward technique for recovery but rather the issue of whether the obligation, placed on a taxpayer wishing to transfer his residence to another Member State, to pay immediately and in full — solely on account of that transfer — a tax of a determined amount on income which has already been realised goes beyond what is necessary to attain the objective pursued, whereas taxpayers remaining in the national territory are not subject to any such obligation.

75 It follows, consequently, from the foregoing that Article 14(3) of Law 35/2006, which obliges taxpayers who transfer their residence abroad to include any income not yet charged to tax in the tax base for the last tax year in which they were treated as resident taxpayers, is disproportionate.

76 As regards the purported justification for the legislation at issue relating to the public interest in preserving the balanced allocation between the Member States of powers of taxation, it should be recalled that this is a legitimate objective recognised by the Court (see, to that effect, *Marks & Spencer*, paragraph 45; *N*, paragraph 42; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 51; Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 31; and *National Grid Indus*, paragraph 45).

77 It is also settled case-law that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 29 and the case-law cited, and *National Grid Indus*, paragraph 45). Such a justification can be accepted where, inter alia, the rules at issue are intended to prevent behaviour capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory (see, to that effect, inter alia, *Marks & Spencer*, paragraph 46; *Rewe Zentralfinanz*, paragraph 42; and *National Grid Indus*, paragraph 46).

78 In this connection the Court has also held, as regards the transfer of the place of effective management of a company from one Member State to another Member State, that that fact cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer (see, to that effect, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 59, and *National Grid Indus*, paragraph 46). Accordingly, the Court has held that, in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country (see *N*, paragraph 46, and *National Grid Indus*, paragraph 46).

79 Those considerations can, *a fortiori*, be applied in the present case since the legislation at issue concerns the taxation of income which has already been realised rather than the taxation of unrealised capital gains. The Kingdom of Spain does not, on the transfer of a taxpayer's residence to another Member State, lose the power to exercise its powers of taxation in relation to activities already carried on in its territory and accordingly need not give up its right to determine the amount of the corresponding taxation.

80 It should be borne in mind in that regard that the aim of that legislation is to make subject to tax in the Member State of origin income, falling within the powers of taxation of that Member State, which has been realised before the transfer of residence. Thus that income is taxed in the Member State in which it was realised, the income obtained after the transfer of the official address of the taxpayer being, in principle, taxed exclusively in the Member State in which it is realised, namely the host Member State.

81 Since, in the present case, 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, the Kingdom of Spain has not proved that, in the absence of conflict between the powers of taxation of the State of exit and those of the host Member State, it would be faced with a problem of double taxation or a situation in which the taxpayers concerned would completely escape paying tax, which could justify the application of a measure such as that at issue in the present case with the aim of pursuing the objective of preserving the balanced allocation of the powers of taxation.

82 In those circumstances, the justification of the legislation at issue by the need to preserve the balanced allocation between the Member States of the powers of taxation cannot be accepted.

83 So far as concerns the justification of that legislation by reference to the need to preserve the coherence of the national tax system, the Kingdom of Spain contends, inter alia, that that legislation is vital to ensure that coherence, given that the option of deferring payment of the tax corresponding to income which has already been received is granted on the basis of the guarantee of payment which is constituted, for the tax authorities, by the fact that the taxpayer resides in Spain and that he is, consequently, subject to the direct and effective authority of those authorities. The disappearance of that relationship of direct and effective authority justifies the loss of the tax advantage consisting in the option to defer payment of the tax.

84 Admittedly, the Court has accepted that the need to preserve the coherence of a tax system may justify legislation restricting fundamental freedoms (see, to that effect, inter alia, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 21; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 43; and *Commission* v *Hungary*, paragraph 70).

85 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, inter alia, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; Case C-524/04 *Test Claimants*

in the Thin Cap Group Litigation [2007] ECR I-2107, paragraph 68; and *Commission* v *Hungary*, paragraph 72), the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (see, inter alia, *Manninen*, paragraph 43).

86 It must first be stated in this connection that, given that the requirements linked to the coherence of the tax system and the balanced allocation of the powers of taxation intersect, the considerations set out in paragraph 81 above — according to which, in the present case, no other Member State has sought the power to tax income realised in Spain — are relevant also as regards the need to preserve that coherence, with the result that the argument relating to that need is of no consequence.

87 Secondly, it should be pointed out that the Kingdom of Spain merely relies on the need to preserve the coherence of the tax system without establishing that there is a direct link in the national legislation at issue between, on one hand, the tax advantage represented by the possibility of charging income to a number of tax periods and, on the other, the offsetting of that advantage by some kind of tax charge.

88 In those circumstances, the justification of that legislation by the need to preserve the coherence of the national tax system cannot be accepted.

89 It should moreover be noted that the Kingdom of Spain and the Member States intervening in support of the forms of order sought by that Member State also rely on essentially the same arguments, alleging that the legislation at issue is proportionate, in view also of the objectives of ensuring the coherence of the tax system and the balanced allocation of the powers of taxation, on account — according those Member States — of the inadequacy of the instruments for cooperation provided for under EU law.

90 Consequently, even if the national legislation at issue were able to attain those objectives, it must be held that, so far as concerns the question whether that legislation is proportionate, the considerations set out in paragraphs 68 to 74 above as regards the justification derived from the need to ensure effective recovery of the tax are also relevant in relation to the alleged need to ensure the coherence of the tax system and the balanced allocation of the powers of taxation, so that, on any view, that legislation goes beyond what is necessary for the purposes of achieving those objectives.

– The existence of a restriction of Article 18 EC

91 As regards the alleged existence of a restriction of Article 18 EC, it cannot reasonably be denied that the exclusion of persons wishing to move within the European Union for reasons not connected with the pursuit of an economic activity from entitlement to the cash-flow advantage concerned may, in some cases, be likely to deter those persons from exercising the fundamental freedoms guaranteed by Article 18 EC.

92 However, the Court has held that such a restriction can be justified in the light of EU law if it is based on objective public interest considerations independent of the nationality of the persons concerned and if it is proportionate to the legitimate objective pursued by the provisions of national law (see Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 33, and *Commission* v *Hungary*, paragraph 88).

93 In that connection, it should be noted that the same conclusion as that reached in paragraphs 51 to 88 above as regards the existence of and justification for restrictions of Articles 39 EC and 43 EC applies, for the same reasons (see, to that effect, Case C-152/05 *Commission* v *Germany*, paragraph 30; *Commission* v *Greece*, paragraph 60, and *Commission* v *Hungary*, paragraph 89).

The grounds of challenge alleging infringement of the EEA Agreement

94 The Commission also asserts that, by adopting and maintaining in force Article 14(3) of Law 35/2006, the Kingdom of Spain has failed to fulfil its obligations under Articles 28 and 31 of the EEA Agreement concerning freedom of movement for workers and freedom of establishment respectively.

95 First of all, it should be observed that those provisions of the EEA Agreement are analogous to Articles 39 EC and 43 EC, which means that the considerations set out in paragraphs 51 to 64 above as regards those provisions apply, in principle, also to the corresponding provisions of the EEA Agreement.

96 Nevertheless, it should be stated that, as regards the justification concerning the need to ensure effective recovery of the tax debt, the framework of cooperation between the competent authorities of the Member States established by Directives 76/308, 77/799 and 2008/55 does not exist between those authorities and the competent authorities of a non-Member State, where that non-Member State has not entered into any undertaking of mutual assistance (see, inter alia, Case C-267/09 *Commission* v *Portugal* [2011] ECR I-3197, paragraph 55).

97 In this connection, the Kingdom of Spain submits that it has not concluded a bilateral treaty with the Kingdom of Norway, or the Republic of Iceland or the Principality of Liechtenstein, providing for mutual assistance in respect of the levying or recovery of taxes. Accordingly, where a taxpayer transfers his residence to one of those States party to the EEA Agreement, the Spanish authorities do not seem to have any means enabling them to have the benefit of effective cooperation with the authorities in those States.

98 In addition, the Commission, by merely describing in very general terms in its observations submitted in reply to the statements in intervention of the Federal Republic of Germany, the Kingdom of the Netherlands and the Portuguese Republic the conventions linking the Kingdom of Spain to the States party to the EEA Agreement which are not members of the European Union, did not show that those conventions actually make provision for mechanisms for the exchange of information which are sufficient for the purposes of checking and reviewing the tax returns submitted by the taxable persons residing in those States.

99 In those circumstances, it must be held that, in so far as it concerns taxpayers residing in the States party to the EEA Agreement which are not Member States of the European Union, 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 tax 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.

100 The action must therefore be dismissed in so far as it concerns infringement by the Kingdom of Spain of its obligations under Articles 28 and 31 of the EEA Agreement.

101 In those circumstances, it must be held that the Kingdom of Spain has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC, by adopting and maintaining in Article 14(3) of Law 35/2006 a provision under which taxpayers who transfer their residence to another Member State must include, in the tax base for the last tax year in which they were treated as resident taxpayers, any income not yet charged to tax.

Costs

102 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.

103 In the present dispute, account must be taken of the fact that the Commission's grounds of challenge alleging failure to comply with the requirements under Articles 28 and 31 of the EEA Agreement have not been upheld.

104 In consequence, the Kingdom of Spain must be ordered to pay three-quarters of the costs, and the Commission to pay the remaining quarter.

105 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 Federal Republic of Germany, the Kingdom of the Netherlands and the Portuguese Republic must accordingly bear their own costs.

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

1. **Declares that the Kingdom of Spain has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC, by adopting and maintaining in Article 14(3) of Law 35/2006 on personal income tax and amending in part the laws on the taxation of corporations, of the income of non-residents and of wealth (Ley 35/2006 del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no residentes y sobre el Patrimonio) of 28 November 2006, a provision under which taxpayers who transfer their residence to another Member State must include, in the tax base for the last tax year in which they were treated as resident taxpayers, any income not yet charged to tax;**

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

3. **Orders the Kingdom of Spain to pay three-quarters of the costs, and the European Commission to pay the remaining quarter;**

4. **Orders the Federal Republic of Germany, the Kingdom of the Netherlands and the Portuguese Republic to bear their own costs.**

[Signatures]