



EUROPEAN COMMISSION

DIRECTORATE-GENERAL

TAXATION AND CUSTOMS UNION

Direct taxation, Tax Coordination, Economic Analysis and Evaluation

Legal affairs - direct taxation

Acknowledgement of receipt and information about pre-closure of a multiple complaint on an alleged breach by Spain of EU rules on the free movement of capital

Reference number: CHAP(2021)1080

In 2021, the European Commission has received a large number of complaints concerning a Spanish tax regime applicable to income derived from the letting of property by non-resident taxpayers from third countries (i.e. persons tax resident in countries other than Member States of the European Union (EU)). The complaints received contend that this tax regime would breach the freedom of capital movements (Article 63 of the Treaty on Functioning of the European Union, TFEU), for the following reasons:

- Non-resident taxpayers from third countries cannot deduct expenses linked to the income and incurred for letting their property in Spain whereas taxpayers resident in Spain or in other EU Member States have the right to deduct such costs.
- They are subject to a tax rate of 24%, while non-resident taxpayers from EU Member States are subject to a tax rate of 19%.
- Finally, they are obliged to declare this income every trimester and submit a tax form per property.

The Commission has registered these complaints under the reference CHAP (2021)1080. Given the very large number of complaints received on this subject, with a view to responding swiftly and informing those concerned as well as taking into account potentially wider public interest in the issue raised by the complainants, the Commission is publishing this notice on its Europa website, to acknowledge receipt of the letters and inform the senders of the results of their examination by the Commission services.

The Commission services treat complaints in a confidential manner by default. Only in the event that a complainant opts for non-confidential treatment in the complaint form may the Commission departments disclose the identity and any of the information submitted by that complainant to the authorities of the Member State against which the complaint has been made. The disclosure of complainant's identity by the Commission departments may in some cases be indispensable to the handling of the complaint.

A [specific privacy policy statement](#) applies in relation to the handling of complaints.

The Commission assessed the multiple complaint in the light of the applicable European Union law and in line with the rules and enforcement priorities set in the [Commission Communication 'EU law: Better Results through Better Application'](#)¹.

¹ C(2016)8600.

Following an examination of the allegations made by the complainants, the Commission has **not been able to detect any breach of EU legislation**, for the following reasons.

General remarks on the application of Articles 63 and 64 TFEU

Article 63 TFEU extends the free movement of capital to third countries, with the effect that non-resident taxpayers from third countries can claim to be treated in the same way as non-resident taxpayers from EU Member States in objectively comparable situations. However, Article 64 TFEU permits Member States to apply the restrictions applicable to non-resident taxpayers from third countries that existed on 31 December 1993.

Accordingly, the question is whether the tax regime in question already existed in 1993.

The Court of Justice of the European Union (CJEU)² has also held, concerning amendments of legislation in force in 1993 and for the purposes of Article 64 TFEU, that *a provision which is, in essence, identical to the previous legislation, or limited to reducing or eliminating an obstacle to the exercise of rights and freedoms established by EU law in the earlier legislation, will be covered by the derogation.*

Consequently, the Commission examined whether the legislation in force today is, in essence, identical to the legislation in force on 31 December 1993 – or whether subsequent changes to it, if any, have been limited to reducing or eliminating obstacles to the free movement of capital. If that were the case, the legislation would be covered by the derogation of Article 64 TFEU.

Limitation to the deductibility of costs linked to letting out of property

The first issue raised in the multiple complaint concerns the calculation of the tax base corresponding to the letting of property. The Real Decreto Legislativo 5/2004, of 5 March, approving the recast of the law on income tax for non-residents (IRNR), Article 24.1, establishes that the tax base is the gross amount of the income received, without any costs being deducted. The consolidated text of this legislation in Spanish is available [here](#).

On 31 December 1993, the legislation in force was Law 18/1991, of 6 June, on income tax for individuals. Article 18 of this law provided that the tax base of non-resident taxpayers for income derived in Spain was the gross amount received, without any costs being deducted. The text of the law in Spanish is available [here](#).

Thus, the legislation in force today is, in essence, identical to the legislation in force on 31 December 1993, and Spain may still continue to apply them, even if they may constitute a restriction on the free movement of capital according to Article 64 TFEU.

Non-resident taxpayers from EU Member States, to whom the derogation set out in Article 64 TFEU does not apply, can, in calculating their tax base, deduct expenses linked to letting the property, according to Article 24.6 1ª a) of the IRNR.

Applicable tax rate

² Judgment of the Court of 10 April 2014, case C- 190/12, Emerging Markets Series of DFA Investment Trust Company, paragraph 48, and judgment of the Court of 20 September 2018, case C- 685/16, EV, paragraph 75.

The second issue raised is the tax rate applicable to non-resident taxpayers from third countries on this income. This is fixed at 24% in Article 25.1 a) of the IRNR. In this case, the restriction would result from the difference in the tax rate applicable to resident taxpayers. Law 35/2006, of 28 November, on personal income tax sets the minimum tax rate resulting from the tax schedule applicable to resident taxpayers at 19% (Articles 63 and 65).

On 31 December 1993, Law 18/1991 set the following tax rates:

- for non-resident taxpayers, 25% (Article 19.1 a);
- for resident taxpayers, the minimum tax rate of the tax schedule was 20% (Article 74).

As we can see, the difference in treatment between resident taxpayers and non-resident taxpayers today is in essence identical to that existing on 31 December 1993. The difference between the tax rates is at most 5 percentage points in situations where, for resident taxpayers, the lowest tax rate applies. As mentioned before, Article 64 TFEU applies also in the case where the rules have been amended but the legislation is in essence identical to that existing on 31 December 1993. Consequently, Spain may apply these rules even if they may constitute a restriction to the free movement of capital.

The current tax rate applicable to non-resident taxpayers from EU Member States other than Spain, for whom the derogation set out in Article 64 TFEU is not applicable, is – pursuant to the IRNR, Article 25.1 a) – 19%. This therefore matches the minimum rate applicable to resident taxpayers and is lower than that applicable to non-resident taxpayers from third countries (24%).

Declaration obligations

The third issue raised in the multiple complaint concerns the obligation to submit tax declarations for income derived from letting property every three months, rather than annually like tax residents of Spain (and other EU Member States). Order EHA/3316/2010 of 17 December, Article 5 c) obliges non-resident taxpayers who derive income from letting property to submit the declaration every three months, for each property.

On 31 December 1993, the obligation to submit a declaration was established in the Order of 31 January 1992, available in Spanish [here](#).

According to number four of this order, the tax declaration had to be submitted on a monthly basis. In the case where the declaration was submitted by the tax representative or by those jointly liable to pay the tax, the declaration could be submitted on a trimestral basis (every three months). In contrast, resident taxpayers submit an annual declaration after the end of the tax year, in the periods approved by the Ministry of Finance in Order HAC/248/2021, of 16 of March, Article 8, available in Spanish [here](#).

Again, the difference in treatment between resident taxpayers and non-resident taxpayers was in essence identical or may even have been reduced. As mentioned before, the derogation provided for in Article 64 TFEU applies also in the case where the rules have been amended but (i) the legislation is in essence identical to that existing on 31 December 1993 or (ii) implies a reduction of the existing restriction. Consequently, Spain may apply these rules even if they may constitute a restriction to the free movement of capital.

Conclusion

In view of the above considerations, the Commission has concluded that EU law has not been infringed and therefore, the multiple complaint CHAP (2021)1080 may be closed.

However, if any of the complainants in this case have new information suggesting that Spain has committed an infringement of Union law not covered by the above assessment, they are invited to send this new information to us within four weeks from the publication date of this notice. Such information can be sent to taxud-unit-d3@ec.europa.eu

If we do not receive any such new information within that four-week period, or if the new information received does not lead to a different conclusion, the Commission may close the case.