

**Portugal, Southern Central Administrative Court, Decision of 19th September 2017**

Member State

 Portugal

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Topic

Rule of law, non discrimination and equality before the law

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Deciding Court Original Language

Tribunal Central Administrativo - Sul

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Deciding Court English translation

Central Administrative Court

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Registration N

06021/12

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Date Decision

29th April 2010

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ECLI (if available)

ECLI:PT:TCAS:2010:04902.09.4E

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National Follow Up Of (when relevant)

This is the court's decision that culminates in a preliminary ruling for the CJEU. After the decision of the CJEU, there was a new decision by the national court.

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EU legal sources and CJEU jurisprudence

Combined provisions of Articles 12, 56, 57 and 58 of the Treaty on European Community [now 18, 63, 64 and 65 of the Treaty on the Functioning of the European Union]

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## ECtHR Jurisprudence

Not applicable.

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## Subject Matter

Non discrimination – equality before the law – Court of Justice of the European Union

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## Legal issue(s)

This case has to do with the payment of a tax on the income tax on natural persons («IRS - Imposto sobre o Rendimento das Pessoas Singulares»).

In particular, article 43 (2) of the IRS Code was at stake. The citizens in question, despite having Portuguese nationality, are resident in Angola. They sold a property located in Portugal. This sale, according to the article in question, means that they have to pay the capital gains that resulted from it. However, these citizens maintain that this article can only be applied to residents in Portugal because, if not, it contravenes the current article 63 of the Treaty on European Union. In other words, if they were to pay the capital gains, and in order to fulfill the principle of non-discrimination, they ought to benefit from the same prerogatives as the Portuguese residents, namely limiting the tax incidence to 50% of the capital gains.

However, the Tax Authority (AT), considering that the Contestants were non-residents in Portugal, decided to tax the surplus value in its entirety, without limiting the tax incidence to 50% of the capital gains realized by residents in Portugal, enshrined in art. 43, no. 2 of the CIRS.

The citizens in question found this to be illegal, as they consider that this application of article 43, paragraph 2 of the CIRS discriminates against them by taxing them by a more serious measure than other people placed in the same patrimonial situation, but residing in Portugal. The Court of First Instance agreed with these citizens. However, the Tax Authority appealed the decision.

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## Request for expedited/PPU procedures

Not applicable.

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## Interim Relief

Not applicable.

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## National Law Sources

Article 43 (2) of the IRS Code

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## Facts of the case

See «Legal issues».

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## Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Central Administrative Court decided to refer a question for a preliminary ruling to the Court of Justice of the European Union as follows:

The combined provisions of Articles 12, 56, 57 and 58 of the Treaty on European Community [now 18, 63, 64 and 65 of the Treaty on the Functioning of the European Union ] must be interpreted as opposing national legislation, such as that at issue in the main proceedings (paragraph 2 of article 43 of the IRS Code, approved by Decree-Law no. 442-A / 88, of 30 November, as amended by Law No. 109-B / 2001, of 27 December), which subjects the capital gains resulting from the sale of a property located in a Member State (Portugal ), when such alienation is carried out by a national of that Member State, resident in a third country (Angola), at a tax burden higher than that which would apply, in relation to this same type of operation, on the capital gains realized by a resident of the State where this property is located?

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## Relation of the case to the EU Charter

Not applicable, since only the Treaty on the Functioning of the European Union was used.

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## Relation between the EU Charter and ECHR

Not applicable.

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## Use of Judicial Interaction technique(s)

The Court has made a preliminary ruling to the CJEU.

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## Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

Not applicable.

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## Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Not applicable.

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## Strategic use of judicial interaction technique (purpose aimed by the national court)

The technique used by the court (conforming interpretation) aimed to safeguard a fundamental right recognized by the Portuguese Constitution, namely in the aforementioned article 20, paragraph 4: the right of access to justice

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### Impact on Legislation / Policy

Pursuant to the CJEU's decision, article 43 of the IRS Code was amended accordingly in 2018

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### Notes on the national implementation of the preliminary ruling by the referring court

The CJEU answered as follows:

Legislation of a Member State, such as that at issue in the main proceedings, which makes the capital gains resulting from the alienation of immovable property located in that Member State, carried out by a resident in a third State, subject to a higher tax burden than which would apply, in the same type of operations, to the capital gains realized by a resident in that Member State constitutes a restriction on the free movement of capital which, subject to verification by the referring court, is not covered by the exception provided for in Article 64 (1) TFEU and cannot be justified on the grounds referred to in Article 65 (1) TFEU.

Following this decision, the appeal Court, by Decision of 8 May 2019, decided to uphold the decision of the Court of First Instance, condemning (again) the Tax Authority. Thus, the outcome achieved by the national judge is consistent with the decision of the CJEU.

The Court cited the case law of the CJEU, namely the judgment given in case C-443/06 which stated that: "Article 56 EC must be interpreted as meaning that it is contrary to national legislation, such as the one at issue in the dispute in the main proceedings, which subjects capital gains resulting from the sale of immovable property located in a Member State, in this case in Portugal, when the sale is made by a resident in another Member State, to a tax burden higher than which would apply, in relation to this same type of operation, on the capital gains realized by a resident of the State where the immovable property is located ..". This decision was used by the court of first instance.

In this case, there was a consensus on submitting a preliminary ruling to the CJEU, as the parties to the case were heard and agreed.

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### Impact on national case law from the same Member State or other Member States

Not applicable.

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Connected national caselaw / templates

Not applicable.

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[\(Link to\) full text](#)

First decision (before the preliminary ruling):

<https://jurisprudencia.csm.org.pt/ecli/ECLI:PT:TCAS:2017:06021.12.EB>

Final decision (after the preliminary ruling):

<http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/bca5ceb1b80d357f802583f40058bb8b?>

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