



Reports of Cases

Case C-269/09

European Commission
v
Kingdom of Spain

(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)

Summary of the Judgment

- 1. Member States — Retained powers — Direct taxation — Obligation to exercise that competence consistently with EU law*
- 2. Citizenship of the Union — Right to move and reside freely within the territory of the Member States — General provision of the Treaty finding specific expression in the provisions laying down freedom of movement for workers and freedom of establishment*
(Arts 18 EC, 39 EC and 43 EC)
- 3. Freedom of movement for persons — Workers — Provisions of the Treaty — Purpose — Rules intended to facilitate the pursuit of occupational activities throughout the European Union*
- 4. Citizenship of the Union — Freedom of movement for persons — Freedom of establishment — Restrictions — Tax legislation — Transfer of a taxpayer's residence to another Member State — Obligation to include, in the tax base for the last tax year, any income not yet charged to tax — Not permissible — Justification — Effective recovery of the tax debt — Preservation of the balanced allocation between the Member States of powers of taxation — No coherence of the tax system*
(Arts 18 EC, 39 EC and 43 EC; Council Directive 2008/55)
- 5. Citizenship of the Union — Right to move and reside freely within the territory of the Member States — National provisions precluding or deterring a national of a Member State from leaving his State of origin — Not permissible — Requirement that the justification be based on objective public interest considerations independent of the nationality of the persons concerned*
- 6. International agreements — Agreement on the European Economic Area — Freedom of movement for persons — Freedom of establishment — Tax legislation — Transfer of the residence of a taxpayer to a State party to that agreement — Obligation to include, in the tax base for the last tax year, any income not yet charged to tax — Restriction — Justification — Effective recovery of the tax debt — Conditions*

(EEA Agreement, Art. 28 and 31)

1. See the text of the decision.

(see para. 47)

2. See the text of the decision.

(see para. 49)

3. See the text of the decision.

(see para. 51)

4. A Member State which adopts and maintains in force legislation 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, fails to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC.

Even though the Treaty provisions on freedom of movement for persons, 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, they also preclude 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. That is true of national legislation which triggers an obligation for the taxpayer transferring his residence to another Member State to pay tax before taxpayers who continue to reside in the first Member State are required to do so. That difference in treatment, which is capable of placing persons who transfer their residence abroad at a financial disadvantage, cannot be explained 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. It follows that such a difference in treatment constitutes an obstacle to the exercise of the freedoms laid down in Articles 39 EC and 43 EC.

That obstacle cannot be justified by the need to ensure effective recovery of the tax debt, in so far as the cooperation mechanisms existing at EU level between the authorities of the Member States, in particular those provided for by Directive 2008/55, on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, are sufficient to enable the Member State of origin to recover the tax debt in another Member State. The obligation imposed by that national legislation is therefore disproportionate in relation to the aim to facilitate recovery of the tax debt.

Nor is that obstacle justified by the need to preserve the balanced allocation between the Member States of powers of taxation, given that the Member State of origin 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.

Lastly, in the absence of a direct link, in the national legislation, 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, that legislation cannot be justified by the need to preserve the coherence of the tax system.

(see paras 52, 53, 57, 59-61, 67, 68, 79, 87, 88, 101, operative part 1)

5. See the text of the decision.

(see paras 91, 92)

6. A Member State which adopts and maintains in force legislation which obliges taxpayers who transfer their residence to a State party to the Agreement on the European Economic Area (EEA) which is not a Member State of the European Union to 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, does not fail to fulfil its obligations under Articles 28 and 31 of the EEA Agreement.

Such an obstacle to freedom of movement for workers and to the freedom of establishment is justified for nationals of States party to the EEA Agreement by the need to ensure effective recovery of the tax debt, in so far as the framework of cooperation between the competent authorities of the Member States, established by the rules of EU law, does not exist between those authorities and those of the States party to the EEA Agreement, where the States concerned have not entered into any undertaking of mutual assistance in respect of the levying or recovery of taxes.

(see paras 95-99)