

Direct taxation: The European Commission refers Spain to the European Court of Justice over exit taxation

The European Commission has decided to refer Spain to the over restrictive provisions on exit tax European Court of Justice for its tax provisions which impose an exit tax on companies which cease to be tax resident in the country. The provisions are incompatible with the freedom of establishment.

Under Spanish law, when a Spanish company transfers its residence to another Member State or when a permanent establishment ceases its activities in Spain or transfers its Spanish located assets to another Member State, unrealised capital gains must be included in the taxable base of that financial year, whereas unrealised capital gains from purely domestic transactions are not included in the taxable base.

The Commission considers that such immediate taxation penalises those companies that wish to leave Spain or to transfer assets abroad, as it results in less favourable treatment as compared to those companies which remain in the country or transfer assets domestically. The rules in question are therefore likely to dissuade companies from exercising their right of freedom of establishment and, as a result, constitute a restriction to the freedom of established as laid down Article 49 of the Treaty on the Functioning of the European Union and the corresponding provision of the EEA Agreement.

Background

The Commission already decided to refer Spain to the Court in October 2009 (IP/09/1460). However, Spain amended later on its legislation. Taking into account these amendments, the Commission sent an Additional Reasoned Opinion on 18 March 2010. The Spanish authorities refused to amend the new legislation

The Commission's opinion is based on the EC Treaty as interpreted by the Court of Justice of the European Communities in its judgment of 11 March 2004, in Case C-9/02, De Lasteyrie du Saillant, as well as on the Commission's Communication on exit taxation ([COM\(2006\)825](#) of 19 December 2006).

The Commission's case reference number is 2007/2382 (exit tax for companies in Spain).

For the press releases issued on infringement procedures in the taxation or customs area see:

http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/index_en.htm

For the latest general information on infringement measures against Member States see:

http://ec.europa.eu/community_law/index_en.htm