

**Case C-449/20****Request for a preliminary ruling****Date lodged:**

22 September 2020

**Referring court:**

Supremo Tribunal Administrativo (Secção de Contencioso Tributário) (Supreme Administrative Court (Tax Division)), Portugal

**Date of the decision to refer:**

1 July 2020

**Appellant:**

Real Vida Seguros, S. A.

**Respondent:**

AT – Autoridade Tributária e Aduaneira (Tax and Customs Authority)

---

**Supremo Tribunal Administrativo (Supreme Administrative Court)**

[...]

The Secção de Contencioso Tributário (Tax Division) of the Supremo Tribunal Administrativo (Supreme Administrative Court) has issued the following decision:

[...]

- I.1. Real [Vida] Seguros, S. A., [...] Porto, lodged an appeal on a point of law against the judgment delivered [by the] Tribunal Administrativo e Fiscal do Porto (Administrative and Tax Court, Porto) on 29 June 2018, in so far as concerns that part of the judgment dismissing its appeal as unfounded – that is, the acceptance of dividends received on foreign shares as a tax cost for the purposes of a tax benefit, in the sum of EUR 10 196.54 (financial year 1999) and EUR 13 406.62 (financial year 2000) – which part (partly) upheld the additional assessment of the [Imposto sobre o Rendimento das Pessoas Coletivas (Corporation Tax; ‘IRC’)] for the financial years 1999 and 2000.

I.2. The appellant put forward the following arguments and claims:

- i. [...]
  - ii. The purpose of this appeal on a point of law is to challenge the judgment of the referring court on grounds that it erred in law solely as regards its consideration of the question concerning the deduction of dividends received on foreign shares from net income for 1999 and 2000 pursuant to Article 31 of the [Estatuto dos Benefícios Fiscais (Statute governing Tax Benefits; ‘EBF’)] as it applied at the time of the facts, specifically because it held that the possibility of deduction provided for in the aforementioned provision applies only to dividends on shares admitted to trading on the Portuguese **[Or. 2]** stock exchange and does not apply to dividends on shares admitted to trading on foreign stock exchanges;
  - iii. Tax rules must be interpreted in accordance with the general principles of legal interpretation, that is to say, by applying the criteria laid down in Article 9 of the Civil Code;
  - iv. It therefore follows that the wording of the legislation must be the main criterion and the starting point for (all) interpretation, and that in interpreting laws the interpreter must seek to reconstruct their rationale;
  - v. Interpretation may not go beyond the language and (formal and syntactic) linguistic construction in order to assert a meaning or particular characteristic that is not expressly included in the law itself;
  - vi. In this regard, if there is no reference in either the law or its explanatory preamble to the origin of the dividends (domestic shares or foreign shares), the interpreter may not make such a distinction;
  - vii. Moreover, any such distinction would be contrary to European Union law in the case of shares admitted to trading on [EU] stock exchanges;
  - viii. Likewise, making the application of the tax benefit conditional on the share’s national origin is manifestly in breach of the principle of free movement of capital (Article 63 TFEU and following);
  - ix. It would also give rise to a clear breach of the principle of capital export neutrality, since a tax benefit would be granted to tax residents who obtain income in the national territory, to the disadvantage of those who obtain income abroad[.]
  - x. [...] **[Or. 3]** [closing arguments]
  - xi. [...] [closing arguments]
- [...] [form of order sought by the appellant]

1.3. [...] [procedure]

- 1.4. The Public Prosecutor stated that the appeal should be dismissed as unfounded, in view of the fact that the ‘... *ratio legis* of Article 31 of the EBF lies in the introduction of a measure intended to incentivise the capital market, on the Portuguese stock exchange’.
- 1.5. [...] [procedure]
- 1.6. In view of the claims submitted in the appeal, it is necessary to determine whether, contrary to the ruling in the judgment under appeal, for the purposes of IRC it must be possible under Article 31 of the EBF to deduct dividends received on foreign shares from net income for 1999 and 2000.

**[Or. 4]** 7. It is also necessary to ascertain whether, under Article 31 of the EBF, there has been a breach of the principle of free movement of capital (Article 63 et seq. of the Treaty on the Functioning of the European Union (TFEU)), as submitted in the appeal.

Since breach of the principle of free movement of capital may give rise to an obligation to make a reference for a preliminary ruling pursuant to Article 267 TFEU (unless it is considered that the Court of Justice of the European Union (CJEU) has already given a clear ruling on this point), the court must examine the issue of its own motion, [...]. [procedural rules]

With regard to breach of the principle of capital export neutrality, this must be examined in the light of the obligations on the State established in Article 81(f) of the Constituição da República Portuguesa (Constitution of the Portuguese Republic).

[...]

[...] **[Background] facts**

The judgment under appeal found the following facts proven:

- 1) The appellant was the subject of an inspection [...] by the Serviços de Inspeção Tributária da Direção de Finanças do Porto (Tax Inspectorate of the Porto Finance Directorate) in respect of the financial years 1999 and 2000, which resulted in a correction of income for tax purposes for the years in question amounting to EUR 5 055.88 (1999) and EUR 15 816.85 (2000), making a total of EUR 20 872.73 [...];
- 2) Amongst other things, the corrections consisted in disallowing provisions of EUR 1 253.35 and EUR 27 050.71 made for bad debts (for 1999 and 2000 respectively) and in corrections to the taxable amount amounting to EUR 10 196.54 (for 1999) and EUR 13 406.62 (for 2000) [...];

**[Or. 5]**

- 3) The grounds for the corrections are set out in the tax inspection report [...] which, specifically, includes the following:

[...]

*'The inspection of accounting and tax aspects conducted in accordance with current procedures at a level of detail considered appropriate to the circumstances has given rise to the following corrections:*

**III-1 – Financial year 1999**

**III-1.1 – Corrections to the taxable amount – IRC**

**III-1.1.1 – Tax benefits**

*EUR 10 778.46 (PTE 2 160 888.15), amount of correction in favour of the Tax Authority, as set out below: [...]*

- *EUR 10 196.54 (PTE 2 044 222.75) – The examination of the taxable amount used as the basis for calculating income that benefits from the deduction for shares admitted to trading on stock exchanges pursuant to Article 31 of the EBF shows that the taxable person included the gross dividends received on both Portuguese and foreign shares.*

*However, having regard to the concept of tax benefit, and given that the benefit in question was conceived in order to stimulate the national stock exchange, it should only have included dividends received on shares admitted to trading on the national stock exchange, and therefore the amount has been corrected in accordance with the aforementioned statutory provision[.]*

[...] [Or. 6] [...]

[...] [Or. 7] [...] [facts that are not relevant to the request for a preliminary ruling]

**III-2 – Financial year 2000**

**III-2.1 – Corrections to the taxable amount – IRC**

**III-2.1.1 – Tax benefits**

*The examination of the taxable amount used as the basis for calculating income that benefits from the deduction for shares admitted to trading on stock exchanges pursuant to Article 31 of the EBF shows that the taxable person included the gross dividends received on both Portuguese and foreign shares.*

*However, having regard to the concept of tax benefit, and given that the benefit in question was conceived in order to stimulate the national stock exchange, it should only have included dividends received on shares admitted to trading on the national stock exchange, and therefore a correction has been made in the sum of*

*EUR 13 406.62 [...], in accordance with the aforementioned statutory provision.'*  
[...]

[...]

**[Or. 8]** [...]

[...] **[Or. 9]** [...] [facts that are not relevant to the request for a preliminary ruling]

**[Or. 10]**

- 4) By decision [...] [,] the appellant was informed of the tax inspection report [...];
- 5) The Tax Authority then issued the IRC assessment[s] [...] for financial years 1999 and 2000, **which showed that a sum of EUR 92 107.83 was payable in tax** [...].
- 6) On 25 September 2003 the appellant lodged an internal administrative appeal against the tax assessments referred to in paragraph 5 [...];
- 7) The present appeal on a point of law was lodged on 21 June 2004 [...].

[...]

[...] **Points of law:**

The judgment under appeal ruled that, with regard to points III-1.1.1 and III-2.1.1 of the tax inspection report [...], the tax benefit established in Article 31 of the EBF should be applied to dividends received on shares admitted to trading on national stock exchanges, but not on those admitted to trading on stock exchanges of other countries of the European Union.

The aforementioned provision is worded as follows:

*'For the purposes of IRS [personal income tax] or IRC, only 50% of the dividends received on shares admitted to trading on stock markets shall be taken into account.'*

In support of the reasoning that was followed, it was argued that the objective of the provision in question was to stimulate or develop the stock exchange, that is to say, there was a significant public interest, specifically an economic interest, which was deemed to outweigh **[Or. 11]** the tax objective, and that public interest should be pursued under the enabling law and pursuant to Article 2(1) of the EBF.

This latter provision provides as follows:

– *'Tax benefits are exceptional measures adopted in order to protect non-fiscal public interests that outweigh the fiscal public interests which thus cannot be achieved.'*

The above reasoning was also based on a logical approach (Article 9(3) of the Civil Code) which reasoned that, since the objective of Article 31 of the EBF was to develop the national stock exchange, it makes no sense to apply the same measure to dividends on shares in companies listed on the market of other countries of the European Union.

The appellant argues that the wording of the aforementioned Article 15 of the EBF makes no such distinction and, above all, that the distinction that has been made is contrary to EU law since, in its opinion, there is a clear breach of the principle of free movement of capital — established in Article 63 TFEU et seq. — and of the principle of capital export neutrality.

The main conclusion to be drawn from the principles of interpretation that apply in the present case is that the guiding principle must be the unity of the legal system — Article 11(1) of the Lei Geral Tributária (General Tax Law) and Article 9(1) of the Civil Code — which makes the interpretation of the tax benefit in question subject to the outcome obtained by applying the principle and the rules relevant to the case.

In that regard, the tax treatment of dividends on shares admitted to trading on national stock exchanges and those of other countries of the European Union could be considered to interfere with the free movement of capital referred to in Article 63 TFEU and following (formerly Article 56 and following of the Treaty establishing the European Community (TEC)), relied on in connection with this principle.

**[Or. 12]** With regard to the free movement of capital, it is expressly stated that ‘all restrictions shall be prohibited’ (Article 63 [TFEU]).

There are exceptions to this provision, including those provided for in the ‘relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested’ and also other exceptions that include ‘measures which are justified on grounds of public policy’ – Article 65(1)(a) and (b) TFEU (formerly Article 58 TEC).

The application of the exception is also conditional on there being no ‘arbitrary discrimination’ and no ‘disguised restriction on the free movement of capital’, requirements which apply to the situations provided for in Article 65(1)(a) and (b) by virtue of Article 65(3).

[...] [reference to national case-law]

As noted by [João Sérgio Ribeiro] on page 56 [of *Direito Fiscal da União Europeia. Tributação Direta*, 2nd ed. Almedina, 2019], ‘the Court of Justice has held that movements of capital within the meaning of Article 63 TFEU include in particular “direct” investments, namely investments in the form of participation in an undertaking through the holding of shares which confers the possibility of

effectively participating in its management and control, and “portfolio” investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking’, as established in the judgment of 8 July 2010, *Commission v Portugal*, C-171/08, paragraph 49 and the case-law cited.

**[Or. 13]** Moreover, a search undertaken at [www.curia.europa.eu/juris/](http://www.curia.europa.eu/juris/) failed to uncover any previous ruling in the case-law of the Court of Justice of the European Union on breach of the principles of free movement of capital or capital export neutrality in the circumstances contemplated in Article 31 of the EBF and in accordance with the reasoning followed by the judgment under appeal now under consideration, that is to say, as a means of restricting the 50% deduction for IRC purposes solely to dividends received from shares quoted on national stock exchanges, thus excluding net dividends obtained on other stock exchanges in the countries of the European Union.

Finally, having regard to the principles of the primacy of [EU] law and compatible interpretation, from which it can be seen that a reference for a preliminary ruling is an essential instrument for ensuring the uniform interpretation and application of EU law in all Member States, as well as the coherence of the European Union’s system of judicial protection and the principle of effective legal protection for the rights of individuals, it is considered helpful and necessary to ask the Court of Justice of the European Union to rule on the following question referred to it pursuant to Article 267 TFEU:

**Does the fact that, for the purposes of calculating the amount of the imposto sobre [o rendimento] [d]as pessoas coletivas (Corporation Tax; IRC) due from the appellant in respect of financial years 1999 and 2000, Articles 31 and 2 of the Estatuto dos Benefícios Fiscais (Statute governing Tax Benefits) permit a 50% deduction in dividends obtained on national (Portuguese) stock exchanges but exclude dividends obtained on the stock exchanges of other countries of the European Union from benefiting from the deduction, constitute a breach of the free movement of capital under Article 63 TFEU and following?**

[...] [procedure]

[...] **Decision:**

The Judges of the Supremo Tribunal Administrativo (Secção de Contencioso Tributário) (Supreme Administrative Court (Tax Division)) decide to refer the above question to the Court of Justice of the [Or. 14] European Union for a preliminary ruling and therefore to stay the proceedings.

[...] [subsequent procedure]

[...] [reference to an exemption from costs]

1 July 2020

[...] [signatures]

WORKING DOCUMENT