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Judgment of the Court in Case C-9/02

*Hughes de Lasteyrie du Saillant / Ministère de l'Économie, des Finances et de l'Industrie*

**FRENCH LEGISLATION TAXING UNREALISED INCREASES IN VALUE  
SIMPLY BECAUSE THE TAXPAYER HAS MOVED TO ANOTHER  
MEMBER STATE INFRINGES THE FREEDOM OF ESTABLISHMENT**

*Such legislation constitutes a dissuasive difference in treatment that cannot be justified by imperative reasons of public policy, because they are disproportionate in relation to the objective of preventing tax avoidance*

When Mr de Lasteyrie du Saillant left France in September 1998 to go and work in Belgium, he held, or had held at some stage during the five years before his leaving France, either directly or indirectly through members of his family, securities conferring entitlement to more than 25% of the earnings of a company established in France and subject to corporation tax. The market value of those securities being then higher than the price at which they were acquired, Mr de Lasteyrie was subject to immediate taxation on the unrealised (or latent) increase in value of the securities held, in accordance with the provisions of the Code Général des Impôts (General Tax Code) applicable to taxpayers moving their residence for tax purposes outside France.

Although provision is made for suspension of payment, that is not automatic and is subject to strict conditions, namely the setting up of guarantees and designation of a representative in France.

Taking the view that those provisions both created “inequality of treatment” because they penalised only taxpayers wishing to leave France and were disproportionate to their declared aim of preventing tax avoidance, Mr de Lasteyrie asked the Conseil d’Etat to annul the decree instituting them for excess of powers.

The Conseil d'Etat decided to refer a question to the Court of Justice as to whether French legislation which, in order to avert the risk of tax avoidance, established a mechanism for taxing increases in value where tax residence was transferred abroad, was compatible with the principle of freedom of establishment under the EC Treaty.

**The French measure taxing latent increases in value where tax residence is transferred abroad is liable to hinder the freedom of establishment.**

The Court began by underlining the fact that freedom of establishment is one of the fundamental provisions of Community law and recalled that, according to well-established case-law, observance of that freedom precludes a Member State of origin from hindering the establishment of one of its nationals in another Member State, including by tax measures. In this case, **the Court took the view that the provision in question was likely to restrict the exercise of that right**, having at the very least **a dissuasive effect on taxpayers wishing to establish themselves in another Member State**, because they are subjected, by the mere fact of transferring their tax residence outside France, to tax on a form of income that has not yet been realised, and thus to disadvantageous treatment by comparison with a person maintaining his residence in France.

Moreover, the possible suspension of payment, made subject, for example, to conditions that guarantees must be lodged, constitutes a restrictive effect in that the taxpayer is deprived of enjoyment of the assets given as a guarantee.

Such a hindrance can be allowed only if it pursues a legitimate purpose that is compatible with the Treaty and is justified by imperative reasons in the public interest.

**This tax measure, inferring a general intention of tax evasion from the mere transfer of tax residence to another Member State, cannot be justified by imperative reasons in the public interest: it is disproportionate in relation to the objective sought.**

This provision is aimed **generally** at any situation in which a taxpayer with substantial holdings in a company subject to corporation tax transfers his residence outside France for any reason at all, and thus presumes an intention to circumvent French tax law on the part of any taxpayer who transfers his residence outside France. Moreover, **the Court considers that the objective envisaged – to prevent a taxpayer eluding payment of the tax on increased value due in France – may be attained by measures that are less coercive or less restrictive of the freedom of establishment**, and which relate specifically to the risk of such a temporary transfer, for example by taxing a taxpayer who, after a short stay abroad, returns to France once his increased values have been realised.

*Unofficial document, for media use only, which does not bind the Court of Justice.*

*Available languages: English, French, German.*

*The full text of the judgment can be found on the internet ([www.curia.eu.int](http://www.curia.eu.int)).*

*In principle it will be available from midday CET on the day of delivery.*

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