

Newsalert

EU Direct Tax Group

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OPINION IN CASE C-470/04 (N.): DUTCH RULES ON THE EMIGRATION OF SUBSTANTIAL SHAREHOLDERS UNDER CONDITIONS IN ACCORDANCE WITH EU-LAW

Mr N. left the Netherlands on 22 January 1997 in order to settle in the UK. As from 2002, Mr N. exploits in the UK a farm with an apple tree orchard.

As at the date of emigration, Mr N. held 100% of the shares in three Dutch BV's (limited liability companies), as from the date mentioned tax residents of the Dutch Antilles. For Dutch personal income tax purposes, these shares, qualified as a substantial shareholding, were deemed to be disposed of as a result of his emigration. Dutch personal income tax was due over the market value of the shares minus their acquisition price. Based on Article 25(6) of the Dutch Law on the Collection of State Taxes 1990 (Invorderingswet 1990), Mr N. applied for a suspension of payment of the income tax due for a period of ten years. The request for a suspension of payment was granted conditional upon Mr N. setting up guarantees sufficient to ensure recovery of the tax. To be in accordance with this condition, Mr N. granted a pledge in favour of the Dutch tax authorities. Based on the judgement of the ECJ in *De Lasteyrie du Saillant* (C-9/02) the Dutch tax authorities informed Mr N. the pledge could be considered released.

Mr N. first raised an objection against the tax assessment on the deemed disposal of the substantial shareholding at the Dutch tax authorities and then brought an appeal before *Gerechtshof Arnhem* (Regional Court of Appeal of Arnhem) arguing that the levy of taxes as a result of the deemed disposal of the shares due to his emigration within the EU, is in breach of EU law. *Gerechtshof Arnhem* decided to stay proceedings and requested the European Court of Justice for a ruling. The court asked whether a resident of a Member State who establishes himself in another Member State can rely on the application of Article 18 EC, solely on the ground that a tax assessment linked with his departure entails an obstacle to that departure. Subsequently, the court asked whether Article 43 EC is applicable in the situation in which it is not clear or plausible from the outset that an economic activity as referred to in that article will be performed. The third and fourth question relate to the possible incompatibility of the tax assessment relating to the deemed disposal of the shares with the Articles 18 and 43 EC and the consequences of the retroactively release of the security provided. In the fifth question, the court addresses the possible justification, might there be a breach of EU law.

On 30 March 2006 the Advocate General Kokott delivered her opinion in this case. With respect to the first question of *Gerechtshof Arnhem*, she is of the view that it is only necessary to answer the question with regard to Article 18 EC if the freedom of establishment is not applicable. Regarding the relationship between Article 18 EC and Article 43 EC the AG states that Article 43 EC is not applicable for the sole reason that the moving resident is owning shares in a company. Furthermore, the AG addresses the question whether the economic activities established years after the transfer of residence give the resident the right to rely on Article 43 EC. According to the AG this question can be answered in the affirmative if, at the point in time at which is relied on this fundamental freedom, there is specific evidence that it is foreseeable that appropriate economic activity in the other Member State will be taken up. As long as the disadvantageous measure makes it more difficult to perform activities under the scope of the freedom of establishment, the resident can rely on Article 43 EC.

Following her answer on the second question, the applicability of Article 43 in the current situation depends on the presence of 'specific evidence'. If, based on these facts, Article 43 EC is not applicable, Article 18 becomes relevant again. The AG is of the view that a resident may rely against his home State on Article 18 EC if the serving of a tax assessment linked with his departure subjects him to a disadvantage compared to domestic taxpayers who have not exercised their right to free movement.

With regard to the possible infringement of the Articles 18 and 43 EC, the AG argues that these articles do not preclude a provision of a Member State such as under discussion provided the following conditions are met: (i) the assessed tax is deferred until the shares are actually disposed of without any further conditions being met, and (ii) it is ensured that the tax in fact levied on a disposal following emigration is not higher than the tax which would have been levied on disposal within the territory assuming all other circumstances to be the same. Currently, the Dutch rules are in line with these conditions.

On the remaining question regarding the consequences of the release of the security, the AG is of the view that it can be required that a Member State compensates the taxpayer for costs related to the security provided. However, only to the extent that national law provides for such claims. In addition, the AG refers to the possibilities to claim compensation for damages a taxpayer suffered from a Member States' infringement of EU law. This liability arises where three conditions are satisfied: (i) the rule of law infringed must be intended to confer rights on individuals, (ii) the breach must be sufficiently serious and (iii) there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties. Given that the situation at hand was unclear until the judgement in *De Lasteyrie du Saillant*, the AG is of the opinion that the breach in the current situation is not sufficiently serious.

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