



Liechtenstein and Article 164 C of the French Tax Code

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Liechtenstein is not Monaco when it comes to principles of non discrimination and freedom of capital movement in respect of Article 164 C of the French Tax Code (FTC).

In a decision of 24 June 2010, the Paris Court of Appeal ruled on the compatibility of Article 164 C of FTC with non discrimination provisions contained in international Double Tax Treaties (DTT) and the principles of freedom of capital movement and non discrimination under European law.

This decision does not concern residents of Monaco but of Liechtenstein. The Court's response can be compared with but is distinct from the singular situation enjoyed by certain foreign residents in Monaco regarding this tax on dwellings available in France.

The Facts

An Italian citizen, Mrs R, resident in Liechtenstein owned a villa in France (Cap d'Ail, a small town just next door to Monaco). In accordance with Article 164 C of the FTC, the French tax authorities charged Mrs R to income tax on a deemed income equal to three times the rental value of her villa, in respect of the tax years 1996 to 1998, being the years concerned by a tax reassessment.

Mrs R contested this tax before the French Courts on two separate grounds:

- The non-discrimination clause contained in the DTT between France and Italy of 5 October 1989;

- The principles of European law of freedom of capital movement and of non discrimination.

The Court of Appeal rejected these arguments and upheld the charge to back tax made by the French tax authorities.

The Court's decision

Concerning the non-discrimination clause contained in the DTT between France and Italy

The Court initially confirmed that Mrs R could seek to benefit from the non discrimination clause contained in the DTT even though she was not resident in France nor in Italy but in a third country ie Liechtenstein. Certain non discrimination clauses can only benefit nationals resident in one of the Contracting States and do not extend to nationals resident in a third country. The other non discrimination clauses in other DTTs can extend to nationals wherever they reside. This is why, in Monaco, there are "good" and "bad" DTTs in this context. The DTT between France and Italy is a "good" DTT in this respect.

However, having established this principle, discrimination still remains to be established.

For this purpose, Mrs R had to demonstrate that she would have been more favourably treated had she been of French nationality, by comparing the situation of a foreign taxpayer resident in Liechtenstein with that of a French national resident in the same country.

The argument advanced by Mrs R was that she was less favourably treated than a French national residing in Monaco. As was to be expected, this was not accepted by the Court because, as already seen, the comparison has to be made with French nationals residing in Liechtenstein (and not in another country such as Monaco).

Vis-à-vis Article 164 C of FTC, French nationals residing in Liechtenstein are not necessarily treated more favourably than other foreign nationals residing there. French nationals residing in Liechtenstein might be liable to French income tax under Article 164 C of FTC tax unless they can prove that they are subject to tax in Liechtenstein which is not less than two thirds of the tax they would have paid in France (had they been resident there).

The Court considered that the non discrimination clause within the France/Italy DTT entitled Mrs R to this exemption. However, Mrs R did not take advantage of this, presumably because she was unable to justify that she was sufficiently taxed in Liechtenstein.

Conversely, if Mrs R had been resident in Monaco, she could have advanced the Bisso case ruling to avoid exposure to tax under Article 164 C.

Her situation would then have been compared to that of a French national who was a non-privileged resident in Monaco and in this situation the Court would have concluded that they were treated differently and that the tax regime applied to her was less favourable.

French nationals and foreigners living in Monaco are indeed subject to different tax treatment: the former are not subject to Article 164 C because, from a French tax viewpoint, they are treated as French tax residents, while the latter, who are by definition non-French tax residents, fall within the scope of this taxation. Although not obvious, there is indeed a different tax treatment operating.

European law principles

In her second argument, Mrs R considered that Article 164 C constituted a hindrance to the freedom of capital movement and also discrimination.

The Court confirmed that Mrs R could invoke the principle of freedom of capital movement (even though she did not reside within a EU country) and confirmed that investment in French real estate constituted capital movement.

The Court recognised that Article 164 C indeed created an additional tax on non French tax residents which might constitute an infringement of the principle of freedom of capital movement. By virtue of Article 164 C, non French resident owners of French real estate are charged to higher tax than that applicable to French resident owners.

However, in order to establish that there is such an infringement, there must be no objective difference of situations.


The Court examined whether the situation of residents and non residents with regard to Article 164 C was objectively different or comparable. If comparable, the tax regime must be identical, but where there is a difference of situation, the tax regime could be different.

The Court considered that Mrs R's situation was not objectively comparable to that of a resident of France for the following reasons: the absence of a DTT between France and Liechtenstein and, in particular, the absence of an administrative assistance provision linking these two countries. In this context, the Court considered that the French tax authorities were not in a position to appreciate the real tax circumstances of the taxpayer whilst they were in such a position with regard to residents of France.

It should be noted that an agreement between France and Liechtenstein regarding the Exchange of Tax Information was signed on 22 September 2009 but is still not in force.

Mme R's situation was not, therefore, comparable to that of a French tax resident for the years in question. The Court concluded that the difference in treatment established by Article 164 C was not discriminatory. Discrimination consists of treating differently taxpayers whose situations are identical.

Had Mme R been resident in Monaco, and had she invoked European law principles, her claim could have been upheld following the four decisions rendered by the Marseilles Court of Appeal in 2007 and 2008. In these decisions the Court considered that the difference in tax treatment between French nationals and foreigners under Article 164 C, based purely on nationality, constituted discrimination, and was a restriction on the freedom of capital movement between EU countries and non EU countries.



Here again the singular situation of French nationals residing in Monaco might enable discrimination to be characterised. We can nevertheless ask ourselves what the decision of the Paris Court of Appeal would have been if, at the time of the facts (the period covered was 1996 to 1998), the agreement between France and Liechtenstein regarding the Exchange of Tax Information which was signed on 22 September 2009 had been in force.

This only goes to show that timing is everything and that tax in respect of Art 164 C can be avoided or become due as a consequence of a mix of nationality, place of residence, existence of a "good" or "bad" DTT, or relevance of the Treaty of Rome.

For further information, please contact:

William Easun
E/ william.easun@lg-legal.com
Frederic Mege
E/ frederic.mege@lg-legal.com

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