

<b>Subject-matter concerned</b>	<p>X1) non-discrimination on grounds of nationality</p> <p><input checked="" type="checkbox"/> 2) freedom of movement and residence: Art. 5,7,8,14,15, 27 and 28 Directive 2004/38</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p> <p><input type="checkbox"/> 5) the right to petition</p>
<b>Decision date</b>	30.06.2011
<b>Deciding body (in original language)</b>	Tribunal Superior de Justicia en Valencia. Sala de lo Contencioso.
<b>Deciding body (in English)</b>	High Court of Justice (Administrative Chamber) Headquarter Court: Valencia
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	<p>Appeal No. 3916/2008</p> <p>Decision No. 796/11</p> <p>ECLI: ES: TSJCV:2011:5906</p> <p>Reporting Judge: Juan Luis Lorente Almiñana</p>
<b>Parties</b>	<i>Eutimio and Marcelina</i> (alias) v. Spanish Tax Administration Agency
<b>Web link to the decision (if available)</b>	<p><a href="http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&amp;databasematch=AN&amp;reference=6179416&amp;links=%223916%2F2008%22%20%22JUAN%20LUIS%20LORENTE%20ALMI%C3%91ANA%22&amp;optimize=20111115&amp;publicinterface=true">http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&amp;databasematch=AN&amp;reference=6179416&amp;links=%223916%2F2008%22%20%22JUAN%20LUIS%20LORENTE%20ALMI%C3%91ANA%22&amp;optimize=20111115&amp;publicinterface=true</a></p>
<b>Legal basis in national law of the rights under dispute</b>	Royal Decree 5/2004, of 5 March on non-residents tax (Real Decreto Legislativo 5/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre la Renta de no Residentes)
<b>Key facts of the case</b> (max. 500 chars)	<p>Both actors, British citizens, sold a property after more than a year in ownership. They earned €8,643.53 with this operation and should pay income tax as non-resident European citizens in Spain. This increase of their patrimony in Spanish territory converted them into passive taxation subjects, As a consequence of this, they must pay the tax in Spain only on the acquisition of assets and rights as non resident taxpayers and under regulation of Royal Decree 5/2004, of 5 March on non-residents tax. Under this norm, the claimant should pay 35 % tax, unlike the 15 % tax corresponding to the European Union citizen residents in Spain.</p> <p>The actors consider they had been discriminated against on grounds of their nationality, contradicting the European Union Treaty.</p>

<b>Main reasoning / argumentation</b> (max. 500 chars)	<p>The Court considers that the different tax rates for the same situations could be contrary to the European Union Treaty, special to Articles 12 and 18, which forbid the discrimination on grounds of nationality and grant the right to move and reside freely within the territory of the EU Member States, because it could discourage to use the right to move and reside freely granted by the Directive.</p> <p>It is suggested by the State Attorney from the previous case that there is no discrimination as the ECJ has not made pronouncements stating any contradiction between Article 25.1.f) of Royal Decree 5/2004 and the European Union Law. But the Spanish Court has considered the primacy of the European Union Law and finds there is discrimination, it not being necessary to propose a preliminary ruling, as this is a “clear act”. Nevertheless, other preliminary rulings have already been proposed to determine the financial situation of European citizens in other countries, in cases Asscher (C-107/94) and Gerritse, confirming the illegality of this discrimination. Following the previous approach, and according to the primacy of the European Law, this law should be revoked, ordering the difference of amount to be given back to the actors. This is also in line with the Spanish Constitutional Court doctrine.</p>
<b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)	<p>The primacy effect of the European law has been invoked by the Spanish Court in order to avoid discrimination on grounds of nationality that the Spanish law permitted.</p> <p>The theory of the “clear acts” was also clarified, declaring that it was not necessary to state a preliminary ruling against a national law that is apparently contrary to the European law, if the primacy effect is clear enough in the particular case.</p>
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)	<p>The resolution is revoked and the Administration had to pay back all the additional money the claimants had paid, according to the tax rates, and the legal interests.</p>
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<p>“En consecuencia, y siguiendo la doctrina del Tribunal Constitucional (sentencias de 14-2-1991 y 22-3-1992), partiendo de la primacía del derecho comunitario y a la vista de la discriminación que las mencionadas normas fiscales implican para los actores, con abierta contravención del derecho comunitario, esta Sala deberá dejarlas inaplicadas, más teniendo en cuenta que ya han sido derogadas por la Ley 35/2006 con efectos desde el 1-1-2007, lo que debe suponer la estimación del recurso contencioso-administrativo, reconociendo el derecho de los demandantes a la rectificación pretendida, con devolución de lo indebidamente pagado (11.678,23 euros), con sus intereses desde la fecha de la reclamación (22-7-2007) hasta su completo abono.” <b>Fundamentos de Derecho- Segundo</b></p> <p>La Comisión considera que la diferencia de trato fiscal de las dos categorías de contribuyentes, en la medida que genera una carga fiscal superior para las personas no residentes en situaciones objetivamente similares a las de los residentes, constituye una <b>discriminación</b> indirecta por razón de <b>nacionalidad</b> prohibida por el Tratado. La carga fiscal superior que soportan los no residentes puede disuadir a las personas de aceptar un trabajo o comprar propiedad inmobiliaria en España al mismo tiempo que siguen siendo residentes fiscales en otro Estado miembro. <b>Fundamentos de Derecho- Tercero-</b></p> <p>"Consequently, and following the doctrine of the Constitutional Court (judgments of 14 February 1991 and 22 March 1992), starting from the primacy of Community law and in view of the discrimination that the aforementioned fiscal rules imply for the actors, in open contravention</p>

	<p>of Community law, this Chamber must declare them to be inapplicable, especially when taking into account that they have already been repealed by Law 35/2006 with effect from 17 January 2007, showing respect for the contentious-administrative appeal, and recognising the right of the claimants to the rectification sought, with repayment of the unduly paid amount (€11,678.23), including interest accruing from the date of the claim (22 July 2007) up to their full payment. " – Second Legal Reasoning</p> <p>The Commission considers that the difference in tax treatment of the two categories of taxpayer, since it creates a higher tax burden for non-residents in situations which are objectively similar to those of residents, constitutes indirect discrimination on the grounds of nationality prohibited by the treaty. The higher tax burden borne by non-residents may discourage people from taking up work or buying property in Spain while still being tax residents in another Member State. Third Legal Reasoning</p>
<p><b>Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.</b></p>	<p>No</p>