BRISAL AGO: WHAT IS THE RESTRICTION AND WHEN IS THE DEDUCTION OF DIRECTLY LINKED EXPENDITURE REQUIRED BY EU LAW?

Grahame Turner[1]

Introduction

Advocate General Kokott delivered her opinion in the matter of *Brisal*[2] on 17 March 2016[3]. The matter under dispute is tax withheld from interest payments made by a Portuguese borrower (Brisal) to an Irish lending bank (KBC Finance Ireland) in the years 2005 to 2007. Under Portuguese national law, modified by provisions in the Portuguese/Irish Double Tax Convention, tax is to be withheld at the rate of 15% calculated on the gross payment of interest made. These same Portuguese provisions have been reviewed previously by the Court in proceedings taken by the European Commission against Portugal under Article 226EC.[4]

The purpose of this article is not to discuss the Advocate General's opinion in general but to consider two of the points that she discussed, which may be of general interest.

The first of these is whether, indeed:

> "…the only thing relevant to the question of whether a fundamental freedom is infringed is the ultimate result of the tax burden."[5]

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2 CJEU 17 March 2016 C-18/15 *Brisal — Auto Estradas do Litoral SA, KBC Finance Ireland v Fazenda Pública* ("*Brisal AG*") EU:C:2016:182

3 Judgment by the Court was pending at the time that this article was written.

4 CJEU 17 June 2010 C-105/08 *European Commission v Portuguese Republic* ("*Commission v Portugal (interest withholding tax)*") EU:C:2010:345

5 *Brisal AG* [2016] para 46

The Advocate General was considering what she appears to have felt are conflicting approaches taken by the Court in two cases, *Hirvonem*[6] and *Gerritse*[7], in its examination of national tax provisions to determine whether they infringed the Treaty. The tax burden imposed by any charging provisions will be determined by the manner in which the income or profit is assessed and, in particular, whether any deductions are allowed; and that burden will be determined also by the rate(s) at which tax is charged on the assessed income or profits. The Advocate General rejected the notion that, in principle, the only matter of relevance to consider is the tax burden borne, the final result, without having regard, separately, to the manner in which it is arrived at.[8]

The second of the points to be discussed in this article is the vexed question of what principle of EU law requires the deduction of directly linked expenses and what alleged EU rule determines the components to be included.

What is the Restriction: the additional tax burden; or the discriminatory mechanism for calculating the income or profit and/or a discriminatory rate of tax applied?

Preliminary comments

The relevant case law referred to by the Advocate General concerns both the *internal market* freedoms of movement and the rights of free movement guaranteed by what is now Article 21 TFEU[9].

Whilst *Brisal* and *Gerritse* both concern the freedom to provide services guaranteed by Article 56 TFEU, *Hirvonen* concerned an infringement of Article 21 TFEU, the general freedom of an EU citizen to move to another Member State otherwise than for the purpose of conducting an economic activity. The review of cases is further broadened beyond Article 56 TFEU as, in *Hirvonen*, the Court referred to its judgment in *Gielen*[10], which concerned Article 49 TFEU, the

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6 CJEU 19 November 2015 C-632/13 *Hirvonen* ("*Hirvonen*") EU:C:2015:765

7 CJEU 12 June 2003 C-234/01 *Arnoud Gerritse and Finanzamt Neukölln-Nord* ("*Gerritse*") EU:C:2003:340

8 *Brisal AG* [2016] para 47

9 In the course of my general discussion, I shall refer to the Treaty provisions as now re-enacted in the TFEU,

10 CJEU 18 March 2010 C-440/08 *F. Gielen v Staatssecretaris van Financiën* ("*Gielen*") EU:C:2010:148

freedom of establishment, and to *Wallentin*[11], which concerned Article 45 TFEU, the free movement of workers. In the case law review following, reference will be made to two cases in which the national provisions engaged Article 63 TFEU, the free movement of capital.

Whilst it is the case that "*…those provisions were designed to regulate different situations and they each have their own field of application*."[12], it may be concluded that obstructions of the exercise of the internal market freedoms of movement and of Article 21 TFEU may be commonly described.

The two principal forms of infringement of the freedoms of movement might be termed:

- Obstructing or deterring a person from exercising a freedom of movement: this might be by either the state of origin or the host state; and
- Discriminatory treatment by the host state that, in relation to establishment and services, may result in a competitive disadvantage, or may constitute:

> "…a restriction on the freedoms of movement…in that [it has] a dissuasive effect…on persons [wishing to exercise such freedoms][13]

The dissuasive effect that the Court was referring to above was explained by it in the following terms:

> "…by refusing to grant the tax advantage at issue to those purchasing a property in Hungary for use as their principal residence when they have sold or are about to sell their previous principal residence situated in another Member State, that legislation results in a heavier tax burden for those persons than for those benefiting from that advantage."[14]

Accordingly, if the host state's national provisions impose a financial cost on a foreigner exercising a freedom of movement that exceeds that that would be incurred by a person resident in that state, regardless of whether that additional financial burden results in the foreigner suffering a competitive disadvantage, which would clearly be contrary to the very notion of an internal market, the

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11 CJEU 1 July 2004 C-169/03 *Florian W. Wallentin v Riksskatteverket* ("*Wallentin*") EU:C:2004:403

12 CJEU 3 October 2006 C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* ("*Fidium Finanz*") EU:C:2006:631 para 28

13 CJEU 1 December 2011 C-253/09 *European Commission v Republic of Hungary* ("*Commission v Hungary (property duty)*") EU:C:2011:795 para 68 adapted and emphasis added

14 *Commission v Hungary (property duty)* [2011] para 66 emphasis added

national provisions will be regarded as deterring a foreigner from exercising the freedom of movement. An infringement of the Treaty will occur.

On the basis of this analysis, it is the additional financial cost that gives rise to the infringement not the calculation mechanisms that give rise to it, save that the additional cost must be incurred only because of the exercise of the freedom.

Before moving on and reviewing example case law it is pertinent to point out that direct taxation is an area that has been harmonised only to a limited extent and, accordingly, except as regards the few matters that have been subject to harmonisation and the general prohibition of discrimination on the ground of nationality, the Member States have the retained competence to structure their direct tax systems as they wish.

The constraint on the Member States to exercise that competence consistently with EU law requires any conflict of national law with EU law to be justified and proportionate.

It is contended, however, that EU law has nothing to say about whether a source of income should or should not be taxed with or without regard to the cost of producing it. EU law has still less to say about what costs might be regarded as 'directly linked' to the income in question. Those matters are to be determined by the Member States and, if different views are taken by different states resulting in a less favourable situation to a person exercising a freedom of movement:

> "…the EC Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to circumstance."[15]

And:

> "…[the freedoms of movement] cannot be understood as meaning that a Member State is required to draw up its tax rules and, in particular, a notification obligation such as that at issue in the main proceedings on the basis of those in another Member State in order to ensure, in all circumstances, that any disparities arising from national rules are removed…"[16]

15 CJEU 15 July 2004 C-365/02 *Marie Lindfors* ("*Lindfors*") EU:C:2004:449 para 34

16 CJEU 14 April 2016 C-522/14 *Sparkasse Allgäu v Finanzamt Kempten* ("*Sparkasse Allgau*") EU:C:2016:253 para 31

Case law review

Two cases have been chosen for this review in addition to *Gerritse* and *Hirvonem*, the cases considered by the Advocate General.

In both cases chosen, the national law applied a discriminatory mechanism for calculating the taxable amount coupled with a compensatory, lower, tax rate. The national provisions in both cases engaged Article 63 TFEU but, as argued above, whilst the provisions in the Treaty may have their own fields of application, obstructions to the exercise of the freedoms of movement can be commonly defined.

Hollmann[17]: In this case, the non-resident taxpayer was charged Portuguese tax on the gain realised on a property located in the state at a rate of 25%. Had she been a Portuguese resident, Mrs Hollmann would have been charged tax on one half of the gain added as a top slice of her income. The highest rate of Portuguese income tax at the time was 42% and, consequently, the highest effective rate payable by a resident was 21%. Inevitably, the Court found there to be an infringement of Article 63 TFEU. Because of the formula applied, a non-resident would always suffer a higher tax burden whilst the rate of tax applied to the gains of non-residents exceeded 50% of the highest rate of income tax charged to residents.

Bouanich[18]: In brief, Mme Bouanich, a French resident, invested in a Swedish company and the dispute concerned the Swedish tax charged to Mme Bouanich when the company repurchased part of its share capital. A Swedish resident investor would have been charged tax at the rate of 30% on the gain realised whereas Mme Bouanich was charged tax at the rate of 15% on an a deemed dividend[19] in an amount equal to the excess of the proceeds received over the nominal value of the repurchased shares.

Whether or not Mme Bouanich, a non-resident, suffered a higher tax burden than a Swedish resident taxpayer depended upon whether the deemed distribution calculated by deducting the nominal value of the shares from the proceeds received was greater or less than twice the gain actually made calculated by deducting her acquisition cost from the proceeds received.

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17 CJEU 11 October 2007 C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública* ("*Hollmann*") EU:C:2007:600

18 CJEU 19 January 2006 C-265/04 *Margaretha Bouanich v Skatteverket* ("*Bouanich*") EU:C:2006:51

19 The repurchase of its share capital by a company (otherwise than by purchase of its shares through a stock market) at a price exceeding the issue price is defined as being a distribution under UK tax law also: see CTA 2010, ss.1000(1)B and 1025

The Court directed that it was for the national court to ascertain the facts and to determine:

> "…whether the fact that non-resident shareholders are permitted to deduct the nominal value and are liable to a maximum tax rate of 15% amounts to treatment that is no less favourable than that afforded to resident shareholders, who have the right to deduct the cost of acquisition and are taxed at a rate of 30%."[20]

Accordingly, the Court was looking at the tax burden rather than at the mechanism for calculating the taxable amount and, separately, the tax rate.

The cases considered by the Advocate General

Gerritse: The Court's judgment in this case appears to have formed the basis for the Advocate General's contention that: "*…refusing the deduction of operating costs directly linked to the taxed activity of a person subject to limited taxation in itself infringes the freedom to provide services*"[21]

Briefly, Mr Gerritse, a Dutch resident musician, provided services to a customer in Germany and the fee for those services was subjected to a withholding of German income tax at the rate of 25%. No deduction for his expenses representing about 16%[22] of the fee was allowed for the purpose of assessing that tax whereas a resident taxpayer would have been taxable under German rules on his fee income net of expenses. However, tax was levied at progressive rates on the income of German residents, another difference in treatment, although they qualified for a tax-free personal allowance.

The Court analysed the discriminatory method of calculating the income assessable separately from its review of the fixed rate of tax levied on the income of non-residents. It is clear from the judgment[23], however, that Mr Gerritse's principal complaint was that he was ineligible as a non-resident to claim a tax-free personal allowance. This is a different issue altogether because, whilst the refusal to grant to a non-resident a tax-free personal allowance will result in an increased tax burden, the Court had already held previously in *Schumacker*[24] that residents and

20 *Bouanich* [2006] para 55

21 *Brisal AG* [2016] para 48

22 Deduction of expenses was allowed if they exceed 50% of the income. *Gerritse* [2003] para 4

23 *Gerritse* [2003] para 30 and para 43 to 51

24 CJEU 14 February 1995 C-279/93 *Finanzamt Koln-Altstadt v Roland Schumacker* ("*Schumacker*") EU:C:1995:31 para 34

non-residents are not as a general rule in a comparable situation as regards deductions from their total income such as tax-free personal allowances.

It was only after concluding that Mr Gerritse was not in a situation comparable to a resident taxpayer as regards his claim for the grant of a tax-free personal allowance to set against his German income that the Court turned its attention to a comparison of the different levies of tax on residents and non-residents respectively.[25] The Commission, which had undertaken the necessary calculation, had concluded that the tax levied on Mr Gerritse as a non-resident at the fixed rate of 25% was marginally less than the tax that would have been levied on him taxed as a resident applying the progressive rates but disregarding the tax-free personal allowance.

Accordingly, it is contended that the Court had good reason to conduct separate analyses in *Gerritse*. There was the separate issue of comparability to resolve in order to respond to Mr Gerritse's claim to a tax-free personal allowance.

Under an Article 267 TFEU procedure, the Court will endeavour to answer the questions of the national court, which will relate to the national law under examination and the circumstances advised. Although general rules do emerge from the Court's rulings in such cases, there is no reason to suppose that the Court was seeking to establish a general rule such as that stated by the Advocate General. Having regard for the national law and circumstances of the case, it is clear that the non-resident tax rate applied to Mr Gerritse's income was not sufficiently lower than the rates applied to the income of residents to compensate for the over-assessment of his income. Indeed, having regard for the German rule permitting deduction of expenses incurred by non-residents and noting that non-residents could obtain no deduction for their expenses unless they exceeded 50% of the relevant income, to ensure that a non-resident would never be taxed more unfavourably, the tax rate would have to be reduced to just marginally more than 13%.

Hirvonen: the Advocate General appears to have rejected the Court's conclusion in paragraph 48 of that case, which was:

> "Accordingly, the refusal by national legislation...to grant non-resident taxpayers the possibility of particular deductions is irrelevant as regards any disregard of EU law by that legislation, provided that those taxpayers are not subject to an overall tax burden greater that that placed on resident taxpayers and persons in a similar situation to them whose circumstances are comparable to those of non-resident taxpayers."

25 *Gerritse* [2003] paras 53 & 54

Mrs Hirvonen, the non-resident in question, had an option under Swedish tax law to elect to be taxed on her Swedish source income (a pension) as a resident, in which case, she would be granted a tax-free personal allowance but would have been subject to the progressive rates of tax on the taxable balance of her income, but she chose instead to be taxed as a non-resident at the fixed rate on the whole of her income. The Court observed:

> "…Since she benefited from more advantageous taxation than that which would have been applied to her had she opted for the ordinary taxation regime, Ms Hirvonen cannot in addition claim a tax advantage which would have been granted to her under the ordinary taxation system."[26]

The Court's analysis, comparing the application of a fixed rate of tax to the income of non-residents to the application of the progressive rates applied to the income of residents, disregarding any deduction from total income such as a tax-free personal allowance, was the same as that applied in the separate tax rate issue examined in *Gerritse* as discussed above.

The Court in both cases considered the individual circumstances and the arithmetical result and concluded that the non-resident had not been treated *less favourably* by the national provisions.

The circumstances in *Gielen* can be distinguished as there was no suggestion in the question put to the Court in that case that a non-resident would be taxed at a compensatory lower rate. Mr Gielen, a non-resident carrying on a small self-employed business in the Netherlands, was ineligible for a special deduction from his profits because the time spent working in the Netherlands did not qualify him for that deduction although the aggregate time that he spent working there and in Germany, his home state, would have qualified him for that deduction had he been treated as being tax resident in the Netherlands because residents could count time spent engaged in business outside the state. In the absence of a compensatory lower tax rate applicable to the income of non-residents, the Dutch rule would inevitably lead to higher levels of taxation being levied on non-residents as compared with that levied on residents engaged in comparable business activities split between the Netherlands and another Member State.

What is the Restriction – concluding comments

The Treaty freedom of movement provisions are interpreted by the Court to provide that, *inter* alia, discriminatory treatment by a host state of an EU citizen who is exercising a freedom of movement will be regarded as causing him to be deterred from exercising the freedom if the result of the discriminatory treatment is

26 *Hirvonen* [2015] para 45

to cause him to be disadvantaged as compared to a resident of the host state in a comparable situation.

That is regardless of whether or not the EU citizen affected is actually deterred[27] from exercising the freedom.

Host state discriminatory provisions that cause a non-resident EU citizen to bear a heavier tax burden in respect of his income or profits derived from activities or investments in the host state or in respect of services provided to a resident of the host state are likely to deter the EU citizen from exercising the freedom in question. As such, they will be regarded as infringing the Treaty unless justified. That heavier tax burden may arise from a discriminatory mechanism for calculating the taxable amount or as a result of the application of a higher rate of taxation (or both). As direct taxation is an unharmonised area, the Member States are free to design their tax systems as they wish subject only to the *provisio* that the requirements of EU law are observed and respected. Accordingly, provided that a non-resident is treated *no less favourably* overall, a Member State may assess a form of income or profit on a non-resident in a different manner and may compensate for a resulting over-assessment of the taxable amount by applying a lower rate of tax to it. This was confirmed by the Court in *Bouanich* as discussed above.

In the case of ordinary business activities, because the gross profit margin will vary from one trader to the next, it is likely to be impractical to design a variable tax rate to compensate for over-assessment of profits. Accordingly, unless there is no risk that a non-resident could find himself bearing a tax burden higher than that of a resident in comparable circumstances if different rules are applied for computing taxable income and profits, the income and profits of non-residents would have to be assessed applying the same rules as those applied to the income and profits of a resident.

If the national rules assess residents on their net profit from a business activity, the same rule will have to be applied when assessing the taxable net profit earned by a non-resident. If the national rule applicable to residents does not permit deduction of certain "direct expenses" for tax purposes, non-residents can expect to suffer the same disallowance.

This conclusion is not the same as saying:

> "…according to the Court's consistent case-law since its judgment in *Gerritse*, it is in principle an infringement of freedom to provide services

27 CJEU 13 March 2007 C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* ("*Thin Cap GLO*") EU:C:2007:161 para 62

> if non-resident taxpayers (subject to limited taxation) — by contrast with resident taxpayers (subject to unlimited taxation) — are precluded from deducting expenses directly connected to the activity which is being taxed"[28]

The infringement arises from the higher tax burden imposed upon the non-resident. If the national rules have a statutory mechanism that ensures that non-residents do not suffer a higher tax burden, the Treaty requirement should be satisfied.

What principle of EU law requires the deduction of directly linked expenses and what rule determines the components to be included

It is not intended to discuss the Advocate General's analysis in detail but she does appear to regard the identification of expenses incurred in the production of income that are to be regarded as deductible from that income for tax purposes as being a matter of EU law:

> "…according to the definition developed in the case-law, every expense which is necessary in order to carry out the taxed activity is directly linked to that activity. Thus, the concept of 'direct link' is not to be interpreted narrowly. Therefore, such a link also exists in the case of financing costs which are necessary for carrying out an activity."[29]

At no time did the Advocate General consider the national rules applicable to resident financial traders engaged in comparable business activities.

The Advocate General then reviewed the case law to find or deduce an answer the question of whether finance costs are necessarily incurred by a financial trader in relation to its trade and therefore 'directly linked' to the income generated. That does not appear to be a question so much of law as one of fact. It is for the national court to determine such matters.

In the context of interest receivable, a distinction must be made between the provision of debt capital, such as that provided by an associated company to *Truck Center*[30], and loans provided by financial traders, such as the bank finance provided by KBC Finance Ireland to Brisal.

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28 *Brisal AG* [2016] para 27

29 *Brisal AG* [2016] para 33

30 CJEU 22 December 2008 C-282/07 *État belge - SPF Finances v Truck Center SA* ("*Truck Center*") EU:C:2008:762

In the case of the former type of transaction, the interest costs incurred by a company providing debt capital to an associate will generally be deductible from the lender's total profits and the interest received by the lender will be included in total profits. There will not generally be a calculation of a net profit on that type of lending. The provision of debt capital by an associate is a form of investment and the interest income of the lender in respect of that loan is investment income, not trading income. However, the basis for taxing the income from those two forms of financial provision will be determined by national rules, not by EU law.

It is clear from the information provided in *Commission v Portugal (interest withholding tax)* that banks resident in Portugal are not assessed on gross interest comprising their trading income. Accordingly, non-resident banks suffering a withholding of tax assessed on their gross interest income are likely to suffer a higher tax burden than resident banks making comparable loans because the margin made by a bank on a commercial loan is slender once costs such as the charge for default risk[31] are eliminated. A non-resident bank's profit might be totally eliminated by the withholding tax. Indeed, the OECD recently updated the Model Tax Convention commentary on Article 11 saying:

> "…a bank generally finances the loan which it grants with funds lent to it and, in particular, funds accepted on deposit. Since the State of source, in determining the amount of tax payable on the interest, will usually ignore the cost of funds for the bank, <u>the amount of tax may prevent the transaction from occurring</u> unless the amount of that tax is borne by the debtor."[32]

The Commission's contention in *Commission v Portugal (interest withholding tax)* was based on that point:

> "…in order to prove that the Portuguese legislation…results in higher taxation of non-resident legal entities, the Commission relies on an arithmetical example based on the assumption that the profit margin achieved by the entity in question in that example is 10%"[33]

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31 Deductibility for tax purposes of a general provision for default will vary between Member States. Other direct costs include the taking on of term loans to manage the bank's liquidity profile as affected by the customer loan in question and a contribution to the depositor protection fund, which directly relates to the money taken in to fund the customer loan.

32 2014 Update to the OECD Model Tax Convention dated 15 July 2014, paragraph 40 replacing para 7.7 of the Commentary on Article 11 emphasis added

33 *Commission v Portugal (interest withholding tax)* [2010] para 27

It should be noted also from this passage that the Court did not concern itself with "directly linked expenses" but with proof that non-resident banks suffered a higher tax burden.

The Court did not deliver a judgment on the Portuguese provisions because the Commission had failed to provide evidence of the profit margin generally made by resident banks and therefore of a reliable estimate of the tax burden suffered by them as a percentage of gross income that could then be compared to the withholding tax levied on non-resident banks.

However, returning to the question in the heading, the answer is that whether or not finance costs should be deducted from a non-resident's income, and what costs and charges might be included in deductible costs, is determined by reference to national rules applied to residents acting in the same capacity.

Where the national rules do not distinguish between deductible costs directly related to the production of the income in question and other deductible costs incurred by the taxpayer, it will then be necessary to apply a general rule consistent with the Court's case law.

As the Advocate General does not appear to have examined the national rules, it is not clear whether a general rule needs to be applied. However, if a general rule is required, then it appears to be that any cost (other than a cost that is not deductible under national rules) that would not have been incurred by the non-resident taxpayer but for the production of the income in question should be deductible from that income for tax assessment purposes.

When is the deduction of Directly Linked expenditure required by EU law? – concluding comments

The Advocate General appears to have elevated statements made by the Court in its judgments in relation to deduction of directly linked expenses to being general principles of EU law. It appears to be the consequence of looking at the headline but not at the context. For instance, the Advocate General made reference to *Schroder* and so shall I. The Court said in paragraph 40:

> "…the Court has held, in relation to expenses, such as business expenses which are directly linked to an activity which has generated taxable income in a Member State, that residents and non-residents of that State are in a comparable situation…"

But the Court did not say that EU law required directly linked expenses to be deductible from income assessed on non-residents. It continued:

> "...legislation of that State which denies non-residents, in matters of taxation, the right to deduct such expenses, while, on the other hand, allowing residents to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality."

The critical condition is: "*while, on the other hand, allowing residents to do so*". The EU law principle is simply that non-residents should be treated *no less favourably*. If the national tax scheme permits residents to deduct expenses from the income in question, non-residents must be allowed to do also to avoid them suffering a higher tax burden. As *Schroder* did not involve the levy of tax at a different rate on a non-resident, the Court did not need to consider whether the tax burden imposed on the non-resident would be reduced by a compensatory lower rate of tax.

Concluding comment

One can see the consistency in the Court's case law if one has regard for the underlying objectives of the Treaty provisions and if one takes account of the specific circumstances examined by the Court in the relevant cases.

Another example in point is that of the question of whether a state of origin seeking to tax the accrued gain on a chargeable asset possessed by a taxpayer at the time of his transfer of tax residence should take account of subsequent diminution of the value of the asset (if any). The Court was obliged to explain its divergence from its ruling in *N*[34], in which the asset in question was a shareholding in a controlled company, when it gave its ruling in *National Grid Indus*[35] in relation to assets of a company "*assigned directly to economic activities that are intended to produce profit*"[36].

Neither the ruling in *N* nor the differing ruling in *National Grid Indus* is a rule of EU law. The Court took account of the likelihood that relief for any diminution in value of assets employed in the economic activities of the taxpayer company would

34 CJEU 7 September 2006 C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* ("*N*") EU:C:2006:525

35 CJEU 29 November 2011 C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam* ("*National Grid Indus*") EU:C:2011:785 paras 53 to 59

36 *National Grid Indus* [2011] para 57

be obtained in the Member State of destination, which would have the exclusive right to tax the profits of those economic activities. The Court took account of the circumstances. Because of disparities between Member State tax systems, the state of destination in question might not grant relief for a diminution in value of the particular asset in question but such disparities should not in principle determine whether an exit charge applied by the state of origin to assets employed in the economic activities of the taxpayer is an obstruction to the exercise of the freedom of establishment.

In *Brisal*, the Court should find the Portuguese withholding tax to be a restriction on the freedom to provide services because the tax burden borne by the Irish bank on its trading profit in respect of the loan would considerably exceed that of a Portuguese banks and the tax burden may even exceed the profit itself. Because the tax burden could exceed the commercial profit earned by making the loan, the levy of a lower rate of withholding tax could not compensate for the discriminatory rule applied to non-resident banks that levies tax on the gross income.