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Article

Subject : ***HMRC's unlawful attempt to tax French and Spanish usufruit / nue-propriété dismemberments as settlements in contravention of article 56 TFEU***

Date : 6th December, 2015.

There seems to be a distinct lack of action from professional advisers in London on French and for that matter Spanish usufruit / nue-propriété dismemberments. One would have thought with the sufficiently advertised successes in at least six cases against the Sheriffs at Trusts and Estates in their bastion in Nottingham that some attempts would be made by taxpayers and their advisers to restore the respect of the property law and rights in question, if only for mere certainty.

My concern is about the right of individuals to purchase structure and transfer their "in rem" property rights in France governed exclusively by EU principles of freedom of movement, in particular article 56 TFEU and not under the patently ill-founded attempts by HMRC to treat everything as if it was a settlement firstly under Part III ITA 1984, which does not cover a usufruit under s 43 (2), there is no administration, even with and then the various attempts to plaster over the holes in HMRC's 'Hogwarts' fiscal masonry since then - Pre-owned asset "resimulations" etc.

I stress here that it is not only *usufructuary* rights which are involved here, but also all in rem property rights such as *droits d'usage et d'habitation* which fall under the same chapter in the French civil code. I forbear on comment on the Spanish situation. HMRC has recently attempted to extend its folly to those

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HMRC's unlawful attempt to tax French and Spanish usufruit / nue-propriété dismemberments as settlements in contravention of article 56 TFEU

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I Cite Case *C-35/08 a preliminary Ruling of the CJEU* :

> *"18 The Court – noting, in particular, that inheritances consisting in the transfer to one or more persons of assets left by a deceased person come under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements' – has held that an inheritance, including one of immovable property, is a movement of capital for the purposes of Article 56 EC, except in cases where its constituent elements are confined within a single Member State (see, inter alia, Case C-513/03 van Hilten-van der Heijden [2006] ECR I-1957, paragraphs 40 to 42; Case C-43/07 Arens-Sikken [2008] ECR I-6887, paragraph 30; Case C-318/07 Persche [2009] ECR I-0000, paragraphs 26 and 27; and Block, paragraph 20).*
>
> *19 Consequently, a situation in which natural persons residing in Germany and liable to unlimited taxation in that Member State inherit a house situated in Spain is one that is covered by Article 56 EC. It is therefore not necessary to consider whether Articles 39 EC and 43 EC apply, as argued by the applicants in the main proceedings.*
>
> *20 With regard to the existence of restrictions on the movement of capital within the meaning of Article 56(1) EC, it should be noted that the measures prohibited by that provision include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see Case C-370/05 Festersen [2007] ECR I-1129, paragraph 24; Case C-101/05 A [2007] ECR I-11531, paragraph 40; and Case C-377/07 STEKO Industriemontage [2009] ECR I-0000, paragraph 23).*
>
> *21 It is not only national measures liable to prevent or limit the acquisition of an immovable property situated in another Member State which may be deemed to constitute such restrictions, but also those which are liable to discourage the retention of such a property (see, by way of analogy, STEKO Industriemontage, paragraph 24 and case-law cited)."*

My emphases ...

That I believe in any language, even in plain English, to be sufficient to put paid to the hubristic ignorance contained in HMRC's Newsletters on the subject, which remain no more than an ill-disguised bullying threat against those seeking to organise their property rights abroad in conformity with European law.

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Anyone seeking to assess the foundations of this specious approach is invited to purchase a copy of Standing Committee A's minutes on the Finance Bill 1975; 11th sitting February 17th 1975, where it is evident that the only foreign dispositions intended were trust like entities, not property rights, such as Liechtenstein anstalts and foundations. Any rational reading of those minutes with the statute that ensued, will see that the notion of "administration" required for there to be a section 43.2 ITA 1984 settlement is simply not applicable in a dismemberment of property into property rights at law absolutely, owned by the property right owners. "Oh, it must be a Settlement" is no more than a sign of wearing an inadequate prescription and confusing contractual civil law administration vehicles such as anstalts and foundations with mere property rights. There was not even a hint of a mention in the 1975 Standing Committee minutes at which this provision was discussed of any potential breach of the then EC freedom of movement of capital rights.

Once the issue is put in its right place as a set of property rights under Part I of the ITA 1984, rather than going under the fictional yoke of Part III, the treatment is not only clear but EU compliant, which the present policy of HMRC attempting to "discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States" manifestly is not.

The TAXUD at Commission is primed and awaiting the first taxpayer complaints, as the area is now becoming subject to European Regulatory issues after Regulation 650/2012, which takes effect within the zone of freedom of movement of capital. If the German tax administration has been told to behave, then HMRC should expect the same. If your wish me to handle the drafting of correspondence in these issues, I will be pleased to help.

The tripling up of taxation by deploying or rather "positioning" a different set of fiscal property attributions, thereby also displacing credit, to the legal property definitions in the State where

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the property rights are situated with no reference to the property laws defining them is simply not permitted under article 56 TFEU, by anyone.

Merely assuming that it is better to give a surviving spouse a false settlement on a spouse exempt basis, is no longer a sufficient excuse for laxity. It is a matter of fundamental common sense that in matters of property taxation, the moment you start departing from the property right itself there is distortion of fiscal provisions. Statute is one thing, as that gives a degree of certainty. Administrative flexi-interpretation is not that same thing. I stress that if accurately presented, and argued there is also an automatic step up basis available for CGT purposes. That is not in the same HMRC department as "Trusts and Estates".

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