

Case C-430/25 * [Gena] ⁱ

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

30 June 2025

Referring court:

Wojewódzki Sąd Administracyjny w Warszawie (Poland)

Date of the decision to refer:

29 May 2025

Applicant:

AR

Defendant:

Dyrektor Krajowej Informacji Skarbowej

Subject matter of the main proceedings

Tax on unrealised gains payable by a natural person in connection with the transfer of his or her tax residence to another Member State

Subject matter and legal basis of the request

Interpretation of EU law, in particular Articles 21 and 45 TFEU; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must the provisions of European Union law, in particular, Articles 21 and 45 TFEU, be interpreted as precluding legislation of a Member State which, in the

* Language of the case: Polish.

i The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

taxable amount for the purposes of income tax on natural persons in respect of unrealised gains from personal property collected in connection with a person's transfer of tax residence to another State ('tax on income from unrealised gains'), takes into consideration an increase in the value of the asset which took place at a time when the person was not a resident of that Member State?

2. Must the provisions of European Union law, in particular Articles 21 and 45 TFEU, be interpreted as precluding legislation of a Member State which, for the purposes of determining the taxable amount for the purposes of the tax on income from unrealised gains, requires that only income from those assets whose value has increased be taken into consideration, excluding from consideration in the taxable amount losses from those assets whose value has decreased?

3. Must the provisions of European Union law, in particular Articles 21 and 45 TFEU, be interpreted as precluding legislation of a Member State which provides that a change of tax residence by a natural person subject to tax on income from unrealised gains results in the immediate levying of that tax, or alternatively payment thereof in instalments over a period of no more than five years (from the end of the tax year), instead of deferring payment thereof until the disposal of individual assets?

Provisions of European Union law relied on

Articles 21 and 45 TFEU

Provisions of national law relied on

Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych (Law of 26 July 1991 on income tax on natural persons) (Dz. U. of 2024, item 226, as subsequently amended; 'the Law on Income Tax') (as the law stood on 31 December 2024))

Article 11(2), (2a) [and] (2b) (determination of the value of benefits; determination of income)

Article 19(3) (determination of the market value of assets or property rights)

Article 22(1d) (business expenses, inter alia in the case of disposal for consideration of assets or rights obtained not for consideration or partly for consideration)

Article 23(1)(38) (exclusion from business expenses of expenditure on, inter alia, the take-up or acquisition of shareholdings (shares) and securities, and also expenditure on the acquisition of units in capital funds)

Article 30b(1): On income derived: ... (2) from the disposal for consideration of shareholdings (shares) ... – income tax shall be 19% of the income derived.

Article 30b(2): The income referred to in paragraph 1 shall be: ... (4) the difference between the sum of the income derived from the disposal for consideration of shareholdings (shares) or shareholdings in cooperatives and the business expenses

Article 30da(1): The tax on income from unrealised capital gains shall be: (1) 19% of the taxable amount – where the tax value of the asset has been established; ...

Article 30da(2): The following shall be subject to tax on income from unrealised gains: ... (2) a change of tax residence by a taxable person subject to unlimited liability to tax in the Republic of Poland, as a result of which the Republic of Poland loses the right to tax income from the disposal of an asset owned by that taxable person in connection with the transfer of his or her residence to another State.

Article 30(da)(3): In the case of a non-business asset, only assets constituting the following shall be subject to tax on income from unrealised gains in the case referred to in paragraph 2(2): all rights and obligations in a company which is not a legal person, shareholdings in a company, shares and other securities, derivative financial instruments and units in capital funds ('personal property'), if the taxable person has resided in the territory of the Republic of Poland for a total of at least five years in the ten-year period preceding the date of the change of tax residence.

Article 30(da)(7): Income from unrealised gains shall be the excess of the market value of an asset, established at the date of the transfer thereof or at the date preceding the date of the change of tax residence, over the tax value thereof.

Article 30(da)(8): The market value of an asset shall be determined: (1) in accordance with Article 19(3) – in the case of assets of personal property

Article 30(da)(10): The tax value of an asset shall be the value, which has not been incorporated in advance into business costs, in whatever form, which would have been accepted by the taxable person as a business cost if that asset had been disposed of by that person for consideration. ...

Article 30(da)(12): The taxable amount for the purposes of tax on income from unrealised gains shall be the sum of the income from unrealised capital gains established in respect of each asset.

Article 30(da)(14): Taxable persons shall be required to submit to the tax offices declarations, in accordance with the established form, on the amount of income from unrealised gains by the seventh day of the month following the month in which the total market value of the transferred assets exceeded [4 000 000 zlotys (PLN)], and to pay the tax due within that period. If further assets are transferred after the month in which the total market value of the assets transferred exceeds PLN 4 000 000, taxable persons shall be required to submit a declaration by the seventh day of the month following the month in which the assets are transferred and to pay the tax due within that period.

Article 30(db)(1): The provisions of Article 30da shall not apply if the total market value of the transferred assets does not exceed PLN 4 000 000.

Article 30(de)(1): A taxable person may apply to the competent head of the tax office to pay in instalments all or part of the tax on income from unrealised gains, over a period of no more than five years

Rozporządzenie Ministra Finansów z dnia 27 czerwca 2019 r. w sprawie przedłużenia terminu do wpłaty przez podatników podatku dochodowego od osób fizycznych podatku należnego od dochodów z niezrealizowanych zysków (Regulation of the Minister for Finance of 27 June 2019 on the extension of the time limit for payment by taxable persons of income tax on natural persons payable on income from unrealised gains) (Dz. U. of 2023, item 902, as amended; ‘the regulation’) (as the law stood on 31 December 2024): Paragraph 1(1), (3) [and] (4).

Succinct presentation of the facts and procedure in the main proceedings and the essential arguments of the parties

- 1 On 30 October 2024, AR requested an advance tax ruling from the Director of the Krajowa Informacja Skarbowa (National Revenue Administration Information Center, Poland) (‘the director’), stating that, as an Italian and US citizen, he is a natural person not engaged in business. Since 1 January 2023, he has been a Polish tax resident and liable to tax in Poland on all his income (revenue) regardless of the location of the sources of revenue (unlimited tax liability).
- 2 AR has concluded an employment contract with a Polish company and will be a Polish tax resident until at least 1 January 2028 (he will have his place of residence in the territory of Poland for a period of at least five years). At the end of that contract, AR will change his place of residence and tax residency to Germany, where he owns immovable property.
- 3 Prior to taking up employment in Poland, AR accumulated significant assets which were unrelated to income derived in Poland and whose disposal would not have been subject to tax in Poland had he not acquired Polish tax resident status. At the time of the change of residence, AR’s personal property will include non-business-related shares in various companies acquired privately and under incentive programs, stock units granted under employee incentive programs, and immovable property in other countries. According to AR, the market value of the assets at the time of the change of residency will exceed PLN 4 million.
- 4 AR asked, inter alia, the following questions (with his answers):
 - In the event of a change of residence after 31 December 2027, can AR be liable to the tax referred to in Article 30da et seq. of the Law on Income Tax (‘exit tax’)? (In his view, no, as this is inconsistent with, inter alia, Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance

practices that directly affect the functioning of the internal market, as well as the judgment of 26 February 2019, *Wächter* (C-581/17, EU:C:2019:138), in which it was found that tax authorities cannot demand immediate payment of tax.)

- If the answer to the first question is in the affirmative, will the possible obligation to pay the tax arise only if the market value of assets subject to that tax (that is to say, excluding immovable property) exceeds a total of PLN 4 000 000 as of the date of the change of residence? (In his view, yes.)
 - If the answer to the first question is in the affirmative, will the value of the assets acquired abroad and the costs incurred to acquire them abroad during the period of AR's residence in a State other than Poland form the basis for calculating tax liability? (In his view, no.)
 - If the answer to the first and third questions is in the affirmative, will AR be entitled to reduce the market value of assets subject to exit tax acquired during the period of his residence in a State other than Poland by their tax value? (In his view, yes.)
 - If the answer to the first question is in the affirmative, for the purpose of calculating the tax on income from unrealised gains, should the market values and tax values of AR's assets as referred to in Article 30da(3) of Law on Income Tax be aggregated and compared on the date before the date of the change of residence? (In his view, yes.)
 - Can revenue from an employment relationship recognised abroad in the form of shares in AR's previous employers acquired not for consideration or partly for consideration – within the meaning of Article 22(1d) of the Law on Income Tax – be recognised as the tax value in calculating the taxable amount for the purposes of tax on income from unrealised gains? (In his view, yes.)
 - If AR is liable to pay tax on income from unrealised gains, does this amount to 19% of the taxable amount? (In his view, yes.)
 - If AR is liable to pay tax on income from unrealised gains, when will he be required to pay that tax and submit a tax declaration? (In his view, by the seventh day of the month following the month of the change of residence.)
- 5 In an advance tax ruling of 31 December 2024, the director found that AR's position is incorrect with regard to, inter alia: liability to tax on income from unrealised gains; taxation of only the assets which AR acquired/developed during the period of his Polish tax residence; the determination and calculation of the taxable amount of the assets subject to that tax; [and] the time limit for payment of the tax.
- 6 The director stated, inter alia, that all the assets accumulated by AR, as referred to in Article 30da(3) of the Law on Income Tax, which he acquired both when he

was a Polish tax resident and a tax resident of other countries, are subject to tax on income from unrealised gains, where, as a result of changes in tax residency, Poland loses the right to tax income from the disposal of such assets. However, for the purpose of determining the taxable amount, AR may take into account the costs incurred in acquiring a given asset during the period of his foreign tax residence. The director stated that, for the purpose of calculating the taxable amount, AR is to take into account and aggregate the income from unrealised capital gains established in respect of each asset, whilst in respect of assets whose tax value is higher than their market value, there will be no income. AR cannot offset the increase in value of some assets against the loss in value of other assets; nor is it possible to reduce the income from unrealised gains thus calculated by losses. AR will be required to submit a declaration by the seventh day of the month following the month in which the change of residence occurs, but the time limit for payment of tax at the time of submitting an application is postponed until 31 December 2025.

- 7 AR has challenged that advance tax ruling, alleging, inter alia, an infringement of the Law on Income Tax, in conjunction with Directive 2016/1164 and Articles 21 and 45 TFEU, through: a failure to take account of the fact that taxation on income from unrealised gains should cover only taxable persons for the purposes of income tax on legal persons and not taxable persons for the purposes of tax on natural persons; the erroneous finding that assets acquired/developed during a period of tax residence in a country other than Poland are also subject to that tax; the erroneous finding that it is impermissible to calculate the taxable amount for that tax as the excess of the sum of the market values of individual assets over the sum of their tax values; [and] the inability to defer payment of the tax on unrealised gains until disposal of the assets, which is contrary to the principle of free movement of persons.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 The Sąd Administracyjny has doubts as to whether the national legislation infringes the Treaty freedoms in that it impedes or renders less attractive the exercise of those freedoms (see the judgment of the Court of Justice of 12 July 2012, *Commission v Spain*, C-269/09, EU:C:2012:439, paragraphs 53 to 55) and whether this is justified.
- 9 The Sąd Administracyjny has regarded as well founded the reliance on, inter alia, the right to freedom of movement and the principle of the freedom of movement for workers on the ground that AR's change of residence and the acquisition of the status of resident in Poland is a result of performing work in the territory of Poland, whereas the loss of the status of resident in Poland will be a consequence of ceasing to perform work in the territory of Poland and moving to settle in another Member State (Germany).

- 10 The Sąd Administracyjny has doubts as to whether the tax provided for in Article 30da et seq. of the Law on Income Tax is compatible with the provisions of EU law.
- 11 The first doubt relates to whether it is compatible with EU law to levy tax on unrealised gains on the increase in the value of a financial asset which took place before AR became a Polish resident. The national legislature includes in the taxable amount (Article 30da(7) of the Law on Income Tax) the excess between the market value of the asset (as at the date preceding the date of the change of residence) and the expenditure on its acquisition (Article 30da(10) of the Law on Income Tax, in conjunction with Article 23(1)(38) thereof) or income derived previously from its acquisition not for consideration (including partly not for consideration) (Article 30da(10) of the Law on Income Tax, in conjunction with Article 22(1d) thereof).
- 12 Currently, direct taxation falls within the competence of the Member States. That means a relatively broad discretion of the Member States in determining the key structural elements of that tax – including the determination of the taxable amount, rates, exemptions, and so on. However, the Sąd Administracyjny has doubts as to whether, in exercising its tax sovereignty, a State may provide for such a structure for taxing unrealised gains which, by subjecting to taxation the increase in the value of assets at a time prior to the obtaining of national residence, renders the prospect of temporarily settling in the country and taking up employment so unattractive that the resulting restriction of freedoms will result in an infringement of EU law.
- 13 While there is no doubt that an increase in the value of a particular asset derived in the period when the taxable person is a Polish resident (provided that its value on the date preceding the change of residence is higher than the acquisition price) should be subject to tax on unrealised gains, there are doubts as to the possibility of taxing the increase in the value of a particular asset in the period preceding the taxable person's national residence.
- 14 The consequence of this is that a person such as AR will be liable to pay tax on unrealised gains which will include the increase in the value of his or her assets recorded in a period during which there was no connection with the country of taxation. Moreover, even if the value of the asset might have decreased during the taxable person's stay in that Member State, he or she will be subject to tax on unrealised gains if the value of the asset has increased at all (from the date of acquisition). This may constitute a sufficient obstacle to the taxable person deciding (temporarily) to settle and take up employment in that country.
- 15 That obstacle arises from the fact that an unrealised gain acquired/developed during the period prior to national tax residence falls within the scope of the tax. From that perspective, the doubt of the Sąd Administracyjny concerns in particular whether the retention of the allocation of powers of taxation between the Member States can be regarded as relevant grounds (judgment of

19 November 2009, *Commission v Italy*, C-540/07, EU:C:2009:717, paragraph 29 and the case-law cited). The doubts concern whether or not the taxation of an unrealised gain (obtained in another State) constitutes an excessive – in this case – extension of powers by a Member State, and whether it meets the condition of proportionality, and so on.

- 16 The inclusion within the scope of the tax of an unrealised gain obtained/developed in the period prior to national residence is a consequence of the reference to tax categories such as ‘expenditure on acquisition’/‘revenue obtained’, which are successfully applied by Polish residents. The problem in the present case, however, is that, firstly, residents are not (where there is no change in residence) subject to tax on unrealised gains, and secondly, it is uncertain to what extent the situation of a person who has been a resident of a particular country throughout the period concerned and whose financial assets increased in value while he or she was such a resident is comparable (from the point of view of the taxation of income by the State concerned) with that of a person whose financial assets increased in value while he or she was not a resident and only subsequently became one.
- 17 Restricting the harmonisation of direct taxes may, by definition, lead to certain distortions in the functioning of the single market. However, the legislation in question may constitute a significant distortion of the functioning of the single market which effectively discourages qualified workers with experience abroad from taking up employment in Poland.
- 18 The second doubt concerns whether it is consistent with EU law to determine the taxable amount in a manner which takes into account only income from those assets whose value has increased, while excluding from the taxable amount losses from those assets whose value has decreased. The national legislature defined the taxable amount for the purposes of tax on unrealised gains as ‘the sum of the income from unrealised capital gains established in respect of each asset’ (Article 30da(12) of the Law on Income Tax), where income for individual assets was defined as the excess of the market value over their tax value (Article 30da(7) of the Law on Income Tax). On the other hand, for a taxable person disposing of securities or shares (shareholdings) for consideration in accordance with the general rules, the taxable amount is ‘the difference between the sum of the income ... and the business expenses’ (Article 30b(1)(2) of the Law on Income Tax, in conjunction with Article 30b(2)(4) thereof).
- 19 The Sąd Administracyjny doubts whether such a differentiation of the situation of taxable persons is compatible with EU law where, on the one hand, a taxable person who does not change his or her residence in the event of disposal of assets may, when calculating the taxable amount, take into account a loss incurred on the disposal of part of the assets, and, on the other hand, a taxable person who, as a result of a change of residence, is subject to tax on unrealised gains and, when calculating the taxable amount, cannot take into account a loss incurred (to date) on part of the assets.

- 20 It may be that the legislature is not so much concerned with depriving the taxable person of the possibility of deducting a loss as with taxing the ‘unrealised gains’, which is based on the assumption of a (fictitious) disposal of only those assets whose value has increased. Reasoning in this way, it can be stated that the legislature, by making the assumption that the investor is seeking to realise gains, supposes that only assets on which a gain has been realised would be disposed of and, as a result, only such transactions (showing income) should be taken into account in the taxable amount for the purposes of tax on income from unrealised gains.
- 21 The third doubt concerns whether it is compatible with EU law to introduce a requirement that the tax on unrealised gains be collected immediately (after a change of tax residence) or, alternatively, payment in instalments over a period of no more than five years, instead of deferment of payment thereof until the capital gains are realised.
- 22 Although the legislation provides for an extension of the time limit for payment of the tax, in the present case those provisions cannot be applied as the extension is until 31 December 2025 at the most and AR will leave Poland no earlier than 1 January 2028.
- 23 As a result, the Sąd Administracyjny assesses the legislation laying down the obligation to pay the tax by the seventh day of the month following the month in which the total market value of the transferred assets exceeded the amount of PLN 4 million (Article 30da(14) of the Law on Income Tax), with the possibility of paying all or part of the tax in instalments over a period of no more than five years (Article 30de(1) of the Law on Income Tax).
- 24 Doubts as to the compatibility of such legislation arise from the fact that, for example, the Court of Justice has already pointed out, in its judgment of 7 September 2006, *N* (C-470/04, EU:C:2006:525), that, whilst it is possible to benefit from suspension of payment, that is not automatic and it is subject to conditions, such as the provision of guarantees (paragraph 36), and has then, as regards guarantees for the granting of a deferment of the tax, stated that they go beyond what is strictly necessary in order to ensure the functioning and effectiveness of such a tax system based on the principle of fiscal territoriality (paragraph 51).
- 25 In its judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785) (concerning the taxation of legal persons), the Court of Justice held that ‘national legislation offering a company ... the choice between, first, immediate payment ... and, secondly, deferred payment of the amount of tax, possibly together with interest ..., which necessarily involves [a] burden ... in connection with tracing the transferred assets, would constitute a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment’ (paragraph 73).

- 26 However, in its judgment of 21 December 2016, *Commission v Portugal* (C-503/14, EU:C:2016:979), the Court of Justice ruled that ‘there is no objective reason for distinguishing, for the purposes of the justification deriving from the objective of ensuring a balanced distribution of the power to impose taxes between Member States, between the exit taxation of natural persons and that of legal persons in respect of unrealised capital gains’ (paragraph 56).
- 27 Conversely, in the abovementioned judgment of 26 February 2019, *Wächtler* (C-581/17, EU:C:2019:138), the Court of Justice ruled that ‘the immediate collection of the tax at issue at the time when the taxpayer’s domicile is transferred may, as a general rule, be justified by the need to ensure the effective collection of tax liabilities. ... However ..., that measure goes beyond what is necessary in order to achieve that objective and must therefore be considered to be disproportionate. ... That conclusion is not called into question by the fact that, in a situation where the immediate collection of the tax payable would have consequences that would be difficult for the taxpayer to bear, that tax regime provides for the possibility of payment of that tax in instalments’ (paragraphs 66 and 68).
- 28 Academic writers also note that (i) the requirements of the TFEU with regard to exit tax in income tax on natural persons and income tax on legal persons have been unified (in the abovementioned judgment of the Court of Justice in Case C-503/14), and therefore the earlier more favourable case-law on the taxation of natural persons has become obsolete, and (ii) the Law on Income Tax is in breach of Article 49 TFEU in so far as it provides that the tax must be collected immediately at the time of the transfer of the taxable person’s residence.
- 29 The doubts of the Minister for Finance himself as to the compatibility of the legislation in question with EU law may also have been behind the decision to issue the regulation, extending the time limit for payment of the tax and linking it in part to the actual disposal of the asset in question.
- 30 The Sąd Administracyjny is aware that the arrangement laid down in the Law on Income Tax, addressed to natural persons, is modelled on Directive 2016/1164, which concerns the taxation of legal persons, but that does not render the arrangements in question, which are addressed to natural persons, compatible with EU law.