Summary

The Van Casters, German residents, held portfolio shareholdings in foreign, non-transparent investment funds. Owing to stringent information requirements (whereby investors had to provide very specific information supplied by the fund), the Van Casters were taxed on the basis of a flat-rate calculation, instead of on their actual income. According to the CJEU, this constituted a restriction of the freedom of capital movement. Although such a restriction could potentially be justified by the need to ensure effective fiscal supervision and effective tax collection, the CJEU found in this case that the German rules went beyond what was necessary to attain that objective as investors could also provide the relevant information themselves (instead of having to rely on specific information being provided by the fund) and, given the framework for exchanging information within the EU, the German tax authorities could also obtain this information from and verify it with the authorities in the member state of the investment fund.

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G.F. Boulogne[1]

The fact pattern in this case is relatively straightforward: the Van Casters, German residents, held portfolio shareholdings in foreign, non-transparent investment funds. Under the applicable German legislation, the income from shareholdings in both domestic and foreign investment funds was taxed differently, depending on the information that the investor was able to provide on these shareholdings (still pending with the CJEU is the case of *Wagner Raith*, C-560/13, dealing with the lump-sum taxation of the since abolished Foreign Investment Company Act [*Auslandsinvestmentgesetz*]). An investor able to provide all the required information was taxed on the actual income from that investment, while an investor failing to satisfy those information requirements was taxed on the basis of a flat-rate calculation, implying a minimum basis of assessment corresponding to 6% of the redemption price. The German legislation required the information to have a 'thick German sauce' poured over it: investors were required *inter alia* to provide communication by the investment fund to the shareholders in German, while the information also had to 'be published in the electronic federal bulletin of official announcements accompanied by a certificate issued by a professional authorised by law to provide tax advisory services confirming that the information was established in accordance with German tax law rules' (see para. 22). Investors wishing to provide this information were thus fully dependent on the information made available by the foreign investment fund.

The CJEU found that a flat-rate calculation generally resulted in an overstatement of the taxpayer's real income and, even though theoretical situations in which a flat-rate tax could be more favourable than the general transparent tax regime (i.e. taxation on the basis of the actual income from the investment) are conceivable, it concluded that a flat-rate tax was at least 'likely to be disadvantageous to the taxpayer'. An unsatisfactory element of the German regime was that investors taxed on the basis of the flat-rate tax could not themselves provide evidence or information to demonstrate their actual income. Realistically, the CJEU recognised that an investment fund not active in the German market (or not specifically targeting that market) would not generally bother to fulfil all the German information requirements and to have the information certified by a German tax advisor. The default situation, therefore, was that only German-resident investment funds would comply with the information obligations, with the result that German investors investing in such a fund would automatically be subject to the flat-rate tax, without being offered the opportunity to provide evidence or information as to their actual income.

Having identified a restriction of the freedom of capital movement, the CJEU examined the possible justification grounds in the light of the stated objectives of the German rules. These sought to achieve two types of neutrality: on the one hand, between *direct* investments (in shares and bonds directly) and *indirect* investments (in investment funds) and, on the other hand, between investments in *German*-resident and investments in *foreign*-resident investment funds.

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The CJEU rightly rejected the German government's suggestion that the country's legislation was necessary in order to preserve the balanced allocation of taxing powers: whatever the amount of income on which German-resident investors were taxed, Germany would not be compelled to accept losses from an activity of which it would not be able to tax the profits. The analysis zoomed in, therefore, on the need to ensure effective fiscal supervision and effective tax collection. Citing from its *Meilicke* decision (C-262/09), the CJEU held (in paragraph 47) that:

'It is inherent in the principle of the fiscal autonomy of Member States that they determine the evidence that must be provided and the formal and material conditions which must be respected to enable the tax authorities to establish correctly the tax owed on the income earned from investment funds.'

In the case at hand, it was not the formal and material conditions themselves with which the CJEU found fault, but instead the way in which the information firstly had to be supplied (and tailored) by the investment fund, and secondly submitted by the investor. This is something that a foreign investment fund would not ordinarily do. It is also conceivable that investors would themselves be able to obtain (and provide) the information required in order to correctly establish the taxation of the income from investment funds, for instance by simply requesting this information from the fund. Furthermore, given the opportunities for exchanging information within the EU, the German tax authorities could also obtain this information from and verify it with the authorities in the member state of the investment fund. The CJEU has never in any event accepted the existence of actual or possible administrative difficulties as justifying a restriction of free movement.

What is interesting about the *Van Caster* decision is the CJEU's acknowledgment that, by making certain benefits dependent on formal or material requirements, member states may *de facto* favour domestic situations over cross-border situations if domestic investors/investment funds are more, or even much more, likely to comply with these requirements than foreign investors/investment funds. The requirement for publication in German, coupled with the requirement for a certificate issued by a German *Steuerberater*, is obviously a clear-cut example of this, but legislative developments in Finland and Poland concerning the refund of dividend withholding taxes to foreign pension funds (following European Commission actions or CJEU decisions), for example, also show that member states generally have enough creativity to impose requirements that may make it difficult or more difficult for foreign pension funds to obtain a refund. The CJEU rightly examined in *Van Caster* whether these requirements served a legitimate purpose and whether they were suitable (and did not go beyond what was necessary) to attain that objective. This is a positive trend following the disappointing *Pelati* decision (C-603/10) that was handed down two years ago and in which the CJEU simply held that since the Merger Directive did not contain any procedural requirements concerning the availability of the directive's benefits, it was up to the member states to lay down any procedural requirements, provided that the principles of equivalence and effectiveness were met. In my view, this reasoning leaves too much room for member states to frustrate taxpayers and prevent them from obtaining certain EU benefits/rights by imposing procedural rules that may be burdensome, but not excessively restrictive, even if not all these rules are necessary (or go beyond what is necessary) to attain a legitimate objective. The difference between *Van Caster* and *Pelati* would seem to be the *de facto* discriminatory nature of the rules in *Van Caster*. This is why, unlike in *Pelati*, the CJEU was prepared to apply a full-blown 'rule of reason' test.