



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**One hundredth session**

11 – 29 October 2010

**Views**

**Communication No. 1783/2008**

<u>Submitted by:</u>	Fernando Machado Bartolomeu. (represented by Dr. Rui Ottolini Castelo-Branco and Dr. Maria João Castelo-Branco)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Portugal
<u>Date of communication:</u>	24 March 2008 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 28 April 2008 (not issued in document form)
<u>Date of adoption of Views:</u>	19 October 2010

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\* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Discriminatory tax legislation against casino croupiers
<i>Substantive issues:</i>	Violation of the principle of equality before the law and the prohibition of discrimination
<i>Procedural issues:</i>	None
<i>Articles of the Covenant:</i>	2, paragraphs 1 and 2; 26
<i>Article of the Optional Protocol:</i>	None

On 19 October 2010, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1783/2008.

[Annex]

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (one hundredth session)**

concerning

#### **Communication No. 1783/2008\*\***

<u>Submitted by:</u>	Fernando Machado Bartolomeu (represented by Dr. Rui Ottolini Castelo-Branco and Dr. Maria João Castelo-Branco)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Portugal
<u>Date of communication:</u>	24 March 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 October 2010,

Having concluded its consideration of communication No. 1783/2008, submitted to the Human Rights Committee on behalf of Mr. Fernando Machado Bartolomeu under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Fernando Machado Bartolomeu, born on 21 December 1953, a Portuguese national, living in São Domingos de Rana, Portugal. He claims to be victims of a violation by Portugal of article 26, read in conjunction with article 2, paragraphs 1 and 2, of the Covenant. He is represented by Dr. Rui Ottolini Castelo-Branco and Dr. Maria João Castelo-Branco. The Optional Protocol entered into force for the State party on 3 August 1983.

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin..

**The facts as submitted by the author**

2.1 Mr. Bartolomeu is a croupier working in a casino in Portugal. He refused to declare the income resulting from tips received from his customers (casino players) during the fiscal years of 1999 and 2000. He considered that these amounts had been given purely out of generosity, and could therefore be regarded as charitable donations. They were not, strictly speaking, pay and, as a result, were not taxable.

2.2 According to article 2, paragraphs 1 and 3 (h), of the Personal Income Tax Code (CIRS), earned income from employment comprises all payments from or made available by the employer under a contract of employment or any other legal equivalent. Gratuities received for or on account of services provided, when not distributed by the employer, must be considered as part of earned income from employment. In its ruling 497/97 of 7 July 1997, the Constitutional Court declared this article to be unconstitutional. However, the Budget Act for 1999, 87-B/98, of 31 December 1998, contradicts this ruling, stipulating in article 29 that sums of money received by casino bank staff from players, depending on their winnings, are considered as gratuities received for or on account of services provided.

2.3 The author considers that this has led to discriminatory practice against croupiers, arguing that it constitutes a violation of the principle of taxing legality, equality and justice. They also contend that such practice violates the author's right to family life<sup>1</sup>. Croupiers are the only staff who are taxed on their tips, whereas waiters working in the same casinos, who likewise tend to receive tips from customers, are not taxed. The discriminatory nature of such differentiation was recognized by the Court of Justice of the European Communities (CJEC).<sup>2</sup> In an opinion issued by the Centre for Financial Studies, the tax authorities themselves argued that the provision violated the principle of equality and justice. Their conclusion was not, however, followed by the courts hearing the case (see below).

2.4 The author also notes that sickness and unemployment benefits are not calculated on the basis of their total income, but only on the basis of the salary paid directly by the employer. He points out that they have nonetheless to deduct 12 per cent of their monthly tips for a special social security fund but derive no benefit from that contribution or, at any rate, no greater assistance in the event of illness or unemployment. On this count, tips are not considered as earned income from employment. Furthermore, according to the author, the State's inability to monitor the tips received by other categories of employees, whereas monitoring croupiers' tips is simpler, should not work to their disadvantage. If monitoring tips is not possible and this gives rise to inequality among the professions, the State must quite simply refrain from creating the tax.

2.5 The author filed a complaint before the Administrative and Tax Tribunal of Sintra, which dismissed it on 7 July 2006, ruling that the taxation of croupiers did not infringe the constitutional principle of equality. An appeal against this decision was dismissed by the Central Administrative Tribunal for the South on 12 June 2007, which reiterated the reasoning of the Court of first instance. Finally, on 29 October 2007, the Constitutional Court, ruling on the author's appeal, rejected the assertion that the provisions in question were unconstitutional.

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<sup>1</sup> No more details are provided on that count, nor is any relevant provision of the Covenant invoked in that regard.

<sup>2</sup> The author cites in particular a CJEC judgement of 23 November 2000, which considered a gratuity to be a sum of money which a customer is willing to pay spontaneously for a service provided by one or more croupiers and which cannot be included in the taxable amount, since it is like a sum of money given to a street musician.

### **The complaint**

3. The author considers that the State party has violated his right to equality before the law, guaranteed by article 26, read in conjunction with article 2, paragraphs 1 and 2, of the Covenant. He argues that the adoption of Act 87-B/98 changed the scope of ruling 497/97 of the Constitutional Court, thereby placing croupiers at a disadvantage vis-à-vis other professions. The situation violates the principle of equal taxation. Furthermore, while croupiers pay additional contributions of 12 per cent of their tips into the special social security fund, they receive no additional assistance in the event of illness or unemployment.

### **State party's observations**

4.1 In its observations of 21 October 2008, the State party challenges the merits of the communication submitted by the author. It refers to the legislative history of taxation on croupiers' tips and stresses that the original version of the Professional Tax Code (CIP) contained no provision on the taxation of tips. The tax authorities therefore attempted, based on the legal definition of earned income, to include as part of taxable income tips paid by third parties to staff working in casinos. This sparked strong opposition from croupiers. In order to clarify the situation, Decree-Law No. 138/78 of 12 June 1978 was amended to include article 1, paragraph 2, of CIP, according to which sums received as gratuities or tips by employees in the course of the performance of their work would henceforth be considered as earned income, even when such sums were not distributed by the employer. This provision was declared unconstitutional because it had no basis in law (decree passed by the Government but not validated by Parliament).

4.2 The legislature again attempted to introduce the provision through Decree-Law No. 297/79 pursuant to article 18 of Act No. 21-A/79, which said that the regulations governing the scope of income tax should be revised so as to include all earned or work-related income. The expression "tips and gratuities" was no longer used: the new legislation merely referred to "sums received by employees in the course of the performance of their work, even those not distributed by the employer". This new text was also declared unconstitutional for want of the signature of the Prime Minister in office on the date of promulgation. Decree-Law No. 183-D/80 reinstated the provision, the substance of the text having been correctly adopted. In 1982, however, the legislature decided that the Decree-Law should be repealed and did not reintroduce the wording on tips and gratuities until 1988. The new provision of CIP stipulated that half of any sums received by employees in the course of the performance of their work, irrespective of their nature, would be taxable when the sums were not distributed by the employer.

4.3 When the country moved from a system of two codes (Professional Tax Code and Supplementary Tax Code) to the more modern system, more in line with the European Community, of the Personal Income Tax Code (CIRS), Act No. 106/88 of 17 September 1988 provided, in article 4, paragraph 2 (a), that "all payments stemming from work done on behalf of third parties, whether performed by servants of the State and other public-law entities or in consequence of a contract of employment or other contract legally equivalent to a contract of employment" would be considered as earned income. Article 2 of the Personal Income Tax Code (CIRS) concerning the tax base of category A income, specifies in paragraph 3 (h), that "[...] gratuities received for or on account of services provided, when they are not distributed by the employer, are also earned income".

4.4 The constitutionality of this provision was called into question by the Mediator, who referred the matter to the Constitutional Court. Responding to the question of whether a gratuity was a donation that might be exempt from employment tax regulations, the Constitutional Court found the provision to be constitutional. The Court considered that the specific nature of the profession of croupier made for a special arrangement which could not be considered unconstitutional. A consequence of this unique framework was a

differentiation in the pattern of remuneration. Since this Constitutional Court ruling, No. 497/97 of 9 July 1997, the legislature and Government have been in favour of making tips subject to tax. Article 29, paragraph 5, of Act No. 87-B/98 of 31 December 1998, containing the State budget for 1999, stipulates that article 8 of CIRS should make explicit reference to the income of casino croupiers that does not come from the employer. The croupiers are up in arms against this provision, since they consider it a new development, inasmuch as their profession is referred to directly.

4.5 Before expressing its views on the merits of the allegations made by the author, the State party analyses the legislation governing croupiers' incomes and, more particularly, gratuities. Casinos are private entities subject to a strong tax regime. They are inspected by the Inspectorate-General of Gambling. Regulatory Decree No. 82/85 of 28 August 1985 governs the system for distributing gratuities received by staff in gaming rooms. As can be seen, these gratuities are not given *intuitu personae* to a certain croupier to whom a player takes a liking. They are deposited into a fund for this purpose and distributed every two weeks to croupiers according to the category to which they belong (more senior croupiers receive more). Since the issuance of Decree No. 24/89 of 15 March 1989, a Commission for the Distribution of Gratuities (CDG) has been established. This fact attests to the size of the sums of money involved and their sensitive nature. The equitable, legal and transparent distribution of these gratuities must be ensured. The State party goes on to say that the social security system also has an interest in gratuities. Under the laws governing the system, gratuities are considered as earned income.

4.6 The State party insists that gratuities are income stemming from the employment relationship, contrary to the author's claims that they are donations, and thus exempt from tax. Croupiers receive tips because of their contracts of employment. Tips are not income obtained *intuitu personae* and are subject to social security deductions. The State party cites a study by law professors which argues that the adoption of an overarching, comprehensive concept of income, including tips, is not only in keeping with social practice but is also a natural consequence of the principle of capacity to pay. It notes that earned income comprises several elements, including basic pay, seniority bonuses, various gratuities such as holiday and Christmas allowances, extras such as payments for special duties and overtime, night work and shifts, etc. This complex set of types of income counts towards various uses of different kinds, all legitimate. For example, only basic pay and seniority bonuses count towards severance pay; for accidents at work, only regular monthly benefits apply. There is nothing to preclude the taxation of tips, which are gratuities awarded for the performance of work.

4.7 The State party notes that the author invokes Court of Justice of the European Communities (CJEC) case law, according to which the performance of music in the street prompts voluntary donations of indeterminate amounts of money. In one case, it had been established that no legal relationship existed between the performer and the recipient. There was thus no need to tax the very variable income of street musicians, which consisted solely of such gratuities. The State party is in agreement with this case law, but considers that the author invokes it wrongly because it is not relevant to this case.

4.8 The State party bases itself on the jurisprudence of the Constitutional Court, which has analysed the principle of equality from three angles. First, formal equality provides that all citizens are equal before tax legislation, which means that all taxpayers in the same situation as defined by tax legislation must be subject to the same tax regime. Second, substantive equality requires the law to ensure that all citizens with an equal income must bear an equal tax burden, thereby contributing equally to public expenses. Lastly, equality through the tax system aims to achieve a fair distribution of income and wealth besides satisfying the financial requirements of the State and other public entities, since one purpose of income tax is to reduce inequalities among citizens. Therefore, although

croupiers receive considerable amounts in the form of gratuities, these gratuities are not donations but customary gifts, and it makes no sense to relieve croupiers of taxes on such gratuities if the tax burden on other people at work is not alleviated.

4.9 The State party notes that, according to the Human Rights Committee, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. It follows that the criteria adopted by the Portuguese courts are fully in accordance with those established by the Committee. For all these reasons, the State party considers that the sums of money in question are earned income which is legitimately subject to tax and that no provision of international law, including article 26 of the Covenant, has been violated.

#### **Author's comments on the State party's submission**

5. In his comments dated 25 November 2008, the author reiterates the arguments expounded in the initial communication. He requests the Committee to find a violation of articles 26 and 2 of the Covenant, read together, to order the State party to repeal article 2, paragraphs 1 and 3 (h), of the Personal Income Tax Code, and to pay him 50,000 Euros in damages.

#### **Additional submission by the State party**

6. On 2 June 2009, the State party reiterates that under the meaning of article 26 of the Covenant, a differentiation, which is based on reasonable and objective criteria does not amount to prohibited discrimination. It further reiterates that the legislative evolution, which led to the taxation of croupiers, is legitimate, both with respect to domestic and international law. The State party also maintains that such taxation is not arbitrary, as the relevant gratifications are governed by a strict legislative framework, are not granted *intuitu personae*, and are considered as earned income. As such, the State party reiterates that the taxation of Casino croupiers is not in violation of the principle of equality, and cannot be held to breach article 26 of the Covenant.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 In the absence of objections by the State party to the admissibility of the communication or reasons indicating that the communication might be wholly or partly inadmissible, the Committee declares that the allegations under article 26 of the Covenant, regarding the right to equality before the law, are admissible.

##### *Consideration of the merits*

8.1 As provided for under article 5, paragraph 1, of the Optional Protocol, the Human Rights Committee has considered the communication in the light of all the information made available to it by the parties.

8.2 The Committee notes the author's arguments that they are discriminated against vis-à-vis the members of other professions because they alone pay taxes on their tips; that tips are given by customers purely out of generosity and that they can therefore be regarded as charitable donations; that such tips cannot, strictly speaking, be considered as pay and are therefore not taxable. The Committee notes that, according to the author, in the event of unemployment or sickness he would not receive any additional benefits in consideration of the tax to which he is subject.

8.3 The Committee also notes the arguments of the State party that taxation on tips earned by croupiers is the result of a legislative development intended to re-establish equality between the professions; that tips earned by croupiers cannot be compared with those of other professions because of the large sums of money involved; that, for that reason, a Commission for the Distribution of Gratuities has been established to manage the large sums received in tips; and that those sums are placed in a common fund and redistributed among the croupiers according to their rank. The Committee notes that, according to the State party, gratuities are income stemming from the employment relationship, contrary to the author's claims that they are donations, and thus exempt from tax. Furthermore, earned income comprises several elements, including basic pay, seniority bonuses and various gratuities, and that this complex set of types of income counts towards various uses of different kinds, all legitimate. For example, only basic pay and seniority bonuses count towards severance pay. The Committee further notes that, according to the State party, laws governing gratuity-related matters consider such income as earned income for social security purposes. Finally, the Committee notes that, according to the State party, all taxpayers in the same situation as defined by tax legislation must be subject to the same tax regime; that all citizens with an equal income must bear an equal tax burden; and that the ultimate objective of tax legislation is to reduce social inequalities.

8.4 The Committee recalls its communication No. 1565/2007, *Aurélio Gonçalves et al. v. Portugal*, which is identical in the facts, and where it observed the unique and specific nature of the tax regime for croupiers. The Committee reiterates that is not in a position to conclude that this taxation regime is unreasonable in the light of such considerations as the size of tips, how they are distributed, the fact they are closely related to the employment contract and the fact that they are not granted on a personal basis. Accordingly, the Committee concludes that the information before it does not show that the author has been victim of discrimination within the meaning of article 26 of the Covenant.

8.6 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation by Portugal of the provisions of the Covenant.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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