European Tax Report
Confédération Fiscale Européenne (CFE)

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NEWS - INDIRECT TAX

European Council

Continuing national differences on reduced VAT rates

After the Ecofin meeting on 4 November there were still differences about the European Commission's proposal to extend the lowest, 5% VAT rate to include labour-intensive industries, such as catering. Germany is blocking an agreement on a proposal for compromise and is supported by Austria, Denmark, Estonia and by Latvia and Lithuania. Germany believes that there is no evidence that a lower VAT in these businesses would create jobs and believes the list of areas that would be covered by the 5% rate is too motley and requires rationalization. The EU should abandon its bit-by-bit approach of adding to the lists "as if anything goes". The French Presidency has suggested that the Member States that wish to introduce a reduced VAT rate for the first time should carry out a study to prove the economic timeliness of the measure envisaged. The Commission would then assess the results of the study. The draft compromise also suggests applying reduced taxation to work and services intended to reduce the environmental impact of certain buildings. The French EU Presidency nonetheless hopes unanimous agreement will be reached in December and an agreement is expected this year.

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Progress towards adoption of measures aimed at combating tax fraud

During the Ecofin meeting on 4 November, European Finance Ministers took discussions forward on the legislative package (directive and regulation) aimed at combating value added tax fraud (VAT). The Netherlands initially opposed the idea of obliging companies to report the VAT they pay on cross-border trade every month, rather than every three months, arguing that it would hurt business. However, a compromise was reached under which companies would submit VAT reports every month, but not companies with revenues from cross-border trade totaling less than €100,000 per quarter. This figure would be lowered to €50,000 in 2012, depending on a report that the Commission is expected to deliver in 2011. Technical aspects of the deal will now be addressed by ambassadors to the EU and then returned for approval by finance ministers.

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European Parliament

Duty-Free Shops

The European Parliament voted in November in favour of keeping in place tax-free sales outlets at the external borders of the EU. This provision is aimed directly at the proposal of the Commission to get rid of the „duty-free" shops in Greece and Romania. According to the Rapporteur „these outlets in no way disturb the single market" and getting rid of them could even lead to „the loss of thousands of jobs". The Commissioner for Taxation, László Kovács, reminded the plenary that countries such as Slovenia and Hungary had had to get rid of this kind of shops in order to join the EU in 2004. As usual with tax matters, the European Parliament's position is consultative.

During the November Ecofin Council, the French Presidency stated that a general agreement had formed over this dossier, acknowledging that Slovenia, in the middle of transferring power, was not at that stage in a position to take decisions. By way of compromise, it suggested a transitional period of nine years, until 2017, to close „duty-free" shops in Greece.

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NEWS - INDIRECT TAX

European Commission

Action plan to better combat VAT fraud

On 1 December the European Commission adopted a Communication presenting a short term action plan with a list of future legislative measures to enhance the capacity of tax administrations to prevent or detect VAT fraud (in particular „missing trader fraud") and to recover taxes. Moreover, it has adopted two measures to amend the VAT Directive. The first aims to prevent the existing abuse by fraudsters of the VAT exemption at importation and the second to give Member States the possibility to make the supplier of goods liable for the VAT loss created by his missing customer in another Member State, when he did not report his supply to his VAT authority.

The Communication provides a global approach to enhance the tools for Tax Administrations to tackle VAT fraud at different stages in the process. The action plan proposes to introduce measures to:

- prevent potential fraudsters from abusing the VAT system including: common approach to the registration and de-registration process of VAT taxable persons in the EU; on line confirmation available to traders of the validity of the VAT identification number of their customer; simplification, modernisation and harmonisation of the current rules on invoicing
- enhance the tools for the detection of VAT fraud, in particular by the creation of a European network, called Eurofisc (see CFE European Tax Report 2008/7), for closer operational cooperation between Member States;
- strengthen the possibilities for tax authorities to recover VAT losses in cross-border cases.

Proposal to amend the VAT Directive in two specific areas

- The importation of goods is exempt from VAT if followed by a supply or transfer of those goods to a trader in another Member State. Inadequate implementation of this exemption in national law has lead to difficulty in following-up the physical movement of the imported goods. The Commission proposes to tighten the conditions under which the importer can benefit from the exemption: at the time of importation, he shall clearly indicate to the Member State of import his VAT identification number, the VAT identification number of his customer and he shall prove that the imported goods will be transported to another Member State.
- Fraud investigators have reported that traders in intra-community supplies intentionally do not report (or report incomplete/false data or report late) their supply to the tax authorities. As a consequence, the Member State of destination gets no information about the arrival of goods on its territory, which impedes the detection of potential VAT losses. The Commission therefore proposes that the supplier in intra-community transactions be liable for the VAT loss created by his missing customer in another Member State, when the supplier contributed to the loss by not reporting his supply to his VAT authority. The proposal will provide tax administrations with a tool for recovering VAT from non-established traders.

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VAT- Review of existing legislation on invoicing

The European Commission has published a summary report on the outcome of its consultation on „VAT – The review of existing legislation on invoicing". In total 64 replies were recieved.

The Fiscal Committee of the Confédération Fiscale Européenne has published an Opinion Statement on the subject.

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CFE Opinion Statement

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NEWS - INDIRECT TAX

Procedure against the Netherlands' too widely VAT exemption

The VAT Directive exempts certain supplies of goods and services in the socio-cultural, health and the education sector. In order to respect the neutrality of the VAT system and avoid unfair competition in the internal market, the Court of Justice has made clear on several occasions that the exemptions in the VAT Directive are to be strictly interpreted. The Commission is of the opinion that the Netherlands applies these exemptions too widely by also exempting the provision of personnel in these areas.

In addition, the Netherlands does not consider public corporate bodies providing personnel to Euregions to be VAT taxable persons. Therefore services supplied by them are not subject to VAT. The Commission is of the opinion that these public corporate bodies do act like private bodies (like, for instance, job agencies) when they provide personnel, and should therefore qualify as taxable persons, subject to VAT.

The Commission sent a reasoned opinion to the Netherlands in June 2008. As the Netherlands has not amended its legislation within the time limit laid down, the Commission has decided to refer the matter to the Court of Justice.

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Infringement procedure Italy: failing to notify transposition measures of two VAT Directives

The European Commission has decided to send Italy two reasoned opinions for failing to notify transposition measures of two Directives: Council Directive 2006/69/EC aiming at countering VAT fraud and Council Directive 2006/112/ EC, the VAT Directive, recasting the Sixth VAT Directive on the common system of value added tax.

Since Italy failed to inform the Commission of the steps it had taken to comply with the Directives, despite letters of formal notice the Commission concludes that Italy doesn't comply with its obligation of implementation.

Directive 2006/69/EC of 24 July 2006 brings in more effective and transparent rules which allow Member States to adopt antifraud measures more flexibly than before, while at the same time repealing certain derogations granted to individual Member States. National laws, regulations and administrative provisions necessary to comply with this Directive should have been brought into force from 1 January 2008 at the latest.

Directive 2006/112/EC of 28 November 2006 is a recasting of Directive 77/388/EC, once commonly referred to as „the Sixth VAT Directive" to rationalise into a single statutory instrument the various amendments made to that Directive over time. The time limit for the transposition was fixed on 1 January 2008.
The Commission may initiate proceedings before the European Court of Justice if Italy fails to notify the requested measures within two months of receiving the reasoned opinion.

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The Commission refers Poland to the ECJ for the application of a reduced rate to children's items

The European Commission has decided to refer Poland to the Court of Justice regarding the reduced VAT rate it applies to the supplies of certain children's items. The Commission supports social and family friendly policies, as part of the EU's response to the pressing challenge of demographic ageing. However, it must also ensure that the EU VAT binding rules are applied by all Member States. It points out that more efficient instruments- such as direct subsidies or personal income tax allowance- can be easily (without the agreement of the 26 other Member States) implemented by Poland to reach its objectives.

According to the VAT Directive (Article 98, in connection with Annex III of Directive 2006/112/EC) only a limited list of supplies of goods and services may be subject to reduced rates of VAT. None of the aforementioned items are included in this exhaustive list, and Poland has been granted no derogation in this regard. The conclusion is that by applying a reduced VAT rate in these cases, Poland is in breach of Community Law.

NEWS - INDIRECT TAX

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The Commission launches procedures against five countries for reduced VAT rate for horses

The European Commission has decided to refer the Netherlands to the European Court of Justice for applying a reduced VAT rate to horses, and in particular race horses. At the same time, the Commission formally requested Austria, France, Germany and Luxembourg to amend their legislation with regard to similar measures. If these Member States fail to comply with the reasoned opinion within two months, the Commission may also refer them to the Court.

Annex III of the VAT Directive contains a limited list of supplies of goods and services which may be subject to reduced rates of VAT. Included in that list are foodstuffs for human and animal consumption as well as live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs (point 1) and agricultural inputs (point 11).

Reduced rates constitute exceptions to the general principle that the standard rate applies, and the legislation must therefore be strictly interpreted.

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European Court of Justice

Advocate General analyzes VAT aspects of canteen supplies and free meals (C-371/07)

On 23 October 2008, Advocate General Sharpston rendered her Opinion in the case of Danfoss A/S and AstraZeneca A/S against the Danish tax authorities (C-371/07). Both companies made canteen supplies for no consideration to personnel and supplied free meals to business relations. For those supplies, both companies declared VAT based on the cost price of the meals. However, arguing that no VAT was due, both companies asked for a refund of the remitted VAT. The Danish tax authorities refused that refund.

In her Opinion, the Advocate General first stated that the supply of free meals to business relations in the own canteen of the company can be regarded as a taxable activity as mentioned in Article 5, sixth paragraph or Article 6, second paragraph of the Sixth EC VAT Directive. The same is applicable regarding free meals supplied to personnel in the companies' canteens. However, for both these supplies, neither of the two articles referred to are applicable if the supplies in principal have the purpose of serving the business.

Furthermore, the Advocate General is of the opinion that supplies under the mentioned articles can never be treated as being supplied against consideration unless the input VAT relating to those supplies is partially or completely deductible.

Moreover, according Article 17, sixth paragraph, second indent of the Sixth EC VAT Directive, a Member State may not 'retain' an exclusion from deduction with respect to expenses for which a right to deduct was recognised by administrative practice on the date on which the Sixth EC VAT Directive came into force, even if the exclusion was provided for in theory under national legislation. Nor may a Member State, having once allowed deduction of VAT on certain expenses after the Sixth EC VAT Directive came into force, subsequently revert to excluding the same expenses from the right to deduct, even if such an exclusion had been provided for when the Sixth EC VAT Directive came into force.

READ MORE ***(click to open):***

ECJ case C-371/07

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NEWS - INDIRECT TAX

Advocate General: group exemption applicable for services only rendered to one or more members (C-407/07)

On 9 October 2008, Advocate General Sharpston rendered her opinion in the Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing ('SCBIT'). SCBIT is a foundation with members consisting of medical and health insurance bodies and certain members of these bodies. SCBIT aims to promote the quality in medical care and therefore, it renders certain services to its members. For its services, SCBIT applies the VAT exemption for groups as mentioned in Article 13 A, first paragraph under f of the Sixth EC VAT Directive. The exemption is also applied to the rendering of occasional services to individual members of SCBIT, from which services not all members profit. Regarding the latter services, the tax authorities argued that this exemption did not apply due to the fact that the criterion of 'reimbursement of their share in the joint expenses' had not been met.

The Dutch Supreme Court referred a preliminary question to the ECJ asking whether the group exemption of Article 13 A, first paragraph under f of the Sixth EC VAT Directive, also covered services provided by groups to their members which are directly necessary for the exercising of those members' activities or activities for which they are not subject to VAT if those services were supplied only to one or more members, and not to all. The Dutch Supreme Court requested that the circumstance be taken into account that for these services, no amount was invoiced in excess of the costs incurred by the body which rendered the services.

In her Opinion, the Advocate General stated that the exemption applied, also in such situation. However, she explicitly noted that, of course, all other conditions of the exemption had to be met.

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ECJ case C-407/07

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European Council

Anti-fraud agreement with Liechtenstein

On 4 November, The European Finance Ministers agreed to ask the Commission to improve and clarify an agreement on the exchange of financial information with Liechtenstein. This has been in focus this year because of allegations that EU companies and individuals are using its exemptions from the savings-tax directive to evade tax. The Finance Ministers want more results from the discussions on anti-fraud agreement with Liechtenstein. They believe that the results achieved hitherto by the European Commission, which is conducting the negotiations on the basis of an EU mandate, are real but insufficient. The Ministers want the Commission to ensure that the Liechtenstein authorities undertake to respond to European requests for information and that the exchange of information also covers investment carried out through the creation of "foundations". All Member States, "including Austria and Luxembourg", agreed that negotiations with Liechtenstein should be continued, since such an exercise should be carried out within the existing mandate. The anti-fraud agreement will deal with fraud, but not tax evasion. No timeline was set.

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NEWS - DIRECT TAX

European Commission

Savings Taxation Directive

The European Commission has adopted an amending proposal to the Savings Taxation Directive, with a view to closing existing loopholes and eliminating tax evasion. Since 2005, the Savings Directive ensures that paying agents either report interest income received by taxpayers resident in other EU Member States or levy a withholding tax on the interest income received. The Commission proposal seeks to improve the Directive, so as to better ensure the taxation of interest payments which are channeled through intermediate tax-exempted structures. It also proposes to extend the scope of the Directive to income equivalent to interest obtained through investments in some innovative financial products as well as in certain life insurances products. Moreover, simplification of the technical operation of the Directive should lead to a more user friendly system and more efficient implementation.

Interest payments made by paying agents established in the EU to intermediate structures established outside the EU

The Commission proposes that paying agents in the EU (who know, under the anti-money laundering provisions that the beneficial owner of the interest payments is an individual resident in the Union) apply the provisions of the Directive at the time of the payment to the intermediate structure, as if this payment was directly made to the individual.

Payments of interest to certain intermediate structures established within the EU

Those structures will be obliged to act as a “paying agent upon receipt”. This means that the provisions of the Directive (exchange of information or withholding tax) must be applied by these structures upon receipt of any interest payment from any upstream economic operator (bank, financial institution, independent professional), no matter where they are established and regardless of the actual distribution of any sums to the individual beneficial owners.

The suggested definition of „paying agent upon receipt“ includes all entities and legal arrangements (trust foundations etc) which are not taxed on their income under the general rules for direct taxation in their Member State of residence/establishment.

Extending the scope of the Directive

The Commission proposes extending the scope of the Directive to income from:

- securities which are equivalent to debt claims (of which the capital is protected and the return on investment is pre-defined),
- life insurance contracts whose performance is strictly linked to income from debt claims or equivalent income and have less than 5% risk coverage.

The Commission hoped for adoption, by unanimity in Council, of the legislation before the end of 2009 so that it can be implemented from 2012. Amending directive 2003/48/EC would mean having to renegotiate bilateral agreements with five non-EU countries (Andorra, Liechtenstein, Monaco, San Marino and Switzerland) and 10 dependent or associated with member states which apply measures equivalent to European rules.

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Green Tax Report

A report by the European Commission argues that reduced energy consumption could lower governments‘ tax revenues and highlights risk of ‚carbon leakage‘. The report warns about the economic costs of the EU‘s proposed energy and climate-change package, arguing that tax revenues could fall.

According to the European Commission‘s Economic Policy Committee‘s working group a strong pursuit of the goals set out in the package, which the EU presidency wants agreed this year, would reduce energy consumption and, with it, tax revenues. It warns that rising energy bills might result in stronger calls for governments to help poorer members of society, which, if heeded, could increase public spending. The paper also flags up the increased risk that companies could move their operations abroad to avoid the restrictions imposed by emissions-reduction targets, a process often referred to as ‘carbon leakage‘. The working group states that a global and comprehensive agreement “imposing similar CO2 price to all emitters on an international level” is the best way to avoid carbon leakage. There is also a fear that, in the absence of a comprehensive international agreement, additional compliance costs under Phase 3 of the EU‘s emissions-trading scheme (ETS) could add to the chances of carbon leakage.

NEWS - DIRECT TAX

Decisions on ETS will finally be made by environment, rather than finance ministers.

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Report Economic Policy Committee

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Infringement procedure Luxembourg: the Savings Tax Directive

The European Commission has formally requested Luxembourg to amend its legislation which incorrectly transposes certain provisions of the Savings Tax Directive. The request takes the form of a reasoned opinion. If no satisfactory reaction to the reasoned opinion is received within two months, the Commission may decide to refer the matter to the European Court of Justice.

The reasoned opinion adopted by the Commission concerns the incorrect application by Luxembourg of the Savings Directive 2003/48/EC, adopted in 2003. According to the Commission, Luxembourg cannot provide an exemption from withholding tax in situations other than those expressly provided by article 13 of the Directive. However, Luxembourg also gives an exemption from withholding tax to interest payments made to beneficial owners who benefit from the so-called „non-domiciled resident" status in their country of residence. This status is granted by some Member States to residents who are generally exempt from income tax in their State of residence or provided the interest payments, in the absence of a transfer to the State of residence (remittance), are not subject to tax in that State.

The Commission is of the opinion that the paying agent has the obligation to establish the residence of the beneficial owner on the basis of minimum standards, as provided by article 3(3) of the Directive. Therefore, if the beneficial owner is a resident of another Member State in accordance with these standards, the Member State of the paying agent must ensure that the latter applies the Directive and, in the case of Luxembourg, that the paying agent levies a withholding tax on interest payments to such a beneficial owner. Consequently, the Commission considers that Luxembourg's legislation, in its current state, is not compatible with articles 2, 3, 10 and 11 of the Directive.

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Infringement procedure Portugal and Spain: restrictive exit tax provisions for companies

The European Commission has formally requested Portugal and Spain to change their tax provisions which impose immediate exit taxes when companies cease to be tax resident in these countries or transfer their assets to another Member State. The requests take the form of a reasoned opinion

Under *Spanish* law, when a Spanish company transfers its residence to another Member State or when a permanent establishment ceases its activities in Spain or transfers its Spanish located assets to another Member State, unrealised capital gains must be included in the taxable base of that financial year, whereas unrealised capital gains from purely domestic transactions are not included in the taxable base.

Under *Portuguese* law, in case of the transfer of seat and place of effective management of a Portuguese company to another Member State or in case a permanent establishment ceases its activities in Portugal or transfers its Portuguese located assets to another Member State

- the taxable base of that financial year will include any unrealised capital gains in respect of the company's assets whereas unrealised capital gains from purely domestic transactions are not included in the taxable base;
- the shareholders of the company that transfers its seat and place of effective management abroad are subject to tax on the difference between the company's net assets (valued at the time of the transfer at market prices) and the acquisition cost of their participation.

The Commission considers these provisions to be incompatible with the freedom of establishment (art. 43 EC) provided for in Article 43 of the Treaty and Article 31 of the EEA Agreement.

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NEWS - DIRECT TAX

Infringement procedure Estonia: discrimination of foreign charities

The European Commission has sent Estonia a formal request to end the discriminatory treatment of donations to foreign non-profit organisations and foundations (charities). Estonia offers various forms of tax relief for donations to charities by resident individuals and resident companies. However, this favourable tax treatment is only granted if the charity is established in Estonia and is included in a special list. The beneficial treatment of donations is also extended to certain bodies established by Estonian governmental institutions and to religious organisations registered in Estonia. No relief is granted in respect of donations to similar foreign bodies and organisations.

The difference in treatment between donations made to charities in Estonia and charities in other Member States constitutes an obstacle to the free movement of capital. Cross-border donations are mentioned in Council Directive 88/361/EEC, which provides for a Community definition of capital movements. The Estonian rules are also contrary to the freedom of establishment, as foreign charities are forced to set up branches in Estonia in order to enable Estonian residents making donations to such charities to benefit from the favourable tax treatment. Estonia may use the Mutual Assistance Directive (77/799/EEC) to ensure that charities established in other Member States use their assets and income only for charitable purposes.

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The Commission refers Portugal and Spain to ECJ over discriminatory taxation of foreign pension funds

The European Commission has decided to refer Spain and Portugal to the European Court of Justice for their rules under which dividend and/or interest payments to foreign pension funds (outbound payments) may be taxed more heavily than dividend and/or interest payments to domestic pension funds (domestic payments).

According to the *Spanish* rules, pension funds established in Spain are exempted from tax on their income, and they can claim back any Spanish withholding tax on the dividends that they receive. Any domestic dividends that they receive are thus effectively tax free. By contrast, Spain levies a withholding tax of 18% on dividends paid to pension funds established elsewhere in the EU or in the EEA/EFTA countries.

Similarly, *Portugal* exempts dividends received by domestic pension funds and levies a withholding tax of 25% on dividends paid to pension funds established elsewhere in the EU or in the EEA/EFTA countries. This results in higher taxation of dividends paid to foreign pension funds. Bilateral tax treaties may provide for a reduced withholding tax rate.

The higher taxation on dividends paid to foreign pension funds dissuades these funds from investing in Spain and Portugal. At the same time, companies established in Spain and Portugal may face difficulties in attracting capital from foreign pension funds as a result of this difference in treatment. The higher taxation of foreign pension funds thus results in a restriction of the free movement of capital as protected by Article 56 EC and Article 40 EEA. In the case of controlling participations held by the foreign pension funds, it may also result in a restriction of the freedom of establishment, protected by Article 43 EC and Article 34 EEA. The Commission is not aware of any justification for such restrictions.

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Infringement procedure UK: cross-border pension contributions

The reasoned opinion adopted by the Commission concerns the income tax rules which deny workers established in the UK the right to deduct pension contributions they pay to pension funds established elsewhere in the EU or the EEA from their UK taxable income. UK legislation denies such deductibility if an overseas pensions fund does not provide certain information to the UK tax authorities. In particular, the UK requires information on the date that the pension is to start to be paid to an individual and on the capital value of the pension. The denial of deductibility particularly affects cross-border workers who move to the UK whilst continuing with a pension fund established in their state of origin.

The Commission is of the opinion that the UK should allow deductibility for all pension contributions paid by resident taxpayers to funds established in other EU and EEA Member States as is the case for similar contributions to domestic pension funds. In cases where the foreign pension provider is unwilling or unable to provide the required information, the non-deductibility of the contributions may in practice oblige the mobile worker to replace his foreign pension scheme with one provided in the UK in order to be eligible for a tax deduction in the UK. A person resident in another Member State may thus be dissuaded from exercising his right of free movement by taking up employment in the UK.

Furthermore, the information requirements constitute a costly formality, particularly for foreign pension providers that do not wish to enter the UK market but merely provide services to existing scheme members who have exercised their right of free movement.
Consequently, the Commission considers that the United Kingdom's legislation, in its current state, is not compatible with Articles 39, 43 and 49 EC Treaty.

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European Court of Justice

France ruled against for failing to recover tax aid (case C-214/07)

On 13 November, the Court of Justice ruled that France had failed in its Community duties by failing to recover tax aid to resume operations granted to struggling industrial companies (case C-214/07). This recovery was ordered in a decision of the Commission of 2003 (2004/343/EC). This decision declared that the mechanism for tax exemptions in several articles of the General Tax Code (GTC), brought in by the Finance Law for 1989, nos. 88-1149, of 23 December 1988, without prior notice to the Commission, constituted illegal tax aid. Companies created to take over the activities of industrial firms in difficulty are exempted from corporate taxation for a period of two years. In addition, these newly created companies may also enjoy exemption from corporate taxation and property tax for a period of two years. This aid, with the exception of the few specific cases, was declared illegal in the Commission's decision.

The Commission has noted that the French authorities have failed to take appropriate measures to recover the aid in question, and has brought this case before the Court. In the judgment, the Court backed up position of the Commission, ruling that France was derelict in its Community obligations for its failure to recover the money in question, or to notify the measures it was planning in order to do so within the stated deadline. The Court did, however, exempt the French authorities from recovering aid granted for 1993, as the relevant company paperwork is only kept for a period of 10 years in France (bearing in mind that the decision of the Commission was taken in 2003). For all other companies, the money must be recovered, states the ruling. The Court rejects the argument- put forward by France- that it is impossible to recover the money.

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ECJ case C-214/07

EN FR DE

German rules in line with EC law regarding the recapture of cross-border losses in foreign establishment (C-157/07)

The ECJ have given its decision in the Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt ('KR Wannsee') case (C-157/07). KR Wannsee was a German resident GmbH, which maintained a permanent establishment in Austria from 1982 to 1994. Between 1982 and 1990, it suffered losses for that establishment, which were taken into account by the Finanzamt in calculating the taxable amount. Between 1991 and 1994, KR Wannsee made profits at its permanent establishment in Austria. In 1994, KR Wannsee disposed of that permanent establishment. Under the German rules in question, losses deducted in the past related to a permanent establishment located in a Member State during the period 1991 to 1994 were recaptured in the Member State of residence of the principal company.

The substance of the issue

The question arose whether this recapture was permitted under Article 31 EEA (right of establishment) as the losses were also recaptured, whereas they were not deductible in the Member State where the permanent establishment was located. A second question was whether it was relevant that, in turn, the legislation of the other Member State was not in line with Article 31 EEA, as the deduction of losses was not allowed. The freedom of establishment protected under Article 31 EEA is relevant in this context, since Austria only acceded to the European Union as a Member State on 1 January 1995.

The ECJ observed that, unlike the legislation at issue in Lidl Belgium (C-414/06), the German tax system at issue in the main proceedings provides that, in the results of the company established in Germany to which the permanent establishment in Austria belongs, losses made by that permanent establishment were to be taken into account. However, by subsequently proceeding to reintegrate losses by the said permanent establishment into the basis of assessment of the principal company when the latter had made profits, the German tax system withdrew the benefit of that tax advantage. The ECJ therefore concluded that the tax system at issue in the main proceedings entailed a restriction on the right set out in Article 31 EEA.

Judgment

The ECJ concluded that the restriction which follows from the reintegration thus provided for is justified by the need to guarantee the coherence of the German tax system. Restriction was appropriate to achieve such an objective, in that it operated in a perfectly symmetrical manner, only deducted losses being reintegrated. Moreover, the Court considered that restriction entirely proportionate to the objective pursued, since the reintegrated losses were reintegrated only up to the amount of the profits made.

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ECJ case C-157/07

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Cross-border charity donations must not be excluded from tax benefits (Case C-318/07)

Advocate General Paolo Mengozzi has issued his Opinion in the Persche case (C-318/07). Advocate General Mengozzi expressed the view that cross-border charity donations in another EU member state should receive the same tax advantages as donations to domestic charities. He acknowledged the problems for tax authorities to check the exact nature of beneficiary organisations abroad but said these problems were not insurmountable.

The Advocate General concluded that:

- The free movement of capital covers gifts in kind by an individual of a Member State to an organization whose seat is in another Member State and which qualifies as a charitable organization under its national law,
- Articles 56 and 58 EC preclude that gifts to charitable organizations are only deductible when donated to organizations that have their seats in the same Member State as the donor.
- The Mutual Assistance Directive does not contain an obligation for tax authorities of a Member State to request the necessary information from the tax authorities of other Member States. It is for the national court to decide on a case-by-case basis whether the denial of the desired deductibility without obtaining assistance under the Mutual Assistance Directive is based on a diligent consideration of the required evidence.

If the Court follows the advocate general‘s opinion, it will tell the Bundesfinanzhof, the highest German court dealing with tax issues, that a Member State must not make it a condition for tax deductions for donations that the recipient cannot be located abroad.

READ MORE *(click to open):*

ECJ case C-318/07

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OTHER NEWS

Conferences

VAT anti fraud seminar on 23 January 2009 in Amsterdam

The Dutch Tax and Customs Administration and the European Commission organise a one day Fiscalis seminar in Amsterdam on 23 January 2009 on „*VAT fraud: A common concern for businesses and tax administrations*“.

Participants will have an exchange of views and ideas on measures developed in the Commission Communication on a coordinated strategy to improve the fight against VAT fraud in the EU.

The seminar will bring together representatives from businesses, the national tax administrations and the European institutions. It will focus on both short term and longer term measures to combat VAT fraud.

Further information on the seminar, the draft programme and the registration form can be found on the Commission's **website**

Seminar on the impact of ECJ decisions on national and international rules on direct taxation

The German Minister of Finance organised a seminar on the *Impact of ECJ decisions on national and international rules on direct taxation* which took place in Berlin on 17 and 18 November 2008. The background to the Conference was the Meilicke case (C-292/04), where the ECJ when interpreteing Article 56, 58 EC, refused to grant a limitation of the retroactive effects, which had been said to cost Germany 5 bil €. The German government now tries to prevent similar "accidents" by intervening in potentially "dangerous" cases at the ECJ.

In four panels the conference treated the following subjects:

- *Direct taxes in the framework of European and international law*: Peter J. Wattel, Advocate-General at the Hoge Raad of the Netherlands, presented pairs of judgments, from which it was unclear which interpretation of EU law would be that adopted by the ECJ. Koen Lenaerts, Judge at the ECJ, explained that in the absence of harmonisation Member States are competent for direct taxation, but have nevertheless to respect the Treaty framework; however, the Treaty does not give any indication to which Member State to give the preference in case of competing taxing rights.
- *Perspectives of Member States*: The reception of ECJ judgments by national tax courts and their reactions was presented for Germany (Dietmar Gosch, Bundesfinanzhof), France (Philippe Martin, Conseil d'Etat) and the UK (Philip Baker, lawyer). It became clear that German events are most prepared to request a clarification from the ECJ under Art. 234 EC. A speech by Axel Nawrath, Secretary of State in the German Federal Ministry of Finance, concluded this panel by expressing his satisfaction about the fact that the ECJ recently has better taken into account the legitimate concerns of Member States, inter alia by accepting that profits and losses should be taken into account in a symmetric manner (such as in the Krankenheim Wannsee judgment of 23 Oct 2008, C-157/07).
- *Selected aspects of ECJ judgments*: Lerke Osterloh, judge at the German Federal Constitutional Court (BVerfG), presented a brilliant scholarly analysis of the different approaches of the German Federal Constitutional Court (BVerfG) and of the ECJ towards the retroactive effects of judgments.
- *Political and scientific perspectives*: Joachim Wieland, Professor at the German Postgraduate School for Administrative Sciences, Speyer, challenged the applicability of the EC Treaty to direct taxes altogether, referring to Article 58 (1)(a) of the latter. However, Vassilis Skouris, President of the ECJ, opposed vigorously.

IMPRESSUM

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