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EU Tax Alert > 76 EU Tax Alert

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1. Top News

- ECOFIN reaches agreement on Directive on strengthened mutual assistance in the recovery of taxes
- ECJ finds Belgian transfer pricing rules compatible with EU law (*SGI*)
- ECJ rules on the revision of an incorrect customs export declaration

2.State Aid/WTO

- New taxes to finance Spanish public broadcasting subject of State Aid investigation

3. Direct Taxation

- Commission refers Portugal to the ECJ on discriminatory taxation of foreign pension funds (*Commission v Portugal*)
- Commission requests Belgium to amend certain provisions on the taxation of dividends and to change its provisions with regard to the higher taxation of dividends and interest received by foreign investment funds
- Commission opens a new infringement procedure against Greece for failure to comply with an ECJ judgment concerning taxation of income from inbound dividends
- Commission requests Greece to amend its tax provisions on tax deductibility of certain categories of consumer expenditure
- Commission requests Spain to amend certain rules related to the appointment of fiscal representatives
- Developments in the Netherlands: Advocate General Wattel issues Opinions in five cases concerning third countries

4. VAT

- ECOFIN adopts Derogation from VAT directive for Portugal
- Reach of VAT exemption for educational services further explained (*Eulitz*)
- Limited period of three years to exercise right to refund of excess VAT allowed (*Alstom Power Hydro*)
- Dutch system of limitation right to deduct input VAT partially in conflict with EU VAT Directive
- Commission starts infringement procedure against Denmark regarding VAT exemption for charity organizations
- Commission takes action against France over 'telecoms tax'

5. Customs Taxes and Excise Duties

- Commission authorises Hungarian fiscal aid for transport coordination
- Commission calls on Portugal to change its legislation on annual circulation tax on motor vehicles

6. Capital Duty

- Commission requests Spain to abolish its transfer tax on certain contributions of capital

1. Top News

ECOFIN reaches agreement on Directive on strengthened mutual assistance in the recovery of taxes

During the ECOFIN meeting held in Brussels on 19 January 2010, the EU Council examined a package of measures aimed at improving tax governance and clamping down on tax evasion in Europe. The EU Council reached agreement on a general approach, pending the opinion of the European Parliament, on a draft directive aimed at strengthening mutual assistance between Member States in the recovery of taxes. The directive will be adopted at a forthcoming ECOFIN meeting, once the Parliament's opinion is available.

The other measures in the package comprise:

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- a draft directive aimed at enlarging the scope of Directive 2003/48/EC on the taxation of savings interest;
- a draft directive aimed at strengthening cooperation between the Member States in the field of direct taxation;
- a draft agreement with Liechtenstein on measures to combat tax fraud; and
- a draft decision authorising the Commission to negotiate anti-fraud agreements with Andorra, Monaco and San Marino, as well as a new anti-fraud agreement with Switzerland.

Agreement on strengthened mutual assistance in the recovery of taxes
National provisions on tax recovery are limited in scope to national territories, and fraudsters have taken advantage of this to organise insolvencies in Member States where they have debts. Member States, therefore, increasingly request the assistance of other Member States to recover taxes, but existing provisions have only allowed a small proportion of debts to be recovered.

The draft directive is aimed at better fulfilling the Member States' needs with regard to the recovery of taxes, providing an overhaul of Directive 76/308/EEC (codified by Directive 2008/55/EC), on the basis of which the Member States have engaged in mutual assistance since 1976, aimed at clamping down on tax evasion. The draft directive is intended to provide for an improved assistance system, with rules that are easier to apply, including rules as regards information held by banks and other financial institutions, and to provide for more flexible conditions for requesting assistance, requiring the spontaneous exchange of information.

^ top

- Patrick Vettenburg
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ECJ finds Belgian transfer pricing rules compatible with EU law (*SGI*)

On 21 January 2010, the ECJ rendered its judgment in the *SGI* case (C-311/08) regarding the compatibility of the Belgian transfer pricing rules with Articles 43, 48 and 56 EC (respectively, Articles 49, 54 and 63 of the Treaty on the Functioning of the European Union ('TFEU'), in force since 1 December 2009) and, as appropriate, Article 12 EC (corresponding with Article 18 TFEU).

Belgian tax law provides that exceptional or gratuitous (i.e. non-at arm's length) benefits granted by a resident company to a non-resident company with which the resident company is directly or indirectly related, are automatically added to the taxable base of the company granting the benefits. However, exceptional or gratuitous benefits granted in identical circumstances by a resident company to another resident company with which the latter is directly or indirectly connected, are not added to the taxable base of the company granting the benefits.

After having determined that the Belgian transfer pricing rule at stake only had to be investigated in the light of Article 43 and 48 EC (now Articles 49 and 54 TFEU), given the circumstances of the case at hand, the ECJ ruled that the transfer pricing rule did indeed constitute a restriction of the freedom of establishment. After all, resident companies granting non-at arm's length benefits to related non-resident companies are treated less favourably than resident companies granting non-at arm's length benefits to related resident companies. Moreover, non-resident companies might be dissuaded from investing or acquiring a participation in resident companies.

Nevertheless, the ECJ ruled that the restriction could be justified by (i) the need to maintain the balanced allocation of the power to tax between the Member States; and (ii) the need to prevent tax avoidance, taken together. According to the ECJ, the allocation of the power of taxation could seriously be undermined if resident companies would be allowed to transfer their profits to related non-resident companies by way of non-at arm's length benefits. In that case, Belgium could be forced to renounce its right to tax profit arising from activities carried out in Belgium. Furthermore, although the Belgian transfer pricing rule is not specifically aimed at wholly artificial arrangements, the ECJ decided that it could still be justified by the need to combat such arrangements. Without this transfer pricing rule, the risk exists that, by means of wholly artificial arrangements, income transfers may be organised by resident companies to related non-resident companies established in Member States applying the lowest rates of taxation or in Member States in which such income is not taxed.

Hence, according to the ECJ, the Belgian transfer pricing rule pursues legitimate objectives which are compatible with the TFEU and constitute overriding reasons in the public interest. Furthermore, the ECJ considered that the rule is appropriate to attain those objectives. In order to determine whether or not the rule goes beyond what is necessary, the ECJ referred to the national courts but gave some guidelines. Whether or not a rule is aimed at wholly artificial arrangements should be verified on the base of objective data. Moreover, the taxpayer needs to have the possibility to prove the opposite and the corrective tax measure must be limited to the non-at arm's length benefit itself. Whether or not these requirements are met by the transfer pricing rule at stake is for the national courts to decide.

^ top

ECJ rules on the revision of an incorrect customs export declaration

On 14 January 2010, the ECJ rendered its judgment in the Terex *Equipment Ltd and Others* joint cases (C-430/08 and C-431/08). The cases concerned the consequences of the use of an incorrect code on an export document and whether these consequences could be avoided by revision of the export documents.

Terex is a company which manufactures earth-moving machinery. It imports various items which are incorporated into that machinery. Customs duties on those imported items were suspended under the inward processing procedure laid down in Articles 114 through 129 of the Customs Code. That machinery is sold to buyers inside and outside the EU. Where those goods are re-exported in accordance with the conditions of the inward processing procedure, no duty becomes payable.

Between January 2000 and July 2002, customs agents acting on behalf of Terex or purchasers inserted code 10 00 into the export declarations, indicating the export of EU goods, instead of code 31 51 used for the re-export of goods for which duties are suspended. The customs authorities considered in that case that the export declarations under an incorrect customs procedure code had the effect of wrongly conferring on the goods at issue the customs status of EU goods, which led to a customs debt pursuant to Article 203(1) of the Customs Code and Article 865 of the Implementing Regulation. In any event, a customs debt arose under Article 204(1)(a) of the Customs Code, because there had been no prior notification of the re export of the goods, which is obligatory under the inward processing procedure.

Terex sought a revision of its export declarations in order to regularise the situation pursuant to Article 78(3) of the Customs Code. The customs authorities refused to amend those declarations on the grounds that Terex's application sought to change the customs arrangements applicable and, moreover, the situation could not be regularised because it was impossible to present, after the event, a prior notification of re-export of goods. Terex also sought remission of the customs debt pursuant to Article 239 of the Customs Code. The customs authorities refused that request on the ground that Terex had displayed 'obvious negligence' which precluded the application of that provision.

The national court was of the view that the use of an incorrect code in the export declaration, can give rise to a customs debt. As to the application of Article 78(3) of the Customs Code to the present case, the national court considered that that provision enabled the situation to be regularised despite the fact that Article 182(3) required that there be prior notification of the re-export of goods. Lastly, the national court was of the opinion that Terex could not be criticised for obvious negligence within the meaning of Article 239 of the Customs Code. In that regard, it was of the view that the behaviour of the customs authorities contributed, during the relevant time period, to the use of an incorrect code. In those circumstances, the VAT and Duties Tribunal, Edinburgh, stayed proceedings and referred the following questions to the ECJ for a preliminary ruling:

1. 'Does the Customs Code, and in particular Article 78, permit revision of the declaration to correct the customs procedure code and if so, are HMRC required to amend the declaration and to regularise the situation?
2. In the circumstances summarised in paragraph 3 to 21 [of the order for reference] were the goods in this case unlawfully removed from customs supervision within the meaning of Article 203(1) of the Customs Code by reason of the operation of Article 865 of the Implementing Regulation?
3. If so, was a customs debt on importation thereby incurred under Article 203 of the Customs Code?
4. Even if there was no customs debt under Article 203 of the Customs Code, has a customs debt arisen by virtue of Article 204 having regard to
    i. the findings on "obvious negligence" in paragraphs 34 to 43 [of the order for reference] and
    ii. the question whether HMRC failed to comply with Article 221(3) of the Customs Code by failing to communicate the Article 204 customs debt within the time-limit?
5. Given that:
    i. there can be no regularisation under Article 78 of the Customs Code and
    ii. there was a customs debt and
    iii. there was a special situation as contemplated by Article 899 of the Implementing Regulation, was it in the circumstances [described in the order for reference] open to the Tribunal to conclude that there was no obvious negligence present, so that the customs debt should be remitted under Article 239 of the Customs Code?'

The ECJ ruled that the use in the export declarations at issue in the main proceedings of customs

code 10 00 indicating the export of EU goods, instead of code 31 51 used for goods for which duties are suspended under the inward processing procedure, gives rise to a customs debt pursuant to Article 203(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the EU Customs Code and the first paragraph of Article 865 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 establishing the EU Customs Code, as amended by Commission Regulation (EC) No 1677/98 of 29 July 1998.

Further, the ECJ ruled that Article 78 of Regulation No 2913/92 permitted the revision of the export declaration of the goods in order to correct the customs procedure code given to them by the declarant, and the customs authorities were obliged, first, to assess whether the provisions governing the customs procedure concerned had been applied on the basis of incorrect or incomplete information and whether the objectives of the inward processing regime had not been threatened, in particular, in that the goods subject to that customs procedure had actually been re-exported, and, second, where appropriate, to take the measures necessary to regularise the situation, taking account of the new information available to them.

Preliminary remarks
It follows from this decision that in case incorrect codes have been used, a customs debt may occur. However, the export document can be revised. If the goods have been exported and other conditions concerning the inward processing procedure have been fulfilled, the revision of the export document will result in no customs duty being due.

^ top

2.State Aid/WTO

New taxes to finance Spanish public broadcasting subject of State Aid investigation

On 2 December 2009, the Commission opened a formal investigation into changes in the financing of Spanish public television. As compensation for discontinuing advertising, teleshopping and pay-per-view Spain provides compensation of EUR 1.2 billion, part of which will be financed by a 3% tax on revenue of commercial broadcasters, of 1.5% on revenue of pay-TV broadcasters and of 0.9% on revenues of electronic communications operators, all in addition to a share in levies on radio spectrum use. To the extent these taxes would not suffice to compensate for loss of commercial revenue, additional contributions will be made from the general budget. A reserve fund will be set up, contributed to by any amount exceeding that required to cover the costs of public service obligations, of up to 1% of those costs. This fund will then serve to cover possible losses of previous years or to lower the government compensation in years to come.

While Spain did provide a system to prevent overcompensation, the Commission is primarily concerned with the hypothecation of the aforementioned tax revenue levied for the purpose of financing public broadcaster RTVE. In the case of a hypothecated tax, such tax should be included in the State aid examination. In this respect, the third tax on electronic commerce may be incompatible with the 2002 Electronic Communications Directive. Spain did not notify the changes in advance. The Commission is of the opinion that because of the change in sources of financing RTVE, the entire scheme will have to be regarded as new aid and, if found to be unlawful, it could become the subject of recovery.

^ top

3. Direct Taxation

Commission refers Portugal to the ECJ on discriminatory taxation of foreign pension funds (*Commission v Portugal*)

On 27 November 2008, the Commission decided to refer Portugal (as well as Spain) to the ECJ (see EU Tax Alert, edition 61, December 2008). The case is now pending as the *Commission v Portugal* case (C-493/09) and concerns the incompatibility with EU law of the Portuguese tax regime applicable to dividends and interests paid to foreign pension funds.

Under the Portuguese tax legislation, income paid to domestic pension funds is exempt from corporate income tax. Differently, dividends or interest paid to foreign pension funds are subject to the general withholding tax rate of 20% or, if applicable, the reduced rates provided under a double tax treaty concluded by Portugal.

According to the Commission, the higher taxation of dividends and interest paid to foreign pension funds dissuades foreign pension funds from investing in Portugal. Therefore, such different tax treatment of foreign pension funds as per comparison with domestic ones results in a restriction of the free movement of capital provided in Article 63 TFEU (former Article 56 EC).

Preliminary remarks
It should be mentioned that this issue is currently being discussed in other jurisdictions. In this regard, it is worth remembering that the Dutch tax authorities approved requests filed by EU pension schemes for a refund of Dutch dividend withholding tax for the years up to 2006. In addition, the French Supreme Court had already considered, in its judgment of 13 February 2009 in the case *Unilever pensioenfonds* (Case no. 298108), that the French withholding tax charged on dividends distributed to foreign pension funds was in breach of the free movement of capital.

^ top

Commission requests Belgium to amend certain provisions on the taxation of dividends and to change its provisions with regard to the higher taxation of dividends and interest received by foreign investment funds

On 28 January 2010, the Commission formally requested Belgium to change its tax provisions related to dividends received from Belgian investment funds investing all of their assets in real estate ('Real Estate SICAF'). On the same date, the Commission also requested Belgium to change its tax provisions which result in a higher tax burden on dividends and interest paid to foreign investment funds compared to similar payments made to domestic investment funds. Both requests take the form of reasoned opinions (i.e., the second step of the infringement procedure provided for in Article 258 TFEU). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matters to the ECJ.

Real Estate SICAF
Dividends paid by a Belgian Real Estate SICAF investing at least 60% of its assets in real estate situated in Belgium are exempt from withholding tax in the hands of resident shareholders, whereas dividends paid by their foreign counterparts are not. The Commission considers this treatment discriminatory and amounting to an obstacle to the free movement of capital and the freedom to provide services, since such a rule creates an incentive for Belgian residents to invest only in Belgian real estate investment funds. Moreover, the rule that Belgian investment funds investing in real estate have to invest at least 60% of their assets in real estate situated in Belgium in order to benefit from the exemption, also constitutes a restriction of the free movement of capital and the freedom to provide services, as it dissuades Belgian investment funds from investing in real estate situated abroad.

Foreign Investment Funds
Under certain conditions, dividends distributed by Belgian companies to a Belgian investment fund are exempt from withholding tax, whereas dividends distributed by Belgian companies to similar foreign investment funds are subject to 25% or 15% withholding tax. More specifically, in order to benefit from the exemption from withholding tax, the Belgian investment fund must meet the following conditions:

i. the units of the fund must be registered by the management company of the fund (e.g. the management company of the fund must keep a register including the name of all unit holders);
ii. the unit holders must be non-residents that do not perform lucrative activities and are not subject to tax in their resident State. The fulfilment of this requirement must be confirmed by a certificate delivered by the tax authorities of the resident State of these unit holders; and
iii. at least 75% of the assets of the fund must be invested in Belgian shares or profit participating loans.

The envisaged investment funds have to be distinguished from investment companies. According to the administrative guidelines, no such fund has been approved by the Minister of Finance to date.

A Belgian investment fund meeting certain legal obligations related to its investments and investors is exempt from withholding tax on revenues deriving from money deposits performed in Belgium, whereas revenues from money deposits in Belgium paid to their foreign counterparts are taxed at a rate of 15%. The Commission considers the above treatment of dividends and revenues from money deposits to be discriminatory and a restriction of the EU fundamental freedoms, since it results in a higher tax burden on dividends and revenues from money deposits paid to foreign investment funds compared to similar payments made to domestic investment funds.

^ top

Commission opens a new infringement procedure against Greece for failure to comply with an ECJ judgment concerning taxation of income from inbound dividends

On 28 January 2010, the Commission decided, under Article 260 TFEU, to open a new infringement procedure against Greece. Despite the ECJ judgment of 23 April 2009 in *Commission v Greece* (C-406/07), Greece has not communicated any changes to its legislation relating to the taxation of income from inbound dividends paid to individuals. If Greece fails to comply with the letter of formal notice, the Commission may refer the case to the ECJ a second time, seeking the imposition of a lump sum or penalty payment.

Under Greek law, dividends from non-Greek companies are subject to income taxation in Greece, whereas dividends from domestic companies are exempted from tax. The Commission referred the case to the ECJ, which declared that by applying a tax regime for dividends from abroad that is less favourable than that applied to domestic dividends, Greece failed to fulfil its obligations under Articles 43 EC and 56 EC (now Articles 49 and 63 TFEU) and Articles 31 and 40 EEA (see EU Tax Alert, edition 66, May 2009).

^ top

Commission requests Greece to amend its tax provisions on tax deductibility of certain categories of consumer expenditure

On 28 January 2010, the Commission sent Greece a formal request to amend its rules which only allow a tax deduction of certain types of consumer expenditure if it is incurred in Greece, and only allows Greek tax residents to carry out such a deduction. This effectively excludes non-residents from the deductions, even if they obtain the major part of their global income in Greece. This request is in the form of a reasoned opinion and if Greece does not amend its law within two months, the Commission may refer the case to the ECJ.

The Commission considers that the Greek legislation on the tax deductibility of certain types of consumer expenditure runs contrary to the free movement of persons, the freedom of establishment and the freedom to provide services. The non-deductibility of consumer expenditure incurred abroad has the effect of discouraging Greek residents from receiving services from abroad. In addition, such rules may also have the effect of impeding foreign service providers from offering their services to Greek taxpayers.

Furthermore, it follows from the ECJ judgment in the *Schumacker* case (C-279/93) that a non-resident taxpayer who derives his income entirely or almost exclusively from activities based in Greece is in a comparable situation to a Greek resident and should thus enjoy the same beneficial tax treatment that applies to residents. Currently, however, only Greek residents may deduct the expenditure in question from their Greek income. Non-resident taxpayers who earn most of their global taxable income in Greece are not availed of this possibility.

^ top

Commission requests Spain to amend certain rules related to the appointment of fiscal representatives

On 28 January 2010, the Commission formally requested Spain to change its tax provisions related to the appointment of fiscal representatives. The Commission considers that the rules which require certain non-resident natural and legal persons to appoint a fiscal representative in Spain result in discriminatory treatment. The request takes the form of a reasoned opinion and if there is no satisfactory reaction from Spain within two months, the Commission may decide to refer the matter to the ECJ.

Under Spanish law, the following are amongst those obliged to appoint a resident tax representative in Spain: foreign pension funds located in Member States other than Spain and providing for occupational pension schemes in Spain; EU insurance companies operating in Spain under the freedom to provide services; non-resident companies operating in Spain through a permanent establishment; and non-resident natural persons subject to inheritance and gift tax in Spain. The Commission considers that this requirement is not proportionate and that it restricts the free provision of services.

^ top

Developments in the Netherlands: Advocate General Wattel issues Opinions in five cases concerning third countries

On 19 November 2009, Advocate General Wattel delivered his Opinion in five cases pending before the Dutch Supreme Court. The two main issues in these cases (combined; not all cases relate to the same issues) are (i) the qualification of the Netherlands Antilles in respect of the application of the EU fundamental freedoms; and (ii) the application of the free movement of capital with third countries in majority shareholding situations.

Advocate General Wattel is of the view that the Netherlands Antilles, as part of the Overseas Countries and Territories ('OCT') further to Article 299 EC and Annex II to the EC Treaty (equivalent to Article 355 TFEU and Annex II to the TFEU), cannot be considered a third country for the applicability of the free movement on capital. Advocate General Wattel comes to this conclusion, inter alia, further to the Council Decision 2001/822/EC of 27 November 2001 on the Association of the Overseas Countries and Territories with the EU ('Overseas Association Decision'), where the Council notes (see paragraph 6 of the preamble):

'Though not third countries, the OCTs do not form part of the single market and must comply with the obligations imposed on third countries in respect of trade, notably rules of origin, health and plant health standards and safeguard measures.'

Furthermore, according to the Advocate General, case law of the ECJ in the *Leplat* (C-260/90) and *Van der Kooy* (C-181/97) cases, and Dutch domestic case law, lead to the same conclusion, which is that capital movements between a Member State and its OCT must be regarded as having taken place in an internal situation, leading to non-applicability of the free movement of capital.

Should, however, in the three cases relating to dividend distributions between the Netherlands and the Netherlands Antilles, the Supreme Court come to the conclusion that as a principle matter, an OCT can invoke the free movement of capital, the question of whether the free movement of capital can be applied in a situation of majority interest (and whether the freedom of establishment takes precedence in such case) has been dealt with in the respective Opinions of the Advocate General. In the other two cases, this question, which was the main question, has also been dealt with in his respective Opinions.

Advocate General Wattel took ECJ cases such as *Glaxo Wellcome* (C-182/08), *KBC Bank* (joint cases C-439/07 and C-499/07), *Holböck* (C-157/05) and *Burda* (C-284/06) into consideration, and came to the following interpretation. There are three possibilities against which domestic legislation must be tested:

1. Domestic legislation which purpose in essence relates to majority interest situations. Only the freedom of establishment can be applied;
2. Domestic legislation which purpose in essence deals with minority interest situations. Only the free movement of capital can be applied; and
3. Domestic legislation which purpose is general, and can equally relate to both minority and majority interest situations. In such case, the facts of the specific case are decisive for the question whether exclusively the freedom of establishment or the free movement of capital may be applied.

The Advocate General then based his Opinions on each of the five pending case on this interpretation of the case law referred to.

Preliminary remarks
Although the Opinions of Advocate General Wattel are supported by some of the ECJ cases referred to, we may doubt whether an *acte clair* or *acte éclairé* is present, and whether the Supreme Court should not choose to refer these issues to the ECJ for a preliminary ruling. Advocate General Wattel justly notes the decisions by domestic courts in other Member States which indicate that there is still no clarity. This is a sign that input from the ECJ is required.

^ top

4. VAT

ECOFIN adopts Derogation from VAT directive for Portugal

During the ECOFIN meeting held in Brussels on 19 January 2010, the EU Council adopted a decision authorising Portugal to apply a measure derogating from Directive 2006/112 on the common system of value added tax. Portugal is allowed to apply, until 31 December 2012, a special scheme for the taxation of doorstep sales. Firms authorised to apply the scheme are entitled to deduct VAT payable or paid by their resellers for goods they have supplied to them, and will be liable for the VAT payable on the supply of these goods to the final consumers by their resellers.

^ top

Reach of VAT exemption for educational services further explained (*Eulitz*)

On 28 January 2010, the ECJ delivered its judgment, without an opinion of the Advocate General, in the *Eulitz* case (C-473/08). This case between Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz (‘Eulitz’), an engineering consultancy company, and the German tax authorities concerned the interpretation of the VAT exemption for tuition given privately by teachers covering school or university education as in Article 13 A, first paragraph, ‘j’ of the Sixth EU VAT Directive (currently Article 132, first paragraph, ‘j’ EU VAT Directive).

One of the partners of Eulitz gave lectures at a postgraduate course for the university in Dresden. Furthermore, he was an examiner of the course examinations, and he was responsible for organizational and technical issues of the course. The course in this case was only open to persons who had obtained at least a university degree or higher technical college qualification as an architect or an engineer. Furthermore, students had to have had at least two years professional experience in the field of fire protection planning or the construction sector.

The German tax authorities taxed the income related to these services with VAT. Eulitz, however, was of the opinion that the income received was VAT exempt, due to the fact that the income received was for services performed by one of the partners as a teacher privately for his own account and risk. According to Eulitz, therefore, Article 13 A, first paragraph, ‘j’ of the Sixth EU VAT Directive was applicable.

Finally, given that the Saxony Finance Court was uncertain about the applicability of that Article, it, decided to refer two questions to the ECJ. First, the Court wanted to know if the teaching and examination work performed by an engineer at an education institute as in this case qualified as ‘school or university education’ as mentioned in Article 13 A, first paragraph, ‘j’ of the Sixth EU VAT Directive. Second, if in this case the activities performed by the partner of Eulitz could be regarded as having given tuition ‘privately’ in the sense of that Article.

In its considerations, the ECJ gave an explanation about the reach of the exemption from Article 13 A, first paragraph, ‘j’ of the Sixth EU VAT Directive. It ruled, furthermore, that under the circumstances of this case the courses given can be regarded as a VAT exempted activity under this Article. The exemption could also be applicable to other activities on the condition that the other activities are mainly performed essentially in the context of the transfer of knowledge and skills between a teacher and the students, and on the condition that it covers school or university education. Whether the latter is the case had to be determined by the referring court itself. Moreover, the ECJ ruled that Article 13 A, first paragraph, ‘j’ of the Sixth EU VAT Directive must be interpreted in such way that a person, like the partner of Eulitz in this case, who performs teaching work for courses offered by another body, cannot be regarded as having given tuition privately within the meaning of that provision.

^ top

Limited period of three years to exercise right to refund of excess VAT allowed (*Alstom Power Hydro*)

On 21 January 2010, the ECJ delivered, without an Opinion of the Advocate General, its judgment in the *Alstom Power Hydro* case (C-472/08).

Alstom Power Hydro, a Latvian company, asked for a refund of undue paid VAT in the period 1998 through 1 October 2004. The Latvian tax authorities rejected part of the request, arguing that the three-year period, set by Latvian tax legislation, had been exceeded. Alstom Power Hydro appealed against the rejection, arguing that Article 18, fourth paragraph of the Sixth EU VAT Directive did not mention a limited period and that the Latvian rules with respect to the three-year period were applied incorrectly. One of the Courts handling the case decided to ask the ECJ if Article 18, fourth paragraph of the Sixth EU VAT Directive precluded Member States from implementing national legislation in which a limitation period was taken into account of three years for the exercise of the right to a refund of overpaid VAT.

The ECJ considered that indeed, the mentioned article did not expressly lay down a limited time period. However, the principle of legal certainty contradicted the absence of a temporal limitation to exercise the right to a refund. Furthermore, the ECJ ruled that if EU legislation does not contain rules on the refund of national taxes that are levied though not due, it is up to the national legal systems to design a system that aims to protect the rights that individuals derive from EU law, provided that such system is not less favourable than that governing similar domestic actions. Based on the facts and circumstances available to the ECJ, it could not be said that the Latvian system did not comply with the latter. Finally, the ECJ considered that based on the principle of

effectiveness it was compatible with EU law that reasonable terms are set and that in earlier case law it had been determined that a two-year period was allowed. Consequently, the ECJ ruled that Article 18, fourth paragraph of the Sixth EU VAT Directive does not preclude Member States from implementing a limitation period of three years in which a taxpayer can reclaim a refund of excess VAT collected by, though not due to, the national tax authorities.

^ top

Dutch system of limitation right to deduct input VAT partially in conflict with EU VAT Directive

On 28 January 2010, Advocate General Mengozzi delivered his Opinion in the joint cases *X Holding* and *Oracle Nederland* (C-538/08 and C-33/09). Both, originally Dutch, cases concern the Dutch VAT system in which under circumstances it is prohibited to deduct input VAT on costs for supplies to personnel and business gifts.

Both X Holding BV and Oracle Holding BV deducted input VAT relating to supplies to staff, X Holding with respect to company cars also used for private purposes of staff, and Oracle Holding with respect to supplies of food and beverages, a company party, seeking accommodation for one of its employees, and on costs relating to business gifts. The Dutch tax authorities did not agree with a full deduction of that input VAT and imposed VAT assessments. Those assessments were based on the Dutch scheme in which the deduction of input VAT relating to supplies to staff and business gifts was limited. Both taxpayers however, were of the opinion that the Dutch limitation of deducting input VAT was not in line with EU VAT rules, which allow a full deduction of input VAT and consequently, tax the private use of goods and services. The tax authorities, however, were of the opinion that the divergence from the European system was allowed based on Article 17, sixth paragraph of the Sixth EU VAT Directive, because the Dutch limitation scheme already existed when the Sixth EU VAT Directive entered into force. Both taxpayers argued that the standstill clause of Article 17, sixth paragraph EU VAT Directive was not applicable due to the fact that the categories of goods and services for which the limitation was applicable, were not adequately defined. Furthermore, they argued with respect to the limitation of input VAT on food and drinks to be supplied to personnel that the system of limitation had been amended after the Sixth EU VAT Directive came into force and that an amendment after that occasion was precluded by the standstill clause.

After a series of proceedings, the Dutch Supreme Court in the case of X Holding BV and the Court of Appeals at Amsterdam in the case of Oracle Holding BV decided to stay the proceedings and to request clarification from the ECJ. In his Opinion, the Advocate General first reviewed some categories of goods and services to which the special Dutch scheme applies. He considered that with respect to providing staff with the opportunity for private transport, the provision of food and drinks to staff and the provision of accommodation for staff, the scheme did satisfy the condition requiring the designation of a category of adequately defined goods and services by reference to the nature of those goods and services. With respect to the categories described as ‘providing staff with opportunities for recreation’ and ‘business gifts or other gifts’, the scheme did not satisfy the condition. Consequently the scheme regarding the latter mentioned categories was in conflict with EU VAT rules. Furthermore, the Advocate General considered that an amendment to the exclusion of deducting input VAT after the entry into force of the Sixth EU VAT Directive, in principle, was not allowed. However, due to the fact that in the case at hand the amendment provided, in principle, a restriction on the scope of the limitation, such amendment did not harm the application of the standstill clause. The fact that only in an individual case in a particular year could the amendment extend the scope of the limitation, was in the view of the Advocate General, not sufficient to waive the applicability of the scheme.

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Commission starts infringement procedure against Denmark regarding VAT exemption for charity organizations

On 28 January 2010, the Commission formally requested Demark to amend its VAT legislation with respect to several VAT exemptions. This formal request is the second step of an infringement procedure provided for in Article 258 TFEU. If Denmark does not amend its legislation within two months after the request, the Commission is may refer the matter to the ECJ.

In Denmark, all supplies by charitable or other non-profit making organizations in line with their normal activities are VAT exempt. The also applies to goods supplied by second-hand shops in the case the profit made by the second-hand shops is used entirely for charitable or public-interest purposes, the goods sold were received for free and only voluntary staff was employed. According to the Commission, however, the VAT exemption for charitable and other non-profit making organizations as mentioned in Article 132 of the EU VAT Directive has detailed restrictions and,

therefore, the exemptions in the Danish legislation are too broad.

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Commission takes action against France over 'telecoms tax'

On 28 January 2010, the Commission opened an infringement procedure against France concerning the 'telecoms tax' on telecommunications operators. The French Government has two months to reply to the letter of formal notice sent by the Commission. If the Commission receives no reply, or if the observations presented by the French Government are not satisfactory, the Commission may issue a reasoned opinion (i.e., the second stage in an infringement procedure).

To offset the ending of advertising on public TV channels, France has introduced a specific tax on the turnover of telecommunications operators in connection with their licence to provide telecoms services (including Internet and mobile phone services). However, the Commission takes the view that in reality this tax constitutes an administrative charge that is incompatible with European law.

Background
The EU telecoms legislation, and in particular, Article 12 of Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services, lays down precise rules relating to the administrative charges that Member States can levy on businesses providing a telecommunications service or network. According to the EU rules, an administrative charge levied in this connection can only cover certain costs specified in them (relating mainly to licensing and regulation).

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5. Customs Taxes and Excise Duties

Commission authorises Hungarian fiscal aid for transport coordination

On 13 January 2009, the Commission decided not to raise any objections to Hungary's decision to refund or exempt from excise duties railway and inland waterways transport, to encourage their use and reduce pollution and other external costs in the transport sector.

Hungary applies excise duty exemption or refunds for fuel used in inland navigation and excise duty exemption for fuel used in railway transportation. The measures are in line with the provisions of the Energy Taxation Directive. The present authorisation covers the period until 30 April 2017. Rail and inland waterway transport have much lower external costs in terms of accident, climate change and air pollution than road transport. As these transport modes have considerable spare capacity, they can also play a role in diverting traffic away from the congested parts of the road networks.

Since external costs are not charged to road freight transport, it is appropriate to reduce the gap between the cost of use of combined transport operations and of road transport in order to put cleaner transport modes on an equal footing. Hungary opted for excise duty exemptions and refunds. In deciding on necessity and proportionality of the measures which Hungary had introduced for the benefit of cleaner modes of transport, the Commission focussed on checking that external cost savings per tonne-kilometre resulting from the use of cleaner transport modes instead of the road transport were higher than the corresponding aid amount per tonne-kilometre.

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Commission calls on Portugal to change its legislation on annual circulation tax on motor vehicles

On 28 January 2010, the Commission called upon Portugal to modify its provisions on annual circulation tax on motor vehicles. The Commission request was made by means of a reasoned opinion under Article 258 TFEU. If the relevant national legislation is not amended in order to comply with the reasoned opinion, the Commission may decide to refer the matter to the ECJ.

Under the provisions currently in force in Portugal, the annual circulation tax for two similar used cars will be calculated differently depending on whether these cars were registered in Portugal for the first time before or after 1 July 2007. Cars first registered in Portugal from 1 July 2007 are subject to a generally higher annual circulation tax than those registered before that date, due to a difference in the way the tax is calculated. The differentiated annual circulation tax system was introduced in Portugal as a part of an overall reform of vehicle taxation, taking the vehicle's polluting capacity indicators as the criterion for determining the tax base. Registration tax on cars

was lowered, whereas the annual circulation tax was raised. When introducing the new measures, the Portuguese legislator found that it would be unfair for cars registered in Portugal before 1 July 2007, and consequently subject to a higher registration tax, to have to pay the new and higher annual circulation tax.

The Commission appreciates and welcomes the Portuguese authorities' efforts to amend their car taxation legislation in order to take the pollution caused by CO2 emissions into account. In fact, the Commission itself put forward a proposal for a Directive on passenger car related taxes, which sought to make it compulsory for Member States to base the calculation of taxes on passenger cars on their emissions of carbon dioxide. However, as far as the taxation of imported used vehicles is concerned, the ECJ has held that a car becomes a ‘domestic car’ once it has been imported and placed on the domestic market. According to the ECJ, Article 110 TFEU is infringed where the tax charged on imported cars and that charged on similar domestic cars are calculated in a different manner, on the basis of different criteria, leading to higher taxes being imposed on the imported product. The Commission believes that this is exactly what is happening in the Portuguese case.

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6. Capital Duty

Commission requests Spain to abolish its transfer tax on certain contributions of capital

On 28 January 2010, the Commission formally requested Spain to change its tax provisions related to the transfer of securities. The Commission considers that the imposition of a transfer tax on certain contributions of capital, in addition to capital duty, is contrary to the Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (the ‘Capital Duty Directive’). The request takes the form of a reasoned opinion, i.e., the second step of the infringement procedure provided for in Article 258 TFEU. If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the ECJ.

According to Article 108 of Law No. 24/1988 of 28 July 1988 on the securities market, any contributor who, as a result of certain contribution of capital, obtains a position such as to exercise control over this entity or, once this control has been obtained, increases his shareholding in the entity, will have to pay a transfer tax (at a tax rate which ranges from 6% to 7%) in addition to the capital duty (1%) paid by the company increasing its capital. This transfer tax applies in the case of a contribution of capital to a company (i) which real estate assets located in Spain represent more than 50% of its total assets; or (ii) which assets include securities in another entity whose assets consist for at least 50% of real estate located in Spain.

The Capital Duty Directive allows Member States to levy capital duty on contributions of capital but the tax rate may not, in any event, exceed 1% of the capital increase and Member States may not levy any other tax on such an increase (Article 5). The Commission considers that the Spanish legislation at issue is not in conformity with Article 5 of the Capital Duty Directive as it provides for another tax to be levied in addition to capital duty on certain contributions of capital that fall within the scope of that Directive.

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