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that his former spouse had been taxed in Austria on the alimony payments. Mr. Schempp was unable to produce such a certificate, as Austrian tax law excludes, in principle, taxation of alimony.

Mr. Schempp would have been able to deduct the total amount of the alimony paid to his former spouse if she had been resident in Germany, although she would not have paid any tax on the same item, as her income is less than the taxable minimum in Germany.

While it is correct that Mr. Schempp has not exercised such a right, it is nevertheless common ground that his former spouse, by establishing her residence in Austria, exercised the right granted by Art. 18 of the EC Treaty to every citizen of the Union to move and reside freely in the territory of another Member State. Since the exercise by Mr. Schempp's former spouse of a right conferred by the Community legal order had an effect on his right to deduct in his Member State of residence, such a situation cannot be regarded as an internal situation with no connection with Community law.

Article 12 of the EC Treaty is not concerned with any disparities in treatment, for persons and undertakings subject to the jurisdiction of the Community, which may result from divergences existing between the various Member States, so long as they affect all persons subject to them in accordance with objective criteria and without regard to their nationality.

The payment of alimony to a recipient resident in Germany cannot be compared to the payment of alimony to a recipient resident in Austria. The recipient is subject in each of those two cases, as regards taxation of the alimony, to a different tax system. The Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. The same principle applies to a situation where the person concerned has not himself made use of his right of movement, but claims to be the victim of a difference in treatment following the transfer of his former spouse's residence to another Member State.

Articles 12 and 18(1) of the EC Treaty do not preclude a taxpayer resident in Germany from being unable, under national legislation, to deduct from his taxable income in that Member State the alimony paid to his former spouse resident in another Member State in which the alimony is not taxable, where he would be entitled to do so if his former spouse were resident in Germany.

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GREECE

Council of State (Supreme Court) 404/2004 - Reimbursement of VAT paid without lawful cause - General principles of EU Law - Sixth VAT Directive - Law 1642/1986

Member States are granted the freedom to establish domestic reimbursement procedures as regards sums of tax, the refund of which to taxpayers, is prescribed by Community law provisions. However, such reimbursement procedures may not differ from comparative procedures implemented in case of reimbursement of tax paid under domestic legislation, thus constituting the tax refund impossible for the taxpayer. Ministerial decisions may not limit the time of prescription applying on claims deriving from VAT and thus the right of the taxpayer to judicial protection.

Council of State (Supreme Court) 115/2004 and 1918/2002 - Claim to tax exempted from in form of state aid in infringement of EU Law - Decision 89/659/EEC - Article 92, s. 1, Article 93, s. 3 of the EEC Treaty - Articles 28 and 78, s. 2 Greek Constitution - Law 1796/1988 - Law 2214/1994

Ministerial Decision prescribing the exemption from extraordinary tax imposed on corporate profits deriving from exports to EU Member States is in breach of Art. 92 of the EEC Treaty and therefore does not produce legal effects. It derives that the claim to the corresponding tax due by the entities unlawfully exempted from it, does not constitute abrogation of the tax exemption and therefore, the constitutionally provided for prohibition for retroactive imposition of imposition of tax does not apply.

Council of State (Supreme Court) 2393/2004 - Free movement of capital, Mergers Directive (88/361/EEC, 90/443/EEC) - Law 2166/1993, 1297/1972 - Tax exemption on immovable property offered in the process of domestic mergers - Articles 2, 7, 52, 58, 59 of the EEC Treaty

The entity having its seat in other Member State, taxation of capital deriving from the realization of immovable property in Greece devolved to said corporation through the process of a merger by absorption of an entity having its seat in another Member State. The differentiated tax treatment of the receiving - selling corporation on grounds of nationality constitutes limitation to the free movement of capital within the territory of the Community, as it renders said transaction burdensome in comparison to domestic mergers. Therefore such tax treatment discourages Community entities from investing in the domain of real estate in Greece and thus hinders the free movement of capital without any imperative reason of public interest justifying such discriminatory treatment in favour of domestic mergers.

Council of State (Supreme Court) 600/2003 - Prohibition of retroactive effect of tax - taxation of profits and reserves of foreign corporations with branches established in Greece - Article 78, s. 2 Greek Constitution - Article 23, s. 2 of Law 2214/1994, 2238/1194

Should said profits and reserves be credited to the seat of the foreign corporation or withdrawn or transferred abroad, profits and reserves of branches of foreign

corporations that have remained untaxed at company level are taxed. The same obligation also exists should such profits or reserves have been consistently taxed in a special way with fulfilment of the tax obligation of foreign corporations, irrespective of the time of gain of the profits or the accumulation of the reserves. In both of the above cases the Law renders the tax treatment of the foreign corporations burdensome, given that the profits or the reserves were totally or partially exempt from taxation at the time that they were gained or accumulated. It derives that any provision imposing tax on such profits or reserves is in breach of the constitutional provision prohibiting the retroactive effect of tax statutes. The minority of the Court was of the opinion that the transfer of profits of the branch already credited to the seat of the foreign company does not constitute income, therefore it is not subject to taxation and thus the Law is in breach of Art. 78, s. 2 of the Greek Constitution.

Council of State (Supreme Court) 2654/2003 - VAT and Greek Constitution - Formality of Law imposing taxes - Sixth VAT Directive - Prohibition of the preservation or imposition of national measure of effect equivalent to those of VAT

ECJ C-78/2002 to C-80/2002 - VAT - Provision of translation services to the Greek Ministry of Foreign Affairs - Inapplicability of the Sixth VAT Directive to contracts of dependent labour - Claim of VAT disbursed without lawful cause - Abatement of the formality of tax rule - Neutrality of tax principle - establishment of domestic reimbursement procedures

Justified Opinion Request: the European Commission has requested from Greece justified opinion on the issue of the subscription imposed according to Law 1676/1986 on companies that transfer their seat or effective management from a Member State or a third country to Greece. Said subscription is the indirect tax, of 1 per cent maximum, levied according to Directive 69/335/EEC on capital accumulation only at the stage of incorporation of the legal entity and may not apply in cases of transfer of seat. Greece levies the subscription on any company transferring its seat or effective management, with the exemption of agricultural and maritime companies. Such exemption is also incompatible with the Directive, which permits the exemption from taxation of specific transactions but not of domains of economic activity in total.

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Legislation

GREECE

Law 3193/2003, Decision of the Ministry of Finance 1039/29 April 2004: Implementation of Directives 2002/38/EC and 2001/115/EC on rules applicable on the invoicing of electronic services by which Art. 18A was added to the Greek Code of Tax Books and Records and Art. 14, s. 3 of the Greek VAT Code was amended

Law 3296/2004 amended the Greek Income Tax Code. Based on tax theory and case law the Law prescribes the expenditure deductible from the gross incoming in order to determine the taxable net profit of professionals and corporations. It also amended the method, criteria and entity conducting tax audits. The Law is interpreted by the Tax Authority in Circulars 1016/7 February 2005 and 1027/22 February 2005 issued by the Ministry of Finance. It is prescribed that from 1 January 2007 the tax rate on the net profits of general and limited partnerships shall be gradually reduced from 25 per cent to 20 per cent, while gradually domestic public companies, limited liability companies, partnerships, foreign legal entities and joint ventures shall be taxed with 25 per cent from 35 per cent. Furthermore, the Law provides that all sums paid by domestic corporations to foreign legal entities, excluding offshore companies, in the form of fees, royalties, rights or indemnities shall be deducted from the gross incomings of the corporation provided that the payments derives from relevant agreement in writing and corresponding invoice and that the corresponding domestic tax has been paid. Finally the Law prescribes for tax incentives regarding the encouragement of mergers between small and medium corporations.

Law 3229/2004: the new tax incentives and development statute has been approved by the European Commission and is already in effect. The enhancement measures of its predecessor were considered incompatible with the EC Treaty provisions on equal treatment and non-discrimination and therefore the statute was annulled and replaced.

Law 3301/2004 (Art. 12): the Law amended the Greek Code of Books and Records through the implementation of the International Accounting Standards in Greece and is administratively interpreted in Circular 1025/16 February 2005.

Law 3259/2004 (Art. 38), Decision of the Ministry of Finance 101/2005: tax rate of 3 per cent levied on capital of any form 'repatriated' from abroad until 4 June 2005. Following the example set by several Member States, Greece implemented this method in order to attract funds of its nationals reserved abroad. However the incentive was of limited effectiveness.

Law 3312/2005 implemented the following.

- Directive 2003/93/EU on the Mutual Assistance of Tax Authorities on issues of direct taxation. The Law transferred the provisions of the Directive into Greek Law and designated the Department of International Economic Relations of the Ministry of Finance as the authorized national representative as regards the exchange of requested information. The statute is administratively interpreted by Circular 1117/10 November 2004 issued by the Ministry of Finance.
- Directive 2003/93/EU on the taxation of persons on income deriving from interest on savings. The Law came into effect on 1 July 2005.
- Directive 2003/49/EU on the taxation of royalties and interest paid among affiliated companies from different Member States.
- Implementation of Directive 2003/93/EU on the amendment of Directive 77/388/EEC regulating the sites of delivery of electric power and natural gas.

Circular of the Ministry of Finance 1003/5 January 2005: requirements for the issuance of Tax Registration Number to foreign legal entities that transfer shares of domestic public companies or claim tax reimbursement from savings or bonds.

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Case Law

EUROPEAN COURT OF JUSTICE

14 July 2005; C-435/03; British American Tobacco International Ltd and Newman Shipping & Agency Company NV

Sixth VAT Directive - Articles 2 and 27(5) - Chargeable event and taxable amount - Supply of goods for consideration - Theft of goods from a tax warehouse

BATI manufactured and packaged tobacco products in Belgium. Newman operated a tax warehouse in Antwerp (Belgium), in which the tobacco products were stored without tax stamps on them.

Cigarettes were stolen from the warehouse. The thefts were reported to the police. Payment of VAT on those goods subject to excise duty was demanded precisely following the theft. It was indeed the theft itself which was regarded as the chargeable event for VAT by the Belgian fiscal authorities, not the possible introduction of the goods into commerce by the thieves.

The Belgian referring court asks whether the theft of goods can be classified as a supply of goods for consideration within the meaning of Art. 2 of the Sixth VAT Directive and whether the fact that goods are subject to excise duty affects that classification.

The circumstance that goods are subject to excise duty has no bearing on the chargeability of VAT. No provision of the Directive links the chargeability of VAT to excise duty. The chargeable event for VAT merely is the supply or importation of the goods.

The Belgian referring court also asks whether a Member State which has been authorized, pursuant to Art. 27(5), to apply arrangements for the advance payment of VAT by means of tax stamps is entitled to subject transactions to VAT other than those provided for in Art. 2, by applying that tax to products subject to excise duty which are stolen from a tax warehouse.

The national derogating measures referred to in Art. 27(5) are allowed 'in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance'. These measures may not derogate from the basis for charging VAT laid down in Art. 11 except within the limits strictly necessary for achieving that aim and cannot extend beyond the purpose on the basis of which they were requested.

An authorization to apply measures facilitating monitoring of the charging of VAT, granted on the basis of Art. 27(5), does not empower a state to subject transactions to VAT other than those set out in Art. 2. Such an authorization cannot provide a legal basis for national legislation subjecting to VAT the theft of goods from a tax warehouse. The authorization granted to Belgium under Art. 27(5) did not entitle Belgium to subject the theft of manufactured tobacco to VAT.

14 July 2005; C-434/03; P. Charles and T.S. Charles-Tijmens

Sixth VAT directive - Deduction of input tax paid - Immovable property used in part for the business and in part for private purposes

Mr. and Mrs. Charles jointly purchased a holiday bungalow in the Netherlands in March 1997. It was intended both for letting and for private use. From 1 April to 30 June 1997, the bungalow was let 87.5 per cent of the time. On account of that letting, Mr. and Mrs. Charles are taxable persons within the meaning of the Sixth VAT Directive. Given that the bungalow is let to persons who stay only for very short periods and that the letting is done through a 'holiday undertaking', such a letting does not fall within the VAT exemption in the Netherlands for the letting of immovable property under Art. 13B(b)(1).

In their VAT declaration for the second quarter of 1997, Mr. and Mrs. Charles deducted 87.5 per cent of the tax invoiced to them in respect of the bungalow. Afterwards, taking the view that the VAT paid by them was 100 per cent deductible, they submitted an application for the additional refund of the amount relating to the 12.5 per cent of the time that the bungalow was used for private purposes.

The Netherlands referring court asks whether Arts. 6(2) and 17(2) and (6) of the Sixth VAT Directive precludes national legislation adopted before the Sixth VAT Directive came into force, to disallow a taxable person to allocate capital goods used in part for business purposes and in part for other purposes wholly to his business and disallow immediate deduction in full of the VAT due on the acquisition of those goods.

Where capital goods are used both for business and for private purposes the taxpayer has the choice of allocating those goods wholly to the assets of his business, retaining them wholly within his private assets or integrating them into his business only to the extent to which they are actually used for business purposes.

According to Art. 6(2)(a) when the input VAT paid on goods forming part of the assets of a business is wholly or partly deductible, their use for the private purposes of the taxable person or of his staff or for purposes other than those of his business is treated as

granted to traders and craftsmen by virtue of the cessation payment, the TACA is not hypothecated to the cessation payment.

As regards the allocation of part of the revenue from the TACA to the financing of basic old-age insurance schemes for self-employed persons in the craft sector and for self-employed persons in manufacturing and trading occupations, the recipient funds each administer a basic social security scheme founded on a solidarity mechanism. As the activity carried out by the funds concerned does not constitute an economic activity, the financing of that activity falls outside the scope of Art. 87(1) of the EC Treaty. In any event the national legislation at issue in no way establishes hypothecation of the TACA to the old-age insurance schemes for craftsmen and traders. The amount of the TACA allocated for financing the insurance schemes in question is determined each year by joint order of the competent Ministers. In view of the discretion enjoyed by those Ministers, it cannot be accepted that the revenue from the TACA directly affects the amount of the advantage granted to the recipient funds at issue.

Consequently, the possible illegality of such aid would not be such as to affect the lawfulness of the TACA in the light of the Treaty provisions in respect of state aid.

1 December 2005; C-394/04 and C-395/04; Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE

Sixth VAT Directive - Article 13A(1)(b) - Exemptions - Activities closely related to hospital and medical care - Provision of telephone services and hiring out of televisions to in-patients - Provision of beds and meals to persons accompanying in-patients

Ygeia is a Greek medical establishment. Following an audit of Ygeia's accounts, the Greek tax authorities considered that the income earned by this company from, first, the provision of telephone services and the hiring out of televisions to in-patients and, second, the provision of beds and meals to persons accompanying them should be subject to VAT.

The Greek referring court asks whether such services renders to in-patients by a medical establishment referred to in Art. 13A(1)(b) of the Sixth VAT Directive and the supply by that establishment of beds and meals to persons accompanying in-patients amount to activities closely related to hospital and medical care within the meaning of that provision.

The aim of Art. 13A is to exempt from VAT certain activities which are in the public interest. That provision does not, however, provide exemption from VAT for every activity performed in the public interest, but only for those which are listed therein and described in great detail. The hospital and medical care envisaged by this provision is that which has as its purpose the diagnosis, treatment and cure of diseases or health disorders. The provision of services which are of such a nature as to improve the comfort and well-being of in-patients, do not, as a general rule, qualify for the exemption provided for in Art. 13A(1)(b). It can be otherwise only if those services are essential to achieve the therapeutic objectives pursued by the hospital services and medical care in connection with which they have been supplied. Services whose purpose is to obtain additional income for the person who provides them, cannot be exempted under Art. 13A(1)(b).

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GREECE

Council of State (Supreme Court) 1408/2005: VAT, Law 1642/1986 Arts. 3, s. 1a, 23, s. 1, 27, s. 1, ECJ 8 June 2000, C400/98, Breitsohl, 2000, p.I-4321, 34-42

Request of retrospective refund of sums deducted by company subject to VAT .

The right of deduction continues existing even when the realization of flows by the enterprise is not expected. The tax of which the deducting company seeks the return, had been paid for investment expenses necessary for the operation of enterprise prior to the initiation of this real exploitation. Therefore the company's right for the refund of tax had been objectively created and is irrelevant from the realization of flows by the company. Any entity expressing the intention, confirmed by objective elements, to initiate independent economic activity, and realizes for such aim investment expenses, should be considered as amenable in the tax. Consequently, under this attribute, such company has the right to seek direct deduction of VAT paid on investment expenses relevant to its future activity, without the initiation of the activity constituting prerequisite for such direct deduction.

Council of State (Supreme Court) 267/2005: VAT, Sixth Directive 77/388/???, Art. 20, s. 1b, Art. 15, s. 2 of Law 2836/2000

In case of evident or justifiable detriment of goods, subjects to VAT may during court proceeding before national courts directly rely on Art. 20, s. 1b of the Sixth Directive on VAT as its provisions are unconditional and adequate, prohibiting the establishment by Member States of more specific requirements relating to the adjustment of the deduction of the corresponding VAT paid at the time of purchase by the company of the perished goods (ECJ C-8/1981, *Becker/Finanzmat Munster Innenstadt*, 1982, I-53, 23 October 1993, C-10/1992, *Ballochi*, 1993, I-5105, C-150/1999, 18 January 2001, *Svenka Staten/Stocholm Lindpark AB*, 2001, I-493, C-62/2000, 11 July 2002, *Marks & Spencer PLC/Commisioners of Custom & Excise*, 2002, I-6325). The adjustment of the paid VAT deduction may not be reviewed even if the usual period of consumption, depreciation or use of the perished goods has not elapsed. Such case of partial or total

detriment of the goods is distinct from the provided for in the same Art. 21 of the Sixth Directive cases when payment of the purchase price or part of it had not taken place as well as from the case of larceny of the goods, in which Member States are granted the freedom to claim adjustment of the refunded VAT.

Council of State (Supreme Court) 191/2005: VAT Refund, justification of refusal by the tax authorities to effect VAT refund, substantial judicial review of the tax authorities refusal. Article 11, s. 4 of Law 1839/1989

Even if the affirmative decision of the tax authorities relating to the refund of VAT paid subject to tax is not lawfully, fully and adequately justified, the Administrative Courts of substance, i.e. the First and the Second Instance Courts, may not annul the said decision of the tax authorities on grounds of lawfulness or adequacy of its justification. The Courts should themselves rule on whether the legal requirements for the refund of paid VAT are fulfilled and consequently uphold or overrule the tax authorities' decision on the refund.

Council of State (Supreme Court) 1810/2004: VAT Refund, Art. 27, s. 2 of Law 1642/1986

According to Art. 27, s. 2 of Law 1642/1986 the right for the refund of VAT paid is not abolished by the taxpayer even in cases that the rendered services that conduced to the effect of the taxable acts, the place of taxation of which lays outside the territory of the taxing Member State, constitute distinctly taxable acts within the territory of the Member State. It derives in case of companies of other Member States based in the territory of another Member State rending services relating to the preparing of peripheral acts aiming at the pursuit of a wider, final product or service, what should be taxed is the ultimate act and not the acts prior to it, i.e. not the preparatory acts that aim to the ultimate, taxable, result.

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ITALY

Is the Italian limitation to the deduction of input Vat on cars consistent with the Sixth Directive?

Article 17 of the Sixth VAT Directive (Directive 77/388/EEC of 17 May 1977) states that, in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct, from the tax which he is liable to pay the value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person.

This general principle knows some significant exceptions. Indeed, according to Art. 17, para. 7 of the Sixth Directive, each Member State may, for cyclical economic reasons and subject to the consultation provided for in Art. 29, totally or partially exclude all or some capital goods or other goods from the system of deductions. To maintain identical conditions of competition, the Member States may, instead of denying the deduction, tax the goods manufactured, purchased or imported by the taxable person himself, in such a way that the tax does not exceed the value added tax which would have been charged on the acquisition of similar goods. For this purpose, the Sixth Directive set up an Advisory Committee on value added tax to be involved in every exclusion of the general principle of deduction laid down by Art. 17 of the Sixth Directive.

According to the settled case law of the ECJ, the right of deduction provided for in Art. 17 *et seq.* of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. This right must be exercised immediately in respect of all the taxes charged on input transactions. Any limitation to the right to deduct the VAT affects the level of the tax burden and must be applied in a similar manner in all Member States. Consequently, derogations are permitted only in the cases expressly provided for in the Sixth Directive.[1]

Nevertheless, by means of the provisions contained in Art. 17, para. 6 of the Sixth Directive, the Member States are authorized to retain their existing legislation as at the date of entry into force of the Sixth Directive in regard to exclusion from the right of deduction until such time as the Council has adopted the provisions envisaged by that Article. On the other hand, national legislation does not constitute a derogation permitted by the above-mentioned provision, if its effect is to increase, after the entry into force of the Sixth Directive, the extent of existing exclusions. In short, after the entry into force of the Sixth Directive only the peculiar procedure of consultation allows Member States to introduce in their VAT law an exclusion from the right of deduction.

To this end, the ECJ underlined that:

> 'consultation enables the Commission and the other Member States to control the use by a Member State of the possibility of derogating from the general system of deducting VAT, by checking in particular whether the national measure in question satisfies the condition of adoption for cyclical economic reasons. Article 17(7) of the Sixth Directive thus lays down a procedural obligation which the Member States must observe in order to be able to make use of the derogation it sets out (see, by analogy, with respect to Article 27(5) of the Sixth Directive, which also provides for derogations from the scheme of the directive, Case 324/82 Commission v Belgium [1984] ECR 1861, paragraph 28).

Consultation of the VAT Committee is thus clearly a condition precedent to the adoption of any measure on the basis of that provision.'[2]

1 See European Court of Justice Joined Cases C-177/99 and C-181/99 Ampafrance and Sanofi and C-409/99 Metropol Treuhand.

2 European Court of Justice C-409/99 Metropol Treuhand.