ECJ REPORTS

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We now produce summary reports of recent decisions by the European Court of Justice. We hope that this will form a regular feature for the ECTJ allowing readers a regular summary of developments in this area.

I *Jyske Finans A/S v Skatteministeriet (Case C-280/04)*, European Court of Justice, 8th December 2005

Jyske Finans was a company that operated a car-leasing business. In operating this business, it was purchasing either new or second-hand motor cars. For the latter, the purchase was made without the possibility of deducting the VAT included in the price, the vendors being unable, according to the national legislation, to declare VAT on the price of the car.

Between 1st January 1999 and 31st May 2001, Jyske Finans, at the end of the sale-and-leaseback, resold 145 vehicles which had been purchased second-hand. In May 2001 the Danish tax authorities requested that Jyske Finans pay VAT.

Jyske Finans disputed this liability, maintaining that to pay the VAT would mean double taxation, as it had not been able to exercise the right to deduct the VAT which remains incorporated in the purchase price of second-hand cars and which is not declared.

The Court considered two issues: whether Article 13B(c), in conjunction with Articles 2(1) and 11A(1)(a), of the Sixth Directive … must be construed as precluding a Member State from maintaining a situation under its law on value added tax pursuant to which a taxable person who has introduced capital goods to a significant extent into his business assets is, in contrast to second-hand car dealers and other traders who sell second-hand cars, liable to VAT on the sale of those capital items, even in the case where the items were purchased from taxable

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persons who did not declare tax on the price of the items, with the result that there was no possibility of deducting VAT at the time of acquisition?

Another issue to establish whether taxable person who, in the normal course of his activities, resells cars which he purchased second-hand with a view to using them in his sale and leaseback business, can be considered to be a 'taxable dealer' within the meaning of Article 26a of the Sixth Directive.

The conclusion of the Court was that the provisions of Articles 13B(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 94/5/EC of 14 February 1994 are to be construed as meaning that they do not preclude a national law which imposes value added tax on transactions by which a taxable person, after having used them for the purposes of its business, resells goods on the acquisition of which, by virtue of Article 17(6), value added tax did not become deductible, even where that acquisition, made from taxable persons who could not declare value added tax, did not, for that reason, give rise to a right to deduct.

As far as the second question is concerned the Court stated that an undertaking which, in the normal course of its business, resells cars which it had purchased second-hand with a view to using them for the purposes of its business of sale and leaseback and for which the resale is not, at the time of the purchase of the second-hand goods, the principal objective but only its secondary objective, ancillary to that of leasing, can be considered to be a 'taxable dealer'.

II Turn- und Sportunion Waldburg v Finanzlandesdirektion für Oberösterreich (Case C-246/04), European Court of Justice, 12th January 2006

Turn- und Sportunion Waldburg is a sports club classed as a non-profit-making association. In 1997 it commenced construction of an annexe to its clubhouse, part of which was intended to be used for the practice of sport, whilst the other part, having a surface area equal to approximately a quarter of the total area of the annexe, was to be used as a refreshment bar and leased to a lessee. In the 1997 VAT declaration, the club deducted a total amount of ATS 39 285 in respect of the input VAT paid exclusively for that part of the annexe intended to be used for the bar. It opted to waive application of Paragraph 6(1)(27) of the UStG 1994 relating to small businesses.

According to the decision of 27th August 1999, the Finanzamt refused those deductions.

Consequently, the following questions were addressed to the Court, namely:

1. May a Member State exercise its option under Article 13(C) of the Sixth … Directive … to give taxable persons the right, despite the tax exemption for the letting of immovable property provided for in Article 13(B)(b) of the directive, to opt for taxation only in a uniform manner or may the Member State distinguish by reference to types of transactions or groups of taxable persons?

2. Does Article 13(B)(b) in conjunction with (C)(a) of the [Sixth] Directive permit Member States' legislation, such as Paragraph 6(1)(14) of the UStG 1994 in conjunction with Paragraph 6(1)(16) of the UStG 1994, under which the possibility of opting for taxation of leasing and letting transactions is limited in such a way that non-profit-making sports clubs do not have that option?

As far as the first question is concerned, the Court stated that the Member States ought to observe the principle of fiscal neutrality and the requirement for correct, straightforward and uniform application of the exemptions.

With regard to the second question whether the Member States may exclude non-profit-making sports clubs from the right of option by way of a general exemption of all their transactions, it must be noted that Article 13(C) of the Sixth Directive does not specify on what conditions and by what means the scope of this right of option may be restricted. It is therefore for each Member State to specify, in its national law, the scope of this right of option and to lay down the rules pursuant to which certain taxable persons may benefit from the right to opt for taxation of the leasing and letting of immovable property.

Consequently, the Court stated that:

> "*Member States, when giving their taxable persons the right to opt for taxation under Article 13(C) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, may make a distinction by reference to types of transactions or groups of taxable persons provided that they observe the general objectives and principles of the Sixth Directive, in particular the principle of fiscal neutrality and the requirement of correct, straightforward and uniform application of the exemptions provided for*."

Another conclusion of the Court was that it is for the national court to determine whether national legislation which, by exempting generally the transactions of non-

profit-making sports clubs, restricts their right to opt for taxation of leasing and letting transactions exceeds the discretion conferred on the Member States, having regard in particular to the principle of fiscal neutrality and the requirement of correct, straightforward and uniform application of the exemptions provided for.

III *Ritter – Coulais and another v Finanzamt Germensheim* (Case C-15/03), European Court of Justice, 21st February 2006

In 1987 the appellants in the main proceedings were assessed in Germany for the tax year 1987 as natural persons liable to income tax on their total income in accordance with Paragraph 1(3) of the Law on Income Tax (Einkommensteuergesetz) in the version applicable in 1987 ('EStG 1987'). They earned income in that Member State from employment as secondary school teachers but lived in a private dwelling in France, which they owned. It would appear that at that time Mr Ritter-Coulais was a German national while Mrs Ritter-Coulais had dual French and German nationality

Pursuant to the second point of Paragraph 32b(2) of the EStG 1987, the appellants in the main proceedings requested that 'negative income' (loss of income) deriving from their own use of their house as a dwelling be taken into account for the purposes of determining the rate for their tax liability in the 1987 tax year.

The Court was to answer the two questions: whether it is contrary to Article 43 and Article 56 of the Treaty establishing the European Community that a natural person assessable to tax in Germany on his or her total income and in receipt of income from an employment there should be unable to deduct rental income losses arising in another Member State in the computation of taxable income in Germany. If the answer to the aforementioned question is negative: is it contrary to Article 43 and Article 56 of the Treaty establishing the European Community for such losses not to be taken into account for the purposes of what is known as the 'negative tax progression clause'.

The ECJ stated that the dispute before the national court is not concerned with the situation referred to in the first question, namely the determination of the basis of assessment, but only with the situation covered by the second question, namely the computation of the applicable rate of taxation, an answer to the first question is not necessary for the purposes of deciding the case. As a consequence, the Court has only to answer the second question.

In the Commission's point of view, the case has to be analysed as far as the principle of the free movement of workers set out in Article 48 EEC (subsequently Article 48 EC and now, after amendment, Article 39 EC) is concerned.

The Court stated, that the treatment of non-resident workers under the national legislation is less favourable than that afforded to workers who reside in Germany in their own homes. As a consequence, the legislation such as that at issue in the main proceedings is, as a rule, contrary to Article 48 EC.

On the grounds of the aforementioned, the Court stated, that Article 48 of the EEC Treaty (subsequently Article 48 of the EC Treaty and now, after amendment, Article 39 EC) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not permit natural persons in receipt of income from employment in one Member State, and assessable to tax on their total income there, to have income losses relating to their own use of a private dwelling in another Member State taken into account for the purposes of determining the rate of taxation applicable to their income in the former state, whereas positive rental income relating to such a dwelling is taken into account.

IV *Heirs of M.E.A. van Hilten-van der Heijden v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* (Case C-513/03), 23rd February 2006

Mrs van Hilten-van der Heijden died on 22nd November 1997. Of Netherlands nationality, she had been resident in the Netherlands until the start of 1988, then in Belgium and, since 1991, in Switzerland. Her estate included immovable property situated in the Netherlands, Belgium and Switzerland and investments in quoted securities in the Netherlands, Germany, Switzerland and the United States of America, as well as bank accounts opened at Netherlands and Belgian branches of banking institutions established in the European Union and managed by them. Her heirs were assessed to inheritance tax calculated on the basis of Article 3(1) of the SW 1956 (1956 Law on Succession). Those assessments were upheld by the Inspector after an appeal brought by four of the heirs.

The Court was to answer two referred questions: first of all, whether Article 3(1) of the SW [1956] constituted a permitted restriction within the meaning of Article [73c(1) of the Treaty] and the second one: does Article 3(1) of the SW [1956] constitute a prohibited means of arbitrary discrimination or a disguised restriction on the free movement of capital within the meaning of Article [73d(3) of the Treaty] where applicable to a capital movement between a Member State and a non-member country having regard also to the Declaration on [Article 73d] of the Treaty establishing the European Community adopted on the occasion of the signature of the Final Act and Declarations of the Intergovernmental Conferences on the European Union of 7th February 1992?

Meanwhile, considering the case, the Court stated that inheritance is a movement of capital within the meaning of Article 73b of the Treaty, except in cases where its constituent elements are confined within a single Member State.

The Court stated, that Article 73b of the Treaty is to be interpreted as meaning that it does not preclude legislation of a Member State, such as that in question in the main proceedings, by which the estate of a national of that Member State who dies within 10 years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that State, while enjoying relief in respect of inheritance taxes levied by other States.

As a consequence, the Court noted that there is no need to reply to the questions referred for a preliminary ruling in so far as they relate to Articles 73c and 73d of the Treaty.