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Contents of Volume 6, Issue 2, 2002

CONTENTS

	Page No
Editorial	vii
Taxation and Employment in the European Union Michel Vanden Abeele	87
The European Economic and Social Committee - Structure and Function Kenneth Walker	93
Outsourcing in the Financial Services Sector - The Key VAT issues Peter Jenkins	103
<i>Abus de Droit: Further Thoughts on the Cleansing of the Stables, and the Community Notion of Own Resources</i> Peter Harris	111
Abuse of Rights in EC Law Robert Venables QC	119
Claims for the Recovery of Unduly Paid Taxes: Empirical Domestic Cases Show That Progress is Required Francisco de Sousa da Câmara	145
Holding Companies Put To The VAT Test Yves Bernaerts	165
Freedom of Establishment in the Direct Tax Jurisprudence of the European Court - A Review Gaëlle d'Oreye de Lantremange	187

The Editorial

EDITORIAL

This Issue begins with an article by Michel Vanden Abeele, Director General Taxation and Customs Union at the Commission and a member of the Advisory Editorial Board, on the relationship between tax (and tax policy) and employment in the EU. The key points of the article are that over the last decades the effective rate of taxation on employed labour increased significantly more than that on other productive factors or on consumption. There was for the Member States over the period 1980–1999 a correlation between increases in the effective taxation of employed labour and the increase in the unemployment rate. EU policy in this area therefore aims to reduce taxes on employed labour as one instrument to improve the employment situation. We are extremely grateful to Michael Vanden Abeele for his contribution to the debate on this topical subject.

Michael Vanden Abeele's article is followed by an article by Kenneth Walker, a member of ECOSOC, giving an insider's view of the structure and function of ECOSOC. The role of ECOSOC is often misunderstood and Kenneth summarises it with clarity. This article continues our series of occasional articles on the EU institutions which we hope you will find both interesting and informative as well as a useful source of reference.

The article on the key VAT issues raised by the trend to outsourcing in the financial services sector is by Peter Jenkins, Global Head of Indirect Taxation at Ernst & Young, an acknowledged expert in this field. Peter urges caution when setting-up these arrangements for reasons which are made clear in his article.

The fourth article in this Issue, '*Abus de droit*: further thoughts on the cleansing of the stables, and the Community notion of own resources' by Peter Harris of Temple Gardens Tax Chambers, and the fifth, 'Abuse of Rights in EC Law' by Robert Venables QC continues the thread begun by Jonathan Peacock QC and Robert himself in an earlier Issue of this Journal.¹ Peter's article elaborates on some of the issues raised in his own earlier article on this subject² as well as dealing with possible Customs' arguments based on the decision of the European Court in

¹ ECTJ 4/3 [2000] 152 and ECTJ 4/3 [2000] 153 respectively.

² ECTJ 5/3 [2001] 187.

*Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*³. Robert considers the notion of *abus de droit* in more general terms.

Readers may be interested to know that a reference has now been made to the European Court by the Tribunal in the *Halifax Case*.⁴ The High Court, Neuberger J., had referred the matter back to the Tribunal on the grounds that it was unclear as to whether the Tribunal had found that two of the companies involved in the scheme had shared Halifax's intention to avoid VAT. Three questions were posed for the Tribunal's determination on the reference back:

- (i) whether VAT avoidance was the sole purpose of the companies in question in entering into the material transactions;
- (ii) whether the tribunal wished to reconsider its original finding that Halifax's scheme would distort competition at national and community level; and
- (iii) whether the tribunal wished to reconsider a finding as to one of the constituent transactions in that scheme.

The tribunal answered these questions as follows:

- (1) The sole purpose of the relevant companies in entering into the relevant transactions was tax avoidance.
- (2) The Tribunal did not wish to reconsider its finding regarding distortion of competition but amplified on its reasoning.
- (3) The Tribunal saw no need to reconsider its other finding.

The questions referred to the European Court by the Tribunal were:

- (a) whether transactions effected by each participator with the intention solely of obtaining a tax advantage and which had no independent business purpose, qualified for VAT purposes as supplies made by or to the participators in the course of their economic activities; and

³ Case C-110/99 14th December 2000 unreported.

⁴ *Halifax plc v Commissioners of Customs and Excise* – decision of the VAT and Duties Tribunal of 1st March 2001.

- (b) whether the doctrine of abuse of rights as developed by the European Court operated to disallow the appellants their claims for recovery of or relief from input tax arising from the implementation of the relevant transactions.

Watch this space!

The article on unjust enrichment with particular reference to Portugal by Francisco de Sousa da Câmara, a member of the Advisory Editorial Board, follows up an article by Dr Kirsten Borgsmidt.⁵ The article examines the right to repayment of amounts paid to national authorities in breach of Community law from a both a Community and a single Member State perspective.

'Holding companies put to the VAT test', an article by Yves Bernaerts of Ernst & Young Tax Consultants, and a Professor at the Ecole Pratique des Hautes Etudes Commerciales in Brussels, takes an in-depth look at the treatment of holding companies in the EU VAT system and points up some of the many inconsistencies and anomalies. M. Bernaerts' article elaborates on some of the points raised by Christian Amand in his article on the deductibility of VAT incurred on the issue of new shares.⁶

The final article in this Issue, a review by Gaelle d'Oreye of the direct tax jurisprudence of the European Court on freedom of establishment, is a very useful summary of the case-law in this area as well as drawing some interesting conclusions about the way forward.

The next Issue will be devoted to excise duties and should make good holiday reading!

Ann Humphrey
Joint Managing Editor
London

June 2002

⁵ 'Principles of equivalence and effectiveness', ECTJ 5/1 [2001] 11.

⁶ ECTJ 5/3 [2001] 203.