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Contents of Volume 6, Issue 3, 2002

CONTENTS

	Page No
Editorial	vii
Excise Duties and the Internal Market Katherine Holmes	223
Article 90 EC and the Principle of Non Discrimination Scott Crosby and Nicholas Bridgland	243
The Consequence of Member States Favouring Home Production Jeremy White	267
<i>R. (Hoverspeed et al.) v Commissioners of Customs and Excise</i> [2002] EWHC 1630 Admin Rhodri Thompson QC	289
Directive 92/12/EEC and the Free Movement of Alcoholic Beverages Scott Crosby	299
Book Review - <i>Finnish International Taxation</i> Jonathan Schwarz	339

The Editorial

EDITORIAL

This special issue of the EC Tax Journal examines a number of legal issues arising in connection with indirect taxation, specifically excise duties, in the context of the European Community.

There are two related key topics. The first concerns the provisions in the EC Treaty which prohibit discriminatory taxation in favour of domestic production. This issue looks at the meaning of those EC Treaty provisions and the consequences for individual traders if they believe themselves to be the victim of discriminatory taxation. The second issue relates to the EC Commission's efforts to achieve a level of fiscal harmonisation in the context of the creation of the single internal market. This issue looks at the consequences for traders and consumers of the continuing differentials, particularly in excise duties as between different Member States, and considers the lawfulness of actions taken by some Member States to prevent large scale cross-border shopping and any remedies which might be available.

At the heart of excise duty is, of course, the matter of Member States' sovereignty. The contribution which excise duty makes towards total indirect tax receipts and the balance between indirect and direct taxation differs as between Member States. Member States have from time to time used indirect taxation as a means of favouring domestic industry to the detriment of producers in other Member States. A well known case is the EC Commission's proceedings against the United Kingdom in respect of the taxation of beer compared with that of light table wine, most of which is imported into the UK. The ECJ held that the tax on beer was at a preferential rate compared with the excise duty levied in respect of light table wine, with which beer was held to be in competition, and was therefore unlawfully discriminatory. Other tax schemes have involved the imposition of, for example, higher rate of duty imposed in relation to cars with large capacity engines in circumstances in which local production has tended to be of smaller engine cars. Article 90 of the EC Treaty prohibits the imposition of tax privileges for domestic products compared with 'similar' products of other Member States. The second paragraph of Article 90 prohibits the use of indirect taxation as a means of protecting competing domestic products.

Article 93 of the EC Treaty gives the Commission power to propose harmonisation measures in respect of indirect taxation. To date, only a limited degree of

harmonisation has been achieved in relation to structures of excise duties in Directive 92/12 but no harmonisation in relation to rates. In September 2002, the Council of Ministers abandoned further efforts to achieve a greater degree of harmonisation in respect of rates. Political will did not support the initiative, despite the growing and significant issues arising for consumers, and businesses, from the large differentials in taxation between Member States for similar or competing products. The EC Commission's White Paper on the Internal Market, published as far back as 1985, recognised that the creation of an internal market in which tax levels were not harmonised would lead to large scale fraud and cross-border shopping. High tax countries, such as the UK, have had to take measures to protect their revenue in the face of increased opportunities for cross-border shopping. Courts in England and Wales have had to consider the legality of those measures taken by the UK authorities, specifically HM Customs & Excise. Most recently, the Divisional Court considered these issues in a judgment of 31st July 2002 in *Hoverspeed Limited & Others v HM Customs & Excise*. For businesses and consumers there is some confusion about their legal rights in this area. The political reluctance to wrestle with the difficulties of harmonisation in this field has meant that, to a large extent, moves towards elimination of distorting tax rates and towards achieving the internal market have been made as a result of cases considered by the ECJ rather than by harmonisation initiatives.

This issue of the EC Tax Journal opens with a scene-setting article which looks at the political background to the harmonisation process and, briefly, some of the achievements of the European Court. This is followed by an analysis of Article 90 and the principle of non-discrimination by Scott Crosby and Nicholas Bridgland of Stanbrook & Hooper. Scott Crosby then in the third article looks at the measures which the Commission has taken to establish the internal market in the context of excise products and specifically alcoholic beverages: he reviews critically Directive 92/12. Jeremy White of Pump Court Tax Chambers considers the legal remedies available to victims of discrimination and the extent to which businesses can recover tax which has been levied unlawfully in breach of Article 90. Rhodri Thompson QC of Matrix Chambers considers the powers of customs authorities to protect their Member States' revenue by seizing goods purchased in lower tax (and the vehicles in which they have been transported); specifically, Rhodri Thompson looks at the very careful analysis undertaken by the Divisional Court in its judgment of 31st July 2002 in *Hoverspeed Limited and Others v HM Customs & Excise*.

Katherine Holmes
Joint Managing Editor

September 2002