

7th Annual *Avoir Fiscal*
Anniversary EU Tax Conference

“The Application of EU Law on the
Greek Tax System: two recent cases”

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Outline

- ◆ Introduction
- ◆ 1. Court of Justice, C-155/09, *Commission v Greece*, 20 January 2011: exemption from real estate transfer tax and free movement of persons
- ◆ 2. European Commission, C 16/2010, 25 May 2011: aid to certain Greek casinos.

1. Commission v. Greece (C-155/09)

◆ Introduction

- Domestic legislation aiming at facilitating the acquisition of first residential real state
- Exemption from real estate transfer tax for the acquisition of first residential real property
- Benefit granted to
 - Greek residents – irrespective of nationality
 - Greek nationals – non-residents

1. Commission v. Greece (C-155/09)

◆ Persons covered

■ Residents

- Irrespective of nationality
- Application to all EU nationals BUT under different conditions: a 12month uninterrupted period of residence is required to have been completed before the acquisition
 - ◆ Different = more burdensome condition
- Non-EU nationals: administrative practice denies application BUT courts grant the exemption.

1. Commission v. Greece (C-155/09)

- Non-residents
 - Exemption granted to non residents Only if
 - ◆ Greek nationals or
 - ◆ of Greek origin
 - ◆ Provided that they are registered in a municipal registry in Greece
 - Problems
 - ◆ The residency criterion relaxed ONLY for Greek nationals
 - ◆ The requirement of registration in a registry: easier to satisfy by Greek nationals than other EU nationals

1. Commission v. Greece (C-155/09)

◆ Analysis

- 1. Which Freedom Applies? (EC + EEA)
 - Non-discrimination on grounds of nationality (Art. 12 EC)
 - Right to move and reside freely within the territory of the Member States (Art. 18 EC)
 - Free movement of workers (Art. 39 EC)
 - Freedom of establishment (Art. 43 EC)

1. Commission v. Greece (C-155/09)

- 2. Is there discrimination and/or restriction?
 - Different treatment of *current residents* v *future residents*
 - Case of covert discrimination: the distinction is drawn on the basis of residence or ordinary residence; that requirement is liable to operate mainly to the detriment of nationals of other MS (paras. 45-47)
 - The provision places at a disadvantage persons willing to reside in Greece, has a deterrent effect and is liable to impede the freedom of movement (paras. 48-50)

1. Commission v. Greece (C-155/09)

- ◆ The different treatment of non-residents (Greek nationals are eligible, non-Greek nationals are not) constitutes prohibited direct discrimination on the basis of nationality (paras.67-72).

1. Commission v. Greece (C-155/09)

- 3. Is the discrimination and/or restriction justified? **NO**
 - Discrimination based on nationality may only be justified by Treaty provisions: no such justification exists
 - Arguments of the Greek government
 - ◆ Facilitate Greeks residents to acquire ownership of their homes
 - ◆ Facilitate the repatriation of Greeks living abroad
 - ◆ Real link with the state of residence (Greece)

1. Commission v. Greece (C-155/09)

- ◆ There are other less restrictive measures:
 - eg entry on the tax register, entry on the land register, written declarations by the purchaser, implementation of checks by the tax authorities etc.
 - Conclusion: legislation is not proportional

1. Commission v. Greece (C-155/09)

- ◆ Implementation of the judgment:
 - Extension of the exemption to all **EU citizens**: effective 31 March 2011 (Law 3943/2011)
 - Extension of the exemption to all **EEA nationals**: tax bill approved by Parliament on 24/01/2012, pending publication in the OJ

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

◆ The measure

- Fixing of a uniform levy of 80% on the price of admission tickets
- Setting of two unequal regulated prices of admission tickets at EUR 6 and EUR 15 respectively for publicly (+one privately held)* and privately owned casinos
- Competitive disadvantage for the latter => Complaint

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

- ◆ Grounds for initiating the procedure
 - Art. 107(1) TFEU: unlawful state aid
 - The measure is not a general measure
 - The measure resulted in a loss of State resources for the Greek State
 - The measure is selective
 - The measure is liable to distort competition

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

- ◆ Presence of state aid (Art.107(1)TFEU)
 - **Advantage**, which relieves the beneficiary of charges normally borne from their budgets:
 - Privately owned casinos pay $15\text{EUR} \times 80\% = 12\text{ EUR}$ tax on each admission ticket
 - Publicly owned casinos pay $6\text{ EUR} \times 80\% = 4.8\text{ EUR}$ tax on each admission ticket
 - Customary commercial practice of Greek casinos to waive the admission fee, but pay the tax due on it.

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

- ◆ Presence of state aid (Art.107(1)TFEU)
 - **State resources and imputability to the State:**
 - Fiscal discrimination established by a number of law, decrees, ministerial decisions, regulations etc.
 - The State forgoes revenues that would otherwise have to collect from the Casinos, in normal circumstances
 - In this case: reduces tax base for the state-owned casinos (6EUR) as compared to private ones (15 EUR)

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

- ◆ Presence of state aid (Art.107(1)TFEU)
 - **Selectivity:**
 - The measure constitutes a departure from the application of the general tax system that applies to all casinos
 - The Greek Government could not justify the selective nature of the measure; the lower or higher admission fee was not connected to any objective factor

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

◆ Implementation

- No official/public information
- The amount to be recovered is estimated at EUR 140 million
- * Tragic irony: among the “victims”, there was a privately owned casino that had claimed the application of a MFN clause and had been assimilated to the publicly owned ones.

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

- ◆ Presence of state aid (Art.107(1)TFEU)
 - **Distortion of competition and effect on trade:**
 - It is sufficient that the undertaking receiving the aid competes with other undertakings on markets open to the competition in the internal market.

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

- ◆ Compatibility of the aid (Art.106-107 TFEU)
 - No exemption applies – No compatibility
- ◆ Legality of the aid
 - No prior notification
 - The measure constitutes new and unlawful aid

2. Commission Decision C16/2010 On State Aid to certain Greek casinos

◆ Quantification and recovery

- For the past: Any aid granted from 21 October 1999 (complaint) until the adoption of the decision (24 May 2011) should be recovered (+interest)
- For the future: All related outstanding fiscal discrimination cancelled with effect from 24 May 2011.



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THANK YOU!