DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION

TAXATION OF CARS TRANSFERRED WITHIN THE COMMUNITY OR USED REGULARLY ON CROSS-BORDER JOURNEYS

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INFORMATION DOCUMENT FROM THE COMMISSION ON THE RIGHTS AND DUTIES OF THE EUROPEAN CITIZEN

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INTRODUCTION

A. Purpose of the document

Cars are an important means of getting around and, therefore, of exercising the right of freedom of movement their users are guaranteed under the EC Treaty. Many citizens take the car when they leave their Member State temporarily or settle permanently in another Member State. Others buy or hire a car in a Member State other than their own.

At the same time, vehicle taxation represents a considerable source of budget revenue in all Member States. In and of itself, vehicle taxation is not unjustified since vehicles give rise to massive expenditure (for instance on road infrastructure, in respect of environmental damage and as a consequence of road congestion).

For the Community citizen this raises many questions regarding the tax consequences of transferring cars across borders. The aim of this document is to provide answers to those questions. It addresses only the transfer of cars from one Member State to another.

B. The law as it stands

a. So far there has been no comprehensive harmonisation of vehicle taxation in the European Union. In 1983, when internal frontiers between Member States still existed, two Directives were adopted to overcome some of the tax barriers to the free movement of cars within the territory of the Member States,[1] namely: Council Directive of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily "imported"[2] into one Member State from another[3] and Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent "imports" from another Member State of the personal property of individuals.[4]

As from 1 January 1993, Directive 91/680 of 16 December 1991 introduced a specific new arrangement for the application of VAT to cars purchased in another Member State.[5] Thereafter Directives 83/182 and 83/183 no longer applied to VAT in this context.

In addition to these legal texts, there is the already fairly extensive case law of the Court which has defined - and limited - the powers of the Member States with regard to taxing private cars brought into one Member State from another. This case law is based not just on the above 1983 Directives but also on the fundamental rules of the EC Treaty (in particular those of Article 90 (formerly Article 95)).

b. In the last few years the Treaty has undergone major amendment and the effects of the single market also need mentioning. The market now extends over an area without frontiers in which goods, persons, services and capital are guaranteed freedom of movement by the EC Treaty (Article 14). Within the single market, freedom of movement - which formerly applied only to people engaged in an

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1 There were already some international conventions such as the Customs Convention on the Temporary Importation of Private Road Vehicles, concluded in the United Nations at New York on 4 June 1954.

2 The term "imported" was not altered when the European Union's internal frontiers were abolished on 1 January 1993. Since that date the more appropriate legal terminology would be *the "transfer" of a good from one Member State to another*.

3 OJ L 105/59 of 23 April 1983; amended by Directive 89/604 of 23 November 1989 (OJ L 348/28 of 29 November 1989) and Directive 91/680 of 16 December 1991 (OJ L 376/1 of 31 December 1991).

4 OJ L 105/6 of 23 April 1983; amended by Directive 89/604 of 23 November 1989 (OJ L 348/28 of 29 November 1989), Directive 91/680 of 16 December 1991 (OJ L 376/1 of 31 December 1991) and Directive 92/12 of 25 February 1992 (OJ L 76/1 of 23 March 1992).

5 Published in OJ L 376/1 of 31 December 1991. The provisions of this Directive contain amendments which were introduced into the Sixth VAT Directive (77/388) of 17 May 1977.

economic activity - has been extended to all Community citizens (Article 18 EC) and partially to third-country nationals (Article 62(1) EC). Clearly, we cannot accept that the freedom thus won is indirectly subverted by unjustified taxation of cars, the means most often used by people exercising their right of freedom of movement. The Commission therefore considers that the above Directives and other applicable provisions should be interpreted in the light of the principle of freedom of movement.

I. APPLICATION OF VAT WHEN A CAR IS PURCHASED OR HIRED IN ANOTHER MEMBER STATE

This part of the paper deals with harmonised VAT rules applicable to the purchase and hire of cars by residents of one Member State in another Member State with a view to the persons concerned using the cars - most of the time, at least - in the State in which they are normally resident.

A. Purchasing a car in another Member State

On this point VAT legislation distinguishes between new vehicles and those which are no longer new. However it must be remembered that, for VAT purposes, use of the terms "new" and "second-hand" differs somewhat from current usage. For VAT purposes, a car is deemed to be a "new" means of transport as long as it was supplied less than six months after the date of first entry into service or has not travelled more than 6 000 km when supplied. If neither of these conditions is met, the car is no longer deemed to be "new" (Article 28a(2)(b) of the Sixth VAT Directive).

1. An individual buys a "new" car from a trader or a private individual in one Member State with a view to moving it to another.

When an individual buys a "new" car in one Member State to move it to another where the vehicle is to be registered and used, no VAT is due in the Member State of departure; it is due in the Member State to which the vehicle is moved. This applies regardless of the status of the seller (i.e. whether this is a trader or a private individual). In other words, the VAT of the Member State of destination applies.

The purpose of this particular arrangement is to limit the number of new cars moved around by the trade. Without the arrangement, the difference in VAT rates (combined in some cases with the difference between the prices charged in different Member States) would encourage consumers to buy their cars in those Member States levying the lowest VAT.

At the same time, the Community legislator has laid down a rule specifically designed to avoid double taxation when a new vehicle, taxable in the Member State of destination, is sold by a private party. This seller is entitled to deduction of the VAT he himself paid when he bought the car in his own Member State, or when he imported it after buying it in another Member State (Article 28a(4) of the Sixth VAT Directive). However, he may deduct only as much as the amount of VAT he would have had to pay if the vehicle had been supplied in the seller's Member State.[6]

2. *A private party buys a car that is no longer "new" in one Member State with the intention of moving it to another*

Here the status of the seller dictates which VAT rules apply:

- If the seller is a private individual (or a trader who has not deducted the VAT he paid on the car), no VAT is due on the purchase, either in the State of departure or in the State of destination.
- If the seller is a taxable re-sale business, that business usually applies the special rules on taxing profit margins. This means that the business will apply the amount of VAT due in its State on the profit made from selling the second-hand car (but the amount will not be shown in the invoice). This purchase will then not be subject to VAT in the Member State of destination.
- If the seller is a taxable trader who has himself deducted the VAT due on the car, the normal tax rules apply. This generally means that the seller invoices the VAT due in his own Member State. However, supply of the vehicle may be subject to VAT in the Member State of destination if, for instance, the car is moved there by the seller - or on his account - and supplies by this trader to the Member State of destination exceed a given threshold (set by each Member State), or if the seller elects to be taxed in the Member State of destination. In either case it must be stressed that VAT on such a sale may be charged in only one of the Member States involved. The possibility of double taxation is therefore prevented.

B. Hiring a car in another Member State

If an individual leases or hires a car from a leasing company established in a Member State other than his own, the place where this service is taxed is deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied (Article 9(1) of the Sixth VAT Directive). Hence only the Member State where the supplier of the service is established[7] may charge VAT on the hiring of the car.

II. GENERAL RULES GOVERNING THE APPLICATION OF OTHER TAXES TO CARS BROUGHT IN FROM OTHER MEMBER STATES

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[6] This is illustrated by the following example: Individual A buys a new car for €20 000 plus €5 000 VAT in Member State X. He then sells the car - still deemed to be new for tax legislation purposes - to individual B for €16 000 and individual B moves the car to Member State Y. The second purchase is subject to VAT in Member State Y. Had VAT on the second transaction been charged in Member State X, the amount payable would have been €4 000. The seller (individual A) is therefore entitled to recover from the State in which he is resident (Member State X) €4 000 of the VAT he paid there when he bought the car.

[7] ECJ, 17 July 1997 in Case C-190/95, ARO Lease, ECR 1997, p. I-4383; ECJ, 7 May 1998 in Case C-390/96, Lease Plan Luxembourg, ECR 1998, p. I-2571.

A. Determining whether Member States are entitled to tax cars

As Community law stands at present, Member States have wide discretion over maintaining or introducing taxes on cars. The decision as to which cars are liable for national tax is generally linked to vehicle registration. In a communication of 15 May 1996, the Commission observed that an individual cannot be allowed to register his vehicle in the Member State of his choice as this would mean that all vehicles would be registered in the Member State with the lowest tax rates.[8] At the time the Commission confirmed the principle that every individual must register his vehicle in the Member State in which he is normally resident.[9] In most cases it is easy to determine the normal place of residence. Article 7 of Directive 83/182/EC[10] sets out precise rules for determining normal residence in situations where the persons concerned are temporarily living and driving in a Member State other than their own. However, as the Commission points out, Court case law holds that the quantitative criterion to which this particular Article refers (having to live more than 185 days per year in a given place) cannot be taken as the main criterion if there are other factors which alter the situation.[11] Nevertheless the Commission considers defensible the argument whereby, if a resident of one Member State keeps a car which is used fairly regularly at a place in another Member State where he has his second residence, that car should be registered in the second Member State. This approach is also justified in other contexts, e.g. for the purposes of vehicle testing.[12]

B. General limits on the authority of Member States to tax cars "imported" from another Member State

Although Member States have always had wide powers to introduce or maintain vehicle taxes, these powers are nevertheless subject to certain restrictions in respect of vehicles "imported" from another Member State:

- the taxes may not give rise to border-crossing formalities in trade between Member States (Article 3(3) of Directive 92/12/CE);[13]
- they may not be measures having an effect equivalent to customs duty (Articles 23 and 25 of the CE Treaty);

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8 Commission interpretative communication on procedures for the type-approval and registration of vehicles previously registered in another Member State, OJ C 143/4 of 15 May 1996, point V.1; cf. ECJ, 21 March 2002, C-451/99, Cura Anlagen, point 42, and point 45 of the Advocate-General's conclusions of 25 September 1999 in the same Case.

9 The question whether this rule also applies to hired cars is currently awaiting a preliminary ruling from the Court (Case C-451/99, Cura Anlagen).

10 This provision corresponds to Article 6 of Directive 83/183/CEE.

11 ECJ, 23 April 1991in Case C-297/89, Ryborg, ECR p. I-1943.

12 Cf. Advocate-General's conclusions of 25 September 1999 in Case C-451/99, Cura Anlagen, point 45.

13 OJ L 76 of 23 March 1992, p. 1.

- they may not discriminate against "imported" cars (Articles 90 and other provisions of the EC Treaty).

These conditions apply to both "imports" by residents of the Member State to which cars are transferred and to transfers of cars to one Member State by residents of another, e.g. when a non-resident transfers his car to leave it at his second home in the Member State of "importation".

The second and third of the conditions listed above are examined in what follows.

1. Prohibition on taxes with equivalent effect

Member States may not introduce or maintain taxes having an effect equivalent to import - or export - duties on cars "imported" from one Member State or "exported" to another, i.e. taxes imposed on cars simply because they have crossed an internal border in the European Union (Articles 23 and 25 of the EC Treaty).

However, a tax which is part of the domestic tax system - i.e. one levied systematically on given categories of goods in accordance with objective criteria and applied regardless of the origin of the goods - is not deemed to be a tax with an effect equivalent to customs duty (see point 2 below).

In several instances Member States that manufacture no cars (or very few) charge a one-off, very high tax (often but not always when the car is first registered and enters into service in their territory). Here, even though in theory the tax is levied on all cars, in practice it only affects "imported" cars. However the Commission considers that this does not constitute a tax with an effect equivalent to import duty since it is levied on all cars.

2. Prohibition of domestic discriminatory taxes

As well as taxes imposed solely because a car has crossed a border, Community law prohibits generally applicable taxes (on "imported" and national vehicles, whether new or second-hand), if these general taxes discriminate against "imported" vehicles.

a) Article 90 of the EC Treaty

The prohibition on discriminatory domestic taxes is expressly stated in Article 90 of the EC Treaty. *Inter alia*, this provides that:

- if a Member State manufactures new cars, it may not impose, directly or indirectly, on cars of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.[14] (first paragraph of Article 90);

[14] To judge the similarity, one has to analyse the properties of the cars to be able to see whether these are equivalent and whether both fulfil similar consumer requirements. This will be the case if the said properties and requirements are such as to place the cars in competition with each other. The degree of competition between two models depends on how far each meets various standards, particularly of price, size, comfort, performance, consumption, longevity and reliability.

- this Member State may not impose on cars of other Member States any internal taxation of such a nature as to afford indirect protection to other products (second paragraph of Article 90).

1. General observations

Discrimination of this kind can only occur if there are any "imported" cars to compete (or likely to compete) with domestic cars. The Court decided earlier that, where a Member State has no domestic car manufacturing industry, and where its national legislation provides for a one-off, very high tax on all new cars, making no distinction between cars of domestic production and imported cars, the tax cannot be deemed to be discriminatory within the meaning of Article 90 of the EC Treaty.[15] By contrast, Article 90 of the EC Treaty prohibits domestic legislation which provides for more favourable taxes on cars produced in the country than on new "imported" cars, even if national car production is very low or practically non-existent.[16]

Discrimination between national and imported products can come about in several ways, e.g. as a result of tax rates, the tax base[17] or even tax payment methods.[18] It should be stressed that all kinds of discrimination are prohibited, even if the discrimination arises in only a few cases.[19]

It should also be stressed that Article 90 of the EC Treaty does not restrict the freedom of any Member State to establish a differentiated tax system, applicable even to similar products, as long as the criteria are objective - based, for instance, on the type of raw material or production process used. This kind of differentiation is compatible with Community law if the purpose is to achieve economic policy objectives which in their turn are compatible with the requirements of the Treaty and secondary legislation and if the methods used ensure that all discrimination - direct or indirect - against imports from other Member States, and protection of competing domestic products, is avoided. For instance, the level of pollution emitted by cars is an objective criterion not dependent on the origin of the product. Similarly a tax graduated in accordance with numbers of cylinders is based on objective criteria

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15 ECJ, 11 December 1990 in Case C-47/88, Commission v. Denmark, ECR p. I-4509.

16 See the Advocate-General's conclusions in cases C-90/94 Haahr and C-242/95 GT-Link, C-114/95 Texaco and C-115/95 Olieselskabet, ECR 1997 p. I-4085, points 86 to 89.

17 E.g., if the tax base for domestic cars is the "ex works" value, whereas transport, distribution and marketing costs are included in the tax base used for "imported" cars; or if a Member State applies to second-hand cars "imported" from other Member States a tax system in which depreciation in the actual value of the said cars is calculated in accordance with a general, abstract formula and standard criteria or tariffs which provide no guarantee that the amount of tax levied does not exceed the amount of residual tax included in the value of similar cars already registered in domestic territory - even if this affects only a very few cases.

18 E.g. if payment facilities are granted to tax debtors in respect of domestic cars but no such facilities - or lesser facilities - are granted for imported cars.

19 ECJ, 22 February 2001 in Case C-393/98, Gomes Valente, ECR p. I-1327.

independent of the origin of a car. However, although at first glance the latter tax would seem to be objective, the Commission points out that some Member States have manipulated the system or set the "taxable horsepower" in such a way as to protect domestic production. The Court has already had occasion to specify the conditions subject to which this criterion may be applied so as to ensure that it is not discriminatory.[20]

2. *The special case of second-hand cars*

Levying non-graduated taxes on "imported" second-hand cars raises a particular difficulty in respect of Article 90 of the EC Treaty, especially where domestic second-hand cars are not taxed in that capacity because they were taxed earlier when new (i.e. when registered or when first put on the road). [21]
The Court has agreed that this method of taxation is permissible but that - to ensure compliance with the first paragraph of Article 90 of the EC Treaty - it may not exceed a maximum amount equal to the residual tax incorporated in the value of similar domestic second-hand cars. This maximum applies even if the tax criterion applied by the Member State is not the value of the second-hand car but - for instance - its cylinder capacity.[22] At the same time the Court specified that the residual tax incorporated in the value of a domestic second-hand car which had already been taxed at an earlier stage - usually when new - and which was similar to the imported second-hand car decreased in proportion to the actual depreciation of the car.[23] In practice the calculation involved is

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[20] Article 90 of the EC Treaty prohibits the charging on cars exceeding a given power rating for tax purposes of a special fixed tax the amount of which is several times the highest amount of the progressive tax payable on cars of less than the said power rating for tax purposes, where the only cars subject to the special tax are imported, in particular from other Member States (ECJ, 9 May 1985 in C-112/84, Humblot, ECR p. 1367). A road tax system which, on the one hand, by establishing a tax band containing a larger number of power ratings than the other bands, restricts the normal progression of the tax to the advantage of top-of-the-range cars of domestic manufacture and, on the other, includes methods for determining the power rating for tax purposes which, for no objective reason, operate to the disadvantage of cars imported from other Member States has a discriminatory or protective effect prohibited by Article 90 of the EC Treaty (ECJ, 17 September 1987 in Case 433/85, Feldain, ECR p. 3528).

On the other hand, a system of taxing cars cannot be regarded as discriminatory solely because only imported products, in particular those from other Member States, come within the most heavily taxed category. (ECJ, 5 April 1990 in Case C-132/88, Commission v. Greece, ECR p. I-1567).

[21] *Domestic vehicle* must be taken to mean a vehicle which, even if manufactured in another Member State, has already been registered or placed on the market in the Member State concerned. (ECJ, 11 December 1990 in Case C-47/88, Commission v. Denmark, ECR p. 4509, point 17).

[22] ECJ, 9 March 1995 in Case C-345/93, Nunes Tadeu, ECR p. I-479.

[23] To calculate the maximum amount of tax chargeable on an imported second-hand vehicle (and assuming that there are similar second-hand vehicles to be had in the domestic market), the following method must therefore be used: (1) Determine how much tax would have been chargeable on the car if it had been imported when new. (2) Calculate by how much the value of the second-hand vehicle has depreciated in the domestic market of the importing State. This means determining the price for the model in question when imported as a new car into the

usually so complex that Member States generally lay down specific methods to be applied across the board for calculating the amount of tax applicable to "imported" second-hand vehicles.[24] Here attention should be drawn to the fact that Article 90 of the EC Treaty imposes on Member States a clear and unconditional obligation regarding the outcome; they are deemed to be in breach of the obligation if the respective taxes on the imported product and a similar domestic product are calculated by different methods providing different results, even if only in a few cases, and the outcome is higher taxes on the imported product.[25] Neither may the importing Member State plead practical difficulties as grounds for any discrimination whatsoever against imported products.[26]

b) Other provisions of the EC Treaty

The prohibition against applying discriminatory tax arrangements is also to be found in other provisions of the EC Treaty, e.g. Article 49. This prohibits restrictions on the freedom to supply services by nationals of a Member State other than that of the person for whom the services are intended.[27] This

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domestic market of the importing State and calculating the price for the same model when imported into that State in its actual, second-hand, condition. (3) Deduct from the amount of tax determined in point (1) an amount proportional to the actual depreciation calculated in point (2).

24 In practice most Member States that have introduced a single (non-graduated) tax have had to use one of the three following methods: either they have given a committee a remit to assess the value, on a case by case basis, of any second-hand vehicles imported into the domestic market; or they base the amount of tax on a very detailed, published table of prices for second-hand vehicles in the domestic market in which prices are broken down by make, model, age and kilometrage prior to "importation"; or they reduce the amount of tax by a flat rate which depends on the age of the vehicle.

For instance, as the Court indicated in its judgement in the Gomes Valente Case (22 February 2001, C-393/98, ECR p. I-1327, points 24, 26 et 28), for a fixed scale of prices to reflect the true depreciation of vehicles with sufficient precision, it has to take into account the age, make, model, kilometrage, type of propulsion, mechanical state and state of maintenance of the vehicles concerned. Thus, also, the Court decided that the annual depreciation in the value of a car is usually considerably more than 5% and that such depreciation is not linear, particularly in the early years when it tends to be much greater than subsequently (ECJ, 23 October 1997 in Case C-375/95, Commission v. Greece, ECR p. I-5981).

Whatever method is used to determine depreciation in the value of second-hand vehicles, it has to be wholly transparent so that a national judge is able to take a decision when a taxable person considers that application of the method in question to the vehicle he has imported means that he is taxed more heavily than the buyer of a given similar vehicle in the domestic market (ECJ, 22 February 2001 in Case C-393/98, ECR p. I-1327; ECJ, 18 December 1997 in Case C-284/96, Tabouillot, ECR p. I-7471; ECJ, 26 June 1991 in Case C-152/89, Commission v. Luxembourg, ECR p. I-3141; ECJ, 26 June 1991in Case C-153/89, Commission v. Belgium, ECR p. I-3171).

25 ECJ, 23 October 1997in Case C-375/95, Commission v. Greece, ECR. p. I-5981, points 20 and 29.

26 See also point 19 of the Nunes Tadeu case quoted above.

27 Restrictions for which objective reasons are given and which comply with the principle of proportionality are, however, exempt from this prohibition.

provision means that Member States are prohibited from applying a discriminatory tax regime to cars leased from a leasing company established in another Member State.[28]

In this connection the Commission would point out that taxes which apparently apply equally to leasing services supplied in a given Member State by a leasing company established in that State and by one established in another Member State may in fact prove to be incompatible with Article 49 of the EC Treaty. For instance, if this is a one-off tax (not one levied on the basis of the length or cost of the hire), a leasing company of the first State could lease vehicles several times, or sell them in that State, without any additional payment being required, whereas a competitor established in another State would have to pay the same amount of tax for a single - possibly very short - lease period. The Commission considers that this kind of tax amounts to an extra burden for the company established in the other Member State and one likely to discourage private individuals from contracting with leasing companies established in another Member State. To ensure compatibility with Community law, the tax should be charged on a pro rata basis, a position confirmed earlier in a Court judgement of 21 March 2002.[29]

III. <u>SPECIFIC RULES ON DUTY-FREE ALLOWANCES WHEN A CAR IS PERMANENTLY OR TEMPORARILY TRANSFERRED FROM ONE MEMBER STATE TO ANOTHER</u>

A. <u>Tax consequences of permanently transferring a car to another Member State when its owner moves from the State in which he is normally resident</u>

What tax rules apply when a car is permanently transferred from one Member State to another when its owner moves house? This question was addressed in Directive 83/183 of 28 March 1983 on tax exemptions applicable to permanent "imports" from a Member State of the personal property of individuals.

1. Taxing the permanent transfer of vehicles is prohibited

The idea underlying this Directive is that the Member State to which a car is permanently transferred may tax <u>use</u> of the car in that State - just as it taxes other cars on its roads (Article 1(2)) - but that a <u>transfer</u> alone may not be taxed provided the car in question has been acquired under the general conditions of taxation in force in the domestic market of the Member State where it originated (Article 2(2)(a)). The Directive therefore provides that every Member State must "*exempt personal property imported permanently from another Member State by private individuals from turnover tax, excise duty and other consumption taxes which normally apply to such property*"

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[28] Cf ECJ, 7 May 1998 in Case C-390/96, Lease Plan Luxembourg, ECR p. I-2571.

[29] ECJ, 21 March 2002 in Case C-451/99, Cura Anlagen.

(Article 1(1)).[30] All taxes levied simply because a car is transferred from one Member State to another when its owner moves house are therefore prohibited.

The Commission would point out that this also applies to taxes which, although levied for other reasons, amount in practice to an "import" tax on a car brought in from another Member State. For instance, the Commission considers that any tax on the registration of a car in the Member State to which that car is permanently transferred when its owner moves house could be deemed to be the kind of tax which amounts in practice to taxing the act of "importing" the car. By contrast, the Directive does not stand in the way of fees (charges) being imposed if they are in proportion to the administrative cost of the formalities involved in registering the said car (Article 1(2)).[31]

It should be noted that the Court of Justice has as yet not been asked to decide on the question.

2. *Conditions for granting exemption in the country of destination*

Under Directive 83/183 of 28 March 1983, a person "importing" a car into another Member State may be exempted from vehicle import taxes if he complies with the following set of conditions:

- the vehicle concerned must actually have been used by the person concerned before his change of residence; Member States may require such use for a period of at least 6 months prior to the change of residence (Article 2(2));
- the vehicle must be transferred to the "importing" Member State not later than 12 months after its owner transfers his normal place of residence (Article 7(2));
- the "imported" vehicle may not be disposed of, hired out or lent during the 12 months following its duty-free "importation", except in circumstances duly justified to the satisfaction of the competent authorities of the Member State of "importation" (Article 4).

The Community legislator laid down these specific rules at the time to assure Member States that the (partial) harmonisation thereby achieved would not bring with it a risk of abuse or tax fraud. However, it would be excessive to apply general rules which automatically exclude certain types of transactions from a tax advantage - whether or not there is actually any tax evasion or fraud - in order to combat this type of tax fraud or evasion.[32] The Commission therefore considers that the provisions concerned must be interpreted in a flexible manner, guided by common sense and taking account of their aim, which is to prevent abuses as well as fiscal fraud.

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31 It should be pointed out that a permanent transfer such as this is not subject to VAT either. This is because such a transfer is not deemed to be a taxable transaction within the meaning of the Sixth VAT Directive, 77/388.

31 Cf. the term « motor vehicle registration *fees*» in the English version of Article 1(2) of the Directive.

32 ECJ, 17 July 1997 in Case C-28/95, Leur-Bloem, ECR p. I-4161, point 44 (as concerns Directive 90/434/EEC); ECJ, 29 May 1997 in Case C-63/96, Skripalle, ECR p. I-2847 and ECJ, 19 September 2000 in Case C-177/99 Case C-181/99, Ampafrance (for VAT).

B. Temporary use of a car in a Member State other than the State of residence of the person concerned

Residents of one Member State frequently make temporary use of a car – their own or a hired or borrowed vehicle – in another Member State for private or business purposes. Generally speaking this should not have any tax consequences provided that what is involved is a short-term transfer.

1. Prohibition on taxing temporarily transferred cars

a) Blanket prohibition …

Here the first thing to point out is that Member States clearly cannot levy any taxes already prohibited in connection with the permanent transfer of a car, particularly not vehicle registration tax, a tax on the act of "importing" a vehicle from another Member State or any equivalent tax (cf. point III. A above). Clearly, a non-resident who "imports" a car temporarily cannot be required to pay taxes which Member States are not even allowed to levy on permanently transferred vehicles.

Also, the provisions of Directive 83/182 of 28 March 1983 mean that a Member State to which a car is temporarily transferred must grant [the car's owner who is a] resident[33] of another Member State exemption from consumption taxes and the taxes specifically mentioned in the Annex to the Directive (Article 1(1)). This therefore also covers taxes on using the car (mostly road tax).[34] The clear purpose of this provision is to avoid double taxation as the cars concerned already pay this type of tax – deemed to be equivalent – in the Member State where they are registered.

It should be pointed out that temporary tax-free use is not restricted to a single vehicle. Limiting the number of cars eligible for the exemption is liable to hinder the free movement of residents within the Community, whereas the Directive is intended to facilitate such freedom of movement.[35] Neither does the Directive require the person benefiting from the exemption to be the owner of the car he is driving.[36]

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[33] Articles 7 and 8 of the Directive cover the question of determining where the person concerned is normally resident. The criteria set out there lie outside the scope of this communication. Here the Commission is restricting itself to pointing out that the burden of proof regarding normal residence is on the persons concerned but that they may provide this proof in different ways (Article 7(2)). It should be added that the provisions in question are the subject of several Court decisions which clarify their interpretation (ECJ, 23 April 1991 in Case C-297/89, Ryborg, ECR p. I-1943; ECJ, 12 July 2001 in Case C-262/99, Louloudakis).

[34] As already mentioned in the introduction, Directive 83/182 no longer applies to VAT. The situation regarding VAT is simple: the Sixth VAT Directive does not provide for any taxation when a car from one Member State is temporarily used in another.

[35] ECJ, 29 May 1997 in Case C-389/95, Klattner, ECR p. I-2719, point 26.

[36] Cf conclusions of the Advocate-General in Case C-389/95, Klattner, ECR 1997, I-2722, point 25.

b) … but for a limited period

1. General rule: exemption for 6 months in any 12 month period

The Directive provides that the exemption may be granted for a period, continuous or otherwise, of not more than six months in any 12 months (not necessarily coincident with the calendar year; Articles 3 and 4(2)). This applies whether the car is used for private or business purposes.

The Directive does not indicate what kind of proof has to be brought to show how long the vehicle has remained in the territory of a given Member State. Although Member States are free to decide what proof should be brought, the means they choose have to comply with the legislation on freedom of movement.[37] Here it is appropriate to refer to Article 62 of the EC Treaty which prohibits Member States from using checking methods which require the completion of formalities at the Community's internal borders.[38]

The Commission considers that the six-month period provided for in the Directive will generally be sufficiently long to enable citizens to exercise in full their right of freedom of movement in a Member State other than the one in which they are normally resident. It is not unreasonable to suppose that, if a citizen remains in another Member State for more than six months, this implies a degree of permanence which allows the Member State in question to levy the regular road tax and even require registration involving dues (fees) in connection with the registration of that car. However, so as to ensure respect for the principle of the free movement of persons, the condition should be applied reasonably, guided by common sense and taking account of its aim, which is to prevent abuses as well as fraud.

2. Specific exceptions

For obvious reasons the exemption is not subject to limitation in the following cases (Article 5):

- where a car registered in the country of normal residence of the user is used <u>regularly for the journey</u> from his residence to

[37] ECJ, 2 August 1993 in Case C-9/92, Commission v. Greece, ECR p. I-4467 and the conclusions of the Advocate-General in Case C-389/95, Klattner, ECR 1997, p. I-2730, point 28.

[38] This is expressly confirmed in Article 22(8) of the Sixth VAT Directive and Article 3(3) of Directive 92/12 on excise duty.

his place or work in an undertaking in the territory of another Member State, and vice versa;[39]

- where a student uses a private vehicle, registered in the Member State of his normal residence, in the territory of another Member State in which the student is residing for the sole purpose of pursuing his studies.[40]

The Directive also provides that the exemption should be for seven months in any 12 month period where the car is imported by a commercial intermediary (Article 4(2)).[41]

2. Conditions for granting the exemption

The exemption provided for in Directive 83/182 is subject to certain specific conditions:

a) the car may not be disposed of, hired out or lent

The Directive provides that an individual who transfers his car temporarily to another Member State for private use may neither dispose of it, hire it out nor lend it to a resident of that State (Article 3).[42] These rules apply equally to any car used for business purposes, which may not even be lent to persons not resident in the State to which the car has been temporarily transferred (Article 4).[43] This prohibition applicable to cars used for business purposes also applies to persons who, as mentioned above, use the car to travel from their residence to their place of work in

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39 In a judgement of 6 July 1988, the Court addressed the opposite situation in which a car used by a worker to travel between his home and his place of work was placed at the disposal of the worker by his employer who was established in another Member State (Case 127/86, Ledoux, ECR p. 3741). The car was registered and taxed in the employer's Member State. It returned to that State regularly and was to return there permanently once the work relationship between the employer and the employee he paid terminated. The employee was also allowed to use the car for private purposes (including in the territory of the Member State where he was normally resident). In view of the fact that the car would no longer be available to the employee once he ceased to be employed, the Court decided that the Member State where the worker was normally resident should grant an exemption. This decision was taken in respect of a situation which occurred before Directive 83/182 was adopted, but followed the same line of reasoning.

40 Article 9(3) of the Directive establishes a special arrangement for Denmark, which is authorised to regard all persons (including students) from another Member State as having their normal place of residence in Denmark if they stay for a whole year or for 365 days in any 24 month period. However, the said provision also sets out rules and even the obligation to consult with the Member States concerned in order to avoid double taxation.

41 Directive 83/182 defines commercial intermediaries by reference to Article 3 of Directive 64/224. This was repealed and replaced by Directive 1999/42 of 7 June 1999. Since then commercial intermediaries have been defined in Part one, List V, point (a) of Annex A to the latter Directive.

42 There is a special exception for car hire companies.

43 When a car is used for both private and business purposes, the principal use is taken to determine which rules apply (ECJ, 6 July 1988 in Case C-127/86, ECR p. 3741).

another Member State and to students studying in another Member State (Article 5(2)).

The reason is simple: the aim is to prevent residents of Member States where vehicle taxation is (very) high from trying to avoid the taxes by using cars made over, rented or lent to them by residents of other Member States.

Here again, however, the prohibition has to be interpreted reasonably. One cannot prohibit a holder of this exemption from carrying out the routine tasks of daily life or responding to duly substantiated exceptional circumstances. For instance, the Commission considers that the prohibition on lending such a car does not apply when the holder is on board but the car is being driven by a resident of the Member State of temporary "importation". Neither can one treat as prohibited lending a situation where a resident of one Member State, temporarily visiting his family or friends in another Member State, allows a member of the family or a friend to make occasional use of the car. Another example is the Profant case, in which the Court decided that the marriage of a student, studying in a Member State other than his own, to a national of that State who was working there, necessarily implied that the student had transferred his normal place of residence.[44]

b) *Specific conditions relating to business use*

- An individual who transfers his car may use it for private or business purposes in the State of destination, but not to carry passengers or industrial and/or commercial goods for hire or reward (Article 4(1)). Given the scope of this communication, the Commission will simply state here that it does not consider this restriction applicable to ordinary car sharing where the persons concerned share the costs.

- If the car is used for business purposes, the Member State to which the car is transferred may request payment of a security if the State has serious doubts as to whether the car is being temporarily "imported" by a resident of another Member State (Article 8). The user of the car may always request reimbursement of the sum when he later provides evidence that he is normally resident in another Member State. The authorities are required to reimburse the security within two months of the date when evidence is presented (second paragraph of Article 8).

  It should be stressed that the amount of the security has to be moderate so as to comply with the principle of proportionality. The Commission therefore considers that the amount should not exceed

[44] ECJ, 3 October 1985 in Case C-249/84, Profant, ECR, p. 3237. By this decision the student continues in principle to benefit from the exemption for the duration of his studies since he gives no indication of wishing to establish himself permanently in the Member State where he is studying.

the amount of vehicle tax the person would have to pay in the State concerned if he did not succeed in proving that he was normally resident in another Member State.

CONCLUSION

In this document the Commission's aim has been to interpret the rights of individuals under existing Community law on vehicle taxation. It considers that many of the problems encountered by Community citizens can be resolved by interpreting Community provisions in the light of that fundamental component of the single market, the right to freedom of movement within the European Community.

Individuals may invoke this right before a national administration or court. The national jurisdictions may request preliminary rulings from the Court of Justice on how to interpret Community law. In some cases, Community citizens may put complaints to the European Commission, but it must be pointed out that the Commission can only address cases where a Member State’s administration is in general breach of provisions of Community law.