

Press and Information Division

**PRESS RELEASE No 21/03**

20 March 2003

Opinion of Advocate General Jacobs in Case C-147/01

*Weber's Wine World and Others v Abgabenberufungskommission Wien*

**A NATIONAL PROVISION RESTRICTING RETROACTIVELY THE  
RIGHT OF A PERSON TO REIMBURSEMENT OF TAX FOUND TO BE  
INCOMPATIBLE WITH COMMUNITY LAW IS NOT PROHIBITED BY  
COMMUNITY LAW PROVIDED THAT IT COMPLIES WITH THE  
PRINCIPLES OF EFFECTIVENESS AND EQUIVALENCE**

*Such a provision would infringe the principle of effectiveness if it presumed that there would be unjust enrichment where the burden of the charge had been passed on to a third party or if it imposed an obligation to produce evidence which could not be foreseen at the time when the evidence could be obtained*

In Austria, prior to 2000, sales of drinks and ice creams were subject to certain local and regional taxes. These taxes provided a significant proportion of the revenue of Austrian local authorities. The amount of tax owed by a retailer was calculated by the retailer himself and declared to the authorities.

In March 2000, the Court of Justice ruled that these taxes were prohibited by a Directive of 1991 on excise duty insofar as they applied to alcoholic . However the effect of the ruling was limited, as regards claims for reimbursement, to claimants who had already initiated proceedings or raised an equivalent administrative claim.

A week before that judgment, the Wiener Landtag (Vienna regional assembly) had amended the rules governing reimbursements of tax credits so that tax which was wrongfully imposed, even prior to the amendment, could no longer be recovered by the taxable person if the economic cost had been borne by a third party. The only

---

<sup>1</sup>Case C-437/97 EKW and Wein Co. [2000] ECR I-1157 decision of 9 March 2000

exception to this rule was where the person concerned was claiming reimbursement of a tax found to be unlawful by the Verfassungsgerichtshof (Constitutional Court).

In Vienna alone there are approximately 16,000 claims for recovery of the tax amounting to ATS 3,000 million. At least four of these claims have been refused by the tax authorities and the refusals have been challenged on appeal before the Austrian Verwaltungsgerichtshof (Administrative Court). These concern Weber's Wine World, two restaurants, and a *Gasthaus*. The Austrian court asked the Court of Justice whether the amendment introduced by the Vienna Regional Assembly was compatible with the EKW ruling and with Art.10 EC Treaty.

Advocate General Jacobs delivers his Opinion in this case today.

**The view of the Advocate General is not binding on the Court of Justice. The task of an Advocate General is to propose to the Court, in complete independence, a legal solution to a case.**

The Advocate General notes that it is established that individuals are entitled to reimbursement of national charges which are imposed in breach of Community law but that it is for the Member States to determine the procedural rules applicable to this reimbursement. He proposes that the Court rule that **the amendment does not infringe Community law** provided that it is interpreted so that it is **not less favourable than those governing similar domestic situations** (the **principle of equivalence**) and does not render the exercise of the rights conferred by Community law **practically impossible or excessively difficult** (the **principle of effectiveness**).

As regards the principle of **equivalence** the Advocate General finds that there is nothing in the wording of the amendment that explicitly distinguishes between claims based on national law and those based on Community law. However, the Advocate General does state that the exception for persons bringing a case before the Constitutional Court could infringe the principle of equivalence as it may mean that those people challenging a tax found to be incompatible with national law were treated more favourably than those challenging a tax found to be incompatible with Community law.

In relation to the principle of **effectiveness**, the Advocate General notes that it is not contrary to Community law for a Member State to refuse to reimburse unlawfully levied taxes where this may result in unjust enrichment. However, he argues that **the mere fact that the burden of the tax has been passed on**, for example to a customer, **does not necessarily mean that the retailer has not suffered an economic loss**, since he may have absorbed the cost of the tax within the normal price, or lost business by raising his prices to take account of the tax. The Advocate General considers that the national court should take such factors into account when interpreting the provision.

Moreover, Advocate General Jacobs recalls that certain **presumptions** or **rules of evidence** which place a burden of proof on the taxpayer and certain **procedural time-limits**, could make the recovery of an unlawfully imposed tax **practically impossible or excessively difficult**, particularly where these rules are applied retroactively. Advocate General Jacobs stresses that it is not for the Court of Justice

to interpret matters of national procedural law but that the national court must be satisfied that the rules governing evidence are not biased against the claimant. Specifically the Advocate General considers that it would be **incompatible** with the principle of effectiveness if the national procedural rules included any **presumption that the economic burden had been borne by a third party or required the claimant to prove otherwise**. The Advocate General also argues that the principle of effectiveness would be **infringed** if national procedural rules required a person to produce **evidence which was not anticipated** at the time when it could have been obtained.

**Note:** *After delivery of the Advocate General's Opinion, the judges of the Court of Justice of the EC begin their deliberation on the judgment, which they will deliver at a later date.*

*Unofficial document for media use; not binding on the Court of Justice.*

*This press release is available in English, French and German*

*For the full text of the Opinion, please consult our internet page  
**[www.curia.eu.int](http://www.curia.eu.int)**  
at approximately 3 pm today.*

*For further information please contact Christopher Fretwell  
Tel: (00 352) 4303 3355; Fax: (00 352) 4303 2731.*