OPINION OF ADVOCATE GENERAL ALBER

delivered on 16 November 2000 [1]

I — Introduction

1. The questions referred by the Administrative Court of Heraklion concern the interpretation of the concept of 'normal residence' within the meaning of Directive 83/182/EEC on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another. Beyond that, the case concerns the observance of the principles of proportionality and the protection of good faith.

II — The facts

2. The questions arise in the course of the consideration by the courts of administrative jurisdiction of a notice of fines of 8 January 1996 imposed on the claimant in the main proceedings because of the alleged illegal importation of three motor vehicles. The claimant was required by the Greek authorities with a notice of assessment to pay an increased duty and fines in the amount of GRD 83 516 969 [2] in aggregate plus further taxes in the amount of GRD 2 004 410.

3. Specifically, the following amounts are involved:

— a fine of GRD 100 000 in respect of each motor vehicle that he imported into the Hellenic Republic without declaring it;

— a fine of GRD 5 000 000 in each case in respect of two motor vehicles whose cubic capacity exceeded 2 001 c.c. and of GRD 1 000 000 for a vehicle with a cubic capacity of less than 1 300 c.c.; and finally

— double the customs duties and other taxes which, according to the customs authorities, he had intentionally evaded (that is to say GRD 36 108 840 x 2).

1 — Original language: German.

2 — If one adds the specified individual amounts, this should be GRD 83 517 680.

4. The reason given for the notice of fines was that the normal residence of the claimant is in the Hellenic Republic. He lives there in a house with his family, his children attend the local school and he set up a company in Heraklion whose objects are the trading in and the importing and exporting of olive oil.

5. According to the decision of the national court, the claimant was born in Chania, Crete, in 1956. For more than 15 years he has been an Italian national. He has lived in Italy since 1974, retains a house in Florence and has an Italian identity card and a passport indicating that he has been permanently resident in Florence since 1991. According to the pleadings of the Greek Government, he also has a Greek passport.

6. The claimant is an architect but for many years has been engaged in business in Italy. On 15 September 1986 he, together with his wife, set up the limited partnership (Eterorrythmi Etairia) Studio Fiorentino Ikodomikes Epikhirisis P. Louloudakis kai Sia (Studio Fiorentino SAS), which is established in Florence. The buying, selling, import and export of machinery and olive oil and the power to create branches/storehouses in Italy and abroad comprise the statutory objects of the partnership. Income tax returns of the partnership have been adduced for the financial years from 1990 to 1995.

7. The partnership purchased a Fiat Iveco in 1989, a Ford Fiesta in 1991 and a BMW in 1993, these being the objects of the notice of fines. The vehicles are insured with an Italian insurance company. However, the Fiat Iveco and the Ford Fiesta were also insured with Greek insurance companies for periods in 1993, 1994 and 1995. According to the decision of the national court, all three vehicles are to be regarded as private vehicles within the meaning of the Directive.

8. On 17 September 1993 the claimant, with his wife, founded a partnership in Chania whose object was the packaging of oil and fats. The activity of that business appears in the tax return for the financial year 1994 with gross income from the sale of olive oil of GRD 3 686 355 and led to the issue of its first invoice/consignment note (serial number 1) in 1994 in respect of 25 tonnes of olive oil which were transported from Kastelli to Italy.

9. On 2 November 1994 the claimant also founded the public limited company Kritiki Viomichania Elaioladou AE (KRI-V-EL), whose registered office was in Chania. It failed to develop any significant business, ceased trading following the initiation of proceedings against the claimant and was dissolved on 17 July 1995.

10. Together with his wife, the claimant submitted an income tax return in the

Hellenic Republic for the years 1993 and 1994; he claimed to have received no income as an architect and only his wife showed net profits, of GRD 931 250 from trade in olive oil, in 1994. Since 1982 the claimant has been insured with the Tamio Sintaxeos Mikhanikon Ergolabon Dimosion Ergon (Pension Fund for Public Works Engineering Contractors), an institution of principal insurance, but according to a certificate of the Dievthynsi Poleodomias (Directorate of Urban Planning), Chania, he had not, up to October 1995, carried out any projects in the Hellenic Republic. He states that he is also insured in Italy.

11. In 1991 and 1995 he renewed his Italian driving licence which he has held since 1984.

12. He is registered on the electoral roll of the Italian town of San Severo and voted in the elections of 21 April 1996.

13. In the school year 1994/95 his eldest son attended Korais Primary School, Chania, in the second year. He had also been in the preceding year at the same school. However, the claimant maintains that his children also attended a school in Florence. The Hygiene and Public Health Service of the Municipality of San Severo certifies that the eldest son was inoculated against hepatitis B on 18 August 1994, on 24 September 1994 and on 25 February 1995.

III — The questions referred

14. In the course of the consideration by the courts of administrative jurisdiction of the legality of the notice of fines, the Administrative Court has referred the following questions to the Court:

1. Is the second subparagraph of Article 7(1) of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another to be interpreted as meaning that the normal residence of a national of State A is in State A, where he successfully carries on business for many years both as an architect and in commerce through a limited partnership, retains a residence and spends most of his working time, or is in State B, of which he is also a national and where, simultaneously, he starts up an independent business with a similar or at least related object, leases a house and begins to spend part of his time, while also complying with his fiscal obligations, assisted by his wife who participates in all the above activities in both State A and State B and takes shares in those businesses?

Apart from the abovementioned provision, do other criteria exist on the basis of which, in cases where it is difficult to determine normal residence, it is possible for that determination to be made?

2. In the case of possession or use of private vehicles by a person not entitled to a temporary exemption, which under national law constitutes a simple customs contravention, is it consistent with the Community principle of proportionality to impose, on the basis of the sole criterion of the cubic capacity of the vehicle, a special administrative penalty, in particular a fine (such as the fine under Article 88(2)(g) of Law No 2127/1993) of an amount from GRD 1 000 000 to GRD 5 000 000 per vehicle, where that fine exceeds the current market value of the vehicle having regard also to its age?

3. Is it permissible for the administrative measures as a whole — including those arising from the charge of smuggling — which are decided on as appropriate in the field of customs contraventions by Member State B which is competent in that regard (in view of the absence of harmonisation of national laws) to lead to penalties which amount to many (ten) times the original purchase price of the article in Member State A, without impeding the free movement of goods and persons? If the answer is in the negative, do criteria exist as to the limits of what is strictly necessary in order to achieve the objectives pursued?

4. Does Directive 83/182/EEC or another provision give rise to an obligation on the Member States to take into account, when imposing administrative penalties in cases with which that directive is concerned, the good faith of the persons concerned and the absence of fraudulent intent (for example ignorance)?

IV — Relevant legislation

(1) *Community legislation*

Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another[3] (hereinafter 'the Directive')

3 — OJ 1983 L 105, p. 59.

15. The tax exemption for motor vehicles imported temporarily is based on Article 1(1) of Directive 83/182. This provision states:

'(1) Member States shall, under the conditions laid down below, exempt temporary imports from another Member State of motor-driven road vehicles... from:

— turnover tax, excise duties and any other consumption tax,

— the taxes listed in the Annex hereto.'

16. In the present case, the following provisions must also be noticed:

Article 4

'(1) A private vehicle imported temporarily for business use shall be exempt from ... the taxes specified in Article 1, provided that:

(a) the individual importing the private vehicle:

(aa) has his normal residence in a Member State other than the Member State of temporary importation;

(bb) does not use the vehicle within the Member State of temporary importation in order to carry passengers for hire or material reward of any kind, or for the industrial and/or commercial transport of goods, whether for reward or not;

(c) the private vehicle has been acquired or imported in accordance with the general conditions of taxation in force on the domestic market of the Member State of normal residence of the user and is not subject by reason of its exportation to any exemption from or refund of turnover tax, excise duty or any other consumption tax.

This condition shall be presumed to be satisfied if the private vehicle bears a standard registration plate of the Member State of registration, all types of temporary plate being excluded.

...'

17. Article 7 of Directive 83/182 reads:

'(1) For the purposes of this Directive, 'normal residence' means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties because of personal ties which show close links between that person and the place where he is living.

However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school shall not imply transfer of normal residence.

(2) Individuals shall give proof of their place of normal residence by any appropriate means, such as their identity card or any other valid document.

(3) Where the competent authorities of the Member State of importation have doubts as to the validity of a statement as to normal residence made in accordance with paragraph 2, or for the purpose of certain specific controls, they may request any additional information or evidence.'

(2) *National legislation*

(a) Law No 2127/1993

18. At the time relevant for establishing the contravention, Law No 2127/1993 (FEK (Official Gazette) I, p. 48) contained the following relevant provisions:

Article 75:

'Motor vehicles and motorcycles which... are dispatched or transported to Greece from other Member States of the Community shall be subject to the special consumption tax which is imposed on imported or domestically produced vehicles respectively.'

...

Article 84:

'2. The exemption from special consumption tax which the applicable provisions grant in respect of vehicles imported under the customs procedure for temporary importation subject to the condition of re-export shall also apply, analogously and subject to the same conditions and requirements, to vehicles covered by Article 75 which are dispatched or transported from other Member States of the Community in order to be used temporarily within Greece.'

Article 88:

'1. Any form of evasion or attempted evasion of payment of the tax and other charges owed or failure to observe the formalities laid down by law with the objective of not paying the abovementioned taxes and other charges shall be treated and punished in accordance with Article 89 et seq. of Law No 1165/1918 concerning the Customs Code.

2. Without prejudice to the application of the preceding paragraph, the following fines shall also be imposed in accordance with the circumstances:

(a) For failure to submit a declaration under Article 79(1) and (2), a fine of GRD 100 000 for each vehicle;

... ...'

(g) In the case of possession or use of a vehicle covered by Article 75 by a person who does not enjoy a temporary exemption under Article 84(2), a fine as follows:

— up to 1 300 c.c., GRD 1 000 000...

— from 1 301 to 1 600 c.c., GRD 2 000 000...

— from 1 601 to 2 000 c.c., GRD 3 000 000...

— 2 001 c.c. and above, GRD 5 000 000...

A fine under this subparagraph shall become due forthwith and any application to the administrative courts shall not suspend its payment as a single sum.

(b) Law No 1165/1918

19. Article 97(3) of the Customs Code (Law No 1165/1918 — FEK 1, p. 73) provides:

'Multiple duty amounting to between two and ten times the customs duties, taxes and charges payable on the subject-matter of the contravention shall, in accordance with Article 100 et seq. of this Law, be imposed jointly and severally on each person who participates in any way in a customs contravention under Article 89(2) of this Law. The multiple duty shall reflect the degree of participation of each such person and shall be imposed irrespective of criminal proceedings brought against them...'

(c) Ministerial Order Ik.D.247/13/1-3

20. Ministerial Order Ik.D.247/13/1-3/6.4.1998 concerning the temporary importation of certain means of transport

and goods for personal use provides, *inter alia*:

A. — Article 1:

'1. Under the procedure for temporary importation which is provided for by this order, it is permitted to import, without the corresponding customs duties and other taxes being levied, means of transport for private use which are intended to remain temporarily in Greece and subsequently to be re-exported within the time-limit laid down in the particular case...'

...

Article 4:

'1. ... An individual who wishes to import temporarily goods referred to in Article 1 must (a) have his normal residence outside Greece, (b) come to Greece temporarily and (c) use the goods for private use.

2. The period for which the goods may remain is six months, whether continuous or not, in a 12-month period. That period of six months may be extended for a further nine months, but in the case of a person engaging in business activity in the Hellenic Republic this extension is limited to a maximum of three months....'

Article 5:

'1. An individual who wishes to import temporarily a private vehicle for business use as defined in Article 2(3) must:

(a) have his normal residence outside Greece; and

(b) not use the vehicle in Greece to transport persons in return for payment or other material advantage or for the purpose of the industrial and commercial transport of goods, whether for payment or not.

2. The period for which the private vehicle may remain is seven months, whether continuous or not, in a 12-month period for commercial representatives and six months in all other cases.

3. Where in exceptional circumstances, and despite the evidence produced to prove normal residence, the customs authorities

still have serious doubts, a security covering all forms of claim by the State shall be paid when a private vehicle intended for business use is placed under the procedure for temporary importation pursuant to this order. However, if the person concerned ultimately proves that he has his normal residence in another country, the customs authorities must refund the security within two months from the day on which that evidence is produced.'

B. — Article 3:

'For the purposes of this order 'normal residence' means the place where a person usually lives, that is for at least 185 days, whether continuous or not, in each calendar year (see Article 15(2)(a) of Law No 2187/1994 (FEK I, p. 94)) because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living. However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more countries shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a country in order to carry out a task of a definite duration. Attendance at a university or school shall not imply transfer of normal residence.'

(d) Circular D 366/26 Pol 10

21. The 'means of proof', within the meaning of Article 7(3) of Directive 83/182, listed in Circular D 366/26 Pol 10 of the Minister for Economic Affairs, implementing Order No 247/1988, include the following: a passport, an identity card, a certificate of registration with a municipality or a commune, a certificate of registration with consular authorities, a residence permit, a work permit, tax returns, certificates of an insurance institution, other evidence proving the place of residence of other members of the family and any other piece of evidence from which normal residence in a place may be deduced.

V — Arguments of the parties

22. The claimant is of the view that the vehicles were only temporarily imported into the Hellenic Republic. They formed part of the assets of the partnership Studio Fiorentino SAS, for whose account and to serve whose business needs they were imported into the Hellenic Republic. The Fiat Iveco truck was used for the transport of goods within Italy or to Italy and the private vehicles for journeys made by the

claimant or employees of the partnership within and outside Italy for the purposes of business meetings. In the period from September 1994 to February 1995 all these vehicles had made journeys and deliveries within Italy and across borders. They could not therefore during the same period also have been found for a long time in the Hellenic Republic. Indeed, they only entered the Hellenic Republic between 1 and 8 March 1995.

23. According to the submissions of the claimant, the BMW has a value of ITL 10 200 000, that is about GRD 1 200 000, the Ford of ITL 8 000 000 or GRD 1 200 000. The value of the vehicles was slight and therefore precludes smuggling of the extent and gravity of that of which he has been accused (customs duties and taxes of GRD 31 181 280 were imposed on the BMW, and of GRD 4 156 050 on the Ford), at a time when the value of all three vehicles together was no more than GRD 4 000 000.

24. He alleges that Directive 83/182 has not been correctly implemented as regards the provisions concerning proof of normal residence (Article 7(2) and (3) of the Directive). Moreover, he alleges that the determination of the consumption tax and other taxes on the three vehicles infringes Article 100a of the EC Treaty (now Article 95 EC). The amount of value added tax incorporated in the value of the vehicles was illegally included in the taxable amount. Furthermore, the assessment of the taxable amount for the special consumption tax on imported used vehicles amounts to discrimination compared to the treatment of domestic vehicles. Finally, he alleges that there is a disproportionate difference between the penalties for the importation of vehicles in the case of non-payment of the special consumption tax in comparison with corresponding offences within the territory.

25. The Greek Government considers that the present case does not fall within Directive 83/182. In the claimant's case, the place of employment and the place of residence of his family are not different. However, this is a condition of the applicability of Article 7(1)(2) of the Directive. Furthermore, the present case is concerned more with a practical problem in the application of Article 7(1) of the Directive and less with the question of law as to what the criteria are by reference to which 'normal residence' within the meaning of the abovementioned provision is to be determined.

26. For the determination of 'normal residence' all the criteria specified in Article 7 are to be applied. On the basis of the circumstances as they appear in the facts of this case, the 'normal residence' of the claimant has been in the Hellenic Republic since 1993. What would be decisive would be for the national court to require the claimant to provide proof that he resides for at least 185 days per year in one of the two places.

27. In respect of the question as to the proportionality of the fines imposed, the

Greek Government states first that in the absence of the harmonisation of these matters, the Member States are competent to regulate the amounts of fines. It considers the principle of proportionality to have been observed. Drastic fines are necessary to deter fraudulent schemes, for it is impossible continually to inspect all vehicles driven in the Hellenic Republic that are registered in other Member States. The determination of the amount of fines by reference to cubic capacity is proportionate, since cubic capacity is proportional to the commercial value of the vehicles.

28. The Greek Government is further of the opinion that fixed rate fines are proportionate. This is likewise a means of deterrent.

29. The addition of a double penalty duty is likewise justified in order to guarantee compliance with the importation provisions.

30. The Greek Government suggests that the last question of the Administrative Court should also be answered in the negative. The question of whether account should be taken of the good faith of the claimant is to be determined solely according to national law.

31. The Commission shares the doubts of the claimant as to the law. In respect of the determination of the 'normal residence' of the claimant, it is of the view that the present case should be determined by means of consultation between the Greek and the Italian Government in accordance with Article 10(2) of the Directive, since the present reference points make it truly difficult to determine the residence of the claimant clearly.

32. If the residence of the claimant is held to be in Italy, then the claimant is to be exempted under the Directive from all taxes. If it is decided that he has moved his residence from Italy to the Hellenic Republic, he is to be subject only to registration tax but not, however, to consumption tax. If it is decided that the claimant has never had his residence in Italy, then he is to be assessed both to registration and to consumption tax. The Court has already held in its judgment in Case C-375/95 *Commission* v *Greece* [4] that the latter is disproportionate.

33. In respect of the fines, the Commission maintains the opinion that they are disproportionate, since the determination of the normal residence of the claimant is extremely difficult. This legal uncertainty also excludes the presumption that the claimant

4 — [1997] ECR I-5981.

had a fraudulent intent. Finally, it is disproportionate to set fines higher than the present commercial value of the vehicles.

VI — Legal analysis

The first question

34. The first question of the national court concerns the relationship of the individual criteria specified in Article 7(1) of Directive 83/182 to one another. It concerns the weight of occupational interests as against private interests.

35. In relation to the claimant, the national court sets the following criteria against each other: in State A, nationality, carrying on an independent business, retaining a residence and spending most of his working time; in State B, nationality, an independent business, leasing a house and compliance with fiscal obligations. From this list it is clear that the national court supports its determination of normal residence in both cases with the same criteria, namely, nationality, occupational activity and the presence of a dwelling place.

36. The opinion of the Greek Government that the present case concerns only questions of fact cannot be accepted. For it emerges from the question of the Administrative Court that the claimant spends the largest part of his working time in State A (Italy) and he is only beginning to spend a part of his time in State B (the Hellenic Republic). To this extent, the question of the national court can be understood as concerning the weight of occupational interests on the one hand in relation to private interests on the other.

37. According to the wording of Article 7(1) of the Directive, the normal place of residence is to be determined on the basis of a person's personal and occupational ties. The use of the conjunction 'and' indicates that the criteria are of equal weight.

38. No other interpretation can be given to the phrase following on from this, that in the case of a person with no occupational ties, it depends on personal ties. Here, the criterion of occupational ties is simply abandoned without any other criteria being added. Thus, what is involved is simply taking into account two population groups, being those who are workers and those who are not.

39. However, a different result might be deduced from the context in which the provision stands. Specifically, Article 7(1)(2) of the Directive provides that in the case where the place of the occupational ties and the place of the personal ties are different, the place of the personal ties is decisive. However, this precedence in favour of the place of the personal ties only applies subject to the condition that the person regularly returns to this place. Applied to the facts established by the national court, according to which the claimant spends the major part of his working time in State A and is only beginning to spend a part of his time in State B, this means that the national court would have to determine whether the claimant regularly returns to State B.

40. The fact that the children of the claimant have at least temporarily attended a school in State B is immaterial for the determination of the normal residence of the claimant. For under the third sentence of Article 7(1)(2) of the Directive the attendance at school of the subject of the provision himself, that is the claimant in the main proceedings, 'shall not imply transfer of normal residence.' So much the less can the attendance at school of the children of the claimant in the main proceedings lead to a transfer of the claimant's normal residence.

41. Apart from the analysis of the wording and of the systematic context of the provision, it must be pointed out that the Court in its case-law has always emphasised that all of the criteria specified in Article 7(1) of the Directive are to be considered together. Referring to its case-law in other areas of Community law, it has defined 'normal residence' within the meaning of Directive 83/182 as the place where the person concerned has established his permanent centre of interests. [5] Accordingly, it follows that all relevant elements of fact must be taken into account in regard to determining normal residence as the permanent centre of interests of the person concerned. [6]

42. In its judgment in the case of *Ryborg*, the Court also founded on a subjective element as well. Over and above the purely objective circumstances, it considered whether the person concerned had, in the course of his actings, manifested the intention to settle in a different Member State from the one in which he had hitherto had his normal place of residence. [7] In his Opinion in the case of *Swaddling*, Advocate General Saggio too founded on the fact that it must appear from the objective circumstances that the person concerned has decided to choose his residence in a particular Member State. [8] In its judgment in this case, which concerned social security, the Court likewise founded on the intention of the worker as it appeared from a consideration of all the circumstances. [9]

5 — Judgment in Case C-297/89 *Ryborg* [1991] ECR I-1943, paragraph 19 and references therein.

6 — Judgment in Case C-297/89 *Ryborg*, cited in footnote 5, paragraph 20.

7 — Judgment in Case C-297/89 *Ryborg*, cited in footnote 5, paragraph 25.

8 — Opinion in Case C-90/97 *Swaddling* [1999] ECR I-1077, paragraph 17.

9 — Judgment in Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 29.

43. In a case such as the one to be decided by the national court, in which the claimant has both occupational and personal ties both in Member State A and in Member State B, the subjective element must be of decisive importance. The claimant has both nationalities, has in both Member States both a business and a home and his family resided in both Member States in the period in question, from 1993. If the case is not decided by means of mutual agreement between the Greek and the Italian authorities as provided for under Article 10(2) of the Directive, as the Commission suggests, but for which the Greek Government apparently sees no reason, and which, it must here be expressly emphasised, it is, neither according to the wording of the Directive nor according to the case-law of the Court, [10] obliged to do, then only the determination of the intention of the claimant is of further assistance. The national court has therefore to examine all the circumstances from which both the occupational and the personal ties of the claimant emerge and must determine from these the centre of interests of the claimant. In this connection, the question must be posed as to whether from the claimant's actings since 1993 an intention appears to transfer his normal residence, which it is not disputed was until that time in Italy, to the Hellenic Republic.

44. For these reasons it is suggested that the first question should be answered to the effect that the question as to whether the 'normal residence', within the meaning of Article 7(1) of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, of a national of State A is in State A

— where he successfully carries on business for many years both as an architect and in commerce through a limited partnership, retains a residence and spends most of his working time —,

or is in State B,

— of which he is also a national and where, simultaneously, he starts up an independent business with a similar or at least related object, has leased a house and begins to spend part of his time, while also complying with his fiscal obligations, assisted by his wife who participates in all the above activities in both State A and State B and takes shares in those businesses —,

is to be determined by the national courts and authorities on the basis of all the

10 — Judgment in Case C-297/89 *Ryborg*, cited in footnote 5, paragraphs 30 to 35.

circumstances from which the centre of interests of the person concerned emerges. In this connection, a possible intention of the person concerned to leave his original normal residence and acquire a new one must be considered.

The second question

45. The second question referred concerns the proportionality of the administrative penalties imposed.

46. Before discussing the individual aspects of this question, a few preliminary remarks must be made:

First, the following considerations apply only to the case of an intentional evasion of the circumstances that give rise to the tax. The possibility of taking into account the good faith of the taxpayer will be considered in the fourth question.

Second, the following considerations apply subject to the condition that the taxes for imported vehicles, in particular the consumption tax that was the subject of the judgment in Case C-375/95, are determined in accordance with Community law. The national court itself refers in this connection to the judgment in Case C-398/95. It is therefore assumed that the national court will take these judgments into account in making its decision.

Third, it is to be noted that according to the decision of the national court, the contested notice of assessment levies an increased duty under Article 97(3) of Law No 1165/1918 of double the rate of duty. The abovementioned provision refers for its part to the definition of a customs contravention in Article 89(2) of Law No 1165/1918. This provision does not mention duties but only taxes generally. In the present case, that must be the consumption tax that is under Article 75 of Law No 2127/1993 due on importation. However, this does not clearly appear from the decision of the national court, so that it must first be stated that according to Article 9 of the EC Treaty (now Article 23 EC) duties may not in principle be levied on means of transport that are in free circulation in one Member State and are brought from there into the Hellenic Republic. For this reason, if the contested notice of assessment in fact purported to levy duties, then this notice of assessment is to this extent not compatible with Community law.

47. Now to the second question. It concerns the fine imposed under Article 88(2)(g) of Law No 2127/1993 on the claimant in the main proceedings, which is set solely by reference to the cubic capacity of the vehicle concerned. The national court asks whether this approach, which completely ignores the current value of the motor vehicle, is compatible with the principle of proportionality. In the first place, it must be remembered that in the current state of development of Community law, the Member States have authority to enact such provisions on penalties for import contraventions as appear to them to be justified, in particular to prevent tax evasion. The Court has confirmed this specifically in relation to the implementation of Directive 83/182. [11] In enacting these penalty provisions, they have a margin of appreciation.

48. However, the system of penalties must not have the effect of impeding the freedoms of movement granted by the EC Treaty. This is the case where a penalty becomes an obstacle to the freedom guaranteed by Community law. [12] The penalty must be appropriate and necessary to achieve the aim pursued. [13]

49. The enactment of a fine is a suitable means of ensuring the payment of importation taxes. Since there is moreover no less restrictive means of ensuring the fulfilment of the tax obligation, the imposition of a fine is also a necessary means. However, what is questionable is whether the determination of the amount of the fine solely by reference to cubic capacity is not an excessive means.

50. In this regard, it must first be stated that the question raised concerns only a part of the fine imposed, namely the part imposed under Article 88(2)(g) of Law No 2127/1993. Another part is calculated according to the amount of the taxes due (Article 97(3) of Law No 1165/1918) and another is a flat rate (Article 88(2)(a) of Law No 2127/1993). The extent to which the taxes due are linked to the value of the article imported cannot be deduced from the decision of the national court. However, it cannot be excluded that the value of the motor vehicle is taken into account in this connection.

51. In relation to the part of the fine imposed under Article 88(2)(g), it must be stated that the size of the cubic capacity of a motor vehicle is first of all an objective reference criterion. It follows that in the determination of the amount of the fine imposed discrimination is not possible. The Court has declared systems of tax that use the cubic capacity of the taxed motor

11 — Judgment in Case 283/79 *Carciati* [1980] ECR 2773, paragraph 9.

12 — Judgment in Case 299/86 *Drexl* [1988] ECR 1213, paragraph 18; judgment in Case C-265/88 *Messner* [1989] ECR I-4209, paragraph 14; judgment in Case C-389/95 *Klattner* [1997] ECR I-2719, paragraph 38.

13 — Judgment in Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285, paragraph 24.

vehicle as an objective criterion to be compatible with Community law. [14]

52. Furthermore, it must be doubted that the value of a motor vehicle is perhaps not proportional to its cubic capacity, as the Greek Government argues, but that the cubic capacity is at least a determining factor for the performance of the engine and the engine in turn represents for its part a significant factor in determining the value of the vehicle. To this extent there exists at least a link between the value of a vehicle and its cubic capacity.

53. As regards the case in which the fine set by reference to cubic capacity may exceed the commercial value of the motor vehicle concerned, it is to be noted that the calculation of consumption taxes in respect of motor vehicles is also linked as a rule to an unalterable standard, such as the cubic capacity or the horsepower of the engine and that tax calculated in this way is not reduced by reference to depreciation in the commercial value either. A 10-year-old car is taxed in exactly the same way as a new car.

54. Moreover, it is to be observed that the purchase price paid by the claimant in Italy cannot without further qualification be compared to the fine determined in accordance with the Greek provisions. On the basis of the differing taxation authorised by Community law the commercial values of a vehicle in the two countries may differ significantly from one another. The fine calculated in accordance with Greek law forms part of the whole context of the fines that are to be imposed under Greek law and may, if need be, lawfully have Greek commercial values as a standard of reference, not however those of other Member States.

55. On the basis of the foregoing considerations, one must regard a provision that refers solely to cubic capacity as not excessive and must therefore declare it to be proportionate.

56. For these reasons, it is suggested that the answer to be given to the second question is that in the case of possession or use of private vehicles by a person not entitled to a temporary exemption, which under national law constitutes a simple customs contravention, it is consistent with the Community principle of proportionality to impose, on the basis of the sole criterion of the cubic capacity of the vehicle, a special administrative penalty, in particular a fine (such as the fine under Article 88(2)(g) of Law No 2127/1993) of an amount from GRD 1 000 000 to GRD 5 000 000 per vehicle, where that fine exceeds the current market value of the vehicle having regard also to its age.

14 — Judgment in Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, paragraphs 6 and 10 f.

The third question

57. With its third question the national court examines the compatibility of a fine with the principles of the free movement of goods and of the free movement of persons. According to the decision of the national court, the administrative penalty imposed by Member State B can amount to up to 10 times the original purchase price of the article in Member State A.

58. Accordingly, this question concerns the aggregate amount of the fine imposed by the notice of assessment. As stated above, national administrative penalties are only compatible with Community law to the extent that they do not present an obstacle to the exercise of the freedoms guaranteed by the EC Treaty. [15]

59. In relation to Directive 83/182 one can also support this principle with the first two reasons (recitals) of the Directive, according to which the '... freedom of movement of Community residents within the Community is hampered by the taxation arrangements applied to the temporary importation of certain means of transport for private or business use' and the elimination of 'the obstacles resulting from these taxation arrangements is particularly necessary if an economic market having features similar to those of a domestic market is to be established'. The Court has already confirmed this protective purpose of the provisions of Directive 83/182 in its judgment in the case of *Ryborg*. [16]

60. National provisions on the basis of which a fine can be imposed which amount to many times the original purchase price of the article in a different Member State are certainly a suitable means of preventing tax evasion and of deterring potential perpetrators from such a contravention. As the Greek Government furthermore submits, it considers drastic penalties to be necessary for deterrence since it is impossible continually to inspect the cars driven in Greece with foreign registration plates.

61. As already explained, the fine in the present case consists of three parts: double the amount of the duties due, a fine determined by reference to cubic capacity and a flat rate fine. In respect of the duties demanded in double amount, reference may be made to the Opinion of Advocate General La Pergola in the case of *Klattner*, in which he considered an administrative penalty amounting to 100% of the total

15 — Judgment in Case 299/86 *Drexl*, cited in footnote 12, paragraph 18.

16 — Judgment in Case C-297/89 *Ryborg*, cited in footnote 5, paragraph 13.

amount of the duties and other taxes to be compatible with Community law. [17] I agree with this view. An administrative penalty does not only serve to enforce the claim to tax: beyond that, it fulfils the function of a deterrent.

62. However, in the present case further amounts are added to that amount, namely, the fine calculated by reference to cubic capacity and the flat rate fine for every motor vehicle not declared. If one compares these amounts with one another, it emerges that of the aggregate amount of GRD 83 517 680 as much as GRD 72 216 960 and therefore by far the most extensive part represents the double liability to duty, which in the preceding paragraph has already been considered as lawful. For the three vehicles of the claimant, the fine due on the basis of cubic capacity amounts to GRD 11 000 000 and the flat rate fine GRD 300 000. These component amounts therefore make up a good seventh of the aggregate fine. This cannot exceed the margin of appreciation that is allowed to the Member States in enacting penalty provisions. The discrepancy that appears from the commercial value of the motor vehicles, estimated by the claimant at GRD 4 000 000, and the amount of the fines must rather be again the result of the different commercial values of motor vehicles in the two Member States concerned. The reason for these is in turn the different national tax regimes that exist in the absence of Community-wide harmonisation.

63. In general, it remains to be noted that the principles of free movement of goods and of free movement of persons cannot serve to eliminate differences between the Member States that exist in the absence of the harmonisation of taxation provisions by the Community or to diminish fines for tax evasion committed intentionally. The purpose of the provisions concerning free movement of persons cannot be to benefit breaches of the law. However, in the case where vehicles are duly declared there are, at least according to the decision of the national court, no duties due that restrict the free movement of goods or the free movement of persons. The calculation of the consumption tax due in such a case is compatible with Community law, as was already stated at the start.

64. For these reasons, it is suggested that the answer to be given to the third question is that it is permissible for the administrative measures as a whole — including those arising from the charge of smuggling — which are decided on as appropriate in the field of customs contraventions by Member State B which is competent in that regard (in view of the absence of harmonisation of national laws) to lead to penalties which amount to many (10) times the original purchase price of the article in Member State A, without impeding the free movement of goods and persons.

17 — Opinion in Case C-389/95 *Klattner* [1997] ECR I-2719, p. I-2722, paragraph 40.

65. The supplementary point put by the national court within the framework of the third question, whether criteria exist as to the limits of what is strictly necessary in order to achieve the objectives pursued, is already answered by the above considerations. A fine is the least restrictive means available for enforcing the tax claims of the state and whether it is appropriate is to be determined on the basis of objective and substantive reference criteria.

The fourth question

66. The last question of the Administrative Court concerns the obligation to take into account, when imposing administrative penalties, the possible good faith and absence of fraudulent intent of the perpetrator.

67. Directive 83/182 contains no provisions at all regarding penalties that are to be applied in the case of contraventions of the tax provisions of the Member States. As stated above, the Member States are therefore competent to regulate the penalties due for the evasion of payable taxes and imposts. The question of taking into account facts found in the individual circumstances of the perpetrator, such as any good faith he may have, is therefore likewise to be determined according to the law of the Member States.

68. However, as has likewise already been stated, it must in this connection be remembered that the national penalty cannot be contrary to the realisation of the freedoms granted by Community law, such as for example the free movement of persons. In addition to this, Directive 83/182 is intended to eliminate obstacles to the free movement of persons that derive from the existing provisions of tax law, as appears from the first two recitals. If a citizen of the Union exercises the right to free movement of persons and uses his motor vehicle, which is registered in one Member State, in good faith in another Member State without observing its rules concerning the declaration of motor vehicles, it conforms to the purpose of Directive 83/182 to take this good faith into account in determining the administrative penalty. This result also complies with the encouragement the EC Treaty strives to give to the exchange of goods as well as to the long-term alignment of the fiscal rules of the Member States pursued by the Community.

69. For these reasons, it is suggested that the fourth question should be answered to the effect that the purpose of Directive 83/182/EEC (to facilitate the exercise of the right to free movement) gives rise to an obligation on the Member States to take into account, when imposing administrative penalties in cases with which that directive is concerned, the good faith of the person concerned and the absence of fraudulent intent (for example ignorance).

VII — Conclusion

70. On the basis of the above considerations, it is suggested that the questions referred by the Administrative Court of Heraklion should be answered as follows:

(1) The question as to whether the 'normal residence', within the meaning of Article 7(1) of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, of a national of State A is in State A

— where he successfully carries on business for many years both as an architect and in commerce through a limited partnership, retains a residence and spends most of his working time —,

or is in State B

— of which he is also a national and where, simultaneously, he starts up an independent business with a similar or at least related object, leases a house and begins to spend part of his time, while also complying with his fiscal obligations, assisted by his wife who participates in all the above activities in both State A and State B and takes shares in those businesses —,

is to be determined on the basis of all the circumstances from which the centre of interests of the person concerned appears. In this connection, a possible intention of the person concerned to leave his original normal residence and acquire a new one must be considered.

(2) In the case of possession or use of private vehicles by a person not entitled to a temporary exemption, which under national law constitutes a simple customs contravention, it is in the case of intentional breach consistent with the Community principle of proportionality to impose, on the basis of the sole criterion of the cubic capacity of the vehicle, a special administrative penalty, in particular a fine, where that fine exceeds the current market value of the vehicle having regard also to its age.

(3) It is permissible for the administrative measures as a whole which are decided on as appropriate for the punishment of a customs contravention committed intentionally by Member State B which is competent in that regard (in view of the absence of harmonisation of national laws) to lead to penalties which amount to a multiple of the original purchase price of the article in Member State A, without thereby impeding the free movement of goods and persons.

The limits of what is strictly necessary in order to achieve the objectives pursued is to be determined in the course of the examination of the proportionality of the measure. In particular, whether it is not excessive is to be determined on the basis of objective and substantive reference criteria.

(4) The purpose of Directive 83/182/EEC (to facilitate the exercise of the right to free movement) gives rise to an obligation on the Member States to take into account, when imposing administrative penalties in cases with which that directive is concerned, the good faith of the person concerned and the absence of fraudulent intent (for example ignorance).