The EC Tax Journal

TAKING VAT CASES TO THE ECJ

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1. Introduction

Although VAT, the first 'European' tax, was introduced in the UK from 1973, and the European Sixth VAT Directive ('the Sixth Directive') replaced the Second Directive in 1977, UK lawyers and courts were slow to acknowledge that the supremacy of UK tax law had been undermined. European Directives were looked at as an afterthought, if at all. It was not until 1984 that a UK court first decided a VAT case on the basis that the Sixth Directive had direct effect and overrode UK law,[2] and not until a year later that the UK got its first tax case heard in the European Court of Justice ('ECJ').[3] Then in 1988, the House of Lords showed the way by recognising in the *Apples & Pears* case[4] that although they of course knew what the word 'consideration' meant in UK law, it might very well mean something else entirely in Europe, and with 1988 also seeing the Commission's first two successful infraction proceedings against the UK,[5] everyone (with the exception of a few die hard judges!) finally realised that the Sixth Directive needed to be at the forefront of our interpretation of UK VAT law, and the trickle of references became a stream; and with every ECJ judgment of course applying equally throughout the EU, it was necessary to keep up with cases referred not just from the UK, but from all other Member States too, a fact that Simon's Tax Cases recognised in 1990 when they started reporting all ECJ tax cases, rather than leaving practitioners to search for them in ECR or CMLR. During the 90's UK tax practitioners learnt that it was not just the Sixth Directive that they needed to keep an eye on; general overriding

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2 *Yoga for Health Foundation*, [1984] STC 630, Nolan J.

3 *Direct Cosmetics v CCE*, Case C-138/86, [1988] STC 540.

4 *Apple & Pear Development Council v CCE* [1986] STC 192, HL; [1988] STC 221, ECJ.

5 *EC Commission v UK* Case 353/85 [1988] STC 251, the spectacles case; and *EC Commission v UK*, Case 416/85, [1988] STC 456, the zero-rating case.

principles of EC law such as non-discrimination, effectiveness, freedom of establishment, legal certainty, legitimate expectation, neutrality, proportionality and unjust enrichment kept rearing their heads, most of them easy enough to describe but very difficult to apply with confidence in practice, especially since the ECJ is continually developing them, and indeed describing new ones, such as 'abuse of right', first defined in a fiscal context in December 2000.[6]

2. Getting the Case Referred

Taxpayers have no right to go to the ECJ direct; the reference procedure is for the use of the courts, and it is the court alone which decides whether it is going to refer or not. Article 234 (formerly Article 177) of the Treaty of Rome as amended gives all UK courts short of the House of Lords a discretion to refer a question raised on the interpretation of, in particular, the Sixth Directive, 'if [the court] considers that a decision on the question is necessary to enable it to give judgment'. The principles which the court has to bear in mind in arriving at a decision whether or not to refer are well established, and set out in a series of cases in the 1980's,[7] but it is almost impossible to predict how any particular court will apply these principles in deciding whether or not to exercise its discretion. Some judges seem to regard it as a sign of weakness and indecision if they make a reference, others are only too pleased to let the ECJ take the matter out of their hands!

One of the features, for example, which is emphasised in the UK case law as being a strong indicator that a reference should be made is where there is evidence that different Member States take different views of the interpretation of the same provision, because of course VAT is supposed to be applied in the same way across the entire EU, and obvious distortions can arise if this is not achieved. Even in such cases, however, a judge who is confident of his or her own interpretation of the Sixth Directive may simply say 'The correct interpretation is clear; other Member States are simply getting it wrong'[8] and what for some judges is crystal clear is for others obscure, so that it regularly happens that a refusal by one court to refer is overturned on appeal.[9]

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6 *Emsland-Stärke v Hauptzollamt Hamburg-Jonas*, Case C-110/99.

7 See the cases referred to in the judgment of the Court of Appeal in *BLP Group v CCE* [1994] STC 41.

8 See for example Chadwick LJ in *Trinity Mirror v CCE* [2001] EWCA Civ 65, para. 54, [2001] STC 192 at page 213.

9 See for example *BLP Group v CCE* [1994] STC 41, QBD and Court of Appeal; *Conoco v CCE* [1995] STC 468 and 1022.

In the House of Lords, the test is slightly different, because Article 234, third paragraph, lays down what, on a literal reading, appears to be a duty on the House of Lords to refer any question on the interpretation of, for example, the Sixth Directive. However, it is long established that the House of Lords does not have to refer questions where the answer is entirely clear. The ongoing case of *Sinclair Collis v CCE*[10] is an illustration of how the threshold is nevertheless lower, because in that case, three of their Lordships (Lords Nicholls, Millett and Scott) would have allowed the taxpayer's appeal, but because Lord Slynn and possibly Lord Steyn would have decided the case the other way, they all agreed to make a reference.[11]

3. Agreeing the Question for Reference

Usually, a considerable amount of effort is put into the careful drafting of the question to be referred to the ECJ. However, one may wonder whether that effort is well spent, because there is no guarantee that the ECJ will answer the questions put to it, and certainly not that they will answer all of them. In the *Boots* case,[12] the ECJ were asked six questions, which might have yielded the answers to a whole raft of questions concerning vouchers, but frustratingly the court only answered one out of the six, saying that having decided that in Boots' favour, there was no need to answer the others. This left other taxpayers to journey back to Luxembourg to raise these other questions separately.

On the other hand, it is becoming recognised by the ECJ that it has a duty to guide Member States, and prevent the domestic courts being led astray. In the *Marks & Spencer* three year capping case,[13] which awaits the ECJ's judgment at the time of writing, Advocate General Geelhoed, in his Opinion delivered on 24th January 2002[14] suggests in paragraphs 26-44 that the court should depart from its normal practice of considering itself bound by the substantive framework of the questions

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10 [2001] UKHL 30, [2001] STC 989, House of Lords.

11 This was despite the fact that it seemed to be common ground during the oral hearing (and was certainly agreed between the parties) that the relevant principles had already been established in a series of ECJ judgments, and the difficulty was simply in applying those principles to the facts of the particular case.

12 *Boots Co plc v CCE* Case C-126/88, [1990] STC 387, ECJ in 1990 for example.

13 [1999] STC 205, [2000] STC 16, Court of Appeal.

14 *Marks & Spencer Plc v CCE*, Case C-62/00.

referred to it, and answer a rather wider question, because in his view the UK Court of Appeal had gone seriously wrong in its analysis of the rights of taxpayers when the Sixth Directive is transposed correctly into UK law. The Court of Appeal had refused to refer a question concerning the position where the Directive had been correctly transposed into UK law (only referring a question concerning the position where there had been incorrect transposition), but the Advocate General has recommended to the ECJ that they nevertheless answer both questions.

4. The Written Observations

Once the question has been referred, then all interested parties are invited to submit Written Observations. Obviously the taxpayer and the UK government (on behalf of HM Customs and Excise) will do so, as will the Commission, and frequently other Member States do so as well, in cases where they have an interest.[15]

Great care should be taken to make the Written Observations as clear and succinct as possible. They have to be translated into an increasing number of languages (currently twelve, but shortly to increase greatly) and have to be read and understood by a number of officials and judges of different nationalities. These Written Observations are even more important than Skeleton Arguments in the UK courts, because frankly the chances of influencing the court at the subsequent Oral hearing (see below) are very slim.[16]

5. The Report for the Hearing

Once the Written Observations have all been submitted, the 'judge-rapporteur' produces a 'report for the hearing', which summarises the facts, and the arguments of all the parties who have submitted Written Observations. This is always a very useful document, although it should not be regarded as a substitute for reading the Written Observations themselves!

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15 The Greeks seem particularly keen! Also, the UK itself is particularly alert in intervening in other Member States cases.

16 In some cases approaching nil, as in *CCE v CFC Financial Services*, Case C-235/00, [2002] STC 57, where Advocate General Ruiz-Jarabo Colomer had written his Opinion *before* the Oral hearing.

6. The Oral Hearing

The parties are then asked whether or not they wish to attend an Oral hearing. UK VAT cases have always in practice had an Oral hearing. This means staying at least one night in the delightful city of Luxembourg, because the court hearing times and the flight times are such that it is not possible to fly over from the UK on the day of the hearing.[17]

Sometimes, however, the journey may not seem worth making. Each party is very strictly permitted as to how many minutes they can speak for in opening their case: the maximum is 30 minutes, but it seems generally agreed that it is politically unwise to go on for more than 20 minutes, and shorter if possible[18] and if, as often happens, neither the Advocate General nor any of the judges have any questions to ask, the whole thing is over in under an hour, and one comes away wondering whether the judges were interested. On other occasions, however, there can be very lively debate, and one gets an indication of how the judges are thinking.[19]

7. The Advocate General's Opinion

What usually happens at the end of the Oral hearing is that the President of the Chamber of Judges hearing the case turns to the Advocate General and asks him or her when the Opinion will be published, and the Advocate General gives a date, usually about two months after the oral hearing. In *CCE v CFC Financial Services (formerly Continuum)*[20] the President duly turned to the Advocate General, and the Advocate General started speaking in Spanish. The Oral hearing had until that point been conducted entirely in English, so no-one was using headphones, and everyone was simply packing up their papers ready to leave, when it was realised that the Advocate General must be saying rather more than simply what date he was going to deliver his Opinion on. All grabbed their headphones, and heard that he was

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17 Further, although it is sometimes possible to get a plane back at midday after a morning hearing, more often than not the first available plane is around 5.00 p.m. or 6.00 p.m. in the late afternoon, so one is forced to have a leisurely lunch!

18 Immediately before the Oral hearing starts, Counsel are invited into an ante-chamber to meet the judges and, in particular, say how many minutes they are planning to speak for: anyone having the temerity to say more than 20 is met with groans and face-pulling and cries of 'Can't you be shorter'!

19 There was such a lively debate in *Marks & Spencer* Case C-62/00.

20 Case C-235/00 [2002] STC 57.

saying that he had already written his Opinion, and that it would be available outside the door of the court in 12 languages in 15 minutes! Neither one of the Counsel involved in the case had ever heard of this procedure before; it certainly saves time, but rather undermines one's faith in the oral procedure!

The Advocate General's Opinion is however just that; it is no more than a guide for the judges (usually five) who are preparing the judgment, and in a material percentage of cases, the ECJ's judgment does not follow the Advocate General's Opinion.[21]

When the Advocate General's Opinion is followed by the ECJ, then in subsequent cases in the UK courts, the Advocate General's Opinion is usually helpful in putting flesh on the bones of the ECJ's judgment (which traditionally is very succinct).

Difficulties arise, however, where the Advocate General's Opinion is followed in its result, but not necessarily in all its reasoning. The ECJ seems to be reluctant ever to say that the Advocate General is actually wrong; more often than not, the judgment simply ignores what he says! One is then left with a wide-ranging Advocate General's Opinion, upon large parts of which the ECJ has made no comment, and this naturally causes problems for the UK courts, particularly at tribunal level, since the Advocate General is usually regarded as being of equivalent rank to a High Court judge. Opinions of this nature currently causing problems of interpretation, in the world of insurance and finance alone, include the Opinions in *Card Protection Plan*,[22] *Skandia*[23] and *CFC Financial Services*.[24] The VAT Tribunal decisions in *C&V (Adviceline)*,[25] *Winterthur Life*,[26] and *Institute of Directors*,[27] and the recent High Court judgment in *BAA*,[28] all illustrate the difficulties which can

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21 I have not done the research, but I get the distinct impression that, whereas in the early days, the judgment tended to rubber stamp the Opinion, since the mid 90's, the Advocate General's chances of having his Opinion followed by the ECJ are no better than about 2-1.

22 Case C-349/96, [1999] STC 270.

23 *Försäkringsaktiebolaget Skandia*, Case C-240/99, [2001] STC 754.

24 Case C-235/00, [2002] STC 57.

25 *C&V (Adviceline) Services Limited v CCE*, Trib Ref 17310.

26 *Winterthur Life UK Limited v CCE*, Decision released 8th January 2002.

27 *Institute of Directors v CCE*, Trib Ref 17503.

28 *CCE v BAA Plc*, Etherton J, 14th February 2002.

arise. In the latter case, Etherton J has held that paragraphs 39 and 40 of the ECJ's judgment on the meaning of 'negotiation', are inconsistent with the very narrow interpretation of the Advocate General, even though the judgment does not refer to the Opinion in this connection at all. He has therefore held that, although the Advocate General's Opinion clearly supported the arguments being put forward by the Commissioners, nevertheless he could put it to one side; and since he considered that there was nothing in the judgment of the ECJ that was inconsistent with a previous judgment of the Court of Appeal[29] in a case on very similar facts to those before him, he remained bound by that Court of Appeal judgment.

8. The ECJ Judgment

Ultimately, the ECJ produces its judgment. It used to be the case that the judgment would come out about two months after the Advocate General's Opinion, and the dates for both Opinion and judgment would be announced at the end of the oral hearing. However, the pressure on the ECJ is such that they no longer give dates for production of the judgment, and there have been many cases recently where the judgment has not been produced for some nine months after the Opinion.[30]

Hopefully, after that wait, the judgment will at least answer the questions necessary for the case concerned to be finally disposed of; this is usually the case, although the judgment frequently says that certain points are 'a matter for the national court', and so sometimes there has to be a further hearing for the national court to decide those matters in the light of the ECJ judgment.[31]

The problem frequently arises, however, that in giving judgment in the case before it, the ECJ (or even more often the Advocate General) say things which potentially impact on other cases. A current example of that is paragraph 26 of the ECJ's judgment in *Mirror Group*,[32] in which the ECJ makes a statement which appears to undermine a whole line of UK cases, and will doubtless spawn further litigation, and

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29 In *CCE v Civil Service Motoring Association* [1998] STC 111.

30 See for example *Card Protection Plan* (Opinion 11th June 1998, judgment 25th February 1999 – the original VAT Tribunal decision was released on 14th December 1990!) and *Mirror Group*, Case C-409/98 (Opinion 23rd January 2001, judgment 9th October 2001).

31 As for example in *Card Protection Plan*, which was not finally decided until 31st January 2001 (thus over 10 years after the Tribunal's decision): see *Card Protection Plan v CCE* [2001] UKHL/4, [2001] STC 174.

32 *CCE v Mirror Group*, Case C-409/98, [2001] STC 1453 at page 1468.

probably further references. Something of the same nature happened in *Sparekassernes Datacenter*,[33] in which at paragraphs 73 and 75 of the judgment, the ECJ made some fairly tangential remarks which led the High Court to refer further questions in the *CFC Financial Services (formerly Continuum)* case.[34]

9. The Present Position

It will be seen that the original trickle which became a stream has now become more of a flood, and that the strains are showing on the European Court system, not least in the delays now being experienced. The European Court has itself been trying to slow the flow, and any judge who does not want to refer a case will nowadays quote the following passage from the Opinion of Advocate General Francis Jacobs:[35]

> *'Another development which is unquestionably significant is the emergence in recent years of a body of case law developed by this Court to which national courts and tribunals can resort in resolving new questions of community law. Experience has shown that, in particular in many technical fields, such as Customs and Value Added Tax, national courts and tribunals are able to extrapolate from the principles developed in this court's case law. Experience has shown that case law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without need for a reference.'*

For example, in the recent *Littlewoods* case,[36] Chadwick LJ, giving the judgment of the Court of Appeal, said:

> *'A measure of self-restraint is required on the part of the national court, if the ECJ is not to become overwhelmed.'*

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33 *Sparekassernes Datacenter v Skatteministeriet*, Case C-2/95, [1997] STC 932.

34 *CCE v CFC Financial Services*, Case C-235/00, [2002] STC 57.

35 Paragraph 51 of his Opinion in *Weiner SI GbmH v Hauptzollamt Emmerich*, Case C-338/95, (1998) CMLR 1110.

36 *The Littlewoods Organisation Plc v CCE*, and related appeals, (2001) EWCA Civ 1542 [2001] STC 1568, at paragraph 117.

Most recently, both the above passages have been quoted by Etherton J in deciding not to refer the *BAA* case[37] to the ECJ.

It may therefore be that trips to Luxembourg in VAT cases are going to become more of a luxury – but the direct tax cases are now beginning to line up nicely, so that Luxembourg restaurants need not worry too much about the future!

37 *CCE v BAA plc* (judgment handed down 14th February 2002).