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BERND von HOFFMAN v FINANZAMT TRIER[1]

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Some people might express the view that VAT continues in its own world and is not affected by the political, social and economic events of the day. The more cynical members of society might take the contrary view, whereas the paranoid might allege that political, social and economic events are all driven by VAT!

The above case is the third European Court of Justice case referred by the German Courts in recent years on whether or not the German VAT authorities are entitled to collect VAT on certain types of services. In my view this constitutes a trend, one which many economic and political commentators foresaw when they predicted that the unification of Germany would cause the financial and budgetary problems for the German Government which resulted in their continuing struggle to meet the convergence criteria for Economic and Monetary Union. Other evidence of the tightening of the German belt has been the slowing down of the otherwise prompt and efficient service the German tax authorities have offered on the repayment of 8th and 13th Directive Claims. These are now being met with lengthy questionnaires. When a government has a budget deficit it seeks to raise taxes or at least be more rigorous in collecting the taxes that it believes are due to it.

In the first of 3 cases, *Dudda,*[2] the German tax authorities sought to tax Dudda, who carried out sound engineering at artistic and entertainment events, on the basis that as a German he was based in Germany and that his services fell within Article 9(1) of the

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1 (Case C-145 96) [1997] STC 1321 judgment dated 16th September1997.

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3 *Dudda v Finanzamt Bergisch Gladbach* (Case C-327/94) [1996] STC 1290.

Sixth VAT Directive[3], whereas he argued that his services were similar activities to entertainment and therefore fell within Article 9(2)(c) of the Sixth VAT Directive. In *Faaborg-Gelting Linient A/S v Finanzamt Flensburg*[4] (a case on the VAT liability of the supply of meals on a ferry between Germany and Denmark), bringing the supplies within Article 9(1) was not to the benefit of the German authorities (because Faaborg was established in Denmark) so they argued that the meals were supplies of goods and when they were supplied within German territorial waters were subject to German VAT. In *Dudda* the court held the services were supplied where performed and in *Faaborg-Gelting Linien* the court held that the supply was a supply of services and therefore supplied in Denmark. Two cases fought and two cases lost by the German authorities. At least the law of averages said that they were going to win Hoffman which they did.

In short the Hoffman case is a good example of the distinction that appears to exist in the place of supply rule for VAT services between those who decide and those who advise. The former being an Article 9(1) service supplied at the place where the supplier belongs and the latter being most often an Article 9(2)(e) service and a supply where the customer belongs.

The Hoffman Case

Bern von Hoffman is a Professor of Civil Law at the University of Trier in Germany and such is his reputation that he acts as an arbitrator for the International Chamber of Commerce. As such he acts as an arbitrator where parties in dispute have chosen arbitration over litigation. Arbitrators are commonly judges, retired judges or academics, and invariably lawyers, and their role is acknowledged as being judicial or quasi-judicial. Professor von Hoffman considered the nature of his services were scientific or at least similar to scientific services or failing that were legal services. Scientific services are deemed to be supplied where performed and lawyer's services are deemed to be supplied where the customer belongs.

The key part of the Sixth Directive is Article 9(2)(e) third indent which refers to "services of consultants, engineers, consultancy bureau, lawyers, accountants and other similar services....."

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4 EC Council Directive 77/388 on the harmonisation of turnover taxes.

5 (Case C-231/94) [1996] STC 774.

In short the question was were the services supplied by Professor von Hoffman services of lawyers or failing that other similar services? As the European Court correctly identified the phrase "other similar services" does not refer to a common feature of all the types of services but to services similar to each of the activities listed.[5]

In a key passage in paragraph 17 of the judgment the court said the following:

> "In particular, the Community definition of a lawyer does not, in view of the range of services principally and habitually provided in the Member States as part of that profession, cover the services of an arbitrator. While arbitrators are in fact often chosen amongst lawyers by reason of their legal knowledge, the services provided by a lawyer are none the less principally and habitually those of representing or defending the interests of a person, whereas the services of an arbitrator are principally and habitually those of settling a dispute between two or more parties, even though this is done on an equitable basis."

I am afraid that I have to disagree with the Court's view of a lawyer. For a start they did not identify where the Community definition of a lawyer came from. My belief is that it is founded very much on a very narrow view of a lawyer as one who is a notaire or an advocate, not one who would be described in France as a conseil de juridiques. Today's lawyer provides many different services. A lot of lawyers only advise but some lawyers do act as arbiters informally although not under the auspices of the International Chamber of Commerce or even under their local arbitration provisions. Other professions do this too, I have in my own experience used surveyors in similar capacities. They did not see this as something surveyors did not do, they were happy to do it. The parties to the dispute (a boundary dispute) were both happy to have the lawyers make submissions to the surveyor whose decision, they agreed, would be binding upon them both. Glossy brochures produced by all sorts of professionals may well mention that they are there to facilitate the resolution of disputes by either representing parties or making impartial decisions on their behalf. Indeed one of the key elements of professional life is the ability to remain impartial regardless of where the fee comes from. I therefore disagree when the European Court says in paragraph 17 that "none of the services principally and habitually provided as part of any of those professions concerns settling a dispute between two or more parties". Certainly that does not relate to the modern professional world. However, that is not to say that I think that the decision is necessarily incorrectly decided. I think it is correctly decided for the wrong reasons but perhaps a better reason could have been found.

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6 See *Linthost, Powels and Sheres v Inspecteur Der Belasstingdienst/Ondermeimingen Roermond* [1997] ECR 1-0000.

Wrong basis, right decision?

One of the many different interpretations in the application of the Sixth Directive arises on the supply of cross-border consultancy or management services. Some jurisdictions try to be quite prescriptive, for example, a supply of a director of a company who is employed by a company in another member state would be treated as a supply within Article 9(1) and not a supply of staff within Article 9(2)(e). The key, however, which appears to be applied in member states which have addressed their minds to this issue, and probably in practice to those member states which have not, is that if the function of the individual is to advise then the relevant provision is Article 9(2)(e) and the place of supply is where the recipient of the advice is. However, if it is their job to manage i.e. make decisions on the future or operation of the business then their services are within Article 9(1). Similarly an arbitrator decides but does not advise. This would then form a logical distinction for the treatment suggested by the European Court of Justice. Regrettably this distinction is not made clear in the Sixth Directive, particularly in the context of the third indent of Article 9(2)(e). This refers to services of lawyers i.e. services by reference to what is carried on by a particular profession rather than a qualitative nature of that service.

Consequences

The Hoffman decision has provided to be very unpopular with arbitrators who do not like having to account for VAT in their own jurisdiction when it is much easier for them to have their customers apply the reverse charge provisions. One foreseeable consequence of this which, having spoken to some arbitrators is happening, is they are now being asked to conduct their arbitrations in Middle Eastern States. Whilst these countries can offer excellent facilities, the thought of being separated for long periods of time by such a long distance from friends and family solely for the chance of saving some VAT is not something which appeals to Europe's leading arbitrators.