Indirect Tax Forum 2018

Case law update
Introductions

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Agenda

1. Boehringer
2. Stadion Amsterdam BV
3. Cussens
4. Fortyseven Park Street Ltd
5. Phoenix Foods Ltd
6. Look Ahead
Boehringer (C-462/16)

Reduction of taxable amount
Key cases pre Boehringer

**Elida Gibbs (C-317/94)** – Discounts given to end customers should be used to reduce the taxable amount:

A manufacturer of a product had no contractual relationship with the final consumer but was at the head of a single chain of transactions ending with the final consumer. It funded ‘price discounts’ to consumers redeeming discount coupons with retailers, and the CJEU held that the taxable amount must be reduced because the consideration received by the Taxpayer in that chain of transactions was reduced by the ‘price discounts’ granted by it to the final consumer.

The Taxpayer was a travel agent which allowed and funded discounts to travellers when it arranged holidays which were supplied to the travellers by third party tour operators. The Taxpayer sought to deduct the amount of the discounts from the taxable amount of its commission for VAT purposes. The CJEU distinguished the claim from *Elida Gibbs* on the basis that the Taxpayer was not at the head of a single chain of transactions ending with the customer. The discount was granted as an intermediary, of its own initiative and at its own expense.

**Ibero Tours GmbH (C-300/12)** – The *Elida Gibbs* principle only applies where there is a single chain of transactions:

Given that the proportion of the card price which is paid as winnings to players is fixed in advance and is mandatory, it cannot be regarded as part of the consideration received by the organiser of the game for the supply of the service provided to players because the consideration actually received consists of the card price after deduction of the portion of that price, fixed by legislation, which must be paid as winnings to players. The organiser actually has at its disposal and can take for itself only that portion of the sale price.

**International Bingo Technology (C-377/11)** – CJEU upholds right of VAT deduction if the claimant has acted in good faith:
Boehringer (C-462/16) - legislative context

**Article 73 of the PVD** provides:

In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

**Article 90 of the PVD** provides:

‘1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.’
The Taxpayer is a German manufacturer of pharmaceutical products which it supplies, charging VAT, to wholesalers which supply them onward to pharmacies. Where products are purchased from pharmacies by people with public insurance a discount is provided by the pharmacies to the insurers. It is deemed as a supply from the public insurance company to the end customer. The pharmaceutical companies, including the Taxpayer, are required by German law to reimburse the discount to the pharmacies. The German tax authority treats the discount paid to pharmacies by the Taxpayer as a reduction in consideration.

By contrast, where products are purchased by individuals with private medical insurance, the discount is instead given by the pharmaceutical companies (not the pharmacies). Unlike public health insurance funds, private health insurance funds are not treated as purchasing the products from the pharmacies. Although exempt from the supply chain, German law requires all pharmaceutical companies, including the supplier, to provide discounts on the price of the medicinal products.

Unlike the position for discounts paid to public health insurance funds, the German tax authority does not regard this discount as a reduction in consideration for the purposes of article 90 PVD. In 2011, the Taxpayer paid the required discounts to private health insurers but adjusted the consideration for VAT purposes when calculating the value of its supplies of pharmaceutical products.

The tax authority issued an assessment, and the Taxpayer’s initial appeal was unsuccessful. However the Taxpayer appealed to the Finance Court, and it amended the assessment to include the discounts paid to private health funds in the Taxpayer’s annual VAT declarations. The German tax authority appealed to the Federal Finance Court which decided to refer to the CJEU.
Public Health Insurance

Discount reimbursed

Pharmaceutical co.

Supply

Reduced in consideration allowed for VAT

German Tax Authority

Supply

Pharmacies

Discount

Treated as purchasing products from pharmacies

Public Health Insurance Funds

Treated as supplied to the public

Public

Private Health Insurance

Discount required to be granted even though not in chain of supply

Reduction in consideration not allowed for VAT

Pharmaceutical co/Appellant

Supply

Insurance Co.

Insured

Not treated as supplied to the public from insurance co – simply reimburse the insured

Pharmacies

Treated as purchasing products from pharmacies

Insurance co not treated as purchasing products from pharmacies

**Boehringer**

**Decision**

1. The CJEU reviewed the provisions in Articles 73 and 90 of the PVD which stipulate that the taxable amount for VAT purposes is determined, fundamentally, by reference to what the supplier actually receives for the products, even after the supply has taken place. As such, tax authorities may not collect an amount of VAT exceeding the tax which the Taxpayer has received.

2. Furthermore, per *Elida Gibbs*, the principal of neutrality requires within each country, similar goods should bear the same tax burden whatever the length of the production and distribution chain.

3. In the first instance, the CJEU noted that it would be contrary to the principle of fiscal neutrality for the VAT chargeable to exceed the sum finally received by the Taxpayer. Thus the discount paid to private health insurance companies reduces the taxable amount.

4. Although the private insurance company is not the direct beneficiary of the supplies, this does not break the direct link between the supply made and the consideration received. The private health insurance company must be regarded as the final customer. In addition, in accordance with *International Bingo Technology*, the discount is fixed by law in advance and is mandatory: therefore it cannot be regarded as forming consideration for Article 90.

5. "In the light of the principles outlined by the CJEU in *Elida Gibbs*, regarding the determination of the taxable amount for value added tax and having regard to the principle of equal treatment under EU law, Article 90(1) of Council Directive 2006/112/EC ... must be interpreted as meaning that the discount granted, under national law, by a pharmaceutical company to a private health insurance company results, for the purposes of that article, in a reduction of the taxable amount in favour of that pharmaceutical company, where it supplies medicinal products via wholesalers to pharmacies which make supplies to persons covered by private health insurance that reimburses the purchase price of the medicinal products to persons it insures."
This is a significant judgment, as it sheds light on the scope of adjustments available where amounts are retrospectively paid away after VAT has been brought to account. In principle, the CJEU is saying that:

- *Elida Gibbs* is not restricted to discounts paid through the original chain of supply to persons with whom the supplier paying the discount has a contractual relationship;
- On the basis of *International Bingo Technology*, the Taxpayer never had the amount of the discount freely at its disposal and so that amount should not be regarded as part of the consideration it received;
- The private insurer should be regarded as the final consumer of the pharmaceutical supplies; and
- The fundamental principle of VAT and Articles 73 and 90 in particular (which should be treated in the same way) is that VAT is due only on the consideration actually received.
Stadion Amsterdam BV (C-463/16)

Single/composite supply
**Stadion Amsterdam BV**

**Background**

- The Taxpayer is a company operating a building complex, consisting of a stadium and associated facilities (including a museum for AFC Ajax).

- The Taxpayer offers tours of the Arena in return for an admission charge. The tour includes a guided tour of the stadium and an unguided visit to the museum. During the period of the dispute, it was not possible to visit the museum without participating in the guided tour of the stadium.

- The Taxpayer considered that the tour should be treated as the supply of a cultural service which is subject to a reduced rate of VAT in Dutch VAT legislation. The tax authority concluded that the supply should have been subject to the standard rate.

- The Supreme Court referred a question to the CJEU: Whether the Sixth Directive was to be interpreted as meaning that a single supply, comprised of two distinct elements, one principal and one ancillary, which if they had been supplied separately would be subject to different rates of VAT, should be taxed according to those rates of VAT, where the two components of the full price could be identified.
The CJEU’s consideration of issues

1. Where a transaction comprises a bundle of elements, regard must be had to all circumstances to determine whether it is a single supply or a number of distinct supplies.

2. A transaction which comprises of a single supply from an economic point of view must not be artificially split.

3. There will be a single supply where two or more elements are so closely linked that they form, objectively, a single, indivisible, economic supply.

4. There will also be a single supply where one or more elements are the principal supply and other ancillary supplies which share the same tax treatment.
The CJEU considered there to be a single supply constituting two elements.

To subject those elements to various rates of VAT would mean artificially splitting supply and risk distorting the VAT system.

This holds true that even where it is possible to identify the price of each element - this does not justify an exception.

However the CJEU also held that an exception from those principles could be derived from the judgments *Talacre Beach Caravan Sales* and *Commission v France*, although both were of a different nature to this case and so not applicable.
In the UK, taxpayers' arguments for separate taxation of elements of a single supply, based on the case law considered in this case, have been rejected in cases such as *Wm Morrison Supermarkets plc v HMRC [2013] UKUT 247 (TCC)*, and *A N Checker Heating & Service Engineers [2013] UKFTT 506 (TC)*.

There are extremely limited circumstances allowing separate taxation of an element of a single supply.
Cussens and Others (Case C-251/16)

Abuse of rights
**Background**

Cussens and others (the Taxpayers) jointly owned a plot of land in Ireland. They constructed 15 holiday homes on the land which they intended to sell. To reduce the amount of VAT due on the sale of properties the Taxpayers carried out preliminary transactions with an associated company, Shamrock Estates Ltd:

1. The taxpayers granted a long term lease on the properties for 20 years and 1 month;
2. The properties were then leased back to the Taxpayers for a term of two years.

Within a month, both leases were extinguished by mutual surrender and full ownership of the properties reverted to the taxpayers.

The properties were then sold by the Taxpayers to third parties, who acquired full ownership. No VAT was due on the sales as under Irish VAT law, first supplies of immovable property are subject to VAT and subsequent supplies are exempt. The taxpayer therefore only declared £40k of VAT on a long term lease as first supply (instead of £125k VAT due on sale).

The Irish Tax Authority took the view that the first disposal (the long-term lease) was artificial and constituted an abuse of rights. The High Court (Ireland) agreed with the Tax Authority, as the leases lacked commercial reality, and that consequently the sale to third parties should be treated as the first disposal and subject to VAT. Assessed for the £85k difference.

At appeal to the Irish Supreme Court, the case was referred to the CJEU.
Questions referred

1. Is the principle against abusive practices capable of being applied directly in order to refuse the exempt sales of immovable property, in the absence of a national measure giving effect to it in domestic law?

2. Is the application of the principle against abusive practices consistent with the principles of legal certainty and the protection of legitimate expectations, considering that the transactions at issue were carried out before the judgment in Halifax was delivered?

3. If the principle of abuse of rights applies so transactions are redefined, what is the legal mechanism for assessing the VAT due and how are the national courts to impose such liability?

4. In determining whether the essential aim was to obtain a tax advantage, should pre-sales transactions be considered in isolation or must the courts consider transactions as a whole?

5. Have the taxpayers achieved a tax advantage contrary to the directive?
The CJEU first established that the principle against abusive practices, as applied in the *Halifax* judgment, is not a rule established by a Directive. The principle against abusive practices is based on case-law which provides that EU law cannot be relied upon for abusive/fraudulent activities, and that the application of EU law cannot be extended to cover abusive practices. The principle does not need to be transposed into domestic law to be effective.

If the transactions are to be redefined pursuant to the abuse of law principles, the transactions which are not abusive may be subject to VAT on the basis of national legislation.

The application of the principle that abusive practices are prohibited is consistent with the principles of legal certainty and of the protection of legitimate expectations, even in the case of transactions carried out before the *Halifax* judgment, as the interpretation which was given in the *Halifax* judgment was to clarify and define the meaning and scope of the law as it should have been understand from the date of entry into force. Additionally, *Halifax* did not restrict the temporal effects of its interpretation that abusive practices with regard to VAT are prohibited.

In order to determine whether the essential aim of previous transactions was to obtain a tax advantage, account should be taken of objective of pre-sale leases in isolation.

*Halifax* – abusive practice only if transactions result in an accrual of a tax advantage contrary to purpose of EU and domestic law. Article 13 B(g) exempts supply of land and buildings which have already been the subject of ‘first occupation’ i.e. they leave the production process and enter the consumption process and property has been ‘used’. The properties had not been ‘used’ before the sale to the third party purchasers by the owner or tenant. Therefore, taxpayers accrued a tax advantage contrary to the purposes of the directive.
Cussens

Observations

• CJEU has repeated important points of principle concerning prohibition of abusive practices for VAT purposes:
  ➢ Unlike a Directive, the principal of prohibition of abuse can be relied on by the Member State against a taxpayer without implementation into domestic law
  ➢ The Court repeated the *Halifax* test
  ➢ Once the abusive transactions have been identified and disregarded, the remaining transactions are to be taxed in accordance with national legislation

• Query the similarity between this case and *University of Huddersfield*
Fortyseven Park Street Ltd [2018] UKUT 0041 (TCC)

Fractional Interests
Fortyseven Park Street Ltd [2018] UKUT 0041 (TCC) - legislative context

Item 1, group 1, Sch 9 VAT Act 1994 provides:

VAT Exemptions:
1. ‘The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right, other than—
   (d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering;
   (e) the grant of any interest in, right over or licence to occupy holiday accommodation;’
**Fortyseven Park Street Ltd**

**Background**

The Appellant owned a 60 year lease of property which was formally a hotel and created 49 self contained apartments.

The fractional interests in residences were sold under terms of a membership agreement.

- The members who sign up to its membership agreement are granted, in return for an up front purchase, the right to occupy a reserved residence of a particular type for a maximum number of nights per annum until 2050.

- The Appellant was seeking to argue that its sole supply to a member in return for the purchase price was the grant of a licence to occupy land which was within the scope of the exemption for supplies of land, and so no VAT was payable on the purchase price.

HMRC considered that the supply was excluded from the exemption, either as the provision of “accommodation” (Item 1(d) Grp 1 Sch 9) in a “hotel, inn, boarding house or similar establishment” or as the provision of “holiday accommodation” (Item 1(e) Grp 1 Sch 9), so that the purchase price was liable to VAT.

HMRC also considered that the Appellant was not supplying members any interest in land capable of falling within the land exemption, but was providing a taxable service of the right to participate in a plan comprising a number of benefits including the provision of an opportunity for the member to occupy a residence.

The FTT found that although the supplies fell within the exemption, the provision of the residences to members under their fractional ownership interests fell within the exclusion in item 1(d) because the fractional interest was provision of accommodation in a similar establishment to a hotel. The case was appealed to the UT.
On the land exemption issue, the UT considered that what was being supplied was a licence to occupy a residence. The UT relied heavily for this analysis on the Court of Appeal's judgment in *Esporta Ltd* [2014] EWCA Civ 155. The licence to occupy was granted by the Appellant irrespective of whether the individual member actually occupied at any given time and it provided the right to exclude other from enjoying such a right. The supply was within the scope of "letting of immovable property" for VAT purposes.

As regards the hotel sector issue, UT considered that the nature of the supply should be considered by reference to the supply of a long-term right to occupy a reserved residence, which was more than something in the nature of short-term accommodation in the hotel sector. The member's right endured and could be sold, carrying with it financial obligations and risks that do not apply to supplies of accommodation in the hotel sector. UT held that the Appellant's supplies were not excluded from the exemption.
Fortyseven Park Street Ltd

Implications

This case demonstrates how difficult it can be to determine the correct VAT treatment of property transactions.

The FTT had taken into account the short term nature of individual stays by members, and also the additional services received which were outsourced to different providers.

But the UT focussed its attention on what the Appellant was supplying to its members, an enduring right of occupation conditional only on being able to reserve a residence. The nature of the wider package obtained by the member on an individual stay, even though similar to a package that might be obtained in a hotel, was not determinative.
Phoenix Foods Limited [2018] UKFTT 018 (TC)

Zero Rating on Food
Phoenix Foods Limited [2018] UKFTT 018 (TC) - legislative context

Section 30(2) and item 1, group 1, Sch 8 VAT Act 1994 provides:

**Section 30(2)**
A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

**Item 1, group 1, Schedule 8**
The supply of anything comprised in the general items set out below:

General Items
1. ‘Food of a kind used for human consumption.’
Phoenix Foods Limited

Background

The Appellant supplied dried powdered and granular products to food retailers, including Bicarbonate of Soda (BoS). The Appellant packaged the BoS for sale to supermarkets. For example, it was packaged in 200g tubs for Tesco and packaged as the supermarket's own-brand product.

The Tesco packaging referred to BoS as “a versatile raising agent for soda bread, cookies and gingerbread” but the packaging for another supermarket also referred to the fact that BoS “can also be used around the house as a cleaner, deodoriser and mild abrasive”.

The Appellant treated all of its supplies to Tesco and the other supermarket as zero rated for VAT purposes on the basis that they were “food of a kind used for human consumption” within item 1 Grp 1 Sch 8 VAT Act 1994.

But in April 2014, HMRC wrote to the Appellant to advise that HMRC considered that BoS should be standard rated, regardless of its usage. The Appellant appealed.
BoS is an essential ingredient in some bread and cakes and is critical to the texture of such foods. Texture, as well as taste, is an important attribute of food. The addition of BoS to foods is not purely cosmetic, or the same as adding a preservative, colouring or a vitamin. It is essential to those foods being in the form in which consumers expect them to be, so that they are palatable.

The Appellant's supplies of BoS were intended to be used primarily as a baking ingredient. The packaging was consistent with this and it was sold to retailers for sale in their home baking sections. Typical customers would have little doubt that they were purchasing an ingredient for home baking, as were the supermarkets purchasing the BoS from the appellant.

The FTT acknowledged that BoS can be purchased as a bulk chemical and might have several uses, but the intended use of the product was one of the circumstances surrounding the supply and had to be taken into account in determining its nature. Here, it was clearly being supplied as a baking ingredient.

Although BoS is not usually consumed in the form in which it is sold, or recognisable in the final product, that could also be said, for example, of flour, and so does not prevent it from being classified as “food of a kind used for human consumption”.

Phoenix Foods Limited

FTT Decision
Phoenix Foods Limited

Implications

The FTT's decision in this case highlights that the purpose for which a product is intended to be used can have a bearing on its VAT liability.

That may be particularly the case where the legislation, as here, includes a purposive element, i.e. "for human consumption". Suppliers of such products might wish to consider whether this analysis might also apply to other similar products.
Look ahead

*United Biscuits* – Court of Appeal

*DPAS* – AGO

*University of Cambridge* – reference to the CJEU
Any questions?
Thank you