

# VAT, DUTIES & INDIRECT TAX LAW

## JOINED CASES C-497/09 ETC: HERR BOG'S SAUSAGE VAN, COMPOSITE SUPPLIES AND THE PRINCIPLE OF FISCAL NEUTRALITY

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**On 10 March 2011, the Court of Justice of the European Union (“ECJ”) gave judgment in four joined cases from the Bundesfinanzhof (Federal Finance Court) in Germany (Joined Cases C-497, 499, 501 and 502/09). The cases referred concerned the appropriate VAT treatment of foods supplied for immediate consumption, including as to whether the element of services or goods predominated when prepared food was served to customers other than in restaurant-like conditions.**

The taxpayer in the first of the joined cases, Herr Bog, sold food and drinks from mobile snack bars described as being:

*“...equipped with a sales counter with a glass splashguard, below and around which ran a ‘board’ made from a material sold under the name ‘resopal’ which could be used for the consumption of food on the spot. To the sides of the vehicle, above the drawbar, there was a folding ‘tongue’, which was in the form of a table at the same height and from the same material as the ‘board’ running round the vehicle. The area where customers could consume the food was protected from the rain by a folding roof”. (§13)*

The ECJ dealt fairly shortly with the question of whether traders such as Herr Bog’s were providing a number of separate supplies or a single composite supply, concluding that there was nothing in the orders for reference or the observations submitted to show that the referring court had not applied correctly the test set out in *Case C-41/04 Levob Verzekering BV v Staatssecretaris van Financiën* [2005] ECR I-9433 and other cases: see §§51-57.

In Herr Bog's case, the main question for the ECJ was whether the transaction was one in which the supply of services or supply of goods elements predominated. In this regard, the ECJ applied the "typical consumer" test, stressing that regard must be had to the "qualitative and not merely quantitative importance of the elements of supply of services in relation to the elements of supply of goods" (§62). Herr Bog's supplies were not qualitatively similar to those provided by restaurants:

*"Moreover, with respect to the elements of supply of services that are characteristic of restaurant transactions...it is clear that, in the activities at issue..., there are no waiters, no real advice to customers, no service properly speaking consisting in particular in transmitting orders to the kitchen and then presenting and serving dishes to customers at tables, no enclosed spaces at an appropriate temperature dedicated to the consumption of the food served, no cloakrooms or lavatories, and essentially no crockery, furniture or place settings.*

*The elements of supply of services mentioned by the referring court consist solely in the presence of rudimentary facilities such as counters to eat at, with no possibility of sitting down, enabling a limited number of customers to eat on the spot, in the open air. Such rudimentary facilities require only negligible human intervention. In those circumstances, those elements are only minimal ancillary services, and cannot alter the predominant character of the principal supply, namely that of a supply of goods." (§§69-70)*

## COMMENT

On one view, it is surprising that the parties to these cases did not rely in the ECJ on the principle of fiscal neutrality. It is easy to imagine two transactions either side of the snack bar/restaurant distinction that would appear to involve the provision of similar and competing goods and services but would (at that time) have received different VAT treatment.

In many instances, of course, it is likely that the objective differences between the differently treated supplies will be sufficiently great to prevent these being "similar supplies...which are this in competition with each other"; a qualitative assessment from the typical consumer's perspective ought, in principle, to result in closely substitutable supplies being treated in the same way.

It is also possible that the ECJ would view a composite supply in which the services elements predominate as being, by definition, dissimilar to a composite supply in which the supply of goods elements are the more substantial. The ECJ arguably adopted this approach in *Case C-276/09 Everything Everywhere (formerly T-Mobile) v HMRC* [2011] S.T.C. 316 in respect of the question whether an element of a composite supply may be treated differently from an otherwise similar but distinct supply without infringing the principle of fiscal neutrality, holding that the supplier of the composite supply was in that case in a different position “*from that of an economic operator which provides the [distinct supply] as the principal supply*” (§31).

The *Everything Everywhere* case is unlikely, however, to be the last word on this point: there are currently two UK cases under reference to the ECJ in which it is asked, amongst other things, whether it is contrary to the principle of fiscal neutrality to treat a putative supply differently from an actually or potentially competing supply on the basis that the former is part of a single composite supply with a different VAT different from that of the latter (the *Purple Parking Ltd* and *Field Fisher Waterhouse LLP* cases).

A re-visiting of this question may also open up new opportunities for taxpayers to press the tax authorities to take into account effects on competition when determining the nature of a composite supply. Where the difference between a composite supply of services with one tax treatment and a composite supply of goods with another turns on a question such as whether a sausage van is rudimentary or de luxe, the potential for distortions of competition is real.