

## **Beynon and Partners v C & E Comrs [2004] UKHL 53**

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**First published in De Voil Indirect Tax Intelligence**  
**December 2004**

Single or multiple supplies – Where a doctor authorised to dispense drugs personally administers those drugs there is no separate supply of goods but a single supply of exempt medical services – Supplies should not be artificially split and tax treatment should correspond with the social and economic reality of the situation – Citation of cases decided before *Card Protection Plan v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270, ECJ should not be necessary and should be discouraged

This case concerned the proper VAT treatment of drugs administered by NHS doctors in rural areas who are also authorised to separately dispense drugs to patients, pursuant to Regulation 20 of the National Health Service (Pharmaceutical Services) Regulations 1992 (SI 1992/662).

The specific dispute in this case only concerned those NHS doctors who were registered for VAT and who, as part of their services to rural communities, were also authorised to dispense drugs. Those doctors, when dispensing drugs to patients for self-administration were effectively acting as pharmacists. There was no dispute between the parties that whenever such a doctor, duly authorised pursuant to Regulation 20, dispensed drugs without administering them, the supply fell to be regarded as a zero-rated supply of goods, pursuant to VATA 1994 Sch 8 Group 12 Item 1A(a).

In essence, Dr Beynon argued that, when administering drugs such as vaccines, two separate supplies arose: an exempt supply of medical services and a zero-rated supply of goods (eg the vaccine itself). The Commissioners contended that only a single supply of exempt medical services arose. The Commissioners had been successful before the Tribunal and on appeal to the High Court. That judgment had been overturned by the Court of Appeal.

Lord Hoffman, with whom their Lordships agreed, allowed the Commissioners appeal.

After referring to the relevant NHS legislation, which it is not necessary to consider in detail here, Lord Hoffman first considered whether, if there were any separate supply of goods, that supply would, in fact, be zero-rated pursuant to Item 1A(a). Insofar as

relevant, that Item provides that a supply of drugs would be zero-rated when supplied "in accordance with a requirement or authorisation under Regulation 20".

On this issue, his Lordship concluded that, even assuming a separate supply of goods could be identified, he found it impossible to see how the personal administration of a drug to a patient could fall within Item 1A(a), as the doctor had no need for any authorisation under Regulation 20 to give a patient an injection. The relevant NHS legislation drew a clear distinction between the administration of a drug to the patient by the doctor himself and the dispensing to the patient of drugs which the doctor has ordered for him. Even assuming the existence of a separate supply of goods, which his Lordship later rejected, that supply would therefore be standard-rated. Parliament had never contemplated that personal administration by a doctor involved any supply of goods at all.

Lord Hoffman then went on to consider the proper application of European law, and *Card Protection Plan v Customs and Excise Commissioners* (Case C-349/96) in particular, to the facts of this case. Before turning to the specific facts of the case, his Lordship specifically remarked that "no advantage" could be gained by referring to cases which were decided before CPP and that their citation in the future should be discouraged. In reliance on CPP, his Lordship also restated the principle that a supply which from an economic point of view comprises a single service should not be artificially split into separate supplies. What mattered were the essential features of the transaction.

In relation to the question of whether the proper classification of a transaction as a supply of services or of goods and services, his Lordship indicated that authority supported the view of the Court of Appeal that such a question was one of law. At the same time, citing *C & E Comrs v British Telecommunications plc* [1999] STC 758, HL, his Lordship concluded that, as the question was one of fact and degree, taking into account all the circumstances, any appellate court should "show some circumspection before interfering with the decision of the tribunal merely because it would have put the case on the other side of the line" (see para 27).

Turning to the specific facts of the case, Lord Hoffman disagreed with the Court of Appeal, which had placed some reliance on the fact that doctors would make out a prescription for all personally administered drugs. Such prescriptions were needed by the doctor in order to obtain reimbursement from the NHS, though they did not affect the patient, who was not required to make any separate payment for drugs administered by the doctor. While the writing of the prescription showed, at least from the point of view of the NHS, that a separate payment for the drugs arose, that fact was not determinative and the Court of Appeal had exaggerated the significance of the prescriptions.

The Court of Appeal had analysed the transaction as involving several different stages, whereby a doctor would first dispense the drug and then administer it. His Lordship indicated that the approach adopted by the Court of Appeal in this respect involved the kind of artificial dissection of a transaction which the Court of Justice had warned against in CPP. The social and economic reality was to regard the transaction as the patient's visit to the doctor for treatment and not to split it into smaller units. That transaction amounted to a single supply of services.

In his closing remarks, Lord Hoffman acknowledged that in some cases the nature of the drug being administered might assume greater importance than in other cases. Nevertheless, his Lordship stressed the need for uniform application and for a rule which applies to all transactions of a certain kind. It would be administratively impossible to deal with each specific transaction on a case by case basis. It was essential to have a rule which applied across the board.

While the specific ruling on the facts of this case are unlikely to be of great consequence,<sup>1</sup> the matters of principle addressed by the House of Lords are extremely wide ranging and likely to extend well beyond NHS doctors.

By far the most important point arising out of this case is likely to be found at paragraph 19 of Lord Hoffman's opinion, where he clearly indicated that citation of pre-CPP case law would be of "no advantage" and "should be discouraged". The dictum will, no doubt, soon become familiar territory

and be cited whenever either a taxpayer or the Commissioners attempt to rely on earlier decisions. At the same time, the dictum leaves open the question as to whether parties could go further and seek to overturn those earlier decisions.

Also of wider relevance is the emphasis placed by Lord Hoffman on avoiding any artificial splitting of transactions and the importance of the "social and economic reality" whenever deciding whether a single or multiple supply exists. In rejecting the approach adopted by the Court of Appeal and in stressing the need for rules which can apply "across the board" and which are not "administratively impossible" to deal with, the House of Lords has gone some way in clarifying how future disputes should be evaluated by the Tribunal and the Courts.

1 In effect the specific facts only affected some 180 medical practices out of about 4,000 NHS registered practices in England (see para 10).

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