

# VAT Tribunals: The European Dimension

Between Luxembourg and Bedford Square

**W**hen I started to think about this article, I expected to be able to comment on how long it had taken for any party to an appeal to the Tribunal to rely on EC law. I would not have been right. It is certainly true that early VAT decisions of the Tribunal, and of the Courts on appeal, approached the interpretation and application of the legislation as a purely domestic law exercise. It was in that spirit that the Tribunal held in *Theatres Consolidated Ltd v C&E Commissioners* in 1975<sup>1</sup> that the term 'consideration' in Finance Act 1972, s 5 had no special meaning and was to be given its ordinary meaning in English law. But it was not long before the Tribunal began to engage with the Directives and the emerging Luxembourg case law.

History records one isolated invocation of the Second Directive by counsel for the Commissioners as early as 1973 in *Processed Vegetable Growers Association v C&E Commissioners*.<sup>2</sup> The issue was whether fees charged by the National Farmers' Union (NFU) for

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be astonishing if the Crown could levy tax in circumstances not authorised by Parliament on the basis of a Directive of the Council of the European Communities at a time when the United Kingdom was, under its treaty obligations, in default in relation to the imposition of that tax, by not giving relevant effect to that Directive'.

The Commissioners' somewhat optimistic invocation of the Directive in *Processed Vegetable Growers* appears to have been a flash in the pan. The English-law-based approach to consideration laid down in *Theatres Consolidated* was applied by another Tribunal in *Pippa-Dee Parties v C&E Commissioners* in 1979.<sup>3</sup> The 1970s closed without any further mention of EC law in the reported decisions of the Tribunal.

27 categories of supply that the Directive required to be taxed. With only 38 articles, it first saw the light of day as a much simpler piece of legislation than successive subsequent amendments made it, certainly bearing no comparison with the code of 414 articles into which it has recently been recast.

By 1980 the ECJ had only decided four cases on the interpretation of VAT Directives and none of them was of great import. It was not until February 1981 that the Court gave a judgment – in the *Dutch Potato Storage* case<sup>6</sup> – that dealt with one of the key concepts in EC VAT law, that of consideration.

## The Tribunal listens

The *Dutch Potatoes* judgment was ignored when *Pippa-Dee* was heard in the High Court in June 1981.<sup>7</sup> This was very probably because the judgment had not been published in English as a result of the chronic delays in translation at the Court which to this day affect some Advocates-General's Opinions. I have not been able to track down the date of publication of the judgment in English but it was not reported in the Common Market Law Reports until October 1981.<sup>8</sup>

The Tribunal quickly noticed. In *UFD Ltd v C&E Commissioners*,<sup>9</sup> decided in November 1981, a Tribunal chaired by Lord Grantchester noted the ECJ's decision that the provisions of the Directive had an 'autonomous' Community law meaning and said 'it seems to us that, on this appeal and henceforth in all appeals involving issues of liability, the tribunal should consider the relevant provisions of the Council VAT Directives to ensure that the provisions of the United Kingdom

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supplying staff to an associated organisation were subject to VAT. The appeal succeeded on the ground that the NFU was not acting in the course of a business, despite the Commissioners' arguing that, since the Second Directive did not contain any requirement for supplies to be made in the course of a business, those words should be disregarded in applying the 1972 Act. A Tribunal chaired by Lord Grantchester rejected the submission, reasoning that the concept of 'business' in the Act corresponded to 'economic activities' in the Directive and in any event 'it would

## Luxembourg begins to speak

It is easy to forget, now that the ECJ is deciding VAT cases at a rate faster than one a fortnight,<sup>4</sup> how little EC VAT law there was in those early days. The First Directive had six articles and the Second Directive a modest 21 articles and two annexes. The more detailed Sixth Directive was enacted in May 1977 with an implementation deadline of 1 January 1978 but with a transitional period<sup>5</sup> during which Member States could continue to tax 15 categories of supply that the Directive required to be exempted and could continue to exempt

legislation are consistent therewith'. The Tribunal construed the domestic exemption for 'the disposal of the remains of the dead' compatibly with the exemption in the Directive for 'services supplied by undertakers' so as not to cover the exhumation and reinterment of remains in the course of clearing a former cemetery for redevelopment.

### The impact of direct effect

Until the Court gave judgment in *Becker*<sup>10</sup> in January 1982, it was not established that any provision of the Directive had direct effect. The test for direct effect – that the Community law provision be 'clear and precise' and 'unconditional' had been established but it was debatable whether and to what extent the Sixth Directive satisfied it; even leaving aside the transitional provisions, it was peppered with provisions to the effect that 'Member States may treat ...', 'Member States may consider ...' or 'Member States may derogate ...'<sup>11</sup>. In *Becker* the French government submitted that 'the Directive as a whole is incapable of producing any effects whatever in the Member States before the adoption of the relevant national legislative measures'. The German government argued more narrowly that Article 13 did not have direct effect, relying mainly on its introductory reference to exemption under 'conditions that [Member States] shall lay down'.

The terms of the Court's rejection of those arguments – that the various discretions left to Member States could not prevent provisions having direct effect where they were clear and precise and that Germany could not rely on the latitude allowed to it by the opening words of Article 13B when it had not adopted any conditions – signalled that the Directive was a more effective weapon in the taxpayer's armoury than might have been thought.

### Taxpayers arm themselves

*Open University v C&E Commissioners*<sup>12</sup> concerned the VAT treatment of fees charged by the BBC to the Open University for broadcasting Open University lectures. The University, which was undoubtedly an exempt supplier of education, sought to avoid VAT on the broadcasting fees by arguing that the broadcasting done by the BBC was an exempt supply. The argument on the domestic law depended on the unsuccessful assertion that the BBC was supplying education but the University's counsel (Mr Stephen



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Oliver) relied in the alternative on Article 13A(1)(i) of the Sixth Directive, which exempts not only university education but also 'the supply of services ... closely related thereto', arguing that the Act should be construed in conformity with it as in *UFD Ltd*, or that the Directive should prevail by virtue of *Becker*.

Before the Tribunal the Commissioners produced one of their officials who had participated in the drafting of Article 13A to give evidence about the intended scope of the exemption. Coming a full ten years before the House of Lords decided *Pepper v Hart*,<sup>13</sup> this was to say the least an

### The first reference

The first reference made from the United Kingdom to the ECJ in a VAT case was made by a Tribunal chaired by Mr Neil Elles in *Direct Cosmetics*,<sup>15</sup> predating by some three years the next UK VAT reference to be decided by the ECJ: *Apple and Pear Development Council*,<sup>16</sup> referred by the House of Lords in April 1986.

### The quiet revolution

Provisions of the Directives were considered by the Tribunal in some dozen reported cases in the 1980s and two more references to the ECJ were made by the Tribunal.<sup>17</sup> On the first occasion that a provision of the Directive decisively altered the result of an appeal to the Tribunal,<sup>18</sup> it happened without fanfare. *Parkinson v C&E Commissioners*<sup>19</sup> concerned the sale of fishing rights, which amounted in law to a supply of land. The domestic exemption excluded sales of fishing rights. Lord Grantchester held that 'under the 1983 Act, tax was chargeable' and continued 'but I must now pass to consider the provisions of the Sixth Directive'. He held that Article 13B(h) of the Directive had direct effect and required the transaction to be exempted. Similarly, submissions based on the direct effect of Article 4(5) and Article 13A(1)(g) prevailed over the 1983 Act in *Westminster City Council v C&E Commissioners*<sup>20</sup> in 1989.

### Growing familiarity

In the 1990s consideration of the Directive alongside the domestic law became

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unorthodox proposal but the Commissioners justified it on the basis that it was permissible to look at the *travaux préparatoires* of an international instrument and their witness could give an oral account of them.

The University's objection to this course was upheld by the Tribunal on the ground that the witness's account did not satisfy the criteria for resort to *travaux préparatoires*<sup>14</sup> but the University's reliance on Article 13A(1)(i) was unsuccessful nevertheless, the Tribunal holding that the EC exemption only covered related supplies made by a supplier of education.

commonplace. Some 15 references were made by the Tribunal itself in that decade – more, I think, than were made by the higher courts in VAT appeals. An example of the confidence with which the Tribunal was handling EC law was *J and M Gregg v C&E Commissioners*,<sup>21</sup> where a husband and wife who operated a nursing home as partners wished to be taxable and relied in part on the reasoning in the ECJ decision in *Bulthuis-Griffioen*<sup>22</sup> to the effect that only a legal person could be an 'establishment' or 'organisation' within the meaning of the exemptions in Article 13A which the relevant domestic provisions implemented. The Tribunal (HH Stephen Oliver) was

