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## **“VAT Planning and EC Law: Evasion, Avoidance and Abuse of Rights”**

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## 1. INTRODUCTION

## 2. HISTORY

## 3. TAX AVOIDANCE IN ENGLISH LAW

### *'Anti-avoidance' construction of taxing statutes*

- 3.1 The story starts with the House of Lords' decision in *Ramsay v IRC* [1981] STC 174, with its shift of emphasis from the classic approach in *IRC v Duke of Westminster* [1936] AC 1. In the Duke's case, a tax planning arrangement succeeded, the House rejecting the heresy that 'the Court may ignore the legal position and regard what is called "the substance of the matter" '. In *Ramsay*, by contrast, the House refused to regard a loss, incurred as part of a tax planning exercise and counterbalanced by a corresponding gain in another part of the transaction, as constituting a loss for the purposes of the capital gains tax legislation.
- 3.2 In *Ramsay*, Lord Wilberforce said that capital gains tax was a tax on gains less losses and not a tax on arithmetical differences. He went on to say that, as a matter of construction, a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage ... is not such a loss (or gain) as the legislation is dealing with ....
- 3.3 This approach to the construction of tax legislation, under which an artificial gain or loss could be treated as 'not such a loss (or gain) as the legislation is dealing with', appeared to open the door to the disregarding of artificial steps in tax avoidance transactions. Dicta in subsequent House of Lords decisions in tax avoidance cases seemed to confirm the existence of a new power to disregard artificial steps. Shortly after *Ramsay*, in *IRC v Burmah Oil* [1982] STC 30, Lord Diplock referred to the effect of *Ramsay* upon a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax ....[T]he approach to tax avoidance schemes of this character sanctioned by *Ramsay* entitles you Lordships to ignore the intermediate circular book entries and to look at the end result ....
- 3.4 Another two years later, Lord Brightman's frequently quoted dictum in *Furniss v Dawson* [1984] STC 153 appeared to derive from the *Ramsay* principle a code of practice for disregarding artificial steps in transactions:  
 First, there must be a preordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end....  
 Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax - not, 'no business effect'.  
 If these two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.
- 3.5 Unlike *Ramsay*, where assets had simply moved in a circle - justifying the conclusion that the taxpayer had not in truth made any loss - *Furniss v Dawson* had involved what has been called a 'linear' transaction, in which a sale of shares between the taxpayer and an unconnected third party had been routed through an intermediary controlled by the taxpayer in order to obtain more favourable capital gains tax treatment. The House of Lords' approach squarely involved disregarding the intermediate steps and recharacterising the transaction, for capital gains tax purposes, as a straightforward sale by the taxpayer to the third party.

3.6 The pendulum swung back to some extent in *Craven v White* [1988] STC 476, where the House of Lords held that the steps in the various 'linear' transactions at issue had not been sufficiently 'preordained' to fall within *Furniss v Dawson*. The interesting feature of the speeches in *Craven v White*, in the light of subsequent developments, is their focus upon whether the criterion of a 'pre-ordained series of transactions' was fulfilled: the issue of law had moved from being a question of construction of the taxing statute to a question of construction of the 'rule of construction' adopted in cases like *Furniss*.

*'Anti-avoidance' construction in VAT*

3.7 Prior to the recent series of Tribunal decisions considered later in this paper, the *Ramsay* approach had not become established in relation to VAT. Indeed, there was a school of thought to the effect it could not be applied to VAT, either because VAT was governed by the Sixth Directive, which left no scope for it, or because, unlike direct taxes which tax profits or gains, VAT was a tax on transactions; and one could not legitimately recharacterise a transaction between a tax avoider and an 'innocent' third party. That view derived some support from the dissenting speech of Lord Hoffmann in *Comms of Customs and Excise v Thorn* [1998] STC 725.

3.8 The tax avoidance arrangements in *Thorn* took advantage of the VAT group rules. In outline, Company I within the Thorn VAT group agreed to sell goods to Company II, also within the VAT group, for a price of which 90% was payable immediately and the balance upon delivery; the 90% was paid over and immediately loaned back. The first company then (i) left the VAT group, (ii) acquired the goods from an outside supplier and (iii) delivered them to the second company, which paid the remaining 10%. Thorn argued that there had been a supply as to 90% of the goods within the VAT group, which fell to be disregarded under the rules relating to VAT groups, and a later supply as to 10%, which alone was subject to VAT.

3.9 The case reached the House of Lords, which by a majority, decided in the Commissioners' favour as a matter of straightforward construction of the VAT Act; they declined to express a view on whether the *Ramsay* principle applied. Lord Hoffmann, dissenting, held both that the straightforward construction of the Act was in favour of Thorn and that the Commissioners could not rely upon *Ramsay*.

3.10 The Commissioners had relied upon *Ramsay* in two ways: (i) that the interposition of Company I into the chain of supply between the outside supplier and Company II had no commercial purpose other than the avoidance of tax and (ii) that the payment of 90%, accompanied by the loan back, had no commercial purpose and should be ignored. Lord Hoffmann rejected the first argument on the grounds that it involved taking a 'global view' of genuine transactions, contrary to the ECJ decision in *BLP* [1995] STC 424 and the second argument on the grounds that one could not simultaneously ignore the 90% payment and at the same time seek to tax it.

3.11 The 'global view' criticism is at first sight as much a criticism of *Furniss v Dawson* as of the Commissioners' argument in *Thorn*. *Furniss* had equally involved ignoring the artificial insertion of an intermediary into a disposal of assets by the tax-avoider to a third party and treating the disposal as though it had taken place directly from the tax-avoider to the third party.

3.12 It is arguable that this process is objectionable in a VAT context in a way that it is not in a direct tax context: for the purposes of capital gains tax, the issue of how much of a gain a taxpayer has made on a disposal is an issue purely between him and the Inland Revenue Commissioners. If the Inland Revenue approach that issue on the basis that the taxpayer has for tax purposes, disposed of the assets to someone other than the person he in fact transferred them to, that is again a matter purely between the taxpayer and the Revenue, with no 'knock-on' effects for the third party. Conversely, a VAT analysis which recharacterises a supply as having been received by one Thorn company rather than another has at least potential repercussions upon the VAT position of the third party, whose own

supply is recharacterised as having been to one recipient rather than another. However, if Lord Hoffmann was distinguishing *Furniss v Dawson* on that basis, he did not say so.

*Ramsay reanalysed: the decision in McNiven*

- 3.13 *Ramsay* returned to the House of Lords in the direct tax context in *McNiven v Westmoreland Investments* [2001] STC 237. In a speech with which, on this occasion, all of their Lordships agreed (some of them giving concurring speeches), Lord Hoffmann reasserted the character of *Ramsay* as an approach to construction of particular taxing provisions and abolished the 'artificial transactions' approach as a self-standing rule of construction of fiscal provisions.
- 3.14 Westmoreland was a subsidiary of a pension scheme; it had engaged in a disastrous series of property investments which left it with no assets and substantial debts to the parent scheme. Westmoreland was, however, potentially marketable as a company with tax losses; an acquirer could use the company to make other taxable profits and reduce its corporation tax bill by setting off Westmoreland's past losses against those profits. But in order for Westmoreland to get to the position of having tax losses, it had to have paid the interest it owed to its parent. The parent therefore made a new loan to it of the money with which to pay the interest - a loan which the parent had no hope of recovering as such, but which it was worthwhile for the parent to make in order to transform a worthless subsidiary into a marketable tax-loss company.
- 3.15 The Inland Revenue Commissioners argued that Westmoreland still did not in truth have tax losses; it had incurred the supposed losses by paying the parent with money lent by the parent and this had been done for tax avoidance purposes, i.e. to create an artificial tax loss which could be set off against other taxable profits. The House of Lords rejected that argument: the relevant taxing provision allowed payments of interest to be set off; it was common ground that Westmoreland had made a payment of interest to the parent, the fact that the money had been provided in a fresh loan from the parent was irrelevant, since a payment of a debt as part of a refinancing transaction in which a new loan is made is still a payment.
- 3.16 Lord Hoffmann analysed the previous case-law about disregarding steps lacking a commercial purpose as follows: it was all a question of construing the relevant tax provision. Some tax provision used a commercial concept, such as that of a loss; in that context, a loss meant what a businessman would regard as a loss. A businessman would not regard a loss arising on paper in one part of a transaction as a loss, if it was counterbalanced by a corresponding gain achieved in another part of the same transaction. Lord Wilberforce had been right in *Ramsay*.
- 3.17 Similarly, he reasoned, the House in *Furniss v Dawson* had regarded the concept of a disposal of shares as a commercial concept. They had held that, commercially, the taxpayers had disposed of their shares to the ultimate purchaser, rather than to the intermediary company which had (as part of a pre-orchestrated transaction) received a paper transfer of the shares from the taxpayers and made an onward paper transfer to the ultimate purchaser. This was not the same thing as adopting a general rule of disregarding artificial transactions for tax purposes; the paper transfers were still potentially relevant, for example, for stamp duty purposes.
- 3.18 The concept in issue in *Westmoreland* was that of 'payment'. Payment was not a commercial concept but a legal concept. In that situation, *Ramsay* could have no application; while one could understand a concept of loss, which did not include a loss immediately counterbalanced by a corresponding gain, there could be no such thing as a payment which discharged a debt but was nevertheless not a payment.
- 3.19 It remains to be seen whether this will be the last word on *Ramsay*. Lord Hoffmann's distinction between the use in taxing statutes of commercial concepts and of legal concepts is open to debate, as is his explanation of *Furniss v Dawson*: why is the question to whom

shares have been disposed a commercial rather than a legal question, answered by looking at the share register? Conversely, if the question at issue in *Furniss* is a commercial question, why is it not equally a commercial question whether the pension scheme had in truth received a payment where it had merely received back its own money, advanced - for no other purpose than making the 'payment' - to a subsidiary whose behaviour it controlled? Can *Westmoreland* be reconciled with *Furniss v Dawson*, or is one of them wrong? And, if so, which?

Ramsay in VAT after McNiven?

- 3.20 The qualification that *McNiven* introduces into the *Ramsay* line of case-law - that it only applies where the taxing statute uses a commercial concept - would not on the face of it appear to present any new obstacle to a *Ramsay* approach to the VAT Act. As will be seen below, the approach of the Tribunal has been to disregard 'supplies' inserted into a transaction for tax avoidance purposes on the grounds that they are not 'in the course of a business'. Whether something is done in the course of a business or not can readily be seen as a question requiring an answer in commercial terms.

Ramsay in VAT despite Thorn?

- 3.21 As will be seen below, the Tribunal in *Halifax* did not regard itself as taking the 'global view' condemned by Lord Hoffmann.....

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#### 4. ANTI-AVOIDANCE IN THE TRIBUNAL: THE DECISIONS

- 4.1 Despite Lord Hoffmann's structures, the anti-avoidance approach to VAT finally broke through with the Tribunal decision in *Halifax* [2001] V & DR 73 and [2002] V & DR 117, closely followed by *BUPA* (Decision 17588) and *Blackqueen* (Decision 17680). Two strands of thinking emerge from the decisions; one of them can fairly be described as inspired by, if not based upon, *Ramsay*; the other owes its inspiration to a concept of abuse of rights borrowed from EC law.

##### (i) Halifax

##### The facts

- 4.2 Halifax was a bank substantially making exempt supplies; its input tax recovery rate at the material time was 5%. Halifax needed to incur substantial standard-rated building costs in establishing call centres for telephone banking. In the ordinary course, it would only recover 5% of the VAT on those costs.
- 4.3 Halifax set up a scheme designed to enable the Halifax group of companies to recover all the VAT paid to the builders. In broad outline, the scheme involved three other companies in the Halifax group (none of which were in the same VAT group). Company I agreed to take leases of the sites from the Halifax, to carry out specified building works and later to assign its leases to Company III. Company I also agreed with Company II that Company II would carry out or procure the carrying out of the specified works. Company II entered into contracts for the works with outside builders.
- 4.4 The effect of the arrangements was that the outside builders charged VAT to Company II on the building works; Company II paid that VAT but reclaimed it as input tax. Company II charged VAT to Company I. Company I made a small taxable supply of building work in the same accounting year and accordingly reclaimed all the VAT charged to it by Company II as input tax. In the *next* accounting year, Company I assigned the leases to Company III, which leased the sites back to the Halifax.
- 4.5 The intention behind the arrangements was that all the VAT charged by the outside builders to Company II and 'passed on' by Company II to Company I would be recoverable by

Company I. If the Halifax had contracted directly with the outside builders, only 5% of the VAT would have been recoverable.

*The issues*

- 4.6 The Commissioners' attack on the tax-effectiveness of these arrangements was based on the argument that the additional transactions inserted into the arrangements were there solely for the purposes of tax avoidance, so that the transactions between Company II and Company I and between Company I and the Halifax did not count as supplies; Halifax should be seen as receiving a supply of building works from the outside builders. The Commissioners bolstered these arguments by reliance upon the EC law concept of 'abuse of rights'.

**The first decision**

- 4.7 In its first decision, released on 1 March 2001, the Tribunal (HH Stephen Oliver QC and Mr Davda) decided
- (1) That the transactions were carried out for reasons of tax avoidance, as that concept was defined by the ECJ, for the purposes of article 27 of the Sixth Directive, in *Direct Cosmetics No 2* [1988] STC 540. The Tribunal did not cite any definition by the ECJ of the concept, but relied on the Court's finding that the concept was objective, not involving any element of intention, and that the concept was to be interpreted in conformity with the principle that factors which may lead to distortions of competition are to be eliminated that the tax is to be as neutral as possible.
  - (2) The scheme caused distortions of competition, because it gave the Halifax a competitive advantage over competitors who did not enter into such a scheme; it therefore amounted to 'tax avoidance in the EC law sense.
  - (3) The scheme also amounted to 'tax avoidance' in the domestic tax law sense.
  - (4) In participating in the arrangements, Companies I and II were not making taxable supplies as a matter of domestic law, because the sole object of the purported supplies was tax avoidance and they were thus not made in the course of a business.
  - (5) Nor were Companies I and II engaging in an 'economic activity within the meaning of the Sixth Directive in making the purported supplies. Treating the supplies as non-economic was consistent with fiscal neutrality and fell within the ECJ's description (in another context) in *Fischer* [1998] STC 708 of supplies "wholly alien to the provisions of the Sixth Directive".
  - (6) As a matter of commercial reality, and applying the approach of Laws J in *Reed Personnel* [1995] STC 588 - that VAT supplies are not synonymous with contractual obligations - the outside builders made their supplies to the Halifax and not to Company II.

**(ii) BUPA**

- 4.8 Next in time came the decision of the Tribunal (HH Stephen Oliver QC and Mrs Salisbury) in *BUPA*.

**The facts in broad outline**

- 4.9 A BUPA subsidiary, BUPA Hospitals ('BHL'), ran private hospitals in which drugs and prostheses were supplied to patients. This was an exempt supply under the Sixth Directive but, in other well-known litigation, the Court of Appeal held that the supply also fell within a domestic zero-rating provision which the Directive allowed the United Kingdom to maintain; the result was that BHL could supply the items free of VAT but reclaim its input tax on their purchase (supplies further up the chain of supply being taxable). The government then proposed to amend the legislation so as to remove the supply to patients from zero-rating, with the result that input tax would not in future be recoverable
- 4.10 BUPA had recently acquired another group of companies ('Goldsborough') that had a separate VAT group and also ran a small number of hospitals. In anticipation of the change in the law, BHL entered into an agreement with a then dormant company in the Goldsborough VAT group, under which BHL paid the Goldsborough company £100 million plus VAT for the future supply of drugs and prostheses by the Goldsborough company to BHL;

BHL reclaimed the input VAT on the footing that the onward supplies to patients were (under the still unamended law) zero-rated.

- 4.11 At the same time, another company in the Goldsborough VAT group which ran four hospitals ('the Goldsborough hospital company') entered into a similar agreement with a dormant company in the same VAT group as BHL for the future supply of drugs and prostheses by the BUPA company to the Goldsborough hospital company, in return for a payment of £100 million plus VAT by the Goldsborough hospital company to the BUPA company.
- 4.12 The intended effect of the arrangements was that the BUPA VAT group incurred deductible input tax of £17.5 million on the payment by BHL to the Goldsborough company but, at the same time incurred output tax of £17.5 million on the payment by the Goldsborough hospital company to the BUPA company - so that the sums cancelled out in the BUPA VAT group's return. The Goldsborough VAT group incurred output tax of £17.5 million on the payment received by the Goldsborough company from BHL, but at the same time incurred output tax of £17.5 million on the payment by the Goldsborough hospital company I to the BUPA company - so that the sums cancelled out in the Goldsborough group's VAT return.
- 4.13 £100 million covered BHL's requirements for drugs and prostheses for about 8 years' and the smaller Goldsborough hospital group's requirement for (according to the Commissioners) between 50 and 100 years. The reason for having the back to back arrangements was that, if only a one-way supply arrangement between BHL and the dormant Goldsborough company had been entered into, BHL would have had to apply to the Commissioners for the repayment of the input tax on the payment to the Goldsborough company; having two-way supply arrangements between the two VAT groups avoided any risk of the Commissioners refusing an input tax recovery claim.

#### *The issues*

- 4.14 The Commissioners disputed that input tax was incurred by the two hospital companies, and assessed the two VAT groups for £17.5 million. The issues were: (1) had the hospital companies received supplies under the agreements and, if so, (2) were they attributable to taxable (i.e. zero-rated) supplies to be made *by* the hospital companies? The Tribunal decided both issues in favour of the Commissioners.

#### **The Tribunal's decision**

- 4.15 The Tribunal decided
- (1) The right to deduct input tax attributable to a zero-rated supply was a domestic law right, since the Sixth Directive merely tolerated and did not require there to be exempt supplies on which input tax was recoverable. Nevertheless the origin and scope of the right to deduct are prescribed by Community law.
  - (2) A trader's motive or purpose in making a purported supply is relevant in considering whether the supply is made in course of a business or as part of an economic activity (this was a departure from the purely objective approach in *Halifax*).
  - (3) The supplies by the formerly dormant companies to the hospital companies were not made with a commercial motive, but exclusively for the purposes of tax avoidance. They were not economic or business activities.
  - (4) The transactions between the hospital companies and the supplier companies did not therefore give rise to supplies for VAT purposes.
  - (5) Even if the hospital companies received supplies under the transactions, the drug and prostheses were not attributable to taxable (i.e. zero-rated) onward supplies *by* the hospital companies, since the goods acquired under the arrangements were intended to be used only in the period after supplies to patients had ceased to be zero-rated.
  - (6) If (contrary to the Tribunal's other conclusions) the hospital companies had a good claim to for input tax deduction under English law, that right was a right under section 26 of VAT Act and could not be defeated by the EC principle of abuse of rights, which only operates where *EC* rights are exercised abusively.

4.16 The Tribunal nevertheless considered the scope of the EC principle and held that, relevantly for present purposes, the ingredients of an abuse of rights in Community law were (1) a combination of circumstances in which, despite formal observance of the conditions laid down by Community rules, the purpose of those rules has not been achieved and (2) an intention to obtain an advantage from the Community rules by creating artificially the conditions for obtaining it.

**(iii) Blackqueen**

**The facts**

- 4.17 The case concerned a group of companies involved in the motor trade in the United Kingdom. It bought and resold motor cars, but a number of its purchases were of demonstrator and courtesy cars on which input tax recovery was blocked under the then Input Tax Blocking Order.
- 4.18 The scheme at issue involved the acquisition of two subsidiary companies in Ireland - Blackqueen and its subsidiary Strong Run. The demonstrator and courtesy cars were first sold on by the main English company to Blackqueen (with the result that the English company's input tax on the purchase was not blocked). The main English company charged Blackqueen VAT, which Blackqueen reclaimed under the Eighth Directive (it was that claim that the Commissioners rejected and gave rise to the appeal)
- 4.19 Blackqueen immediately leased the cars to another English company in the group, which leased them on to the main English company, and the cars were used in the company's business in the same way as before.
- 4.20 Blackqueen, however, sold the cars, subject to those leases, to its Irish subsidiary; these sales were treated as sales of a leasing business as a going concern, not subject to VAT.
- 4.21 At the end of the leases, the Irish subsidiary sold the cars to the main English company, which sold them on to consumers.
- 4.22 The intention of the arrangements was that the input tax on the original acquisition of the cars was not blocked and, at the same time, the main English company would only be liable for output tax on the profit margin on its final supply of the cars to consumers, because the main English company had acquired the cars secondhand in a transaction on which no VAT had been chargeable under the 1994 Act. The intended global effect was therefore not only that the full input tax recovery would be obtainable by the group, but that output tax would be paid by it only on the final margin and not on the full final sale price.

*The issues*

- 4.23 The dispute concerned Blackqueen's application to the Commissioners under the Eight Directive for recovery of the input tax charged to it when it bought the cars from the main English company. The issues (so far as relevant) were (1) were the sale of the cars by the main English company to Blackqueen and the leasing of the cars by Blackqueen to the other English company economic activities? and (2) was there an abuse of rights?

*(i) Whether economic activities*

- 4.24 This part of the dispute turned upon the *Halifax* decision. The Tribunal (Dr Brice and Mr Bentley) defined the principle in *Halifax* as: where the sole reason for transactions is the avoidance of liability for VAT, the transactions have no business purpose and do not constitute economic activities with the result that the supplies are not made by a taxable person acting as such and fall outside the scope of the Directive. It held
- (1) The *Halifax* principle applies equally to supplies of goods as to services.
  - (2) The arrangements did not achieve the purposes of the Directive. The intended result - full input tax recovery coupled with output tax liability only on the margin - was not intended by the Directive, and in particular by article 26a (dealing with onward

supplies of secondhand goods acquired from a non-taxable person). That provision was designed to cover second-hand goods acquired from a consumer who had suffered full irrecoverable input tax when he originally bought them new.

- (3) Objectively, the scheme amounted to tax avoidance, because it led to distortions of competition,, was not fiscally neutral and did not tax all the stages of the distribution process. The series of transactions was (in the language of *Fischer*, referred to above) “wholly alien to the provisions of the Sixth Directive.
- (4) Applying the principle in *Halifax*, the transactions had no business purpose and did to constitute economic activities. The only transactions that did constitute economic activities were the original acquisition of the cars from the manufacturers and their final sale to consumers.
- (5) Accordingly, Blackqueen was not entitled to recover input tax on its acquisition of the cars from the main English company and that company should not have charged output tax on that sale; it should, however, have accounted for output tax on the full consideration for the final sales to consumers.

(ii) *Abuse of rights*

- 4.25 This part of the appeal turned upon the decision in *BUPA*. The Tribunal found that the ingredients of an abuse of rights as described in *BUPA* (see paragraph 4.16 above) were present: the scheme did not achieve the purposes of the VAT Directives because it distorted competition, was not fiscally neutral and did not result in the application to the trade at issue of a general tax on consumption.
- 4.26 As to whether the principle of abuse of rights applied in the circumstances of the case, the Tribunal held that, unlike in *BUPA*, Blackqueen was invoking Community law and not merely domestic law. This was on the fairly narrow ground that one of Blackqueen’s arguments was that its claim for a refund of input tax must be allowed because it had been rejected outside the time limit prescribed by the Eighth Directive

**(iii) Halifax (continued)**

*The appeal to the High Court*

- 4.27 Halifax appealed against the Tribunal’s decision, contending among other things that the Tribunal had failed to find (and could not have found) that the sole purpose of Companies I and II was to avoid or mitigate VAT, was wrong to find that the scheme led to a distortion of competition and made other unsupported findings. Neuberger J ([2002] STC 402) agreed that the Tribunal had not made a finding as to the subjective intentions of Companies I and II, and remitted the case to the Tribunal to proceed as it thought fit.

*The second Tribunal decision*

- 4.28 In its further decision the Tribunal indicated that it had not based its original decision about tax avoidance upon the subjective intentions of Companies I and II, because it had regarded the issue of whether something was or was not a supply under the Directive as an objective question, but went on to give the reasons why it would have found that the only subjective purpose of all the transactions was tax avoidance. It also noted that a subjective approach had been adopted in its subsequent decision in *BUPA* and that the issue of whether there was an abuse of rights had revived as a result of the quashing of its original decision (decided without regard to that issue). It found that the companies had had the intention of obtaining a tax advantage through the implementation of an artificial scheme.
- 4.29 The Tribunal referred to the ECJ the questions whether on the facts (including the companies’ intentions as found by it) the transactions (a) amounted to supplies within the meaning of the Directive and (b) fell foul of the EC principle of abuse of rights.

**(v) BUPA (continued)**

- 4.30 BUPA appealed to the High Court from the Tribunal's decision. The High Court decided to make a reference to the ECJ, in the hope that it would be considered in tandem with *Halifax*. [Is this right?]

**5. THE ABUSE OF RIGHTS IN EC LAW**

- 5.1 In *BUPA* the Tribunal identified three manifestations of the principle of abuse of rights in ECJ case-law:
- (1) EC law must not be used abusively to circumvent national law (for example, transporting goods to and from another Member State in order to give a fictitious 'Community dimension' to a situation).
  - (2) EC law (specifically EC Regulations) must not be used abusively to obtain, for example, payments out of Community resources by artificially satisfying the formal conditions for payment in circumstances where a the Regulation did not intend a Community payment to be payable (for example, taking goods to a non-member country to obtain an export refund and immediately bringing them back).
  - (3) EC law must not be used to over-ride a national abuse of rights provision.
- 5.2 The Tribunal held that the case did not fall in the first or third category. The second category was closest to the facts of *BUPA*, but different because BUPA's putative rights did not flow from the Directive, which had been correctly transposed by the VAT Act, but only from the Act itself. This part of the reasoning has been undermined by the subsequent ECJ decision in *Marks and Spencer* [ref], where the Court held that a taxpayer has rights under the Directive not only where it is incorrectly transposed but also where it is incorrectly applied.

**6. THE EMERGING PRINCIPLES AND ISSUES**

- 6.1 Understandably in a developing area of law, the Tribunal decisions -rather like the *Ramsay* line of House of Lords case-law discussed above - disclose a variety of different approaches, not always reconcilable with each other. The issues to which they give rise can be listed as follows:
- (1) is a 'supply' forming part of a preordained series of transactions not 'in the course of a business' and thus not a VAT supply under domestic law where it has no purpose other than VAT avoidance - (*Halifax*)?
  - (2) is such a supply not by a taxable person 'acting as such' and thus not a VAT supply in EC law - (*Halifax*)?
  - (3) in these tests, is the purpose of a purported supply to be ascertained objectively or subjectively - (*Halifax, BUPA*)?
  - (4) is a 'supply' not a supply if its purpose is 'wholly alien to the provisions of the Sixth Directive - (*Blackqueen*)?
  - (5) is there an EC law principle of abuse of rights applicable to the Sixth Directive (*Halifax, BUPA, Blackqueen*)?
  - (6) if so, is it in category (2) or (3) identified in section 5 above? In other words, is it a principle that can/must be directly applied by national authorities and Tribunals, or does it merely permit the application of an independently existing national abuse of rights rule? and
  - (7) if the latter, is the *Ramsay*-inspired rule that