VAT focus

Huddersfield and the VAT anti-abuse principle

Speed read

The CJEU ruled on *University of Huddersfield* in 2006. On return to the UK, the taxpayer fought on against the application of the anti-abuse principle. Now, more than ten years later, the Court of Appeal has delivered its judgment on the latest appeal. The ingenuity of the university's arguments (drawing on the *Weald Leasing* ruling) failed to impress the Court of Appeal, which had little hesitation in affirming the Upper Tribunal judgment that the arrangements were abusive within the *Halifax* ruling.

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The date of 21 February 2006 was a milestone for VAT: it was the day the CJEU confirmed, in *Halifax* (Case C-255/02), the application of the 'principle of prohibiting abusive practices' to VAT. It is easy to forget that, on the same day, the CJEU also ruled on two other planning related UK referrals: *BUPA* (Case C-419/02); and *University of Huddersfield* (Case C-223/03). *Halifax* and *BUPA* both settled on their return to the UK; *Huddersfield* did not. Now, more than ten years later, the Court of Appeal has delivered its judgment on the latest appeal ([2016] EWCA Civ 440, reported in *Tax Journal*, 20 May 2016).

In that case, the University of Huddersfield refurbished a property, which it then occupied for mostly exempt purposes. On the face of that simple summary, one would expect the university to be able to deduct only a small portion of the VAT it incurred on the refurbishment. What actually happened was more involved. The university granted an opted lease to a (technically) unconnected trust (which it established). The trust granted an opted lease back to it. The university sought to deduct the VAT it incurred on the refurbishment by attributing it to the opted lease that it granted to the trust (while incurring non-deductible VAT on the rents it paid).

The CJEU ruled that the arrangements in *Huddersfield* were an economic activity and gave rise to supplies. The fact that they were carried out with the sole aim of obtaining a tax advantage (with no other economic objective) did not affect the position. Because the *Huddersfield* referral did not include any questions about the anti-abuse principle, the CJEU did not discuss it in any detail or how it might apply to the arrangements.

One might think that, because both cases involved arrangements to help mostly-exempt taxpayers deduct more input tax than they would otherwise be able to deduct, the *Halifax* ruling would simply transpose to *Huddersfield*. However, there was a complication.

That complication was *Weald Leasing* (Case C-103/09). In *Weald Leasing*, an insurance company, which was normally only able to deduct 1% of its input tax, acquired an asset under lease rather than by way of outright purchase. The asset was purchased by a group company, which leased it to a friendly (unconnected) third party. The third party in turn sub-leased the asset to the insurance company. The question was whether the arrangements were abusive; and, in short, the CJEU held they were not.

The university in *Huddersfield* relied heavily on the *Weald Leasing* ruling. It raised a variety of technical arguments, including the proposition that tax advantages that were intrinsic features of normal leasing arrangements were not abusive, even if they were obtained solely for a fiscal purpose. The Court of Appeal gave short shrift to such arguments. It had little hesitation in holding that the arrangements were abusive within the *Halifax* principle, i.e. that:

- they did result in the accrual of a tax advantage, the grant of which was contrary to the purpose of the relevant legal provisions; and
- the essential aim of the arrangements (assessed objectively) was to obtain a tax advantage.

Apart from the *Halifax* ruling itself, there is often little in the decisions of planning cases by way of general guidance on the application of the anti-abuse principle. The latest judgment in *Huddersfield* conforms to the mould. This may be because where the purpose of the legal provisions in question is clear, the approach tends to be high level.

Huddersfield concerns the right to deduct input tax. In *Halifax*, the CJEU said that: 'To allow taxable persons to deduct all input VAT even though, in the context of their normal commercial operations, no transactions conforming with the deduction rules of the Sixth Directive or of the national legislation transposing it would have enabled them to deduct such VAT, or would have allowed them to deduct only a part, would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of those rules.'

While *Weald Leasing* may appear to be an exception to that general statement, a key feature of that case was that: 'there was no attempt by [the insurance company] to recover any more input tax than that to which they are entitled'.

The leasing arrangements in *Weald Leasing* did not enable the insurance company to deduct more input tax than if they had not been put in place; they only served to spread the VAT cost over a number of years. The difference in *Huddersfield* was the finding (as far back as 2002) that, as a matter of fact, the sole purpose of the arrangements was to reduce the VAT cost, and the university's intention was to obtain an absolute tax saving (by collapsing the arrangements prior to the expiry of the leases). In the end, despite the amount of technical arguments deployed, *Huddersfield* was only ever about that general statement and that finding of fact.

By way of contrast, where the purpose of the legal provisions in question is more neutral, such as where the planning revolves around who a supply is made to, the approach tends to be less high level and more technical. This was the case with *WHA* [2013] UKSC 24 and *Newey* [2015] UKUT 300. Dicta from both impact on the wider VAT world (but on how contracts should be construed, rather than the application of the anti-abuse principle). One could argue that while those are planning cases, they are not really anti-abuse cases. And that distinction, if real, may inform future planning arrangements. ■

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