

VAT focus

Happy 50th Birthday, VAT!

Flotsam and jetsam in VAT.

**Etienne Wong**

Old Square Tax Chambers

Etienne Wong has been advising on VAT since 1989, with particular focus on finance, real estate, funds, crypto assets, renewables and new technology. He is a barrister with Old Square Tax Chambers at 15 Old Square. Email: ewong@15oldsquare.co.uk; tel: 020 7242 2744.

With an article like this, it is hard to resist playing with the number '50'. My first thought was to list the top 50 VAT cases, but everyone has a different top 50, so if it was going to be a personal list anyway, it might as well be '50 things I love and loathe about VAT', which, as the spirit of late 60s experimental cinema took hold, became '50 flotsam I see in the sea of consciousness while bobbing along in my yellow VAT submarine' (or should that just be 'my yellow VAT-marine?').

So, here we are:

1. **VATA 1983 Sch 6A paras 5 and 6 (1 August 1989 to 1 March 1995/1997)**: the (developers) self-supply that time forgot (and the unlikely gateway drug that hooked me to a lifelong love affair with the tax). Looking back on the provisions now, they are not nearly as plutonian as their spiritual successor – the current anti-avoidance regime (provided for under VATA 1994 Sch 10 paras 12–17) – but then, as they say in the funny books, as one gets older, 'the past, even the grimy parts of it, it just keeps on getting brighter all the time'.
2. **United Biscuits (LON/91/160)**: the Jaffa cakes case. Possibly the only VAT case known to the public at large.
3. **EU law**: the basis of VAT law, relevant even after Brexit, thanks to the concept of 'retained EU law' (defined in the European Union (Withdrawal) Act 2018 s 6(7)), which extends to ...
4. **CJEU judgments (and related advocate general opinions)**: as a judge said to me in the course of a recent hearing, 'these are often cast at a high level of abstraction', and often 'rather Delphic in tone'. Which, for many VAT practitioners, is one of the more appealing aspects of the tax, characterising it as more art than science. Also, where else would one find 'teleological' or 'emphyteutic' used in a sentence?
5. **Commission v UK (Case C-416/85)**: the infringement proceedings the European Commission brought against the UK that stripped 'the construction of industrial and commercial buildings and ... community and civil engineering works' of zero-rating, and which led to ...
6. **The option to tax**: the mechanism that converts exempt supplies of land into standard rated supplies, putting the tax on the radar of banks, insurance companies and the healthcare industry, (and, in turn, tax practitioners who until then had thought stamp duty was as far as they needed to stray into indirect tax territory).
7. **TOGCs**: the provisions that relieve from VAT the supply of assets in the course of the transfer of a business (or part of a business) as a going concern (or, as it is more commonly known, a TOGC). It is difficult to fathom now, but once upon a time, long discussions were had over whether the transfer of a single let building was the transfer of an asset or a TOGC.
8. **SDC (Case C-2/95)**: the first case to consider the payments exemption (now provided for under the Principal VAT Directive (or PVD) article 135(1)(d)) in any detail, that did for the finance sector what the option to tax had done for the property sector – pushing VAT into the limelight. Also the case that, with the wide construction many placed on the CJEU's judgment, (inadvertently) launched a thousand VAT-advantageous structures.
9. **Nordea (Case C-350/10)**: the first case to start pulling to the door that (many thought) SDC had thrown wide open, leading eventually to ...
10. **Bookit (Case C-607/14) & NEC (Case C-130/15)**: and the now narrower approach to the payments exemption.
11. **AXA (Case C-175/09)**: the case that defines 'debt collection' (a transaction type that falls outside the payments exemption), although twelve and a half years on, the precise scope of the CJEU's definition remains elusive.
12. **DPAS (Case C-5/17)**: the case that many had hoped would shed light on the limits of the definition but sadly did not.
13. **CSC Financial Services (Case C-235/00)**: the leading case on the 'negotiation' (intermediation) concept (as used for the purposes of PVD article 135(1)).
14. **Robert Gordon's College [1996] SC 6 (HL) 6**: the case that confirmed that the classic UK anti-avoidance principle (the so-called *Ramsay* principle) did not apply to VAT, thus ushering in the 'wild West' teenage years of the tax, when egregious VAT planning was ubiquitous, until ...
15. **Halifax (Case C-255/02)**: when the party ended and the EU anti-abuse principle became a fixture in VAT life.
16. **Economic reality**: or substance over form. Or calling a spade a spade.
17. **Newey (Case C-653/11)**: the oft-cited case that affirms the principle that contracts, while a factor to be taken into consideration, are not decisive for VAT analysis and may be disregarded if they did not reflect economic and commercial reality.
18. **CPP (Case C-349/99)**: one of two leading cases on how to determine, when multiple elements are supplied in a single bundle, whether there is only one composite supply (with a unified VAT treatment) or multiple supplies (with possibly divergent VAT liabilities). *CPP* is the case that holds there is a single supply where one or more elements constitute the principal supply, relegating the other elements to being merely ancillary supplies.
19. **Levob (Case C-435/06)**: the other leading case on single composite supplies – the one that holds there is a single supply where two or more elements are so closely linked they form a single, indivisible economic supply that would be artificial to split.
20. **Hedqvist (Case C-264/14)**: the first case (I believe) to address the tax treatment of cryptoassets, placing VAT ahead of other taxes in terms of adaptability to the modern world.
21. **Consideration**: a key concept because, VAT is charged on 'all forms of supply, but not anything done otherwise than for a consideration' (see VATA 1994 s 5(2)).
22. **Tolsma (Case C-16/93)**: a case that would have been in my top 50, not only because it defines 'consideration' for VAT purposes, but also because it involves an organ grinder. (It would have been in my top 3 if it had

- involved a monkey as well.)
- 23. *Naturally Yours* (Case C-230/87):** the case that holds, for VAT purposes, that the value of non-cash consideration is subjective, confirming that (save in limited, specified circumstances) there is no market value substitution for VAT.
- 24. *Empire Stores* (Case C-33/93):** the case that clarifies how subjective value is to be ascertained when ‘that value is not a sum of money [that has been] agreed between the parties.’
- 25. *Redrow* [1999] STC 161:** the first case to tackle the question that arises where A carries out services for B but then is paid not by B, but by C – is A supplying its services to B (a case of third party consideration) or C (a case of third party benefit)?
- 26. *Airtours* [2016] UKSC 21:** the latest high-profile case to tackle the same question. While seventeen years may have passed since *Redrow*, and the discussions may have become more sophisticated, the issues remain, unfortunately, just as opaque as they were in 1999.
- 27. *Business*:** another key concept, because VAT is charged only on supplies made ‘in the course or furtherance of business’ (see the VAT Act 1994, s 4(1)). But what does ‘business’ mean for VAT purposes? The short answer is ...
- 28. *Economic activity*:** as the term is used in PVD article 9(1). That the concept is different from the everyday understanding of the word ‘business’ was clear early on – see, for example ...
- 29. *Polysar* (Case C-60/90):** in which the CJEU held that the mere acquisition of shares by a holding company, which many may view as a ‘business’ activity, was not an economic activity for VAT purposes.
- 30. *Lord Fisher* [1981] STC 238:** the case that identified the six indicia HMRC incorporated into the so-called ‘business test’, used when determining whether an activity was ‘business’ for VAT purposes until ...
- 31. *Longridge on the Thames* [2016] EWCA Civ 930:** the case that cast doubt on whether *Lord Fisher*, and the other domestic authorities that followed it, were consonant with EU jurisprudence. An ironic decision, because, in less than two years, came ...
- 32. *Wakefield College* [2018] EWCA Civ 952:** the case that cast doubt on whether *Longridge on the Thames* was consonant with EU jurisprudence. HMRC has now updated its *VAT Business/Non-Business Manual* and replaced the *Lord Fisher*-derived ‘business test’ with the two-stage test laid down in *Wakefield College*.
- 33. *FCE Bank* (Case C-210/04):** the case that confirms an institution and its branches are the same person for VAT purposes (so there can be no supplies between them), except ...
- 34. *Skandia* (Case C-7/13) and *Danske Bank* (Case C-812/19):** where either the institution or the branch is a member of a VAT group. And if that was not confusing enough, the UK complicates the position even further – see *Revenue & Customs Briefs 18/2015* and *23/2015*.
- 35. *VAT recovery*:** simple in concept – if you charge VAT on a supply you make (the output supply), you can recover VAT incurred on the supply (the input supply) you purchased to make the output supply. However, as with all things VAT, simplicity is superficial, and even the gentlest scratch unearths a cornucopia of abstract concepts – ‘direct and immediate link’ (between the input supply and the output supply or supplies), and (the input supply having to be a) ‘cost component’ (of the output supply), among others. Leading cases on these concepts include ...
- 36. *Midland Bank* (Case C-98/98):** on ‘direct and immediate link’.
- 37. *SKF* (Case C-29/08):** on ‘cost component’.
- 38. *Securenta* (Case C-437/06):** the case that confirms that where a person carries on both economic and non-economic activities (i.e. activities that fall outside the scope of VAT), he is entitled to recover only the VAT incurred on such expenditure as is attributable to his economic activities. Or does it? Because some ‘outside the scope’ activities seem to have no adverse impact at all on a person’s entitlement to recover related VAT – see, for example ...
- 39. *Abbey National* (Case C-408/98):** where the ‘outside the scope’ activity was a TOGC;
- 40. *Kretztechnik* (Case C-465/03):** where the ‘outside the scope’ activity was a share issue;
- 41. *Larentia + Minerva* (Cases C-108/14 & C-109/14):** where the ‘outside the scope’ activity was the receipt of dividend; and
- 42. *Sveda* (Case C-126/14):** where the ‘outside the scope’ activity was a supply made for free. But then, there is ...
- 43. *University of Cambridge* (Case C-316/18):** which had a different outcome, with the CJEU throwing in even more Delphic concepts to muddy the waters.
- 44. *Kittel* (Case C-439/04 & C-440/04):** the case that confirms a person would be denied his right to recover VAT where he knew or should have known he was participating in a transaction connected with the fraudulent evasion of VAT.
- 45. *DASVOIT*:** not a German film but the Disclosure of tax Avoidance Schemes for VAT and Other Indirect Taxes. Or, as referred to sometimes in unkind circles, a damp squib.
- 46. *Fiscal neutrality*:** an EU principle inherent in the VAT system under which businesses carrying on the same transactions are not to be treated differently for VAT purposes.
- 47. *Claverhouse* (Case C-363/05):** the case that illustrates the power of the principle – even when a member state is exercising what appears to be an absolute, unfettered discretion conferred under PVD, it is prohibited from doing so in such a way as would breach the principle.
- 48. *Rank* (Cases C-259/10 & C-260/10):** a leading case on the principle, and authority for the proposition that two supplies that are identical or similar in that they meet the same needs of the consumer must be treated in the same way for VAT purposes.
- 49. *Landlinx* [2020] UKFTT 220 (TC):** a curious case. Authority, if any were needed, on how the tax is not immune from random madness. One to read if it has escaped your notice to date.
- 50. *Brexit*:** Brexit is done, and VAT (an EU tax) is still here. For those of us in the VAT world, leaving the EU feels not so much like a divorce but leaving home for college. This is where the UK iteration of the tax grows into its own.
- Happy 50th birthday, VAT! ■

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