THE LISBON INTERNATIONAL & EUROPEAN TAX LAW SEMINARS

VAT ABUSE

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January 5, 2015
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Slides

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Prohibition of abuse in European VAT law

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5 January 2015
The Lisbon International & European Tax Law Seminars, IDEFF, FDUL
‘The application of EU legislation may not be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by that law’ (European Court of Justice)

See in particular the landmark cases Centros, C-212/97; Emsland-Stärke, C-110/99; Halifax, C-255/02; Agip Petroli, C-456/04; Cadbury Schweppes and Cadbury Schweppes Overseas, C-196-04; Kofoed, C-321/05
The prohibition of abuse of rights: a general principle of EU law

- Applies to both primary and secondary law (directives)
- Even in the absence of an explicit recognition in the wording of the relevant legislation
- Applies potentially to all areas of law, e.g.
  - Taxation (direct and indirect)
  - Customs and agricultural duties
  - Free movement of persons (in relation to social policy): see Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, article 35; ECJ, 18 December 2014, C-212/13, McCarthy
- Other concepts of abuse exists: ex. EU Labour law (C-190/13, Samohano)
• Abuse of fundamental freedoms

_Cadbury Schweppes_, C-196/04: “It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.”

(many other cases, recently confirmed in Commission v. UK, C-112/14, para. 25)
ECJ case-law on freedoms direct tax abuse in a nutshell:

- To look for the most advantageous tax system is a legitimate objective
- 49 TFEU protects any establishment provided the operations have a true economic substance (no letterbox companies)
- No irrebuttable presumption of abusive practice
- “Artificial arrangements” “which do not reflect economic reality” can only be established on basis of OBJECTIVE elements (personnel, premises, equipment)
- Taxpayer cannot be forced to a negative or subjective evidence. He “must be given an opportunity, without ... undue administrative constraints, to provide evidence of any commercial justification”
- Proportionality
• Parent subsidiary directive (2011/96/UE), Art. 1 (2) and Interest royalty directive (2003/49/EC), Art. 5: “This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse”.

• Interest royalty directive (2003/49/EC), Art. 5 (2): “Member States may, in the case of transactions for which...the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive…”

• Merger Directive (2009/133/EC), Art. 15 (see ECJ, Kofoed, C-321/05; Foggia, C-126/10)
• New “general” anti-abuse measure in the Parent subsidiary directive (2011/96/UE) adopted on 9th December 2014

“Art 1, 2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements that, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage which defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.”

Compare with the wording of the original Proposal of 25 October 2013 (COM (2013) 814 final)
• *3 M Italia Spa* (C- 714/10, 29/03/2012, rec. 32):

„Finally, in any event, it is clear that no general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation and which would preclude the application of a provision such as that at issue in the main proceedings where the taxable transaction proceeds from such practices and European Union law is not involved.“
Secondary law: VAT

  “The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse”.

- **ECJ:** “preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112”
Abuse in VAT: elements

21 February 2006, Halifax, C-255/02

• “notwithstanding formal application of the conditions laid down in the relevant provisions of the VAT Directive and in the national legislation transposing it, the transactions concerned must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions” (objective element)

• “it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage” (subjective element)

Consequence:

• “transactions involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.”
ABUSE OF LAW IN VAT

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5 January 2015
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JUDICIAL PRACTICES POST-HALIFAX

• **Part Service (C-425/06):**
  • Referral from Italian courts
  • CJ asked whether abusive practice can take place where advantage is principal aim of the transaction, or whether only where tax advantage constitutes the sole aim pursued
  • Court ruled in favour of “principal aim”

• **Ampliscientifica (C-162/07):**
  • Referral from Italian courts
  • Connection with direct taxation (*Cadbury Schweppes*)
  • Court makes reference to “wholly artificial transactions”
JUDICIAL PRACTICES POST-HALIFAX

- Weald Leasing (C-103/09):
  - Referral from UK Courts
  - Leasing arrangement designed with the sole purpose of deferring the payment of irrecoverable VAT
  - Questions from UK court concentrate on three key points:
    - how should the first element of the abuse of law test, as set out in Halifax, be interpreted, namely in the context of an artificial leasing structure;
    - what is the meaning and significance of the expression “normal commercial operations” for the purposes of the abuse test; and
    - where an abusive practice has been found to have taken place, how should redefinition of transactions be approached, namely in the context of a leasing structure

Court’s decision:

- “Normal commercial operations” is irrelevant
- Two-part test is fundamental – relevance of the first element of the test reiterated

“The tax advantage accruing from an undertaking’s recourse to asset leasing transactions, such as those at issue in the main proceedings, instead of the outright purchase of those assets, does not constitute a tax advantage the grant of which would be contrary to the purpose of the relevant provisions of the Directive”

“If certain contractual terms of the leasing transactions at issue in the main proceedings, and/or the intervention of an intermediate third party company in those transactions, constituted an abusive practice, those transactions must be redefined so as to re-establish the situation that would have prevailed in the absence of the elements of those contractual terms which were abusive and/or in the absence of the intervention of that company”
VAT ABUSE OF LAW TEST
POST WEALD LEASING

• Applying the abuse of law test to VAT:
  • Autonomy or subjective element
    • corresponds loosely to what is generally accepted to be aggressive tax planning or tax avoidance, i.e., transactions whose main objective is to obtain a tax advantage
    • discussion centred on factual situation
  • Teleological or objective element
    • teleological interpretation of provisions giving rise to right invoked BUT most rules in question in itself contravention of general VAT principles
    • discussion of legal nature

THE DECISION IN OCEAN FINANCE

Paul Newey (Ocean Finance) (C-653/11):

- Reference from UK tax courts
- Loan broker (exempt supplies) sets-up Jersey company to avoid paying input VAT on advertising services
- Arrangements were challenged by HMRC, which submitted that (in alternative) they were contrary to the principle of abuse of law
- On the facts, case appeared to fulfil both elements of abuse of law test – although teleological interpretation may indicate financial services providers should bear costs of VAT
- Nevertheless, Court concluded…

“(…) the contractual terms, even though they constitute a factor to be taken into account are not decisive (…). They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set-up with the sole aim of obtaining a tax advantage, which it is for the national court to determine”
THE DECISION IN OCEAN FINANCE

- Decision raises various practical questions:
  - What is the criteria now for abuse of law?
    - two-part test, or just artificiality? (*Weald Leasing; RBS*)
    - “wholly artificial transactions” or “principal aim”? (*Part Service; Ampliscientifica*)
    - what is role of “normal commercial operations”? (*Weald Leasing; Ampliscientifica*)
  - Was there an intentional decision of the Court to alter the test, or was it a “mistake”?
  - Whether intentional or not, what could be ratio for Court’s decision?
    - Influence of direct tax jurisprudence?
    - Lack of knowledge of previous case-law?

The (in)insignificance of the decision in Ocean Finance
THE DECISION IN OCEAN FINANCE

- And raises even more conceptual questions:
  - Is artificiality on this own a reasonable test for abuse?
  - Can a transaction, which is not against the spirit of the law, be deemed abusive solely because it was undertaken with sole purpose of saving tax? Abuse of what?
  - The progressive erosion of the rule of law, and the rise of tax morality as legal interpretative criterion

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Reading Materials

January 5, 2015
REVISTA
DE
FINANÇAS
PÚBLICAS
EDIREITO
FISCAL

ARTIGOS, COMENTÁRIOS
DE JURISPRUDÊNCIA, RECESÕES,
CRÓNICA DE ACTUALIDADE.

OUTONO

JOSÉ VIEIRA DOS PEIS
Direito Contabilístico
Sistema Contabilístico Português
Normalização Contabilística

JOÃO RICARDO CATAHINO
Ampliação de depreciação
Estate Planning
Previdência
Plano de Benefícios
Amparo ao trabalhador

ANTÓNIO MARTINS E RUTE ALMEIDA
Contabilidade
Fiscalidade
Controlo Financeiro
Controlo da Construção

EMANUEL VIDAL LIMA
Entregas de bens entre UE
Invenção juro regime transitório
Provas materiais e provas formais
Jurisprudência do TJUE

CLAUDIA DIAS SOARES
Eco-marketing
Impuestos ambientais
Política e análise

SIGIRD HEMELS
Clarity
European Tax Law
Tax incentives
1. Processo em Ocean Finance

O processo em Ocean Finance é um que envolve a recuperação de ativos. O cliente, que é uma empresa de transporte marítimo, realizou exportações fraudulenta durante o ano de 2000, ocasionando prejuízos ao banco que financiou as operações.

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...
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uma vantagem fiscal. Tal como relativamente à prevalência do elemento subjetivo, cabe questionar se o desvio ter-se-á ficado a dever a um mero acidente de percurso do Tribunal ou, ao invés, a uma alteração intencional do seu entendimento. Terá o Tribunal sido influenciado pela referência fugaz ao seu acórdão em Caullery Scheepwepes,49 constante da decisão em Ampliscientifica50? Qualquer que tenha sido a ratio subjacente ao desvio jurisprudencial, é claro que também aqui o TJUE acabou por se aproximar da sua anterior jurisprudência relativa ao exercício das liberdades fundamentais, em particular em matéria de tributação directa.

3.4. A dialética da criação de princípios jurídicos europeus

A criação de princípios gerais de Direito Europeu resulta, fundamentalmente, de um processo dialéctico entre o Direito nacional dos Estados-Membros e o Direito Europeu, no qual estes princípios são, ao mesmo tempo, fonte e resultado, de um longo processo de intercâmbio entre os sistemas jurídicos dos Estados-Membros e o ordenamento jurídico europeu.51 Vários termos têm sido utilizados para descrever este processo dialéctico – nomeadamente transplant e recepção52 mas aquele que, em nossa opinião, melhor o caracteriza é o conceito de reverberação.53

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49 Acórdão no processo C-196/04. [2006] Colect. 1-7995
Comentarios de Grillo, 2009, pág. 327.

El proceso de reflexión y cambio político puede ser un proceso complejo y multifacetado, que involucra diferentes actores y procesos interrelacionados. En este contexto, es importante entender cómo se producen los cambios políticos y cuáles son los factores que los impulsan. La reflexión es un elemento fundamental en esta dinámica, ya que permite que los actores políticos se autocrítiquen y progressive hacia nuevas estrategias y acciones. Es importante que los actores políticos reflexionen sobre sus logros y fracasos pasados, y también sobre las perspectivas de futuro, para poder tomar decisiones informadas y estratégicas. En este sentido, la reflexión puede ser un camino hacia la transformación política, que permite que los actores políticos cambien y evolucionen hacia nuevas formas de acción y de pensamiento.

En este contexto, es crucial que los actores políticos se involucren en un proceso de reflexión y cambio político, que involucre a diferentes actores y que se basa en un diálogo y una cooperación efectiva. Es importante que los actores políticos trabajen juntos para poder avanzar hacia nuevas formas de acción y de pensamiento, que permitan superar los desafíos actuales y construir un futuro más justo y equitativo. En este sentido, la reflexión y el cambio político pueden ser un camino hacia la transformación política, que permite que los actores políticos cambien y evolucionen hacia nuevas formas de acción y de pensamiento.
La presente es una copia de la versión aprobada para este proyecto. Los cambios en el texto de la versión digital de este documento se han eliminado para preservar la integridad del trabajo original.

**Contenido**

- Objetos de la producción de la experimentación
- Metodología
- Resultados
- Conclusiones
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Upcoming Seminar (April 10, 2015)

VAT FRAUD

Rita de la Feria (Durham University)

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