

Tax Journal
The non-taxing weekly for top practitioners
Tax Journal, Issue 745, 8

14 June 2004

View From The European Court

European Court

Professor Sir David Edward

© Reed Elsevier (UK) Ltd 2004

Professor Sir David Edward, KCMG, QC, LLD, FRSE, Judge of the European Court of Justice 1992-2004, gives us his thoughts on the law of VAT

The law of Value Added Tax is an early example of a growing (and perhaps unavoidable) trend in EC law. Starting from a basis in the Treaty, the Community legislation has become increasingly technical and influenced in matters of detail by the need for political compromise in the legislative process. Cases coming before the Court of Justice tend to focus on narrow points of interpretation arising in a particular national context. As a result, relatively simple texts have become more complicated and the case law interpreting them may sometimes be confusing. In seeking a way through the maze, it is important not to lose sight of the fact that the law has its roots in the Treaty and the aims the Treaty seeks to achieve.

The authors of the original EEC Treaty recognised that sales taxes, turnover taxes and similar charges could have an adverse effect on free movement of goods and services and on competition. The relevant provision (Article 99) appeared in a section (Part Three, Title I) entitled 'Common Rules' which included the rules on competition, internal dumping and state aids. These rules were intended to complement and complete the preceding section (Part Two, entitled 'The Foundations of the Community') establishing freedom of movement of goods, persons, services and capital. A harmonised system of turnover taxes was seen as an essential aspect of creating the common market (see the Preamble to the Sixth VAT Directive, fourth recital).

Harmonisation did not, at that stage, necessarily call for uniformity. The need for a uniform system, established by the Sixth Directive in 1977, followed from the decision taken in 1970 to substitute a system of 'own resources' for the previous arrangement by which the Community budget was financed by direct contributions from the Member States by a system of 'own resources'. The Community's own resources were to include 'resources accruing from VAT and obtained by applying a common rate of tax on a basis of assessment determined in a uniform manner according to Community rules' (see the Preamble to the Sixth VAT Directive, second recital).

Thus, uniform application of a harmonised system of VAT serves the double purpose of completing the internal market and maximising Community revenue. In particular, there is a Community interest in ensuring that, as far as possible, all supplies of goods and services are subject to the tax and, correspondingly, in limiting the scope of exceptions and exemptions.

Nevertheless, Member States may have special reasons on economic, social or political grounds for wishing to exempt or zero-rate particular supplies. Since the interests of the several Member States and of the Community do not necessarily coincide in this respect, the legislative evolution of exceptions and exemptions may be the result of political horse-trading rather than of any clearly defined principle.

As regards the evolution of case law, VAT cases normally come before the Court of Justice in the form of references from national courts under Article 234 (formerly Article 177) of the Treaty. The problems submitted for decision tend to arise in a national context that may have no parallel in other Member States and may depend very much on the form or language of national legislation, or on administrative practice. Other Member States may believe that they have no immediate interest in the outcome of the particular case and so may not take part in the proceedings. Only later do they and their taxpayers find that their interests have been affected by a Court judgment that goes (or seems to go) wider than the context in which the case arose.

Whilst the Commission will always seek to assist the court as *amicus curiae*, the position it adopts may be affected by its interest in protecting the Community budget. The presentation of cases before the court may also be influenced by the fact that VAT, unlike other taxes, is a tax that the taxpayer may positively wish to pay -- notably in order to be able to treat expenditure as an input.

The potential cross-currents of interest and argument in the cases before the court may therefore be very varied and may affect the extent to which any particular judgment should be relied on as illustrating or laying down a general principle.