



# Methods of Interpretation of ECJ cases v. Historical Background

Christian Amand  
ERA, 25 November 2011

# VAT exemptions

- An economic issue
  - VAT exemptions do not allow the deduction of input VAT, while taxable operations allow the deduction of input VAT
  - Copenhagen Economics and KPMG Report[2011]
    - Abolition of VAT exemptions in sectors other than immovable property and financial services would allow a reduction of 3,6 % of all the VAT Rates and an increase of 0,19 of the GDP
  - Mirrlees Review [2011]
  - ABC Report [1962], page 96
    - VAT exemptions damage the European Economy
- A political and e'motional issue

# Case C- 253/07, Canterbury Hockey Club [2008]



# Should (some ?) VAT exemptions be interpreted extensively ?

Are the services (advices, training of arbitrators, marketing, etc.) rendered by « England Hockey » to « Canterbury Hockey Club » VAT exempt ?

- Article 13(A)(1)(m) of the Sixth VAT Directive exempts
  - “certain services closely linked to sport or physical education supplied by non-profit-making organisations to “persons” taking part in sport or physical education”
- ECJ in Case C-253/07, *Canterbury Hockey Club* [2008]:
  - The words “persons taking part in sport” include services supplied to corporate persons and to unincorporated associations, provided that their true beneficiaries are persons taking part in sport (consequently, advices, marketing are taxable).
- The motivation
  - VAT exemptions may be interpreted extensively
  - VAT exemptions are based on their nature
  - VAT neutrality is a variety of prohibition of discrimination

# Methods of interpretation

- Wording, context, purpose and « effet utile »
  - Text, context and purpose  
(AG Francis Jacobs – 1989; AG Poiares Maduro – 2007)
  - Methods derived from interpretation of international treaties
  - Since Case 8/55 [1956], *Fédération Charbonnière*
    - See for example, Case C-466/07, *Dietmar Klarenberg*

# Text

- art. 13(A)(1)(b) exempts
  - **hospital and medical care** and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature’.
- VAT exemptions are interpreted strictly
  - Case C-287/00 *Commission v Germany* [2002], para 43, and Case C-498/03 *Kingscrest* [2005] , para 29 “since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person” (see Case 348/87 *SUFA* [1989] para13; *Institute of the Motor Industry* [1998], para17, and Case C-384/98, *D.* [2000], para 15).
  - Prevent deduction of input VAT, destroy the neutrality of the VAT system and discriminates business
- « *supply of telephone services and the hiring out of televisions to in-patients in hospitals is not VAT exempt*” (case C-394/04 , *Ygeia*[2005])
  - « I gave instruction not to implement this Case » (Declaration of the Belgian Minister of finances 23 February 2006)
    - See also the Cases *Arthur Andersen*, *MKG*, *Holland Autolease*, *Van der Steen*, *My Travel*, *Axa UK Plc*, *Seeling* etc...

# Context

- Art. 13(A)(1)(d) of the Sixth VAT Directive exempts
  - “supplies of human organs, blood and milk”
- Court of Appeal of Liège:
  - The supply of organs is prohibited by international treaties, therefore the only reasonable meaning of the word « supply » (in French « livraison » = « delivery ») is « *transport of organs* » (textual interpretation)
- ECJ in Case C-237/09, *De Fruytier* [2010]
  - Article 5(1) of the Sixth Directive provides that “*supply of goods*” shall mean the transfer of the right to dispose of tangible property as owner’
  - Article 6(1) of the Sixth Directive that the term ‘*supply of services*’ covers any transaction not constituting a supply of goods within the meaning of Article 5 of that directive

# Purpose

- Purpose of the Treaties
  - Under the system of the treaty *the purpose* of the provisions of article 95 in conjunction with the provisions on the abolition of customs duties and charges having equivalent effect is to ensure free movement of goods within the community under normal conditions of competition by **eliminating all forms of protection** which may arise **from** the application of **discriminatory internal taxation against products from other member states** (Case 15/81 [1982], *Gaston Schul I*)
- Purpose of provisions of the Directive in a more restricted context
  - The exemptions under Article 13A(1)(m) is intended to encourage sport and physical education (Case *Canterbury Hockey Club [2008]*, para. 19)

# « Effet utile »

- Rules of interpretation without which that treaty or law would have no meaning or could not be reasonably and usefully applied
  - Case 8/55, *Fédération Charbonnière* [1956] para. 20, « argument by absurdum »
  - A restrictive interpretation of a VAT exemption « would mean that a large number of supplies of services essential to sport would be automatically and inevitably excluded from the benefit of that exemption » (Case *Canterbury Hockey Club* [2008], para. 19)

# Changes in the jurisprudence of the Court

## Case Bulthuis-Griffioen (1)

### Child care by a nurse

- Art. 13(A)(1)(g) exempts
  - the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people' s homes, **by bodies** governed by public law or by other organizations recognized as charitable by the Member State concerned."
- VAT exemptions should be interpreted strictly because exemptions are exceptions to the common VAT system
- A day nurse is not a « body »  
(Case C-453/93, *Bulthuis-Griffioen*[1995]) (Textual interpretation)

# Changes in the jurisprudence of the Court

## Case Gregg and Gregg(2)

- Case C-216/97, *Gregg and Gregg* [1999]
  - the terms '**other duly recognised establishments** of a similar nature' and 'other organisations recognised as charitable by the Member State concerned', **do not exclude from that exemption natural persons running a business**
- consistent with the principle of fiscal neutrality inherent in the common system of VAT (C-283/95, *Fischer* [1998] regarding illegal operations)
- the exemptions are granted in favour of activities pursuing specific objectives, (*Gregg and Gregg*[1999], para.13) (**Purpose argument**)
  - (but is the taxation of costs - and mainly the investments - coherent with the objective to encourage some activities ?)

# Change in the Jurisprudence of the Court

## Case Canterbury Hockey Club (3)

- Article 13(A)(1)(m) exempts “certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education”
- Case 253/07, *Canterbury Hockey Club* [2008] “persons taking part in sport”, it includes services supplied to corporate persons and to unincorporated associations, provided that their true beneficiaries are persons taking part in sport.
  - *effective application* of the exemption under Article 13A(1)(m) of the Sixth Directive (para. 31) (= **argument of “effet utile”**)

- Written observations of the European Commission in *Canterbury Hockey Club*
  - *The purpose of the exemption is to reduce the VAT burden borne by persons taking part in sport or physical education (para. 12)*
  - *It is legitimate to have regard not only to the formal, legal recipient or effective beneficiary. Thus the services which directly provide a natural person with means of practising a sport (access to a tennis court of a golf course; hire of sport equipment, provision of an umpire or referee) may be considered to be supplied to the natural person concerned, even though it is a club which undertakes the organisation of the service, pays and receive the invoice. Only in this way can the intent of the exemption be fulfilled and the principle of neutrality upheld (para. 11)*

# Fiscal neutrality

- « Principle of fiscal neutrality, inherent in the common system of VAT » (Canterbury Hockey Club, para. 30, by reference to *Gregg and Gregg* para. 20)
- Case C 216/97, *Gregg and Gregg* para.20
  - The principle of fiscal neutrality precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. It follows that that principle would be frustrated if the possibility of relying on the benefit of the exemption provided for activities carried on by the establishments or organisations referred to in Article 13A(1)(b) and (g) was dependent on the legal form in which the taxable person carried on his activity
- Case C-216/97 [1999] *Gregg and Gregg* para. 19
  - That interpretation, to the effect that the terms 'establishment' and 'organisation' do not refer only to legal persons, is, in particular, consistent with the **principle of fiscal neutrality inherent in the common system of VAT** and in compliance with which the exemptions provided for in Article 13 of the Sixth Directive must be applied (**refer to Case C-283/95 Fischer[1998] , para. 27**).

# Principle of equal treatment

- Case C-283/95 *Fischer*[1998], para. 28 : it is clear from the judgment in *Lange* that **the principle of fiscal neutrality** precludes a generalised distinction from being drawn in the levying of VAT between *unlawful and lawful transactions*.
- Case C-111/92, *Lange* [1993] regarding unlawful exports of hightech materials

# Misunderstanding of the principle of « fiscal neutrality »

- the principle of fiscal neutrality (...) implies that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities

(Case C-174/08, *NCC Construction Danmark* para. 39 )

- That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment

(Case C-174/08, *NCC Construction Danmark* para. 41 ; see also Case C-259/10 and C-260/10, *The Rank Group Plc*, 10 November 2011)

# Neutrality of the VAT = prohibition of discrimination ?

Where is the source ?

- That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment (Case *NCC Construction Danmark A/S* point 41 and refers to: )
  - Case C-309/06, *Marks & Spencer [2008]*, para. 29) and refers to
  - Case C-106/05 *L.u.P.* [2006] para. 48 and refers to
  - Case C-45/01 *Dornier[2003]*, para.69; Case C-498/03 *Kingscrest Associates et Montecello[2005]* para. 52; Case C-443/04, *Solleveld et van den Hout-van Eijnsbergen*, para. 36 [2006] and refers to
- Case C141/00 *Kügler* [2002], para 56. regarding “out patient care services” and medical services: **Where a person seeks the status of charitable organisation, it is for the national courts to examine whether the competent authorities have observed those limits while applying Community principles, in particular the principle of equal treatment.** (BUT does not REFER TO A PRECEDENT ! )

—?????

# Community law and internal discriminations

Case C-212/06, *Gouvernement de la Communauté Française et Gouvernement Wallon c. Gouvernement Flamand*, « *Brasserie de Hoegaarden* » (1 april 2008)

- Para. 37 First, application of the legislation at issue in the main proceedings leads, inter alia, to the exclusion from the care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the French- or German-speaking region and have never exercised their freedom to move within the European Community.
- Para. 38 **Community law clearly cannot be applied to such purely internal situations.**
- Para. 40 It may nevertheless be remarked that interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court (see, to that effect, Case C-250/03 *Mauri* [2005] para 21, and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] para. 29).

# Principle of equal treatment

Written observations of the European Commission in *Gregg and Gregg* (para. 9)

- Exemptions from VAT are to be construed narrowly , **but**
- « *It must not be overlooked that, if the Court were to adopt a narrow construction of the terms establishments and organisations, this might well lead to distortions between Member States: in all probability certain activities frequently carried out by entities with legal personality in some States are generally performed by entities in other Member States which lack such personality* »

# Contradiction between the jurisprudence and the VAT system

## The jurisprudence

- Extensive interpretation of « some » VAT exemptions
- VAT neutrality is « *equal treatment of two competing business* » (**neutrality at the final consumer stage**)
- VAT exemptions are based on their « nature »
- VAT exemptions are destined to reduce the costs

## The VAT system

- Restrictive application of the VAT exemptions
- VAT neutrality means « *deduction of input VAT in order to allow indirect tax free supplies in intracommunity trade* » (**neutrality at each production stage**)
- VAT exemptions have no objective as such
- VAT exemptions increases the costs of acquisition of investments

The treaties

The VAT System

Provisions of the  
VAT Directive

# The History and the Economic Purpose

- VAT Directive [2006] and Sixth VAT Directive [1977]
- Second VAT Directive [1967]
- First VAT Directive [1967]
- The European Treaties [1958]
- GATT Rules [1947]

# Sixth VAT Directive [1977]

- Council Decision of 24 April 1970
- VAT is a part of the « Own resources »
- Uniform taxable base, but no uniform methods of deduction of input VAT

# Purpose of the VAT exemptions

in the Explanatory Memorandum to the Proposal for a Sixth Directive [1974]

- Article 10(3) of the Second Directive left the Member States completely free, subject to the obligatory consultations provided for in Article 16, to provide for whatever exemptions they thought fit; whereas the purpose of the present Directive, ***dictated by the need to ensure equality of treatment as between the various Member States as regards collection of the Community's own resources, is that there should be uniformity as to the transactions which are taxable.*** This necessarily implies uniform rules as to exemptions.
- The list of exemptions has been drawn up having regard (i) to **the exemptions already existing** in the various Member States, and (ii) the need to **keep the number of exemptions as small as possible**. This need reflects a concern to keep exceptions to the minimum in a general system of taxation of consumption, but also reflects a desire to avoid the inconveniences which such exemptions cause, mainly by reason of the fact that, unless the transaction exempted forms part of an international trading operation, taxes paid on inputs will not be deductible. The exemptions provided for within the territory of a country are based on a variety of grounds. The exemptions set out in section A are those already existing in the majority of the Member States. They relate to the postal services (a), to medical services (b), (c), (d), (e) and (f), to welfare services (g), to educational services (h) and (i), to physical recreation (j), and to bodies providing services of a social, cultural or educational nature (k).
- The other exemptions, which are set out in section B, relate to specific fields, such as insurance, provision of credit and dealings in currency and on the stock exchange, where they are justified for reasons of general policy common to all the Member States.

# VAT in the Second VAT Directive

- Second VAT Directive [1967]
  - Indirect tax free circulation of goods and services within the EU
  - Positive list of taxable services having an impact on the intracommunity trade
  - Banking, Insurance and immovable property should have been subject to VAT because of their impact on the community trade (see explanatory Memorandum)

# VAT in First VAT Directive

- First VAT Directive[1967] abolition of consumption taxes refunds on exports and taxation on imports
  - Deringer Report [1963]: authorize VAT exemptions on supplies to final consumers in order to introduce as quickly as possible a VAT system
  - Case 48/65, *Alfons Lütticke GmbH* [1965]: > 300 000 complaints
  - German Constitutionnal Court, 20 December 1966, *Allphasenumsatzsteuer Organschaft*: existing discriminatory turnover taxes should be abolished within 2 years

# VAT system and the Treaties

Article 1(2) of the Directive 2006/112/EC

- 2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.
- On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable **after deduction** of the amount of VAT borne directly by the various cost components.
- The common system of VAT shall be applied up to and including the retail trade stage.

Preamble of the Directive 2006/112/EC “Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof”

# VAT is a system

- Case 15/81 *Gaston Schul I* « the purpose of the provisions of article 95 ...is to ensure free movement of goods within the community under normal conditions of competition by eliminating all forms of protection which may arise from the application of discriminatory internal taxation against products from other member states”
- But such a neutrality is not possible if the deduction of VAT is disallowed on B2B operations

# The treaties

## (art. 113 TFEU, ex-93; ex-99)

### *Article 93 TEC (ex Article 99)*

- The Council shall (...) adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is **necessary to ensure the establishment and the functioning of the internal market** within the time-limit laid down in Article 14.

### *Article 113 TFEU (ex Article 93 TEC), as applicable since December, 1 2009*

- “The Council shall (...) adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is *necessary to ensure the establishment and the functioning of the internal market* **and to avoid distortion of competition.**”

# Looking forward ...

- Formal methods of interpretation should take into account the economic objectives of the VAT system and of the Treaties
- There are probably a few major « legal bugs » that are reproduced in the recent jurisprudence of the Court and that today destabilize the VAT system, the equal treatment at the production level and the internal market
  - Case C-216/97, *Gregg & Gregg* [1999] (education, social security)
  - Case C-326/99, *Goed Wonen* [2001] (immovable property)
  - Case C-281/91, *Muys' en De Winter BV* [1993] (financial services)
  - Case C-210/04, *FCE Bank* [2006] (internal market)
  - ... ?



Christian Amand  
Tax Lawyer  
Avenue Tedescolaan 7  
1160 Bruxelles - Brussel  
Tél. : + 32 2 663.14.55  
Fax : + 32 2 663.30.78  
E-mail: [ca@xirius.be](mailto:ca@xirius.be)  
Website: <http://www.xirius.be>