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Press and Information

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Judgment of the Court of Justice in Joined Cases C-354/03, C-355/03 & C-484/03

Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03) and Bond House Systems Ltd (C-484/03) v. Commissioners of Customs & Excise

COMPANIES UNWITTINGLY PARTY TO CAROUSEL FRAUD ARE ENTITLED TO REIMBURSEMENT OF INPUT VAT PAID

In a supply chain, each transaction must be considered on its merits as a separate economic activity. The right of a taxable person to deduct VAT cannot be affected by the fact that, without that person knowing or having any means of knowing, another transaction in the chain is vitiated by fraud.

'Carousel fraud' consists of chains of supplies of goods in which a defaulting trader is involved, that is to say a trader liable to VAT who goes missing without accounting for that VAT to the tax authorities, or a trader using a hijacked VAT number.

In this type of fraud, a trader registered for VAT in a Member State sells goods to a trader registered for VAT in another Member State. The second trader disappears without accounting to the tax authorities for the VAT due or uses a hijacked VAT number. The goods are sold at a loss to a company in the same Member State, which in turn sells the goods on to another company established in that State, paying the output VAT invoiced to the tax authorities, after deduction of the input VAT paid. Following this, possibly after further transactions, the goods are exported to another Member State exempt from VAT. The exporting company none the less is entitled to claim reimbursement of the input VAT paid on the purchase of those goods. Where the purchaser is the first company, this constitutes carousel fraud. The procedure may be repeated.¹

At the material time, the three companies involved in the case, Optigen Ltd, Fulcrum Electronics Ltd and Bond House Systems Ltd, were exporters of computer chips ('CPUs'). They unwittingly became party to this type of fraud. In 2002, their claims for repayment of

¹ As Advocate General Poiras Maduro observed in his Opinion delivered on 16 February 2005, there appears to have been an increase in this type of fraud in intra-Community trade over the past few years and it currently represents a major concern for Member States. Although the exact amount of money involved is difficult to quantify, it clearly causes a considerable loss of national revenue (point 9 of the Opinion - ref. the Report from the Commission to the Council and the European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud, 16 April 2004, COM(2004) 260 final).

VAT were rejected by the Commissioners of Customs & Excise in England, who took the view that the sales and purchases made by the companies were devoid of economic substance and did not constitute 'supplies made in the course of an economic activity' for the purposes of VAT.

The High Court (England & Wales) (Chancery Division), currently considering these cases on appeal, seeks an interpretation by the European Court of Justice of Articles 2(1), 4(1), 4(2) and 5(1) of the Sixth VAT Directive which establishes a common system of VAT.² Essentially, the High Court questions whether a transaction which represents a link in a fraud of this kind constitutes a 'supply of goods' made by a 'taxable person acting as such' and an 'economic activity' within the meaning of the directive.

In its judgment today, the Court of Justice points out that the Sixth VAT Directive assigns a very wide scope to VAT and to the key terms 'taxable person',³ 'supply of goods'⁴ and 'economic activities'.⁵ It is settled case-law that these terms are objective in nature and apply without regard to the purpose or result of the transactions concerned. It would be contrary to the directive to take account of the intention of a trader other than the taxable person concerned involved in the same chain of supply, and/or the possible fraudulent nature of another transaction in the chain, whether prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and had no means of knowledge. In such a chain, each transaction must be regarded on its merits and the character of a particular transaction in the chain cannot be altered by earlier or subsequent events. It follows that **transactions such as those at issue in the main proceedings, which are not themselves vitiated by VAT fraud, constitute supplies of goods or services effected by a taxable person acting as such and an economic activity, within the meaning of the Sixth VAT Directive, where they fulfil the objective criteria on which the definitions of those terms are based.**

The Court has therefore held that the right of a taxable person who carries out such transactions to deduct input VAT cannot be affected by the fact that in the chain of supply of which those transactions form part, without that taxable person knowing or having any means of knowing, another prior or subsequent transaction is vitiated by VAT fraud.

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Languages available: FR, DE, EN, PL

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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² Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) amending First Council Directive 67/227/EEC of 11 April 1967 (OJ, English Special Edition 1967, p. 14).

³ Under Article 4(1) of the Sixth Directive, 'taxable person' means any person who independently carries out any economic activity, whatever the purpose or results of that activity.

⁴ Article 5(1) of the Sixth Directive provides that the transfer of the right to dispose of tangible property as owner is to constitute such a supply.

⁵ The term 'economic activities' is defined in Article 4(2) of the Sixth Directive as covering 'all' activities of producers, traders and persons supplying services.