

***COLLEGE OF ESTATE MANAGEMENT v. CUSTOMS & EXCISE
COMMISSIONERS [2005] STC 1597***

CASE NOTE AND COMMENTARY

by Nicola Shaw

The College of Estate Management is a leading provider of distance learning courses in the field of property management and construction. The teaching provided by the College includes:-

- (a) study at home or in the workplace using materials provided by the College;
- (b) preparation and submission of assignments;
- (c) attendance at face-to-face teaching sessions; and
- (d) access to the College's "virtual learning environment" provided on its website.

It was common ground between the parties that the College made supplies of educational services to its students. These supplies were exempt for VAT purposes with the consequence that no input tax in respect of them could be recovered. The area of dispute was as to whether or not the College also made a separate zero-rated supply of printed materials, thereby entitling it to reclaim input tax incurred in relation to those supplies. The House of Lords held that although the written materials were an essential part of the supply made by the College, they were nonetheless only a component part of what was, as a matter of economic reality, a single supply of education services.

The case explores the "authoritative guidance" of the ECJ in *Card Protection Plan v. CCE* (Case C-349/96) ("*CPP*") and is extremely helpful in breaking down the particular analytical approaches to different types of single supply cases. Their Lordships stressed the importance of not straining judicial language or attempting to force every supply into one descriptive pigeon-hole. Since the Judgment of the ECJ in *CPP*, the question of whether a transaction amounts to a single supply or multiple supplies has been before the House of Lords on no fewer than five occasions¹. It is extremely well-trodden ground and yet a definitive answer as to the correct approach to determining the matter remains elusive.

As Lord Walker of Gestingthorpe, who gave the leading judgment, held "this is an area in which it is unwise to attempt any exhaustive schematic analysis"² (). This echoes Lord Hoffmann's comments in *Dr. Beynon and Partners v. CCE* [2004] 4 All ER 1091 at paragraph 20. However, the "schematic analysis" suggested by their Lordships in *College of Estate Management* is at the very least a very insightful starting point. The analysis involves dividing the single supply cases into two categories:-

- (i) principal/ancillary cases, exemplified by *CCE v. Madgett and Baldwin (trading as Horndean Court Hotel)* Joined Cases C-

308/96 and C-94/97, *CCE v. British Telecommunications* [1999] 3 All ER 961 and *CPP*; and

- (ii) component part cases, exemplified by *Faaborg-Gelting Linien A/S v. Finanzant Fleursborg* Case C-231/94, *Dr. Beynon* and now *College of Estate Management*.

In assessing the nature of a transaction, the following principles should be borne in mind:

- (i) the essential features of the transaction must be ascertained to establish whether the transaction is a single supply or a number of distinct supplies;
- (ii) a supply which comprises a single service from an economic point of view should not be artificially split; and
- (iii) every supply of a service is normally to be regarded as distinct (see para.29 of *CPP*).

Category (i) Cases

The classic exposition in relation to this type of case is found in paragraph 30 of the ECJ's judgment in *CPP*:

“There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principle service. A service must be regarded as ancillary to a principal service if it does not constitute for customs an aim in itself, but a means of better enjoying the principal service supplied.”

In the High Court appeal in *College of Estate Management* [2004] STC 235, Lightman J described this type of case as an “add-on” supply. The ancillary element is an “add on” to the principal supply. This is a helpful way of analysing the nature of these types of transactions, although, as Lord Walker pointed out in the House of Lords, the notion of an “add on” element is wide ranging in its nature: an “add on” may be optional (like certain in-flight catering) or it may be indispensable (like a car's ignition key)³. Lord Walker described the term “ancillary” as meaning “subservient, subordinate and ministering to something else”⁴. Lord Rodger described an ancillary element as an “accessory” to the principal supply⁵. So, the use of the term “ancillary” was entirely appropriate to describe the transport element supplied by a hotelier to his customers (*Madgett and Baldwin*), the delivery element of the sale of the car (*BT*) and the labels, key tags and medical cards within a package of insurance services (*CPP*). Furthermore, it would seem that a relevant factor in assessing whether or not an element can be described as “ancillary” to a principal supply is its proportionate value to the overall package price. In *Madgett and Baldwin* the ECJ considered that an ancillary supply would only account for a small proportion of the

total price⁶, and certainly in both *BT* and *CPP* the ancillary elements constituted insignificant proportions of the total package prices. And most recently, in the case of *Levob Verzekeringen BV v. Staatssecretaris van Financiën* Case C-41/04, the ECJ has listed cost as one of a number of factors (in the context of a supply of a customised software programme – the other relevant factors being the importance of the customisation to the purchaser and the extent and the duration of the customisation) relevant to the determination of the question of single supply or multiple supplies. Quite how important a part this particular factor will play in an analysis of Category (i) cases is unresolved. The Court of Appeal has just granted permission in relation to an appeal concerning this very point⁷, so we can expect further developments still in this area. However, in my opinion, the question of whether or not an element is ancillary to a principal supply fundamentally boils down to the economic reality.

In *College of Estate Management* Lord Rodger considered that it would be “highly artificial” to describe the printed materials as “ancillary” to the principal supply of education services. The correct analysis was not that the materials were simply a better means of enjoying the supply of education, because the materials were the means by which the students obtained the supply of education. Rather, the correct analysis was to ascertain whether the essential features of the transaction pointed to a single supply or a bundle of separate supplies.

Category (ii) Cases

Even if an element cannot be described as “ancillary” to a principal supply, it does not necessarily follow that it must be regarded as a separate supply⁸. An element may be an essential (as opposed to a subordinate) element of a transaction but nonetheless, as a matter of economic reality, simply part of an overarching single supply. As Lord Walker acknowledged⁹, food is an integral part of restaurant services (*Faaborg-Gelting*) as are pharmaceuticals to the provision of medical care (*Dr. Beynon*): a restaurant with no food or a doctor without medicines are contradictions in terms. And yet, unquestionably, the nature of what is being supplied in each case is a single supply of restaurant services and medical care. Likewise, in *College of Estate Management*, although the written materials could not “on any sensible use of the word” be regarded as ancillary, they were nonetheless still simply part of an overall package of education services. The written materials were integral to that supply in that they were the mechanism by which those services were supplied. But the economic reality was nonetheless that there was a single supply of services of which the written materials constituted a component part.

Conclusion

Even if the analysis can all be reduced to matters of economic reality, it would be naïve to assume that future determinations of single supply cases will necessarily be easier. Whilst the notion of “economic reality” is a fairly simple one, it can of course be notoriously difficult to apply. One person’s view of the economic reality can be quite removed from another person’s view. Indeed, this is very often at the heart of any dispute between a taxpayer and the Commissioners.

¹ *CCE v. British Telecommunications* [1999] 3 All ER 961; *CPP v. CCE* [2001] 1 All ER 143, *CCE v. Plantiflor Ltd* [2002] STC 1132, *Dr Beynon and Partners v. CCE* [2004] 4 All ER 1091 and *College of Estate Management v. CCE* [2005] STC 55

² See paragraph 33 of the judgment

³ See paragraph 33 of his opinion

⁴ See paragraph 30 of his opinion

⁵ See paragraph 11 of his opinion

⁶ See paragraph 24 of the judgment

⁷ *International Masters Publishers Ltd v. HMRC*

⁸ See Lord Rodger's opinion at paragraph 12

⁹ See paragraph 30 of his opinion