

Distortion of competition

Isle of Wight Borough Council

Following the response from the ECJ, the High Court has now released its decision in the Isle of Wight case, which concerned a number of local authorities providing off street parking.

Whilst local authorities are treated as non taxable persons under Article 4(5) of the Sixth Directive this does not apply where it would lead to significant distortions of competition. Local authorities had previously accounted for VAT on such car parking and submitted claims for output tax on the basis that they should be treated as non taxable persons in making such supplies. The key to the dispute was economic consequences of such non taxable treatment. The Tribunal decided the required economic test was a local one and allowed the local authorities appeals. On appeal to the High Court, a number of questions were referred to the ECJ. These included questions around the geographical nature of distortion and the meaning of the terms 'would lead to' and 'significant'.

The ECJ responses can be summarised as follows:

1. Evaluation of distortion to competition must relate to more than any local market, consequently distortion to competition should be considered nationally in relation to the same activity.
2. The expression 'would lead to' must incorporate potential competition as well as existing competition, providing the possibility of a competitor entering into the relevant market is real.
3. 'Significant' must be interpreted as more than 'negligible'.

Given the ECJ's response the High Court concluded that the Tribunal had not established the facts that would allow a conclusion on whether the parking activities would lead to significant distortions of competition. Whilst not explicitly stated the main reason for this would appear to be the VAT Tribunal's localised tests. As a result the court allowed HMRC's appeal and remitted the case back to the Tribunal. The High court also commented on the ECJ's response on the interaction of the second and third sub paras of Article 4(5). The court concluded these paras should be interpreted as meaning the fact that the scale of an activity was more than negligible did not automatically result in non taxable person treatment.

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