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Case No: CH/2007/APP/0191

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16<sup>th</sup> January 2008

**Before :**

**THE HON MR JUSTICE LINDSAY**

**Between :**

**THE COMMISSIONERS FOR HER  
MAJESTY'S REVENUE AND CUSTOMS**

**Appellants**

**- and -**

**WEALD LEASING LIMITED**

**Respondent**

**Mrs Melanie Hall QC and Mr Raymond Hill** (instructed by **HMRC**) for the Appellants

**Mr Michael Conlon QC and Miss Nicola Shaw** (instructed by **McGrigors LLP**) for the Respondent

Hearing dates: 27<sup>th</sup> and 28<sup>th</sup> November 2007

**Judgment**

**Mr Justice Lindsay :**

**Introduction**

1. The taxpayer, Weald Leasing Limited (“Weald”), a member of the Churchill commercial group of companies (“the Churchill Group”) carrying on insurance businesses but not a member of their VAT group, acquired in the ordinary way from third parties goods of a kind needed, in the course of their insurance businesses, by two other members of the commercial group. Those two Group companies were Churchill Accident Repair Centre (“CARC”) and Churchill Management Limited (“CML”). So great a part of CARC’s and CML’s respective businesses consisted of the exempt supply of insurance that purchases of the goods by CARC and CML themselves would have given rise to an input tax recovery by them of less than 1%. Weald, though, was not an exempt trader and, having paid the input tax associated with its purchase of the goods, it then obtained appropriate deductions from its output tax. Weald’s acquisition was in the course of a scheme which, whilst its component transactions were intended to take effect according to their respective letter, was (as is now admitted) a scheme the essential, indeed sole, aim of which was the obtaining of a VAT advantage.
2. The scheme involved interest-free loans from CML or other Group companies to Weald to enable Weald to pay for the goods and then the leasing of the goods so acquired by Weald to an interposed third party (which was neither a Churchill Group company nor inside any relevant VAT group) and subleasings on from that interposed third party to CARC and CML. The tax advantage so procured was, or at least included, that instead of one or more members of the Churchill Group bearing irrecoverable VAT on the supply to them of the goods and of the Group thus bearing that expense in full at the point of supply, instead, by way of such a leasing by Weald and by such subleases as I shall describe, CML and CARC came to enjoy immediate use of the goods whilst bearing VAT only, little by little, as payments under the subleases fell due. Lest the subleases might have been regarded by HM Revenue and Customs (“HMRC”) as at too low a rental, the third party had been interposed as part of the scheme with a view to denying to HMRC the ability (likely otherwise to be open to them) to require tax to be paid as if the sublettings had been at full market value. CARC and CML have paid VAT on the sublease rentals as, period by period, they have fallen due. However, HMRC, having in mind what they took to be the artificiality and want of commerciality of the scheme and what they believed to be its essential aim, namely the obtaining of a tax advantage, saw themselves as entitled to label the whole scheme as so consisting of abusive practice as duly to give HMRC the right to “redefine” the arrangement made in such a way as to undo all tax advantage which it might otherwise have conferred upon the Churchill Group or upon Weald (a subsidiary of CML) as part of it.
3. Regarding themselves as so entitled, HMRC made assessments which relied upon such a “redefinition”. Weald’s appeal against those assessments came before the London Tribunal Centre on a number of days between January 2005 and September 2006. The hearing before the Tribunal was unusually prolonged partly because of a very detailed investigation of the facts, which included cross-examination spread over several days, but also because the hearing straddled the important decision of the ECJ in *Halifax plc and Others v. Customs and Excise*

*Commissioners* [2006] STC 919 - Case C-255/02, the judgment in which was published on 21<sup>st</sup> February 2006. On the same day the ECJ handed down judgments in *BUPA Purchasing Ltd & Anor v Customs and Excise Commissioners* [2004] STC 967 and *University of Huddersfield Higher Education Corporation v Customs and Excise Commissioners* [2006] STC 980 which cases, like *Halifax*, deal with abusive practice and VAT deductibility.

4. As for what is meant in *Halifax* by “redefinition”, that was dealt with in paragraph 98 of the judgment of the Court and in identical terms in holding 3 of the Grand Chamber’s ruling, namely:

“Where an abusive practice has been found to exist, the transactions involved must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.”

5. Once the *Halifax* judgment was available arrangements were made for further written and, later, oral argument to be received by the Tribunal from the parties and the decision of the Tribunal – Mr Theodore Wallace (Chairman), Mr K. Goddard MBE and Mr Cyril Shaw FCA – was released on 7<sup>th</sup> February 2007. The Tribunal held that no “redefinition” of any kind claimed by HMRC was appropriate and the taxpayer’s appeal against the assessments was allowed.

6. A large part of the hearing before the Tribunal had been directed to Weald’s assertion that genuine commercial motives had underpinned the transactions within what I have called the scheme. HMRC, appearing then, as also before me, by Mrs Melanie Hall QC leading Mr Raymond Hill, had cross-examined Weald’s witnesses to counter that assertion and the Tribunal dealt robustly with the matter. At its paragraph 151 it said:

“We do not find any of the explanations for the transactions other than the attainment of tax advantages by the Churchill VAT group to be remotely convincing.”

Before me Weald, appearing by Mr Michael Conlon QC (who had not appeared below) leading Miss Nicola Shaw (who had), now accept that the loan, purchase and leasing arrangements which I have spoken of as a scheme were entered into for the *sole* purpose of obtaining a tax advantage.

7. Given that radical change of approach and given also that a good part of the argument at the Tribunal before the *Halifax* judgment had been published had been directed to the argument (unsustainable post-*Halifax*) that the transactions within the scheme did not even amount to economic activity, the case as argued before me has been so different to that put to the Tribunal that the more convenient course, in my view, is for me first to deal with the argument as it has been presented to me and only then to deal, in such detail as then may be necessary, with the decision of the Tribunal. But even upon that basis it is necessary first for me to explain what were the transactions within the scheme.

## The scheme

8. I have mentioned that a third party was interposed in the leasing arrangements. That third party was Suas Limited (“Suas”), a company incorporated in 1995 which was owned by Mr Mark Buffery FCA and his wife. Mr Buffery was at material times the only director of Suas. From 1995 he was VAT consultant to the Churchill Group. Weald was incorporated on 16<sup>th</sup> April 1997 as a wholly owned subsidiary of CML. It commenced trading on 17<sup>th</sup> June 1997. In the meantime, by April 1997 and prompted, it would seem, by Mr Buffery, Mr Boddy, a finance manager in the Churchill Group Finance Department, was considering the possibility of using a company – which became Weald - as a vehicle for recovering VAT on assets that the Group might buy in the future. The plan was that Weald would buy the goods, then lease them to Suas which would then sublease to whichever Churchill Group company had needed them. On 29<sup>th</sup> May 1997 Mr Boddy sent to CARC a memorandum which said:

“With a view to reducing our VAT costs, we have set up a separate company I would like purchases of all assets from now on, which are authorised by yourself, to be invoiced to [Weald] ...”

Weald acquired assets with either the assistance of, or with a total reliance upon, unsecured interest-free loans from companies in the Churchill Group, including from its parent, CML. Group companies thus indirectly bore at the outset the expense of the very goods which were then subleased to one or more of them. Weald had no employees and it was not Weald but employees of CARC and CML who selected the assets which Weald bought. It was not Weald but employees of CARC or CML who obtained quotations from the prospective suppliers of the goods. Within the Churchill Group, a purchase requisition form was sent not to Weald but to the Group Finance Department for authorisation. Authorisation was given at Group level for the purchases. Management decisions relating to the purchases were taken not by Weald but by the Group Executive Committee, which met weekly. No separate decisions on the purchases and leasing of assets were taken by Weald’s own board.

9. Weald signed an equipment leasing agreement with Suas and thereafter either further leasing agreements were made between them or new equipment was added by agreement to existing leasing agreements between those parties. Rent was payable quarterly in advance. Time was of the essence in respect of rental payments. The equipment remained in the ownership of Weald and the lessee was not to dispose of it otherwise than by sublease. Weald remained liable to maintain the equipment but the lessee was required to make good any damage or loss. Weald was entitled to terminate if the lessee failed to pay sums due on time or breached any other term of the agreement. Suas was entitled to terminate without penalty at any time by giving 21 days’ notice in writing and Weald was entitled to terminate by giving 28 days’ notice, again without penalty. Without regard being paid to the likely prospective useful life of the particular goods leased out by Weald, the rent was calculated so as to pay back 100% of the cost to Weald over 10 years. That was fixed without any negotiation case by case.

10. When the equipment was delivered it was delivered not to Weald or to Suas but direct to whichever Group company was to use it. At that stage Suas was not even aware of the impending purchase of the goods of the particular description concerned. The Group company which was to use the equipment would requisition a cheque which would be issued by the Group Finance Department and drawn on Weald's bank account. If that would cause Weald to be overdrawn then a transfer from the Group Finance Department would be made to avoid that.
11. A list would then be drawn up of the assets being purchased by Weald for subleasing to Suas; that list was sent to Suas accompanied by the purchase invoices to Weald and a list of cheques to evidence that Weald had made the relevant payments. Mr Buffery, perhaps as VAT consultant to the Churchill Group or perhaps as a director of Suas, considered the list and was able, if he chose, to reject items as being unsuitable for leasing. He would then prepare a leasing agreement in a form which the parties had settled upon together with a schedule of whatever equipment was then about to be leased by Weald to Suas. The rent payable by the ultimate sublessee was at the outset, and without any regard to the commercial life expectancy of the particular goods concerned, the same as Suas was obliged to pay Weald but plus a further 7.5% or 5%, although later that margin was reduced. When Weald invoiced Suas, Suas would invoice CML or CARC and when Suas received the rent it would pay Weald. All the rents, be they of leases or subleases, were paid.
12. Weald's directors' emoluments were paid by CML. Its accounts for its initial period disclose a loss of £190,172. In its accounts to December 2001, the period covering a substantial proportion of the material assessments, Weald made a loss of ordinary activities before taxation of £2,336,699. Accumulated losses, later, to 31<sup>st</sup> December 2002, were £6,691,617. HMRC's Skeleton Argument sets out, under separate alphabetical headings from (a) to (p), a number of respects in which many of the hallmarks of normal commercial operations were missing from the leasing arrangements as they were between Weald and Suas and between Suas and CARC or CML. Thus the lease agreements could be terminated by the lessee at will and without penalty and accordingly the lessor could not be sure that its cost of purchase would be met by rental payments. Rental periods were not tailored to fit expected life of assets; although goods having various life expectancies were leased, all rentals were calculated on the 10-year basis. Subject, perhaps, to the reduction in the margin as described in para 11 supra, no attempt seems ever to have been made for lessee or lessor to have negotiated better terms than those which were agreed. Mr Buffery of Suas, the lessee, drafted documents for Weald, the lessor. Composite rents were charged so that it was impossible to attribute a particular rent to an individual asset, which, in turn, would tend to make any termination by the lessee in respect of obsolete or discarded assets difficult, a feature one might normally expect between parties negotiating commercially at arm's length.
13. As for the parties being at arm's length, again HMRC's Skeleton Argument goes through the alphabet from (a) to (o) on aspects which it asserts mark that the parties were not at arm's length. Thus Weald was a wholly owned subsidiary of CML. Weald's directors were also directors of CML and its Finance Manager was the Finance Manager of CML. CML and the other members of the Churchill

Group made no charge to Weald for the services provided by its directors or Finance Director. When Suas chose not to accept an item for leasing from Weald, Weald sold the items to CML or CARC at cost. Weald had no customers other than members of the Churchill Group and Suas. With only small exceptions to this observation, Suas obtained assets only by way of lease from Weald and leased or subleased assets only to members of the Churchill Group. CML provided letters of comfort to suppliers of goods to Weald to indicate that Weald was a wholly owned subsidiary of CML and that, from that suppliers' perspective, nothing had changed since invoices would still be settled upon CML's normal terms. It was accepted in evidence, asserts the HMRC Skeleton, that suppliers would have noticed no difference between selling to CML or CARC on the one hand and selling to Weald on the other save that a different address was put on the invoice. It was CML and CARC who determined whether and when to dispose of leased assets even though the assets were in point of law owned by Weald and leased to Suas.

14. Before I go further I should explain why Suas was interposed between Weald and CARC or CML. Schedule 6 para 1 of the 1994 Act, so far as relevant, provides:

“1 (1) Where—

(a) the value of a supply made by a taxable person for a consideration in money is (apart from this paragraph) less than its open market value, and

(b) the person making the supply and the person to whom it is made are connected, and

(c) if the supply is a taxable supply, the person to whom the supply is made is not entitled under sections 25 and 26 to credit for all the VAT on the supply,

the Commissioners may direct that the value of the supply shall be taken to be its open market value.

(2) A direction under this paragraph shall be given by notice in writing to the person making the supply, but no direction may be given more than 3 years after the time of the supply.

(3) .....

(4) For the purposes of this paragraph any question whether a person is connected with another shall be determined in accordance with section 839 of the Taxes Act.”

HMRC would have had a good arguable case that such were the terms of the rentals from Weald to Suas and from Suas to CARC or CML that they fell within 1(1)(a). However, it seems to have been accepted that, within section 839 of the Taxes Act, Suas and Weald and Suas and CARC and CML were not connected

within para 1(1)(b). The otherwise commercially pointless interposition of Suas was thus intended to deny to HMRC a Schedule 6 revaluation.

15. I accept HMRC's submission that none of the parties – CML and CARC, Weald and Suas – bore the ordinary economic and commercial burdens and risks typically associated with the leasing of goods. So far different were the arrangements of the scheme from what one might expect either as between parties who were at arm's length or even as between related or associated parties who were concerned to behave as if in the course of normal commercial operations that I accept Mrs Hall's metaphorical description of the arrangements of the scheme as being "commercially hollow". The transactions, being, as I have mentioned, intended by the parties thereto to take effect according to their letter, were not shams but, despite the attempts to confer the outer appearances of familiar commercial arrangements, they were artificial in the sense of being such as, but for their having the essential aim of obtaining tax advantage, they would never have been made in any commercial context.
16. The features I have mentioned justify, in my view, the use of the term "scheme" which I use not in any pejorative sense but to indicate that the whole series of transactions, from selection of goods by and interest-free loans from CML or CARC at one end to the later subleases by Suas to CML or CARC and payment of the sublease rentals and VAT thereupon at the other, were ordained in the sense that once the goods were selected the manner in which they would be enjoyed and in which their costs would be dealt with would almost invariably be by way of arrangement which, without further negotiation and without bespoke alterations to fit the particular goods, would take a particular shape and yield foreseeable payments. Prior to the use of the scheme both CML and CARC had purchased the goods which they needed for their respective businesses direct from suppliers. I accept HMRC's contention that the scheme I have described and which is covered in a good deal more detail by the Tribunal in its decision, fell outside normal commercial operations and, indeed, I have not understood Mr Conlon to argue otherwise. It is the significance, if any, of the scheme being outside normal commercial operations which has chiefly been at issue.

### **Normal Commercial Operations; abusive practices**

17. The phrase "normal commercial operations" ("nco") appears only twice in *Halifax* supra. It does not appear at all in the judgment of the ECJ on the same day in the related cases of *BUPA* and *Huddersfield*. The Advocate General in *Halifax* had not found it necessary to refer in terms to nco. Indeed, at his para 56 he negated the idea of there being some single normal way to conduct an economic activity. But in its paragraph 69 (and at that stage speaking generally rather than particularly as to VAT) the Court said:

"69. The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law".

18. A number of authorities were cited in support of that approach and the Court (now turning to VAT) continued, in its paragraph 70:

“70. That principle of prohibiting abusive practices also applies to the sphere of VAT.”

19. A number of things are notable about para 69 and the succeeding paragraphs. Firstly, the proposition at this stage of the judgment is at first a general one, not limited to tax nor, within tax, to VAT. It is thus not dealing only with *tax* advantages but with any advantages provided for by community law. Secondly, it is apparently not the case that a transaction which is not nco but is solely for the purpose of obtaining a community law advantage is, without more, an abusive practice. That would be to ignore the presence of the word “wrongfully”. The need to add the word “wrongfully” indicates that even where a transaction is solely for the purposes of obtaining an advantage provided for by community law and is outside the context of nco, it can nonetheless escape being branded an abusive practice. Thirdly, as paragraph 70 and the succeeding paragraphs make clear, the Court, at this part of its judgment, is considering how far, if at all, the very general principle – see paragraph 68 – that community law cannot be relied on for abusive or fraudulent ends - can conveniently be applicable within the context of VAT. VAT – see paragraph 72 – is an area where the requirement of legal certainty needs strictly to be observed. It is also an area – paragraph 73 – where a taxpayer may quite properly decide between one type of transaction and another by reference to a large range of factors which include tax considerations and against the background that the taxpayer may choose to structure his business so as to limit his tax liability.

20. It was against that background that in paragraphs 74 and 75 the Court indicated what *appeared to it* to be an appropriate summary. In speaking of what appeared to the Court at that stage it was not, it would seem, setting out something intended to guide national courts. It did not turn to that purpose until paragraph 77 and thereafter, having first stated, in paragraph 77, that the Court could, when giving a preliminary ruling, provide a clarification designed to give the national court guidance in its interpretation. Thus, paragraphs 74 and 75 were no more than what appeared to be the Court’s view of a prospective preliminary ruling. In those paragraphs the Court said:-

“74. In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.

75. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried

out may have some explanation other than the mere attainment of tax advantages.”

21. These paragraphs, too, bear closer examination. The word “only” in the first sentence of paragraph 74 does suggest that what the Court is considering embarking upon is a complete and exclusive description of what constitutes abusive practice. Secondly, if one compared the words “the grant of which would be contrary to the purpose of those provisions” in para 74 with the earlier para 69 reference to “for the purpose of wrongfully obtaining advantages provided for by Community law”, it may be that, for the purposes of paragraph 74, the accrual of any tax advantage the grant of which would be contrary to the relevant provisions of the Sixth Directive was intended to fall within the earlier description of things “wrongfully” obtained. Thirdly, it is notable that paragraphs 74 and 75 do not import any reference to nco; that operations are not nco may, thus far, be seen to be material to a denial of general community law advantages – para 69 – but not, as yet – paras 74 and 75 – to a denial of VAT advantages.

22. But there is a second reference to nco; it occurs in paragraph 80 where the Court says:

“80. To allow taxable persons to deduct all input VAT even though, in the context of their normal commercial operations, no transactions conforming with the deduction rules of the Sixth Directive or of the national legislation transposing it would have enabled them to deduct such VAT, or would have allowed them to deduct only a part, would be contrary to the principle of fiscal neutrality and, therefore, contrary to the purpose of those rules.”

23. But, following the indication in para 77 that the Court may, when appropriate, give guidance to the national Court, that is what the Court is now giving. Here the reference is not to operations, as in paragraph 69, which are not in the context of nco but those that are. Moreover, the Court spells out a cause-and-effect relationship between a transaction breaching the principle of fiscal neutrality and its being *therefore* contrary to the purpose of the deduction rules of the Sixth Directive. That tends to suggest that a transaction that does not offend the principle of fiscal neutrality would not, at least on that account, be contrary to the purpose of the deduction rules of the Sixth Directive. That requires one to have in mind what are the limits of “the principle of fiscal neutrality”, to which I shall need to return.

24. At its paragraph 81 the Court continued:

“81. As regards the second element, whereby the transactions concerned must essentially seek to obtain a tax advantage, it must be borne in mind that it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal,

economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden...”.

25. In para 83 the Court reminded itself that the right of deduction of input tax provided for in Article 17 of the Sixth Directive “is an integral part of the VAT scheme and in principle may not be limited” although – para 84 – it only arose in the absence of fraud or abuse. The Court then rounded off on the topic in its paras 85 and 86 as follows:

“85. Accordingly, the answer to be given to the second question must be that the Sixth Directive must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice.”

86. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.”

26. Throughout that sequence there is, in the judgment of the Court, no reference to nco other than the two mentions to which I have referred, nor is any equivalent forms of words used in that sequence. Exempt supplies, as I have mentioned, made up so large a proportion of CML’s and CARC’s respective businesses that, in general, as I have mentioned, there was virtually no input tax recovery. When either needed goods for the purposes of its business it thus could expect, if it bought the goods, to suffer an input tax which would, to all intents and purposes, be wholly irrecoverable. If, instead of buying the goods, it chose to take a lease of them then it could expect to pay irrecoverable VAT on each succeeding payment of the agreed rentals as they fell due. Mrs Hall accepts that CML and CARC and, indeed, the Churchill Group, had that choice open to them – a supply to it of goods by way of a purchase of them or a supply of a service by way of a leasing to them of those goods. The lease alternative, of course, may be said, in comparison with a purchase, to effect, in a loose sense, a deferral of the input tax to the extent that, rather than its being paid in full at the outset, it would be paid, little by little, as the rental periods occurred. In a correspondingly loose sense, the lease alternative may be said usually to be likely to increase the aggregate of input tax paid as (even if the VAT rate had not increased over the relevant period) the aggregate of all rentals, if at commercial levels, would be likely to exceed the purchase price and hence the VAT paid by reference to that aggregate would be likely to be greater than had the tax been paid on the purchase price at the outset. Even so, the deferral available to tax exempt traders by way of a leasing rather than a purchase of goods can not inaccurately be spoken of, especially where the rentals are uncommercially low, as being a tax advantage in the sense of being an advantage to the consumer that relates to VAT. That, I apprehend, is one form of

tax advantage which Weald had in mind when it conceded that the sole aim of the scheme was the obtaining of a tax advantage.

27. Mrs Hall accepted as a consequence of *Halifax* that a transaction is not to be denied its ordinary fiscal consequence merely because its essential aim was to obtain a tax advantage. To that extent an exempt trader's choice of a leasing rather than a purchase could be expected, even when his essential aim was to obtain a tax advantage, to lead to the tax advantage of a deferral. I leave aside that in its paragraph 109 the Tribunal recorded HMRC having submitted below that the deferral by the Churchill VAT group, an exempt trader, of the *immediate* burden of VAT was contrary to the purpose of the Sixth Directive and our domestic legislation, a submission not repeated before me and which, if right, which it is not, could have made the scheme abusive even if made with an outside third party at full market rentals so long as its essential aim was to obtain that deferral. But, in a submission at the very core of her argument, Mrs Hall said that in such circumstances such advantage would accrue to the tax exempt participant only if the surrounding dealings of which the lease of goods was part represented *normal commercial operations*. If that was not the case, she argued, then the trader would not be so much using as rather abusing the provisions of the Sixth Directive and that, as *Halifax* made clear, was not open to the trader. It was, said Mrs Hall, a monumental error of law on the Tribunal's part, first, not to have recognised the crucial importance of whether or not the context was one of nco, and, secondly, to have failed to have seen that that consideration had to be taken into account in determining whether there was abusive practice.
28. Mr Conlon raised the question of whether the issue of "normal commercial operations" had been raised to such an effect before the Tribunal; his view was that it had not. Mrs Hall, though, drew attention to a passage in the written further submissions of HMRC before the Tribunal which dealt with the *Halifax* case and in which it had been asserted that in the *Halifax* case the ECJ had stated in terms that community law could not be relied upon for abusive ends, including "transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by community law", a reference, of course, to *Halifax's* para 69 - at para 17 supra. It is, though, to be noted that the argument was being raised by HMRC at the Tribunal in response to Weald's submission that it had not been demonstrated that the very broad "abuse of rights" argument available in community law in general applied, in particular, to VAT. However, in my view, argument by reference to nco was sufficiently raised below for HMRC to be entitled to raise it before me and, accordingly, I shall have to deal with it but, equally, I need, in fairness, to bear in mind that, before the Tribunal, the argument was not given the commanding role which it has now acquired. It is against that background that, in the light of Mrs Hall's reliance upon nco, the HMRC's submission, I think, becomes this: where one is speaking of a series of transactions which, on their face, appear to confer a tax advantage by way of deductibility of input tax and where the accrual of that tax advantage is admittedly the essential aim of the series, then the grant of that tax advantage has to be taken to be abusive, as contrary to the purpose of the Sixth Directive, even if the only further proven ingredient is that the series of transactions between its parties was not in the "context of their normal commercial operations". At extreme points in her

argument Mrs Hall, whilst accepting that exempt traders could use leases of goods, firstly argued that they could only expect the tax advantages of that course if the leases were nco. Later she argued that it was abusive for parties to aspire to the fiscal advantages of a transaction when not bearing the actual commercial risks attendant upon it. I find no warrant for either proposition. But such is the importance attributed to nco in Mrs Hall's argument that I see no way in which HMRC's submissions can stop short of how I have put them, namely, put another way, that when the essential aim falls within the latter part – the second sentence - of para 86 of *Halifax* the transaction has, without need for further inquiry, to be regarded as falling also within the earlier part – the first sentence - of para 86 if it is not nco. As I have understood HMRC's argument, then, given that the scheme was not nco and given that its essential aim was the obtaining of a tax advantage, the scheme either fell within the first sentence of para 86 of *Halifax* (that combination thus denying the accrual of the tax advantage) or (I am not sure that this was said, but it may be a logical alternative) the scheme was within a further category outside paragraph 86 but which nonetheless had to be regarded as abusive practice. I doubt that such a further category is intended to be capable of existence; the word “necessary” in paragraph 86 of *Halifax* coupled with “only” in the first sentence of paragraph 74 seem to mark an intention that paragraph 86 should represent an exclusive definition or a description of the necessary components of abusive practice in all its possible forms. But, given the essential aim of the scheme, does its not being nco, without more, brand it as so abusive that the tax advantage which it prima facie confers has to be denied? It has not been argued that anything but *Halifax* goes that far but does *Halifax* go that far?

29. There are a number of features which suggest it does not. First of all, had such importance been intended to repose in either or both of the two references to nco, one might have expected some explanation, however inescapably broad, about what the Court meant by nco. In a sense any transaction of a kind which a trader has not done before is not within his nco even if it is of a kind which is common enough in the trade in which he engages. Is his first venture into such a transaction to be taken not to be nco whereas his succeeding ones might be? Or are nco to be judged not by an individual trader's practices but by industry-wide practices, whether or not within the individual trader's normal practice? Is a court to judge what are nco or are not by reference to national practices or only to Community-wide practices and, if the latter, is comparative evidence to be adduced? On whom does the onus lie - does the taxpayer have to prove that what was done was within his (or someone's) nco or is it for the authority to disprove that? I recognise that in *Halifax* the Court was giving a judgment not writing a statute, still less writing a statute in the detailed, even fulsome, manner of a United Kingdom taxing statute but the ECJ was plainly intending to give guidance and given that the Advocate General in *Halifax* at his paragraph 64 recognised the need for a “more detailed doctrine or test to determine whether or not abuse occurs” it would be unlikely, if consideration of nco was to be as crucial as HMRC suggest, that so novel and broad a test would have been left by the Court without some further explanation. No explanation of any such kind is to be found. Even had the Court been willing to leave what was or was not nco to the national courts, had it intended, in every case where an “essential aim” fell foul of the latter part of its para 86, that a grant of a tax advantage would, without more, be taken to be contrary to the provisions identified in the first part of the paragraph if

arising out of a transaction which was not within the taxpayer's nco it would have been very simple to say so. Nothing such was said.

30. Next, by its use, already noted, of the word “necessary” in its paragraph 86, coupled with the word “only” in its paragraph 74, the ECJ would seem to be intending to give in its para 86 an exhaustive definition of what has to be found if abusive practice of any relevant kind can be said to exist. It is a definition that includes no direct reference to nco yet, as I have mentioned, such reference would, had it been intended, have been simple to include.
31. I revert to the reference in *Halifax's* paragraph 80 supra to transactions and the grant of deductibility of input tax “contrary to the principle of fiscal neutrality”. The ECJ does little to help by failing to refer to some locus classicus as to that principle. I may be alone in finding references to it as varying in emphasis depending upon its context; sometimes it seems to direct one to the way in which VAT is intended to be passed on, by way of deductibility, supplier to supplier, until it is finally and irrecoverably borne by the ultimate consumer-recipient. Another aspect of the principle is that a person who, within the EU, provides services which are exempt for VAT purposes cannot recover the input tax attributable to those services – see *WHA Limited & Another v Revenue and Customs Commissioners* [2007] STC 1685 at paragraph 16. Sometimes the principle seems to refer to a sort of fiscal parity, as between one supplier and others, so that it can be said, so far as concerns VAT, that they are competing with one another on the mythical level playing field. Sometimes it may refer to the fact that VAT advantages open to one supplier using a particular mode of supply are to be of a kind neutral between suppliers in the sense that, whether or not other traders have sought to obtain the VAT advantages under consideration, it would at least be open to them to arrange their business so as to seek it. But, whatever is the full content of the principle, I fail to see that what is done here is contrary to it. Here the supplier of goods to Weald passes VAT on to Weald; Weald, as the Sixth Directive and domestic legislation requires, passes it on (rental payment by rental payment) to Suas and Suas correspondingly passes it on to CML or CARC who, as ultimate consumers, bear it irrecoverably as both the Sixth Directive and domestic legislation requires, sublease payment by sublease payment. The VAT payable on the rentals may be, indeed will have been, less in aggregate than it would have been had the leases and subleases been by way of wholly commercial arrangements at commercial rates (a point the consequences of which I shall come on to) but I fail to see that a mere difference in quantum can fairly be here identified as something contrary to principle. And the arrangement used in the scheme was, at least in theory, open to any trader who is in a commercial group or who can procure that he becomes so. I fail to find features in the scheme that can be said to be contrary to the principle of fiscal neutrality.
32. Next it is a familiar feature of VAT that its incidence should depend on features which are broadly “objective” in character – see the Advocate General in *Halifax* at his paragraphs 40, 52 and 83 - and that such incidence needs to be well foreseeable – the Advocate General's paragraphs 41 and 84 and the judgment of the Court in its paragraphs 56 and 57 where there is reference to supply being “without regard to the purpose or results of the transactions concerned” and that for the tax authorities:

“to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating the application of VAT by having regard, save in exceptional cases, to the objective character of the transaction in question.”

Against that background I would regard an inquiry into whether a series of transactions, as between particular parties, was within or without either “*their* normal commercial operations” – paragraph 80 of *Halifax* supra or “normal commercial operations” – paragraph 69 – as being of a subjective and unpredictable kind which would be inimical to the broad approach required by the Sixth Directive. Plainly the ECJ did not regard *every* inquiry as to intention as contrary to the objective of the common system of VAT as, in the same judgment, it sanctions inquiry into whether a taxpayer’s essential aim was to obtain a tax advantage but had it intended to create or to permit the creation of other exceptions, again, one might reasonably expect that to have been indicated or at least hinted at, especially given that nco can be seen to have been within the Court’s contemplations. No such indication or hint is to be found.

33. For these reasons I conclude that *Halifax* does not go as far as Mrs Hall argues that it does; where one is looking at a series of transactions the essential aim of which is to confer a tax advantage by way of the deductibility of input tax, it does not, in my judgment, suffice to brand the series as abusive simply to add and to prove that the series was not in the “context of their normal commercial operations”. Put another way, even when the essential aim is admitted and where the arrangements made are artificial, not at arm’s length commercially and devoid of commercial motive other than as to the attainment of the essential aim, the first part of the strict definition of abusive practice laid down in paragraph 86 supra of *Halifax* is not satisfied merely by pointing to the arrangements made having been not nco (whatever that may be) *unless* (as is the test whether or not the transactions are nco) in the circumstances, viewed as a whole, the grant of the tax advantage concerned would be contrary to the purposes of the Sixth Directive and the national legislation transposing it. Whether one regards the tax advantage here in issue as being simply a spreading of the VAT over a period as rentals or sublease rentals are paid or, as Mrs Hall would prefer to see it, as a composite made up of Weald having deducted 100% of its input tax when it made the purchase, of using Suas so as to avoid a Schedule 6 valuation and as mitigation of VAT by way of its being spread, as she put it, by “drip feeding over the life of the leases”, given that the VAT exigible upon the supply of the goods, upon their leasing by Weald and upon their subleasing to CML and CARC was all duly paid, I fail to see that the accrual of the tax advantages in issue would be contrary to the purpose of the relevant provisions of the Sixth Directive and of the national legislation transposing it.
34. As for it being right, when judging whether there is abusive practice or not, to stand back from individual transactions and look at the scheme as a whole, I rely upon paragraph 22 of *WHA* supra and it was in any event Mrs Hall’s argument that that was the correct approach.

35. *WHA* supra was concerned with an insurer who, despite providing services exempt for VAT purposes, sought to recover input tax attributable to those services – see paragraph 16. To the extent that the scheme there in issue had that effect, it was held to be contrary to the purposes of the Sixth Directive – see *WHA*, paragraph 17. *WHA* was, as I read it, a clarification of *Halifax* and an application of that case to the particular facts; I do not read *WHA* as departing from *Halifax* (it could not have done so) and I fail to see it as illustrating a principle that it must have been abusive of CML and CARC to have arranged to have “drip fed” their irrecoverable VAT or for them to have alighted upon a scheme that led to the drip feed (for want of the higher levels of leasing and subleasing rentals that could be expected in a truly commercial arrangement) being at a lower level than would otherwise have been the case.
36. HMRC relied upon the recent decision of 3<sup>rd</sup> May 2007 of the Tribunal under Sir Stephen Oliver QC in *Lime Avenue Sales and Services Limited; Benenden School Trust*. There, applying *Halifax* supra to the facts of the case, the Tribunal held that the transactions there in issue violated the principle of fiscal neutrality – paragraph 63. The Tribunal there felt able to apply *Halifax* to the facts of their case without regard to the reasoning of the Tribunal in the *Weald* case as now before me – paragraph 91. The converse is also true; as I have said, I have not been able to discern any breach, on the facts of the case before me, of the principle of fiscal neutrality and the facts in *Weald* are so different from those in *Benenden* that it is not, as it seems to me, necessary to go to *Benenden* in any detail. Mr Conlon argued that *Benenden* was decided per incuriam; I say only that I would be a little uneasy at the apparent equiparation in *Benenden*’s paragraph 59 between a transaction not being a “normal commercial operation” (*Benenden* mistakenly says “normal commercial transactions”) and a transaction being “a completely new departure”. I am far from sure that a step which is a “completely new departure” for a party is thus ipso facto not an nco; if that were so there would, as I have referred to in paragraph 29, be improbable consequences depending on whether a party, although taking a step conventional in the trade, was taking it for the first or a succeeding time.
37. HMRC’s argument before me was that the pivotal question in the case was whether or not the scheme as I have described it was nco when viewed as a whole. The Tribunal, it was argued, had failed to address that question and that failure, as I have mentioned, represented, it was said, a monumental and fatal error of law. I accept that the Tribunal did not deal with that question but I do not conclude that their decision would have been any more favourable to HMRC had they done so than it was. The Tribunal would have been entitled, in my judgment, to have regarded the scheme, as I do, namely as exempt traders acquiring goods, as they were entitled to do, by way of lease rather than purchase and hence bearing VAT referable to the rentals and by instalments, as the legislation provides, which VAT they paid. I accept that the transactions (not, in my view, offending the principle of fiscal neutrality or of any other relevant principle or purpose of the Sixth Directive or of our relevant domestic provisions identified to me) were, to use Mrs Hall’s phrases, riddled with artifice, commercially hollow and not nco. *WHA* emphasises that regard has especially to be paid to elements that are artificial. Even so, such facts of themselves do not, in my judgment, justify the consequences that a grant of the tax advantage prima facie gained would be

contrary to the purposes of the Sixth Directive but rather point more to the limited reach of our domestic Schedule 6 as to who are connected persons and to HMRC's failure to have argued that it was (as I shall come on to) the interposition of Suas coupled with the lowness of the rentals which (if there was any) was the real abuse. I am far from saying that a combination of the essential aim described in the second part of paragraph 86 of *Halifax* coupled with the transaction in question not being an nco will never require the transaction concerned to be regarded as abusive and as such that the accrual of a tax advantage from it would be contrary to the purpose of the Sixth Directive and of national legislation transposing it. There will, no doubt, be cases where that combination, with some added factors such as a breach of the principle of fiscal neutrality, will suffice. But here, on the case *as put* by HMRC, there is no added factor. One cannot add, for example, that here there is artifice to that here there is activity which is not nco; the uncommerciality and the artifice are one and the same.

### **Redefinition**

38. It follows that I do not see the nco argument as opening a door, one which the Tribunal had failed to spot, to a "redefinition" of the scheme. Indeed, even had redefinition been available to HMRC, I would not have regarded the one it suggested – that matters should be regarded as if the goods had been sold by the outside third party supplier direct to CARC and CML at invoice price, as being any less artificial than the scheme itself. Had I been obliged to "redefine" the transactions within the scheme I would have done so by declaring that there should be a reassessment for VAT to yield such VAT as would have been payable had fully commercial open market rents been payable as between Weald and Suas and Suas and CML or CARC. Redefinition is not intended to open the door to penalty and is to do no more than undo the advantage which should never have been gained. If, contrary to my conclusion generally, there is to be a redefinition, the one I have suggested is, as it seems to me, not penal and is no more than is proportionate and is thus more fitting than the HMRC's suggestion which sweeps everything aside and purports to start afresh as if with transactions that were never made and never intended to be made.

### **Over-low rentals**

39. Mr Conlon deploys an argument that impressed the Tribunal, which was that if there was any abuse in the scheme it was only as to the over-low rentals paid, rentals by which the payable and paid VAT was measured. Although there was no evidence given below as to what open market values would have been (still less open market values for rentals on the highly unusual terms including, for example, terms which permitted termination of the leases or underleases without penalty) Mr Conlon was prepared to let me *assume* that the rentals were, indeed, too low. That being so, paragraph 1 of Schedule 6 of the 1994 Act would, but for the interposition of Suas, have entitled HMRC, within three years from the relevant supply, to direct the values on which VAT was payable to be whatever were the open market values at the time. If (the taxpayer's other arguments failing, which was resisted) there was any abusive practice by the taxpayer, it lay and lay only, says Mr Conlon, in the combination of the lowness of the rentals and the denial to HMRC of a Schedule 6 readjustment because of the interposition of Suas. In such a case, continued Mr Conlon, any permissible redefinition would

have needed to do no more and should have done no more than to adjust to higher rental levels and hence higher payable VAT as if those higher rentals had been payable all along. But HMRC – see the Tribunal’s paragraph 146 – had not contended below that the level of rents was itself an abuse or even that that, coupled with the intervention of Suas, was abusive – see paragraph 144 of the Tribunal. “Any abuse” said the Tribunal “arose not from the leases themselves but from the level of the rentals under the leases and from the arrangements to avoid directions under Schedule 6, paragraph 1” – Tribunal’s paragraph 147. However, that, said the Tribunal – its paragraph 147 – was not how HMRC had chosen to argue the case. In my judgment if, as I have held, the nco argument fails, there would have been, as I see it, a strong case that it was the lowness of the rentals coupled with the interposition of Suas that would, if anything, have been an abusive practice within *Halifax* terms. The fact that, at any rate for three years, there may have been an ability in HMRC, based on a more obvious and less radical readjustment than the one which HMRC in fact sought, to have the highly artificial and uncommercial scheme “redefined” in a way that would have led VAT to be payable at much the same levels as would have been appropriate had thoroughly commercial arrangements been made at arm’s length with outside parties if anything weakens the case for a comprehensive sweeping aside of the features of the scheme which the nco argument was intended to lead to.

### **The Tribunal’s summary**

40. If I am right in holding that the nco argument fails then HMRC’s appeal is, in my judgment, left without any real substance. That central argument, for the reasons I have given, does fail and on the argument I have heard on the point I would thus dismiss the appeal. As I indicated I would do in my paragraph 7, I had intended to go on to deal, in such detail as would have become necessary, with the decision of the Tribunal. But, having already included the extensive reference to facts incontrovertibly found by the Tribunal and to its important conclusion in its paragraph 147 supra as to what, if anything, was abusive about the scheme (a decision which, had I been obliged to come to a view upon, I would have shared) coupled with HMRC’s inability now to rely upon that argument, I see no need, beyond looking at the Tribunal’s summary of its own conclusions, further to lengthen this judgment with a recital of just what the Tribunal did or did not hold. In its paragraph 169 (bis), under the heading “Summary of conclusions”, the Tribunal said as follows:

“We summarise our conclusions as follows:

- (1) It is a purpose of the Directive that a trader may not artificially avoid the burden of input tax attributable to exempt supplies (paragraph 136);
- (2) Nothing in the Directive expressly or by implication precludes a trader from leasing an asset to be used for exempt activities so spreading the burden of irrecoverable input tax (paragraph 136);
- (3) The question whether tax advantages accrued, the grant of which was contrary to the purpose of the

Directive, must be considered at the time when the tax advantages accrued considering the result of the transactions as a whole including whether the deferral was artificial (paragraphs 137-139);

- (4) It has not been shown that the transactions on which Weald's input tax claimed were based resulted in tax advantages accruing either to Weald or to the Churchill VAT group which were contrary to the provisions of the Directive and the UK legislation implementing it (paragraph 146);
- (5) The aim of the transactions was to defer the VAT borne by the group; none of the explanations advanced have the effect that it was shown that the obtaining of tax advantages was not the essential aim (paragraphs 150-151);
- (6) Any redefinition would depend on the ambit of the abuse identified. If we had concluded that the level of rentals and the introduction of Suas was abusive, redefinition would have been required to re-establish (or rather establish) the position which would have prevailed if Weald had leased the assets directly to CML and CARC at open market value so making Weald liable to higher output tax than that declared (paragraph 152);
- (7) Redefinition must go no further than is necessary and must not lead to a penalty (paragraph 153);
- (8) Redefinition can only take effect under UK legislation and the powers of the Tribunal are confined to the periods of assessment under appeal and to Weald (paragraph 154);
- (9) In law there were no assessments for periods 04/02 to 10/02 because no tax was shown as due (paragraph 155);
- (10) Redefinition in this case would involve output tax underdeclared rather than input tax overdeclared (paragraph 156);
- (11) Here the assessments were raised under section 73(2) to recover amounts of tax paid or credited to Weald; any underdeclaration of output tax had the effect that too much tax was paid or credited, so that *Ridgeons Bulk* which prevents Customs supporting an assessment under section 73(1) by reference to section 73(2) would not apply (paragraph 169).

(12) The result is that the appeal is allowed.”

41. As to that, subparagraph (1) invites debate; it goes too far in rendering artifice as of itself abusive and, as to subparagraph (11), I need say no more as that was not investigated at all before me, but, subject to that, I see no material error of law in that summary, nor could it be said that there was anything perverse about the Tribunal’s findings of fact, least of all in the Tribunal’s paragraph 58 as to the purpose of the interposition of Suas, which I have accepted. In any event, most findings of fact went in HMRC’s favour. Indeed, the only real errors of law, as I have understood it, which HMRC alleged were to be found in the Tribunal’s decision are those related to an alleged failure to inquire into, to see the significance of and to conclude as HMRC said was appropriate as to the transactions in the scheme being outside the parties’ nco. Even though they were – see my paragraphs 15 and 16 above - HMRC has in my judgment not done enough to prove abusive practice on the taxpayer’s part within the first sentence of paragraph 86 of *Halifax supra*.
42. Lest the matter should go further I should indicate that such were the features of the scheme, not all of which I touched upon in paragraphs 8 – 13 above, that if the Tribunal had addressed the nco issue (and I am far from saying that the fault was entirely theirs that they did not) they could only have concluded that the scheme was not within that description and that I have regarded myself as having sufficient clear evidence on the issue to have so concluded for myself without need for any remission to the Tribunal.
43. For the reasons I have given, I dismiss the appeal.