08 March 2016

Case Alert

HMRC v The Open University

Summary

For many years, the BBC produced and broadcast educational programmes on behalf of the Open University and charged VAT on the provision of those services.

The Open University submitted a claim to HMRC to recover the VAT that it considered had been incorrectly charged – a sum in excess of £21 million. HMRC rejected that claim and the Open University appealed that decision to the First-tier Tax Tribunal which found in its favour. HMRC then appealed to the Upper Tribunal which also found for the Open University. HMRC appealed to the Court of Appeal.

The question to resolve was whether the BBC's services to the Open University should have been exempt from VAT.

Court of Appeal

In its unanimous judgment, the Court of Appeal has dismissed HMRC's appeal from the Upper Tribunal.

In essence, the Open University (OU) argued that the United Kingdom had failed to correctly implement the provisions of the VAT Directive. It argued that the BBC was a body governed by public law and that its charter had clear aims of an educational nature such that its provision of production and broadcasting services were services that were closely linked to education and should have been exempt from VAT. In such circumstances, the OU contended that, historically, VAT should not have been charged to it by the BBC and that it was entitled to seek a refund of the VAT paid in error.

Alternatively, the OU contended that if the BBC was not a body governed by public law, it was, nevertheless a body with similar objects. Although UK VAT law does not expressly define the BBC as such a body, the OU contended that the UK had, in fact, defined it but, even if that was not the case, it argued that it could rely on the direct effect of the VAT Directive and take the benefit of the VAT exemption.

The Court of Appeal held that the BBC was not a body governed by public law. It was not an organ of the state. However, it was a body with similar educational objects as a public body and, as a result, its supplies of production and broadcasting services to the OU were services that were closely related to the OU's supply of education. Whilst the UK had not expressly defined the BBC as a body with similar objects, through the BBC charter and license and the funding from Parliament the UK had de-facto recognised the BBC. On the direct effect point, the Court made it clear that the OU and the BBC could rely on direct effect as the UK had clearly failed to correctly implement the VAT Directive in UK law.

Comment – It seems clear that the UK's law on 'eligible body' status is defective and needs to be amended to bring it in line with EU law. The VAT Directive gives member states discretion to recognise certain bodies as having similar objects to public bodies. However, that discretion has to be exercised in a way that is compliant with EU law and in a way that is consistent with the objectives of the Directive. The Directive requires Member States to recognise bodies with similar educational aims as bodies governed by public law but UK law seemingly fails to do this.

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