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Indirect Tax Update

'Establishment' v 'fixed establishment' – it matters!

Summary

The First-tier Tax Tribunal (FTT) has issued a couple of important decisions this week.

The first concerns the question of 'place of supply' and whether services provided by two companies took place outside or within the United Kingdom.

The second concerns a question of who the customer was in an insurance agency case. Was it the insurer (based in Gibraltar) or was it the insured person. On the evidence, the Tribunal concluded that under the terms of the contract, the customer was the insurer.

Finally this week, HMRC has announced that in September 2017 it is to extend the DOTAS (disclosure of tax avoidance schemes) regime to VAT and all other indirect taxes. Promoters of such schemes will be required to notify HMRC of their existence and use or be subject to hefty financial penalties.

Multimedia Computing Ltd / Deed Poll Services Ltd

The First-tier Tax Tribunal has issued an interesting decision this week. The case concerned the application of the 'place of supply' rules. These are the rules that determine where, for VAT purposes, a supply of goods or services takes place. For supplies that are determined as taking place within the United Kingdom, VAT is due in the United Kingdom unless the supply in question benefits from either an exemption from VAT or zero-rating.

In the case in question, a structure was put in place whereby Multimedia Computing Ltd (MCL) (a UK company) provided services to Deed Poll Services Ltd (DPSL) (a Jersey company) which then provided services to UK consumers (private individuals). The companies asserted that, under the place of supply rules, MCL's supplies were business to business (B2B) supplies which took place where the recipient (DPSL) was established (ie Jersey) and that DPSL's supplies to UK consumers also took place in Jersey. In both cases, therefore, the companies contended that their respective supplies were outside the scope of UK VAT. DPSL was an off-the-shelf Jersey company and to give substance to its claim of being established in Jersey, a UK person commuted weekly to St Helier to undertake various tasks.

Unfortunately, on the evidence before it, the Tribunal concluded that, whilst there was no doubt that DPSL was established in Jersey, it was clear that it also had a fixed establishment in the United Kingdom. DPSL had outsourced most of the clerical and administrative functions to MCL (based in the UK). The judge concluded that, in essence, MCL was an 'auxiliary organ' of DPSL. As such, he was satisfied that all of the resources necessary for the making of supplies of deed poll services were located in the UK and that, at all material times, DPSL therefore had a fixed establishment in the UK from which the supplies were made.

Comment – the case demonstrates the importance of getting the place of supply right. If, as here, there are sufficient human and technical resources at a location to enable supplies of goods or services to be made from that location, the tax authorities and courts may regard that location as a fixed establishment of the business. It is not sufficient merely to consider where the business is established. Each of the companies in this case were found to be making supplies in the UK and each were assessed for circa £500,000 VAT plus a substantial penalty.

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Unicom Insurance Services Ltd

Who was the customer?

The issue in this case was who was the appellant's customer. Was it the person purchasing insurance (the insurance customers) or was it the person supplying the insurance (the insurer)? From a VAT perspective, resolution of that question was crucial. If the appellant was supplying the insurance customers, that would have been an exempt supply for VAT purposes and the appellant would not have been entitled to reclaim input VAT incurred. However, if the customer was the insurer, as the insurer was based in Gibraltar, the services would still have been exempt from VAT but the appellant would have been entitled to reclaim any associated input VAT.

The appellant carries on business in the UK as an insurance agent. Under the terms of a service agreement with the insurer, it was clear that the contract for insurance was between the insurer and the insurance customers with the appellant merely acting as an insurance agent taking a commission. HMRC tried to argue that, on the evidence, the appellant was acting as the agent of the insurance customers. The appellant collected the gross premiums from the insurance customers, retained 25% as commission and passed the remaining 75% to the insurer. HMRC considered that the 25% it retained was consideration for the appellant's supply of intermediary services to the insurance customer. This was not accepted by the Tribunal. The contract between the appellant and the insurer was key and there was no contract to provide services formed between the appellant and the insurance customers. – The appellant's appeal was allowed.

Comment

Once again, we see the Tribunal focus on the importance of the contractual arrangements. Here, HMRC argued that, despite the contract between the appellant and the insurer, the appellant's services were, in fact, supplied to the customer.

The Tribunal did not accept that analysis and allowed the appeal. The services were supplied to the insurer.

HMRC extending DOTAS to indirect tax

Disclosure of VAT avoidance schemes

HMRC has announced that it is to extend the existing direct tax DOTAS scheme to VAT and all other indirect taxes. From 1 September 2017, promoters of VAT avoidance schemes will be required to notify such arrangements.

According to HMRC, legislation is to be introduced in Finance Bill 2017 to set out the requirements of promoters of indirect tax avoidance arrangements to disclose their schemes to HMRC. The legislation will provide that, once a scheme is disclosed to HMRC, they must issue a scheme reference number to the promoter, who in turn must pass this number on to all users of the avoidance scheme. Scheme users must inform HMRC when they use a disclosed scheme.

If there is any dispute concerning whether or not a scheme should be disclosed, HMRC may apply to the tax tribunal for an order to say the arrangements are disclosable or must be treated as if they were. HMRC may apply to the tribunal for penalties of up to £600 per day for a failure to disclose arrangements or provide certain information. Where a promoter fails to disclose arrangements or proposals when they should have been disclosed, the tribunal may impose a penalty of up to £1 million if the penalty would otherwise appear inappropriately low.

The types of tax arrangement which will have to be disclosed to HMRC, the time limits for making disclosures and the form in which they should be made will be set out in regulations.

Comment

According to HMRC, VAT avoidance schemes cost the exchequer substantial sums of money each year.

These new measures are aimed at promoters of such schemes and new regulations to be published in the new year will confirm the finer details.

This is another tool in HMRC's anti avoidance armoury.

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Contact

Stuart Brodie	Scotland	stuart.brodie@uk.gt.com	(0)14 1223 0683
Karen Robb	London & South East	karen.robb@uk.gt.com	(0)20 772 82556
Vinny McCullagh	London & South East	Vinny.mccullagh@uk.gt.com	(0)20 7383 5100