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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update.

Presently, it seems that all eyes are on events connected to 'Brexit' and the UK's Parliamentary issues surrounding the planned exit from the European Union. The Supreme Court has issued its unanimous judgment on the Prime Minister's suspension of Parliament and it seems that Parliament will reconvene but with only weeks to go before 31 October, there is still no real certainty on what exactly will happen. Will the UK leave the EU on 31 October or will Parliament exert pressure to seek a further extension of Article 50?

Hopefully, we will have more to report in the coming weeks.

The world of Indirect Tax has been relatively quiet over the summer months with the Courts on judicial vacation. The Court of Justice is, however, now back in full swing and this week's ITU covers an interesting case relating to the VAT exemption for 'medical care'.

The First-tier Tax Tribunal has also issued a number of interesting decisions recently and we look at one case relating to the sale of a property where the taxpayer argued that the property was transferred as a going concern (TOGC) and that, as a consequence, no VAT was due on the sale. The Tribunal disagreed and dismissed the appeal considering that the conditions for a TOGC were absent.

The First-tier Tax Tribunal has also issued its decision in a case involving American Express – a case involving the recovery of £57 million of input tax. The issue in the case was, essentially, a question of determining who, in fact, was the recipient of a supply of services. HMRC contended that the recipient of the service was an EU based entity which precluded the recovery of the input VAT. However, the Tribunal found that the recipient of the supply was actually a US based entity with the result that, under special rules, American Express was entitled to reclaim the input VAT in question. Given the vast sums involved it is likely that HMRC will seek leave to appeal this decision to the Upper Tribunal.

Court of Justice – Judgment – Wolf-Henning Peters

VAT – exemption for supplies of medical care

The EU VAT Directive stipulates that, as they are or are deemed to be in the public interest, certain supplies of medical care must be exempt from VAT. In particular, supplies of medical care provided by certain 'qualifying' institutions (such as hospitals and clinics etc) or by certain 'qualified' individuals (such as medical practitioners and dentists etc) must be exempt from VAT.

In this case, the taxpayer is a medical specialist in clinical chemistry and laboratory diagnostics who provides medical care services to a laboratory company which, in turn, provides laboratory services to doctors working in medical practice, rehab clinics and public health services and hospitals.

Mr Peters considered that his services, which included the provision of evaluation services aimed at specific laboratory physician diagnoses as well as medical assistance in transfusion medicine measures in specific scenarios were 'medical care' and should, thus, be exempt from VAT.

The German tax authority took a different view. German VAT law stipulates that for the VAT exemption to apply, the service must be provided within a framework of a confidential relationship between the patient receiving care and the person providing the care. It considered that, as the taxpayer had no relationship with the person receiving medical care (but was merely providing his services to a laboratory), his services could not be classed as 'medical care' and could not qualify for VAT exemption. Accordingly, the tax authority raised tax assessments against Mr Peters and he appealed through the German courts. The Federal Finance Court considered that it required the assistance of the Court of Justice and referred the case for a preliminary ruling.

The Court of Justice has ruled that there is no provision in the VAT Directive that requires there to be a direct relationship with the person receiving medical care. The services provided by Mr Peters are capable of falling within the VAT exemption if two conditions are met. Firstly, the service provided must constitute 'medical care' (i.e. they must be services which have, as their aim, the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders) and, secondly the service must be carried out in the exercise of the medical and para medical professions as defined by the EU Member State concerned. Both of these conditions were met in Mr Peter's case so the condition imposed by German law that there had to be a 'confidential' relationship between the practitioner and the patient was contrary to EU law. Accordingly, the services provided by Mr Peters qualified for VAT exemption.

Comment – Whilst this case concerns the application of the VAT Directive in a German context, it does highlight the fact that VAT law develops over time. Here the Court of Justice was seemingly content that the services provided by Mr Peters were sufficiently connected to the diagnosis, treatment or cure of diseases or health disorders to qualify as 'medical care'. Equally, it seems that the Court was also content that in providing his services, Mr Peters was doing so in the exercise of a medical profession.

There are many instances where, in the UK, HMRC asserts that medical services do not qualify for VAT exemption. In light of this judgment, providers of medical care in the UK should review their VAT position

First-tier Tax Tribunal

General Distribution and Storage Ltd

When a taxpayer opts to tax a building (also known as electing to waive exemption) any subsequent supply of that building is, generally, liable to VAT at the standard rate. However, in certain cases, where the property is sold as part of a transfer of a business as a going concern (TOGC), provided that certain conditions are met, VAT law in the UK deems that the transfer of the property is outside the scope of VAT.

In this case, the taxpayer had opted to tax a building that it owned and it charged VAT on the rent payable by its tenant. However, the company sold the building for £800,000 plus VAT of £160,000 but failed to account for the VAT to HMRC. The purchaser claimed the VAT charged as input VAT through its VAT return and when HMRC checked the claim it discovered that the vendor had not accounted for the VAT and raised an assessment.

The vendor claimed that the building had been sold as part of a TOGC and that, as a result, no VAT was actually due. However, the evidence before the Tribunal was that the purchaser had actually entered into a 'back-to-back' sale of the property to another party. Accordingly, the TOGC condition that the assets being transferred (here the property) must be used in the same kind of business by the purchaser as that previously carried on by the vendor was not met. Counsel for the taxpayer argued that the buying and selling of property was a 'property investment business' just as much as the leasing of property was a 'property investment business'. As such, Counsel contended that the Tribunal should not make an artificial distinction between the two. However, the Tribunal was not persuaded. Buying and selling property was not the 'same kind of business'. Accordingly, the taxpayer's appeal was dismissed.

Comment

There are a number of conditions set out in the VAT (Special Provisions) Order that must be met in order for the transfer of assets for consideration to be regarded as outside the scope of VAT.

One of the conditions is that the person buying the assets must intend to use them in carrying on the same kind of business. In this case, the purchaser had no intention of carrying on the letting business previously carried on by the vendor as it had already negotiated a back-to-back sale of the building to a different entity.

The Tribunal did not accept the contention that property letting and the buying and selling of property could be seen for VAT purposes as the same business activity and, as such, it dismissed the appeal

First-tier Tax Tribunal

American Express Services Europe Ltd (AESEL)

This case concerned the supply of payment services by AESEL in connection with the operation of the American Express debit and credit cards. There was no dispute that the service provided by AESEL was exempt from VAT. What was in dispute, however was the identity of the recipient of the service.

HMRC contended that the recipient of the service was a company within the American Express corporate group established in the EU whereas AESEL contended that the recipient was a company established in the United States. The Tribunal was required to consider the relevant contracts and evidence between the parties and determine which company had received the services.

Having examined the contracts and the economic reality, the Tribunal concluded that the payment services provided by AESEL were, in fact, supplied to the entity established in the United States. The difficulty in this case was that HMRC contended that the EU based entity received the supplies of payment services from AESEL on behalf of the USA entity and that, as a consequence, the service was not supplied to the USA entity. However, on the evidence, use of the term 'on behalf of' in the contract did not imply that the EU entity was an agent of the USA entity.

Having decided that the recipient of the service was the USA entity, the Tribunal allowed AESEL's appeal. The consequences of that decision are that AESEL is entitled to reclaim £57 million of input VAT incurred between 2010 and 2014. This is as a result of the VAT Specified Services Order which entitles businesses making exempt supplies to reclaim input VAT in relation to those supplies where it is the case (as here) that the recipient of the service is based outside the EU.

Comment

Under normal VAT rules, a person making exempt supplies of goods or services is precluded from reclaiming any input VAT that is attributable to the exempt business activity.

However, the VAT Specified Services Order provides an exception to that rule. The exception is intended to promote international trade and the export of services outside the European Union.

In cases where the recipient of an exempt supply is based outside the EU then a supplier established in the EU is entitled to reclaim input VAT incurred in the making of those supplies. In this case, the sum at stake was £57 million and, in light of that, it is expected that HMRC will seek leave to appeal the FTT's decision to the Upper Tribunal.

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