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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update. This week we look at a couple of Upper Tribunal judgments.

In the depths of winter it is probably apt to report on a case from the Upper Tribunal involving the operation of a ski slope. In Snow Factor Ltd v HMRC, the company operates an indoor ski resort where customers practice their skiing skills. There is an artificial ski slope and access to the slope is provided to customers via an indoor ski lift. Customers can walk to the top of the slope if they wish but the vast majority of customers use the ski lift.

The company claimed that the income it received from the sale of passes for the ski lift should be liable to VAT at the reduced rate of 5% as the supply it makes to customers is the 'transport of passengers by means of a cable suspended chair'. HMRC argued that the fee paid by the customer was for the rights to use the ski facilities. The First-tier Tax Tribunal agreed with HMRC and the company appealed to the Upper Tribunal.

Our second case this week looks at a penalty case. In Marlow Rowing Club (Marlow) v HMRC, HMRC had issued a penalty for what it considered was the incorrect issuing of a zero-rating certificate by the taxpayer.

The Club was constructing a new clubhouse and, after taking professional advice it considered that the construction work qualified for zero-rating. It issued a certificate to the main contractor but HMRC took the view that the certificate had been issued incorrectly and imposed a penalty of £279,000. The First-tier Tax Tribunal agreed with HMRC and Marlow appealed to the Upper Tribunal.

The Upper Tribunal considered that the First-tier Tax Tribunal had erred in law. The taxpayer had taken professional advice and had sought an opinion from Tax Counsel. All in all, the Tribunal was satisfied that Marlow had a reasonable excuse for issuing the certificate. The appeal was allowed.

Finally, this week, the First-tier Tax Tribunal has issued a decision relating to an appeal by an Import / Export company and its inability to provide sufficient proof of export to support zero-rating.

Upper Tribunal – Snow Factor Ltd

Whether the operation of a ski-lift was liable to the reduced VAT rate of 5%

In 2013, the UK decided that the reduced rate of VAT (currently 5%) should apply to the transportation of passengers by means of a cable suspended chair, bar, gondola or similar vehicle that was designed or adapted to carry not more than 9 passengers. The reduced rate of VAT was not, however, available if the transportation of passengers was to, from or within either a place of entertainment, recreation or amusement or a place of cultural, scientific, historical or similar interest if the transportation was supplied by the same person that provided the right of admission to that place.

In the Snow Factor Ltd case, HMRC took the view that the exception set out in the law meant that the company could not apply the reduced rate to the indoor ski lift. According to HMRC, the money paid by customers was not consideration for a supply of transport but was consideration for the overall right to use the ski facilities. As such, HMRC argued that the supply was, therefore, liable to UK VAT at the standard rate of 20%. The company appealed to the First-tier Tax Tribunal (FTT) which dismissed its appeal. The FTT considered that the company also supplied a right of admission to the ski slope (a place of entertainment) and, as such, the law precluded the application of the reduced rate in such circumstances.

Snow Factor appealed to the Upper Tribunal. It argued that the FTT had made an error of law when it decided that, in addition to the supply of the ski-lift pass, the appellant also supplied a right of admission. The company argued that the term 'supply of a right of admission' should be interpreted in line with VAT law. The term "supply" in a VAT context requires there to be something done for consideration and, on the facts of this case, as the company allowed free access to the facilities, it could not be said to also have supplied a right of admission.

The Upper Tribunal agreed with the company. For a supply to exist for VAT purposes, it is necessary to have something (either goods or services (or both)) given by the supplier in return for consideration. This is referred to as reciprocal performance – the supplier provides something to the customer and the customer provides consideration to the supplier. In the absence of such reciprocal performance, there is no supply for VAT purposes. The Upper Tribunal agreed that, as the company allowed free access to the ski slope, it did not 'supply' a right of admission also. Accordingly, the FTT had made an error of law and the Upper Tribunal allowed the appeal.

The company also argued that businesses operating outdoor ski resorts were being treated differently and that such treatment was a breach of the principle of fiscal neutrality. That principle states that the supply of the same or similar goods or services by different suppliers whoa re in competition with each other should not be treated differently for VAT purposes. The company argued that 'mountain' resorts were being treated differently.

As the issue of fiscal neutrality had not been argued before the FTT, the Upper Tribunal considered that on the limited facts, it was impossible to determine whether there was any real competition between the company and the 'mountain' resorts. Whilst there were many similarities between the appellant's supplies and those of the outdoor resorts, there were also significant differences. In light of that, the Upper Tribunal was not persuaded that the fiscal neutrality point had been sufficiently made out by the appellant. However, in light of the Tribunal's decision on the substantive issue, the fiscal neutrality point was of no consequence.

Comment – the Taxpayer won here because it satisfied the Upper Tribunal that it did not also supply a right of admission to customers. The vast majority of customers paid to use the ski-lift but they were entitled to make their own way to the top of the ski slope should they choose to do so. This would have involved some physical effort. Those paying for the ski-lift were, therefore, paying for transportation from the bottom of the slope to the top and there was no other right of admission for which consideration was paid.

Upper Tribunal

Marlow Rowing Club

UK VAT law provides zero-rating for certain works of construction. In many cases, the contractor will be responsible for determining whether the particular works qualify but, in others, it is the customer who makes that determination. In those cases, the customer is required to issue a certificate to the contractor.

In this case, the club was having a new clubhouse built and it issued a certificate to the contractor claiming zero-rating. HMRC took the view that the works did not qualify for zero-rating and, under the provisions of s62 of the VAT Act, issued a penalty to the club in the sum of £279,000 arguing that the zero-rating certificate had been issued incorrectly.

The Club had taken professional VAT advice in relation to the issue and had also sought an opinion from Tax Counsel. It considered that, in the circumstances, it had a reasonable excuse for giving the certificate incorrectly and, as such, it should not be subjected to the s64 penalty. The First-tier Tax Tribunal had dismissed the club's appeal on the basis that it did not consider that the club had a reasonable excuse.

The Upper Tribunal considered that the FTT was wrong. The particular area of VAT law was complex and, at the time the certificate was issued, the FTT had issued its decision in Longridge on Thames (a similar case concerning zero-rating of a new construction). The fact that the club had sought professional advice and an opinion from Tax Counsel coupled with the complexity of the law was sufficient to satisfy the Upper Tribunal that the club had acted reasonably and that it had a reasonable excuse for the issue of the incorrect certificate. – Appeal allowed.

Comment

As can be seen here, the issue of a zero-rating certificate cannot be taken lightly. S62 of the VAT Act gives HMRC power to issue penalty assessments if they consider that a certificate has been issue incorrectly.

The penalty amount is calculated by reference to how much VAT would have been chargeable had the incorrect certificate not been issued. Here it was £279,000.

What saved the club in this case was the fact that it had taken professional advice before making the decision to issue the certificate. The Upper Tribunal was also persuaded that the law with regard to zero-rating of construction works is a complex area of the law providing further mitigation in the circumstances.

First-tier Tax Tribunal – A & S Import & Export Trading Ltd

Whether the taxpayer had retained sufficient evidence of export

The VAT Act in the UK provides for the export of goods from the UK to be zero-rated. However, zero-rating is conditional on the supplier obtaining (and retaining) sufficient evidence of export.

In this case, the taxpayer purported to have exported certain goods to China. However, the company could not produce specific evidence in relation to certain shipments that met the requirements of paragraph 6.5 of Notice 703 (Exports). This paragraph requires exporters to provide details of the supplier, the consignor (if different from the supplier), the customer, the goods, the value of the goods, the destination of the goods and the mode of transport and route of movement of the exported goods.

The taxpayer provided some evidence of payments that had been received from customers but it was unable to provide any evidence which tied the payments to specific exports.

Having considered the evidence presented to it, the Tribunal confirmed that it did not meet the standard required and it dismissed the taxpayer's appeal. Whilst the evidence required by paragraph 6.5 of Notice 703 (which has the force of law) does not need to be contained within a single document, for the taxpayer to have succeeded he would have needed to provide all of the evidence to tie the payments received to the particular goods exported. This was not done and, in the circumstances, the Tribunal had no alternative but to dismiss the appeal. HMRC's assessment of £152,000 was upheld.

Comment

A timely reminder for exporters (if one was ever needed) to ensure that they obtain sufficient evidence that the goods in question have been exported from the UK.

Parts of Notice 703 have the force of law. In particular, the sections dealing with the provision of evidence of export.

The exact evidence to be provided will depend on the mode of export. For example, goods exported by ship will require either a sea-waybill, bill of lading or a certificate of shipment etc.

When the UK leaves the EU (after the transition period), the movement of goods to former Member States will constitute exports for VAT purposes and exporters will be expected to obtain and retain the evidence necessary to prove export.

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