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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update. This week we consider a couple of cases that have been decided at the First-tier Tax Tribunal (FTT) and we look at a long-running issue that has, finally, been settled in the High Court.

The first decision of the FTT relates to the case of Virgin Media Ltd and Virgin Media Payments Ltd and is yet another case relating to whether payments made by customers falls to be treated as a consideration for an exempt supply of financial services. The case has been running for many years and has been stayed behind other litigation. In essence, the case was concerned with whether a charge made to customers who chose not to pay for their media services by direct debit was consideration for an exempt supply of financial services.

The FTT comprehensively dismissed Virgin's appeal. Agreeing with HMRC, the Tribunal was not persuaded by the taxpayer's arguments that the charge was for a financial service.

Under the terms of an unsigned management services agreement a company provided management services to a subsidiary. HMRC took the view that as the person providing the services was a Director of both the holding company and the subsidiary the taxpayer company did not make any taxable supplies and should not have been registered for VAT. In addition, it argued that VAT incurred by the Holding company on property costs could not be reclaimed as the tax invoices were in the name of the subsidiary company. HMRC disallowed the input VAT claimed and also imposed a 'careless inaccuracy' penalty. The taxpayer appealed.

Finally, in a Group Litigation Order (GLO) case the High Court has ruled that there is no legally enforceable right to require a VAT invoice, even where a supply was agreed to be taxable. In this case, Royal Mail had treated certain supplies of postal services as exempt from VAT only to find that they should have been liable to VAT at the standard rate. Certain taxpayers had submitted claims to recover any input VAT included in the price that they had paid for those services. These claims had failed at the Tribunal as they did not possess a VAT invoice from Royal Mail. This case was an attempt by the GLO members to force Royal Mail to issue a VAT invoice.

First-tier Tax Tribunal – Virgin Media Ltd and Virgin Media Payments Ltd

Whether a supply was a 'transaction concerning payments'

Like many cases before it (Bookit, NEC, DPAS Axa Denplan et al), this case concerned a charge made by a business to its customers which was purported to be consideration for a supply of financial services.

Article 135(1)(d) exempts from VAT transactions concerning payments and Virgin claimed that the charge to customers paying for media services other than by way of a direct debit was such a service. HMRC did not agree arguing that the service was liable to VAT at the standard rate.

Virgin Media Ltd (VML) is a well known supplier of media and other services. Customers contract with VML for those services. Virgin Media Payments Ltd (VMPL) was established to provide payment handling services (ie to put in place the arrangements for customers to pay for media services supplied by VML). For customers that did not pay for media services by direct debit, an additional charge was imposed by VMPL and the appeal concerns the VAT liability of those payments.

In a lengthy and complex decision, the FTT has dismissed Virgin's appeal. In essence, the Tribunal was required to resolve a number of questions, the most important of which was whether or not there was, in fact, a separate supply of services between, on the one hand, Virgin Media Ltd and its customer (of the Media services) and, on the other, Virgin Media Payments Ltd and the customer (of payment handling services). According to the FTT, the terms and conditions imposed by Virgin clearly set out that two separate payments were required to be made. However, it concluded that this did not mean that there was a separate supply of services. The customer required and contracted for media services and had little, if any, choice but to pay the additional fee if it decided to pay other than by way of direct debit. In practice, however, the customer simply received a single supply of media services so that the additional charge was merely additional consideration for that supply.

This finding is on 'all-fours' with the Court of Justice judgment from 2010 in the case of Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd). The FTT considered that it was bound by that judgment. Whilst it accepted that every transaction must normally be regarded as distinct and independent and that a single supply from an economic point of view should not be artificially split, it agreed that several formally distinct services, which could be supplied separately and thus give rise in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent. Whilst both Virgin Media Ltd and Virgin Media Payments Ltd are separate legal entities, they are both members of the same UK VAT Group. As such, even if the FTT had found that there were separate supplies, it agreed with HMRC that, in the context of a VAT group all supplies are deemed to be made by the VAT group as an independent single taxable person.

As an alternative argument, HMRC alleged that Virgin's operation of the payment handling service by VMPL was an abuse of rights and that the principles established in the 'Halifax' case should apply. In other words, HMRC considered that the arrangements had been put in place to garner a tax advantage for the Virgin group which, if the Tribunal agreed, would mean that the transactions ought to be redefined. The Tribunal was not convinced by this line of argument. Based on its detailed findings of fact, the FTT concluded that it was not unreasonable for Virgin Media group to have put the income receipts into one part of the organisation and the payment collection facility into another. That, of itself, was not 'abusive' in a 'Halifax' sense and had not been done with a view to securing a tax advantage.

Comment – the case has taken many years to resolve – mainly due to various stays to allow similar litigation to be concluded in other similar cases. Unfortunately for VML, those other cases have ended in defeat for the taxpayers. The FTT concluded that the earlier Court of Justice judgment in Everything Elsewhere was fatal to Virgin's cause. Even if there were two separate supplies made by two separate entities, (which the FTT found there not to be) the fact that both entities were members of a VAT group meant that there would have been a single supply by the VAT group in any case. Appeal dismissed.

First-tier Tax Tribunal

Alternative Investment Strategies Ltd (AISL)

This was an unusual case in that the taxpayer won on the substantive points and yet the FTT confirmed that the penalty assessed by HMRC for careless errors should stand.

Mr Patel was a Director of both AISL and its subsidiary Hedge Funds Investment Management Ltd (HFIM). A Management services agreement was entered into between AIS and HFIM for the supply of management services which were to be delivered by Mr Patel. This agreement between the parties was undated. HMRC took the view that, as Mr Patel was a Director of both companies, his services were supplied in his capacity as a Director and, accordingly, the management services agreement did not govern the relationship. The FTT disagreed.

There was also a dispute as to whether AISL had, in fact, provided any services to HFIM but the FTT was satisfied on the evidence that service had been provided. Although no VAT had been accounted for on these supplies, the question of whether VAT was due in relation to them was outside the remit of this appeal.

Finally, HMRC argued that AISL was not entitled to reclaim some input VAT incurred on certain property accommodation costs on the basis that the VAT invoice was addressed only to HFIM. The FTT found as a fact that AISL did occupy the premises as licensee. Accordingly, in light of the fact that the company provided HMRC with evidence of such occupation, HMRC was unreasonable not to allow alternative evidence to support AISL's claim for input VAT.

HMRC also imposed a penalty and, although it allowed AISL's appeal in relation to the above substantive points, it confirmed the penalty. Mr Patel only produced evidence of occupation etc to HMRC long after the penalty assessment had been issued. The FTT concluded that, at the time of issue, HMRC's decision to impose the penalty was not unreasonable.

Comment

Although this case is settled on its own facts, it was interesting that the FTT confirmed that supplies between two companies with common directors can take place. The services of a Director under a separate employee service contract are not the same as the duties he owes to the company as a Director. Accordingly, HMRC's assertion that Mr Patel's services were supplied in his capacity as a Director were wrong.

On the facts, the FTT found that AISL did occupy the premises as a licensee and that HMRC had been unreasonable in not accepting alternative evidence to support the input VAT claim for the accommodation costs.

High Court - The Claimants in the Royal Mail Group Litigation

Whether the claimants were legally entitled to a VAT invoice

Back in April 2009, the Court of Justice issued a judgment in the case of TNT which ruled that not all postal services qualified for VAT exemption. This judgment triggered a raft of claims against Royal Mail Group.

Essentially, the argument is based on the premise that, if the services provided by Royal Mail were not exempt from VAT, they were taxable and, if they were taxable, they were deemed to be VAT inclusive. If the amounts paid to Royal Mail Group were inclusive of VAT, the claimants were entitled to reclaim the VAT element of the payment as input VAT.

This argument was subsequently tested in the courts by Zipvit Ltd but, so far, the Courts have rejected Zipvit's arguments on the basis that Zipvit does not hold the requisite VAT invoice and that HMRC is within its rights not to allow alternative evidence to support the claim for input VAT. The Zipvit case is progressing to a hearing at the UK's Supreme Court but, this parallel litigation has begun in case Zipvit also loses at the Supreme Court.

In essence, the claimants (which include Zipvit) argue that, in relation to taxable supplies, they have a legally enforceable right (either contractually or as a matter of private law) to demand or be provided with a VAT invoice by the supplier of taxable goods or services. Unfortunately, the High Court disagrees. In its long judgment, the Court has concluded that Royal Mail Group has no actionable statutory duty or contractual liability to provide the claimants with an invoice containing the particulars prescribed in regulations (ie a VAT invoice).

Comment

There are 340 claimants involved in this Group Litigation Order and the estimated value of the Group's VAT claim is £500 million.

Royal Mail Group had never charged or accounted for VAT in relation to the supplies of the mail services in question. Whilst it is accepted that the services were in fact taxable, HMRC has never demanded the payment of any Output VAT in relation to the supplies.

Zipvit argued that, if the supplies were taxable, it was entitled to reclaim the VAT element of the payments it had made to Royal Mail Group. However, the Court of Appeal has confirmed that this was not possible without a VAT invoice and that HMRC was entitled to exercise its discretion not to allow alternative evidence to support the claim.

Given the ongoing litigation in Zipvit (yet to be heard at the Supreme Court) and the value of the claims in this litigation, it seems unlikely that this judgment will be the last word we will hear on what is now a decade long (at least) argument.

Watch this space !

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