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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update.

This week, we take a look at an Advocate General's opinion from the Court of Justice in the case of "KrakVet" – a Polish pet food supplier. The case is about the 'place of supply' – the VAT rules that determine where a supply of goods or services takes place and the Member State that is entitled to collect any VAT due on the supply.

The case involved the distance selling of goods from Poland into Hungary. Poland considered that the supplies made by KrakVet took place in Poland and were, thus, liable to VAT at the rate of 8%. However, Hungary considered that the place of supply was Hungary and that VAT at 27% was due. Hungary raised tax assessments against KrakVet along with penalties and interest.

The determining factor is whether the dispatch or transport of the goods to the customers in Hungary was carried out by KrakVet or on its behalf or, as KrakVet contended, the dispatch or transport were actually arrangements that were put in place by the customer.

Our second case this week is from the UK's First-tier Tax Tribunal (FTT). The FTT has issued its decision in the case of Archus Trading Ltd v HMRC. In this case, the issue was whether the company supplied medical care services or whether its supply was merely the supply of 'people' (i.e. a supply of staff). HMRC argued that there was a taxable supply of staff and insisted on registering the company for VAT. However, the company argued that the service it delivered was one of 'medical care' and was, therefore, exempt from VAT making a VAT registration unnecessary.

The Tribunal agreed with the company and allowed its appeal.

Finally, we look at another decision from the FTT concerning a DIY Housebuilder's claim. In this case, HMRC argued that the claim had been submitted out of time (i.e. after a period of three months had elapsed from completion). The claimants had occupied the property but were not in possession of a Notice of Acceptance ('NoA') (a requirement of Scottish law). The claim was submitted within three months of obtaining the NoA and, accordingly, the Tribunal allowed the appeal.

Court of Justice of the European Union – Advocate General's Opinion

Whether supplies were 'distance sales' in Hungary

Businesses involved with the sale of goods over the internet and through mail order should be familiar with the complex rules that govern the place of supply. The rules are necessary for a number of reasons. In the case of distance sales (generally, supplies of goods to consumers in a different Member State to the supplier), the place of supply is deemed to be the Member State where the customer is established. The rule creates certainty for both suppliers and tax authorities, but it also ensures that VAT becomes due and payable in the Member State where the goods are consumed.

The General place of supply rule (Article 32 of the VAT Directive) stipulates that where goods are dispatched or transported by or on behalf of the supplier, the place of supply is deemed to be where the supplier is established. However, Article 33 of the VAT Directive provides an exception to that general rule where goods are dispatched or transported to non-VAT registered consumers. If the goods are dispatched or transported by or on behalf of the supplier, the place of supply is deemed to be the customer's Member State. In the case of KrakVet, like many other similar businesses, it actually gave its customers in other Member States the option of either arranging their own transport or choosing to have the goods delivered by KrakVet's sister company KBGT. KrakVet argued that this arrangement (having the customer arrange the transport) meant that its supplies did not qualify as 'distance sales' and were, therefore, taxable in Poland where it was established. (KrakVet even had a binding ruling from the Polish tax authority confirming this treatment). However, the Hungarian tax authority took issue and argued that, in fact, the goods were dispatched or transported by or behalf of KrakVet which meant that the supplies were distance sales and were taxable in Hungary. It issued tax assessments against KrakVet along with penalties and interest. KrakVet appealed to the Hungarian courts which then referred the matter to the Court of Justice for clarification of the EU VAT law.

The Court was asked to clarify the meaning of the term 'dispatched or transported by or on behalf of the supplier'. Advocate General Sharpston has issued her opinion. In essence she confirms that (1) if a supplier, at his own initiative and choice, takes most or all of the essential steps necessary to prepare the goods for transportation, makes the arrangements for the goods to be collected and start their journey and relinquishes possession of and control over the goods the goods have been dispatched by the supplier. (2) if a supplier (either himself or through his agent) physically carried out the transport operation, or owns or controls the legal entity that does so, there has been transportation by the supplier. (3) Goods are dispatched or transported on behalf of the supplier if the supplier, rather than the customer, effectively takes the decisions governing how those goods are to be dispatched or transported.

Advocate General Sharpston confirmed that the determination of these facts is a matter for the national court and should be based on any evidence that is presented. In this case, However, she is of the view that as the Polish tax authority has issued a binding ruling to KrakVet, Hungary should respect the principle of sincere cooperation that exists between Member States – established under Article 4(3) of the EU Treaty.

Comment – At this stage, the Advocate General's opinion provides some useful guidelines to help businesses, tax authorities and national courts decide whether or not goods have been dispatched or transported by or on behalf of the supplier. It seems likely that the full court will confirm those guidelines when it issues its judgment in a few months time. Businesses involved with intra-community supplies of goods to consumers will need to take note of the outcome. There have been many attempts by suppliers to get out of the distance selling regime by ensuring that they are not 'involved' in dispatch or transport of the goods. In this case, the difference between the VAT rate applicable to the supply of KrakVet's goods in Poland and in Hungary was 19% (8% Poland, 27% Hungary) so one can see why KrakVet would choose for its supplies to be deemed to made in Poland.

The place of supply rules are due to change in any case on 1 January 2021.

First-tier Tax Tribunal

Archus Trading Ltd

The issue in this case was whether the company's supplies were VAT exempt supplies of medical care or whether, as contended by HMRC, they were merely supplies of personnel (i.e. a taxable supply of staff).

The company entered into a contract with the Scottish Health Board (SHB) to deliver SHB's obligation to provide GP medical services at Kilmarnock prison. HMRC considered that all that the company supplied was people and that it was SHB that, in turn, supplied the medical care services. Accordingly, HMRC compulsorily registered the company for VAT.

The company argued that it provided much more than people. It argued that what it provided should be regarded as the supply of medical care. The FTT agreed with the company. Having considered the relevant contracts between the company and the SHB it had little difficulty concluding that the contract afforded the company a sufficient degree of flexibility and variability in the way in which the company's services were provided. The company did not report into nor was it, or its staff directed, monitored or controlled by the SHB. The company determined the hours worked and exercised its own discretion as to the nature of the services provided, the treatments prescribed to patients and the training of its staff. In addition, the company maintained its own indemnity insurance and was responsible for staff performance and disciplinary procedures.

All in all, the FTT was satisfied that the company had sufficient autonomy from the SHB and that the SHB had very limited direct oversight of the company's operations. Accordingly the FTT was satisfied that the company was not simply supplying people to the SHB but was, in fact, providing medical care services. The company's appeal was allowed and the compulsory VAT registration was cancelled

Comment

There is very often a fine line to be drawn between whether a supply is of an underlying services (in this case – exempt medical care) or a taxable supply of staff.

HMRC will very often take the view that what is being supplied by company 'A' to company 'B' is personnel which company 'B' uses to fulfil the underlying supply.

What swayed the tribunal in this case was the evidence and the contractual arrangements between the parties. The contract showed that there was a great deal of autonomy on the company's part. Its service delivery was not directly supervised by the SHB. What is supplied was medical care not people.

First-tier Tax Tribunal

Simon and Joanne Cotton

The issue in this case was whether the claimants' DIY Housebuilder's claim had been made within the statutory time limit. HMRC considered that the claim had been made out of time and refused to pay the appellant's claim.

Under the DIY Housebuilder's scheme, any VAT incurred constructing or converting a building into a new dwelling can be reclaimed provided that certain conditions are met. One of those conditions is that any claim for a refund must be made within three months of the works having been completed. In this case, the claimants occupied the dwelling in 2017 but did not submit their DIY claim for a refund until 2018. HMRC considered that this was outside the statutory three month limit.

However, in Scotland, a property cannot legally be occupied until a Notice of Acceptance ('NoA') has been issued by the authorities. The NoA in this case was not issued until 2018 and the claim for a VAT refund was submitted within three months.

The Tribunal was satisfied that the claim had been made within three months of the NoA. The claimants had intended to occupy the property for a qualifying purpose and it was only through circumstances beyond their control that had prevented them from doing so. The property was not legally 'complete' under Scottish law until the NoA was issued - notwithstanding that the property had been occupied prior to that date.

The claimant's appeal was allowed.

Comment

There is a statutory time limit for making claims under the DIY Housebuilder's and Converter's scheme. A claim should be made within three months of the works being completed.

In this case, HMRC took the view that, as the property had been occupied by the claimants in 2017, then logically, the works must have been completed to a sufficient degree to allow occupation.

Under Scottish law, a property cannot be occupied until an NoA is issued by the authorities. The Tribunal therefore ignored the illegal occupation and confirmed that the three month time limit for submitting a claim ran from the date when the NoA was issued.

Appeal allowed.

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