Grant Thornton

Indirect Tax Update

Edition 05/2021 – 04 February 2021

Summary

Welcome to this week's ITU. This week sees the Court of Appeal issue a unanimous judgment in favour of HMRC in the case involving News Corp UK & Ireland Ltd. (News UK)

The case concerned whether or not the supply of a digitised version of a newspaper ought to be classified for VAT purposes as a newspaper in its own right. If the answer to that question is 'yes', then the supply would qualify for zero-rating whereas, if the answer is 'no', the supply would be liable to VAT at the standard rate.

The First-tier Tax Tribunal said 'no' when the case was heard in 2018 but the Upper Tribunal reversed that decision in 2019. According to the Upper Tribunal, the law must be regarded as 'always speaking'.

HMRC appealed to the Court of Appeal and this week, it has issued its judgment.

We also look this week at a judgment from the Court of Justice in the case of Commission v Austria in relation to that country's operation of the Tour Operators' Margin Scheme. The Court has ruled that Austria was in breach of its obligations under the VAT Directive.

Continuing the Tour Operator theme, we understand that Germany has announced that it is to restrict use of the Margin Scheme to businesses that are established in the EU. This will have major implications for UK established Tour Operators.

HMRC v News Corp UK & Ireland Ltd – Court of Appeal

VAT liability of digital newspapers

Readers will recall that, in late 2019, the Upper Tribunal issued a surprising judgment in News UK's appeal. The issue – whether the supply of digital versions of various newspapers qualified as newspapers in their own right and were, thus, zero-rated for VAT purposes – was of massive interest not only to the suppliers of such publications, but also to entities that purchase digital publications.

Initially, in 2018, the First-tier Tax Tribunal had rejected News UK's appeal confirming that, in its view, digital versions of printed newspapers were not newspapers for VAT purposes and could not qualify for zero-rating. News UK appealed to the Upper Tribunal and in December 2019 the Tribunal issued its judgment. In essence, the Upper Tribunal considered that the FTT had made an error of law by adopting the wrong rule of interpreting the VAT statute. The Upper Tribunal considered that, whilst a strict interpretation of the law must be used, the law must be regarded as 'always speaking'. In other words, the law must be interpreted to take account of technological and other developments over time. The Upper Tribunal considered that the content of the digital edition of a newspaper was exactly the same as the printed version and fulfilled the same purpose as far as the reader was concerned. Accordingly, it considered that the digital version was a newspaper in its own right and, under UK VAT law, the zero-rate applied.

Given the potential impact of that judgment, HMRC sought and was granted leave to appeal to the Court of Appeal. It considered that the Upper Tribunal had made an error of law. HMRC's principal ground of appeal was that the Upper Tribunal should have been bound by the doctrine of 'strict' interpretation and that the 'always speaking' doctrine of interpretation could not override the strict meaning of the words used in the legal text or the intention of Parliament.

The Court of Appeal has now issued its judgment and has agreed unanimously with HMRC. As the case involves whether or not a supply qualifies for zero-rating, the Court of Justice has stated in previous cases that the law must be interpreted strictly since zero-rating is an exception to the general rule that supplies should be liable to VAT. Accordingly, a strict interpretation must, therefore, take into account the words used in the legal text and the intention of the legislator at the time the law was drafted. Examination of the wording and intentions could only lead the Court of Appeal to conclude that zero-rating was only ever intended to cover tangible items. In 1972 (when the law was drafted) there could have been no intention to apply the zero-rate to digital (or intangible) items as they, clearly, did not exist at that time. The Court confirmed that the 'always speaking' principle of interpretation is a recognised and acceptable principle but it cannot, in the circumstances of this case, override or usurp the strict interpretation that is required. By doing so, the Upper Tribunal had made an error of law.

News UK also argued that treating print and digital versions of newspapers differently breached the EU law principle of fiscal neutrality. However, the Court of Appeal dismissed that argument confirming that for a fiscal neutrality argument to succeed, the goods in question need to be supplied by different suppliers. Here, the digital and print versions of newspapers were supplied by News UK.

***Comment** – We understand that News UK is to petition for leave to appeal this Court of Appeal judgment to the Supreme Court. If such permission is granted, News UK and any cases stood behind it will live to fight another day. However, if permission is refused, it seems that the Court of Appeal's unanimous judgment will bring an end to this particular case.*

Court of Justice of the European Union

EC Commission v Austria – Tour Operators' Margin Scheme

The Tour Operators' Margin Scheme (TOMS) is a special VAT scheme for business that supply designated travel services. In 2013, the Court of Justice confirmed in its judgment in the case of EC Commission v Spain that the provisions of the scheme laid down in the VAT Directive could not be limited by a Member State solely to supplies to consumers. The scheme should also be used in relation to supplies of designated travel services made to business customers.

Despite that 2013 ruling, Austria continued to restrict TOMS only to retail supplies to consumers and did not apply the scheme to supplies to businesses. In accordance with the infringement provisions laid out in the Treaty, the European Commission commenced infraction proceedings against Austria culminating in a request to the Court of Justice for a judgment against the Member State for its failure to fulfil its obligations under the VAT Directive. Not surprisingly, having considered the issue and ruled on it in 2013, the Court of Justice has, once again reiterated that Member States cannot restrict the use of TOMS and that it should be used for all supplies of designated travel services irrespective of the status of the customer. The Court also ruled in this case that Austria's domestic law was also at odds with the VAT Directive in relation to the method of calculating the relevant taxable margin. Austria permitted the margin to be calculated in relation to all supplies made during a period rather than, as the Directive requires, on a service by service basis.

Comment

Given that the Court of Justice ruled eight years ago that the Tour Operators' Margin Scheme covered supplies to business customers as well as retailers it is not surprising that it has found Austria to be in breach of its VAT obligations.

The Court has also found that Austrian domestic VAT law allowed operators to calculate VAT due on supplies made within a period as a whole rather than by reference to the margin on each separate supply. This also contravened the terms of the VAT Directive.

Tour Operators' Margin Scheme

Germany withdraws TOMS for non-established operators

We understand that Germany has announced that it is to restrict use of the Tour Operators Margin Scheme (TOMS) to businesses established in the European Union only. The German tax authorities have recently amended German VAT legislation with regard to goods and services supplied under TOMS. First indications are that businesses established outside the EU (for example, in GB) whose supplies would have fallen within the TOMS regime, will no longer be eligible to use TOMS for supplies taking place in Germany.

We are making further enquiries in relation to this change with our Grant Thornton colleagues in Germany and will provide further comment shortly. However, assuming this is correct, GB travel and tour operators may now be required to register for VAT in Germany and account for VAT on supplies made there. (There would, one assumes, also be an entitlement to recover VAT incurred on costs relating to such supplies). Importantly, our understanding is that this change is retroactive, taking effect from 1 January 2021. As such, once the detail is fully understood, prompt action may be required where a liability to register and account for VAT in Germany is identified. The TOMS scheme is intended to simplify VAT accounting for businesses involved in the supply of designated travel services by deeming that there is a single supply (as opposed to multiple supplies) which takes place in the country where the supplier is established. This rule means that suppliers do not need to register for VAT in every Member State where the travel services are consumed. By withdrawing the availability of TOMS to non-EU established suppliers, Germany is, in effect, scrapping that simplification.

Comment

Whilst TOMS is a complex VAT accounting scheme, it exists to provide a common and uniform method of accounting on travel services throughout the European Union.

Germany has decided (unilaterally it seems), to restrict the use of the scheme from 1 January 2021 to only EU operators. If this is correct, businesses providing designated travel services established in England Scotland and Wales will need to register for VAT in Germany to account for any VAT due in relation to travel services consumed there. We will provide further information on this development shortly.

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