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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update.

The Court of Justice of the European Union is on a judicial vacation this week so we look to the UK Tribunals for news of VAT developments.

The Upper Tribunal has issued two important judgments this week and both have resulted in defeat for the taxpayers. In Virgin Media Ltd (Virgin), the Tribunal has ruled that the company's supply of Fixed Line Rental (FLR) services were not supplied with a discount for prompt payment and that, as a result, the First-tier Tax Tribunal (FTT) was correct to dismiss its earlier appeal.

Virgin supplies FLR to its customers some of which pay monthly (£13.89 per month) and some of which pay 12 months in advance (£120 per annum). In both situations, the company accounted for VAT on only £10 per month arguing that the difference was a discount for prompt payment which meant that the value of the supply for VAT purposes was only £10 per month.

The Upper Tribunal has concluded that the FTT's decision that there were two separate supplies of FLR to separate groups of customers was correct and that there was no discount for prompt payment granted to the monthly customers. Virgin's appeal was dismissed.

The Upper Tribunal has also dismissed a taxpayer's appeal in a case involving an Icelandic business selling an "action day" planner. The FTT had concluded that the planner was the equivalent of a book and, as such, that it was liable to VAT at the zero-rate. HMRC appealed to the Upper Tribunal.

In its judgment issued this week, the Upper Tribunal has allowed HMRC's appeal. It considered that the FTT had 'erred in law' by using the wrong legal test. The planner was more akin to a diary which is intended to be written in rather than read or looked at.

Finally, in response to the Covid-19 pandemic, HMRC has announced a temporary suspension of Customs Duties and import VAT in relation to the importation of emergency medical equipment including protective equipment, testing kits and medical devices such as ventilators.

Upper Tribunal – Virgin Media Ltd v HMRC

Whether supplies made on terms allowing for a prompt payment discount

Until 1 May 2014, under the VAT Directive and under UK VAT law which implemented that Directive, where a supply of goods or services was made on terms which allowed a discount for prompt payment then, whether or not the customer took advantage of that discount, the value of the supply was to be regarded as reduced by the value of the discount. For example, if the supplier allowed a 10% discount for prompt payment then, even if the customer did not pay promptly, for VAT purposes the value of the supply made was to be regarded as 90% of the price. This law was changed with effect from 1 May 2014.

Virgin Media Ltd (Virgin) is a well know supplier of telephony services including broadband and media services. In the period from August 2012 to April 2014, it supplied these services to retail customers and charged a "fixed line rental" (FLR). Under the terms agreed with the customer, a customer could pay for these services in two ways. It could either pay monthly (for which the consideration was £13.89 per month) or it could pay in advance at £120 for 12 months. Virgin considered that this pricing model, in effect, offered the customer a prompt payment discount (by offering a saving between the annual amount payable and the amount payable over 12 separate months). It therefore considered that the value of its FLR services for VAT purposes was £10 per month rather than £13.89.

HMRC took the view that the FLR services were not offered on terms allowing a prompt payment discount. HMRC submitted that, in reality, there were two different deals available to customers with separately identifiable terms and conditions attaching to them. The first relates to the supply of FLR services in return for monthly payments which gave Virgin the right to amend the monthly payment amounts with due notice. The second relates to an annual subscription for a single 'up-front' payment with Virgin having no right to amend prices until the 12 month period had concluded. Accordingly, there were two separate contracts not, as Virgin contended, a single contract with separate payment options.

The First-tier Tax Tribunal (FTT) agreed with HMRC and dismissed Virgin's appeal and Virgin appealed to the Upper Tribunal. In its judgment released on 8 April 2020, the Upper Tribunal has, similarly, dismissed Virgin's appeal. The Upper Tribunal agreed with the FTT that there were, in fact, two separate supplies of FLR services that were governed by two separate contracts with different sets of terms and conditions. Virgin had argued that there was a single supply of FLR services but with different payment options for monthly customers and annual customers. However, both the FTT and the Upper Tribunal were of the view that, having regard to the contracts, this was not the case.

The Upper Tribunal was of the view that even if it could be said that the terms on which the supply to the monthly customer were made may allow him or her to elect to take a different supply for a different consideration, that is not the same as allowing a discount on the consideration for the supply of a month's services. In the circumstances, therefore, there was no supply of FLR services which allowed a discount for prompt payment and, as a result, VAT was due on the full value of the monthly charge. Virgin's appeal was dismissed.

To some extent this judgment of the Upper Tribunal is somewhat academic as it relates to VAT legislation that was amended in May 2014. Both the FTT and now the Upper Tribunals were not convinced by Virgin's arguments. Offering different terms for a supply of the same FLR services to monthly paying customers and those customers that paid in advance cannot be considered to be the same supply for VAT purposes. The Upper Tribunal agreed with the FTT that there were two separate supplies and the supply relating to monthly customers was not on terms that allowed for a prompt payment discount. The Value of the supply for VAT purposes was, therefore, the monthly amount payable of £13.89.

Upper Tribunal – Thorstein Gardarsson t/a Action Day A Islandi

Whether the 'action day planner' was a book and zero-rated.

The taxpayer in this case is an Icelandic business that is registered for VAT in the UK. The business supplies something called an 'action day planner' which is intended to help people to manage their time better. The planner comprises a collection of pages with a front and back cover (akin to a book). The taxpayer business considered that the planner was a book for VAT purposes and applied a zero-rate to sales income. HMRC, on the other hand, considered that the planner was not a book and was liable to VAT at the standard rate. It assessed the business for VAT, penalties and interest. The First-tier Tribunal agreed with the taxpayer and allowed the appeal. It considered that the content of the first part of the planner was intended to be read and was 'educational' in nature and that this was its predominant purpose.

HMRC appealed to the Upper Tribunal considering that the FTT had applied the wrong test. HMRC argued that the correct test was established in an earlier case in the High Court (Colour Offset). The correct test is whether the main purpose of the item is for it to be read or looked at (in which case it is a book) or whether the main purpose for it to be written in. The Upper Tribunal considered that, on the evidence, whilst there was an educational purpose to the preliminary pages of the planner, the main purpose of the planner was for it to be written in. (there were 16 pages of text explaining how users could improve their time management skills by reference to the planner but there were 52 pages – a page per week – where it was intended that the user would write).

Accordingly, the FTT applied the wrong test and, had it applied the correct test it would have found that the planner was not a book for VAT purposes. HMRC's appeal was allowed and the case was referred back to the First-tier Tribunal for it to determine the appeals in relation to the imposition of penalties and interest.

Comment

In this case, Mr Gardarsson – an Icelandic individual – represented himself at both the First-tier and Upper Tribunals.

His case relied heavily on the published guidance of HMRC and the FTT accepted the arguments that were made on that basis. The guidance suggests that publications with an educational slant could qualify as zero-rated books and the taxpayer cited the likes of crossword puzzle books and past examination papers as examples where HMRC accepted that they were books for VAT purposes.

Unfortunately, (for the taxpayer) the Upper Tribunal pointed out that HMRC's guidance on VAT issues is just that. Guidance is not the law. The FTT was wrong to give HMRC's guidance a status that is not warranted.

Applying the law, the Upper Tribunal found that the planner's primary purpose was to be written in and not read. That meant that, for UK VAT purposes, the planner was not a book and could not be zero-rated.

HMRC announces temporary suspension of Customs duties and import VAT on certain medical goods

Customs Duty and Import VAT

In response to the Covid-19 pandemic, HMRC announced on 31 March 2020 that it is to temporarily suspend the imposition of customs duty and import VAT on the importation of certain medical equipment. This relief can be claimed immediately by state organisations (including state bodies, public bodies and other bodies governed by public law) and other authorised non-state bodies. Non-state bodies can request authorisation by contacting the National Import Relief Unit.

Relief is available for imported goods for free circulation that are for distribution free of charge to those affected by, at risk from or involved in combating the coronavirus (COVID- 19) outbreak or to be made available free of charge to those affected by, at risk from or involved in combating the coronavirus outbreak, while remaining the property of the organisations importing them.

The relief will apply to imports of protective equipment, other relevant medical devices or equipment for the coronavirus outbreak.

The relief from customs duty and import VAT will remain in place until 31 July 2020. However, there is no similar relief for domestic supplies of these goods. VAT must continue to be charged and accounted for at the normal rate.

Importers bringing eligible goods into the UK will need to use customs procedure code 40 00 C26 (box 37) when completing import entries and either 9AID and/or 9AIV and status codes JP or UP as appropriate (in box 44).

Comment

In normal circumstances, the importation of medical equipment is subject to customs duty and import VAT. With immediate effect, the importation of medical products and equipment to be used in the fight against Covid-19 can be done on a duty and VAT free basis.

Relief from duty and import VAT will apply to importations of: aprons, body bags, certain medical devices, cleaning equipment, cleaning products clinical waste bags, COVID-19 test kits / instruments and apparatus used in diagnostic tests, eye protectors, gloves, hand hygiene products, medical consumables, protective garments and the like, pulse oximeters and thermometers.

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