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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 judgments from the Court of Appeal. One case – Logfret Ltd (Logfret) v HMRC provides a stark warning to any business that acts a guarantor in relation to the payment of excise duty in connection with the movement of excise goods under a duty suspension regime.

Logfret acted as such a guarantor but subcontracted the physical transportation of the consignment to a third party. The goods in question were moved under the EU-wide Excise Control and Management system but, unfortunately, in relation to three movements, the goods failed to arrive at their declared destination and in relation to one movement, only arrived after a period of 11 months.

HMRC considered that there had been an 'irregularity' in relation to each of the consignments and assessed Logfret (as guarantor) for the excise duty that it considered was due. Logfret appealed to the First-tier Tax Tribunal and was successful. However the Upper Tribunal allowed an appeal by HMRC and now, the Court of Appeal gives its judgment.

The second case from the Court of Appeal concerns another appeal by Rank Group PLC (Rank) in relation to a claim for overpaid VAT on cash and mechanised Bingo. HMRC had rejected a claim for £67 million on the basis that it had been made out of time. Rank accepted (eventually) that the claim was out of time but then argued that three earlier claims (that were made in time and were settled by HMRC) should have incorporated the VAT overpaid in the late 4th claim. Both the FTT and the Upper Tribunal rejected Rank's arguments and Rank appealed to the Court of Appeal.

Finally, we look at a Court of Justice judgment in a Portuguese referral relating to the recovery of input VAT in a situation where the taxpayer initially made a deduction based on the assumption that its supplies were VAT exempt but where, subsequently, the supplies were found to be liable to VAT. The taxpayer made a retrospective adjustment based on the new understanding but the Portuguese Tax Authority refused to allow the adjustment and denied the taxpayer's claim for repayment.

Court of Appeal – Logfret Ltd v HMRC

Whether guarantor liable to pay excise duty in relation to the movement of dutiable goods under a suspension regime

The issue in this case is fairly simple. Logfret Ltd (Logfret) acted as the guarantor in relation to a number of movements of excise goods under the EU-wide Excise Control and Management system (ECMS). Under the terms of that system, excise goods can be moved across EU borders without creating a liability to pay excise duty. However, when things go wrong, (as they did in this case), EU law stipulates that the duty becomes payable in the country where any irregularity is committed but, if it is not possible to ascertain where the irregularity was committed, the Directive provides for the duty to be payable in the country from which the goods were despatched. In this case, the goods were despatched under Logfret's instructions by a third party to a consignee in Belgium but the goods (in relation to movements one to three) never arrived at that destination. The goods in movement four arrived at a different destination to the one declared and 11 months after they were despatched. Logfret received copy CMR documents but later discovered that these were, in fact forgeries.

HMRC took the view that an 'irregularity' had occurred in relation to all of the movements (in other words an event had occurred with the result that the goods are deemed to be 'released for consumption' triggering a duty point) and imposed a liability to excise duty on Logfret as guarantor.

Logfret appealed to the First-tier Tax Tribunal (FTT) which allowed its appeal. The FTT took the view that the irregularity in relation to the goods took place in France and so any liability to excise duty did not arise in the UK. This decision was, however, overturned on appeal by HMRC to the Upper Tribunal. The Upper Tribunal held that if the goods had not arrived at their declared destination within four months of despatch, there was a deemed irregularity (in relation to the movement) which triggers an excise duty liability in the country of despatch unless evidence can be produced that either the goods did actually arrive at the declared destination within the time limit or that the irregularity actually took place at some other location. In the circumstances and on the facts of the case, the Upper Tribunal confirmed that the FTT was wrong to conclude that the irregularity occurred in France. As the goods did not arrive at the declared destination within four months of their despatch, there was a deemed irregularity which, in the absence of proof otherwise, triggered a liability to duty in the UK – the country of despatch.

The FTT had also found that evidence as to the location of the irregularity did not necessarily need to be 'official' (i.e. emanating from a tax authority) but could include other evidence that was available. The Upper Tribunal again considered that the FTT was wrong. Under the workings of the ECMS throughout the EU it is necessary to have concrete proof of the movement and receipt of excise goods under the suspension regime. The system requires the tax authorities in Member States to acknowledge receipt of goods in their jurisdictions and, as such, evidence to show that goods have in fact arrived at the specific tax warehouse of destination, so that the movement has come to an end, must be evidence emanating from or endorsed by the competent authorities of the Member State of destination. The Upper Tribunal allowed HMRC's appeal.

In the Court of Appeal, Logfret repeated its case (that the irregularity did not take place in the UK and could not, therefore, be liable to duty in the UK and HMRC argued that the Upper Tribunal's judgment was correct on all points. The Court of Appeal agreed with the Upper Tribunal and dismissed Logfret's appeal.

Comment – along with missing trader (MTIC) VAT fraud, excise duty fraud is a major problem for the EU's tax authorities. As in this case, goods that are subject to excise duty can be and are, quite regularly 'diverted' from their intended destination and are released for consumption without the payment of excise duty. Businesses that act as guarantors for any duty payable in relation to a consignment could become liable (as here) when irregularities in relation to the goods occur even where they are 'innocent' parties in the supply chain. Such businesses need to take great care if they are to avoid such liabilities.

Court of Appeal – Rank Group PLC v HMRC

Whether a claim for overpaid VAT was out of time!

Not to be confused with the case reported in ITU 13/2020 dated 16 April 2020, this case relates to a claim made by Rank Group PLC for the repayment of overpaid VAT in connection with income derived from cash bingo and mechanised bingo operations.

Following a judgment of the Court of Justice in an earlier case (Linneweber), Rank submitted four claims for repayment of VAT that it had erroneously accounted for. The first three claims were accepted by HMRC and were settled. However, the final claim – which covered the period from December 1996 to December 2002 was not submitted until November 2011. HMRC rejected the claim on the basis that it was made out of time (ie more than four years after the final VAT period covered by the claim). Eventually, Rank conceded that the claim was made out of time but then counter argued that the earlier three claims (which were all made in time) had been incorrectly calculated and should be recalculated to take account of the additional tax that it considered was due.

In each of the first three claims, HMRC settled the claims by offsetting the VAT overpaid by an amount calculated to be, for each claim period, the amount of non-deductible input VAT. HMRC thus repaid the net amount (i.e. the difference between output tax overpaid and input tax overclaimed). Rank argued that what HMRC should have done was to reduce the amount of the non-deductible input VAT in each of the three claim periods by an amount which equalled the output VAT overpaid calculated in the fourth claim.

The FTT and the Upper Tribunals both dismissed Rank's appeals and Rank appealed to the Court of Appeal which released its judgment on 24 April 2020. The Court of Appeal has also dismissed Rank's appeal confirming in its view that Rank had no entitlement recover the net amount of the fourth claim as a set off in relation to one or more of the other accounting periods and the argument that this can be achieved (although ingenious) involves a distortion of basic VAT accounting principles for which there is no warrant in the provisions of UK VAT law.

Comment

One can understand – with £67 million at stake – that Rank would wish to pursue its cause as far as is practically and legally possible. For this reason, one cannot rule out the possibility that Rank will seek and be granted leave to appeal this Court of Appeal judgment to the Supreme Court.

The case stems form an earlier Court of Justice case concerning the operation of gaming machines and the fact that certain forms of gambling were treated for VAT purposes differently to others.

In this case, the form of gambling was cash and mechanised bingo which HMRC considered were liable to VAT at the standard rate when, in fact, they should have been treated as VAT exempt. The claims for overpaid VAT submitted by Rank (and others) as a result amount to hundreds of millions (if not billions) of pounds.

Court of Justice – Case C-661/18 - CTT — Correios de Portugal

Whether input VAT claimed can be adjusted retrospectively

In a case, with echoes of the previous TNT Post UK ruling from the Court of Justice, the taxpayer in this case was previously (prior to privatisation) the universal service provider of postal services in Portugal. Accordingly, services provided under the universal service were and continue to be exempt from VAT. However, other services provided by the taxpayer are not provided in the capacity and are, in fact, liable to VAT at the standard rate. As a result, the company became a partially exempt person which, as such, was entitled to recover input VAT albeit only to the extent that the inputs in question were used for the purposes of making the taxable supplies.

The problem in this case was that the company had determined the extent to which it was entitled to recover input VAT by way of a formula that was agreed with the Portuguese tax authority. After the TNT case, and the realisation that its non-universal services were not exempt but were liable to VAT, the company sought to adjust the deductible proportion to reflect the now greater taxable use of the inputs. The Portuguese tax authority refused the claim arguing that, under Portuguese VAT law, once the formula had determined the proportion that was deductible (and any permitted adjustments had been made at the end of the tax year), that was the end of the matter – no further adjustments could be made.

The company appealed that decision and the Portuguese courts decided to refer the matter to the Court of Justice for guidance interpreting the VAT Directive. The Court was asked to determine whether the Portuguese VAT law offended the principles of proportionality, effectiveness, equivalence and fiscal neutrality. The Court has delivered its judgment and has confirmed that, in principle, Member States may limit the taxpayer's ability to make adjustments once the final adjustment had been made and agreed. However, if, as in this case, i) the tax authority allows deduction of input VAT based on "use" of the inputs, ii) the taxpayer had acted in good faith when the initial adjustment was made, iii) any limitation period set by the Member State has not expired and iv) the new method leads to a more precise calculation, Member States may not refuse such an adjustment.

Comment

The Court has stated that, in principle, a Member State may limit the taxpayer's ability to alter the method of apportionment of input tax.

However, the Court has also confirmed that, in certain circumstances, the Member State should allow for a subsequent adjustment to the method that was used in the first instance.

This seems to be a fair and reasonable conclusion. After all, it was through no fault of the taxpayer in this case that it had used the wrong method of calculation.

In circumstances where, as here, the tax authority had issued a binding ruling confirming that the services in question were exempt from VAT when, in fact, they were actually taxable, any attempt by the tax authority to deny an adjustment would be unconscionable.

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