Grant Thornton

Indirect Tax Update

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Summary

Welcome to this week's ITU.

As there was a dearth of cases from the Courts and Tribunals there was no ITU last week.

In this week's ITU we consider how Jupiter Asset Management, a partly exempt business, set itself up as two separate VAT groups, and HMRC did not like the result in VAT recovery. The First Tier Tribunal has found that management services charged to a related, partly exempt, VAT group are liable to VAT on the full cost of providing the services. Given the complexity and length of the judgement we are expecting a further appeal.

We also look at the latest attempt by BT to obtain bad debt relief for VAT on unpaid phone bills from the 1970s and 1980s. It has previously failed with its VAT appeal, so it resurrected a restitution claim against HMRC in the High Court, and has won a battle in the long running saga.

It seems that Leicester City Council will have been disappointed that its claim for overpaid VAT on golf courses and sports park activities has been capped at 4 years. The argument that its latest in a line of claims was merely an amendment to an earlier claim has been rejected by the FTT. As a new claim the 4 year time limit applied.

Finally HMRC have updated its Notice 700/22 Making Tax Digital for VAT with new examples of when digital links are required. The "soft landing" period is now at an end so the MTD rules are now mandatory.

Jupiter Asset Management Group – TC08079

The First Tier Tribunal has, in a long winded way, agreed with HMRC that the level of management charges levied to partly exempt subsidiaries was too low.

Jupiter Asset Management Group Ltd was the representative member of a VAT group (JAMG) that included JFM Plc, which made management charges to a VAT group represented by Jupiter Investment Management Group Ltd (JIMG). HMRC considered that the level of management charges was too low, and directed JAMG to charge VAT by reference to an open market value (OMV), and assessed it for output tax.

In a long and detailed decision, the FTT considered that OMV for VAT purposes has to be calculated by reference either to a comparable transaction (in this case, there was none) or to the full cost of JAMG's management services.

The full cost included all the services on which JAMG had recovered input tax (which, by definition, were cost components of a supply by JAMG). It also included costs which were not subject to VAT, in particular the remuneration of Jupiter's executive directors who were employed by JFM Plc even though in practice they were paid by JIMG. JAMG's appeal was dismissed.

Where two parties are related, and the customer is not entitled to recover all the VAT incurred, then HMRC may make an open market direction with up to 3 years' retrospective effect. It is not clear from the FTT judgement how long the JAMG arrangement had been in place before HMRC noticed and issued the direction, so it may have been effective for some time.

It appears that HMRC became aware that there had been an IPO (Initial Public Offering), which is a time consuming and expensive project. As most readers will be aware, VAT on professional fees is a contentious area between HMRC and taxpayers, so, perhaps predictably, HMRC made an assessment to recover the VAT that JAMP had recovered (the input tax assessment). Having been caught out on technical arguments in the past HMRC hedged its bets by also issuing the market value direction, and assessed output tax based on an estimate of the value (the output tax assessment).

The Tribunal appears to have explored every angle of how to come to the open market value, dismissing the analogous guidance from direct tax and transfer pricing, referring to the Principal VAT Directive (whose provisions are more widely drafted than those of HMRC.

Comment: It seems that HMRC's tactics may have resulted in more VAT going into their coffers than would have been the case if Jupiter had a single VAT group. The Judgement is so long and detailed it seems that the Judge is expecting Jupiter to appeal further. Watch this space.

British Telecom v HMRC High Court (Chancery Division)

BT achieves partial success in its long running and historical dispute with HMRC over its right to claim Bad Debt Relief

It is more than many a reader's life time ago that British Telecom had a monopoly on telephones services in the 1970's. Somethings do not change for BT, as they still issue bills with VAT, which sometimes customers do not pay. These days, claiming bad debt relief is straightforward, but historically it was far more difficult and BT considers it has overpaid about £65M of output tax between 1973 and 1989

BT made a restitution claim in the High Court against HMRC in 2010, then let it lie dormant while is pursued a VAT claim through the Upper Tribunal and then the Court of Appeal.

The Court of Appeal rejected BT's arguments in 2014 see *[2014] EWCA Civ 433*

BT dusted off the claim in restitution for the £65M mentioned above, together with compound interest. HMRC were having none of it, and served a defence which persuaded BT to drop the compound interest claim and the period from 1973 to 1977.

HMRC, being HMRC, then applied to have the case struck out as being without merit.

The Court, in a preliminary ruling on the strike out application, has ruled that there was a legal Bad Debt Relief regime in the UK from 1 October 1978 so the restitution claim from then to 1989 could not succeed. However in the 9 month period from 1 January 1978 to the end of September 1978, the European VAT Directive included Bad Debt Relief Rules, which should have been transposed into UK law.

BT therefore has a prima facie case which will be decided in due course after further substantive High Court hearing

Comment

Historical Bad Debt Relief cases were a hot issue in 2014 and 2015 with the appeals of GMAC and BT. Since then, there has been little to report until now.

Of course, for most businesses the opportunity to join the bandwagon and sit behind the lead cases has long gone.

However for those with long memories or an academic interest in the Brexit debate it is intriguing to see that the Courts are still having to rule on the direct effect of European Directives 44 years after the tax was originally charged.

Leicester City Council - TC08060

The Council lost the argument that a claim in 2017 was merely an amendment of an earlier one with the result that the 4 year cap applied

Readers may recall that in early 2009 there was a flurry of activity in the VAT profession to assist clients to make claims for overpaid VAT, sometimes going back as far as 1973. Leicester City Council found that it had overpaid VAT on activities, including its sporting income and made several claims.

It took some years for the claims to work their way through the system, sometimes with lead cases going to the Tribunals. So the Council in 2017 made additional claims, going back to 2006 in relation to its golf course and sports parks income.

In 2019 Ealing Council won its case on similar grounds, and HMRC accepted Leicester's 2017 claim but limited it to 4 years so the Council appealed.

The First Tier Tribunal held that the 2017 claim was the first time the Council had mentioned golf and sports parks, so even though some of the earlier claims had been sporting related, the connection was not close enough to be considered an amendment.

Comment

It may appear to be of historic interest only, as the March 2009 deadline for what are known as Fleming Claims passed over 12 years ago. However, we still see cases related to original and amended claims coming before the Tribunal.

Often there have been changes in staff, office addresses and record keeping systems so open claims are in danger of withering away. (The Tribunal will write to the last contact they have on file.) Sums can be significant, so a trawl through the archives, with the possibility of resurrecting a claim could be a good investment.

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