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Indirect tax update

Edition 19/2020 – 28 May 2020

Summary

Welcome to this week's Indirect Tax Update.

With the Court of Justice on judicial vacation last week, there are no cases to report from that court so we turn to the domestic courts.

The senior courts in the UK have also been quiet this week but the First-tier Tax Tribunal has issued a flurry of decisions and we look at a couple of those cases.

In Window to the Womb (Franchise) Ltd & Ors v HMRC the question to be resolved by the Tribunal related to whether the services provided by the taxpayer businesses were exempt from VAT as a supply of 'medical care'

The company provides ultrasound 'scanning' services to expectant mothers. HMRC contended that the scanning services had no, or little, therapeutic purpose. The purpose of the scan in HMRC's view was to provide a bonding experience or reassurance rather than to provide medical care in the normal sense of that phrase.

The company on the other hand argued that the services constituted medical care for VAT purposes.

The Tribunal agreed with the taxpayer and allowed the appeal.

Continuing the medical services theme, the Tribunal has also issued a decision this week in the case of Mainpay Ltd. This case concerned a familiar issue – whether the taxpayer company supplied staff or whether it supplied medical care services. HMRC contended that there was a taxable supply of staff (and that VAT was therefore due) whereas the company contended that its supplies were of medical care and should be exempt from VAT.

On this occasion, the Tribunal agreed with HMRC. In the circumstances, the company supplied staff and its appeal was dismissed.

Finally this week, HMRC has issued Revenue & Customs Brief 5/2020 – VAT treatment of Fixed Odds Betting Terminals and gaming machines.

The brief states that HMRC now accepts the Upper Tribunal's recent judgment in the Rank PLC case and invites claims for overpaid VAT from other businesses.

First-tier Tax Tribunal – Window on the Womb and Ors v HMRC

Whether ultrasound scanning services are supplies of 'medical care' and exempt from VAT

This case concerns a number of taxpayer businesses which all provide similar services and operate as franchises. The issue to be resolved is whether the services provided by the businesses should be treated for VAT purposes as supplies of 'medical care' services. HMRC consider that the services do not constitute medical care and, as a result, the supplies made by the businesses are not exempt from VAT but are liable to VAT at the standard rate.

The appellants provide various different types of ultrasound scan packages and, according to the Tribunal, the question of whether the service amounts to the provision of medical care must be answered in relation to each package. The appellants contended that what was being supplied in each case was a supply of medical care. HMRC contended that, in each case, what was being supplied was a "bonding experience" or a "reassurance scan" for pregnant women based on viewing the foetus and being provided with images. HMRC were of the view that these services provided no therapeutic benefit to the customers and could not, therefore, be regarded as medical care.

Under the terms of the VAT Directive, Member States are required to implement VAT exemptions into domestic law. In this regard, the UK law provides an exemption for the supply of services consisting in the provision of medical care by a person registered or enrolled in the register kept under the Health Professions Order 2001 which includes the services of radiographers. It was common ground in this case that all of the radiographers providing the scanning services were so registered. The principal issue on appeal, therefore, was the extent to which, if at all, the services provided by the appellants consist in the provision of medical care.

The Tribunal cited the leading Court of Justice judgment in this area (the case of d'Ambrumenil) which requires that, to be classed as 'medical care' a service must have a therapeutic purpose as its principal purpose and in order to fall within the VAT exemption, the principal purpose of the service must be to diagnose, monitor, treat or prevent illness.

The appellants all provided a range of scans at different prices. However, the underlying purpose of any scan was to provide reassurance to the customers that everything was normal. The images themselves served little purpose without the reassurance that the foetus was healthy and, in every case a 'well-being' scan was conducted. The appellant argued that, in reality, the customers did not purchase the service merely to obtain an image of the foetus but purchased the services principally to confirm that the foetus is healthy and the pregnancy is progressing normally. HMRC took the view that the customer could get all of that from the 'normal' screening service provided by the NHS and that accordingly, the purpose of the scan provided by the appellant was simply to provide a 'bonding' exercise and the resulting images.

Having considered the extensive evidence before it, the Tribunal concluded that the principal reason for obtaining a scan was not simply for 'bonding' with the foetus or for the images but was for the well-being report that was generated by the appellant on each occasion. The well-being report focused on the medical condition of the foetus and provided information about the growth and presentation of the foetus. This was a therapeutic purpose and meant that, in line with the Court of Justice judgment in d'Ambrumenil, the scanning service constituted an exempt supply of medical care – The company's appeal was allowed.

Comment – The Tribunal in this case was presented with extensive evidence. On the face of it, yes, the customer could obtain a scan from the NHS under a normal care regime. However, when the customer chose to have and pay for these additional scans, the Tribunal accepted that the main purpose was to receive the well-being report. As such, that was a supply of medical care and exempt from VAT

First-tier Tax Tribunal – Mainpay Ltd

Whether a taxable supply of staff or a supply of exempt medical care

Continuing the theme of medical care services, in this case the Tribunal had to decide whether the appellant's supplies constituted a supply of medical care or, as HMRC contended, a supply of staff. The former being VAT exempt and the latter liable to VAT at the standard rate.

The facts of the case are relatively straightforward. The appellant company entered into contracts with a number of medical professionals. A separate company (A&E Ltd) entered into contracts with NHS hospitals for the supply of locum doctors and, under the terms of a separate contract, the appellant provided the doctors to A&E Ltd making a charge for that service. HMRC considered that there was a taxable supply of staff. However, the appellant argued that it was, in fact, providing medical care.

Following earlier cases on the same topic (Adecco and Sally Moher), the appellant argued that 'control' of the practitioner was not transferred from the appellant to the NHS hospital and, as a result, there could be no supply of staff. In particular, the company argued that the consultants it supplied to hospitals through A&E Ltd were not under the control of NHS Trusts as regards the medical care they provided to patients and the clinical decisions they took in relation to patients. In essence, no-one other than the individual consultant had control over such care and decisions. Accordingly, there was no supply of staff but there was a supply of medical care.

On the evidence before it however, the Tribunal was not satisfied that the appellant provided medical care services. It simply supplied the doctor or other medical practitioner in exchange for payment. The key issue in this appeal was whether NHS Trusts have a power of control, direction and supervision over the consultants. In the view of the Tribunal such a power did exist and, accordingly, there was a supply of staff. Appeal dismissed.

Comment

There is a fine line between the provision of a service and the provision of the human resource which enables the provision of the service.

In this case, as in a number of similar cases before it, the taxpayer tried to argue that it was providing the service itself and that service was VAT exempt medical care.

Unfortunately, the Tribunal found that the evidence in the case did not support that contention. Day to day control over the medical practitioner was ceded to the NHS hospital which hired the particular consultant.

As such, the Tribunal found that there was a supply of staff and that the appellant did not supply the underlying service of medical care.

It is possible that the taxpayer may seek leave to appeal this decision to the Upper Tribunal.

HMRC Revenue & Customs Brief 5/2020

VAT treatment of fixed odds betting terminals and gaming machines

After a protracted legal battle lasting for more than a decade, HMRC has finally conceded defeat in the argument over the treatment of income generated by what are known as FOBT's (Fixed Odds Betting Terminals) and gaming machines. In its Revenue & Customs Brief 5/2020 – published on 26 May 2020, HMRC has announced that it accepts the recent Upper Tribunal's judgment in the cases of The Rank Group Ltd and Done Brothers (Cash Betting) Ltd (and others) – see our Indirect Tax Update 15/2020 dated 30 April 2020).

The case concerns the historical VAT accounting on income generated by FOBT's and gaming machines. The litigation related to the question of whether HMRC could collect VAT in relation to some machines but not others. The Upper Tribunal agreed with the First-tier Tax Tribunal and found that HMRC should not differentiate between the two types of machine. If the different machines meet the same purpose of a typical consumer, they should not be treated differently for VAT purposes as this different treatment undermines the EU law principle of fiscal neutrality.

HMRC has brough the litigation to an end and will not appeal to the Court of Appeal. Accordingly, it invites claims from businesses that have both submitted claims for repayment of overpaid VAT and submitted an appeal to the VAT Tribunal which is still 'live'. HMRC confirm that claims will only be paid if they are properly evidenced. The Brief also states that HMRC reserves the right to examine the amount of the claims as appropriate, including the requirement to apply revised partial exemption calculations and any capital goods scheme adjustments.

Claims will also be adjusted for any amounts due to set-off under if the claimant has any outstanding debts or assessments etc or has any outstanding debts under any other head of taxation Any payments will be made net, taking into account any sums owed to HMRC. The Brief also confirms that any repayment of VAT and the payment of any statutory interest may have direct tax implications.

Comment

The road to fiscal justice is long and arduous. The Rank case has been through all of the UK's Tribunals and Courts and has also been to the Court of Justice of the European Union.

The ultimate outcome after a twelve year battle is that HMRC now accepts that it was wrong to treat the income from FOBT's and other gaming machines as taxable when it treated income from similar gaming machines in the same period as VAT exempt.

The R&C Brief brings this strand of the litigation to an end (there are other issues that are being heard separately at the Court of Appeal later this year).

Affected businesses will now need to ensure that their claims are properly evidenced. In particular, it will be necessary to ensure that partial exemption calculations and Capital Goods Scheme calculations are re-worked where necessary.

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