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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update.

This week, we focus on a judgment from the Upper Tribunal in an appeal concerning the application of the VAT rules where there is cross border supplies of goods in a fiscal warehousing regime. The proceedings concerned the correct VAT analysis of a series of transactions in alcohol involving multiple jurisdictions.

In Ampleaward Ltd v HMRC, the taxpayer had been assessed for VAT on the acquisition of the goods by HMRC in the sum of £1.3 million. The goods were traded within a fiscal warehousing regime and the appellant company argued that this meant that the supplies were outside the scope of VAT.

In a decision issued last year, the First-tier Tax Tribunal disagreed and upheld the assessment raised by HMRC. The company therefore appealed to the Upper Tribunal.

In a complex judgment issued on 29 May 2020, the Upper Tribunal has allowed the appeal. The goods were supplied whilst they were in a fiscal warehouse. As such, the goods were not subject to acquisition VAT in the UK.

The Court of Justice has also issued a judgment this week in the case of World Comm – a Romanian referral to the Court. The case concerns the payment of a retrospective discount by Nokia to World Comm and the VAT accounting arrangements to take account of that discount.

Both of these cases demonstrate that cross-border trade in goods is complicated and that businesses need to take great care to ensure that VAT is accounted for correctly.

This week, HMRC has also promoted a number of situations where businesses can avoid the need to pay import VAT and duty on various goods.

Businesses importing biological or chemical substances for research, blood grouping, tissue typing and certain therapeutic substances, animals for scientific research or museum and gallery exhibits may import these items on a VAT and Duty free basis.

Upper Tribunal – Ampleaward Ltd v HMRC

Whether supplies of alcohol were liable to acquisition VAT in the UK

This case demonstrates how complex the world of indirect tax can be when goods are traded across international boundaries. Not only are the VAT rules complicated, but when the goods are also liable to Excise duty and are traded within the confines of a fiscal warehouse, the tax rules become even more difficult.

In this case, the appellant is a company that is registered for VAT in the UK and is authorised to trade in Excise goods on duty suspended terms within a tax warehouse. During the relevant period, the appellant purchased quantities of alcohol from a supplier established in a different Member State of the EU (MS2). However, the goods were not delivered to the UK but were shipped to a tax warehouse in a third Member State (MS3). Ultimately, the appellant sold the goods on (from their location in MS3) to a customer in yet another Member State (MS4). The appellant used its UK VAT number in respect of the first supply. This meant that the supplier in MS2 did not charge or account for any VAT and, as the goods were moved subsequently from MS3 to MS4 no VAT was charged or accounted for on the subsequent movements. HMRC argued that, as the appellant had used its UK VAT number in relation to the initial supply, acquisition VAT was due in the UK in relation to that supply. The appellant disagreed and argued that, as the supplies took place when the goods were, at all times, subject to a fiscal warehousing regime, the supplies were outside the scope of VAT. At the First-tier Tax Tribunal, the Tribunal agreed with HMRC and upheld the assessments. The company now appeals to the Upper Tribunal.

The main thrust of the appellant's case was that UK VAT law (in particular s13 and s18 of the VAT Act 1994) makes no reference to the fact that the goods must actually be acquired into a warehouse that is physically located in the UK. In the appellant's view, therefore, what is required is, simply, that the goods are placed into a warehousing regime in any Member State of the EU. In its judgment released on 29 May 2020, allowing the appeal, the Upper Tribunal has overturned the decision of the FTT. In essence, the Tribunal considers that, looking at the provisions of the VAT Directive, HMRC's position is legally correct. However, from a UK VAT law perspective, and agreeing with the appellant, the relevant provisions of the VAT Act simply confirm that the goods must be subject to a warehousing regime but they do not stipulate that that regime must be in any particular tax jurisdiction. Such an interpretation means that the outcome is at odds with the provisions of the VAT Directive which UK VAT law is required to implement. That being the case, HMRC urged the Tribunal to adopt a conforming interpretation and the appellants, given the clear and unequivocal wording of the UK legal provisions, objected to that approach.

The Tribunal refused to adopt a conforming interpretation. It recognised that, where possible, a UK court has an obligation to construe domestic legislation consistently with Community law obligations but, in cases where the meaning goes against the grain of the legislation and is not compatible with the underlying thrust of the legislation being construed, a conforming interpretation should not be adopted if it is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment.

The Tribunal considers that HMRC's request to read the term "warehousing regimes" that are referred to in s18(3) of the UK VAT Act as being limited to warehousing regimes within the UK despite Parliament having provided, quite clearly, by means of the definitions set out in s18(6) and 18(7), would involve a significant amendment to a cardinal feature of the legislation that was before it and that would go against the grain of the legislation. Moreover, the reading of s18 that HMRC proposed would be contrary to the doctrine of legal certainty. As an example, a UK VAT-registered trader acquiring goods into a bonded warehouse situated in an EU member state other than the UK could read s18 and conclude that the acquisition was unambiguously treated as made outside the UK and so outside the scope of VAT. Yet, on HMRC's view, the acquisition would be subject to VAT, and the trader potentially liable to penalties if it failed to reflect the acquisition VAT due in its VAT returns. Such an approach would cross the boundary between interpretation of the legislation and amendment of it.

The appeal was allowed.

Comment – this is a clear example of where a Member State has failed to implement the provision of EU law correctly. Ordinarily, the Tribunal would interpret the domestic law in a manner which conforms with EU law. However, this is one of those cases where the Tribunal felt unable to do so. In the circumstances, if the UK wishes to impose the law correctly (in line with EU law), Parliament must amend the defective law and not leave it to Judges in courts and Tribunals to do so.

Court of Justice of the European Union – World Comm

Whether Member State can refuse refund of VAT on bonuses

This judgment of the Court of Justice has not been released in English. However, we understand the case relates to the supply of mobile phones by Nokia – a business established in Finland to World Comm, a company established in Romania. World Comm purchased mobile phones etc from Nokia and these were supplied by Nokia from various countries including directly from Finland, but also from stock held in Romania acquired by Nokia in Germany, Hungary and Romania. These supplies by Nokia were treated as domestic supplies in Romania, and Romanian VAT was charged and accounted for.

Under the terms of its agreement with Nokia, on reaching certain purchase thresholds, World Comm was entitled to a quarterly bonus. To account for this, Nokia issued a single 'negative' invoice each quarter quoting its Finnish VAT number, and World Comm accounted for VAT in Romania by using the reverse charge mechanism. The Romanian tax authorities took the view that, as World Comm was reducing its liability via the reverse charge mechanism, somehow it was not entitled to have reclaimed the VAT it had paid Nokia in relation to the 'domestic' supplies it had received. The tax authority assessed World Comm for this input tax

The Court of Justice has now issued its judgment and seems to have confirmed that an adjustment to the input tax claimed by World Comm is required. This is the case even though the document issued by Nokia did not comply with the documentary requirements of the Directive (ie it was not a credit note, did not identify the sales in question, and did not quote a Romanian VAT number.

This seems to be a somewhat harsh solution from the taxpayer's perspective. Having paid domestic VAT on the receipt of the domestic supplies, one would not have expected the Court to find that, in the absence of a proper credit note, the tax authority would be able to refuse the input VAT claim in this way. – The Court has yet to issue an English language version of the judgment.

Comment

VAT law is complex and is sometimes confusing. Here, the supplier (Nokia) had charge and accounted for Romanian VAT on its domestic supplies of phones in Romania and World Comm reclaimed that VAT in the normal way through its VAT return.

The problem was that, when accounting for the bonus payable to World Comm, Nokia did not identify the domestic supplies but simply gave a credit for all supplies irrespective of the place of supply. It issued a 'global' negative invoice.

The Romanian tax authority appears to have taken the view that an adjustment to the domestic input VAT was required and it disallowed World Comm's claim.

It does seem somewhat harsh to disallow the input VAT claimed by World Comm without also refunding Nokia but the Court considers that to be the correct approach.

HMRC Revenue & Customs

Importing various good without paying import VAT and Duty

HMRC has made a number of announcements in the last week or so highlighting the fact that the importation of certain goods into the UK can be done on a VAT and Duty free basis.

In particular, in guidance published on:

- 27 May 2020, HMRC has confirmed that certain approved importers of therapeutic substances of human origin, blood-grouping or tissue-typing reagents, or related packaging and solvents and accessories can do so without paying import VAT or customs duty. Public institutions or laboratories and private establishments approved by the Department of Health and Social Care to have goods free of duty and VAT may apply for approval.
- 27 May 2020, HMRC confirmed that museums and galleries (and certain other state agencies such as the Arts Council) may import museum and gallery exhibits that are of a scientific, educational or cultural nature provided that the exhibits are dispatched directly on import to the museum or gallery's approved establishment and are used exclusively as exhibits under their control.
- 29 May 2020, HMRC confirmed that approved importers of animals for scientific research may be imported without the payment of import VAT or duty. Only certain public institutions (university medical schools, polytechnics and similar establishments, National Health Service and teaching hospitals, including medical schools with research laboratories, mobile health laboratories, research laboratories of government departments and laboratories or research councils and similar bodies) and certain private establishments involved in education or scientific research and have had approval from the Home Office will qualify.

Comment

In normal circumstances, the importation of goods into the UK from a place outside the European Union is subject to UK VAT on importation and may also be subject to customs duty.

In many cases, import VAT is not reclaimable if the goods in question are imported for non-business reasons. In all cases, customs duty (if payable) is not reclaimable so the imposition of VAT and duty can lead to significant irrecoverable cost for many organisations.

HMRC's announcements mean that qualifying goods can now be imported on a VAT and duty free basis by various organisations both in the public and private sectors. This should mean that the costs of importing these goods will be reduced.

For that reason, the announcements will be welcomed.

Contacts

Karen Robb
T +44 (0)20 7728 2556
E karen.robb@uk.gt.com

Nick Warner
T +44 (0)20 7728 3085
E nick.warner@uk.gt.com

Alex Baulf
T +44 (0)20 7728 2863
E alex.baulf@uk.gt.com

Daniel Sherwood
T +44 (0)1223 225616
E daniel.sherwood@uk.gt.com

Nick Garside
T +44 (0)20 7865 2331
E nick.garside@uk.gt.com

Paul Wilson
T +44 (0)161 953 6462
E paul.m.wilson@uk.gt.com

Claire Hamlin
T +44 (0)161 953 6397
E claire.a.hamlin@uk.gt.com

Morgan Montgomery
T +44 (0)121 232 5126
E morgan.montgomery@uk.gt.com