

Indirect Tax Update

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Summary

Welcome to this week's ITU.

This week we look at the judgment of the Court of Justice in the case of Wellcome Trust Ltd. The case concerns the tricky subject of determining the correct place of supply. In this case, the UK's Upper Tribunal referred the issue to the Court of Justice on the basis that it required assistance interpreting the place of supply rules set out in the VAT Directive.

The rules are complex. In this case, the place of supply of fund management services supplied to the company was the issue. Wellcome considered that it did not act as a taxable person when it purchased the fund management services which meant that the place of supply was not the UK.

The Advocate General disagreed when the Court issued his opinion last year and the full Court has now issued its judgment.

The UK Government has announced this week that a new timetable for introducing import border control processes has been set out to enable UK businesses to focus on their recovery post Covid-19.

Finally this week, HMRC has published a new Revenue & Customs Brief updating its previous guidance in relation to the VAT treatment of supplies of digital newspapers and other digital publications following the Court of Appeal's decision in News Corp UK and Ireland Ltd.

Wellcome Trust Ltd

Whether the company acts as a taxable person to determine the correct place of supply

In the early 1990s Wellcome Trust Ltd (the company) sought to reclaim input VAT it had incurred on the purchase and sale of investments (stocks and shares). HM Customs and Excise (as it then was) refused the claim and the company appealed against that refusal. Ultimately, the matter was referred to the European Court of Justice by the London VAT Tribunal and, in 1996, the ECJ ruled that the investment activities of the company were not 'economic' activities in a VAT sense and so the input VAT could not be reclaimed. In effect, the Court ruled that the investment activities were more akin to the activities of a private investor rather than a business activity.

In 2010, the place of supply for services rules were amended. From that date, the place of supply of services 'to a taxable person acting as such' is the place where the recipient of the service is established or has a fixed establishment. Where the recipient is a non-taxable person, the place of supply is the place where the supplier is established etc. The company argued that whilst it was a taxable person (because it did have some economic activities that were within the scope of VAT), it was not 'a taxable person acting as such' in relation to its investment activities. It argued that the judgment of the ECJ in 1996 supported that view and that, as a consequence, the place of supply of fund management services it had procured was not the UK (where the company is established) but should have been the country where the fund manager was established.

So the question to be answered by the Court of Justice in this case was whether the company was acting as a taxable person when it procured the fund management services from fund managers established outside the European Union. Unfortunately, the Court has ruled against the company – agreeing with Advocate General Hogan's opinion issued in June 2020. Article 43 of the VAT Directive makes it clear that, in a case where a taxable person has both economic and non-economic activities, it must be regarded as a taxable person in respect of all services rendered to him. Moreover, the definition of 'a taxable person acting as such' in the place of supply rules (Article 44) is different to that contained in Article 2 of the Directive and it was to the Article 2 definition that the ECJ was referring when it gave its judgment in the 1996 case. According to the Court, it follows that, in the light of Article 43 of the VAT Directive, a taxable person may (as here) be 'acting as such', within the meaning of Article 44 of the Directive, even when he is acting for the purposes of his non-economic activities.

The fund managers were, therefore, supplying their services to a taxable person acting as such and, accordingly the place of supply was the UK where the company is established. This in turn meant that the company was liable to account for UK VAT on the purchase of those services under the reverse charge mechanism.

Comment – One can see the logic of the company's arguments in this case. However, the Court has determined that its ruling from 1996 does not affect the place of supply rule. The company must be regarded as acting as a taxable person even though the investment activities are not economic activities from a VAT perspective. The rules for determining the correct place of supply are complex but it is very important to interpret them correctly. The VAT at stake in this case was £13 million. However, the Court's judgment now brings this and any cases standing behind it to a conclusion.

Government sets new timeline for import processes

Recovery from Covid-19

A new timetable for introducing import border control processes has been set out by the government to enable UK businesses to focus on their recovery after the upheaval caused by the global pandemic.

The government says that it has listened to businesses who have faced an unprecedented challenge during the pandemic and will now introduce full border control processes on 1 January 2022, six months later than originally planned. This will provide businesses with further time to prepare for changes at the border and minimise disruption as the economy gradually reopens. The government recognises the scale and significance of the challenges businesses have been facing in adjusting to the new import / export requirements of trading with the EU, at the same time as dealing with the impacts of Covid.

In June 2020, the Government announced a timetable for the phased introduction of controls on imports from the EU into Great Britain, to ensure businesses could prepare in a phased way. This timetable was based on the impacts of the first wave of Covid. However, the Government recognises that the disruption caused by Covid has lasted longer and has been deeper than was anticipated. Accordingly, the Government has reviewed these timeframes. Businesses importing most 'uncontrolled' goods will have until January 2022 to submit the supplementary import declarations. In addition, safety and security declarations for imports will not be required until 1 January 2022.

Comment

Given the scale of disruption caused to many businesses by Covid – coupled with the enormous changes brought about by Brexit, the announcement by the Government will be welcomed by many.

The Government is to be commended for both listening to affected businesses and for actually responding to the concerns expressed by those businesses. The Government has confirmed that it will continue to engage extensively with businesses to support them so that they can continue to trade successfully under the new arrangements.

Revenue & Customs Brief 03/2021

VAT liability of digital publications – update on litigation in News Corp UK & Ireland Ltd

Readers will recall that News Corp lost its appeal in the Court of Appeal and, we understand that it has sought leave to appeal that judgment to the UK's Supreme Court (it has until 29 March 2021 to do so). The issue in dispute is whether digital editions of News Corp's newspapers also qualify as newspapers from a VAT perspective and are, thus, liable to VAT at the zero-rate.

HMRC has confirmed in Revenue & Customs Brief 3/2021 that there have been no changes in HMRC's policy which, in line with the Court of Appeal judgment, continues to be that supplies of digital publications before 1 May 2020 are liable to VAT at the standard rate. (the law was changed with effect from 1 May 2020 to zero-rate such publications).

The Brief confirms that, as HMRC's policy has not changed, any claims made in reliance of the Upper Tribunal decision (which News Corp won) will be rejected. Where an organisation considers that the Upper Tribunal decision in News Corp applies to its own supplies of digital publications it should provide HMRC with full details in writing, including: a full description of the supplies for which the claim is being made, clear reasons why it is considered that the claim should be treated in the same way as the supplies in the News Corp Upper Tribunal decision and a breakdown of the amounts of overpaid VAT being claimed by prescribed accounting period.

Comment

It is not yet clear whether NewsCorp will be given leave to appeal to the Supreme Court. If it does, it is even less clear whether the Supreme Court will overturn the Court of Appeal's judgment.

Many organisations have submitted claims on the basis that the Upper Tribunal's judgment (which allowed News Corp's appeal) was correct. The Brief confirms that HMRC continues to defend its position and will reject these claims.

Organisations that have not yet submitted a claim should follow the guidance set out in the Brief and when it is rejected, they should lodge their own appeal and apply for a stay.

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