

# Indirect Tax Update

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## Summary

Welcome to this week's ITU. There was no ITU last week as there was little to report

In this edition we look at a case from the CJEU: whether VAT is chargeable when a Unit Trust manager outsources services or pays for specialist software licence fees. The Court has largely followed the UK case of *Abbey National Plc*, which was decided in May 2006, and provided guidance to the Austrian court for a decision on the facts of the case.

The long running partial exemption appeal of the Royal Opera House appears to have run its course. Having won at the First Tier Tribunal, its trustees will have been disappointed when HMRC appealed further. The Upper Tribunal agreed with HMRC, and the Court of Appeal has confirmed that decision.

HMRC have published Revenue and Customs Brief 9/2021 as a reminder of the rules for exempting welfare services.

Finally, we have a reminder that the Import One Stop Shop will be live from 1 July 2021, and in theory this provides a simplification for retailers selling goods to consumers in the EU. However, with less than a week to go, the details of the simplified customs declaration are still far from clear.

Joined Cases [C-58/20 & C-59/20](#) K and DBKAG (Austria).

The CJEU provides guidance on whether third parties' supplies to special investment fund managers can be exempt.

K provides a number of Unit Trust fund managers with services. It effectively takes source data of the managers, and calculates taxable income and provides tax statements for the individual investors.

BBKAG provides specialist software to fund managers, providing risk management and performance data.

The question from the Austrian courts (arising because the tax authority ruled that the supplies were standard rated) is whether the third party services can be treated as "the management of special investment funds as defined by the Member States" (see Article 135(1)(g) of the PVD).

Quoting widely from the 2006 judgement in *Abbey National Plc* (C-169/04) the Court did not give a definitive view on the liability of each taxpayer's services, but put the onus back to the Austrian court to look at the detailed circumstances. They did say the directive means the services will be exempt "if they are intrinsically linked to the management of unit trusts and if they are provided exclusively for the purposes of managing such funds, even if these services are not outsourced in their entirety".

The Judgement was made without the benefit of a formal opinion from the Advocate General; this is because the Court did not consider the questions it has been asked represent a new point of law.

The wording in *Abbey National* is subtly different, when it said - the concept of "management of special investment funds" covers the services performed by a third party manager if, viewed broadly they form a distinct whole, and are specific to and essential for, the management of those funds.

**Comment:** this Judgement, arguably, does not advance the position very far if at all. The difference in the words of the judgement from that of *Abbey National*, is that there is no mention of the services forming a "distinct whole". However, this may be too subtle to be of assistance.

Perhaps more helpful was the July 2020 judgement in *Blackrock Investment Management (UK)* (C-231/19). Where similar services to those described above were supplied, through a single platform, to both special investment funds, and other funds. The Court ruled that exemption could not apply because the services were not specifically for special investment funds. Careful design of services, and structuring of contracts appears to be key to maximising VAT exemption..

## Royal Opera House Covent Garden Foundation [\[2021\] EWCA Civ 910](#)

Royal Opera House (ROH) loses partial exemption battle that VAT incurred on production costs has a link to meals and drinks.

ROH argued (following North of England Zoological Society – Chester Zoo) in the First Tier Tribunal (FTT) that it should be allowed to include bar and catering income in its partial exemption calculation, because there was a direct and immediate link to production costs. In the audience came for the whole evening of entertainment – the performance, a meal and interval drinks.

The FTT agreed with ROH, but HMRC appealed to the Upper Tribunal and won. ROH took the next step and appealed to the Court of Appeal. In a unanimous decision led by Lord Justice Richards, the Court ruled in favour of HMRC.

The judges considered precedents from both the CJEU (BLP and Sveda) and UK Court (Mayflower Theatre and Associated Newspapers). They concluded there was no “direct and immediate link” between the expenditure on production costs and the income arising from catering and bar sales.

Perhaps more simply they said:

- customers would not normally eat or drink at the opera house, unless they were there to see the performance ;
- many customers would only see the performance and would not eat or drink

The leading judge did comment that if a dining experience was offered with a free ticket to the performance, that could be viewed differently.

## Revenue and Customs Brief 9/2021

VAT liability of day care services supplied by private bodies in England and Wales

The RCB follows the cases of LIFE Services Ltd and The Learning Centre (Romford) Ltd, which held HMRC’s interpretation of the legislation is correct; that providers of day-care must be charities, public bodies or regulated by the relevant authority.

The argument put forward by the taxpayers that “fiscal neutrality” would lead to equal treatment was not strong enough to persuade the Court to override the UK statute.

### Comment

This looks like the end of the line for the ROH, as an appeal to the Supreme Court seems unlikely.

The FTT decision for Chester Zoo no longer provides good support for similar culturally exempt businesses to boost their input tax recovery by including catering and gift shop income in their partial exemption calculations.

This will be seen as a further blow to the not-for profit entertainment sector after its most difficult 15 months of “trading”.

### Comment

This is a restatement of HMRC’s position so at first appears straightforward. However the VAT law is complex and does not closely follow the rules on “state regulation”. This means that uncertainty can remain when a welfare body is regulated by the Care Quality Commission for some of its activities but not others.

## The Import One Stop Shop (IOSS)

A reminder that in less than a week, retailers can in theory take advantage of the IOSS when selling goods, with an intrinsic value up to €150, to EU consumers.

The IOSS will allow a single VAT registration in a chosen EU member state, with monthly returns that include VAT for each destination member state.

With less than a week to go, official guidance on the “super simplified” Customs declaration that will be needed for each consignment is proving elusive.

### Comment

We hope to have an update on the “super simplified” declaration very soon.

For further reading see our previous article [One stop shop: Changes to EU VAT rules on e-commerce](#)

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