Grant Thornton

Indirect Tax Update

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Summary

Welcome to this latest ITU, which is the first since most things in the VAT world went quiet during July.

In this edition we examine the latest batch of Judgements and AG Opinions from the Court of Justice. In Bulgaria National TV, the court has confirmed our view that it is "activity" (whether business, taxable or exempt) that underpins the right to recover VAT incurred. The source of income, for example subsidies that are outside the scope of VAT are only relevant if it is the sole finance of the activity.

There have been no judgements from the UK's higher courts, and both the First Tier and Upper Tribunal appear to have been troubled mostly by procedural issues that are of interest only to tax and legal representatives. However there are two Upper Tribunal cases of interest.

The Upper Tribunal opined that the First Tier has authority to rule on "legitimate expectation" in limited circumstances. However this is at odds with other decisions at so we can expect future challenge from HMRC.

Finally the Upper Tribunal has judged that seeking compensation for mis-sold Payment Protection Insurance in return for a contingent fee is not an exempt insurance transaction.

News from the Court of Justice of the European Union (CJEU)

The CJEU returned from its judicial vacation at the beginning of September so Judgements and Advocates' General Opinions are starting to filter through.

In Case C-21/20 **Balgarska natsionalna televizia** the Court has ruled that a national TV and Radio broadcaster is not undertaking an economic activity when it broadcasts programs that are free to the viewer and the production is financed entirely by government subsidy. However this is not the end of the story, because the broadcaster, **Bulgaria National TV**, also obtains income from sponsorship, advertising etc, which are taxable supplies. The Court acknowledges that some input tax recovery should be allowed, but said it was up to EU member states to determine the methods and criteria for apportioning input VAT between taxable transactions and transactions not falling within the scope of VAT.

The Court also commented that it is the use of the goods and services acquired as inputs for the purposes of taxable transactions that justifies the input tax recovery deduction. In other words, the way in which such purchases are financed, whether by means of revenue derived from economic activities or subsidies received from the State budget, is irrelevant.

Comment: Over the years we have often seen HMRC take the opposite view and incorrectly claim that "outside the scope" income inevitably means there is non-business activity. If you have been faced with such a challenge, or have taken an overly conservative position, we would recommend revisiting the issue.

The Court has also ruled on a claim for overseas VAT (formerly the 8th Directive) that was originally submitted within the strict six month time limit. In Case C-294/20 GE Auto Service Leasing put Spanish claims in on time but without all the required original invoices and back up information. After several requests and delays by Auto Service the Spanish tax authority rejected the claim. The Court has said refusal was justified, subject to the principles of equivalence and effectiveness.

Comment: the 8th Directive procedure, which required original invoices to be submitted within 6 months of the end of the year, was replaced by an electronic portal to reclaim VAT paid in another member state. However the communication between tax authorities and tax payers has often been fraught with delays and language issues. The moral of this case is that whatever the difficulties, considerable effort should be made to respond to queries in a timely manner. Indeed now that UK businesses will have to rely on the 13th Directive to reclaim VAT incurred in EU member states the position will be similar to that faced under the 8th directive.

News from the Court of Justice of the European Union (continued)

Of less potential impact on taxpayers in the UK, the Court has ruled that Poland's law requiring intra-community purchasers of motor fuels to pay acquisition VAT within 5 days of the physical movement, rather than based on the time of supply rules, is ultra vires. See Case C-855/19 **Dyrektor Izby Administracji Skarbowej.**

The Court has also ruled that Germany is entitled to apply the standard rate to theme park admissions, and the reduced rate to travelling fairs. However this is subject to the proviso that fiscal neutrality is observed. See Case C 406/20 Phantasialand.

In Case C-9/20 Grundstücksgemeinschaft Kollaustraße 136, the Advoate General (AG) gave short shrift to the German Tax Authority. The tenant of a property with standard rated rents had opted for cash accounting so would only be entitled to input tax reclaims once the rents had been paid. The tenant found itself in financial difficulty, and the landlord agreed to defer collection, and waived some of the rent. When the tenant eventually paid the rent and sought to reclaim its input tax, the tax authority claimed the tax point was when the rent was originally due and that the tenant was out of time to claim. The AG said the taxpayer had acted entirely properly, and the claims were in time, so we expect the Court to follow the substance of the opinion in due course.

In the next ITU we will report on the AG's opinion in Case C-228/20 I GmbH which looks at how Germany has implemented the medical exemption for private hospitals.

News from the Upper Tribunal (there is nothing from the Higher Courts)

The Tribunals have largely been dealing with procedural issues that are of little interest to our readers, however one or two are worthy of comment.

In KSM Henryk Zeman SP Zoo (KSMHZ) a Polish company originally applied for VAT registration, but was refused on the basis of honest but flawed answers to HMRC's enquiries. When HMRC subsequently became aware of the full facts, it registered the company and assessed for output tax. The company claimed in the First Tier that it had a "legitimate expectation" that prevented HMRC's actions but the FTT disagreed. On appeal the Upper Tribunal considered the words "may assess" in the law gave HMRC discretion and because assessments are within the authority of the FTT, it could consider the legitimate expectation point. However, this was a pyrrhic victory for KSMHZ, as the UT agreed that there was no legitimate expectation and the registration and assessment would stand.

Claims Advisory Group Ltd (CAG) argued its work in seeking compensation for mis-sold Personal Protection Insurance (PPI) was VAT exempt as either an insurance service or related to insurance. Having lost on all counts at the FTT, the UT reached the same conclusions that i) CAG was not involved in the provision of insurance ii) CAG was neither a broker nor an agent as it did not bring the parties together prior to the insurance contract. The UT concluded that, even if were found that CAG was an insurance agent its services were not related to the provision of insurance so were standard rated.

Comment

It is now 9 months since the end of the transitional period and the UK's final exit from the EU. However, the UK has "retained" much of the EU law as it stood on 31 December 2021. We will continue to monitor cases from the CJEU, but the impact of the judgements on the thinking of UK Courts is uncertain, and we are yet to see any significant decisions. We are in interesting times…

Comment

The Upper Tribunal case of KSM Henryk Zeman could be a turning point in the long running saga of the First Tier Tribunal's authority over "legitimate expectation" appeals. We are aware that HMRC have always argued against this position. However, HMRC have won the substantive issue in this case, so will have no opportunity to challenge the view of the UT until the same point is argued in a future appeal. It will need a case to proceed up to the Court of Appeal before we have a clear precedent.

Claims Advisory Group has failed to convince either level of the Tribunal that its services were sufficiently insurance related to be exempt. In effect the Tribunals are saying they were providing standard rated advice and negotiating for the consumers.

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