Grant Thornton

Indirect Tax Update 2023 Edition 9 – 5 September

Summary

We have just had confirmation that HMRC has been granted permission to appeal the Hotel La Tour decision (see the Case Alert below) to the Court of Appeal. That HMRC has chosen to appeal after two successive losses (with only £77k VAT at stake) underlines the wider significance of this litigation.

While this litigation is ongoing there is a significant opportunity to make claims for additional input VAT recovery on deal fees, beyond what has been allowed under HMRC policy to date. Grant Thornton has prepared a number of claims for other taxpayers based on similar principles, and we would be keen to help you with this if you have suffered any irrecoverable VAT in the last four years on any professional fees relating to share disposals or other fundraising transactions.

Apart from this news received on 5 September, we have had a very quiet summer with both the Court of Justice and the UK Courts taking what appears to be a long break. However, looking back to early July, we have two cases in the CJEU to report.

The first is a German case taken by Municipality A, which argued successfully that its "spa tax" payable by both tourists and residents, is outside the scope of VAT. This will be reassuring to UK cities that impose a congestion or low emission charge, as HMRC accepts these are also VAT free.

The second case looks at how the second-hand margin scheme interacts with cross border purchases of artworks. The Court has agreed with the Advocate General that the second-hand margin excludes the acquisition VAT paid from the cost calculation, thus leading to double taxation. The Court would usually apply the fiscal neutrality principle to overcome this problem, but since the law is clearly worded it was unable to reach a different view. It seems possible that the European Commission will propose a change to the law, but it is not a widespread issue, and does not have implications for Great Britain.

Without any cases in the Higher Courts or Upper Tribunal we turn to the First Tier Tribunal, which has published a number of decisions, many of which are solely related to procedural and penalty issues. For those appeals dealing with liability issues, we have two themes in this update – the Tour Operators Margin Scheme, and the limits of the medical exemption.

News from the Court of Justice

Gemeinde A v Finanzamt C-344/22

On 13 July 2023 the Court ruled:

Article 2(1)(c) of the PVD must be interpreted as meaning that the provision of spa facilities by a municipality does not constitute a 'supply of services for consideration', within the meaning of that provision, where, on the basis of municipal by-laws, that municipality imposes a spa tax of a certain amount per day's stay on visitors staying in the municipality, when the obligation to pay that tax is linked not to the use of those facilities but to the stay in the municipal territory and those facilities are freely and gratuitously accessible to everyone.

Background

A is a state-recognised air spa town, whose municipality collects a "spa tax" from certain visitors, and residents in order to fund costs of providing spa facilities. Spa facilitates are available free of charge, including to individuals (such as day-visitors) who do not have to pay the spa tax.

The court considered that a supply of services is only carried out 'for consideration', within the meaning of Article 2(1)(c) of the VAT Directive, if there is a legal relationship between the provider of the service and the recipient pursuant to which there is **reciprocal performance**. As the spa facilities could be used, or not used by taxpayers and others (day visitors), free of charge there was no link between the payment and the facilities, so the Court effectively found that the tax is outside the scope of VAT.

Comment: This appears to have been a straightforward decision based on the requirement for reciprocity to have a supply of services for consideration and it acts as a useful reminder of some fundamental principles on supply & consideration for VAT purposes. An equivalent issue in the media recently is the ULEZ and Congestion charges in London, which are both considered to be outside the scope of VAT as "statutory charges".

Mensing C-180/22

On 13 July 2023 the Court ruled:

Articles 312 and 315 and the first paragraph of Article 317 of the PVD, must be interpreted as meaning that the value added tax paid by a taxable dealer in respect of the intra-Community acquisition of a work of art, the subsequent supply of which is subject to the margin scheme under Article 316(1) of that directive, forms part of the taxable amount of that supply.

Background

This decision supports the AG's Opinion reported in the April 2023 Indirect Tax Update. Mr Mensing is a taxable dealer trading in works of art. He is based in Germany and acquired works of art from artists established in other Member States. Mr Mensing paid the acquisition VAT on the intra-Community acquisition. Mr Mensing did not exercise his right to deduct that tax, but the tax authority did not allow him to include the VAT as a cost when calculating the second-hand margin.

> For example, if the dealer bought an artwork in Germany for €100 and sold it as a margin supply for €200 the margin would be €100 as expected. If he bought a similar artwork from an unregistered artist in Belgium for €100 he would need to account for acquisition VAT (probably at the reduced rate of 7% as it's is a work of art) and would not be able to recover that acquisition VAT. The German tax authority, and the AG agreed that with a selling price of €200 the taxable margin is still €100.

The Court agreed with the Advocate General and concluded that the principle of fiscal neutrality does not allow the scope of a provision of the VAT directive to be extended in such a way as to run counter to the clear wording of that directive. In other words, as per the AG, the court was constrained by the wording of the Directive.

Comment: As was discussed at the time of the AG's opinion, the "problem" here is the way the law has been clearly worded - the legislation would need to be changed for there to be a different outcome. Time will tell if the European Commission thinks this is important enough to propose a change to the Directive.

News from the First Tier Tribunal

TC08852 SONDER EUROPE LTD

The First Tier Tribunal has decided a holiday letting business is able to account for VAT on the margin between the lease charges incurred and holiday rentals received, using the Tour Operators' Margin Scheme.

As a reminder, the Tour Operators Margin Scheme ("TOMS") is a special set of rules that result in output VAT being due only on the **profit margin**, rather than on the total income for a supply of travel or accommodation in the UK. In Sonder's case, the application of TOMS would have led to a much lower VAT burden than if the same income was taxed under normal VAT rules. Sonder therefore argued that TOMS should apply. HMRC disagreed and asserted that output VAT was due on all the income.

Sonder rented 40 individual apartments from third party landlords for use in a holiday letting business. The landlords charged Sonder a VAT-exempt annual rent. The rent paid by Sonder remained the same regardless of the number of days the apartments were occupied by travellers. Approximately 37.5% of the apartments were furnished and 62.5% were unfurnished. Unfurnished accommodation required Sonder to provide furniture and similar items (with the exception of white goods, which were always provided by the landlord). The unfurnished accommodation could not be used to provide accommodation until Sonder had furnished it. Sonder never made any changes which would have altered the fabric or structure of the apartment or building, such as moving a wall or door or changing windows. The agreements with the landlords typically prohibited Sonder from making any alterations or additions to the property.

UK TOMS applies only to travel services (including accommodation) bought in and re-supplied for the benefit of a traveller **without material alteration or further processing.**

HMRC argued that the supply by the landlord was not re-supplied by Sonder or, if it was, it was **materially altered or processed** when it changed from an exempt supply of land to a supply of accommodation to travellers subject to VAT. HMRC also emphasised that the addition of furnishings to unfurnished properties comprised alteration or further processing.

The Tribunal found for the Taxpayer, stating that "material alteration or further processing" must refer to more than minor changes or processes which do not affect the fundamental character of the particular goods or services. In order to be excluded from TOMS, the Tribunal considered that the alteration and processing must change the goods or services supplied so that what is supplied by the tour operator cannot be described in the same terms as the items acquired.

Comment: Notably, HMRC guidance does consider property to be "materially altered" by the addition of catering, and this decision does not seem to contradict that existing policy for catered accommodation. However, HMRC's guidance does not explicitly deal with self-catering accommodation, and it may be possible that other self-catering providers with a similar business model to Sonder can benefit from including this income in TOMS.

Many holiday letting companies operate as disclosed agents of the property owner, so only account for VAT on their commissions. In this case Sonder took on the risk of void periods where the property was not let, it would be acting as principal in making the supply so would have had to account for standard rated VAT on all its income if the TOMS did not apply.

TC 08893 GOLF HOLIDAYS WORLDWIDE LIMITED

This is another TOMS related case where the taxpayer had accounted for VAT using the TOMS from 2017 to 2021 but became aware that it would have been better off accounting for VAT on "wholesale supplies" i.e. to business customers using normal VAT rules.

The CJEU decided in 2013 (Case C-189/11 - Commission v Spain) that wholesale supplies are to be dealt with under TOMS, but HMRC followed up with Revenue and Customs Brief 05/2014 saying there would be no changes to the operation of TOMS in UK domestic law but businesses could choose to apply the direct effect of EU law and treat wholesale supplies as within TOMS.

The Tribunal has decided that this gave the taxpayer two options, but once it chose one, because it was within the law, it was not open for it to change its mind later and submit a valid error correction.

Comment: This is an instance of there being two or more valid methods to calculate a tax liability, perhaps by concession. Taxpayers should satisfy themselves, at the time they submit their returns, that they have used the most advantageous method, as retrospective error correction will be rejected by HMRC.

TC08846 Illuminate Skin Clinics Ltd

The director of the taxpayer company is a registered medical doctor, so the dispute centred around whether the main purpose of the cosmetic procedures provided were "to protect, maintain or restore the health of the individual". The FTT was guided by decisions that have considered the scope of Items 1 and 4 over the last decade and concluded the services could not fall within the exemption.

Comment: this is another dispute around the boundary of what constitutes "medical care by a person registered or enrolled in any of the official medical registers. The appellant attempted to argue that it might apply, but the Tribunal refused to consider this because at the relevant time the company was not CQC registered. It obtained such registration in 2018 but that was not relevant to the appeal.

TC08865 Epem Limited

Epem was compulsorily registered from 2007 and HMRC issued output tax assessments, the quantum of which was not set out in the FTT judgement. Epem provided services that were between those usually supplied by a beautician, and by a cosmetic surgeon. It was not registered with the CQC, because the CQC did not consider it was required, so HMRC asserted it made standard rated supplies and the FTT dismissed Epem's appeal.

Comment: the FTT admitted that some of its supplies could have been exempt, but it had insufficient evidence to support any such finding of an appropriate apportionment, particularly as the burden of proof lay with the taxpayer. EPEM was represented by its Director, who clearly lacked experience of Tribunal procedure and evidential requirements, so the result was not unexpected.

Contacts

Karen Robb
Partner

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

Paul Wilson
Partner

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

Nick Garside
Partner

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

Kevin Martin
Partner

T +44 (0) 20 7728 3163
E kevin.martin@uk.gt.com

Grant Thornton