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Indirect tax update

[01/2019]

January 2019

Summary

Welcome to the first edition of ITU for 2019. This edition catches up with a couple of Court of Justice judgments that were issued just before Christmas 2018 and with a judgment from the Upper Tribunal.

The Court of Justice of the European Union (CJEU) provides national courts with guidance on the correct interpretation of European law. In a VAT context, a national court will refer questions to the CJEU in relation to the correct interpretation of the VAT Directive.

In the case of Arex CZ, the CJEU provided the Czech court with guidance in connection with the intra-community acquisition of goods in a chain of transactions involving the supply of fuel under a duty suspension regime.

In Skarpa Travel, the CJEU provided guidance on the interpretation of the workings of the Tour Operators' Margin Scheme (TOMS) in connection with the receipt of advance payments.

In the UK, the Upper Tribunal has issued an interim judgment in the case of Blackrock Investment Management (UK) Ltd. The case concerns whether UK VAT is due under the reverse charge mechanism. The company buys in the right to use a sophisticated software platform from a group company established outside the UK.

HMRC considers that VAT is due under the reverse charge whereas the company considers that, to the extent that the software is used for the management of special investment funds (SIF's), the service received should also be regarded as the management of a SIF and qualify for VAT exemption.

The Upper Tribunal has agreed with that view but has decided to refer the case to the CJEU in relation to whether the single charge made for the use of the software platform may be apportioned between the element used in the management of SIF's and the element used for the management of non-SIF's.

Court of Justice – Judgment – Arex Cz

VAT – intra-community acquisitions

The CJEU has issued another judgment dealing with the issue of intra-community acquisitions. In this case – referred to the CJEU by the Czech courts – Arex purchased fuel from another Czech business. The transaction was treated for VAT purposes as a domestic supply in the Czech Republic and Arex paid Czech VAT to its supplier and reclaimed that VAT as input tax on its Czech VAT return. The original supplier sold the fuel to a customer based in the Czech Republic. The fuel was then re-sold down a chain of Czech businesses and ultimately, Arex purchased the fuel. However, at all times, the fuel remained with the original supplier at its Austrian depot. Arex collected the fuel using its own transport and moved the fuel under a duty suspension regime from Austria to Czech Republic.

The Czech tax authority concluded that, in its view, there was no domestic supply of the fuel in the Czech Republic. On the facts, it concluded that there had actually been an intra-community supply of the fuel in Austria and a corresponding intra-community acquisition of the fuel by Arex in Czech Republic. Accordingly, Arex was not entitled to reclaim the VAT charged on the 'domestic' supply as no such supply took place. The CJEU agreed with the tax authority. Article 20 of the VAT Directive stipulates that an intra-community acquisition of goods occurs when a person acquires the right to dispose of the goods as owner and the goods are dispatched or transported (either by the person acquiring them or the vendor) to a Member State other than that from where the dispatch or transport begins. The crucial point here is the timing of the acquisition by Arex of the right to dispose of the fuel as owner. This is a matter for the national court to determine taking account of all of the facts and evidence in relation to the particular transaction. On the face of it, in this case, it seemed that Arex acquired the right to dispose of the goods as owner when the fuel was physically still in Austria and before it was transported by Arex from Austria to the Czech Republic. Accordingly, the CJEU was of the view that, in such circumstances, the provisions of Article 20 were fulfilled. There was an intra-community supply by the Czech supplier (which is exempt from Austrian VAT) and a corresponding intra-community acquisition of the fuel by Arex in the Czech Republic. VAT was due in the Czech Republic but under the acquisition rules rather than under the normal rules relating to domestic supplies.

The goods in this case was fuel which is also subject to excise duty. That duty was paid in the Czech Republic by a third party guarantor. Arex tried to argue that, somehow, as the goods in question were transported under a duty suspension regime, it could not acquire the right to dispose of the fuel as owner until the fuel was removed from that suspension. The CJEU dismissed that argument. The fact that the goods were under a duty suspension had no bearing on the matter. The right to dispose of goods as owner is a much wider concept than the acquisition of 'title' to the goods under contract law. It was clear from the facts in this case that even though legal title might not have been transferred until the fuel was removed from duty suspension, the right to dispose of the goods as owner had been transferred to Arex in Austria before the fuel was transported.

Comment – this is yet another case where the CJEU has issued a judgment in relation to intra-community acquisitions. (see earlier cases emag Handl; Euro Tyres). It is clear that in chain transactions, only one of the transactions can be regarded for VAT purposes as an intra-community supply which benefits from VAT exemption. To establish this, it is necessary to determine when the acquisition of the right to dispose of the goods as owner occurs. It is only when the goods are dispatched or transported after the acquisition of that right that the transaction meets the test of being an intra-community acquisition in the Member State of arrival. Businesses need to ensure that they understand the rules relating to intra-community supplies and acquisitions and to account for VAT correctly.

Court of Justice - Judgment

Skarpa Travel

The CJEU has issued a judgment relating to the operation of the Tour Operators' Margin Scheme (TOMS). This scheme applies where tour operators or travel agents buy in and resell travel services. The scheme is complex but, essentially, operators are deemed to supply a single supply of travel services which is taxable in the Member State where they are established. They also only account for VAT on the profit margin they make rather than on the full selling price.

In this case, the Polish tax authority considered that when a customer paid a deposit to Skarpa Travel, then, in accordance with Article 65 of the VAT Directive, VAT was due on the full amount of the deposit received. The problem with that approach is at the time of receiving the deposit the taxpayer may not know what the profit margin will be in relation to the transaction. Skarpa Travel argued that it would be against the provisions of the VAT Directive specifically relating to TOMS if it was required to account for VAT on the full value of the deposit payment.

In its judgment, the CJEU has confirmed that, in principle, the Polish tax authority is correct. Article 65 dictates that, provided the travel services being purchased by the customer are known at the time, VAT is due on the full amount of the deposit received. However, it recognises the difficulty highlighted by Skarpa Travel and ruled that in circumstances where the input costs borne or to be borne by the tour operator are not known at the time the deposit is received, the tour operator may estimate the profit margin that he is likely to make in respect of that transaction and account for VAT on the deposit received on the basis of that estimate. Once the actual margin is known, a subsequent adjustment to the VAT declaration can be made.

Comment

On the face of it, this seems to be a sensible and pragmatic judgment. One can understand the reluctance of a travel agent / tour operator to pay VAT on the full value of a deposit in a situation where the margin is relatively low.

In the UK, businesses are entitled to elect between choosing the date of the holidaymaker's departure or the receipt of payments and in cases where they elect for the latter VAT is only due where the value of the deposit exceeds 20% of the full value. It would seem that, in light of this judgment of the CJEU, the UK's treatment of deposits is not strictly in line with the provisions of the VAT Directive. It is, therefore, possible that UK VAT law might be amended to ensure that when a deposit is received an amount of VAT is calculated and declared by the tour operator.

Upper Tribunal - Judgment

Blackrock Investment Management (UK) Ltd (Blackrock)

Under existing VAT law, the place of supply of services between two businesses established in different countries is the country where the recipient of the service is established. (This is known as the general 'B2B' rule). VAT is accounted for by the recipient business under a mechanism known as the reverse charge. In this case, Blackrock purchased services (the right to use certain software) from an American group company which it used both for the management of Special Investment Funds (SIFs) and other investment funds (Non SIFs). HMRC considered that VAT was due under the reverse charge on the full value of the service received.

Blackrock appealed and the First-tier Tax Tribunal (FTT) agreed that, in relation to SIF's the service received ought to be regarded as the management of SIF's which, ordinarily would qualify for VAT exemption. However, as the software was used by Blackrock for both the management of SIF's and the management of non-SIFs, the FTT decided that the service was a single supply that could not be apportioned between SIFs and non-SIFs. As such, VAT was therefore due on the full value of the service received.

Blackrock appealed on the apportionment point. The Upper Tribunal agreed with the FTT on the exemption issue. Following earlier case law from the CJEU (GfBK, SDC and Abbey National), the Upper Tribunal considered that the supply of the software qualifies as 'management' of the SIFs. However, on the apportionment issue, the Upper Tribunal has decided to refer the matter to the CJEU for further guidance. The questions to be referred will centre around whether there is a single supply of the software which cannot be apportioned or whether the correct approach is to 'carve out' the element attributable to the management of the SIFs.

Comment

The CJEU has held previously that, in situations where a fund manager sub-contracts part of its fund management tasks, the sub-contractor is to be regarded as providing fund-management services in their own right. In cases where the funds in question are SIFs, those services qualify for VAT exemption.

In this case, the supply of the software platform would normally qualify for exemption from VAT but the software is also used by Blackrock for the management of Non-SIFs (indeed it is used predominantly for the management of non-SIFs).

It is not clear whether the Directive permits an apportionment to be made and, in the circumstances, the Upper Tribunal requires guidance from the CJEU on this point.

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