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Indirect tax update

[02/2019]

January 2019

Summary

A relatively quiet week in the courts this week.

The Advocate General of the Court of Justice has issued an interesting opinion in the case of Srf Konsulterna AB (SRF) – a Swedish referral to the Court of Justice that seeks guidance on the interpretation of Article 53 of the VAT Directive.

The question referred relates to the place of supply of 'admission to educational events' and asks whether the supply by SRF should be regarded as taking place in Sweden or, where the event takes place (if in another Member State). This is the first case from the CJEU to consider Article 53 in any detail.

The CJEU has also issued its judgment in a Finnish case - A Oy. In this case, the taxpayer was a demolition contractor. The company set its price for the demolition contract taking into account the value of any scrap metal it could realise from the demolition works. In Finland, VAT is due under the reverse charge mechanism for supplies of scrap metal between two taxable persons and, consequently, the Finnish tax authority argued that VAT was due not only on the demolition contract price but also on the value of the scrap metal acquired by the taxpayer as a result of the demolition.

Finally, Grant Thornton has been successful in two recent client cases taken to the First-tier Tax Tribunal (FTT) – both in relation to the zero-rating of food. In The Core (Swindon) Ltd, the FTT agreed that fruit and vegetable juices sold as meal replacements were not 'beverages' for VAT purposes and in Pulsin' Ltd, the FTT agreed that a 'healthy' chocolate brownie had sufficient characteristics to be classified as a cake for UK VAT purposes.

Court of Justice – Advocate General's Opinion delivered 10 January 2019

Srf Konsulterna AB (SRF) – Case C-647/17

SRF is a company established in Sweden which is wholly owned by a professional association for accounting, management and salary consultants. It provides educational and vocational training to consultants in return for a fee. It provides its educational and vocational training services to other taxable persons established in Sweden. However, the courses take place both in Sweden and in other Member States of the EU. The question in this case was one of determining the place of supply. Was the supply to be treated as falling within Article 44 of the VAT Directive (ie, under the 'general' B2B rule - where SRF's customers belong (ie Sweden)) or should the supply be classified as being in respect of 'admission' to an educational event and fall within Article 53, the place of supply of which is the country where the event actually takes place?

The Advocate General (AG) examined the scope of Article 53 and whether the service provided by SRF falls within that provision. Article 53 refers to "services in respect of admission" to various types of event (including educational events). For the purposes of Article 53, the AG considers that an 'event' is 'a thing that happens or takes place as a planned public or social occasion' and should be construed as 'a gathering of persons to observe or participate in an activity over a period of time'. An event is also 'limited in time'. The duration of a service should normally enable one to distinguish between events and other activities. Accordingly an educational event for the purposes of Article 53 covers an educational activity covering a specific topic which is planned in advance and which takes place at a specified place over a relatively short period of time. As far as 'admission' is concerned, only services that have the essential characteristics of granting the right of admission to an event are included in Article 53

According to the AG, services related to the admission to an event cannot be assimilated with the provision of the event itself. They are not the same thing. The provision of the event itself (ie the organising, hosting and marketing of it as a whole) is not a supply relating to 'admission' and does not fall within Article 53. The essential feature of services that do fall within Article 53 lies in granting an individual or a number of individuals the right of access to the premises where an educational event is held. The AG seems to be saying that, in her view, a supply of admission to an event will take place (and thus fall within Article 53) where the supplier controls the number of individuals able to gain access to the event and charges a fee in respect of their admission.

Contrast this with the staging of an event where 'admission' to it is merely a minor or ancillary element of the overall activity. In these circumstances, whilst the supplier would clearly be providing services relating to admission, the admission element would only be regarded as being ancillary and would not fall within Article 53. Thus, the supply of an event itself (including the rights of admission and all other services associated with the staging of such an event) supplied to another taxable person falls within Article 44.

Comment – the place of supply rule contained with Article 53 asserts that the place of supply of services relating to admission to various events is the place where the actual event takes place. It is important for affected suppliers to understand exactly what the expression 'services relating to admission' actually means. In this case, the events were 'educational' in nature but Article 53 also applies to the rights of admission to cultural, artistic, sporting, scientific and entertainment events or similar (including fairs and exhibitions). According to the AG, where a business supplies only the right of admission, the service is likely to be covered by Article 53 and be taxable in the Member State where the event actually takes place. Where the supplier provides the event itself, this is more likely to fall into the general place of supply rule for B2B services under Article 44.

Court of Justice - Judgment

A Oy (case referred by the Finnish Courts)

In this case, the company 'A' Oy is a demolition contractor. It enters into demolition contracts with its customers and sets a contract price for that service taking into account the value of any scrap metal that it may retrieve from the demolition site. In Finland, VAT law states that VAT is payable under the reverse charge regime for supplies of scrap metal and the question in this case was whether, in the circumstances, A Oy was liable to account for VAT not only on its supply of demolition services, but also on the value of the scrap metal.

The Court has confirmed that, on the evidence, there was a clear understanding between the contractor and his customer that the contract price for the demolition service had been reduced to take account of a value (determined by the contractor – but not disclosed to the customer) attributable to the scrap metal that was, or was potentially retrievable from the demolition of the site and the removal of the waste materials. From a VAT perspective, that value constituted the consideration given by the contractor for the acquisition of the scrap metal and, in accordance with Finnish VAT law, the contractor was obliged to account for VAT on the value of that consideration. It is clear from previous judgments of the court that 'consideration' for VAT purposes has a subjective value. Where that value is not a sum of money agreed between the two contracting parties, it must, to be subjective, be the value attributed to it by the buyer. Here, the value attributed to the scrap metal by the contractor was the value by which he was prepared to discount the demolition contract.

Comment

Barter and similar transactions can often cause difficulties from a VAT perspective.

Clearly, in this case, the contractor was entitled to take away the scrap material belonging to the owner of the demolition site. That in itself constituted a supply of goods for VAT purposes in that the contractor acquired the right to dispose of the material as owner.

The fact that the site owner was not informed of the value of any discount allowed by the contractor did not prevent VAT from being due on the acquisition of the scrap metal. Clearly, the contractor had ascribed a value (or at least an educated estimate of value). This value was sufficient to constitute the consideration for the supply and VAT was due under the Finnish reverse charge rule.

First-tier Tax Tribunal

The Core (Swindon) Ltd & Pulsin' Ltd

Both of these cases involved Grant Thornton clients and related to the UK's VAT law on supplies of food and drink.

In The Core (Swindon) Ltd's case, the question to be resolved was whether the supply of fruit and vegetable juices as meal replacements should be regarded for UK VAT purposes as a 'beverage' (and liable to VAT at 20%) or whether the product qualified for zero-rating. HMRC considered that VAT was due but, allowing the appeal, the Tribunal concluded that the juices supplied under the Juice Cleanse Program were intended to be meal replacements and were thus, food and not a beverage.

In the Pulsin' case, the question was whether a 'healthy' chocolate brownie should be regarded as a cake (and zero-rated) or whether, as contended for by HMRC, the brownie should be regarded as confectionary and liable to VAT at 20%.

Again, the Tribunal agreed with the taxpayer. The Tribunal was satisfied that the brownie in question had sufficient characteristics to be classified as a cake. Like the Snowballs case before it (also a Grant Thornton case), the Judge was satisfied that when compared to other brownies (that are regarded as cakes), the 'healthy' brownie was sufficiently similar and should be treated for VAT purposes as a cake.

Comment

Quite strikingly in the Pulsin' case, the Tribunal judge confirmed that, in her view, the current state of the law on the taxation of food items is not fit for purpose and will necessarily present apparently anomalous results as tastes and attitudes to eating change.

The Tribunal fundamentally disagreed with HMRC's guidance that the borderline between cake and confectionary presents few problems.

UK law on the VAT liability of food is complex. As eating habits change, so must the law adapt. The law has been in place for almost 50 years and HMRC must recognise that what may not have constituted 'food' in 1973 may well do so now (and vice versa). A rigid approach to determining liability is likely to continue to keep the Tribunal busy.

Contacts

Stuart Brodie

Scotland

T +44 (0)14 1223 0683
E stuart.brodie@uk.gt.com

Karen Robb

London & South East

T +44 (0)20 772 82556
E karen.robb@uk.gt.com