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05 April 2017

Case Alert

UK Supreme Court to refer VWFS to CJEU

Summary

This is a long-running VAT case. VWFS supplies cars and HP to VW customers. It argues that VAT incurred on overheads in its retail sector should be apportioned between its taxable supplies (the sale of the vehicle) and its exempt supplies (the supply of finance).

HMRC considers that, as the vehicles are bought and sold for the same price (ie there is no mark-up), the overheads must be attributable solely to the supply of finance.

The First-tier agreed with VWFS but this was overturned by the Upper Tribunal. The Court of Appeal then found for VWFS and HMRC appealed to the Supreme Court, which has decided to refer the matter to the Court of Justice of the European Union.

Supreme Court

One of the golden rules of the EU VAT system is that a business may only recover VAT incurred on the purchase of goods and services if it is attributable to the businesses taxable outputs. Where, however, VAT is incurred on overheads (which by their nature cannot be attributed to any particular sales activity), a business must apportion such input VAT between those activities that are taxable and those that are not. A business may only reclaim the proportion of input VAT that is apportioned to the taxable activity. In this case, VWFS makes taxable supplies of cars. It purchases the car from a motor dealer and then sells it on (at the same price) to the customer. VWFS also makes exempt supplies. It supplies HP Finance to the same customer. Thus, from an economic perspective, VWFS makes its profits from its exempt supplies of finance.

HMRC argue that, in such circumstances, the overheads are not used in making the taxable supply of the car but are used only in making the exempt supply of credit. As such, it contends that VWFS is not entitled to reclaim the overhead input VAT as it is clearly a cost component of the price of finance and not a cost component of the price of the car. VWFS argue that HMRC accepts that the costs incurred are clearly overheads and that, as a result, EU VAT law requires an apportionment to be made. It argues that HMRC's attempted attribution of the costs wholly to the exempt supply of finance is contrary to the VAT Directive. In its judgment issued on 5 April 2017, the Supreme Court has decided that it needs to refer the matter to the Court of Justice. The case will be remitted there in due course for a preliminary ruling. In the meantime, the Supreme Court dismissed HMRC's secondary argument that it had a fall-back position in relation to the extent of any apportionment should it lose its case on the substantive issue. The Supreme Court held that as the matter had been dealt with at the First-tier Tribunal and was not challenged by HMRC at the time, it was too late to re-open those arguments now. Accordingly, the question of the extent of any apportionment is no longer a live issue.

Comment – The CJEU will provide guidance in due course on the question of whether VWFS is entitled to reclaim a proportion of its overhead VAT. It may be a further 18 months to two years before the matter is finally resolved. It seems clear that, as submitted by VWFS, cars do not sell themselves and that some overheads must, therefore, be consumed in the course of that process. The fact that none of the overhead costs are incorporated in the price of the car should not, in our view, prevent the recovery of a fair and reasonable proportion of the overhead VAT.

Contact

Stuart Brodie	Scotland	stuart.brodie@uk.gt.com	(0)14 1223 0683
Karen Robb	London & South East	karen.robb@uk.gt.com	(0)20 772 82556
Vinny McCullagh	London & South East	vinny.mccullagh@uk.gt.com	(0)20 7383 5100