Indirect tax update

[04/2018]

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Summary

Welcome to this week's Indirect Tax Update.

The UK Courts and Tribunals have been particularly quiet this week but the Court of Justice of the European Union (CJEU) has issued an Advocate General's opinion in a UK referral in the case of DPAS Ltd.

DPAS provides dental plan services similar to those supplied by AXA Denplan. The CJEU ruled in that case that Denplan's service of collecting direct debits from patients and arranging the transfer of payment to the dentists was a supply of debt collection services. In DPAS Ltd, the taxpayer changed its contracts and made the patient the recipient of its service. The UK's Upper Tribunal sought guidance from the CJEU on whether, in such circumstances, the change meant that the service provided to the patient was not debt collection.

The CJEU has also issued a judgment in a Slovak case involving Volkswagen. A supplier to VW did not charge VAT on its supplies but later discovered that VAT was actually due. It raised supplementary VAT invoices and VW claimed the VAT back through an 8th Directive claim. The Slovak tax authority refused the refund on the basis that years 2004 to 2006 were outside the Slovak time limit of five years.

The week also saw the UK and the EU announce that they had reached agreement on many aspects of the UK's Brexit deal. Importantly, whilst the UK will formally leave the EU in March 2019, it will continue to benefit from both the single market and customs union for a transitional period that will last until 31 December 2020. This important agreement will give businesses much more time to prepare for the UK's departure.

DPAS Ltd – Case C-5/17

Court of Justice of the European Union Advocate General's opinion 21 March 2018

This referral to the CJEU was by the UK's Upper Tribunal. The Tribunal considered that it needed guidance from the CJEU on the interpretation of EU VAT law relating to Article 135(1)(d) of the VAT Directive. That article confers a mandatory exemption from VAT on a supply of services involving 'transfers or payments' other than debt collection services.

In a previous referral to the CJEU in the case of AXA Denplan, the CJEU had ruled that, in principle, the collection of direct debits from patient's bank accounts and the subsequent transmittal of money to the dentist's account was capable of being a 'transaction concerning payments or transfers' that was exempt from VAT under Article 135(1)(d). However, the Court also ruled that AXA Denplan were actually providing debt collection services to the dentists and, as a result, the services were not exempt from VAT but were taxable.

DPAS Ltd operated virtually the same model as AXA Denplan and, following the Court's ruling in the latter case, DPAS sought to circumvent the ruling by altering its contractual arrangements. Instead of providing its services to the dentists, it amended its contracts so that it supplied its services to the patient - assuming that services supplied to a debtor could not, logically, be regarded as debt collection services (as these are generally supplied to the person to whom the debt is owed ie the dentist).

The Upper Tribunal wished to understand whether this change in the contractual arrangements meant that the service of collecting and transmitting payments between patients and dentists qualified for exemption or was still to be regarded as debt collection. The Advocate General (AG) has issued an opinion and considers that the CJEU should rule that the service provided by DPAS Ltd does not qualify as a transaction concerning payments or transfers. In his view, the AG considers that, as the court has ruled on a number of previous occasions, to qualify as a transaction concerning payments or transfers, the service must have the effect of changing the financial and legal situation subsisting between the payer and the payee. In DPAS Ltd's case, the taxpayer merely provides an administrative service of arranging the transfer of money but it is the financial institutions (ie the banks) that actually change the financial and legal situation between the patient and the dentist by actually transferring the money. As a consequence, the AG considers that the court should not follow its earlier decision in AXA Denplan but should rule that the service provided by DPAS Ltd does not meet the court's previous definition of what constitutes a transaction concerning payments or transfers. Rather, it is a mere technical or administrative service that is not covered by Article 135(1)(d).

In the event that the Court does follow its previous ruling in AXA Denplan, the AG still considers that the service being provided by DPAS Ltd is 'debt collection'. The fact that the recipient of the service is the debtor (the patient) rather than the creditor (the dentist) is irrelevant. The literature issued to patients and dentists at the time of the contractual changes highlighted that they were simply administrative and that nothing had really changed between the parties. On that basis, the AG considers that the economic reality (that nothing has changed) in fact overrides the contractual position. Basically, if 'nothing has changed' the Court should find that the service is one of debt collection.

Comment – Without actually saying that the CJEU's judgment in AXA Denplan was wrong, the AG has invited the court to, effectively overturn it. The last few years have seen a number of cases where businesses have claimed that their supplies qualify for VAT exemption as 'transactions concerning transfers or payments' (NEC / Bookit / Paypoint etc). If the full court agrees with the AG in this case, it will be another example of how narrow the exemption is in Article 135(1)(d). In essence, the exemption is only available where the service actually transfers payments and has the effect of changing the financial and legal position of the payer and the payee. Any other service is likely to be seen as merely preliminary or administrative and liable to VAT.

Court of Justice Judgment

Case C-533/16

This was a referral to the Court of Justice by the Slovakian courts. Volkswagen (VW) is a well-known business established in Germany and it contracted with a Slovak business for certain supplies. Considering that those supplies were not liable to VAT the Slovak business did not charge VAT on its invoices nor account for any VAT during the period from 2004 to 2010.

It subsequently transpired that what had been supplied was actually liable to VAT and, in order to regularise the position, the Slovak business raised VAT invoices to VW and paid the output VAT due over to the Slovak authorities. VW then submitted a claim for a refund of the VAT paid on these invoices to the Slovak Authorities under the provisions of the 8th Directive refund system.

The Slovak Authorities were content to pay a refund of the VAT claimed for the years 2007 to 2010 but, under Slovak VAT law, a five year time limit applied. Accordingly, under Slovak law, the claims for refund relating to the years 2004 to 2006 were out of time. VW appealed and the Slovak courts decided to refer the issue to the Court of Justice. The question to be resolved was whether the five year time limit imposed by Slovak law should run from the date of the original supply (and preclude VW's refund) or whether it should run from the date of the supplementary VAT invoice.

Not surprisingly, the Court has ruled that in the circumstances, the five year time limit should run from the date of the supplementary VAT invoices in which case, VW's claim was made well within the Slovak time limit.

Comment

It really would have been somewhat bizarre for a Member State to collect VAT from the supplier but then deny the purchaser a right of reclaim.

One of the fundamental principles of EU law is that a business that is 'fully taxable' (ie does not make exempt supplies where there is no right to recover attributable input tax) should be entitled to full recovery of the VAT he has paid.

The Court has said in previous cases that Member States may impose limitation periods but here, the error was discovered and corrected after the expiry of the five year time limit. The principle of neutrality would be offended if the Slovak time limit was applicable from the original date of the supply rather than from the date the supplementary VAT invoice was raised.

Brexit Alert

The European Union and UK agree to a 'Brexit' transitional period

Perhaps the biggest story of the week and the one which grabbed most of the headlines was the announcement by the EU and UK that they had reached agreement on many aspects of the UK's Brexit from the EU.

The most important aspect of the agreement from an indirect tax perspective was the announcement that the parties had agreed in principle to adopt a transitional period covering the period from formal withdrawal from the Union in March 2019 to 31 December 2020. This agreement means that businesses will now have a much greater period to prepare for and implement their respective Brexit strategies. Instead of having to be ready to leave in March 2019, this can now be delayed for a further 21 months. Given all of the other changes happening in 2019 (like making tax digital and changes to EU VAT law), this will provide businesses with much more breathing space.

Article 47 of the agreement contemplates that for VAT purposes, the rights and obligations of taxable persons arising from the VAT Directive will continue to apply to transactions arising before 31 December 2020 and to those transactions which span the end of the transitional period. Those rights and obligations will be respected for a period of five years. In essence, therefore, the provisions of the VAT Directive will remain in force until at least 31 December 2025.

The agreement between the EU and the UK has still to be agreed by Member States. It has only been agreed at this stage at 'negotiator' level and may be subject to change although any such changes are not likely to be substantial.

Comment

The so called 'edge of a cliff' scenario for UK businesses has been avoided by the welcome introduction of a sensible and pragmatic transitional period. Businesses should not, however, treat the announcement as a reason to put off planning for Brexit.

Whilst the transitional period clearly buys UK and EU businesses more time to prepare for the UK's departure, that time will disappear quite quickly.

All UK VAT registered businesses will be required to have 'Making Tax Digital' compliant systems by April 2019 and there are some significant EU VAT changes being introduced in 2019 as the EU transitions to its so-called definitive system based on the 'destination' principle. Dealing with Brexit alongside these other considerations will inevitably be a challenge and businesses need to prepare sooner rather than later.

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