Grant Thornton

An instinct for growth™

Indirect tax update

Edition 17/2020 – 14 May 2020

Summary

Welcome to this week's Indirect Tax Update.

This week, the Court of Justice has issued an Advocate General's opinion in the case of United Biscuits Pension Scheme Trustees.

The case concerns whether, as a matter of EU law, the supply of pension fund management services to the trustees of a defined benefit pension scheme is exempt from VAT as an "insurance transaction".

EU Directives on insurance list the supply of pension fund management services as being insurance operations but the UK's Court of Appeal was unsure whether to treat the services as insurance for VAT purposes and so has referred the issue to the Court of Justice. In his opinion issued today, Advocate General Pikamae has concluded that the provisions of the VAT Directive must be interpreted as meaning that investment management services, such as those supplied to the pension fund trustees by a third party fund manager, do not come within the exemption provided for in those provisions.

We will have to wait and see whether the full Court agrees with that opinion when it issues its final judgment in a few weeks.

The Court of Justice has also issued a judgment today in the case between the European Commission and the United Kingdom concerning the UK's alleged failure to meet its obligations under the VAT Directive. (infraction proceedings).

In 1973, (when the UK joined what is now the European Union), it sought (and was granted) a derogation from the normal VAT rules in relation to the supply of commodity futures contracts on various commodity or "terminal" markets. According to the Commission, since the derogation was granted, the UK has amended the application of it without notifying the Commission. This failure is regarded by the Court as a breach by the UK of its EU law obligations.

Finally, this week, as a consequence of the Coronavirus pandemic, the European Commission has published a proposal for a Council Decision to delay the implementation of the VAT e-commerce package from 1 January 2021 to 1 July 2021.

Court of Justice of the European Union – Advocate General's opinion – United Biscuits Pension Trustees

Whether pension fund management services are 'insurance transactions' and VAT exempt

Advocate General Pikamae has issued his opinion in this referral to the Court of Justice by the UK's Court of Appeal. The issue to be resolved is whether the supply of investment management services by third party fund managers to the pension fund trustees fall to be treated as "insurance services" for the purposes of the VAT Directive. If they are regarded as "insurance services", the services should be exempt from VAT.

The Trustees of the United Biscuits Pension fund – a defined benefit pension scheme – contracted with third party fund managers for a supply of fund management services – essentially, the fund managers manage the investments of the pension scheme on behalf of the Trustees. Under various Insurance Directives (1st Non-Life Directive / 1st Life Directive etc), the provision of such pension fund management is regarded as "insurance related" or as an "insurance operation" and it was this classification that prompted the Trustees to argue that the services should be treated as exempt insurance transactions under the VAT Directive. HMRC disagreed with that view and the Trustees brought an action in the High Court. In a judgment in 2017, the High Court dismissed the Trustees' claim and the Trustees appealed to the Court of Appeal which decided to refer the matter to the Court of Justice as the issue involved the interpretation of EU VAT law.

The Advocate General has stated that, in his opinion, the services provided by the third party fund managers to the Trustees are not to be regarded as insurance transactions. The Court of Justice has ruled in many previous cases that, to be regarded as such, a contract of insurance must exist between an insurer and an insured person. In general terms, an insurance contract will provide a promise from the insurer to indemnify the insured person against losses arising from the materialisation of a particular risk. In consideration of that indemnity, the insured will pay a premium (the consideration under the contract). In the present case there is no such contract. The parties both specifically state that the fund managers do not provide any form of indemnity against risk of loss. Accordingly, in the opinion of Advocate General Pikamae, this fact is fatal to the Trustees' case.

The fact that the Insurance Directives list pension fund management as "insurance related" services or "insurance operations", is neither here nor there. There is no provision contained in either the Insurance Directives nor the VAT Directive which states that the term "insurance services" has to be given a common meaning for the purposes of those separate Directives.

The Trustees also raised the principle of fiscal neutrality arguing that prior to 2019, the UK had exempted from VAT fund management services provided by insurance businesses whereas fund management services provided by non-insurers was subject to VAT. According to the Trustees, this difference in treatment breached the principle of fiscal neutrality as, in effect, the same service was being provided. The Advocate General dismisses this contention also. In his view, the fact that the UK incorrectly treated supplies of fund management services by insurers as exempt from VAT for many years is no reason to also treat the services provided by non-insurers in the same way.

Comment – this opinion will come as a blow to the Trustees. It confirms that for VAT purposes an insurance transaction must involve a contract of insurance where a risk is identified and a premium is paid by the insured to the insurer as consideration for the insurer's agreement to indemnify the insured in the event of the covered risk materialising. The management of investments on behalf of the Trustees of the pension scheme contains no such contract and, as a result, it is difficult to see that the full Court will do anything other than agree with the Advocate General in due course.

Court of Justice of the European Union - Judgment

European Commission v United Kingdom

When VAT was introduced in the United Kingdom in 1973, the UK applied for, and was granted, a derogation from the application of the normal VAT rules for certain supplies of commodities on various commodity markets (known as "Terminal Markets"). When the 6th VAT Directive came into force in January 1978, the UK applied to the Commission (as it was required to do under the provisions of the Directive) for the derogation to continue. However, Since 1978, the UK has made a number of changes to the list of affected Terminal Markets without any further notification to the Commission.

The European Commission (as the guardian of EU laws), considers that the UK's failure to notify it of the subsequent changes after 1978 is a breach of the UK's obligations – specifically, its obligations under the VAT Directive. The Commission took infraction proceedings against the UK and the Court of Justice has now issued its judgment.

The UK considered that there was no requirement to notify the Commission of the post 1978 changes as the purpose of the amendments (the simplification of VAT accounting for Terminal Markets) remained the same. This was rejected by the Court. The provisions of the VAT Directive that require Member States to advise the Commission of material changes to derogations (which the subsequent changes were deemed by the Court to be), are a legal requirement. That obligation to give notification is also consistent with the requirements stemming from the principles of legal certainty and transparency, as it allows both the Commission and other Member States to verify, through an express decision adopted by the Council, how a Member State intends to make use of the power to derogate.

The Court has ruled that the UK's amendment of the derogation should have been notified to the Commission and that the failure to do so was a breach of the UK's legal obligations in relation to the VAT Directive.

Comment

The operation of Terminal Markets posed difficulties in terms of the charging and collection of VAT. In recognition of those difficulties, the UK applied for and was granted a derogation to apply simplification rules to such markets (by allowing certain transactions to be zero-rated). As time moved on, the UK added various markets and commodities to the list of affected markets but failed to inform the Commission.

The Court of Justice has agreed with the Commission that the UK failed to meet its legal obligations in this regard.

However, exactly what that means in practice remains to be seen but it does seem that any amendments introduced post 1978 will be regarded as null and void given that they were not applied for correctly nor were they sanctioned by the European Council.

European Commission publishes proposal to delay implementation of e-commerce Directive

Covid-19 pandemic cited as reason for postponement

The European Commission has published a proposal for a Council decision to amend the implementation date in relation to the VAT e-commerce package provisions that were due to come into force on 1 January 2021.

Due to the unforeseen outbreak of the Covid 19 pandemic and its major impact, Member States need to shift priorities away from preparations to implement the e-commerce Directives and to re-allocate resources. As a result, a number of Member States can no longer guarantee that they will be ready to implement the new rules for the e-commerce package by 1 January 2021. Similar concerns have also been expressed by certain economic operators (especially postal and courier operators). Accordingly, the Commission has held meetings with the Member States which confirmed that, whilst most Member States were ready and prepared for the changes, it is necessary for all Member States to implement the new rules at the same time. In light of the fact that some Member States will not be ready by 1 January 2021, it was agreed that the implementation of the e-commerce VAT package will be delayed by 6 months. The implementation date is now set to be 1 July 2021.

The new provisions of the e-commerce Directive require Member States to introduce a digital portal (known as the One-Stop Shop (or OSS)) which is intended to allow suppliers established in other Member States to account for VAT due on distance sales of goods to consumers. There are a number of Member States that have admitted that they will struggle to have this system in place by the original deadline of 1 January 2020. The Covid-19 pandemic has had a serious impact on Member State resources that are available to commission and implement the new portal. As a result, the Commission has taken the decision to delay implementation for six months.

Comment

This seems like a sensible decision of the Commission.

Under the new rules – supplies of goods to consumers in a different EU Member State (above certain limits) are to be taxed in the consumer's Member State. Any business that sells goods and arranges despatch of the goods to the customer will either be liable to register for and charge and account for VAT in the Member State of the customer or, to take advantage of the One-Stop Shop system.

This system should be established in each Member State and should be ready to be used with effect from 1 January 2021. Unfortunately, with the resources being diverted to deal with the Covid-19 pandemic, certain Member States have admitted that they would not have been ready. The extra six months should give them sufficient time to implement and test their One-Stop Shop capabilities.

Contacts

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

Nick Warner
T +44 (0)20 7728 3085
E nick.warner@uk.gt.com

Alex Baulf
T +44 (0)20 7728 2863
E alex.baulf@uk.gt.com

Daniel Sherwood
T +44 (0)1223 225616
E daniel.sherwood@uk.gt.com

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

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

Claire Hamlin
T +44 (0)161 953 6397
E claire.a.hamlin@uk.gt.com

Morgan Montgomery
T +44 (0)121 232 5126
E morgan.montgomery@uk.gt.com