Grant Thornton

Indirect Tax Update

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Summary

Welcome to this week's ITU.

It seems the Advocates General (AGs) and the Judges of the CJEU are clearing their desks in preparation for the long summer break away from Luxembourg. After several quiet weeks we have three cases to consider. Firstly we look at the Judgement on an electrical products retailer, which provided insurance backed extended warranties. The Court has ruled that the commissions receivable must be included in the partial exemption calculations so no all the retailer's input tax is recoverable.

We go on to discuss the time when a supplier must account for output VAT is affected by an agreement to receive the consideration by instalments. The AG based his opinion on the services having been completed, and therefore says VAT was due at that point.

Finally we debate the merits of Zipvit's claim for input tax on historic postal services, at a time when the Post Office, HMRC and Zipvit all thought wrongly that the services were exempt. In the latest, probably penultimate, round the AG says that the lack of a tax invoice in the hands of Zipvit is fatal to its claim, even if there is a good argument that VAT was included in amounts paid to Royal Mail.

Arguably none of these case give us any real surprises nor do they change the status quo.

Case C695/19 Radio Popular Electrodomesticos SA (Portugal) (8 July)

The CJEU rules that a retailer must include exempt insurance commissions in its turnover to calculate its partial exemption percentage.

In common with many electrical consumer goods retailers, Radio Popular offers extended warranties to its customers. These warranties are provided be a separate insurance company to the consumer, and the retailer receives a commission for selling the insurance product.

Radio Popular argued that, even though it was treating the commission income as exempt, it did not need to restrict the recovery of input tax incurred on its costs.

The Court gave its judgement without the benefit of an Advocate General's opinion, which means that it considered there was no new point of law to consider. It concluded that the exempt income could not be excluded from the taxpayer's turnover, when calculating the partial exemption recovery percentage.

Comment: the judgement appears to maintain and reinforce the status quo. It is interesting for specialists that the Court cited six of its previous judgements but did not quote from the Regie Dauphinoise (C-306/94). In that case an estate agent placed client funds on deposit and kept the interest receivable. The Court ruled that the income was a direct, permanent and necessary extension of the business's taxable activity and could not be treated as "incidental".

In the same way the Court has effectively ruled that Radio Popular's commissions are a direct, permanent and necessary extension of it taxable retail sales.

Case C-324/20 - X BmBH(Germany) (1 July)

Advocate General says payment by agreed instalments for a single supply of services does not delay the need to account for VAT.

X was a land agent that charged a fee (€1M plus VAT) on a property transaction, and agreed with its customer that the fee could be paid by five annual instalments.

The tax authority asserted that all of the output tax was due up-front, but X disputed this on the basis that the consideration was not yet due.

The AG, agreeing with the tax authority, said that as there was a single supply of services that had been completed (presumably contingent on the property transaction completing) the time of supply is governed by the basic rule set out in Article 63 of the Principal VAT Directive.

He also said that the rules allowing adjustment of the output tax due because of non-payment would not apply just because there were future agreed instalment dates:

Comment: this opinion also seems to agree with HMRC's policy on time of supply. Presumably the AG would agree that a bad debt relief claim could be made if the instalments were not paid (subject to local rules). The other interesting point is that X disputed the facts as referred by the German Court, but the AG gave this short shrift, confirming that he was bound to opine on the facts provided in the referral.

Case C-156/20 Zipvit Limited (UK)

The Advocate General says that a tax invoice is essential for the recovery of VAT, even where both supplier and customer agree there has been a taxable supply.

Readers will recall that this is a long running claim by Zipvit to recover VAT that it asserts was included in the price paid to the Royal Mail. For many years both supplier and customer acted in the mistaken belief that all postal services were exempt from VAT, so contracts were largely silent, and invoices did not mention VAT. However in 2009 the CJEU ruled that postal services were not exempt for business customers with "individually negotiated" agreements.

Zipvit's claim for input tax was rejected by HMRC, because it did not hold tax invoices. Royal Mail did not feel minded to issue tax invoices (on a VAT inclusive basis) because it would have to pay that VAT to HMRC with no additional recompense from Zipvit.

The AG's opinion is the latest stage in a long line of appeals. None have been successful for Zipvit. The First Tier Tribunal decided that there was no VAT "due or paid" by the Royal Mail, so there was nothing to claim. The Upper Tribunal (UT) disagreed, but Zipvit was disappointed because the UT also ruled that without a tax invoice, it could not claim input tax.

At the next stage, the Court of Appeal was equivocal on the "due or paid" issue, but agreed with the UT that without a tax invoice Zipvit's claim must fail. Undaunted, the taxpayer was allowed to appeal further by the Supreme Court, which decided to make a reference to the CJEU.

AG Kokott of the CJEU introduced the case with a comment from the European Commission: "The simple answer to the issues raised in the present case is that since Zipvit has paid no VAT, it is not entitled to deduct input VAT. Sometimes simple answers are correct. This is one of those times.' It seems she was tempted by this approach, but true to form provided an insightful analysis in the following 100 or so paragraphs.

An in depth review of her analysis would fill up several pages, and probably not leave readers much wiser. For this reason we will skip to paraphrase her conclusions:

The amount paid determines the taxable amount, and in this case that would include VAT. However the lack of a tax invoice in the hands of the customer is fatal to a claim by Zipvit. Furthermore, the position of Royal Mail and whether it has a legitimate defence to any liability to HMRC is not relevant to Zipvit's claim.

Comment

Zipvit is the lead case in the long running dispute about the VAT liability of the Royal Mail's historic services.

Zipvit has been unsuccessful at every stage, perhaps because the Judges have been influenced by the historic position that all parties (Royal Mail, Zipvit and HMRC) were surprised when the VAT exemption for postal services in the UK was found to be too widely defined.

They were all happy, at the time, that the services were exempt, so a claim for input tax recovery that only gave Zipvit a windfall at the expense of Royal Mail or HMRC was always going to be resisted.

Notwithstanding the "moral" argument of whether VAT has been paid at all, the dispute has boiled down, at all stages of the appeal, to the need to hold a tax invoice to recover input tax.

It comes as no surprise that Royal Mail declined to issue such invoices.

It seems likely the will CJEU follow the opinion of the AG. If so the Supreme Court will also likely follow that judgement, despite the UK's exit from the European Union, so Zipvit should prepare for a final disappointment.

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