Indirect Tax Update 2023 – Edition 03 – 22 March

Summary

This month's bumper edition of the ITU has news of the budget, the Windsor Agreement, and several cases from the Court of Justice of the European Union (CJEU) the UK courts and Tribunals.

The UK budget includes widening VAT reliefs for medical services and prescriptions in line with changes to NHS practices. It also includes a consultation on the widening of reliefs for energy saving materials.

The social media platform, Fenix International, has suffered a setback at the CJEU, which found the implementing regulations that still have direct effect in the UK are validly made in accordance with the Principal VAT Directive (PVD). The case can now proceed in the First Tier Tribunal (FTT).

The Supreme Court has ruled that Newscorp's historic electronically supplied newspapers were not zero rated. The Court of Appeal concluded Greenspace's insulated conservatory roof panels are standard rated and Gray and Farrer's high class matchmaking service is standard rated to non UK residents.

The Upper Tribunal (UT) found in favour of an NHS trust that consumables were included in in a supply of services, so VAT is recoverable, and that the time of supply rules trump VAT grouping for Prudential Assurance when its supplier made charges after it had left the VAT group.

On 15 March 2023 the Chancellor, Jeremy Hunt, delivered his budget.

The Chancellor did not specifically mention VAT in his budget speech, but our detailed analysis of the budget Red Book revealed the following announcements:

- The VAT exemption on healthcare will be extended from 1 May 2023 to include medical services carried out by staff directly supervised by registered pharmacists. The zero rate on prescriptions will be extended to medicines supplied through Patient Group Directions (in line with doctors' prescriptions). These changes are designed to keep the VAT system in line with changes to how the NHS operates.

- The government continues to consider changes to the VAT treatment of fund management charges, financial services and energy saving materials, and will make announcements in due course. At long last it will simplify and digitise the claims by DIY housebuilders and extend the deadline for claims from 3 months to 6 months.
- The government has realized the VAT treatment of the proposed drinks container deposit return scheme presents practical and cash flow issues for suppliers and is seeking ways to mitigate the difficulties, and HMRC has announced a consultation.
- The government has announced a consultation on widening the relief for energy saving materials, potentially to include new technologies, as well as widening relief to installations in charity buildings.

On 27 February 2023, the government revealed details of the Windsor Framework, which aims to address issues with the application of the Northern Ireland Protocol, including trade friction.

Summary

From a tax perspective, the Framework could have important ramifications for VAT, Excise and Customs. The headline features of the Framework from a tax perspective are outlined below.

Customs

Under the terms of the Framework there would be no requirement to collect export declarations for a significant majority of trade from Northern Ireland to Great Britain. This is in line with current practice, but export declarations could have been required if the terms of the original Protocol were implemented in full.

For trade in goods from Great Britain to Northern Ireland a new "Green Lane" for authorised traders would be extended so that most Customs formalities would no longer be required with an aim to streamline the requirements for these movements of goods. It is expected that the only checks will be risk and intelligence based to protect against smuggling and criminality resulting in less of a burden for businesses.

Some goods would not be able to use the Green Lane (eg goods 'at risk' of entering the EU via Northern Ireland). For such goods a new tariff reimbursement scheme will be introduced where it can be demonstrated that goods did not ultimately enter the EU.

The Framework also provides for removal or simplification of Customs procedures in respect of parcels moving from Great Britain to Northern Ireland.

VAT

The Framework provides for increased flexibility over VAT rates in Northern Ireland. In particular, the zero-rate would be permitted for goods supplied and installed in land and buildings in Northern Ireland.

This flexibility appears to pave the way for alignment of the rules on energy-saving materials between Great Britain and Northern Ireland (there is currently divergence).

Limits on the number of reduced and zero rates in Northern Ireland would also be removed.

Northern Ireland would be exempted from changes to the small business VAT regime across the EU that are due to come into force in 2025 and which could result in a requirement to lower the VAT registration threshold in Northern Ireland.

Excise duty

Increased flexibility would be permitted over excise duty rules with the apparent effect that changes to UK alcohol duty rules (due to come into effect from August 2023) will be able to apply both in Great Britain and Northern Ireland.

News from the CJEU

Case C-713/21 A - Germany

On 9 February 2023 the Court ruled

Article 2(1)(c) of the PVD means for the purposes of that provision, the one-off supply by the owner of a stable for training competition horses, consisting in housing and training horses and having them participate in competitions, constitutes a supply of services for consideration where the owner of the horses remunerates that service by assigning 50% of the claim corresponding to the winnings from the prizes which he becomes the holder of in the event of victory or Useful classification of his horses during a competition.

Comment: this seems a commonsense decision from the Court. For those businesses who have bought tax or legal services on a contingent basis, the idea that the fees would be outside the scope of VAT would be a bit far-fetched. It seems extraordinary that the dispute has gone all the way to the CJEU.

Case C-482/21 Euler Hermes SA - Hungary

On 9 February 2023 the Court Ruled:

Article 90(1) of the PVD and the principle of fiscal neutrality must be interpreted as meaning that they do not preclude legislation of a Member State under which the reduction of the taxable amount in the event of non-payment, provided for in that provision, is not applied to an insurer who, under a commercial receivables insurance contract, pays to the insured person, by way of compensation following non-payment of a claim, part of the amount of the taxable amount of the taxable transaction in question including value added tax, whereas, in accordance with that contract, that part of the claim and all related rights were assigned to that insurer.

Comment: The case involves an insurer of debts who, in return for a premium, and subject to conditions, will pay a supplier of goods or services 90% of the invoiced value if the debtor defaults. It seems that the insurance contract provided that the insured value included the VAT shown on the invoice.

When the debtor failed to pay the invoice, the insurer paid out 90%, and then the insurer claimed the unpaid VAT proportion as bad debt relief (BDR), even though it had not made the original supply. Unsurprisingly the tax authority rejected this claim and the CJEU has followed suit.

Under UK bad debt relief rules, the order in which the relief is claimed, and the invoice is assigned or sold, is important, and it seems the same is true in Hungary. It is vital for BDR to be claimed by the original supplier (once the qualifying 6 months has passed) before the debt is sold or assigned to a third party (in this case assigned to the insurer).

Case C–519/21 ASA - Romania

On 16 February 2023 the Court ruled:

1. Articles 9 and 11 of the PVD must be interpreted as meaning that the parties to a contract relating to an association without legal personality, which was not registered with the competent tax authorities before the economic activity concerned commenced, cannot be regarded as 'taxable persons' along with the taxable person which is liable for tax on the taxable transaction.

2. The PVD, the principle of proportionality and the principle of fiscal neutrality must be interpreted as meaning that a taxable person, where it does not hold an invoice issued in its name, must be granted the right to deduct the input value added tax paid by another party to an association without legal personality with a view to carrying out that association's economic activity, even if the taxable person is liable in respect of that activity, where there is no objective evidence that the goods and services at issue in the main proceedings were actually provided as inputs by taxable persons for the purposes of its own transactions subject to value added tax.

Comment: it seems the reason the case proceeded is that two sisters owning the land had not accounted for output tax at a positive rate on the sales of newly constructed apartments. In the UK the sales would have been zero rated.

We sometimes see this sort of arrangement in the UK, where private individuals own land with residential development potential. A developer is prepared to put in the capital required to get planning approval, and incur the costs of construction, on the basis of a profit share in the final sale. However, the developer does not take ownership of the land at any stage (usually this is to avoid paying stamp duty land tax). When it comes to sale of the completed new dwellings (zero rated) these are between the original landowners and the new homeowners, with a back-to-back contract between the developer and original landowners which charges an appropriate amount for the construction services.

In such circumstances the original landowners would be wise to register for VAT so they could recover any overhead VAT, even though they would not have an output tax liability. In Romania, where new housing is not zero rated, it seems the arrangement led the owners to have a real VAT liability.

Case C-695/20 Fenix International Limited

On 24 February 2023 the Court ruled:

The examination of the question referred has disclosed no factor of such a kind as to affect the validity of Article 9a(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 implementing Directive 2006/112/EC on the common system of value added tax, as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013, in the light of Articles 28 and 397 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive (EU) 2017/2455 of 5 December 2017, and of Article 291(2) TFEU.

We reported the AG's opinion ITU 2022 09 saying:

Readers may recall that Fenix operates the "only fans" website, where "creators" make photos and videos of themselves available to "fans". Fans may make ad hoc payments to the creators, presumably for personalised content, or pay a monthly subscription for access to the more general content posted by the creators.

Fenix operated the site, including the payment system and kept 20% plus VAT, passing the remainder to the creator. HMRC assessed Fenix for VAT on 100% of the amounts paid by the fans, as opposed to 20% ("the charge"). For the period in dispute the VAT assessed was more than £11 million.

HMRC asserted that output tax was due on the whole of the amounts payable by the fans on the basis that article 9A of the VAT Implementing Regulations has direct effect in the UK and does not require additional UK law to be enacted. However, before the end of the Brexit transitional period the First Tier Tribunal referred its question on the validity of article 9A to the CJEU.

In summary Article 9A requires a taxable person acting in his own name but on behalf of another person (an undisclosed agent) takes part in a supply of (electronic) services, he is deemed to have received and supplied the services himself.

Comment: The Court has followed the AG's opinion, finding no problem with Article 9A of the implementing regulations. This is not good news for Fenix, but the CJEU decision is just a step in the appeal process. The First Tier Tribunal is is still to hear the arguments and evidence of the parties in the dispute, so that it can then consider whether the detailed rules in the Implementing Regulations apply in HMRC's favour.

Case C-42/22 Generali Seguros SA - Portugal

On 9 March 2023 the Court ruled:

1. Article 135(1)(a) of the PVD must be interpreted as meaning that transactions consisting of the sale by an insurance undertaking to third parties of parts from written-off motor vehicles that have been involved in accidents covered by that undertaking, which it has purchased from the persons whom it insures, do not fall within the scope of that provision.

2. Article 136(a) of the PVD must be interpreted as meaning that transactions consisting of the sale by an insurance undertaking to third parties of parts from written-off motor vehicles that have been involved in accidents covered by that undertaking, which it has purchased from the persons whom it insures, do not fall within the scope of that provision.

3. The principle of fiscal neutrality inherent in the common system of value added tax must be interpreted as not precluding the refusal to exempt transactions consisting of the sale by an insurance undertaking to third parties of parts from written-off motor vehicles that have been involved in accidents covered by that undertaking, which it has purchased from the persons whom it insures, where those purchases did not give rise to deductibility.

Comment: it seems extraordinary that this case got all the way to the CJEU. The Court had no difficulty is ruling that the sale of a car for parts, having been written off as beyond economic repair is not an exempt insurance transaction. It said the sale of parts from written-off motor vehicles are made under agreements separate from the insurance contracts, and the sale of goods bears no relation to covering a risk.

Case C-239/22 Promo 54 SA - Belgium

On 9 March 2023 the Court Ruled

Article 135(1)(j) of the PVD, read in conjunction with Article 12(1) and (2) thereof, must be interpreted as meaning that the exemption provided for by that first provision for the supply of a building or a part of a building, and of the land on which the building stands, other than those which are supplied before their first occupation, also applies to the supply of a building which was first occupied before its conversion, even if the Member State concerned has not laid down, in national law, the detailed rules for applying the criterion of first occupation to conversions of buildings, as the second of those provisions authorised it to do.

Background: The dispute arose on the conversion of a former school into apartments and offices. The owner of the former school, Immo 2020, entered into an agreement with Promo 54 for the redevelopment. The idea appears to have been to sell the apartments off plan (ie before the construction was complete) and structure the deal as the of a sale of a former building and the land on which it is constructed, followed by a renovation of that building, subject to the reduced rate of 6%. However, the Belgian tax authority asserted the transaction had been artificially split and the correct analysis is the sale of new apartments with a rate of 21%.

This raised the question of what "first occupation" in article 12(1) of the PVD meant, and how this should be interpreted when the member state had not defined it in its national law.

Comment: The Court has, in essence, confirmed that "first occupation" means the first use of the building by its owner or tenant. In this case the first occupation would have been as a school, so even if there had been significant renovations or alterations, that would not have resulted in a new building.

In the UK, we have a set of quite different rules, from those in Belgium, which apply reliefs to the construction of dwellings and the conversion of non-residential buildings into dwellings. In the right circumstances almost entirely remove the burden of VAT from new or newly converted residential accommodation.

Case C-664/21 NEC Plus Ultra Cosmetics - Slovenia

On 2 March 2023 the Court ruled:

Article 131 and Article 138(1) of the PVD, read in conjunction with the principles of tax neutrality, effectiveness and proportionality, must be interpreted as not precluding national legislation which prohibits the production and gathering of new evidence which establishes that the substantive conditions laid down in Article 138(1) of that directive are satisfied, during the administrative procedure which resulted in the adoption of the tax assessment notice, in particular after the tax inspection stage but before the adoption of that decision, provided that the principles of equivalence and effectiveness have been complied with.

Comment: This is a case involving time limits to provide evidence that goods have been dispatched or exported in cross border transactions. This is a hot topic for HMRC and an issue that has often been flagged as a risk area to or clients and has been before the Tribunals and Courts in the UK. The key message is to ensure that you have evidence of export to hand within the time limits set out in Notice 703.

News from the Supreme Court

News Corp UK & Ireland Ltd [2023] UKSC 7

On 22 February the Supreme Court rejected the taxpayer's appeal against the Judgement of the Appeal Court, which ruled that newspaper (content) delivered by electronic means was not zero rated before the law changed on 1 May 2020.

Comment: In summary the Judges said that the "standstill" provisions in the VAT Directives which allowed zero rating to continue, but not be extended, would not allow new ways of distributing newspaper content to be zero rated.

The judgement includes two detailed views of the concept of "always speaking", which had led to the UT allowing zero rating. Neither view supported the UT's reasoning.

The final nail in the coffin (the case already being dead) was whether the change in law in 2020 to allow electronically supplied publications to be zero rated had a bearing on the dispute. The Judges opined that the new explicit law allowing zero rating for electronically supplied books and newspapers by implication meant the old law did not.

News from the Court of Appeal

Gray & Farrar International LLP [2023] EWCA Civ 121 (13 February 2023)

The Court allowed HMRC's appeal, meaning the supply of matchmaking services to non UK individuals is subject to UK standard rate VAT.

The case concerns matchmaking services supplied to people outside the UK and EU as "services of consultants … and other similar services" under Art.59(c) of the PVD.

The taxpayer provided information and advice, with further support and advice from a support team to clients paying for high-level introductory and matchmaking services. The UT applied the "predominant element" test to determine the principal/material element of, and thereby characterise, the supply. The Court of Appeal agreed that this was the primary test to be applied, but disagreed with the answer of the UT. Looking at the contractual terms, which apparently matched the economic reality, a minimum number of introductions was incorporated but the provision of advice was not.

As such the "the service provided by G&F was not a service habitually supplied by consultants or consultancy firms giving expert advice to a client" and was therefore within the scope of UK VAT. The decision of the FTT was restored, with the appeal upheld in favour of HMRC.

Comment: it is interesting to note that the Court took much of its guidance from pre-Brexit case law of the CJEU, which the result that the place of supply rules for "where received" services provided to consumers should perhaps be read more closely.

Greenspace (UK) Limited [2023] EWCA Civ 106

The Court of appeal has ruled installation of insulated roof panels for conservatories is standard rated.

Greenspace supplied and installed insulated roof panels, comprising polystyrene foam covered with a thin aluminium layer and a protective paint, to residential customers, which were fitted onto existing conservatory roofs. The panels were made to order and slotted into place on the existing frame. and were slotted into place.

Greenspace argued that the reduced rate of VAT should apply as the panels were "energy saving materials" which includes 'insulation for … roofs'.

The First-tier Tribunal and Upper Tribunal ruled that the panels installed by Greenspace were not insulation for a roof but were a new roof in their own right, and that Greenspace's supplies did not therefore qualify for the reduced rate of VAT.

The Court of Appeal has dismissed Greenspace's appeal considering the FTT and UT's approach to the issue was not correct. The issue was not whether something was 'for a roof' or was a roof.

The correct approach was simply to ask whether Greenspace was supplying insulation for roofs, using the ordinary meaning of those words, and the Court found that Greenspace was not supplying insulation for roofs (although the panels have insulating properties, they also have other characteristics), and accordingly the reduced rate of VAT did not apply.

Comment: This was Greenspace's third shot at getting its insulated roof panels for conservatories taxed at the reduced rate of VAT under items 1 and 2 of Group 2 of Schedule 7A. The FTT had been constrained by the UT judgements in Pinevale and Wetheralds, and applied the same tests, and the UT continued this line of reasoning.

In a short judgement the Court of Appeal has ruled that the FTT and UT applied the wrong tests, but using the facts as found by the FTT, has simply ruled that the panels were not "insulation for roofs". It seems unlikely the case will proceed to the Supreme Court.

News from the Upper Tribunal

[2023] UKUT 28 (TCC) – Judicial Review - Gloucestershire Hospitals NHS Foundation Trust

This is a dispute by an NHS Trust about recovery of VAT incurred on consumables supplied as part of a managed services agreement under the contracted services order (COS heading 45). HMRC said there was a separate supply of goods, the VAT on which is not recoverable by the NHS.

There is no right to appeal HMRC's decisions on COS recovery to the FTT, so the Trust asked for Judicial Review, which is within the powers of the Upper Tribunal.

The UT heard a number of arguments and found in favour of the NHS Trust as there was a single supply of services to which the supply of consumables is one element (rather than a separate supply).

Comment: VAT in the public sector is a niche area, but this case is , as it sets out the legal basis for a challenge, being based only on UK law, but once there is a valid question to answer the single versus multiple supply issue that has been dealt with extensively by the CJEU became paramount.

[2023] UKUT 54 (TCC) The Prudential Assurance Company Limited

The Upper Tribunal has ruled that the time of supply of services trumps the VAT Grouping rules, when supplies are treated as made after a supplier has left a VAT group.

While Silverfleet Capital (SCL) was a member of the Prudential VAT group it supplied services which were outside the scope of VAT. It left the corporate and VAT group in November 2007, after which it ceased to supply services to Prudential. However, the original intra-group agreement allowed for performance related fees to be charged, and invoices for these were rendered in 2015 and 2016 (with the addition of VAT).

Prudential, being an insurer, was not able to recover the VAT charged as input tax, so sought a ruling from HMRC that the services were outside the scope of VAT (having been rendered while in the VAT group). The FTT agreed with Prudential and HMRC appealed.

The UT was faced with the question of which rule applies: section 43 VAT grouping, which would make the transactions outside the scope of VAT, or regulation 90 which if a continuous supply of services would make VAT due as the tax point is when the invoice or payment is made.

Overall the conclusion of the UT was that the time of supply (being a continuous supply of

Overall, the conclusion of the UT was that the time of supply (being a continuous supply of services by SCL) should be taxed according to regulation 90 and therefore after SCL left the VAT group, so output tax was due.

Comment: this is an important decision for partly exempt VAT groups; particularly if an agreement allows for deferred consideration payable after the supplier has ceased to be a group member.

News from the First Tier Tribunal

TC08740 Fareham College

In a follow up to the Brockenhurst College case that went to the CJEU, Fareham has claimed it overpaid output tax on its student restaurant, hair dressing salon and its performing arts centre, on the basis that the supplies were closely related to its students' education.

HMRC refused, saying that exemption cannot apply where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.

Within a fairly complex analysis the FTT came down on side of HMRC, effectively saying that although there is no specific "basic purpose" wording in the UK law it is satisfied that the exemption should be construed narrowly these words in place.

The FTT went on to agree the basic purpose of the training restaurant was not to obtain additional income, so the income can be exempt. However, as the burden of proof was on the appellant to show exemption applies, it was not convinced in respect of the Hair Salon nor the Performing Arts centre

Comment: it seems unfortunate that the College did not anticipate the need to provide sufficient evidence to the Tribunal to convince it of the "additional income" point. Especially as the appeal has been designated as a "lead case". For any Colleges with appeals outstanding they will have to think hard about their strategic options, as it is possible to detach yourself from a lead case if your facts differ in a material way.

TC08729 Paradise Wildlife Park Limited (PWP)

The question before the FTT was whether the construction of a lions' enclosure, and a dinosaur walk within a zoo run by a charity could be certified as "solely for a relevant charitable purpose" ie use by a charity otherwise than in the course or furtherance of a business. If this is so the Appellant would have been correct to zero rate its supply of construction services.

Having looked at the evidence, the most important of which was that the predominant source of income for the Zoological Society of Hertfordshire (ZSH), the charity that runs the zoo, is admission fees.

The Tribunal therefore found that ZSH is carrying on a business of operating and charging for admission to the Park, the lions' enclosure and the World of Dinosaurs were intended for use at least in part for the purposes of that business; and the World of Dinosaurs is not a building.

The final conclusion of the FTT was the services PWP supplied in the construction of the lions' enclosure and the World of Dinosaurs were not supplies in the course of construction of a building intended for use solely for a relevant charitable purpose so could not be zero rated.

Comment: it comes as no surprise that the FTT found the zoo was operating as a business, however it seems to have missed the subtlety of the law - the supplier had a certificate from the customer, and this should be sufficient to support zero rating. The correct remedy open to HMRC would appear to be against the customer for incorrect issue of the certificate (with a penalty equal to 100% of the tax not charged).

It is also worthy of note that the dinosaur walk was held not to be a building, because there were neither walls nor a roof. This can be relevant when a charity sets up a fund to erect a memorial or similar. It seems that HMRC will accept that a memorial is a building as long as there is a covered space (with or without a door) where something (eg a book of remembrance) can be stored. This means a memorial gate or wall can be a building, if there is a niche somewhere in the design.

HMRC News

Apportionment of Consideration

On 3 March 2023 published or updated three documents relevant for Businesses that sell goods or services with different VAT liabilities for a single price as part of a package (or 'bundle'). These will include "meal deals" as well as charities that are allowed by concession to apportion the benefits provided in return for a subscription. While HMRC's consultation form 2022, which proposed to provide a legal basis for apportionment has not been followed through, the guidance in these documents indicate the "preferred" methods of calculating output tax should be based on selling prices or cost. Other methods can be used, but HMRC may challenge the basis.

VAT guide (VAT Notice 700) - section 31 'Apportionment of output tax' has been updated with 2 basic methods of apportioning output tax – one based on selling prices, the other based on cost values. this is consistent with Revenue and Customs Brief 2 (2023): VAT and value shifting consultation update which has resulted in HMRC publishing: GFC2 (2023): Guidelines for Compliance — VAT apportionment of consideration

Energy-Saving Materials and Heating Equipment

On 7 March 2023, HMRC updated its guidance in VAT Notice 708/6 - Energy-saving materials and heating equipment. Updated information on installations by sub-contractors in Great Britain and Northern Ireland is in paragraph 2.5.

Complete your VAT Return to account for import VAT

On 10 March 2023 HMRC updated its guidance with information about what to do if there are specific entries missing from your statement has been added to the 'how to complete a VAT Return if you're having problems with your monthly statements' section.

Charging VAT when using an online marketplace

On 8 March 2023, HMRC published its guidance on charging VAT when selling goods to customers in the UK using an online marketplace.

Charging VAT on Goods Sold Direct to UK Customers

On 8 March 2023, HMRC published its guidance on whether VAT needs to be charged by an overseas supplier supplying goods direct to UK customers, i.e., without using an online marketplace.

Notice 701/15 Animals and animal food

Section 6.4 has been updated to include food specifically for assistance dogs as zero rated.

This follows a long campaign by Guide Dogs for the Blind, however since the food has to be held out as exclusively suitable for working dogs (including assistance dogs) to be zero rated, the usefulness of this relief will probably be limited.

Interest on late paid tax, and repayment interest

HMRC is increasing the late payment rate of interest to 6.5%, and the repayment interest rate to 3% from 21 February 2023. Interest on quarterly instalment payments of corporation tax is also increased from 13 February 2023.

Following the Bank of England decision to increase the base rate to 4%, HMRC's late payment interest rate for most taxes will be increased to 6.5% and the repayment interest rate to 3%. These increases apply from 21 February 2023.

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