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Indirect Tax Update

Zipvit loses 'postal services' VAT appeal at Upper Tribunal

Summary

This week's edition of the Indirect Tax Update looks at the Upper Tribunal's judgment in the case of Zipvit. The issue was whether the charges made by Royal Mail to Zipvit included VAT and, if they did, whether Zipvit was entitled to reclaim that VAT without a proper VAT invoice.

We also look at the First-tier Tax Tribunal case of LIFE Services which challenged whether UK VAT law offended the EU principle of fiscal neutrality. The taxpayer – a 'for-profit' body argued that allowing charities to exempt the supply of similar welfare services was a breach of that principle.

Finally, HMRC has lost its appeal in the Imperial College case. The college's claim was made in accordance with the agreed 'special' method and HMRC could not alter that agreement retrospectively.

VAT cannot be reclaimed without a VAT invoice!

The Upper Tribunal has delivered its judgment in this appeal by Zipvit from the First-tier Tax Tribunal (FTT). Zipvit claimed that the price it had paid to Royal Mail over several years, for the supply of certain postal services, contained an element attributable to VAT which, as a taxable business, it was entitled to reclaim as input tax but HMRC refused to repay Zipvit's claim. The FTT delivered its judgment in 2014 and ruled that, for input VAT to be reclaimable, the VAT chargeable by the supplier had to have been due from and paid by the supplier. As Royal Mail had neither paid any VAT on the services (because at the time, both parties considered that the service was exempt from VAT) nor had HMRC demanded any such payment, the 'due and paid' condition had not been met and, consequently, Zipvit was not entitled to make its claim for input tax.

At the Upper Tribunal, Zipvit repeated its assertion made at the FTT. Zipvit argued that, once the Court of Justice had found that individually negotiated postal services supplied by a universal service provider (such as Royal Mail in the UK) were not exempt from VAT but were taxable, VAT law deemed that the price paid by Zipvit must have included an element of VAT. Logically, if VAT was properly chargeable by Royal Mail, it was entitled to reclaim any VAT included in the contract price.

Counsel for HMRC argued that the contract between Royal Mail and Zipvit did not expressly mention VAT at all. This was because, at the time, both parties considered (and neither challenged) that the service provided by Royal Mail (as a universal service provider) was VAT exempt. In the absence of an express term, what mattered was the agreement and understanding of the parties. The evidence was that no VAT was chargeable nor had been charged.

In the end, the Upper Tribunal judge decided that as Zipvit did not possess any valid VAT invoices from Royal Mail, it had no right to reclaim any input tax in any case. Zipvit tried to argue that HMRC should have used its discretion set out in a published statement of practice to allow input VAT claims in the absence of proper VAT invoices. The Upper Tribunal concluded that, as no VAT had been paid by Zipvit, HMRC was right not to exercise its discretion to repay the VAT as to do so would be to the detriment of the public purse. Accordingly, Zipvit's appeal was dismissed

The Upper Tribunal considers that the FTT was wrong on the 'due and paid' point but that the absence of a valid VAT invoice was fatal to the VAT claim. It is possible that a further appeal may be lodged by the taxpayer.

Welfare services VAT exempt

LIFE Services Ltd – First-tier Tax Tribunal

The taxpayer in this case was LIFE Services Ltd. The issue before the First-tier Tax Tribunal (FTT) was whether the services provided by the appellant were exempt from VAT. The company argued that it was a 'state regulated body' within the meaning of UK VAT law which meant that the services it provided were VAT exempt even though it was a profit making body. As an alternative, the company argued that, by granting the exemption for the supply of welfare services to charities but not to profit making organisations providing the same services, the UK had offended the EU principle of fiscal neutrality.

On the first point, the FTT dismissed the taxpayer's argument. The business was not a state regulated body. It may have been monitored by the local authority, but that did not confer the status of 'state regulated' upon it. It was not exempted from registration either as it was not required to be registered (with the State) in the first place.

On the fiscal neutrality point however, the FTT agreed that, if the same (or very similar) welfare services supplied by a charity benefitted from VAT exemption, there was no reason why such a supply of welfare services by the appellant should not also benefit from the exemption. To treat the same supply by different providers differently would offend the EU principle of fiscal neutrality. As such, the FTT allowed the taxpayer's appeal.

Comment

In this case, the taxpayer argued that UK VAT law simply lists which bodies can benefit from the VAT exemption for supplies of welfare services. The FTT considered that the correct test is whether the supplier's aims are 'devoted to social welfare'. The fact that any charity, no matter what its aims can qualify for exemption means that the principle of fiscal neutrality is breached.

HMRC v Imperial College

Upper Tribunal

In the early years of VAT an agreement was reached between HMRC and the Council of Vice Chancellor's & Principals (CVCP) as to how UK universities would recover VAT incurred on the purchase of goods and services. The agreement reached was that universities would only recover input VAT if it was directly attributable to taxable activities. Under the terms of the agreement, VAT incurred on overheads (residual input tax) was not recoverable. Many years later, the agreement was found to be unfair and unreasonable and many universities (including Imperial College) submitted retrospective claims to rectify their positions. Imperial submitted a claim for in excess of £600K.

HMRC refused the claim on the basis that the method used by the college was unfair and unreasonable in that it did not include income received by the college under the 'T' grant (Teaching grant).

The college argued that the formula it had used for the purposes of the input VAT calculation was that agreed with HMRC in the partial exemption special method (PESM). The PESM did not require the inclusion of the 'T' grant and, as a consequence, HMRC should not be entitled to insist on its inclusion on a retrospective basis. The FTT agreed with the college and HMRC appealed to the Upper Tribunal. The Upper Tribunal considered that the FTT had reached the correct conclusion and, as a result, it also dismissed HMRC's appeal.

Comment

This case illustrates the importance of making sure that the finer detail of a PESM is 'nailed down' at the outset.

If HMRC wish to amend the terms of a special method agreement it should only be allowed to do so prospectively.

By dismissing HMRC's appeal, the Upper Tribunal has confirmed that any attempt to amend a method on a retrospective basis should be resisted.

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