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Indirect tax update

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Summary

Welcome to this week's Indirect Tax Update.

This week we focus on a judgment from the Upper Tribunal in the case of The Core (Swindon) Ltd (The Core). The case concerns the VAT liability of the Juice Cleanse Programme - consisting of fresh drinkable products made from juicing raw fruits and vegetables. HMRC considered that, under UK VAT law the product was a 'beverage' and liable to VAT at the standard rate of 20% whereas the taxpayer – advised by Grant Thornton UK LLP – considered that the products should be zero-rated as items of food.

In 2018, the First-tier Tax Tribunal (FTT) agreed with The Core and allowed its appeal. The Upper Tribunal granted HMRC leave to appeal and in a judgment released this week, the Upper Tribunal has dismissed HMRC's appeal. UK VAT law in relation to supplies of food has changed little in almost 50 years and has not 'moved with the times'. This case demonstrates that new and innovative products do not always fit easily into pre-conceived boxes (just because the product is drunk does not make it a beverage). The Upper Tribunal recognised the nutritional value of the product and confirmed the FTT's conclusion that it was not a beverage.

The FTT has also delivered its decision in the case of Leeds Beckett Student's Union which considered whether the Appellant had demonstrated that events it organised (such as Fresher's week) were fund-raising events which qualify for VAT exemption or, alternatively whether, on the evidence, the Union had demonstrated that it was, in fact, a youth club where the provision of facilities to its members (the students) qualify for VAT exemption. The FTT dismissed the Union's appeal on all counts.

Finally, this week, the FTT has issued its decision in the case of Krystal Hosting Ltd. This was an appeal against the compulsory de-registration of the company from UK VAT for failing to comply with its obligations under the Mini-One-Stop-Shop (MOSS) regulations.

Upper Tribunal – HMRC v The Core (Swindon) Ltd

Whether the FTT had erred in law when it found that the Juice Cleanse programme was not a 'beverage' for VAT purposes.

In 2018, the FTT determined that the Juice Cleanse Programme product supplied by The Core (Swindon) Ltd was not a beverage for VAT purposes and it allowed the company's appeal. The case highlighted the difficulties inherent in UK VAT law when determining the VAT liability of food or food products but, on the evidence, the FTT was satisfied that The Core's product - that consists of fresh drinkable products made from juicing raw fruits and vegetables - were not 'beverages'. HMRC was, eventually, given leave to appeal that decision on a single ground. HMRC contended that the FTT had erred in law when it determined that the product was not a beverage because, in making that determination, it had relied on the way in which the product had been marketed.

UK VAT law on the VAT liability of supplies of food and drink is complex and has remained largely unaltered since VAT was introduced in the UK in 1973. In simple terms, subject to a number of exceptions, the supply of food of a kind for human consumption in the UK is zero-rated. The exceptions include things like ice cream and confectionery, beverages containing alcohol and 'other beverages (including fruit juices)'. The law also stipulates, however, that the term 'food' also includes 'drink'. HMRC took the view that the Juice Cleanse programme was a 'fruit juice' falling within the 'other beverages' exception whereas the company – advised by Grant Thornton – preferred to classify the product as food. This was on the basis (and the FTT agreed) that the Juice Cleanse programme was intended to be a meal replacement programme and was not simply a 'healthy drink'. By contrast, a beverage is a liquid that is commonly consumed and is characteristically taken to increase bodily fluid, to slake the thirst, to fortify, or to give pleasure. To determine whether a liquid was a beverage, the FTT stated that it needed to take into account the way in which the product was marketed, why it was consumed by the purchaser and the use to which the product was put. On the evidence the FTT found that the Juice Cleanse programme was marketed as a meal replacement programme, it was consumed by the purchaser to replace meals (for dietary or health reasons) and the consumers purchased the Juice Cleanse Programme to replace meals not as a beverage. In addition, the FTT found that the product did not meet the 'beverage test' and, in light of those findings, the FTT allowed The Core's appeal.

After several attempts, HMRC was finally given leave to appeal the FTT's decision on a single ground. HMRC considered that the FTT had made an error of law when it classified the Juice Cleanse Programme as not being a beverage and that it had made this error by focusing on, and giving undue weight to, the way in which the product was marketed. According to HMRC, this led the FTT to give undue prominence to its finding that the Juice Cleanse Programmes were meal substitutes. In all cases involving classifications for VAT purposes there needs to be a multifactorial assessment.

The way the product is marketed and sold is a potentially relevant factor in every case. In some cases it may carry little weight, and in others it may carry great, or even dominant, weight. The fact that the Juice Cleanse Programme's ingredients could also be used as a beverage was not relevant in this case. The fact remained that the product was marketed as a meal replacement programme and consumers purchased the product with that purpose in mind. Accordingly, the FTT did not make any error of law when it gave the weight that it did to the way in which the product was marketed. HMRC tried to argue that a supplier could also market a Mars Bar as a meal replacement and, thus, take advantage of zero-rating. However, the Upper Tribunal dismissed this argument on the basis that, in the circumstances, Mars Bars are classified as 'confectionery' and would, therefore, fall to be treated as an excepted item under VAT law.

Accordingly, the Upper Tribunal concluded that the FTT had considered all relevant factors in reaching its conclusions and that the weight to be applied to the relevant factors on a multifactorial assessment is a matter for the FTT, which should not be interfered with on appeal unless the conclusion reached is plainly wrong or irrational. The Upper Tribunal considered that there was no such error in the FTT's decision. HMRC's appeal was dismissed.

Comment – classification of products for the purposes of determining the appropriate VAT liability is fraught with difficulty. Here, the product was clearly a drink made up of fruit juice which, ordinarily, would be regarded as a beverage for VAT purposes. However, as the FTT and now the Upper Tribunal have confirmed, the question of how the product is marketed and evidence of why the product is purchased must be taken into account when undertaking the classification exercise. Here, the FTT found that the Juice Cleanse Programme was a meal replacement programme intended to replace the intake of 'normal' food by fruit juice. This should be treated as 'food' for VAT purposes.

First-tier Tax Tribunal – Leeds Beckett Students Union

Whether certain events were 'fund raising events' and exempt from VAT or, alternatively whether the Union's activities were akin to a 'youth club'.

For the second time in two weeks, a University Student's Union has tried to argue that its activities should be exempt from VAT. In this case, Leeds Beckett University Students Union had submitted a claim to HMRC to recover VAT that it had accounted for on income received from various events. The Union argued that the primary purpose of the events organised by the Appellant was the raising of money and, being a charity, this meant that the events qualified for VAT exemption. HMRC, however, argued that the main purpose of the events was to provide social events for students.

In previous cases, the Tribunal has concluded that a fund-raising event in this context is an event the main purpose of which is to raise funds. Fund-raising need not be the sole purpose but if fund-raising is not the primary purpose of the event then it is not a fund-raising event for VAT purposes but is an event which has the incidental purpose of being expected to yield a surplus. The problem with this particular case was that the Union was unable to provide the Tribunal with sufficient evidence that the events (including Fresher's week) were staged for the main purpose of fund raising. The Tribunal concluded that There was insufficient evidence to conclude, on the balance of probabilities, that any of the events organised by the Appellant were events organised with the primary purpose of fund-raising rather than with the primary purpose of providing events to welcome new students.

On the alternative question of whether the Union was a 'youth club', the FTT found that the Union had again provided insufficient evidence to demonstrate that the 'youth club' tests set out in the law had been met. In particular there was no evidence adduced by the Union to establish that its members are mainly under 21 years of age. The Union's appeal was dismissed on all counts.

Comment

To qualify as 'fund raising events' the primary purpose of an event must be for the purpose of raising funds. In this case, the Union failed to provide sufficient evidence to convince the Tribunal that the events were anything other than social events for the benefit of the students.

Similarly, to qualify as a 'Youth Club' an organisation needs to meet a number of statutory tests. Firstly, the organisation must be established to promote the social, physical, educational or spiritual development of its members and secondly, its members must mainly be under 21 years of age. Finally, the organisation must be a non-profit making body which is precluded from distributing any profits.

Again, the Union provided little, if any evidence in support of its arguments leaving the Tribunal with no option but to dismiss the appeal.

First-tier Tax Tribunal – Krystal Hosting Ltd

Whether HMRC entitled to cancel the taxpayer's VAT registration

The VAT Mini One Stop Shop ("MOSS") scheme was introduced on an EU wide basis to simplify VAT compliance for businesses supplying certain digital services in EU Member States other than the one in which they are established. Instead of having to register in all of the EU countries in which supplies are made, the business may instead register only in the country in which it is established.

The Appellant, Krystal Hosting Limited ("Krystal") provides web-hosting services across the EU. Through its agent, it registered for the VAT MOSS scheme in the UK in July 2017. However, it did not submit its first three MOSS returns on time and so HMRC cancelled Krystal's registration under the MOSS scheme in May 2018. The consequences of the cancellation were that the company needed to register and account for VAT in each of the Member States in which it supplied hosting services.

The company contended that it should not have had its UK VAT registration cancelled because HMRC had failed to give it sufficient notice of the consequences of failing to submit MOSS returns. HMRC, on the other hand, contended that it had no discretion in this regard. The UK's VAT law is clear. Where a taxpayer has persistently failed to comply with its obligations to furnish returns under the MOSS scheme, HMRC must cancel the VAT registration. The EU Implementing Regulation sets out certain circumstances in which a person is to be regarded as having persistently failed to comply with their obligations. This includes where reminders have been issued by the Member State of identification, for three immediately preceding calendar quarters and the VAT return has not been submitted for each and every one of these calendar quarters within ten days after the reminder has been sent.

The company persistently failed to comply with its obligations and HMRC were, therefore, right to cancel its registration under the MOSS scheme with effect from 1 July 2018. Appeal dismissed.

Comment

One of the consequences of failing to comply with filing obligations under the MOSS scheme is that a taxable person will be required to register for VAT in every Member State in which electronic or digital services are supplied. This can be a costly and time consuming exercise and is the very reason for the introduction of the MOSS scheme in the first place.

The ultimate sanction for failing to comply with filing obligations is that, after issuing timely reminders to the taxable person, the tax authority (here HMRC) is required by law to cancel the MOSS registration.

Businesses supplying electronic services and registered under the MOSS scheme should take note.

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