Not yet conforming

Technical Indirect Tax

01 February 2015

Key Points

The tribunal in Rapid Sequence read words into UK legislation to give it a conforming approach We wrote to HMRC questioning the ability to do so We have now written suggesting actions that HMRC should take to provide taxpayers with greater certainty

Background

The tax tribunal decided in Rapid Sequence that it could interpret the words of UK legislation so that they conformed to the EU VAT law. This was despite the fact that the tribunal had also concluded that, on the clear wording of the UK law, it would have had no hesitation in finding for the taxpayer.

We wrote to HMRC pointing out that:

- a conforming approach could only be applied if the UK legislation was capable of being read in two ways – one that conformed with the EU legislation and the other that did not;
- the courts have held in other cases that there are limitations to what has become known as the ‘Marleasing’ approach in that when re-interpreting UK law one should not ‘do violence’ to it; and
- the tribunal in Rapid Sequence had sought to interpret the medical exemption in conformity with article 132(1)(c) of the Principal VAT Directive (PVD) but, since the services were provided to a hospital, it was arguable that it should have sought to interpret the UK legislation to conform with article 132(1)(b) instead.

We received a response from HMRC rejecting our view.

Further action

We considered that, although we disagreed with HMRC's analysis, a practical approach was needed to address the problems with the EU law.

We have now written to HMRC, advising that we stand by our analysis, but also pointing out that:

- if a conforming approach had to be adopted, it would mean that, because the UK legislation attempts to implement two different provisions of the PVD, it would mean that it would be necessary to adopt a different interpretation of the same legislation depending on the facts;
- HMRC should not be seeking to enforce a conforming interpretation in cases such as this where they have failed to update their public guidance or the UK law to address a clear difference from their desired policy line;
- in any event, it was unsatisfactory that, at present, taxpayers would have to know not only the UK law but also the approach taken by the tax tribunal in order to apply the legislation as HMRC considered that it should be, which was contrary to the principle of legal certainty; and
- it appeared that the HMRC guidance had not yet been updated for the department's view.

We have therefore suggested that, without delay, HMRC should update their guidance possibly by issuing a Revenue and Customs Brief followed by the introduction of legislation to implement the PVD as they consider it should be.

But…

Although we want HMRC to provide certainty for taxpayers, we still believe it is arguable that interpreting UK law in conformity with article 132(1)(b) would arrive at a different position from that found by a tax tribunal.