Indirect Taxes Conference – VAT stream

Indirect Tax | Tax voice



20 December 2016

Following the introduction by Michael Conlon QC, the morning VAT stream comprised sessions from Neil Hedger (HMRC) on business / non-business use, Etienne Wong on taxable persons, Stuart Walsh on avoidance and abuse and a panel session on avoidance.

Business / non-business

As an alternative, it was suggested that the talk could have been entitled Economic and noneconomic activity (for VAT purposes). Neil's session started with an analysis of the legislative base (s 4 and s 24, VATA) and articles 168 and 173 of the Principal VAT Directive, before moving on to review and highlight the importance of the judgements in the *Kretztechnik*, *Securenta*, *VNLTO*, *Sveda* and *Cesky* cases. By way of conclusion Neil considered the *Vehicle Control Services Ltd* (UT/2015/0191) case

and noted that the tribunal agreed that the critical words in article 168 are, “in so far as…” Referring to the comment at para 39 of the Upper Tribunal’s decision and conclusion at para 44, Neil noted that the AG’s analysis in *Cesky* is both highly persuasive and strongly supportive of HMRC’s interpretation that: VAT may only be deducted in so far as (that is to the extent that) it is attributable to taxable supplies.

Taxable persons

Etienne Wong, Old Square Tax Chambers, began his session with an analysis of articles 2, 4 and 9 of the Principal VAT Directive before considering s 3, VATA 1994. The key, “in scope questions” that then needed to be addressed were: does the transaction constitute an economic activity, is the person carrying out the economic activity a person who does so independently and is the taxable person acting as such? As regards the first of these issues – that of economic activity, several cases were examined: *Commission v Netherlands* C-235/85, *Commission v Greece* C260/98, *Enkler* C-230/94 and *Hutchinson 3G* C-369/04. The conclusion being that the term is wide in scope and objective in character – that the activity constitutes performance of duties conferred and regulated by law is irrelevant, that activities carried on an occasional basis are not included and that the receipt of payment does not mean, per se, that the activity is economic in nature.

Etienne then proceeded to look at the requirement for the activity to be in return “for remuneration”. Five cases were noted in this regard: *Tolsma* C-16/93, *Apple and Pear Development Council* C-102/86, H*otel Scandic* C-412/03, *Saudacor* C-174/14, and *Commission v Finland* c-246/08. Each of these cases sheds light on the meaning of the phrase. However, the result was that there were still questions that remain unanswered:

1. Does the transaction constitute an economic activity – this in turns to three subsidiary questions: is there a supply of services, does the activity constitute the supply of services, and, are the services provided “for consideration”?
2. Is the person carrying on the economic activity a person who does so independently?
3. Is the taxable person acting as such?

The first question highlights the importance of whether it is possible to equate the supply of services with economic activity. A number of cases were then reviewed – ultimately it was noted that this was a question for the national court to determine

based on the facts.

That this is a highly topical and very important issue was underlined by the extensive discussion of the Longbridge on the *Thames* case decision (see article in November Tax Adviser, Dragons defeated).
The final presentation was delivered by Stuart Walsh, Pinsent Masons LLP, who looked at some significant developments as regards avoidance and abuse. Stuart started by looking at the conceptual issues of blame and liability before then focussing on the rules of attribution – in particular, the decisions in *McNicholas Construction Ltd v HMRC* [2000] STC 533 and *Jevita DA & Another v Bilta (UK) Ltd & Ors* [2015] UKSC 23.

Having set the background, Stuart then moved on to look at the discussion document "Strengthening Tax Avoidance Sanctions and Deterrents" published on the 17 August 2016 proposing penalties for enablers of VAT avoidance schemes. The significant feature of this proposal is that it is to apply to "anyone in the supply chain who benefits from an end user implementing tax avoidance arrangements". We have responded to the discussion document and our comments can be found on the CIOT website.

All in all, an excellent morning that was followed by an excellent afternoon