



# UK Indirect Tax Conference 2014

## Compliance in Perspective

### Indirect tax litigation: current trends

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14 November 2014



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# Establishment

## *Welmory sp. z o.o.* – CJEU judgment (Poland)

- CJEU reaffirmed previous jurisprudence on when a fixed establishment exists
- Confirmed that this depends on whether there is “... a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business ...”
- Left the final decision to the referring court, but strong hint in the decision that if, as the Polish taxpayer asserted:

“... the human and technical resources for the business carried on by the Cypriot company, such as computer servers, software, servicing and the system for concluding contracts with consumers and receiving income from them, are situated outside Polish territory ... the referring court would then be led to conclude that the Cypriot company does not have a fixed establishment in Poland, since it does not have the necessary infrastructure to enable it to receive services supplied by the Polish company and to use them for its business”

# Exemptions – Payment Processing

## *Bookit Ltd* – FTT decision

### Issue

- Whether a card handling fee is a “transaction concerning payment” and therefore exempt or should it be excluded from the exemption by virtue of being debt collection?
- Whether the tax advantage accruing to the appellant is contrary to the purpose of the Principal VAT Directive

### Decision

- Reference to CJEU for a preliminary ruling as to the scope of the exemption under Article 135 (1)(d)
- Bookit’s card handling services do not fall within the exclusion from exemption for debt collection
- The contractual arrangements were not artificial or abusive – the FTT held that they reflect economic reality and there was no attempt to disguise or misrepresent commercial reality

# Exemptions – Payment Processing

## *National Exhibition Centre Ltd* – UT hearing

### **FTT decision**

- FTT agreed that the NEC received booking fees as principal, not as agent for the promoter of the various events at the centre
- And that the booking fees were VAT-exempt payments for handling debit and credit card payments
- Not for a wider bundle of services that together were standard-rated, as HMRC had argued

### **Upper Tribunal hearing on 7 November 2014**

# Exemptions – Payment Processing

## *National Exhibition Centre Ltd* – UT hearing

### Upper Tribunal Hearing

HMRC arguments:

- The booking fee charged by NEC was not consideration for a “payment card processing service”
- FTT had made an incorrect finding of fact
- Even if the booking fee was consideration for a “card processing services” it did not meet the requirement in SEC and/or was excluded from the exemption because it was “debt collection”
- HMRC asked for a reference to be made to the CJEU.
- Is Scottish Court of Session binding – Scottish Exhibition Centre

# Exemptions – Payment Processing

## *Virgin Media Payments Ltd* – FTT hearing

### **FTT hearing on 24 September**

- Whether supply is made by Virgin Media Payments in exchange for a £5 payment levied on those customers who choose not to pay by direct debit
- If there is a supply in such cases – what is it?
- Is this supply an exempt service?
- Grouping – do the answers to 1-3 change if Virgin Media Payments is grouped within the Virgin Cable VAT group?
- Abuse – do the arrangements breach the *Halifax* test?



# Exemptions – Pension funds

## *ATP PensionService A/S* – CJEU judgment (Denmark)

### Issue

- VAT treatment of management of defined contribution schemes

### Judgment

- DC schemes have the essential characteristics of other investment vehicles that allow investors who bear the risk of the investment performance and cost of the fund to pool resources and so to spread the exposure across a wider range of investments
- Like other such funds, DC schemes should be treated as “special investment funds” for VAT purposes, meaning that the “management” of them can qualify for exemption under EU law
- Judgment contains guidance on types of services that could be exempted and indicates that comparable services supplied in relation to DC schemes in the UK should also qualify for exemption

# Single and multiple supplies

*Kumon Educational U.K Co Ltd/  
Kumon Book Services (UK) Ltd –  
FTT decision*

## **Issues**

- Whether there was a single or multiple supply
- Whether a restructure was a sham/abusive and could be ignored

## **Decision**

- There were two separate supplies
- Arrangements could not be considered a sham
- There was substance behind the new structure

# Single and multiple supplies

*Kumon Educational U.K Co Ltd/*

*Kumon Book Services (UK) Ltd*

FTT decision

## Implications

- Another decision reinforcing that *Telewest* is still good law and compatible with CJEU decisions on single/multiple supplies
- Cannot fuse a supply when two separate supplies being made
- Abuse – following a similar analysis to *Ocean Finance* there was substance in KBS and therefore arrangement not abusive notwithstanding the substantial VAT efficiency in the new structure

# VAT structuring

## *Pendragon plc & Ors* – Supreme Court

- Supreme Court granted HMRC's application for leave to appeal against Court of Appeal's decision
- Case concerns a VAT planning structure intended to reduce VAT cost associated with demonstrator cars, which HMRC considered to be "abusive"
- Structure had commercial consequences and one of its objectives was said to be to secure financing in a VAT efficient way
- **FTT** rejected "abuse" challenge and agreed that the structure was technically effective
- **Upper Tribunal** disagreed, finding that the structure was "abusive"
- **Court of Appeal** decided FTT had not erred in law, and that it was "entitled, on a comprehensive objective evaluation of the arrangements, to come to the conclusion that no element of the arrangement was inserted artificially, and that the arrangements were not abusive or artificial"

# VAT structuring

## *Paul Newey t/a Ocean Finance*

### History

- **FTT** allowed Ocean Finance's appeal against assessment for almost £11 million, stemming from VAT-driven structure involving a Jersey company
- HMRC's argument: the appellant (and not the Jersey company) made supplies of loan broking and received (in the UK) supplies of advertising, which were subject to reverse charge VAT
- FTT rejected that contention and also HMRC's "abuse" challenge
- **Upper Tribunal** referred questions to CJEU
- **CJEU** confirmed that terms of a contract do not necessarily determine the commercial and economic reality of a supply, and that contracts put into place with the sole purpose of obtaining a VAT advantage can be disregarded

# VAT structuring

## *Paul Newey t/a Ocean Finance*

**Upper Tribunal** hearing on 4 and 5 November

HMRC arguments

- The Upper Tribunal must apply guidance from CJEU – right approach is to apply the principle of economic reality
- The scheme as a whole was abusive and Halifax principle should apply – tax advantage produced is contrary to purpose of the directive

Ocean Finance arguments

- The test to determine economic reality is to find who is making and receiving supplies and consideration.
- Other factors must be afforded appropriate weight – including who is assuming risk

# Input VAT recovery

*Airtours Holidays Transport Ltd –*

## Court of Appeal judgment

### **Issue**

- Were services received by Airtours?
- Was Airtours able to claim VAT input tax?

### **Judgment**

- In favour of HMRC (2:1)
- Appeal dismissed principally based on construction of contract (letter of engagement) between Airtours, PwC and the Institutions
- PwC provided services to the Institutions for which Airtours agreed to pay

# Input VAT recovery

*Airtours Holidays Transport Ltd –*

## Court of Appeal judgment

### **Dissenting opinion**

- Two supplies:
  - Service from PwC to Airtours – reviewing, monitoring, validating financial performance
  - Service from PwC to Institutions – monitoring and advising on Airtours' financial statements and performance

### **Implications**

- Airtours have sought permission of Supreme Court to appeal
- HMRC approach – Business Brief & ADR



# Input VAT recovery

## *Norseman Gold plc* – FTT decision

### **Issue**

- Were there supplies for VAT purposes?

### **Decision**

- Whilst the services in question were “economic activities”, the vague payment terms meant that they were not “supplies”
- No price was agreed before the “management services” were delivered
- As holding company was not making supplies for VAT purposes, it was not entitled to claim input tax

### **Implications**

- Holding companies must have robust processes and appropriate documentation in place to underpin management charges to subsidiaries and to ensure that relevant charges are made

### **Norseman has appealed to Upper Tribunal**

# Input VAT recovery

## German references to CJEU

- Two German cases referred to CJEU
  - *Marenave Schiffahrt*
  - *Larentia & Minerva*
- Corporate share acquisitions through holding companies
  - In each case, the holding company claimed full VAT recovery on its share acquisition costs, on the basis that it was carrying on an economic activity, in the form of supply management services to the subsidiary companies

# Input VAT recovery

## German references to CJEU

- Questions referred:
  - Which calculation method is to be used to calculate a holding company's (pro rata) input tax deduction in respect of input supplies connected with the procurement of capital for the purchase of shares in subsidiary companies, if the holding company subsequently (as intended from the outset) provides various taxable services to those companies?
  - Does the provision on the consolidation of several persons into a single taxable person in the second subparagraph of Article 4(4) of the Sixth Directive preclude national legislation under which (firstly) only a legal person, but not a partnership, can be integrated into the undertaking of another taxable person (a so-called '*Organträger*' (controlling company)) and which (secondly) requires that this legal person 'is integrated into the undertaking of the *Organträger*' in financial, economic and organisational terms (in the sense of a relationship of control and subordination)?
  - If the previous question is answered in the affirmative: can a taxable person rely directly on the second subparagraph of Article 4(4) of the Sixth Directive?

# Consideration

## *ING Intermediate Holdings Ltd* – FTT decision

### Issue

- Whether ING was providing banking services when it accepted deposits

### Decision

- There was a supply for (non-monetary) consideration paid by the depositors
- The “... value of the consideration (the deposits) was *both* what the bank was prepared to spend in interest and what it was prepared to spend in providing banking services, the value of the deposits *less* the value of the interest was equal to what the bank was prepared to spend on its banking services; so the value of the banking services is what the bank was prepared to spend on providing them”

# Partial exemption

## *Banco Mais SA* – CJEU judgment (Portugal)

### **Judgment**

- Alternative partial exemption methods had to aim for a “more precise determination of the deductible proportion”
- In this case, it was more accurate to exclude the value of the assets (cars) from the partial exemption calculation

### **Implications**

- What approach will HMRC take?
- In the UK the case of Volkswagen Financial Services (UK) Ltd has been held over awaiting this decision of the CJEU

# Partial exemption

## *Volkswagen Financial Services (UK) Ltd*

### **Issue**

- Recovery of VAT associated with the VWFS HP business

### **Upper Tribunal decision**

- Inputs **can** be cost components of a particular supply, even if the output price of that supply does not reflect those costs
- The economic reality was that VWFS is engaged in a finance business and not in the business of selling cars on finance terms
- Accordingly, the residual cost inputs have no direct and immediate link with and are not cost components of the taxable part of VWFS's business, save for the small taxable elements of its finance business
- Therefore, VWFS's PESM which attributes 50% of the residual input costs to the taxable outputs, would not be a "fair and reasonable" apportionment

### **Court of Appeal**

- Case listed for hearing in April 2015

# Partial exemption

## *Lok'nStore Group plc* – Upper Tribunal decision

### Decision

- HMRC's appeal dismissed
- The FTT made an error of law in concluding that *AB SKF* was authority for the proposition that the “direct and immediate link” and “cost component” tests are relevant when considering the apportionment of residual input tax attributable to overheads
- However, “... the FTT had not lost sight of the economic use test, and [...] their mistaken reliance on *SKF* did not in fact cause them to set off in the wrong direction, or vitiate the analysis which they undertook”
- The proposed partial exemption special method (floor spaced-based) was “fair and reasonable”

# Grouping

## *Skandia America Corp. (USA), filial Sverige –* CJEU judgment (Sweden)

### Issue

- VAT treatment of charges made by the Corporation's US head office to its Swedish branch, which was included in a VAT group in Sweden

### Judgment

- Where a branch of an overseas entity is part of a VAT group, any supplies of services made by an overseas head office in a non-EU country to this branch are considered taxable transactions made to the VAT group as a whole and hence subject to VAT
- The VAT group is responsible for accounting for VAT on these supplies under the reverse charge provisions

### UK position

- HMRC have stated that there will be no change in the UK position



# Bad Debt Relief

## *GMAC UK plc* – CJEU judgment

### Judgment

- The CJEU has held that a Member State cannot prevent a taxable person from relying on the direct effect of a provision because of domestic law in relation to another transaction even if it involves the same goods
- Therefore, the CJEU said that the taxpayer has a fundamental right to adjust input VAT
- Further, even if the cumulative application of both direct effect and domestic law produce an overall fiscal result which neither national law nor the Sixth Directive intended this is not abusive
- Taxpayer wins, however bear in mind the Court of Appeal judgment in *BT*

# Bad Debt Relief

## *British Telecommunications plc* –

## Court of Appeal judgment

### **Judgment**

- Court rejected BT's £62m claim for BDR) relating to periods before 1990
- Agreed that the “Old BDR Scheme” which existed before that date was defective, as taxpayers could not claim BDR without proving their debt in an insolvency
- However, the eventual withdrawal of the Old BDR Scheme in 1997 should have been foreseen by BT as a “prudent and circumspect operator”, even though a claim would have been incompatible with the UK legislation as it stood at the time
- Consequently, withdrawal of Old BDR Scheme did not infringe BT's legitimate expectations, and BT's claim that was made in 2009 should be rejected

BT has applied for leave to appeal to **Supreme Court**

# VAT on commission for online sales

## *Secrethotels2 Ltd* – Supreme Court judgment

### Issues

- Did Secrethotels2 act as a principal or agent?
- As a matter of English contractual law and EU law was Secrethotels2 an agent?
- Were the contracts determinative of the VAT analysis?

### Decision

- Secrethotels2 was an agent and this was clear in both the contract with the customer and the hotelier
- As a matter of English law the contract was valid and showed Secrethotels2 to be an agent
- As a matter of EC law, the concept of “intermediary” was synonymous with “agency” and therefore the economic reality was Secrethotels2 acted as an agent

# VAT on commission for online sales

## *Secrethotels2 Ltd* – Supreme Court judgment

### Implications

- Some really helpful comments from the Supreme Court on the freedom of the parties to arrange their affairs contractually so as to minimise their tax liability
- The contracts are important but also need to reflect the economic reality
- This is a good decision for the industry

# Compound interest

## *Littlewoods Retail Ltd & Ors*

- **High Court** judgment in March 2014 that compound interest should be payable
- HMRC granted leave to appeal
- **Court of Appeal** hearing on 23 March 2015
- HMRC considers that no payments are due to other claimants at this time, and was seeking to stay existing claims for compound interest

# A look ahead

- ***Investment Trust Companies (in liquidation)***
  - Direct claims against HMRC for VAT refunds
    - Court of Appeal hearing
- ***Vodafone Group Services Ltd***
  - Taxpayer can substitute reasons for VAT repayment claim
    - HMRC has appealed to Upper Tribunal
- ***“TNT Post” VAT claims***
  - Zipvit has appealed to Upper Tribunal
- ***General Healthcare Group Ltd***
  - Single/Multiple Supply



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