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Case alert

The Wellcome Trust Ltd

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Summary

The VAT Directive stipulates that the place of supply of most services between two taxable entities is the place where the recipient of the service is established. This is known as the B2B (business to business) rule. Article 43 of the Directive further stipulates that where an entity engages in both taxable and non-taxable activities, it should be regarded as a taxable person in relation to any services provided to it.

The Wellcome Trust Ltd undertakes both taxable and non-taxable activities. It makes some minor taxable supplies but its main activity – the management of a charitable trust's substantial investment portfolio – is regarded for VAT purposes as a non-business activity.

HMRC considered that, under the provisions of Article 43, the company must be regarded as a taxable person and, as such, that it is liable to account for VAT incurred on fund management services purchased from a fund manager established outside the EU.

The company contended that it does not act as a taxable person when it purchases those services and, as a result, it ought not to be so liable. The First-tier Tax Tribunal agreed with the company.

First-tier Tax Tribunal

When the place of supply rules changed in 2010, Article 44 introduced a new 'general' B2B rule. This rule stipulates that, the place of supply of services to a taxable person acting as such is the country where the recipient business is established. For the avoidance of doubt, Article 43 of the Directive makes it clear that, in cases where the purchasing taxable person is engaged in both taxable activities and non-taxable activities, it is to be regarded as a taxable person in respect of all of the services it receives.

The Wellcome Trust Ltd (the company) is such an entity. It is engaged in taxable activities (supplies of catering services and other minor supplies), but the majority of its activities are regarded as non-taxable. In such circumstances, HMRC took the view that, in light of Article 43, the company received the supply of fund management services from fund managers established outside the UK in its capacity as a taxable person. Accordingly, it ruled that the company was liable to account for VAT in the UK under the reverse charge mechanism.

It was common ground that the activities for which the services were provided were non-business activities. (The Court of Justice had ruled to that effect back in 1996). Consequently, the company argued that it did not act as a taxable person when it purchased the fund management services in question and should not, therefore, be liable to account for any VAT on the receipt of those services.

In a surprising decision, the First-tier Tax Tribunal has allowed the company's appeal. It found that the words "acting as such" in Article 44 effectively exclude the company from the provisions of that Article to the extent that the fund management services are supplied by the fund managers to it for the purposes of its non-economic activities. As a consequence of that finding, the Tribunal confirmed that the company was not, therefore required to account for UK VAT under the reverse charge. The UK's implementation of the reverse charge requirement in situations where, as here, the taxpayer is not acting in a business capacity is, therefore, contrary to the provisions of the VAT Directive.

Comment – This decision of the First-tier Tax Tribunal is not legally binding on any party other than the taxpayer and HMRC and so cannot be relied upon at this stage as setting any legal precedent.

The Tribunal examined the Travaux preparatoires (the working papers that led to the change in the VAT place of supply rules) and was satisfied that an additional condition (namely the requirement for the taxable person to be acting as such) was inserted into Article 44 that was not present in the earlier place of supply rule. On the basis that the EU lawmakers must have intended the change, it is incumbent on the national court to give effect to it. Accordingly the Tribunal allowed the company's appeal.

This is a major decision but it may well be appealed by HMRC. Any entity that is engaged in non-business activities may be entitled to a VAT refund if it has accounted for (and not reclaimed) VAT incurred on the purchase of services received from outside the UK.

Contact

Stuart Brodie
Scotland
T +44 (0)14 1223 0683
E stuart.brodie@uk.gt.com

Karen Robb
London & South East
T +44 (0)20 772 82556
E karen.robb@uk.gt.com

Vinny McCullagh
London & South East
T +44 (0)20 7383 5100
E vinny.mccullagh@uk.gt.com