Wellcome Trust v HMRC

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In the recent case of *The Wellcome Trust Ltd v HMRC* [2018] UKFTT 599 the First-tier Tribunal ("FTT") considered the interpretation of "a taxable person acting as such" in Article 44 of the Principle VAT Directive ("PVD").

The Wellcome Trust is a charitable trust that makes grants for medical research. It received some income from investments, but it also had a number of minor activities in respect of which it was registered for VAT. Its investment income was primarily from overseas investments, both within and outside of the EU, and this income provided the funds for the majority of the Trust's grants.

The case concerned interaction between Articles 43, 44 and 45 of the PVD. At issue was the correct VAT treatment of management fees paid by the Trust to investment managers outside the EU. The question was whether the place of supply of the services in question should for VAT purposes be considered to be the UK. The Trust claimed repayment of alleged overdeclared VAT, which was rejected by HMRC on the basis that the place of supply of the services should be the UK, and as such the Trust correctly applied the reverse charge mechanism.

The law

Articles 43-45 of the PVD state:

"Article 43

For the purpose of applying the rules concerning the place of supply of services:

1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.

…

Article 44

The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

Article 45

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides."

(Emphasis added)

In this case, the only question was the interpretation of "acting as such" in Article 44. The Trust argued that these words took it outside the scope of Article 44, and as such it was not required to account for VAT on investment management services supplied from outside the EU.

It was agreed that there were three categories of activity that had to be considered: (i) economic business activity, (ii) non-economic business activity, and (iii) private activity.

On the basis of the CJEU's findings in the earlier case C-155/94 *Wellcome Trust Ltd v Commissioners of Customs and Excise*, the Trust was carrying on non-economic business activity. This, per Case C-515/07 *Vereniging Noordelijke Land-en Tuibouw Organisatie v Staatssecretaris van Financien*, was separate from private activity.

The FTT had, therefore, to decide what the correct treatment of 'non-economic business activity' was in these circumstances.

The Trust argued that Article 43 determined a person's status as a taxable person, while Articles 44 and 45 respectively determined the place of supply of services to taxable and non-taxable persons. HMRC by contrast argued that Article 43 acted to separate taxpayers between article 44 and 45 – Article 43

took taxable persons receiving supplies for private purposes out of Article 44 and placed them into Article 45.

The judge noted that Article 43 was clear that anyone who was a taxable person on the basis of making some taxable supplies should be considered a taxable person "in respect of all services rendered to him". HMRC's interpretation of Article 43 could not, therefore, be correct. Rather the placing of those receiving supplies for private use into Article 45 was achieved by Article 19 of the Implementing Regulation, which stated that for these purposes "a table person … who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person".

This did not, however, solve the question of what the words "acting as such" in Article 44 meant. The judge did not accept HMRC's submission that the purpose of these words was to place those receiving supplies for private purposes into Article 45.

A gap between Articles 44 and 45 PVD?

HMRC argued that the approach taken by the Trust would lead to a gap between Article 44 and 45; it was common ground that the Trust's activities did not fall within Article 45, and all supplies of services must fall either into Article 44 or Article 45. To hold otherwise, and allow a gap between the two provisions, would lead to uncertainty and complications.

The Trust in response argued that this was not a problem – Article 18 of the Implementing Regulation created sufficient certainty, as a supplier of services was entitled to rely on whether or not the customer had provided him with a VAT number to know whether he should charge VAT on his services, and was required to act as if supplying to a non-taxable person and account for VAT himself if he was not provided with a VAT number. It was agreed in this case that the Trust had provided its VAT number to all suppliers based in the EU, but not to its investment managers outside the EU.

The judge agreed with the Trust's submissions, holding that Article 18 of the Implementing Regulation prevented any threat to the simplicity and certainty of the PVD if there was a gap

The Travaux Preparatoires

The judge was concerned that HMRC's interpretation of the Articles seemed to require that "acting as such" was essentially meaningless. Considering the *Travaux Preparatoires* of the PVD, the judge noted that there had clearly been considerable discussion of the phrase, which had been inserted and removed

at various stages in the drafting process, before being ultimately included in the final text. He noted that the final version contained a note on this phrase:

"The phrase "acting as such" … as worded in the proposal to be found in FISC 150 (a previous report), was deleted from the text afterwards, since a number of member states had problems with this phrase. Nevertheless, in the light of the ongoing discussion, member states may accept this phrase as a compromise now, as it reflects existing rules for the intra-community supply of goods in Article 28a(1)(a)."

The Trust submitted that the *Travaux Preparatoires* demonstrated that its interpretation of "acting as such" was correct. Considering Lord Steyn's judgement in *Effort Shipping Co Ltd v Linden Management SA and another* [1998] UKHL 1, the judge in this case noted that while, in cases of genuine ambiguity, the *Travaux Preparatoires* could be determinative of the construction of a convention, that was "only possible where the Court is satisfied that the *Travaux Preparatoires* clearly and indisputably point to a definite legal intention. Only a bull's eye counts. Nothing else will do" (at page 509).

In this case, the judge was not sure that the evidence of the *Travaux Preparatories* to amount to a "bull's eye", and did not regard it as determinative of the correct interpretation. However, he did hold that it clearly indicated the words "acting as such" were required to mean something, and that any interpretation that required them to meaningless could not consequently be correct.

Equal Treatment

Finally, the judge considered the Trust's submissions on equal treatment. The Trust raised the comparison with a barrister who was registered for VAT with regard to his legal work, but also had an investment portfolio – it was common ground that HMRC would not required him to account for VAT under the reverse charge rules for investment management services received from outside the EU. However, the judge rejected the argument that this positions were comparable – the barrister would, in his view, be carrying out private activities, whereas the investment activities carried out by the Trust were at the heart of its corporate purposes.

Conclusion

The judge in conclusion noted the inconsistency at the heart of HMRC's case. HMRC's interpretation – that the words in Article 43 overrode anything in Article 44 and meant that anyone taxable person is considered such for all purposes – would mean that a taxable person receiving supplies for private purposes would, without further words, be required to account for VAT under

the reverse charge rules, which HMRC accepted did not happen. They were, therefore, required to argue that "acting as such" excluded taxable persons receiving supplies for private persons, but not those receiving supplies for "non-economic business purposes". This, as the judge put it, was "simply not a logical proposition" (paragraph 41).

The judge held that there was nothing in Article 44 PVD or Article 19 of the Implementing Directive which, as far as he could see, required there not to be a gap between Articles 44 and 45 PVD. Consequently, he found that the Trust was not required to account for the VAT on the investment management services it received from outside the EU.

UK legislation

Finally, the judge considered the impact on UK legislation, which he noted was clearly not compliant with his interpretation of Articles 43 and 44 PVD. Applying the principle of interpreting national legislation in accordance with EU law, he held that s. 7A VATA could be read in conformity with the PVD if "or non-economic" was inserted in subsection 4(d), such that it read "received by the person otherwise than for private [or non-economic] purposes".

Discussion

There are a number of important features about this case. First and foremost, it clarifies the position of non-economic business activities, such as investment management fees paid by trustees of a charity, for the purposes of place of supply provisions. These, as this case demonstrates, fall into a gap between Article 44 and 45 PVD. Consequently, although they cannot be treated as supplies for private purposes, and therefore do not fall under Article 45, neither should they be treated in the same way as economic business activity under Article 44.

Secondly, this judgement demonstrates the willingness of the tribunal to allow a gap in the legislation where this did not lead to uncertainty. Despite the fact that the Trust's interpretation effectively left non-economic business activities outside the scope of Article 44 and 45, the judge did not find this problematic as it did not undermine the efficacy of the system under the PVD as a whole.

Thirdly, it reiterates both the importance of and correct approach to the *Travaux Preparatoires*. The judge here made clear that while the *Travaux Preparatoires* are a key guide to interpretation where there are ambiguities in a convention, they must be sufficiently precise to be determinative. It is not enough that they hint at a certain interpretation, or point in that direction – they must, in the words of Lord Steyn, score a "bull's eye". However, even in cases, such as

the present, where they are not sufficiently certain, they can be a helpful way of narrowing down the options legitimately available. While here the *Travaux Preparatoires* did not definitively provide an answer, they did make clear that any interpretation that required "acting as such" to be meaningless was inappropriate.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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