

PUMP COURT  
TAX CHAMBERS

# Recent VAT cases

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# ***Prudential: VAT groups and time of supply rules***

***The Prudential Assurance Company Ltd v HMRC [2021] UKFTT 50 (TC); [2021] SFTD 717***

- Continuous supply of services made during period when S and R were members of the same VAT group, but invoiced and paid after S leaves the group.
- Is there any VAT liability?

# ***Prudential: VAT groups and time of supply rules***

- No doubt that intra-group supply is disregarded for VAT purposes (section 43 VATA 1994; Art 11 PVD).
- But is VAT due (as HMRC say) because payments were made after S left the VAT group and each payment, therefore, created a supply that did not take place between members of the same VAT group? This purports to apply s.6(14) VATA and reg 90 of VATR 1995.
- Or is the correct analysis that, having disregarded the intra-group transactions at the time they were made, there is no *supply* on which VAT could be charged? Section 6(14) and reg 90 apply only where there is “a *supply* of [...] services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period”.
- Can a VAT liability be created by a payment for a transaction that has to be disregarded? Analogous to payment made as part of a demerger?

# ***Prudential: VAT groups and time of supply rules***

FTT held that:

- S's business was treated as carried on by the rep member of the VAT group (which happened to be R). So there was no actual supply by S "in the course or furtherance of" its business [36] [41].
- When S received payment from R, that was by ref to agreements in effect during the intra-group period and did not arise from the business S was carrying on at the time of invoice or payment [41].
- Thus not all the conditions for charge to tax in section 4(1) VATA 1994 were met. Meeting all four conditions is a pre-requisite for engaging the time of supply rules in section 6 VATA 1994 [35].
- Indistinguishable from *B J Rice*, in which the CA held no VAT chargeable because S was not a taxable person at the time of the physical supply, notwithstanding parties agreeing there was a continuous supply of services, for which payment was made after S became a taxable person.

# *Prudential*: VAT groups and time of supply rules

Other factors in support of Prudential's positions:

- Purpose of VAT grouping as explained in CJEU case law (A-G Jääskinen in *Commission v Ireland* (case C-85/11) at [41], [42], [46]; A-G Mengozzi in *L+M* (C-108/14 and C-109/14) at [49]).
- Definition of "supply of services" in Art 24(1) PVD and section 5(2) VATA 1994. Without a transaction or something that is «done» there is no supply and no chargeable event.
- Mann J' s judgment in *RBS* [2012] EWHC 9 (Ch); [2012] STC 797 (a TOGC case) that reg 90 cannot apply where another provision operates to treat no services as having been supplied [21].
- Other domestic cases including *Thorn Materials* [1998] 1 WLR 1106.

# ***Danske Bank: VAT groups and taxable person status of principal establishment versus branch***

*Danske Bank A/S (Case C-812/19)*

- Principal establishment of A Co ("PE") is situated in MS1, where it is part of a VAT group.
- Branch of A Co ("B") is situated in MS2.
- PE supplies B with services and imputes the costs to B.
- Must PE and B be regarded as separate taxable persons?

# **Danske Bank: VAT groups and situation of principal establishment versus branch**

CJEU held:

- “Taxable person” means any person who, independently, carries out in any place any economic activity, whatever the purpose or result of that activity [19].
- A supply between PE in MS1 and B in MS2 is taxable only if there is a legal relationship between S and R in which there is reciprocal performance [20]. If no such legal relationship, then PE and B form a single taxable person and reciprocal performance constitutes non-taxable internal flows of funds [20].
- Whether there is a legal relationship depends on whether B performs an independent economic activity. Does it bear the economic risk arising from its business?
- It is also necessary to take into account whether those companies belong to a VAT group under Art 11 PVD [22].

# **Danske Bank: VAT groups and situation of principal establishment versus branch**

CJEU held (cont.):

- The very wording of Article 11 contains a territorial limitation: a MS may not provide for a VAT group to include persons established in another MS [24]. Under Danish law, only permanent establishments situated in Denmark may form part of a Danish VAT group [24].
- Thus, where PE and B of A Co are situated in different MSs and one belongs to a VAT group, the legal relationship between them must be assessed by taking account (1) of the fact that that group is placed on the same footing as a single taxable person and (2) of the territorial limits of that group [26].
- CJEU has found that services supplied by PE in a non-MS to B established in a MS constitute taxable transactions when B is a member of a VAT group (*Skandia America (USA)* C-7/13, [32]). Same principle applies where services supplied between PE in MS1 belonging to a VAT group within MS1 and B in MS2.

# ***Danske Bank: VAT groups and situation of principal establishment versus branch***

CJEU held (cont.):

- PE is part of VAT group in MS1. For VAT purposes, it is the group which supplies the services [28].
- Territorial limits of Art 11 PVD means that B in MS2 cannot be regarded as forming part of the MS1 VAT group [29].
- So, for VAT purposes, the VAT group to which PE belongs, on the one hand, and B, on the other hand, “cannot be regarded as forming together a single taxable person” [30].

# Danske Bank: VAT groups and situation of principal establishment versus branch

- Is the CJEU's right in its reasoning?
- A "taxable person" is "any person who, independently, carries out in any place any economic activity [...]" (Art 9 PVD).
- Is an entity that is not a legal person in its own right a "person" for that purposes? How can there be a legal relationship between two entities that, as a matter of general law, have no independent legal personality? Should joining a VAT group make a difference?
- If A Co is "established" in MS1, then Art 11 PVD could apply to it and it could form part of a VAT group in MS1. Should the effect of that cover the business activities of A Co wherever they take place?
- In *Skandia America*, should the branch have been allowed to be a member of the VAT group in the MS, if the permanent establishment was elsewhere? The issue was agreed in *Skandia* and not considered by the CJEU.

# Danske Bank: VAT groups and situation of principal establishment versus branch

## *Skandia:*

- [26] As a branch of SAC, Skandia Sverige does not operate independently and does not itself bear the economic risks arising from the exercise of its activity. In addition, as a branch, according to the national legislation, it does not have any capital of its own and its assets belong to SAC. Consequently, Skandia Sverige is dependent on SAC and cannot therefore itself be characterised as a taxable person within the meaning of Article 9 of the VAT Directive.
- [28] However, it is common ground that Skandia Sverige is a member of a VAT group [...].
- [31] Inasmuch as the services provided for consideration by a company such as SAC to its branch must be deemed, solely from the point of view of VAT, to have been provided to the VAT group, and inasmuch as that company and that branch cannot be considered to be a single taxable person, it must be concluded that the supply of such services constitutes a taxable transaction, under Article 2(1)(c) of the VAT Directive.
- [32] Having regard to all the foregoing considerations, the answer to the first question is that Articles 2(1), 9 and 11 of the VAT Directive must be interpreted as meaning that supplies of services from a main establishment in a third country to its branch in a Member State constitute taxable transactions when the branch belongs to a VAT group.

# Royal Opera House Covent Garden Foundation v HMRC [2021] EWCA Civ 910

- ROH sought to deduct VAT paid by it on supplies comprising costs of productions (e.g. costs of sets, props, costumes) from VAT chargeable on its catering supplies (ROH succeeded in the FTT but HMRC's appeal was allowed by the UT).
- Where goods or services supplied to the taxable person are used "for the purposes of" taxed supplies made by a taxable person, a right of deduction arises. The taxable person's purpose is to be objectively ascertained from the facts and circumstances of the transactions. [17]

# Royal Opera House Covent Garden Foundation v HMRC [2021] EWCA Civ 910

- For an input supply to be made "for the purposes of" an output supply, there must be "a direct and immediate link" between them: a direct and immediate link exists "if the acquired goods and services are part of the cost components of that person's taxable transactions which utilise those goods and services". [18]
- Issue: ROH's supplies of tickets for performances were exempt but its supplies of catering services were subject to VAT. HMRC: the only direct and immediate link of the production costs was with the sale of tickets, so input tax is not deductible from the output tax on its catering supplies. ROH: there was a direct and immediate link with both ticket sales and the supply of catering services, so an apportionment is required.

# Royal Opera House Covent Garden Foundation v HMRC [2021] EWCA Civ 910

- Does the purpose of production costs include attracting customers to consume catering supplies or is the catering simply promoted by the productions so the direct and immediate link is only with the exempt sale of tickets? [25-27]
- FTT: the production costs were “essential” for the catering supplies so the purpose of the costs was also to enable the ROH to maintain its catering income.
- UT: the link identified by the FTT of enabling the catering supplies to be made is insufficient and the costs were “specifically attributable” to the performances but were not part of the costs of (e.g.) supplying champagne.

# Royal Opera House Covent Garden Foundation v HMRC [2021] EWCA Civ 910

- Lord Justice David Richards (with whom the others agreed):
  - (1) There can be a direct and immediate link between one set of input costs and two or more output supplies. [41]
  - (2) Sveda: the construction of the path (in respect of which costs were incurred) to which it admitted the public free of charge was “integral” to the taxable supplies of drinks that it proposed to make. Economically, the only purpose of the path was to give access to those supplies. Moreover, viewed in isolation, the provision of the path was a non-economic activity and could be disregarded. [81] [89]
  - (3) The test is not one of economic necessity: it is not sufficient that the performances brought the bars their customers. [86-87]

# Royal Opera House Covent Garden Foundation v HMRC [2021] EWCA Civ 910

- Agreed with the UT: costs were used for the performances (and the programmes) but although the champagne would not be served in the absence of the performances (i.e. “but for”) that is an indirect link, not a direct and immediate link. The test is not one of economic necessity: it is not sufficient that the performances brought the bars their customers. [86-87]

# Zipvit Ltd v HMRC, Case C-156/20

- Supplies of goods/services wrongly assumed to be exempt at the time of supply: were subject to S/R of VAT.
- Supplier did not account for VAT and did not issue VAT invoices to the recipient.
- Recipient was VAT-registered and made taxable supplies.
- Is the recipient in principle entitled to recover as an IT credit the VAT element of the consideration paid for the supplies?

# Zipvit Ltd v HMRC, Case C-156/20

- Decision of the Court of Appeal [2018] EWCA Civ 1515
- Right to deduct does not depend on showing that the input tax has been paid by the supplier as output tax. But that principle does not override the requirement for the person seeking to deduct VAT to produce a VAT invoice. [48-49]
- Issue 1: was VAT “due or paid” in respect of the supplies to the recipient (Zipvit)? VAT must have been paid by/due from Zipvit: the question is not whether the supplier paid/is liable to pay the output tax. [50-51]
- Turns on the contract: in the absence of a contractual right of the supplier to recover the VAT, the consideration paid is treated as VAT-inclusive. [82]

# Zipvit Ltd v HMRC, Case C-156/20

- So, the recipient would be treated as having “paid” the VAT. [87]
- However, Zipvit was obliged to pay any VAT due – this situation not addressed by CJEU and a reference would have been necessary if the resolution of the appeal depended on this issue. [83-4]
- Issue 2: is the absence of a VAT invoice showing that VAT was charged to the recipient by the supplier fatal to a claim by the recipient to recover input tax?
- Yes: VAT invoice enables tax authorities to “enable a check on whether the person issuing the invoice has paid the tax” (AG Kokott in Case C-516/14, *Barlis*). Zipvit’s invoices showed that no VAT was paid. [112] [116-117]

# Zipvit Ltd v HMRC, Case C-156/20

- Decision of the Supreme Court [2020] UKSC 15: reference to the CJEU.
- Opinion of Advocate General Kokott delivered on 8 July 2021:

The Commission: since Zipvit has paid no VAT, it is not entitled to input VAT.

A-G: that cannot be correct because the right of deduction does not presuppose that the taxable person has paid anything.

# Zipvit Ltd v HMRC, Case C-156/20

- Third question: Importance of an invoice for the right of deduction.
- Right of deduction depends upon possession of an invoice, stating the amount of VAT passed on. [48-49]
- Distinguish the right of deduction in principle (right of deduction can arise even prior to payment) and the right of deduction in a given amount. [49-53]
- The right to deduct requires the recipient to hold an invoice. Serves to implement the principle of neutrality: deduction only where recipient sustains a charge to VAT. [56-58]
- Invoice ensures that the passing on of the charge to VAT from the supplier to the recipient is verifiable and can be monitored by the tax authorities; lack of VAT invoice is fatal. [63] [68] [85]

# Zipvit Ltd v HMRC, Case C-156/20

- First and second questions: VAT 'due or paid'.
- Concerns VAT due from or paid by the supplier to the Member State and refers to VAT due in the abstract (i.e. irrespective of whether, for example, the tax authorities have waived a tax assessment) and in the correct amount, which is included in the price actually received: all the consideration actually received already includes the VAT provided for under EU law, whether or not the supplier has the possibility of subsequently recovering a supplement equal to the VAT from the purchaser. [99-100]  
[107-108]

# Newey v Revenue & Customs [2020] UKFTT 366

- VAT assessed on Mr Newey in respect of advertising services provided by a Jersey-based advertising company to a Jersey company (“Alabaster”).
- HMRC argued: (1) Mr Newey, not Alabaster, was the supplier of loan-broking services, with the consequence that the advertising services had to be treated as supplied to him (a reverse charge would arise on Mr Newey); (2) alternatively, if the supplies of advertising services were made to Alabaster, the scheme viewed as a whole constituted an abuse of law under EU law, which should be countered by treating Mr Newey as receiving supplies of advertising services.

# Newey v Revenue & Customs [2020] UKFTT 366

- Critical findings of fact : Alabaster took real decisions in Jersey, it was Alabaster, not Mr Newey, which made the loan-broking supplies and was the recipient of the supplies of advertising services.
- Accordingly, although the essential aim of the scheme had been to obtain a tax advantage, no abuse because functions or activities of Alabaster were not contrary to the purposes of the VAT legislation.
- Conflation of identification of the transaction with the abuse principle.

# Newey v Revenue & Customs [2020] UKFTT 366

- 42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs (Joined cases C-53/09 and C-55/09) [2010] STC 2651, [2010] ECR I-9187, paras 39 and 40 and the case law cited).
- 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of arts 2(1) and 6(1) of the Sixth Directive have to be identified.
- 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
- 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.
- 50. If that were the case, those contractual terms would have to be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice (see, to that effect, Halifax, para 98).

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