Grant Thornton

Tax

Indirect tax update: Financial services

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This financial services update will discuss two important VAT cases and also provide a high level summary of other indirect tax developments relevant to the financial services sector.

The first case considered is the judgement from the Court of Justice in the case of BlackRock Investment Management (UK) Ltd (BIM) which concerns the VAT liability of services provided by BlackRock Financial Management Inc (BFMI, a US Corporation).

BlackRock Investment Management (UK) Ltd ('BIM'), is a company incorporated in the UK and is a Member of the Blackrock VAT Group. BIM manages Special Investment Funds (SIFs) and other funds. However, SIFs do not represent, either by number or by value of the assets managed, the majority of the funds managed.

For the management of all of its funds, BIM receives supplies of services from BlackRock Financial Management Inc. ('BFMI'), a company incorporated in the United States. Those services are provided through a software platform named Aladdin and comprise a combination of hardware use, software and human resources. Aladdin provides portfolio managers with market analysis and monitoring to assist in the making of investment decisions; it monitors regulatory compliance and enables portfolio managers to implement trading decisions. Those services constitute a single supply, whichever funds are being managed. As BFMI is established outside the UK, BIM accounted for UK VAT under the reverse charge mechanism on the full value of that single supply. However, as it considered that the Aladdin services applicable to SIFs should have been exempt from VAT, for the period 2010 to 2013, it only accounted for VAT in relation to the proportion of the price paid that was attributable to the other non-SIF funds.

HMRC disagreed with that approach and raised assessments. BIM appealed to the First-tier Tax Tribunal which dismissed its appeal and so BIM appealed to the Upper Tribunal. The Upper Tribunal decided to refer the case to the Court of Justice as it relates to the interpretation of EU VAT law. In essence, the Upper Tribunal asks whether, in the circumstances, a single supply of management services, provided by a software platform belonging to a third-party supplier for the benefit of a fund management company, which manages both special investment funds and other funds, comes within the exemption from VAT laid down in the VAT Directive. In other words, should the service provided by BFMI be exempt from VAT and not subject to reverse charge.

The Advocate General issued a negative opinion back in March 2020 and the Court has now issued its judgment on 2 July 2020. The Court has agreed with the Advocate General.

On the basis that there is a single supply of management services provided by BFMI to BIM, the Court considers that a single rate should apply to the supply and that it is not permissible to apportion the single supply between an exempt element (here the supply of fund management services supplied to SIFs) and a taxable element (the supply of management services to non-SIFs). That would go against the grain of the Directive which stipulates that a single supply should attract a single rate. Accordingly, the Court has concluded that in circumstances such as those in this case, the tax treatment of the supply of services cannot be determined according to the nature of the majority of the funds managed by the company concerned (ie no apportionment based on value of funds managed).

Furthermore, in order to be classified as exempt transactions within the meaning of Article 135, the services provided by a third-party manager must, viewed broadly, form a distinct whole fulfilling in effect the specific, essential functions of the management of special investment funds. In this case, the parties were in agreement that the Aladdin service was designed for the purpose of managing investments of various kinds and that, in particular, it may be used in the same way for the management of SIFs as for the management of other funds. Therefore, that service cannot be regarded as specifically for the management of special investment funds and, as a result cannot therefore benefit from exemption from VAT.

In light of the above, the Court concludes that the answer to the question referred by the Upper Tribunal is that Article 135(1)(g) of Directive 2006/112 must be interpreted as meaning that a single supply of management services, provided by a software platform belonging to a third-party supplier for the benefit of a fund management company, which manages both SIFs and other non-SIF funds, does not fall within the exemption provided for in that provision.

One can understand the logic of BlackRock's case – had it bought in a separate supply of Aladdin services from BFMI specifically for the SIFs, it might have qualified as an exempt supply. However, as the Aladdin service is used to manage all types of funds it cannot apportion the consideration and ascribe a value to the SIF element based on the value of SIF funds under management. There is a single supply for a single consideration.

The second case concerns an Advocate General's opinion in the case of Wellcome Trust Ltd (WTL). Again, this case concerns the VAT position in relation to investment management services acquired from abroad.

In 1996, the Court of Justice confirmed in a judgment that WTL's activities (of buying and selling shares and other securities) was not a business activity. The Court concluded that the activities were more akin to those of a private investor rather than those of a trader.

Accordingly, since 1996 WTL's main investment management activity has been treated as outside the scope of VAT. However, WTL does have other business activities and is registered for VAT in relation to those activities.

To enable it to conduct its own (outside the scope of VAT) investment management services, WTL buys in investment management services from third party investment managers some of which are based outside the European Union. The question to resolve in this case was whether, when it procures those services, WTL acts as a taxable person.

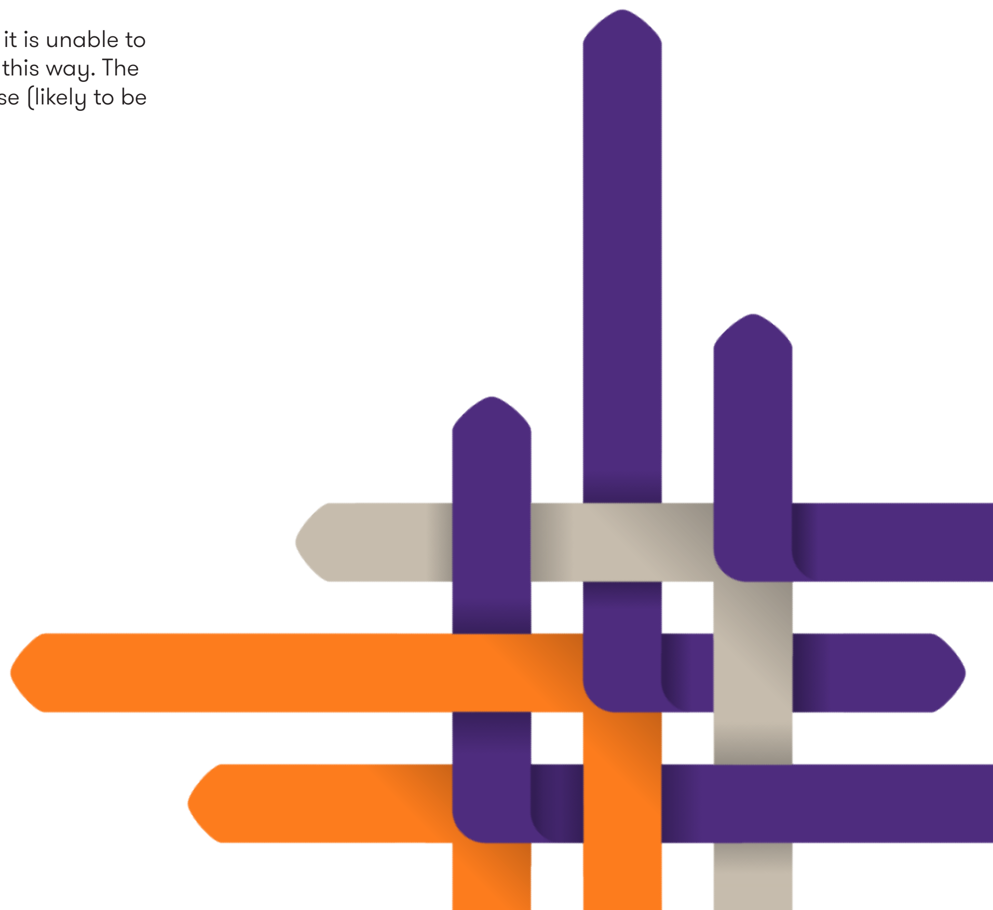
If it does, then the provisions of Article 44 of the VAT Directive – which determine the place of supply of the bought in services as being the place where WTL is established would apply and render the services liable to UK VAT. In essence, WTL argued that in line with the 1996 judgment, it did not act as a taxable person and that, accordingly, Article 44 did not apply to the services it bought in. Unfortunately, the Advocate General disagrees.

Whilst the Court has clearly ruled (in 1996) that WTL is not a taxable person in relation to its own activities, for the purposes of Article 44, it does act as a taxable person when it procures the third party services. As a consequence the services are deemed to take place in the UK and are liable to VAT which WTL must account for in the UK under the reverse charge mechanism.

As WTL's outputs are outside the scope of VAT, it is unable to reclaim the VAT it is required to account for in this way. The full Court will deliver its judgment in due course (likely to be September/October 2020).

The Advocate General considers that the 1996 ruling of the Court (that WTL is not a taxable person in relation to its own investment management activities) cannot be 'read across' to the place of supply rule contained in Article 44. It is necessary to consider the context and objectives pursued by the place of supply and it is necessary to also consider the wording of Article 43(2) of the Directive. Article 43(2) specifically states that non-taxable legal persons identified for VAT (which WTL is) are to be regarded as taxable persons.

The Advocate General, in effect, sees WTL as a 'final consumer' of the services and, as VAT is a tax on consumption, the place of supply is the place where WTL is established and 'consumes' the services it procures. This means that WTL is required to account for UK VAT on the supplies it receives but is unable to reclaim that VAT as input tax.



Further developments in Indirect Tax

Withdrawal of VAT exemption for management of Dutch CLO SPVs

Dutch CLO SPVs no longer qualify for the fund management VAT exemption and this revised position applies retrospectively from April 2019.

It is possible CLO issuers and/or investors will challenge both the retrospective nature of the Dutch Tax Authorities' decision and their revocation of the VAT exempt position.

It is likely investors will want CLOs to consider migrating to another jurisdiction where the exemption still applies, such as Ireland.

Reverse Skandia case referred to CJEU

In 2014 the CJEU held that services provided by a US company to its Swedish branch, which was a member of a Swedish VAT group, were liable to reverse charge VAT in Sweden on the basis the services should be regarded as being supplied to the VAT group rather than to the branch.

The so called "Reverse Skandia' principle has now been referred by the Swedish Supreme Administrative Court to the CJEU in the Danske Bank case.

The question referred to the CJEU seeks to clarify whether Danske Bank's head office and its Swedish branch are two separate taxable persons for VAT purposes due to the head office being a member of a Danish VAT group.

Cardpoint CJEU judgement: Assistance with the operation of ATMs is taxable

The CJEU recently released its decision in this German referral. The CJEU followed the AG's opinion holding that Cardpoint did not make VAT exempt supplies under Article 13B(d)3 of the Sixth VAT Directive.

Banks who have outsourced the operation of their ATMs should consider the implications of this judgment.

Acquiring goods from UK post-Brexit: Do you have an EORI registration?

Finance services businesses not involved in the movement of goods to or from the UK on a regular basis should be aware of the requirement to obtain an EORI (Economic Operators' Registration and Identification) number to facilitate any such movements once the Brexit transition period ends (currently due to end on 31 December 2020).

Having an EORI number is the minimum requirement for businesses to be able to move goods to, from or through the UK post-Brexit.

If a business does not have an EORI number, it will have a high risk of experiencing significant delays moving its goods to the UK from the EU and vice versa post-Brexit. Businesses should apply for an EORI number via the Revenue's Online System as soon as possible to mitigate such risk.

Contact

Should you have any queries in relation to the contents of this article or would like to discuss any indirect tax issue, please feel free to contact us.

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