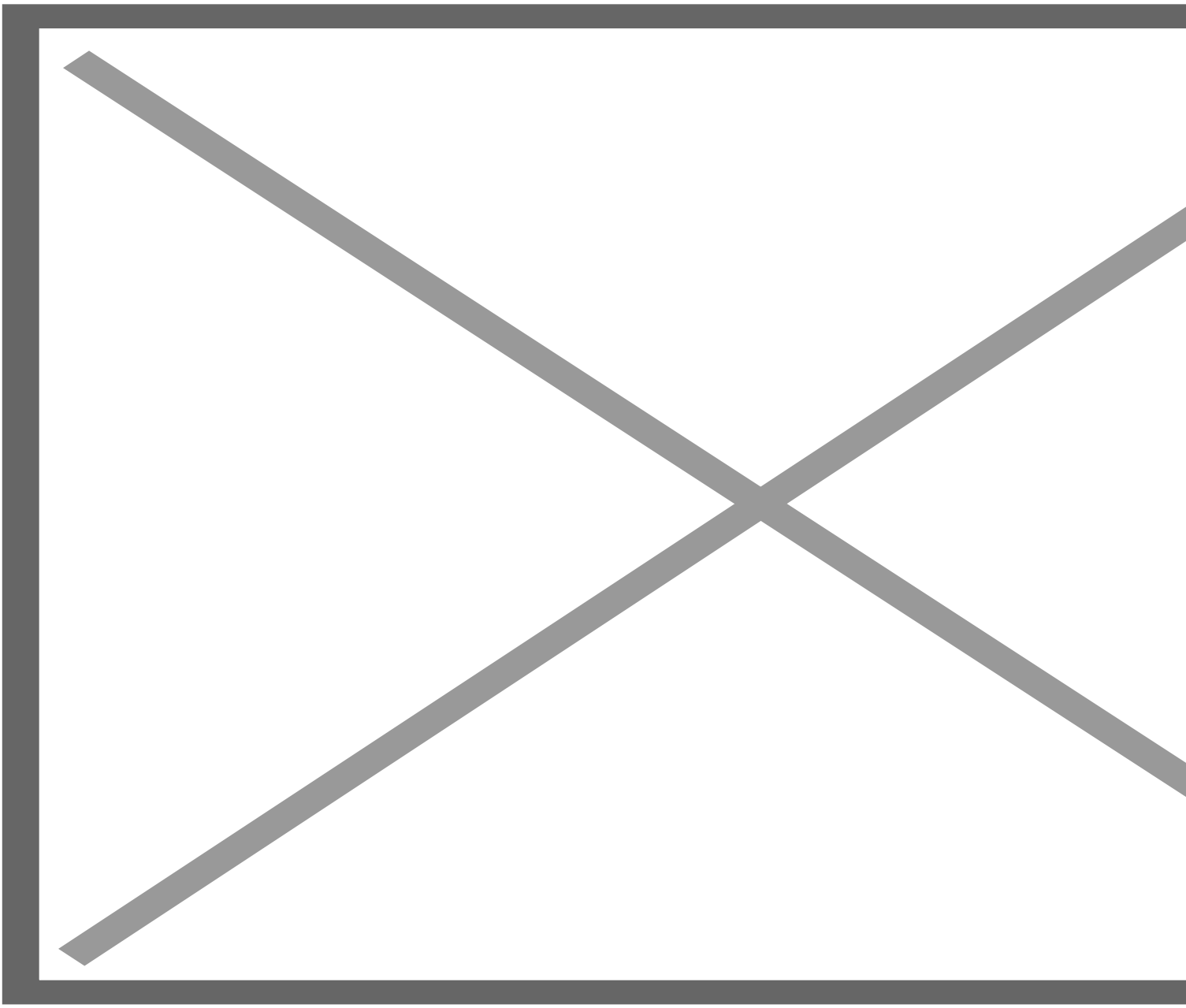
Distortion of competition – is Judicial review an effective remedy?

Indirect Tax Tax voice



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Following on from his critical analysis of the Judgment in *National Roads Authority v Revenue Commissioners* [*C?344/15*] and noting that ‘a key point arising therefrom is that if there is no presumption of a significant distortion of competition where a public body undertakes activities that are also undertaken by the private sector’, Ian Harris deals with the question as to what effective remedy does an aggrieved private provider have?

Presumptions of distortion of competition following '*NRA*'

Notwithstanding the *NRA* Judgment, HMRC have twice recently – unsuccessfully – cited a presumption of distortion of competition in seeking to defend the UK's restrictions in applying exemption from VAT to non-profit making bodies' provision of sporting services under Group 10 of Schedule 9 to the VAT Act 1994, which purports to implement Article 132(1)(m) of the EC Principal VAT Directive.

Bridport and West Dorset Golf Club Ltd [*C-495/12*] concerned non-members 'green fees', which HMRC regarded as VATable by dint of the exclusion from exemption then provided for in Item 3 of Group 10, which, at the time, explicitly excluded sports services supplied by a members club to non-members.

HMRC justified this exclusion by the need to prevent distortion of competition, as permitted under either Article 133(d) or Article 134(b).

However, holding against HMRC, the Court held that the UK cannot apply a blanket exclusion from the exemption to a whole category of supplies that would otherwise meet the criteria to be exempt on the basis of an unproven presumption that exemption would cause a distortion of competition.

Emboldened by this decision, the *London Borough of Ealing* [C-633/15] challenged the exclusion of local authorities from the exemption by dint of Note (3) to Group 10.

Again HMRC sought to defend the exclusion from exemption as preventing a presumed distortion of competition that would otherwise arise. In fact all parties agreed that Note (3) is based on the distortion of competition caveat provided for in what is now Article 133(d), local authorities having lobbied for exclusion from the exemption when belatedly implemented by the UK in 1995 due to the impact otherwise on their partial exemption position (the so-called 5% de-minimis under Section 33(2) of the VAT Act 1994).

Although quite a complex case concerning the precise meaning of Article 133, the CJEU, following the Opinion of Advocate-General Wathelet, has again taken the view that it is not permissible to exclude an entire category of non-profit making bodies from the exemption provided for by Article 132(1)(m) (albeit the key part of the judgment is that the UK cannot apply any such distortion of competition condition to public bodies if it does not apply a similar condition to other non-profit making bodies, which UK law does not).

Judicial Review as an effective remedy

A key question the *NRA* Judgment has left largely unresolved – in the UK at least – is how an aggrieved private sector trader may cite a breach of the tests laid down in Article 13(1), particularly the significant distortion of competition test if it believes its activities to be in competition with the public sector.

The ECJ held in *Finanzamt Eisleben v Feuerbestattungsverein Halle eV* [*C?430/04*] that an aggrieved private sector trader may cite the second sub-paragraph of Article 13(1), and the creation of a significant distortion of competition, to deny a public body treatment as a non-taxable person in respect of competing activities.

What the ECJ did not say is how the private sector trader must be empowered to instigate such a challenge; in the UK that would appear to be by way of Judicial Review of HMRC's acceptance that activities undertaken by a public body, such as a local authority, can be treated as falling outside the scope of VAT under Article 13(1).

Judicial Review though is a bureaucratic, expensive and legally complex remedy and requires (usually) that the applicant proves the decision taken by HMRC was unreasonable based on the evidence before them.

An aggrieved private sector trader would thus have to identify the decision taken by HMRC and then demonstrate why, based on the evidence to hand, no reasonable person could have concluded that the tests laid down in Article 13(1) are met, in particular that the activity when undertaken by a local authority, for example, is subject to a special legal regime and non-VATable treatment therefore would not cause a significant distortion of competition.

'Max Recycle'

How difficult this is was recently demonstrated in *R oao The Durham Company Ltd* (*t/a 'Max Recycle'*) [*(2016) UKUT417(TCC)*].

Max Recycle, with the support of the Environmental Services Association, sought to challenge HMRC's treatment of local authority trade waste collection services as non-VATable.

In 2011, following lobbying by local authorities and having considered economic evidence provided by DEFRA, that suggested the market share of local authorities is not such as to cause a significant distortion of competition, HMRC concluded that local authority trade waste collection falls outside the scope of VAT under Article 13(1).

'Max Recycle', a commercial trade waste collection provider, sought to challenge this, necessitating a Judicial Review application as to the veracity of HMRC's decision.

An application for Judicial Review must be made to the High Court but, as with many tax-related applications, some complex lego-technical arguments were raised and so the High Court transferred the application to the Upper Tribunal (Tax and Chancery Chamber) to consider these questions as a preliminary matter, so further increasing the complexity and cost of the challenge.

The Upper Tribunal, in this case, was content that local authority trade waste collection is subject to a special legal regime – Section 45 of the Environmental Protection Act 1990 – such that any authority acting thereunder does so other than as a taxable person, providing that would not cause a significant distortion of competition, which, the Upper Tribunal held, must be determined on its merits.

'Max Recycle' is, therefore, now left to pursue the 'traditional' Judicial Review question of public law and whether, based on the Upper Tribunal's analysis, HMRC arrived at a reasonable decision. Given that HMRC took account of economic evidence produced by DEFRA in arriving at the decision, it is difficult to see how accepting local authority trade waste collection as non-VATable under Article 13(1) was not reasonable.

'Max Recycle's' experience, therefore, throws into question whether Judicial Review really is an effective remedy to challenge treatment of a public body's activities as falling under Article 13(1).

And it is not just Article 13(1) that raises this spectre; as at the heart of the *Bridport and West Dorset Golf Club* and *London Borough of Ealing* cases, there are a number of 'exemptions in the public interest' in Article 132(1) that are also subject to a distortion of competition caveat when undertaken by 'eligible bodies'.