VAT medical exemption legislation needs change

Indirect Tax

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CIOT and LITRG continue to raise concerns with HMRC

Tax Adviser readers will be familiar with the CIOT's concerns arising from the Rapid Sequence case (see Richard Wild's article, 'When is the law not the tax', Tax Adviser, p36, January 2014, as well as follow-up reports in February 2015 and also in 'Indirect Tax Voice').

There has been further relevant case law so the CIOT has again written to HMRC about both a conforming approach to EU legislation and the medical exemption itself.

A conforming approach

Much of HMRC's view is based on decisions of the UK courts that have typically taken what has been referred to as a 'muscular' approach to a conforming interpretation of EU law. In our original submission, we distinguished between interpreting law in conformity with EU law. This was to ensure that a taxpayer could enforce their rights whether or not they are implemented in national law (the principle of direct effect) and interpreting national legislation in accordance with its purpose and wording to give effect to what was required by the particular directive. We noted that the Court of Justice had consistently pointed out that the principle of direct effect was a remedy in favour of the person, not the state.

In our later submission we drew attention to another EU case, Pupino, which elaborated on the principle. It concerned criminal charges brought against a teacher, Maria Pupino. The case was interesting in that it did not concern the rights of the state as such but a conflict between the rights of the alleged wrongdoer and those of

her victims. In referring to the Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA, the court concluded:

> ‘The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the framework decision.’

But in reaching that decision, the court commented:

> ‘…the principle of interpretation in conformity with Community law cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.’

We remain therefore of the view that a conforming approach to EU law cannot be read as authorising the interpretation of national law in a manner that conflicts with the clear wording of the law.

Exemption for medical services

In our original submission, we pointed out that, since the services of Rapid Sequence comprised the supply of anaesthetists to hospitals, the relevant EU legislation was not article 132(1)(c) of the Principal VAT Directive but article 132(1)(b).

We subsequently pointed out that the First-tier Tribunal in the later case of GSTS Pathology Services LLP also commented on the distinction between the two EU provisions. That difference is that article 132(1)(b) covers not only the hospital’s medical services but also closely related activities; whereas article 132(1)(c) does not cover closely related activities.

Article 132(1)(b) of the PVD refers to services undertaken in ‘hospitals, centres for medical treatment or diagnosis and other duly recognised establishments’.

Thus the scope of article 132(1)(b) is rather wider than 132(1)(c) because of the inclusion of the term closely related activities. We pointed out that:

- In GSTS, the tribunal commented that the purpose of the exemption was to ensure that benefits flowing from medical care were not hindered by the increased costs that would follow if it, or closely related activities, were subject to VAT.
- It was difficult to conceive of many services that could be more closely related to a medical service than the employment of anaesthetists necessary to conduct an operation.
- The exemption does not depend on who supplies the services – they can be supplied by someone other than the hospital performing the main services.

Other recent case law, such as ‘go Fair’, similarly suggests that a supply of staff can be a closely related service.

The way forward

We have suggested that the solution does not lie in writing guidance on how to interpret UK law to comply with EU law, but to move rapidly to amend the legislation so that it complies with EU legislation. In particular, the legislation should distinguish between services provided in hospitals and other services.

In the meantime, we remain of the view that the decision in Rapid Sequence should not be applied.