Par for the course

Indirect Tax

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Adrian Houstoun reviews the *Bridport & West Dorset Golf Club* case and the concept of ‘unjust enrichment’

Key Points

What is the issue?

Even when it is agreed that you are due a VAT refund, you are not necessarily going to receive it.

What does it mean to me?

If you have overpaid VAT on sales, you must first consider whether HMRC might argue that you will be unjustly enriched if it makes the refund.

What can I take away?

VAT registered businesses should ensure that they only pay the correct amount of VAT. If they have overpaid VAT on sales that should not have involved a VAT charge, they should consider carefully how to put the matter right.

Bridport and West Dorset Golf Club's litigation was in respect of VAT on green fees, a point that was successfully concluded in the Court of Justice of the European Union (CJEU). Before Bridport received payment from HMRC, the concept of 'unjust enrichment' was rigorously tested in a related First Tier Tribunal case. That case involved three representative golf clubs, which I shall call 'Berkshire', after the first named club in the litigation. So, what is unjust enrichment?

Unjust enrichment

Occasionally, businesses will incorrectly account for VAT on their supplies. This may occur as a result, inter alia, of mistakenly applying the incorrect rate of VAT; for example, standard-rated instead of exempt. Alternatively, it may be due to a change in HMRC's policy, which is applied retrospectively. This may be due to a court ruling, as has recently been the case for certain pension scheme management services. Businesses can reclaim such overpaid VAT from HMRC, usually by way of a VATA 1994 s 80 claim. However, such claims, even after quantum and principle have been agreed, can be subject to further resistance by HMRC prior to a refund being repaid. This is where unjust enrichment comes into force.

The unjust enrichment provisions are designed to prevent businesses from being enriched at the expense of others who, for all practical purposes, bore the burden of the wrongly charged VAT. It is not a question of whether the enrichment was, in moral terms, unjust – but rather, whether the business would benefit financially at the expense of the customer who paid the improper VAT charge. In theory, HMRC ought to consider whether it is appropriate to invoke the unjust enrichment defence in every case where a VAT refund is claimed under s 80. Unlike much of the VAT

legislation, and as stated in the judgment in Berkshire, the burden of proof lies with HMRC and it is up to HMRC to prove that the claimant will be unjustly enriched. In order to do this, HMRC will need to make appropriate enquiries. It will need to obtain information and documentation from the business on its pricing structure and policy in relation to the goods or services that are the subject of the claim. The first, and probably the most important piece of information, is whether or not the business is claiming an amount that it has passed on to their customers; in other words, who bore the economic burden of the VAT cost. HMRC does not accept that a refund is due if the economic burden has been passed on to the customer, as it regards that as the claimant receiving the VAT twice. See the ***example***.

Image

EXAMPLE

To illustrate this, suppose a retailer sells a taxable item for £120. If the retailer charges the customer £120 for the item and pays £20 to HMRC, it bears the whole of the VAT as it will only receive the remaining £100. In this case, the retailer could reclaim the £20 if it turned out that VAT was not due on that supply. If, on the other hand, the retailer had increased the price to £144, the customer would have borne the VAT. HMRC would then claim unjust enrichment and not pay the VAT back.

Returning to the case, as previously mentioned, Berkshire arose as a result of an earlier CJEU case involving Bridport and West Dorset Golf Club (Case C-495/12). In that case, the Courts determined that green fees paid by visitors to non-profit making golf clubs should also be exempt, whereas HMRC had argued that they were taxable and that only fees paid by members were exempt. In 2009, Bridport, a non-profit making privately owned golf club, made a voluntary disclosure to HMRC for £140,358 VAT in respect of VAT previously declared as output tax for visitors' green fees. HMRC rejected the claim on the basis that visitors' green fees were, in its view, standard-rated. In its view, the supplies did not meet the UK exemption criteria for sport pursuant to VATA 1994 Sch 9 Group 10 Item 3, which is quite explicit on the matter.

Item 3 exempts the supply of services closely linked with and essential to sport or physical education in which the individual is taking part. At the time, Group 10 Item 3 Note 2 provides that: 'An individual shall only be considered to be a member of an eligible body for the purpose of item 3 where he is granted membership for a period of three months or more', but as a result of the case this has been removed from the

legislation.

HMRC accepted that Bridport was an ‘eligible body’ for the purposes of the exemption. Bridport initially appealed to the First Tier Tribunal, arguing that UK legislation on the matter was inconsistent with European Community law, as it discriminated between supplies to members and non-members. HMRC maintained that the distinction drawn between members and non-members was required by the terms of Article 134(b) of the 2006 VAT directive. It said the basic purpose of charging green fees was to obtain additional income for the organisation by carrying out transactions that directly compete with those of commercial enterprises liable for VAT, thereby breaching the principal of fiscal neutrality. Interestingly, both HMRC and Bridport cited the CJEU case of *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (Case C-174/00) as part of their respective arguments, a case with a similar fact-pattern. Bridport referred to the Court’s observation that the purpose of certain exemptions, including the sporting exemption, was to put non-commercial organisations (such as Bridport) in a more favourable VAT position. Meanwhile, HMRC submitted that the Court’s comments made it apparent that non-members’ green fees were not covered by the exemption. Despite the decision in *Kennemer* going in HMRC’s favour, as the Court judged that the purpose of the non-members’ green fees was to obtain ‘additional’ income which fell outside of the exemption, the First-tier Tribunal sided with Bridport and allowed its appeal.

The First-tier Tribunal considered that the UK legislation on the matter was not compatible with the EU Directive because the exemption extended to all relevant supplies to ‘persons taking part in sport’. The Tribunal also held that the appellant’s green fee income could not properly be described as ‘additional’ because it was: derived from an activity included in the principal objects of the Memorandum of Association; received year after year; and applied in the same way as subscription income in defraying the appellant’s ordinary expenses of maintaining the golf course and clubhouse.

HMRC then appealed to the Upper Tier Tribunal, seeking permission for the matter to be heard by the CJEU, as it believed that the First-tier Tribunal had erred in law. The Upper Tier Tribunal agreed and the matter was referred to the CJEU. The CJEU agreed with Bridport on all matters and ruled that the sporting exemption, as provided for under Article 132(1)(m) of the VAT Directive, which stands above and is precedent over UK VAT legislation, should not be restricted to income received from members, but that it should apply to income received from non-members as well.

The decision came as a surprise to many commentators, particularly in respect of the principal of fiscal neutrality. In simple terms, the concept of fiscal neutrality, in the context of VAT, is that the tax should have the same impact on persons carrying on the same type of activity. The result in this case is that non-profit making golf clubs are not required to charge VAT on their green fees from non-members, whereas profit making golf clubs must continue to do so. This clearly puts the latter at a disadvantage. This decision, as well as some other recent CJEU cases, suggests that the Courts see the concept of fiscal neutrality as less persuasive than the terms of the EU VAT Directive.

The Berkshire case

Not only did the CJEU ruling lead to HMRC repaying Bridport's claim, but it also led to a slew of similar claims that had been standing behind the Bridport case. Subsequent to the *Bridport* case, HMRC, having lost on the point of fiscal neutrality, argued that to make repayments to golf clubs would unjustly enrich them – and issued a business brief to that effect (Business Brief 25/14). Consequently, four golf clubs thought to be representative of golf clubs generally across the country were the appellants; although the judgment was in the name of three of them: *The Berkshire Golf Club*, *The Wilmslow Golf Club* and *The Glen Golf Club*.

Included in the evidence was the expert opinion of two eminent economists. The economist instructed by HMRC was asked, prior to HMRC pleading unjust enrichment, to address the following:

1. How competitive is the market for non-member golf at the Club?
2. What is the price elasticity of demand for non-member golf in the relevant market?
3. What is the price elasticity of supply for non-member golf in the relevant market?
4. What direct evidence exists from Club records or other sources on how changes in VAT rates affected prices charged to non-members?

The economist appointed by HMRC considered that the clubs were operating in what approximates to a perfectly competitive market. The clubs, meanwhile, contended that they had significant local competition and that the marginal costs were substantially lower than the green fees charged. They argued that the clubs had

suffered a significant economic loss by the incorrect imposition of VAT. The Tribunal stated that the common ground between Professor Szymanski, HMRC's expert, and Mr Trussler, the Appellants' expert, was that the clubs suffered an economic loss through the incorrect imposition by HMRC of VAT on green fees. The economic loss comprises the VAT absorbed by the clubs, which could not be, or was not, passed on to the green fee visitors. It also includes the net profit on rounds of green fee golf that would have been played had some potential visitors not been deterred by the increased price due to the imposition of the VAT. However, the experts disagreed on the extent of that loss and how it should be calculated. The clubs accepted that there was some unjust enrichment but submitted that, for the four clubs, between 82% and 94% was the real loss. HMRC did not make such an estimate and the Tribunal therefore decided that, although full repayment would constitute unjust enrichment, a figure of 90% would be reasonable, based on the clubs' estimate of 82% to 94% of the potential repayment. The remaining 10%, in its view, represented unjust enrichment.

Corporate days and missed activities

The Tribunal also determined that the supply of corporate days and supplies through the Tour Operators Margin Scheme should be taxable at the standard rate. Finally, it also decided that if the course is used for both exempt and taxable activities (e.g. sponsorship and equipment hire) then the relevant VAT on those costs can be recovered in accordance with its partial exemption method.

Conclusion

It is understood that HMRC accepts the decision and has not made an appeal to the Upper Tribunal. Indeed, as a result of this case, HMRC issued a new business brief (Revenue and Customs Brief 10 (2016), replacing the business brief issued as a result of the Bridport case, covering unjust enrichment for non-profit making sporting clubs. Most clubs have made a claim but, if not, they should do so without delay as claims are subject to a four-year cap.

With Brexit now firmly on the agenda, it will be interesting to see if the *Bridport* ruling that income from both members and visitors of non-profit making sports clubs are eligible for exemption, is retained after separation from the EU. HMRC put up a determined battle to restrict the exemption, showing their firmly held view; but

would it seek to renew the battle knowing that the CJEU had found it to be wrong? Only time will tell.