Constable VAT Consultancy

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Recent CJEU Cases

The CJEU has issued its judgement case of *Wheels Common Investment Fund Trustees Ltd (*Wheels). The question asked of the Court was whether the occupational pension scheme operated by Wheels should be regarded for VAT purposes as, or similar to, a 'special investment fund' such that fund management services provided could be exempt from VAT.

In its judgement, the CJEU has confirmed that occupational schemes are not 'special investment funds'. The judgement draws a clear distinction between collective investment funds (such as Unit Trusts etc) and pension schemes like the one operated by Wheels, the principal differences being that:

- an occupational pension scheme is an employment-related benefit which employers grant only to their employees and is not open to the public;
- unlike private investors with assets in a collective investment undertaking, members of an occupational pension scheme do not bear the risk arising from the management of the investment fund in which the scheme's assets are pooled. The pension that may be received by an employee, who is a member of an occupational scheme, is defined in advance on the basis of length of service with the employer and of the amount of the salary, whereas the return that can be hoped for by persons who purchase units in a collective investment undertaking depends on the performance of the investments made by the fund's managers over the period for which those persons hold the units.

Since the two types of fund are not identical and are not similar to funds that constitute 'special investment funds', the principle of fiscal neutrality is not offended by treating the two types of fund differently for VAT purposes.

The Advocate General has issued his opinion in the case of *Credit Lyonnais*. The opinion is not available in English at this time but roughly translated the French opinion indicates that income derived from overseas branches should not be included in a partial exemption method calculation whether or not the branch is situated in the European Union.

Memorial – Supply of land.

Sandwell Metropolitan Borough Council (the council) runs a crematorium. They offered a plaque on a wall of remembrance or the storage of ashes in an urn within a vault. Agreements ran for 10 years but could be extended. The council believed this was a VAT exempt supply of a right over land; however, HMRC argued that it was a taxable supply of a "commemorative focal point". The Tribunal agreed with the council accepting that, whilst "commemorative focal point" may be an apt description, that did not mean it could not be a supply of immoveable property. The Tribunal's approach in this case was to analyse the issues "without overzealous dissection" and view the nature of the supply from the typical customer's perspective. This is useful in assessing how to approach HMRC when wishing to get a decision.

Time Limits – no repayment due.

A farmer, ED Hitchen, failed to submit two VAT returns and received large central assessments for each. These were paid but the actual returns were not submitted until several years later. These showed that the farmer had overpaid VAT by £55,000. HMRC said repayment was not due as the time limits in place at the time (3 years) had been exceeded. The appellant argued that the current 4 year limit applied. The Tribunal agreed with HMRC. If you have central assessments in excess of the actual VAT due in the period, then the VAT returns should be submitted as soon as possible.

Failure by HMRC to consider exercising discretion = invalid assessment.

A scrap metal dealer, G B Housley Ltd, issued self-billed invoices to suppliers. There were no agreements in place for the self-billing (a requirement at the time). HMRC said the appellant's case was untenable due to the lack of self-billing agreements and assessed for the input tax recovered by the appellant on the self-billing invoices he issued. The Tribunal failed "to see how an invoice, which is otherwise compliant, cannot be considered an invoice". In addition, HMRC had visited the taxpayer a number of times and knew that he was operating self-billing without agreements but had not previously commented. The Tribunal found that in failing to consider any discretion in the matter, HMRC had acted unreasonably and the assessment (for £337,000) was invalid.

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