membership resources

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ECJ – VAT Exemption on Leisure

In July 2017, the European Court of Justice determined that the UK requirement for local authorities to charge VAT on leisure activities was unlawful. This ruling has ramification for all those authorities who currently run leisure services in-house and have previously been charging VAT on leisure activities including Gym memberships. This briefing provides the background to the ruling

Key issues

- Local authorities have the option to cease charging VAT on Leisure services
- In-house leisure services should be in an identical VAT position to Trusts and 'not for profit' companies
- There may be opportunities to reclaim significant historical VAT overpayments

Overview

UK legislation currently regards local authorities who charge members of the public for the use of sporting or recreational facilities as not acting in their capacity as a public authority. The activity is regarded as a business and the authority is required to charge VAT.

However a recent ruling by the European Court of Justice has raised the possibility of leisure services avoiding the need to charge VAT on some activities for which they currently charge the standard 20%.

Whilst Leisure Trusts and other 'Not for Profit' Organisations are exempt from charging VAT on some leisure services including Gym memberships, the same exemption has not applied to in-house council leisure services potentially making them more expensive to the public and at a competitive disadvantage. The ruling allows Local authorities to rely on European Law to avoid charging VAT and may reclaim up to 4 years VAT where overcharged

Councils can reclaim or retain VAT in most circumstances so the calculation is likely to be quite involved, but often VAT is reclaimed centrally and not returned to the leisure service directly. The test case was brought by PWC, who are also acting for several councils in reclaiming overpaid VAT

The case outline

The London Borough of Ealing is a local authority which operates a number of sports facilities, such as gymnasia and swimming pools. In the period between 1 June 2009 and

31 August 2012 it accounted for VAT levied on the amounts charged for admission to those facilities.

In 2013 the London Borough of Ealing made an application to the tax authority for repayment of that VAT, claiming that those charges ought to have been exempt from VAT under Article 132(1)(m) of Directive 2006/112. That application was rejected on the ground that the national legislation excludes the exemption for the provision of sporting services covered by that provision, where those services are supplied by bodies governed by public law, such as a local authority, pursuant to the conditions laid down in point (d) of the first paragraph and the second paragraph of Article 133 of that directive.

The Borough brought an action against that decision before the First-tier Tribunal (Tax Chamber). Before that court, it maintained that the United Kingdom could not rely on the second paragraph of Article 133 of Directive 2006/112, on the ground that that Member State had not applied VAT, on 1 January 1989, to all supplies of sporting services, in that, in particular, rights to participate in a sporting competition were exempted from VAT. Further, according to the Borough, the second paragraph of Article 133, with respect to supplies of services closely linked to sport or physical education, does not permit non-profit making organisations governed by public law to be excluded from the benefit of the VAT exemption, unless non-profit making organisations other than those governed by public law are also excluded from that benefit.

Last, the second paragraph of Article 133 of that directive does not permit Member States to deprive, across the aboard, all local authorities of the benefit of that exemption, since it is necessary to determine 'in each individual case' whether that exemption is likely to cause distortions of competition. The tax authority did not accept those arguments.

According to the information provided in the order for reference, the London Borough of Ealing has to be considered to be a non-profit making organisation, whose supplies are closely linked to sport or physical education and are made to persons taking part in sport or physical education, within the meaning of Article 132(1)(m) of Directive 2006/112.

In those circumstances, the First-Tier Tribunal (Tax Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

The Court as asked to decide on the following:

1. Is the United Kingdom entitled, pursuant to the final paragraph of Article 133 of [Directive 2006/112], to impose the condition contained in point (d) of [the first paragraph of] that article on bodies governed by public law, (i) in circumstances where the relevant transactions were treated by the United Kingdom as taxable on 1 January 1989, but other sporting services were subject to exemption on that date and (ii) in circumstances where the relevant transactions had not first been granted exemption under national law before the United Kingdom sought to impose the condition contained in [point (d) of the first paragraph of] Article 133 [of that directive]?

2. If the answer to [Question] (1) above is in the affirmative, is the United Kingdom entitled to impose the condition contained in [point] (d) of [the first paragraph of] Article 133 [of Directive 2006/112] on non-profit making bodies governed by public law without also applying that condition to non-profit making bodies which are not governed by public law?

3. If the answer to [Question] (2) above is in the affirmative, is the United Kingdom permitted to exclude all public non-profit making bodies from the benefit of the exemption contained in Article 132(1)(m) [of Directive 2006/112] without having considered in each individual case whether the granting of exemption would be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT?'

The judgement

1. The second paragraph of Article 133 of Council Directive 2006/112 of 28 November 2006 on the common system of value added tax must be interpreted as not precluding the legislation of a Member State from providing that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to bodies governed by public law that supply services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, even though, on the one hand, on 1January 1989 that Member State did not apply VAT to all those supplies of services and, on the other, the supplies of services at issue were not exempted from VAT before the requirement of compliance with that condition was imposed.

2. The second paragraph of Article 133 of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, where that legislation provides that compliance with the condition laid down in point (d) of the first paragraph of Article 133 of that directive is a prerequisite for the grant of a VAT exemption to non-profit making organisations governed by public law making supplies of services closely linked to sport or physical education, within the meaning of Article 132(1)(m) of that directive, but fails also to apply that condition to non-profit making organisations other than those governed by public law that make such supplies of services.

APSE Comment

In-house leisure facilities run by Local Authorities should be at no disadvantage to those run as trusts or via not for profit company mechanisms. This ECJ ruling opens the potential to raise prices for swimming and Gym memberships by 20% to that charged currently or to reduce the charges to the public by a similar amount. This ruling potentially provides local authority leisure providers with a competitive advantage to their current position; one that can only enhance their viability in austere times.

The treatment of VAT by local authorities is not a simple calculation. VAT is likely to be reclaimed centrally against other council expenses so the use of the ruling may benefit leisure services whilst reducing revenue elsewhere within the Authority.

APSE provides this briefing for information only. Professional Tax advice should be sought for those wishing to rely on the ECJ ruling

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