VAT focus

The VAT review for November

Speed read

This month's VAT review covers a second CJEU VAT decision involving Boehringer, which confirms that the VAT principles applicable to a reduction in consideration extend to monies paid to a third party under a voluntary arrangement. HMRC has also released guidance on the recent *Balhousie* decision, applying a narrow approach and limiting the application to its particular facts. The Autumn Budget contained little of immediate interest in relation to VAT, but there is the promise of interesting times ahead with consultations in relation to the VAT treatment of investment management and a possible online sales tax. Finally, HMRC has confirmed that full customs declarations and controls will be introduced as planned on 1 January 2022.

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VAT and price reductions

In *Boehringer Ingelheim RCV GmbH* (Case C-717/19), the CJEU has stressed that it is a fundamental principle of the VAT Directives that VAT is levied only on the consideration actually received by the taxable person. As such, it was contrary to EU law for payments, made by the taxpayer to the Hungarian health authority (NEAK) based on its sales of medicines for distribution to patients, not to be deducted from the consideration on which it accounted for VAT.

Boehringer marketed and distributed medicines in Hungary. Under the Hungarian health system, these medicines were sold via wholesalers to pharmacies which then provided them on to patients. The amount paid for medicines by patients was subsidised by NEAK, so that the amounts received by pharmacies came partly from patients and partly from the Health authority.

Under an agreement between Boehringer and NEAK, Boehringer agreed to make payments to NEAK based on its turnover resulting from the sale of medicines which were subsidised by NEAK. The amount of the payments was calculated as a percentage of the amount of the subsidy provided by NEAK.

Boehringer sought to reclaim VAT it had accounted for on its sales of medicines to wholesalers and pharmacies in Hungary. It argued that the amounts it paid to NEAK fell within article 90 of the VAT Directive as a price reduction after the sale had taken place. The Hungarian tax authorities rejected that claim and this position was upheld on appeal. In particular, the payments did not meet the conditions for a reduction in the consideration under local Hungarian law. Boehringer appealed and the case was referred to the CJEU.

The CJEU noted that this case was very similar to an earlier case involving Boehringer (*Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG* (Case C-462/16)). In that case, Boehringer was required to grant a discount, under German law, to a private health insurance company on sales of prescription medicines to pharmacies/wholesalers where those private health insurance companies later reimbursed patient costs. The court held that Germany was required to allow for that discount as a reduction of the taxable consideration received by Boehringer for the purposes of article 90. This was despite the fact that the private health insurer was not a direct part of the supply chain from seller (Boehringer) to patient. However, the earlier case involved a statutory requirement to provide the discount, whereas in this case the agreement between Boehringer and NEAK was voluntary.

The CJEU has again emphasised the fundamental nature of the principle enshrined in Article 90 that the taxable person should only be required to account for VAT on the amounts actually received for its supplies, taking into account any discounts or reimbursements. Hungary argued that there was no 'direct link' between the consideration received for supplies by Boehringer and the payments made to NEAK and as such they were not a 'price reduction'. That argument was, however, rejected on the basis that the fundamental question is whether the taxable person has not received all or part of the consideration for the products. In this case, Boehringer only had at its disposal part of the amount of the consideration for its sales (due to the sums paid to NEAK).

Furthermore, the court went on to say that simply because Boehringer did not have an invoice in respect of those payments made to NEAK should not prevent it obtaining the reduction in the taxable amount provided that there was sufficient alternative evidence of those payments. Whilst it was possible for member states to put in place measures to ensure the efficient administration of VAT, including the obtaining of reductions under article 90, these must not have the effect of making it impossible or excessively difficult for a taxable person to obtain the reduction. Although in this case Boehringer held no invoices from NEAK, the principle of neutrality and proportionality required Hungary to allow Boehringer to establish by other means that the payments had been made. That was all the more so where the transaction is actually carried out with the state in question.

Why it matters

The decision, which is not yet available in English, is suggestive of the argument that 'price reductions' should be given a wide interpretation going beyond, perhaps, the natural meaning of the term and covering a range of situations where the taxpayer does not have the full amount of consideration at its disposal, even where that situation arises from agreements with a third party.

However, the nature of the agreement between Boehringer and NEAK is not entirely clear from the judgment, which appears to suggest that these agreements guaranteed that Boehringer's products would be subsidised by NEAK and allowed access to the market for new products.

If that is the case, it is not clear why these payments were not simply consideration for a service from NEAK to

Boehringer, rather than a price reduction given that a supply of services is defined as 'any transaction which does not constitute a supply of goods'. As a result, the decision appears to blur the lines between the concept of a price reduction and what amounts to a payment for a separate supply of services.

This may have additional UK interest as HMRC updated its guidance on business promotions (*VAT Notice 700/7*) in December 2020 to remove the examples previously listed in section 5.4 which it accepted did not constitute non-monetary consideration.

Meaning of 'entire interest'

HMRC has published *Revenue & Customs Brief 13/2021* confirming its approach to the self-supply charge in VATA 1994 Sch 10 para 36. HMRC accepts that a person entering into a sale and leaseback will not have disposed of their 'entire interest' in the relevant property but it will continue to consider the sale and leaseback as two separate transactions.

HMRC lost before the Supreme Court earlier this year in *Balhousie Holdings Ltd v HMRC* [2021] UKSC 11. The case concerned the application of anti-avoidance legislation in VATA 1994 Sch 10 pursuant to which, when a property to be used for a relevant residential or relevant charitable purpose has been purchased or constructed at the zero-rate of VAT, that property may be subject to a self-supply charge if there is a change in use or the 'entire interest' is disposed of within a ten-year period.

The Supreme Court held that the sale and leaseback in *Balhousie* did not amount to the disposal of the Balhousie's 'entire interest' in the property because the simultaneous sale and leaseback meant that Balhousie always had an interest in the property either as owner or lessee without interruption. This meant there was no break in the operation of the property as a care home throughout the transfer from the sale to the lease agreement.

As a result, *Brief 13/2021* confirms that there will not be a disposal of an entire interest in a property when all the following conditions are in place:

- a qualifying property must have been purchased;
- when the property is sold, there must be an immediate lease in place, which is a seamless transaction with no time lapse;
- the lease must be for the remaining term of the ten years from the original purchase date or longer; and
- the property must be continually used or operated for a qualifying purpose, meaning the business suffers no break in trade during the sale and leaseback.

Why it matters

The revised guidance essentially limits the scope of the Supreme Court decision to the facts of the *Balhousie* case. However, that case is potentially of wider interest due to the judgment of Lady Justice Arden.

First, Lady Arden considered that the jurisprudence of the CJEU indicated that EU principles of statutory construction should be applied to the UK's domestic zero-rating provisions. Secondly, Lady Arden considered that the decision of the CJEU in *Mydibel v Belgium* (Case C-201/18) (that a sale and leaseback should, in essence, be combined based on the economic reality of the situation) should be applied in this case to avoid the conclusion that the taxpayer had disposed of its entire interest in the property.

However, *Brief 13/2021* simply states that HMRC continues to view a sale and leaseback as two separate transactions, since the majority of the Supreme Court did not consider this point and decided the case on the meaning of the words 'entire interest'.

Budget VAT changes

The Autumn Budget was something of a damp squib from a VAT perspective. A number of minor announcements concerned free ports, dental prosthetics and technical issues with one-stop shop regimes. But there was the promise of interesting times ahead.

Firstly, the government confirmed that it is committed to its ongoing review of the UK's funds regime and will publish a consultation on options to simplify the VAT treatment of fund management fees in the coming months. Given the continued focus on UK competitiveness and facilitating the growth of the UK as a fund domicile, it is to be hoped that there will be positive developments, particularly to remove the VAT disadvantage that exists currently for UK managers that manage relevant UK funds.

Secondly, the government also restated its intention to consult on the introduction of an online sales tax. No further details have been provided at this stage of this potentially important development beyond the fact that the consultation will explore the arguments for and against its introduction. However, this may be another area where Brexit has given the government more of a free hand, given the EU restriction on the introduction of turnover based taxes other than VAT.

Why it matters

Both consultations hold out the prospect of important changes to come. Taxpayers potentially affected by these areas should follow these consultations closely and actively engage with the government to ensure that any proposals are carefully thought out.

Full customs controls from January 2022

HMRC has confirmed that full customs declarations and controls will be introduced as planned on 1 January 2022. This means that the option to delay customs declarations for up to 175 days, without an authorisation from HMRC, will come to an end on 31 December.

Businesses that move goods from the EU to Great Britain (GB) during 2021 must make customs declarations for these goods. However, under transitional rules, businesses may generally delay customs declarations for up to 175 days after the goods arrive in GB. For example, goods imported on 29 April 2021 require the submission of the necessary declaration before 21 October 2021.

From 1 January 2022, when full customs controls are introduced, the option to delay declarations without an authorisation from HMRC will no longer apply. Businesses will need to choose to make full customs declarations on import of the goods or to be authorised to make simplified declarations.

Why it matters

Businesses which import goods from the EU into GB should start preparing for the introduction of full customs declarations. It should be noted that where a business has imported goods into GB between January and March 2021, delayed declarations should already have been submitted.

What to look out for

The Finance Bill was published on 4 November 2021. ■

For related reading visit www.taxjournal.com

- *A Blue UK*: leaseback none the richer (C Nyland, 14.10.21)
- *Balhousie*: VAT on sale and leaseback arrangements (J Lloyd & W Scott, 7.5.21)
- Autumn Budget 2021: Report (28.10.21)