



KPMG's Indirect Tax Update

TAX

Highlights

It is always interesting to see the interaction of new innovative products and services with 'old' legislation. The UK has been no stranger to this in recent years. For example new healthy products such as liquidized vegetable 'smoothies' end up being zero rated under legislation dating back to 1973, whilst fruit smoothies are standard rated. However these disputes are UK specific, driven by the difficulty in altering old zero rating provisions. Narrowing of zero rating will upset businesses and widening will incur the wrath of the Commission. A wider issue affecting all Member States is the developments in the healthcare sector. Whilst the recent Tribunal in *Ultralase Medical Aesthetics Ltd* was comfortable in finding that aesthetic cosmetic treatments were not exempt, we have already seen the UK refer the *Future Health Technologies (FHT)* case to the ECJ. Last week the ECJ released the AG's Opinion in the *CopyGene* (C-262/08) which made specific reference to the similarities to *FHT*.

In *CopyGene* the AG was considering whether the collection, transport, analysis and storage of umbilical cord blood from newborns could meet the conditions to be exempt as services closely related to healthcare. The stem cells collected can be potentially used at a later date to treat serious disease. The AG confirms that the principal purpose of a medical healthcare service is the protection maintenance or restoration of health and that whilst the services are not that of medical care, they are closely related. Therefore provided the other conditions are met, exemption could apply.

However, when looking at the condition of whether *CopyGene* were a 'duly recognised similar establishment' the AG said that the authorities were not precluded from refusing such a status. Whilst this was for the national court to decide such a refusal to grant recognition was supported by the fact the public health insurance scheme did not cover the services. The AGO contains some interesting comments including that it may be appropriate when interpreting the exemption to take account of situations not envisaged in 1977, due to medical progress and changing healthcare approaches. The Opinion was 19 pages long. The *FHT* case, which the AG confirmed is awaiting its own ECJ hearing, also goes on to look at the exemption under Article 13A(1)(c) as well as the small issue of whether the services are a single composite supply.

As well as the Judgment in *CopyGene* and the *FHT* case we also report in this week's ECJ Update details of a number of other health related cases recently referred to Europe. The *Verigen Transplantation Service International AG* (C-156/09) case concerns services of the removal of cartilage material (biopsy material) for cell multiplication and return to the patient. It asks whether such services qualify for exemption and also tackles the place of supply issues on whether such services are work on moveable tangible property.

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However by the time the case is settled the new VAT package rules will mean the place of supply for such services will be simply where the business customer belongs or where physically carried out to non taxable persons. The final health related case is that of *De Fruytier* (C-237/09) which concerns whether a self employed person transporting human organs and samples for hospitals and laboratories constitutes the supply of human organs, blood and milk and therefore exempt under Article 13(A)(1)(d) of the Sixth Directive.

Elsewhere it has been a quiet week. Having finally got to the Tribunal after four years, HMRC were refused their request to adjourn the *Hilltop Assistance Ltd* case. HMRC argued they had insufficient time to consider Hilltops amended defence. The Tribunal rejected this but it would appear HMRC had sufficient time to reconsider after the first break in proceedings. After returning from lunch HMRC agreed with the taxpayer that the suppliers of staff were acting as an agent and appeal was allowed. It is refreshing to see the stance taken by the Tribunal. Whilst not specifically referred to, the report suggests HMRC had a number of days to consider the amended defence. The relisting of the case would have led to a further delay in a case going back to 2005.

And finally if you need a light hearted end to this week's highlights you need not look any further than some recent articles in the press. The report on Nick Clegg's comments calling for an immediate end to the VAT rate cut is at best unpractical. As for some of the comments surrounding Harriet Harman's Equality Bill somehow meaning people could pay 'duties' at different levels depending on income are of course completely contrary to EU law.

To access the highlights podcast, please click [here](#).

To access the full podcast, please click [here](#).

Breaking News

Compound Interest Project decision released

The Upper Tribunal has released its decision in *John Wilkins (Motor Engineers) Limited & Others*, known as the 'Compound Interest Project' (CIP). The appeal, brought by a group of motor traders, concerns whether the UK is required to pay interest on a compound basis on sums of VAT paid in breach of Community Law. The Upper Tribunal decided that taxpayers had a right to compound interest under the principal of EU law, but could not bring a claim under the terms of s78 VATA 1994. We will bring you detailed analysis on the case next week.

To read the case in full click [here](#).

From the Tax Authorities

VAT Notes No 3 2009

HMRC publish VAT Notes quarterly. They contain a summary of all recent changes to the VAT rules and announce future changes.

Items in this edition include:

- Major changes to VAT from 1 January 2010 - all VAT registered businesses need to be aware of these changes.
- The end of paper VAT returns - an update.
- New charitable or communal residential buildings - changes to the zero-rate provisions.
- DIY builders - changes to the DIY builders' scheme.
- Reverse charge for mobile phones and computer chips - the UK's position remains unchanged.
- Option to tax - businesses involved in the 'option to tax' land or property need to be aware of a correction to our guidance.
- Voluntary-aided schools - changes to VAT recovery on capital projects.
- Dutch barges and similar vessels - new guidance for such vessels designed for and used as permanent residential accommodation by owners.
- Self Assessment - change of time limits for claims.

- Accountancy Services Providers - Reminder to register with HMRC under Money Laundering Regulations.
- Further advice about VAT

Click [here](#) to read the information sheet.

Revenue & Customs Brief 45/2009 VAT: Changes to forms used to claim VAT refunds under DIY refund scheme

HMRC is introducing two new claim forms for VAT refunds under the DIY housebuilders scheme with effect from 15 August 2009. Public Notice 719 will also be withdrawn and replaced with dedicated guidance for each of the new claim forms. Click [here](#) for the brief.

JCCC Newsletter 23 - EU issues in the Customs area

This HMRC Newsletter contains items on customs tariff and statistical nomenclature meetings concerning: the agriculture and chemical sector; the mechanical/miscellaneous sector; and the textile sector. Click [here](#) for the newsletter.

Tariff Notice 17/2009 Commission Regulation (EC) No 717/2009 of 4 August 2009

This HMRC Notice concerns the classification of certain mobile phone equipment in the Combined Nomenclature. Click [here](#) to read the notice.

EU News

Treatment of Insurance Financial services – new documents sent to the working party but not yet publicly available

The Presidency has sent to the Indirect Tax working party three new documents including a proposal for a Directive and a Regulation. This is the first amended Directive since the March version (click [here](#)) and is the first revised regulation since the original proposal in November 2007 (click [here](#)). The only other times when the regulation has been seen was when parts of the intended regulation appeared in previous two proposals for a Directive issued in January and March. The presidency has also sent a paper on 'services specific to and essential for exempt insurance and financial services'. This no doubt follows the division in the working group highlighted in the recent outsourcing paper (click [here](#)). This is between those who want to introduce criteria which says that the services provided must entail 'changes in the legal and financial situation' from the Sparekassernes Datacenter (SDC) (C-2/95) ECJ ruling and those who want exemption to cover outsourced back office services in the insurance sector which were deemed taxable by the ECJ in the Arthur Andersen (C-472/03) ruling. The Presidency's previous compromise text containing reference to 'specific and essential to' in the outsourcing document was as follows:

"The exemption provided for in points (a) to (gf) of paragraph 1 shall apply to the supply of any constituent element of an insurance or financial service which itself constitutes a distinct whole and is specific to and essential for the exempt service. To be exempt under this point, the supply provided [by the sub-contractor must be intended to form part of the contractual obligations of the main supplier and] must entail a change in the legal and financial situation."

We will bring you these documents as soon as they become available.

UK News

VAT in the media

A couple of recent interesting news reports concerning VAT. Firstly Nick Clegg would not have endeared himself to the wider business community. He was reported (BBC, 10 September) as saying the temporary VAT cut should be ended immediately.

There has been widespread criticism of the 1 January reversion date in terms of being a holiday period for many businesses, in the middle of the New Year sales period as well as clashing with the VAT package changes. However, at least businesses have some certainty and time to prepare for the changes. To read this news story click [here](#).

Another article commenting on VAT related to Harriet Harman's Equality Bill. The report suggests the Treasury could be named and shamed over regressive taxes including VAT which is levied at the same rate irrespective of wealth. The report suggests 'duties on fuel, clothes, electrical goods, cars and holidays could be charged at different levels depending on income...' To read the article, click [here](#).

Arrests in dawn raids by HMRC investigating a construction industry fraud

21 people were arrested on suspicion of conspiracy to cheat the public revenue and money laundering offences amounting to over £6 million. They are currently being questioned by HMRC criminal investigators. The plot is believed to be a complicated conspiracy through a version of 'missing trader' fraud. It is alleged the subcontractor contracts out the work to a second subcontractor, who never actually carries out the work and goes 'missing' with the tax that is owed. The first subcontractor then covers the transactions by false paperwork which is used to fabricate their tax records and their position for direct and indirect tax purposes.

Click [here](#) to read the news.

In the Courts

Opinion C-262/08 CopyGene A v S – liability of stem cell bank supplies

Background

CopyGene are a Danish stem cell bank. The case concerns whether CopyGene's services of the collection, transportation, analysis and storage of umbilical cord blood are exempt. Stem cells are immature cells capable of reproducing themselves and of renewing other specialised cells in the body and can be used to treat diseases in which special cells are absent or have been destroyed. They can be extracted in a number of ways but umbilical cord blood (cord stem cells) are more suitable for certain types of treatment. CopyGene support their argument for exemption under Article 13A(1)(b) of the Sixth Directive which provides

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

The Opinion

In her preliminary remarks the AG makes a couple of interesting comments. Firstly she noted the scientific knowledge in this field is constantly and often rapidly evolving and the Court is in no position to evaluate the scientific use or future use of cord stem cells. She therefore openly dismissed the Commission's approach that the interpretation of the Directive should be based explicitly or implicitly on the current state of scientific knowledge. However the AG did note that exemption under Article 13 of the Sixth Directive has essentially been unaltered since 1977 and that it may be appropriate to take into account medical progress and changing approaches over the years.

In analysing Article 13A(1)(b) the AG took the rare but helpful approach of setting out the Article in table form (see para 27) with a view to providing clarity of the interaction of the conditions. To begin tackling the four questions referred the AG started by looking at whether the services are 'closely related to' hospital or medical care. In addressing this point the AG drew a parallel with blood transfusion or organ transplantation which are covered by Article 13A(1)(d). The AG's logic was that if this specific exemption was absent it would not have been conceivable that the supplies of their collection, transport, analysis and or storage would not have been considered as closely related to hospital and medical care. It was therefore not implausible that had CopyGene's supplies been around at the time the exemptions were created, they would also have been mentioned in 13(A)(1)(d).

The AG also had no issue with the considerable time elapsing between collection and use affecting whether the services are 'closely related'. This time difference is unavoidable given the fact that it is impossible to extract cord blood at any other time than at birth. Similarly the issue of the cells not being subsequently used was again dismissed as not impacting on the nature of the supply. The AG stressed the services were provided with a therapeutic aim in mind and can not be diverted to any other purpose. The AG compared this to the court's treatment on input tax incurred with the right to deduct where the intended transactions never in fact took place. The right to deduct is not affected by this. The AG therefore concluded the supplies in question constitute activities closely related to hospital or medical care and therefore meeting the first part of Article 13A(1)(b).

The opinion moves on to the next part of exemption by looking at CopyGene's characteristics and what the AG considered the three relevant factors. Firstly looking at the social conditions comparable to bodies governed by public law, the AG pointed out that the greater social desirability of public stem cell banking may form a legitimate basis for refusing exemption for private stem cell banking. The fact that the services are not supported by the Danish health insurance scheme is another relevant factor that might support a decision to refuse exemption. Then considering the similar nature point, the AG was of the opinion that CopyGene was more similar to a diagnostic centre rather than a hospital or medical centre for treatment but taking stem cells was not a diagnostic service. Finally the AG examined whether CopyGene was a 'duly recognised establishment'. Here she concluded that there was no case law or facts before the court that prevents the Danish tax authorities from not considering CopyGene as 'duly recognised' for the purposes of exemption.

Another question referred to the court related to preventative treatment with the AG finding the question irrelevant as the services were not deemed to be preventative. The final question concerned the impact of whether the supplies were autologous (for one defined recipient) or allogeneic use (potentially more than one user). The AG found there was no distinction to her response between the different types of use.

This opinion is quite long and despite finding that the CopyGene's services are 'closely related' to medical services it highlights the other conditions which have to be met for exemption to apply. However, the Opinion firmly pushes the decision on these conditions back to the referring Member State. In her final remarks the AG makes reference to the similar UK case of *Future Health Technologies*. The opinion noted that since that case was at an early stage in the procedure when the hearing for the current case was fixed, the two cases could not be joined or dealt with together.

To access the opinion, click [here](#).

Hilltop Assistance Ltd – Supply of staff – whether acting as agent – HMRC subsequently agree with taxpayer – appeal allowed

This rather unusual and short Tribunal decision concerns an assessment for VAT on supplies of staff. Hilltop Assistance Ltd (Hilltop) were appealing against an assessment on a fellow subsidiary Wingate Management Ltd (Wingate). These two companies along with David J Miller Insurance Brokers Ltd (Brokers) were subsidiaries of David Miller Holdings Ltd, a non-trading company. Essentially Brokers carried on the insurance business, Hilltop provided assistance and claims management services to the insurance industry and Wingate acted as paymaster. HMRC argued VAT was due on the supplies of staff by Wingate to associated companies who were not members of the VAT group as the contracts of employment were with Wingate.

Originally the taxpayer argued there was a joint agreement between Wingate and Brokers but this approach was abandoned. Instead it was argued that Wingate entered into a written contract with the employees to act as their agent. This had apparently been done in 2000 following group restructuring. It is not clear at what stage the change in defence occurred. The Tribunal summary reports a request by HMRC to adjourn the case on the basis of insufficient time to consider the amended defence. This was rejected on the basis there had been sufficient time from the beginning of the week to consider the matter. The Tribunal added the case had been fixed for two days with numerous parties in attendance with little chance of relisting in the immediate future. The decision then reports that the Tribunal adjourned for lunch and on its return HMRC had agreed Wingate was acting as agent. In light of this the Tribunal allowed the taxpayers appeal.

To read the case click [here](#).

ECJ Diary

This week's cases:

Wednesday 16 September 2009

Hearing Yaesu Europe C-433/08

This case concerns the Eighth Directive. The first question asks whether the term 'Signature' in the specimen application form in Annex A to the Eighth Directive is to be given a uniform Community law interpretation? If this question is answered in the affirmative the reference goes on to ask whether the term 'Signature' is to be understood as meaning the application for a refund must be signed by the taxable person himself, or in regard to a legal person, by its statutory representative, or is the signature of an agent sufficient? Click [here](#) to read the questions referred.

ECJ Update

The following cases of interest have recently been officially lodged at the ECJ.

C-163/09 - Repertoire Culinaire Ltd – Excise Duty – Whether cooking wine and cognac subject to Excise Duty – questions referred to the ECJ

We reported earlier this year on the Tribunal's referral of this case to the ECJ. The questions, which were originally contained in the appendix to the Tribunal's decision, have now been officially lodged with the ECJ. The case concerned an appeal against the seizure of cooking wine, port and cognac. HMRC refused to restore the goods to the appellant on the basis they were subject to excise duty. The goods themselves were purchased in France. Because of the confusion on the treatment of cooking liquors France believe they are not covered by the Excise Directive and can circulate freely without payment of Excise Duty and need for accompanying documents. The UK Tribunal established there is no agreement within the Community as to how these products should be treated. The questions include asking whether such cooking liquors are subject to Excise duty under Article 20 of Directive 92/83. The questions then go onto ask whether the effect of restricting exemption to those who actually use the products in cooking and exemption thresholds breaches principles such as equal treatment and proportionality. The final question looks at the effect of the Member State where the products are manufactured, releasing the goods into free movement.

To read the questions referred click [here](#). To read the earlier Tribunal decision, please click [here](#).

C-156/09 – Verigen Transplantation Service International AG – Place of supply and liability of removal of biopsy material, cell multiplication and reimplantation

This case concerns both the place of supply and liability of certain health related services. The first set of questions relate to Article 28bF which concerns the place of supply of services for valuations of work on moveable tangible property. This provides where such services are provided to a VAT registered customer in a Member State, but are physically carried out in another, the place of supply is where the customer has his registration. This derogation does not apply where the goods are not subsequently moved out of the Member State where the services are carried out. The taxpayer is involved in the removal of cartilage material (biopsy material) for cell multiplication and return to the patient. The questions ask whether the cartilage constitutes 'movable tangible property' and the services constitute 'work' on that property. The final place of supply question asks whether the criteria for a customer being 'identified for value added tax purposes' is met by putting their VAT number on the invoice without express agreement.

If any of these questions are answered in the negative the final question asks if the services constitute exempt 'provision of medical care' under Article 13A(1)(c). To read the questions in full click [here](#).

C-237/09 – De Fruytier – liability of transporting human organs and samples in self employed capacity

This case looks at whether a self employed person transporting human organs and samples for hospitals and laboratories constitutes the supply of human organs, blood and milk and therefore exempt under Article 13(A)(1)(d) of the Sixth Directive.

To read the questions in full click [here](#).

C-222/09 – Kronospan Mielec – place of supply of services relating to emissions investigation and measurement

This case looks at services falling under the third indent of Article 9(2)(e) of the Sixth Directive now Article 56(1)(c) of the VAT Directive. This part of the legislation treats certain services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services as well as data processing and the provision of information. The first question asks whether for the purpose of the article whether this place is where the customer has established its business or has a fixed establishment. The second question goes on to question whether Kronospan Mielec's supplies fall within that part of the Directive or whether they are in fact services falling under Article 9(2)(c) of the Sixth Directive (now Article 52(a) of the VAT Directive) and therefore supplied where they are physically carried out. The supplies in question involve the investigation and measurement of emissions under environmental protection legislation including investigations of CO2 emissions and emissions trading.

To read the questions in full click [here](#).

C-188/09 – Profaktor Kulesza, Frankowski, Trzaska – whether temporary 30 percent input VAT restriction is compatible with EU legislation

This case concerns a 30 percent temporary input VAT restriction on what appears from the questions to be certain retailers who fail to meet obligations of persons using cash registers. To read the questions in full, click [here](#).

C-228/09 – Commission v Poland – inclusion for VAT purposes of car registration tax in taxable amount of road vehicles

This is the long running dispute on Poland's treatment of including car registration tax within the taxable amount for VAT purposes. The referral was announced earlier this year in a press release by the Commission. To read the press release click [here](#) and to read the application in full click [here](#).

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