

Car Parking – The Isle of Wight case

As you have probably heard, Customs have lost at the Tribunal! But what does that mean to you? We have tried to take some of the mystery out of this matter by looking at its background and effect.

Warning: It is understood that Customs are considering whether to appeal this matter to a higher court, so the story remains unfinished.....

A brief history

It all started in Italy, with a famous ECJ case that we refer to as “Carpaneto”. In this case, the European Court spelled out when local authorities could be treated differently from commercial taxpayers. In short, where a local authority was making a supply under a “special legal regime” – in other words, under special rules for local authorities which do not apply to commercial traders – the supply would fall outside the scope of VAT provided that did not create a distortion of competition with private companies engaged in the same activity. (Article 4.5, EC 6th Directive)

Then we move to Portugal for the “Porto” case, where the ECJ said that the provision of off-street car parking could be a supply that falls within Article 4.5 above.

Our penultimate destination is the Isle of Wight, where the Council asked Customs to repay all the VAT it had accounted for on its car parking charges because this was an activity that fell within the Carpaneto principles. Customs, not unexpectedly, said that they were not prepared to refund the output tax to IoW and in the summer of 2004 the matter was referred to our final destination, the VAT Tribunal, which agreed that parking *was* provided under a special legal regime. The Tribunal also said that because the UK had not implemented Article 4.5 into UK law that IoW did not need to consider the distortion of competition point, but early in 2005 the High Court overturned that point by saying that you could not pick and choose individual sentences in Article 4.5 without considering the Article as a whole, and that the distortion of competition aspect would have to go back to the Tribunal.

The Tribunal has now considered this aspect – the hearing started in July last year and went on for four days, then reconvened in November for a further two days – and decided that there was no distortion of competition if the IoW Council were not to charge VAT on its provision of car parking. The judgement runs to some 36 pages and examines in detail the circumstances of the four local authorities who were party to the appeal (Isle of Wight, Mid Suffolk, South Tyneside and West Berkshire).

The judgement

Apart from telling you the outcome – Four-Nil to the Isle of Wight etc. – it is interesting to note how the Tribunal arrived at its decision, so we have picked out some of the more interesting aspects of and points from the decision.

The Tribunal had to decide first who was responsible for proving the point on competition – did Customs have to prove a distortion would exist, or did the local authorities have to prove that a distortion would not exist? The second feature was to decide whether, on the facts before them, competition *does* exist; if it does, is it significant; and should it be assessed locally or nationally?

Who must prove their point? A government must not make it excessively difficult for a taxpayer to exercise his rights. As well as failing to implement Article 4.5 into UK law, for Customs to require a local authority to prove a negative, i.e. that competition does not exist, is excessively difficult, therefore it is for **Customs** to prove that treatment as non-taxable *would* create a distortion of competition.

How do you decide if competition exists? There has to be someone competing with you. The Tribunal decided that the law allowing a local authority to treat a supply as outside the scope of VAT referred to the supplier, not the supply. That being so, competition has to be assessed for each taxpayer local authority and not by reference to the type of supply (in other words, Customs could not argue that car parking in its own right is always business, but would have to make that argument for each authority).

Once you have decided that competition does exist, you have to prove that non-taxable treatment distorts competition *and* that the distortion is significant.

The Tribunal took the view that to be significant, it must be “exceptional”. The simple fact of a local authority not having to account for output tax on a supply is not exceptional in itself, so a significant distortion of competition must be over and above that. I think we can expect Customs to dispute that analysis. There was much evidence relating to the facts of the individual appellants and experts explaining how the “hypothetical monopolistic test” would prove one thing or another (anyone who can explain this test to me in two simple sentences will win a prize!) but the important outcome was the four step approach to determining, in each case, whether a distortion of competition would be created. The steps for each local authority to consider for its own area are:

- Is it likely that the local authority would change its parking policy as a result of the disapplication of VAT?
- Are any local authority car parks potential substitutes for privately operated parks?
- If a local authority changes its charging policies as a result of the disapplication of VAT, what would be the effect on the sales of a privately operated park?
- Would any significant distortions of competition arise in the future as a result of the disapplication of VAT?

In assessing the likelihood of a distortion of competition, the Tribunal took into account not only the operation of a car park but also the likelihood of the disapplication of VAT affecting outsourcing, Best Value, PPPs and joint ventures, even to the extent of outlining simple VAT planning ideas to allow private sector companies working with local authorities and utilising their ability to provide VAT-free parking!

One final, but important, point made in the summary at paragraph 148 was this:

“The position of particular local authorities in large metropolitan areas may be such that the disapplication of VAT could shut out private operators as potential providers of car parks and parking services thereby leading to some distortions of competition. We do not have the evidence to reach any conclusion on that. But as regards the Four Local Authorities, we have no reservations in deciding that the disapplication of VAT would not result in any distortions of competition, let alone significant distortions of competitor, so far as concerns the supply side.”

Our final comment on the above is that we do not yet know whether Customs will appeal, but it seems likely.

So where do we go from here?

As a client, if you would like to discuss this with us, please call your usual contact.

Meanwhile, ponder on this: If you have made a claim that local authority car parking is outside the scope of VAT, should you be reclaiming input VAT on a car parking receipt from a local authority through your expenses system?

Elysian Associates
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