VAT
Hot Takeaway Food - Potential Refund Opportunity

Background

We have had VAT in the UK for nearly 40 years now and many aspects of the tax have changed over the years. One area that has, however, remained relatively unscathed is the zero rate schedule which allows specified goods and services to be supplied VAT free at the point of delivery and at the same time enables suppliers to recover VAT on cost.

Zero rating is a key aspect of UK VAT law with food being one of the main beneficiaries of this advantageous treatment. Of course, not all food items are zero rated. The now infamous Jaffa Cake case, for example, confirmed that chocolate covered biscuits are subject to VAT whereas chocolate covered cakes are not. In addition, there has always been an exclusion for supplies 'in the course of catering' which attract VAT at the standard rate. The original intention was to apply VAT to 'eating out' but the definition of 'in the course of catering' was, famously, extended in 1984 to include hot take-away food.

Since then a number of taxpayers have challenged the definition of hot take-away, largely without success but some recent European Court cases have cast doubt on the validity of the UK's legislation in this area.

The European Cases

There were four similar cases brought by German taxpayers that were all heard together by the court. The leading case concerned a Mr Manfred Bog who operated a mobile snack bar at weekly markets selling, amongst other things, sausages and chips. The precise configuration of the snack bar was not detailed in the judgement but it was clear that there was nowhere for customers to sit. Instead there was a counter protected by a folding roof which enabled those customers that wanted to do so to stand and eat their food on site. So some of Mr Bog's sales would have been eaten on site and some would have been taken away for consumption.

German VAT law applies a reduced rate of VAT to food. However, food and beverages for consumption on the spot are specifically treated as supplies of services and as such attract VAT at the full standard rate.

The European Court was asked to consider whether the German law was compatible with the Principal VAT Directive and took the view that it was not. The court ruled that the service element was minimal and insufficient to enable the supply of the food and drink to be characterised as a supply of services. As a result the food and drink supplied by Mr Bog should be treated as a supply of foodstuffs and therefore subject to VAT at the lower rate.

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Effect on UK Law

As noted above the UK equivalent of the German law contains specific wording designed to remove *supplies in the course of catering* from the zero rating provisions and then goes on to confirm that any supply of hot food for consumption off the premises is to be treated as a supply of catering.

So the UK legislation contains specific wording to enable hot take-away food to be included in the definition of catering which is remarkably similar to the German law which contains specific wording designed to enable Mr Bog's supplies of sausages and chips to be included in the definition of services.

In spite of this very specific wording the European Court had no difficulty in disregarding the German legislation to find in favour of the taxpayer. So, although these cases relate to German taxpayers and German VAT law they do provide some useful insights which may enable the UK law to be challenged.

View of HMRC

The view of HM Revenue & Customs is, of course, that the cases are not relevant to the UK and a Revenue & Customs Brief (19/11) has been issued confirming that businesses should continue to treat sales of hot takeaway food as subject to VAT at the standard rate.

Back Claims

So far only one Tribunal case has considered the impact of these German cases on UK law and that was only in relation to a food delivery service (Value Catering TC 01189). We have not heard of any cases looking at hot take-away food but understand that a case is likely to appear soon which challenges the UK law and at that point it is to be hoped that the matter will be resolved once and for all. As this process could take several years it makes sense for any businesses in the takeaway food sector to consider submitting protective claims for recovery of overpaid VAT (subject to the unjust enrichment and capping provisions).

As back-claims are capped at four years any businesses that wait until the litigation process is complete will lose out if they do not claim now.

Businesses should, however, continue to account for VAT on supplies of hot takeaway food until the matter is resolved but can continue to protect their right to claim refund of overpaid VAT by submitting claims periodically.

We will, of course, keep you informed of progress in respect of any cases that come forward.

Further information

Please speak to your usual Shipleys contact or to the VAT Team if you would like further information on this or any other VAT matter.

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