

VAT, DUTIES AND INDIRECT TAX LAW

THE AXA 'DENPLAN' JUDGMENT PAYMENT COLLECTION SERVICES SUBJECT TO VAT

HMRC v AXA UK PLC [2010] C-175/09

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The European Court of Justice ('ECJ') has recently handed down judgment in the AXA UK plc ('AXA') 'Denplan' case. The case concerned the VAT treatment of certain services provided by AXA to dentists as part of the Denplan dental scheme. Pursuant to the Denplan scheme, a patient typically is required to pay a monthly charge by direct debit to Denplan, for a particular level of dental care. Denplan acts as the dentist's agent in receiving payments due to that dentist. Those payments are then transferred to the relevant dentist's bank account less various deductions. This case concerned the deduction made from the patients' payments representing the consideration for Denplan's services in "collecting payments" for dentists, consisting in seeking payments from patients' bank accounts via the direct debit system, and accounting to the dentists for them.

The ECJ adopted an analysis which differed from that of the Commissioners, although they agreed that those services should be subject to VAT.

THE ARGUMENTS OF THE PARTIES

The Commissioners refused AXA's claim for overpaid VAT in respect of those payment collection services on the basis that the fees charged to dentists were consideration for supplies of services in managing the Denplan scheme and were therefore subject to VAT.

AXA appealed to the London VAT and Duties Tribunal, contending that the fees were exempt from VAT on the basis that they constituted consideration for a financial service

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falling within Article 13B(d)(3) of the Sixth Directive. Article 13B(d)(3) of the Sixth Directive excludes from VAT “*transactions...concerning...payments, transfers...but excluding debt collecting and factoring.*” AXA argued that the charge was raised in respect of arranging for the transfer of money and therefore that service fell within the wording of the exemption in Article 13B(d)(3) and the UK’s implementing provision (Item 1 of Group 5 of Schedule 9 of VATA 1994).

That argument was successful before the London VAT and Duties Tribunal. The Commissioners’ appeal against that decision was dismissed by the High Court. The Commissioners then appealed to the Court of Appeal which decided to make a reference.

THE ECJ’S JUDGMENT

The ECJ began its analysis by noting that the service of “*collecting payments*” comprised various actions and that, as a preliminary question, it must be determined whether for VAT purposes Denplan provides several distinct and independent services requiring separate assessment or a single complex service comprising several elements. The ECJ held that the actions performed by Denplan are “*indissociably connected*” for VAT purposes, the economic purpose of which is the transfer of the sum due each month from patient to dentist.

The ECJ then turned to consider whether the exemption from VAT under Article 13B(d)(3) was engaged. The ECJ noted that the terms used to specify the exemptions set out in Article 13 of the Sixth Directive are to be interpreted strictly. Further, the ECJ noted that the transactions exempted under Article 13B(d)(3) of the Sixth Directive are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service.

The ECJ observed that Denplan is, in return for remuneration, responsible for the recovery, servicing and management of debts and that therefore, as a matter of principle, the service is exempt under Article 13B(d)(3), unless it constitutes a “*debt collection or factoring*” service.

In this regard, the ECJ noted that the term “*debt collection and factoring*” is to be interpreted broadly as it is an exception to a derogation. Citing Case C-305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, the ECJ held that the term “*refers to financial transactions designed to obtain payment of a pecuniary debt*”. It therefore followed that the service in question is covered by the term “*debt collection and factoring*” in Article 13B(d)(3) of

the Sixth Directive and is therefore subject to VAT. In so holding the ECJ rejected the submissions of AXA and the Commission that it was relevant that the service was supplied as an ongoing payment plan and that they are supplied at the same time that the debts concerned became due. The Commission, in particular, favoured an interpretation of debt collection which was limited to the recovery of a pre-existing debt. The ECJ also considered it to be irrelevant to the analysis of the VAT treatment of the service in question that the service did not provide for coercive measures for the effective payment of the debts. Nor did the ECJ take account of the fact that AXA was integral to the entire arrangement, which, AXA contended, was the operating of a regular payment service, not a debt collection service.

ANALYSIS

The ECJ's approach to what amounts to "*debt collecting*" is somewhat surprising and, in the view of the writer, unnecessarily wide.

Virtually every payment made other than gifts is the result of a pecuniary liability from one party to another and is intended to discharge that liability. Taking the ECJ's reasoning to its logical conclusion, any type of payment service provided to the recipient of that payment is to be regarded as "debt collection" and therefore excluded from exemption, as, ultimately, the payment service "is designed to obtain payment of a pecuniary debt". That reasoning could potentially be extended, for example, to all Direct Debit systems operated by UK banks: like AXA, in operating a Direct Debit system, those banks are obtaining payment of a pecuniary debt. It is the very essence of the Direct Debit system that banks collect, on behalf of their customers, amounts owing to those customers and, applying paragraph 31 of the AXA judgment, it would appear to follow that the service is a taxable one. Such a conclusion is surprising to say the least but, arguably, would appear to necessarily follow from the ECJ's reasoning in this case.

In the writer's view, this judgment is likely to lead to uncertainty in relation to payment services which have previously been consistently accepted as exempt ones. Clearly, if the service is provided to the customer *making* the payment, no issue arises as the service is not designed to "obtain" a payment. On the other hand, if the service is provided to the customer *receiving* the payment (i.e. the creditor), it is difficult to predict where the dividing line will now be drawn between what is properly to be regarded as an exempt "payment service" and what is, instead, "debt collecting".

***Raymond Hill represented the United Kingdom Government.
Mario Angiolini represented AXA UK PLC.***