

## Reviewing the AXA ruling Valentina Sloane, Barrister, Monckton Chambers



On 28 October 2010, the European Court (ECJ) issued its preliminary ruling on the reference made by the Court of Appeal in AXA (C-175/09). In an outcome reminiscent of the ruling in Case C-452/03 RAL [2005] STC 1025, the ECJ determined the reference on a basis which had not even arisen in the judgments of the domestic courts.

The case serves as a reminder of the significant difference in approach which can arise between

the domestic courts and the ECJ and the concomitant litigation risk on a reference to the ECJ, while also raising interesting questions as to which services, previously assumed by both HMRC and taxpayer to be exempt, are now to be regarded as falling within the net of taxable 'debt collection' services.

### The services

Denplan, a subsidiary of AXA, operated a range of services for dentists, including 'payment handling services' in respect of private patients' payment plans.

For a fee charged to the dentist, Denplan collected a monthly payment from the patient by direct debit and, after paying an insurance premium and deducting its fee, transferred the balance to the dentist via BACS.

The issue referred was whether the monthly fees charged by Denplan to its dentist clients fell within the exemption for the provision of financial services contained in Article 13B(d) of the Sixth Directive.

### Debt collection: the surprise from the ECJ

HMRC had argued that Denplan's services did not qualify for exemption as Denplan did no more than give an instruction to its bank to effect transfers.

Both the VAT Tribunal and the High Court had rejected that argument and held that the 'payment handling services' were exempt.

The ECJ agreed that as a matter of principle Denplan's service constituted 'a transaction concerning payments'

which was exempt.

This should knock dead HMRC's repeated efforts to revisit the judgments of the English courts in *FDR* [2000] STC 672 and *Bookit* [2006] STC 1367.

However, in a surprise blow to AXA, the ECJ went on to hold that the service was excluded from the exemption as 'debt collection or factoring'.

## The judgment gives HMRC scope to revisit its policy on the liability of a broad range of payment services previously considered to be exempt, which could hit financial institutions in particular

This was unexpected: the English courts had not addressed the possibility that the service was 'debt collection'; all parties appear to have proceeded on the assumption that the exclusion would not apply.

Adopting a sweeping approach to the concept of 'debt collection', the ECJ gave short shrift to the European Commission's argument that Denplan collected payment when it became due, rather than after the debtor had defaulted, and considered it irrelevant that the service did not encompass coercive measures for payment of the debt.

On that basis, simply instructing the collection of sums by direct debit on behalf of a creditor, and indeed potentially the collection by direct debit itself, constitutes a taxable 'debt collection' service.

### The impact of the decision

The judgment gives HMRC scope to revisit its policy (currently set out in Notice 701/49/09) on the liability of a broad range of payment services previously considered to be exempt, in a move which could hit financial institutions in particular.

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