VAT focus

Leave means leave, or does it?

Speed read

EU law remains significant to VAT because of the continued obligation to adopt a muscular conforming interpretation of UK legislation, so that, in so far as possible, it is construed in a manner that accords with the Principal VAT Directive. However, since 1 January 2024 taxpayers have lost the ability to rely on the direct effect of the Directive. Challenges to UK legislation on the basis that it does not accord with the general principles of EU law are also no longer possible. The ability to rely on such principles was even restricted before 1 January 2024. However, they remain relevant when assessing whether a conforming interpretation is possible.

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VAT is a European tax. So, the first question that arises is...

Does EU law remain relevant to VAT post-Brexit?

The simple answer is that EU law may remain relevant. However, it may be relevant in a more limited manner than when the United Kingdom was a member of the European Union. This is for essentially three reasons. The first is that it is now open to Parliament to override EU law, when this was not previously the position. The second is that the Higher Courts now have an ability to depart from rulings of the Court of Justice of the European Union (CJEU) when they were previously bound by such judgments. The third is that EU law is now only partially incorporated into UK law. The extent to which it is possible to rely on EU law also differs depending on whether you are looking at the position before or after 31 December 2020 or before or after 31 December 2023.

What is the significance of 31 December 2020?

That is the end of the transitional period after which the UK ceased to be generally bound by EU law as a result of its treaties with the EU. In relation to the Charter of Fundamental Rights and the application of general principles of EU law, some of the changes made by the European Union (Withdrawal) Act 2018 (the '2018 Act') purport to have retroactive effect, so it is possible that those legislative changes could have some impact on proceeding commenced after withdrawal that relate to the position before that date. This is limited by article 89 of the Withdrawal Agreement, which obliges the UK to comply with judgments made prior to the withdrawal or decisions on references against the UK which relate to the period when the UK was bound by EU law. Other later judgments may be merely persuasive even when applied to periods before 31 December 2020 (see *Umbrella Interchange Fee* [2023] CAT 49). After that date, EU law only remains relevant in so far as it is retained by the 2018 Act and other Brexit-related legislation.

What is the significance of 31 December 2023?

This is the date that the Retained EU Law (Revocation and Reform) Act 2023 (the '2023 Act') comes into force. This prospectively removes any ability to rely on EU law rights to override UK statutory provisions. The impact of that Act in the VAT context will be limited by clause 28 of the Finance Bill, as introduced in the House of Lords. In the VAT context, this effectively preserves obligations to apply a muscular conforming interpretation to VAT legislation unless the legislation is post 2020 legislation which is not intended to comply with EU law. However, the 2023 Act means that from 1 January 2024 it will no longer be possible to rely on the direct effect of directives or EU Treaty rights to override UK legislation. Prior to that date, despite Brexit, it had in many cases, in consequence of s 4 of the 2018 Act, been possible for taxpayers to rely on the direct effect of directives and EU Treaty Rights to override UK statutory provisions. For periods after 31 December 2023 that will no longer be possible. So, for taxpayers, there may be significant differences in the outcome of disputes relating to periods before or after 31 December 2023. Since HMRC have never been able to rely on the principle of direct effect, this change just adversely impacts on taxpayers.

The simple answer is that EU law may remain relevant

So, what is the significance of the Principal VAT Directive?

The Principal VAT Directive clearly remains relevant as an interpretive aid when construing UK legislation. For periods up to 31 December 2023 it may also have been open to taxpayers to rely on the principles of direct effect to override inconsistent domestic legislation in so far as the rights were preserved by s 4 of the 2018 Act. That section only applied in cases where the right was of a 'kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case)'. The limited case law that has so far specifically considered the impact of these words suggests that the prior case does not need to be on the specific article of the Directive being relied upon (see, for example, *Harris v Environment Agency* [1922] EWHC 2264). From 31 December 2023, the 2023 Act removes any ability to bring claims based on principles of direct effect to override UK legislation. However, as a result of clause 27 of the Finance Bill, principles of conforming interpretation will remain relevant. This may cause disputes about the status of a number of previous EU decisions, because previously it was frequently academic whether a decision took effect under the principle of conforming interpretation or direct effect. Going forward, this distinction will become crucial.

Can you still rely on the Implementing Regulation or other EU Regulations?

Most EU Regulations relating to VAT ceased to have any effect on 31 December 2020, as a result of Taxation (Cross-

Border Trade) Act 2014 s 42. However, under s 42(5) of that Act, the Implementing Regulation remains relevant when the VAT directive remains relevant for the purposes of 'determining the meaning and effect' of the Principal VAT Directive. So, the Implementing Regulation may remain relevant as an interpretive aid for that reason.

Is it still possible to rely on the general principles of EU law or the Charter of Fundamental Rights?

The Charter of Fundamental Rights has ceased to have effect as a result of s 5(4) of the 2018 Act. However, the general principles of EU law as recognised on 31 December 2000 can remain relevant. This includes general principles recognised in the Charter. However, as a result of Sch 1 para 3 of the 2018 Act, it is in general not possible to rely on general principles to override UK legislation. So, general principles can be relied on as an aid when construing retained EU law but probably cannot be relied upon to mount a freestanding challenge to UK legislation (see, for example, *Dawson's (Wales) Ltd v HMRC* [2023] EWCA Civ 332).

It is no longer possible to rely on general principles to override UK legislation. However, general principles remain relevant when determining whether a conforming interpretation is possible

Until 31 December 2023 an exception was made for cases where the disapplication was 'a necessary consequence' of a case decided before 31 December 2020 provided the reliance was not for the purposes of bringing a 'claim' (see Schedule 4 para 39(6) of the 2018 Act). Jacob J in *King v Walden* [2001] STC 822, at paras 57–71, accepted my arguments that tax appeals were instigated by HMRC for the purposes of the Human Right Act 1988 s 22(4). This provides some support for arguments that para 39(6) can be relied upon in tax appeals against assessments. There are also special statutory rules directed at the *Kittel* (Case C-439/04) and abuse principles.

One issue that may be a matter of dispute but has yet to be litigated is what should be considered as a 'general principle' for these purposes. Does it, for example, extend to VAT-specific principles such as the principle of neutrality when it is not being cited as an aspect of principles of equal treatment. Also, it might possibly be disputed whether a right to a remedy as a matter of EU law is a relevant general principle for these purposes. The *Dawson's (Wales) Ltd* case suggests it should be so regarded. However, the specific provisions prohibiting *Francovich* claims, in Sch 1 para 4 of the 2018 Act, possibly suggests otherwise. This may be significant when assessing whether *Revenue & Customs Brief 4/2022* is correct in suggesting that purely EU law based restitutionary claims are no longer possible.

Ignoring *Kittel* and abuse issues, even if it was possible to do so before 31 December 2023, the repeal of s 4 of the 2018 Act by the 2023 Act will mean that it is no longer possible to rely on general principles to override UK legislation for periods after 31 December 2023. However, clause 28(5) of the Finance Bill explicitly acknowledges that general principles remain relevant when determining whether a conforming interpretation of UK legislation is possible.

Have these changes impacted on HMRC's ability to rely on the abuse and *Kittel* principles?

No doubt because HMRC were concerned that the 2018 Act could limit their ability to rely on the abuse and *Kittel* principles, the Taxation (Cross-Border Trade) Act 2018 s 42(4) and s 42(4A) contain specific references to these principles. The provisions are poorly drafted. In particular, it can be contended that s 42(4) adds nothing to the provisions in the 2018 Act, as it just purports to declare the consequences of that Act. The fact that s 42(4A) states that the principles apply to 'any matter relating to VAT' probably points to the principles having a wider application than under the 2018 Act. However, that sub-section commences with the word 'Accordingly' and that conclusion certainly does not follow from either the wording of s 42(4) or the 2018 Act itself, which only gives the general principles limited application. The Upper Tribunal in *Impact Contracting Solutions v HMRC* [2023] UKUT 215 (TCC) at para 59 accepted that these principles continued to apply as a result of these sub-sections. Clause 28(7) of the Finance Bill states that that clause needs to be read with s 42. While possibly not the clearest drafting, this also suggests that these principles continue to generally apply.

The 2023 Act increases the grounds on which the higher courts can depart from decisions of the CJEU

Do the courts remain bound by CJEU case law?

As a result of article 89 of the Withdrawal Agreement decisions of the CJEU remain binding on the UK for periods up to 31 December 2020 if decided prior to that date or on a reference from the UK. Under the 2018 Act other later decisions are merely persuasive. The decision in *Umbrella Interchange Fee* [2023] CAT 49 suggests that this is the position even if the decision relates periods prior to 31 December 2020. The 2018 Act also gives the Court of Appeal and House of Lords a limited jurisdiction to depart from prior decisions of the court which are considered to be wrongly decided. Reasons for not following a decision may include lack of reasoning especially when the decision appears inconsistent with other decisions (see *Industrial Cleaning Equipment (Southampton) v Intelligent Cleaning Equipment* [2023] EWCA 1451).

The 2023 Act increases the grounds on which the higher courts can depart from decisions of the CJEU by making it clear that 'changed circumstances' and the 'proper development' of domestic law are grounds for departing from prior decisions of the CJEU (see s 6(3) of the 2023 Act). It also enables a lower court to seek a reference from the higher UK courts. Clause 28(5) of the Finance Bill makes it clear that these provisions directed at the status of judgments apply when determining whether general principles of EU law impact on a conforming interpretation of VAT legislation. It is probably envisaged that the 2023 Act changes on the extent to which decisions of the CJEU remain binding are intended to apply more generally to VAT legislation. However, clause 28 provides no explicit directions on this issue. ■

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- Revocation/reform of retained EU (VAT) law (E Wong, 9.11.23)
- Using the Principal VAT Directive after Brexit (R Shiers & A Parry, 6.5.21)