

## VAT focus

## AXA and VAT exempt payment services revisited

## Speed read

The Upper Tribunal has referred questions to the CJEU concerning the VAT treatment of supplies of services by a dental payment plan administrator to dental patients: *DPAS Ltd v HMRC* [2016] UKUT 373. The tribunal considered that it was not clear whether DPAS's services qualified as 'transactions concerning payments or transfers' or, if they did so qualify, whether they were excluded from exemption as 'debt collection'. In particular, the Upper Tribunal was concerned that it was difficult to reconcile the decision of the CJEU in the recent *Bookit/NEC* case, requiring a narrow, functional analysis of the exemption, with the statement in the earlier *AXA* decision that Denplan's services in recovering payments for dentists would, in principle, have been exempt had they not amounted to debt collection.



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In 2010, the CJEU held that supplies made by Denplan, a dental plan administrator, to dentists were excluded from exemption as 'transactions concerning payments or transfers' as those services amounted to 'debt collection' (*HMRC v AXA Plc* [2010] STC 2825). The fact that Denplan collected payments as they fell due meant that they were collecting debts on behalf of the dentists. A debt did not have to be overdue for collection to amount to 'debt collection' for the purposes of the VAT exemptions.

### Background

DPAS also provides dental plan administration services. Following the *AXA* decision, DPAS restructured its contractual arrangements to ensure that its plan administration services were provided to dental patients rather than to dentists. As a result of this restructuring, it contended that its supplies of services to patients, for which it charged a plan fee, qualified as exempt provision of transactions concerning payments. Its supplies to patients were, essentially, payment facilitation involving collecting direct debit payments and paying on plan fees to the dentists. In addition, since this supply was made to patients, rather than to the creditor dentists, it could not amount to excluded 'debt collection'. The First-tier Tribunal agreed with DPAS and held its services were correctly exempted from VAT.

On appeal, the Upper Tribunal agreed that the supplies made by DPAS were made to dental patients. The Tribunal concluded that (except in relation to existing patients who

did not sign and return acceptance of the new contractual arrangements) DPAS provided a service of ensuring that money was taken by direct debit from the patients' accounts and passed, after deduction of DPAS's fees, to the dentists and the insurer. In addition, those services were correctly viewed as management and administration separate from and more than the dental services supplied by the dentists. The fact that the services did not change their essential character from the earlier (non-exempt) services as a result of the new contractual arrangements did not affect that conclusion.

However, the Upper Tribunal held over its decision on the correct VAT treatment of those services pending the CJEU decisions in *Bookit* (Case C-607/14) and *NEC* (Case C-130/15).

### Further reference

Following the CJEU decisions in *Bookit/NEC*, the case has now returned to the Upper Tribunal and the Upper Tribunal has decided that a further reference to the CJEU is necessary to clarify the scope of the VAT exemption for payments and transfers and the exclusion of debt collection.

As regards the scope of the exemption, DPAS argued that the original CJEU decision in *AXA* accepted that the supplies of collecting direct debit payments and administering the payment plan amounted, in principle, to transactions concerning payments and transfers. That conclusion was not affected by the *Bookit/NEC* decision. Furthermore, the services provided by Denplan were materially indistinguishable from those provided by DPAS save for the fact that Denplan supplied its services to the dentists, which is why they could be characterised as debt collection, whereas DPAS supplies its services to the patients. DPAS also argued that, as a direct debit originator, it actually effects transfers of funds, unlike *Bookit* and *NEC*, which merely provided information that caused others to make payments.

In contrast, HMRC contended that the decisions in *Bookit/NEC* had materially narrowed the scope of the exemption. In particular, HMRC submitted that the necessary functional analysis of the transactions made clear that DPAS did not effect any transfers or payments. DPAS's activity is functionally the same as *Bookit* and *NEC* in that it requests payments under the authority of a mandate from the patient to the patient's bank. It is the banks that actually effect the transfers. DPAS merely carries out administrative tasks for moving money between bank accounts, and recording what transfers have been made by others. DPAS does not itself debit or credit the respective bank accounts. In this context, HMRC contended that the *Bookit/NEC* judgments made clear that an intermediary who calls on other financial service providers to effect transfers between bank accounts does not make a supply of transactions concerning transfers in its own right.

The Upper Tribunal considered that it could not decide between those rival submissions without further guidance from the CJEU. Whilst acknowledging that the *AXA* decision lends strong support to DPAS's case, the Upper Tribunal also acknowledged that the CJEU's analysis of the limitations of the exemption in *Bookit/NEC* appeared equally applicable to DPAS's supplies. This tension between the decisions in *AXA* and *Bookit/NEC* meant that the Upper Tribunal was unclear as to the correct approach.

### Debt collection?

Furthermore, the Upper Tribunal considered that there is 'real doubt' as to the scope of the exclusion for debt

collection. In particular, it was unclear whether, objectively, the same type of activities undertaken by Denplan in providing services to dentists and which constitute debt collection cease to constitute debt collection when undertaken by DPAS in providing services to patients. HMRC contended that it is the nature of the services that is determinative, rather than the person supplying or receiving them. DPAS argued that, by its very nature, debt collection services can only be provided to the creditor. As a result, the Upper Tribunal has also decided to refer to the CJEU the question of the correct construction of 'debt collection' in this context.

### Clarity needed

It may have been thought that the CJEU decisions in *Bookit/NEC* had brought some much needed clarity to the scope of the exemption for transactions concerning payments and transfers. This referral shows, however, that doubts as to the

scope of the exemption continue, as well as to the extent of the 'debt collection' exclusion.

In particular, the fact that in *AXA*, the CJEU specifically stated in relation to Denplan's services that, 'as a matter of principle, that service constitutes a transaction concerning payments which is exempt under article 13B(d)(3) of the Sixth Directive, unless it is "debt collection or factoring"' is difficult to reconcile with the functional analysis adopted in *Bookit/NEC*. As such, further guidance from the CJEU will be keenly awaited. ■

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- ▶ *DPAS Ltd*, VAT planning and restructured arrangements (Richard Woolich & Jonathan Gordon, 31.1.14)
- ▶ *AXA*: exemption for payment services (Mark Agnew, 9.12.10)

## VAT focus

# The post-Brexit interpretation of UK VAT law

### Speed read

Whilst the effect of Brexit on the UK VAT system cannot yet be fully known, what is certain is that the UK courts will be required to interpret the UK's VAT legislation consistently with EU law until the UK formally leaves the EU. After formal Brexit, it is likely that the decisions of the CJEU on the VAT directives will remain of persuasive authority in interpreting the UK VAT Act, save in areas where Parliament has amended the Act after Brexit. Widespread amendment of the Act is unlikely, save for some modifications to take account of specific UK interests and to reflect the fact that supplies to and from the EU will no longer be intra-Community supplies.



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The UK has formally voted to leave the EU, and the government has since confirmed that 'Brexit means Brexit'. However, there remains significant uncertainty regarding what the UK's relationship with the EU will

look like after formal withdrawal takes place.

Whilst nobody has a crystal ball and the consequences of Brexit are not yet clear, there will no doubt be political considerations that will drive the negotiations. The UK government's objective must be to ensure that the UK remains competitive (or indeed becomes more competitive) in a post-Brexit world, with VAT being only one of a number of considerations. Taxation is clearly a key differentiator for countries but there are a raft of other fundamental issues, such as ensuring that the UK financial services sector is not handicapped by not being able to passport through Europe and the obvious issues around international trade.

## The CJEU's judgments will remain persuasive authority, even if they are no longer binding

The UK VAT strategy cannot be decided until the Brexit model is known. For instance, it is possible that there could be an agreement with the EU for single market access, whereby certain EU laws such as VAT remain in force or are tinkered with to a minimal extent. This article assumes that there is no such agreement reached in respect of VAT. On that basis, we consider what changes Brexit may or may not bring to the interpretation of the UK's VAT legislation; what will happen to preliminary references to the CJEU up until the point at which the UK formally leaves the EU; and specific VAT issues we would expect the UK to address post Brexit.

### CJEU case law

A good starting point is to briefly recap on the current system. As a member state of the EU, the UK courts and tribunals are required to ensure the full effectiveness of EU law. That stems from the general duty of sincere cooperation laid down in article 4(3) of the Treaty on European Union (TEU), which requires the member states to take 'any appropriate measure ... to ensure fulfilment of the obligations arising out of the Treaties', as well as EU secondary legislation. In the context of directives, the UK courts are also subject to the