

CJEU judgment on the VAT treatment of payment services

On 25 July 2018, the Court of Justice of the European Union (CJEU) released its decision in the case of *DPAS Limited* (C-5/17) which was referred by the UK's Upper Tribunal. This case is relevant to businesses operating across a range of sectors, including banks, outsourcers, and FinTech platforms.

The CJEU held that DPAS, which operates dental payment plans on behalf of dentists, provides taxable services. This is on the basis its services are administrative in nature and limited to requesting that payments are made and the actual payment transfers being effected by the relevant financial institution.

Background

DPAS, a UK company, operated dental payment plans on behalf of dentists, collecting and remitting amounts due to them. Following the CJEU judgment in *AXA Denplan*, which held payment services were taxable where they could be characterised as 'debt collection', DPAS put in place new contracts which sought to render its services not 'debt collection'. DPAS did this by contractually providing its services were supplied to patients (i.e. the debtor) rather than to the dentists (i.e. the creditor).

The UK's First-tier Tribunal found partly in DPAS's favour, holding the service was not debt collection, as debt collection can only be provided to the creditor. It also found DPAS's payment handling services were VAT exempt. On appeal by the UK Tax Authority, the UK's Upper Tribunal could not reach a conclusion on, firstly, whether DPAS's services were capable of being payment services and, secondly, whether services to a debtor do constitute debt collection.

Given the uncertainty, the UK's Upper Tribunal referred questions to the CJEU. These focused on:

- ▶ The characteristics of an exempt payment service under Principal VAT Directive Article 135(1)(d) (particularly where another party in the chain may actually move the money) and
- ▶ The 'to whom' test, specifically whether a service supplied to a person who owes the debt (i.e. to the dentist's patient) can be characterised as a taxable debt collection service

The Advocate General (AG) set out his view that DPAS's services did not qualify for exemption. This was on the basis he considered DPAS does not effect the payment transfer as its involvement is limited to requesting a payment. The AG also reiterated a point raised in the earlier *Bookit* (C-607/14) and *NEC* (C130/15) decisions that, because it was easy to value DPAS's services (unlike for other complex financial transactions), VAT exemption should not be available.

CJEU decision

The CJEU has broadly followed the AG's opinion, holding that DPAS's services do not qualify for exemption, on the basis that the services provided by DPAS are administrative in nature and do not effect the payment transfer itself, finding they were 'merely a step prior to the transactions concerning payments and transfers'. The CJEU also referenced the AG's point, raised in the earlier *Bookit* (C-607/14) and *NEC* (C130/15) decisions, that because it was easy to value DPAS's services (unlike for other complex financial transactions), VAT exemption should not be available. However, this aspect was not determinative in the CJEU making its decision.

This decision clarifies the CJEU's previous judgment in *AXA Denplan*. In its earlier decision, the Court implied that AXA Denplan's services (which are very similar to DPAS's) may have been exempt but for the fact they constituted 'debt collection', which is specifically not a VAT exempt service. In this decision, the CJEU has clarified that its previous analysis focussed on the definition of 'debt collection' rather than whether the services met the criteria to qualify as exempt payment transfer services as set out in previous case law.

Finally, in coming to its decision the CJEU considered it significant that DPAS was not responsible for the failure or cancellation of a payment as a result of the direct debit as this was ultimately the liability of the patient's and dentist's banks.

Implications

DPAS is the latest in a long line of payment-focused cases, stretching from *SDC* (C-2/95) to *AXA Denplan* and, most recently to *NEC* and *Bookit*. This decision provides further clarity on the scope of the payment exemption across the EU. It does confirm the payment transfer exemption should be applied narrowly, emphasising that whilst a service may be essential to a payment transfer occurring, that in itself is not enough. The CJEU also reinforced the fact that exemption should not be limited to banks and financial institutions but it is still somewhat unclear which parties are capable of actually providing a VAT exempt payment service.

The decision is relevant to a host of financial services providers - from banks to outsourcers and parties in the card payment cycle - many of which currently benefit from VAT exemption. Where such services are ultimately subject to VAT, it is likely that consumers and certain businesses will face additional costs or shrinking margins. Businesses will eagerly await Tax Authority's reaction to this judgment.

The CJEU's logic is clear and reflects its general direction of travel on this issue. Any potentially affected business should critically review the judgment and map what the impact of VAT on its wider set of payment related services would mean.

How we can help

We have a global indirect tax practice which is experienced in providing support in relation to technical VAT issues. If you feel this judgment could have implications for your business, and you would like to discuss the position in more detail, please speak with or one of the people below or your usual EY indirect tax contact.

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