

## UK eligibility for 13th Directive refunds

### [European Commission v United Kingdom \(C-582/08\)](#)

The ECJ has held that the European Commission has not succeeded in showing that changes to the UK's rules on eligibility for 13th Directive refunds breached EU law. The changes had the effect of preventing refunds of UK VAT to non-EU established financial services and insurance businesses. Previously, such businesses had been eligible for refunds of UK VAT used to make financial and insurance supplies outside of the EU.

#### **Background**

The UK amended the legislation governing 13th Directive claims by non-EU businesses in 2004 as a consequence of the Court of Appeal judgment in WHA[2004] EWCA Civ 559. The Court of Appeal in that case had held that there was no entitlement to Thirteenth Directive refunds insofar as UK VAT was used by a non-EU business to make supplies of financial services to customers outside of the EU. The UK legislation (principally reg 190 VAT Regulations 1995) was therefore amended to preclude claims in respect of financial services and insurance transactions.

The Commission instituted infringement proceedings on the basis that, in making this amendment, the UK had failed to meet its obligations under EU law. In particular, the Commission considered that art 2(1) of the Thirteenth Directive and arts 169,170 and 171 of the Principal VAT Directive 2006/112/EC required Member States to make Thirteenth Directive refunds where the claimant used the VAT-bearing costs to make financial and insurance supplies to customers outside of the EU.

The principal arguments of the Commission were that:

- article 2(1) of the Thirteenth Directive read in conjunction with articles 169 to 171 of the VAT Directive must be understood as conferring a right to a refund on transactions referred to in article 169(c) (broadly speaking, exported financial services);
- the right of non-EU traders to recover such VAT is enshrined within the VAT Directive whilst the Thirteenth Directive contains only implementing provisions;
- the fact that article 169(c) was not specifically referred to in the Thirteenth Directive was a "drafting error";

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- the logic of the VAT system requires a right of refund to be granted in respect of exported financial services; and
- the 8th Directive and 13th Directive (because of almost identical wording of those two provisions) should be construed in the same way, and to adopt the UK's interpretation would have repercussions for other Member States granting refunds under the 8th Directive.

### **Held**

The ECJ considered that the present action concerned the alleged UK failure in respect of the 13th Directive, and the Commission's arguments concerning the absence of reasons for divergent practice between the 8th and 13th Directives and in respect of repercussions for Member States were not factors supporting the Commission's interpretation of the 13th Directive. In relation to the arguments based upon the drafting history, the Court rejected those arguments: not only on the basis that the argument implied errors in implementation of each of the 8th, 13th and Directive 2008/9, but also because the Court took the view that, in reading the disputed provision consistently with the logic of the common system of VAT, it was not for the Court to correct any putative defect within article 2(1) of the 13th Directive.

The ECJ considered that the UK legislation complied with the clear and precise wording of article 2(1) of the 13th Directive and could not be accused of failing to fulfil obligations under EU law. The Court therefore dismissed the action.

### **Implications**

This judgment will be disappointing for those non-EU financial services businesses which have been precluded from making 13th Directive refunds since the amendments to the UK legislation were made. Unfortunately, the prospect of retrospective relief has now been removed. It remains possible that (given the Commission's clear view that refunds should be possible for businesses incurring VAT used to make financial services supplies outside of the EU) the Commission will seek to remedy the position prospectively and submit a proposal to amend the relevant Directives with the express aim of correcting this alleged defect. Watch this space!

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