

An illuminating filler

Guy Smith explains why the tax authority is training its beady eye on the cosmetic medical industry, and outlines potential consequences for operators in the sector

HMRC is embarking on a VAT raising campaign targeting the rapidly growing cosmetic medical sector. The focus of attention is whether treatments such as Botox, dermal fillers, sculpting and thread lifts qualify for medical exemption from VAT.

In HMRC's opinion, the treatments should be treated as standard rated; a view which has recently been supported by a decision at the First-tier Tribunal (FTT) in the case of Illuminate Skin Clinics Ltd (TC/2019/05352).

Illuminate had made a claim for VAT credit in relation to the period ending December 2016, which HMRC had denied, on the grounds that the supplies made during the period were not exempt from VAT.

In a complex ruling, the Tribunal considered written and oral evidence from Dr Sophie Shotter, the Director of Illuminate, and reviewed a bundle of documents totalling 1241 pages. But, ultimately, it decided the supplies did not constitute medical care within the proper meaning and effect of the legislation.

The decision inevitably reflected on a number of previous cases of a similar vein, including SkinRich and Mainpay, both of which were FTT litigation where we at Independent Tax were the lead advisors.

Legislation

Item 1 of Group 7 of Schedule 9 of the VAT Act 1994 exempts the supply of medical care, when delivered by professionals registered with their appropriate statutory body.

As you would expect, the list of professions covered is a long and divergent one but includes:

- Chiropractors
- Dentists
- Medical practitioners
- Optometrists
- Osteopaths
- Physiotherapists

Item 4 of the same Schedule and Act states the provision of care or medical or surgical treatment, and the supply of any goods in connection with it, should take place in a hospital or other state-regulated institution.

The FTT also considered the scope of the exemptions for medical care contained in Article 132 (1)(b) and (c) of the Principal VAT Directive. One of the main principles is that the provision of medical care involves the diagnosis, treatment and, in so far as possible, curing diseases or health disorders.

Background

Dr Shotter qualified as a doctor and is registered with the General Medical Council. She was training to be an anaesthetist and passed the primary exams for admission to the Fellowship of the Royal College of Anaesthetists.

However, in about 2012, she decided to focus on 'aesthetic medicine' and obtained a postgraduate diploma in aesthetic medicine from Queen Mary University, London.

She began treating clients as a sole trader, under the trading name 'Adaptive Aesthetic Medicine', initially from her own home and three beauty salons, whilst also working for the NHS.

In 2014 she established Illuminate from clinic premises that were registered with the Care Quality Commission. During the period in dispute a range of facial and skin treatments, as well as dermal fillers, were being administered solely by Dr Shotter. In October 2016 alone, she saw about 55 patients.

Clients could attend a clinic and be treated on the same day, sometimes during their first visit.

Some of the treatment was also 'client-led', where clients specified the treatment they wanted and examples were given where patients had arrived at clinic asking to go on a vitamin B treatment plan, after reading of the potential benefits, whilst another patient arrived asking for more Botox, despite being warned she was likely to be left with a 'frozen look'.

The clinic would not automatically write to a client's General Practitioner (GP) afterwards, to advise of the work done, unless the client had a health condition that was being managed by their GP, or the client had given their permission for contact to be made.

The decision

The Tribunal accepted that Dr Shotter is a skilled and ethical professional and was complimentary about her 'clear-eyed business vision' and determination.

However, the FTT decided the services offered were not exempt within the proper meaning and effect of the legislation and the Appellant had not met the burden of establishing that it qualified for the exemption.

The Mainpay case ({2022} EWCA Civ 1620) was cited and paragraphs 67 and 69 in particular, where a medical care definition, often seen in European Court of Justice case law, was quoted:

'diagnosing, treating and, in so far as possible, curing diseases or health disorders' (para67)

'which requires that the services have a therapeutic aim, that they consist of the diagnosis, treatment or cure of ill-health' (para69)

Consideration was also given to the definition of 'diagnosis' in the Oxford English Dictionary and was quoted as:

'determination of the nature of a diseased condition; identification of a disease by careful investigation of its symptoms and history; also the opinion (formally stated) resulting from such investigation'

In explaining its decision, the Tribunal drew attention to the following:

Clients were making use of the Appellant's services because they wanted to. There was no diagnosis of a health disorder, no careful investigation of symptoms or analysis of a client's medical history and no referrals from a doctor or other medical professional.

As no diagnoses had been conducted at the starting point for medical care, 'treatment' in the sense captured by the exemption, was not being undertaken in response to a disease or other medical disorder.

A failure to maintain adequate written evidence in support of the Appellant's core position that the primary purpose was the protection, maintenance, or restoration of the health of the person concerned.

Dr Shotter's considerable experience was laid before the Tribunal, with emphasis placed on her knowledge of psychology. She had undertaken a psychiatry placement as an undergraduate and her work in the NHS had involved patients who were psychologically vulnerable.

However, whilst the FTT accepted Dr Shotter had acquired additional skills over time, it did not believe that the appropriate tax treatment of what is being done should depend on the identity of the person doing it, or whether that person has psychological training or experience. Rather, clients attending clinic were doing so because they were unhappy with their appearance and were not expecting to receive advice from a psychiatrist, counsellor, or therapist.

Lessons to learn

Contemporaneous records should be kept of each client, including physical attributes, details of any previous surgeries and the administration of any tests. Evidence of diagnosis and a full treatment or healthcare plan should also be maintained.

Reference should be made to the International Statistical Classification of Diseases and Related Health Problems (ICD), which is released by the World Health Organisation (WHO). ICD-11 came into effect in January 2022. Dr Shotter only started to refer to the ICD once HMRC showed an interest in the clinic.

Summary

HMRC has set up a specialist team to target the sector and clients in this field can expect to see more challenges to their VAT returns.

Once this team has gathered momentum, fine-tuned its approach and prepared template letters, it will be that much harder to adopt a strong defence to HMRC's line of attack.

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