Welcome to the latest edition of EY VAT News. Headlines include the following:

- In the case of DPAS Ltd, the Upper Tribunal considered whether the restructuring by a dental payment plan administrator of its contractual arrangements following the judgment of the Court of Justice of the European Union (CJEU) in the AXA Denplan case was successful in securing exemption for its payment services. Please contact Andrew Bailey for further information.

- The Organisation for Economic Co-operation and Development (OECD) has published its consolidated International VAT/GST Guidelines. Our global tax alert provides further details. Please contact Rosie Higgins for further information.

- A potential delay in the introduction of Indian GST. We understand that it is likely that the timing for the proposed introduction of GST will be delayed from 1 April 2016 to later in 2016 or early 2017. Please contact Uday Pimprikar or your usual EY contact for further information.

- We provide links to a selection of our global tax alerts in respect of recent indirect tax developments.

If you would like to discuss any of the articles in this week's edition of EY VAT News in more detail, please speak with your usual EY indirect tax contact or one of the people below.

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HMRC Material

VAT treatment of direct marketing services using printed matter : Imminent notification deadline

On 15 July 2015, HMRC issued Revenue & Customs Brief 10/2015 setting out its approach to supplies of direct marketing which it considered had been incorrectly treated as zero-rated supplies of delivered goods.

Specifically, HMRC had identified a number of suppliers of printed matter combined with other services which had been treating the supply as one of zero-rated delivered goods. In HMRC's view, these supplies should have been treated as a supply of standard-rated direct marketing services. However, HMRC accepted that its earlier published guidance (VAT Notice 700/24: Postage, delivery charges and direct marketing) in this regard was not clear and updated the guidance to provide greater clarity.

Within the Brief, HMRC set out transitional arrangements whereby no retrospective assessment action was to be taken in respect of any supplies made prior to 1 August 2015 where the supplier, having misunderstood the former guidance, had incorrectly zero-rated a separate single supply consisting of either addressed or unaddressed mail only. The Brief made clear that to use these transitional arrangements, suppliers would need to notify HMRC of its intention to do so by 30 November 2015.

The Brief also set out the terms available to businesses whose supplies of direct marketing services prior to 1 August 2015 did not come within the scope of the transitional arrangements to settle their outstanding VAT liabilities. For the purpose of the settlement, the Brief indicated that HMRC will allow the supply of marketing services to be treated as multiple supplies of zero-rated printed matter and standard-rated services, with VAT being due only on the latter element of the supply. Again, the Brief made clear that suppliers wishing to adopt the settlement terms must notify HMRC by 30 November 2015, and provide details of the relevant VAT due by 31 December 2015.

Comment: Any suppliers wishing to adopt the transitional arrangements or accept the settlement terms will need to notify HMRC of its intention to do so by 30 November 2015 if they have not already done so or risk being held liable for VAT on the full value of any supplies of direct marketing services using printed matter.

Next step in ten-year modernisation programme : Office closures

HMRC has published a press release and an issue briefing announcing the next step in its ten-year modernisation programme to become a tax authority fit for the future with fewer, more modern regional centres. HMRC is to consolidate its 170 offices across the UK into 13 large regional centres and 4 specialist sites. The first new regional centre is expected to open in 2016-17, with the others opening over the following four years. HMRC expects that 90% of its current workforce will either work in a new regional centre or see out their career in an existing HMRC office.

Legislation

Royal Assent of the Summer Finance Bill 2015

The Summer Finance Bill is due to receive Royal Assent on 18 November 2015. The progress of the Summer Finance Bill can be tracked here.

Parliament

Committee seeks views on reduced VAT rate for Northern Ireland tourism

The Northern Ireland Affairs Committee is seeking written submissions by 11 December 2015 to help inform its inquiry into whether the introduction of a reduced rate of VAT could promote growth in Northern Ireland’s tourism and hospitality sector.
Upper Tribunal

Decision : Dental payment plan : VAT exemption for transactions concerning payments

HMRC v DPAS Ltd

The Upper Tribunal considered whether the restructuring by a dental payment plan administrator of its contractual arrangements following the CJEU judgment in the AXA Denplan case was successful in securing exemption for its payment services.

The Upper Tribunal released its decision on 5 November 2015 in this appeal by HMRC against First Tier Tribunal decision TC03058 in favour of DPAS Ltd. This case concerns whether the taxpayer, a dental payment plan administrator, made an exempt supply of payment services to the patients of dentists. The Upper Tribunal has allowed HMRC’s appeal in part and stayed the remainder of the case pending the CJEU judgment in the cases of Bookit Ltd (Bookit) and National Exhibition Centre Ltd (NEC).

The taxpayer operated dental payment plans on behalf of dentists. Payment was made by patients via monthly direct debit from their bank accounts to the taxpayer, which accounted to the dentist for payments received less an amount retained by the taxpayer in respect of its charges. New patients were also charged an initial registration fee, which the taxpayer retained as a means of recovering directly from the patient the costs of registration onto a dental plan. The taxpayer deregistered for VAT in 2004 on the accepted basis that its services were predominantly exempt supplies of ‘payment services’ falling within Items 1 and/or 5 of Group 5 of Schedule 9 to the VAT Act 1994 and Article 13B(d)(3) of the Sixth Directive (now Article 135(1)(d) of the VAT Directive). However, in October 2010, the CJEU gave judgment in the case of AXA UK plc (C-175/09). This case concerned the proper VAT treatment of supplies by Denplan Ltd, a competitor of the taxpayer which, like the taxpayer, operated dental payment plans on behalf of dentists. The CJEU held that Denplan’s service of collecting payments was specifically excluded from the exemption in Article 13B(d)(3) as ‘debt collection’ and was therefore liable to the standard rate of VAT. In July 2011, HMRC agreed to allow affected businesses to delay the implementation of the AXA judgment until 1 January 2012. Recognising that it operated a similar business model to AXA at that time, the taxpayer restructured its underlying contractual arrangements with effect from 1 January 2012 with the intention that, in addition to its supplies to dentists (of taxable dental payment plan services), it would also make supplies directly to patients (of the provision of dental payment plan facilities), although the total monetary value of the taxpayer’s charges remained unaltered.

Post 1 January 2012, it was not disputed that the dental payment plan was administered by the taxpayer on behalf of the dentist and that the services the taxpayer supplied to dentists were a standard-rated supply. However, the disputed issues were (i) whether the taxpayer also made a supply of services to the patient for consideration; (ii) if so, whether that supply was an exempt supply of payment services or a taxable supply of services such as management of the dental plan or debt collection; and (iii) if an exempt supply to patients, whether the change in the contractual arrangements from 1 January 2012 amounted to an abusive practice for the purposes of the Halifax doctrine. The First Tier Tribunal allowed the taxpayer’s appeal, holding that (i) the taxpayer made a supply of services to the patient for consideration; (ii) the supply was exempt as a transaction concerning payments; (iii) the services were not debt collection (which would be standard-rated) because they were supplied to the debtors (i.e. the patients), not to the creditors (i.e. the dentists); (iv) the registration fee was consideration for a service ancillary to the principal supply which was thus also exempt; and (v) the contractual arrangements from 1 January 2012 did not amount to an abusive practice. HMRC appealed against this decision on five grounds that challenged all of the conclusions reached by the First Tier Tribunal.

On the changes to the contractual arrangements, the Upper Tribunal concluded that there was an agreement between the taxpayer and the existing patients as at 1 January 2012 who signed the taxpayer’s acceptance form (some 30% of the total) and the new patients after that date who signed the taxpayer’s authorisation form. Under that agreement, the taxpayer supplied services in return for monthly charges paid by the patients as part of their monthly payments under their dental plans. Accordingly, under the contractual arrangements introduced with effect from 1 January 2012 and as a matter of economic and commercial reality, the taxpayer made a supply of services to those patients. However, there was no agreement between the taxpayer and the remaining 70% of existing patients who failed to sign and return the taxpayer’s acceptance form and, accordingly, the taxpayer did not supply services to those patients. To the extent that the First Tier Tribunal found that the taxpayer supplied services to such patients, the Upper Tribunal considered that it made an error of law and allowed HMRC’s appeal on the first ground.

As regards HMRC’s second and third grounds of appeal, the Upper Tribunal did not reach any conclusion on the issue of whether the services supplied by the taxpayer to the patients (i.e. those patients who signed and returned the taxpayer’s acceptance form and new patients who entered into dental plans from 1 January 2012) were exempt under Article 135(1)(d), directing instead that final determination of this matter should be reserved until after the CJEU has given its judgment in Bookit...
(C-607/14) and NEC (C-130/15). On HMRC’s fourth ground of appeal, it was common ground that the registration fee was consideration for a supply of services by the taxpayer. The issue was whether the registration fee was consideration for a separate standard-rated supply of registration services or for a service that was ancillary to an exempt supply of payment services. In this regard, the Upper Tribunal considered that patients paid the registration fee to join the dental plan primarily in order to obtain dental care and not to obtain payment services from the taxpayer. The supply by the taxpayer in return for the registration fee was separate from its supplies of payment services. Accordingly, the Upper Tribunal held that the taxpayer’s supply of registration on the dental plan was chargeable to VAT at the standard rate, regardless of the VAT liability of its payment services. HMRC’s appeal on this ground was therefore allowed. Finally, the Upper Tribunal rejected HMRC’s fifth ground of appeal that the contractual arrangements from 1 January 2012 amounted to an abusive practice.

Comment: Any taxpayers who charge a fee for handling payments will be interested in the outcome of the Bookit and NEC cases.

Please contact Andrew Bailey for further information.

Court of Appeal

Latest appeal updates: IFX, Open University, Finmeccanica, Wilton Park and Massey

The latest appeal updates are as follows:

- The Court of Appeal had been due to hear the appeal by IFX Investment Company Ltd and others against the Upper Tribunal’s decision in favour of HMRC on 3-4 November 2015. However, this hearing was vacated. This case concerns whether Spot the Ball is a ‘game of chance’ for the purposes of the VAT exemption within Item 1 of Group 4 of Schedule 9 to the VAT Act 1994. The taxpayers claimed that their supplies in relation to Spot the Ball competitions were properly exempt from VAT. The First Tier Tribunal allowed the taxpayers’ appeal. However, the Upper Tribunal reversed this decision and allowed HMRC’s appeal holding that operators of Spot the Ball competitions did not provide facilities for the playing of games of chance so as to fall within the exemption. There was no ‘game’ and completing and posting a coupon was not ‘playing’.

- The Court of Appeal will hear HMRC’s appeal against the Upper Tribunal’s decision in favour of the Open University on 2-3 February 2016. This case concerns a claim for the repayment of VAT charged on supplies of services made by the British Broadcasting Corporation (the BBC) to the taxpayer during the period from 1978 until 1994. The services consisted of the production and broadcasting of television and radio programmes relating to the taxpayer’s degree courses. The Upper Tribunal held that the services supplied by the BBC to the taxpayer were covered by the VAT exemption for education under EU law.

- The Court of Appeal will hear Finmeccanica Group Services SpA’s appeal against the Upper Tribunal’s decision in favour of HMRC on 11-12 October 2016. This case concerns whether the taxpayer, an Italian company, was entitled to make a claim under the Refund Directive for the repayment of the UK VAT charged to it on supplies relating to the provision of an enclosure at the Farnborough air show. The taxpayer invoiced its sister companies, also established in Italy, for its services of arranging the enclosure. The First Tier Tribunal held that the taxpayer’s supply was made in Italy so that it was entitled to the VAT refund. However, the Upper Tribunal overturned this decision and allowed HMRC’s appeal, holding that the taxpayer’s supply was made in the UK at the air show so that it was not entitled to the VAT refund.

- The Court of Appeal will hear the appeal by Wilton Park Ltd and others against the Upper Tribunal’s decision in favour of HMRC on 5-6 October 2016. The taxpayers, five companies forming the Secrets group of companies, operated licensed lap/table dancing clubs where dancers performed stage and table side dances for the entertainment of club patrons, who paid the dancers for their services. The appeals concerned the correct VAT treatment of transactions involving ‘Secrets money’, being vouchers issued by the taxpayers which enabled club patrons to continue spending money in a club when they had run out of cash. The taxpayers contended that the disputed transactions were exempt from VAT. The Upper Tribunal held that, whilst the taxpayers’ vouchers constituted a security for money within the meaning of the financial services exemption, their services of redeeming those vouchers formed part of a composite taxable supply of performance facilitation services.

- Julian Massey and Beryl Massey t/a Hilden Park Partnership and Hilden Park LLP have applied for permission to appeal the Upper Tribunal’s decision in favour of HMRC to the Court of Appeal. This case concerns whether certain
arrangements implemented by the taxpayers, involving the use of two purportedly non-profit making companies, amounted to an attempt to avoid paying VAT on supplies of sporting services which constituted an abusive practice liable to redefinition under the Halifax doctrine (which addresses the scope of the EU principle of abuse of rights in the context of VAT). The Upper Tribunal held that the arrangements did constitute an abusive practice.

Court of Justice of the European Union (CJEU)

Calendar update

Wednesday 25 November 2015 - Opinion C-332/14 Wolfgang und Dr Wilfried Rey Grundstücksgemeinschaft GbR - German referral concerning the calculation of the deductible proportion of input VAT paid in respect of the acquisition or construction and ongoing maintenance of a building used for both taxable and exempt purposes.

Thursday 26 November 2015 - Hearing C-520/14 Gemeente Borsele - Dutch referral concerning whether the transport of school pupils should be treated as carried out by a taxable person and if so, whether an assessment should be made according to the arrangement as a whole or according to the distance of each journey.

Wednesday 2 December 2015 - Hearing C-40/14 BRE Ubezpieczenia Sp. z o.o. - Polish referral concerning the scope of the exemption for insurance transactions and related services performed by insurance brokers and insurance agents contained within Article 135(1)(a) of the VAT Directive, specifically whether that exemption covers services which are supplied in the name and on behalf of an insurer by a third party who has no legal relationship with the insured person. Please contact David Bearman for further information.

Thursday 17 December 2015 - Judgment C-419/14 WebMindLicences Kft. - Hungarian referral asking some seventeen detailed questions aimed at establishing whether the transfer, by means of a licensing agreement, of intellectual property between two taxable persons in different EU Member States constitutes an abusive practice for VAT purposes. Please contact Simon Harris for further information.

Thursday 17 December 2015 - Opinion C-550/14 Envirotec Denmark ApS - Danish referral asking whether bars consisting of a random, rough fusion of various scrapped, gold-bearing metal objects, which are created with a view to extracting the gold content and which exceed the prescribed purity levels, are covered by the term 'gold material or semi-manufactured products' within the meaning of Article 198(2) of the VAT Directive, which permits Member States to designate the customer as the person liable for payment of VAT.

European Commission

Updated list of VAT Committee guidelines : VAT treatment of crowdfunding

The European Commission has published an updated list of guidelines agreed by the VAT Committee as at 11 November 2015. These guidelines have been prepared in response to specific questions raised by the Commission or a Member State concerning the application of EU VAT provisions. Note that guidelines issued by the VAT Committee are merely views of an advisory committee. They do not constitute an official interpretation of EU law and do not necessarily have the agreement of the Commission. They do not bind the Commission or the Member States who are free not to follow them.

The latest VAT Committee guidelines relate to the VAT treatment of crowdfunding, in particular the VAT implications of reward-based crowdfunding, crowd-investing and crowd-lending. Crowdfunding generally refers to the process of raising funds for a specific project via an open call on the Internet, by way of specifically designed platforms which allow interaction between entrepreneurs (i.e. those that create a project) and contributors (i.e. those that provide financial support for that project). The expression ‘crowdfunding’ merely refers to the channel used for the financing, but can take different forms. Two main crowdfunding models are identified: (i) non-financial return models, where the return may range from either nothing (donation) to goods or services (reward-based crowdfunding); and (ii) financial return models, where a financial return is expected, either in the form of a participation in future project earnings or securities (crowd-investing), or interest on loans (crowd-lending). The VAT Committee guidelines consider whether such crowdfunding arrangements give rise to supplies for VAT purposes.
Proposed VAT derogations: Austria, Belgium, Germany, Hungary, Latvia and Lithuania

The European Commission has published derogation proposals authorising:

- **Austria and Germany** to continue excluding from the right of deduction the VAT borne on goods and services that are used by a taxable person more than 90% for private or non-business purposes, including non-economic activities.
- **Belgium** to continue to exempt from VAT taxable persons whose annual turnover is no higher than €25,000 (i.e. VAT registration threshold in UK terminology).
- **Hungary** to apply the reverse charge mechanism in relation to supplies of staff.
- **Latvia** to limit the right of deduction of input VAT to 50% (currently 80%) as regards the purchase and leasing of specified passenger cars and on related expenditure thereto, including the purchase of fuel, where the vehicles are not used exclusively for business purposes.
- **Latvia** to continue to apply the reverse charge mechanism in relation to supplies of timber.
- **Lithuania** to continue to apply the reverse charge mechanism in relation to supplies of timber and supplies by taxable persons under judicial insolvency or restructuring procedures.

It is proposed that these derogations will apply until 31 December 2018, except in the case of Hungary (31 December 2017).

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Organisation for Economic Co-operation and Development (OECD)

Publication and agreement of consolidated OECD International VAT/GST Guidelines

On 6 November 2015, the OECD published its consolidated International VAT/GST Guidelines (the Guidelines). The publication of the Guidelines is the outcome of a long-lasting and inclusive process that started in the late 1990s and involved some non-OECD economies as well as business representatives, including EY. Our global tax alert provides further details.

At the annual meeting of the OECD Global Forum on VAT on 5-6 November 2015, one of the key events was the agreement of the Guidelines as the “preferred international standard for the coherent and efficient application of VAT/GST to international trade in services”. The endorsement of the Guidelines by more than 100 countries and jurisdictions means that governments have taken an important step towards ensuring that consumption taxes on cross-border transactions are effectively paid in the jurisdiction where products are consumed, while minimising the risk that uncoordinated tax rules will distort international trade.

Over the last few years, governments worldwide have had to deal with an increasing volume of cross-border services and online downloads on which no VAT is paid, particularly on products purchased by private consumers from suppliers outside their home jurisdiction. The new elements of the Guidelines include a recommended solution for the effective collection of VAT/GST on cross-border business-to-consumer (B2C) supplies of digital products. The Guidelines recommend that VAT is accounted for in the jurisdiction where the final consumer is located, and that foreign sellers register and remit tax in that jurisdiction. The new B2C Guidelines were developed in the context of the OECD’s base erosion and profit shifting agenda and were included in the final report on Action 1 (tax challenges of the digital economy) released on 5 October 2015. Our global tax alert examines this report in more detail. Going forward, the Global Forum participants urged the OECD and G20 to continue working on the development of effective implementation packages to support the consistent implementation of the Guidelines in all countries.

Comment: With wide-reaching global consensus, the Guidelines now set the international standard for the VAT/GST treatment of international trade in services and intangibles. A growing number of jurisdictions have already implemented the rules and mechanisms recommended by these Guidelines. However, businesses making cross-border B2C supplies of digital products in countries where VAT/GST is not currently accounted for in the country of consumption may wish to consider the potential tax and commercial implications of the Guidelines including pricing, systems and contractual issues.

Please contact Rosie Higgins for further information.
India

Possible delay to the introduction of GST

We understand that the introduction of GST in India may be postponed. It is now more likely that GST will be introduced later in 2016 or early 2017 (although we also understand that 1 April 2016 continues to be the official implementation date declared by the Government).

The primary reason for the postponement is the delay in the passage of the Constitution Amendment Bill (CAB) in the Upper House of the Indian Parliament, which based on news reports of last week seem to suggest that the present stalemate in the Upper House may possibly be ending, clearing the way for the passage of the CAB in the upcoming winter session.

Meanwhile, the Government has released draft reports on various aspects of the new GST regime including registration, returns, refunds and payments. Roadshows were conducted by State and Central Government officials across the country to socialise these reports and understand the concerns of industry last month and several detailed representations have now been received by Government officials.

Draft GST legislation is expected to be released into the public domain in early December 2015.

Please contact Uday Pimprikar or your usual EY contact for further information.

EY Global Tax Alerts

Recent indirect tax developments

Please see links to a selection of our global tax alerts in respect of the following recent indirect tax developments. Additional articles are available in our global tax alert library.

Slovakia: The Slovak Parliament has approved a number of VAT amendments, including the introduction of a reverse charge mechanism for supplies of construction services and supplies of goods by non-established taxpayers with effect from 1 January 2016.

Hungary: The Hungarian Government has issued guidance on Hungary's implementation of the CJEU judgment in the case of Skandia America Corporation (C-7/13) concerning the VAT treatment of cross-border intra-company (e.g. branch-to-branch) transactions where one or both establishments are members of a VAT group. The alert also reports that tax audits concerning the Electronic Control System of the Movement of Goods on Road (EKAER) are intensifying, whereby a broadened and more complex scope of documents and information are being scrutinized.

Hungary: The Hungarian Parliament has passed a number of important VAT changes that will take effect from 1 January 2016, including the requirement to integrate a special data export function into invoicing software, new tax point rules for continuous supplies of services and new electronic invoicing and electronic archiving rules. The alert also further reports on the fact that the Hungarian tax authorities have launched intensified EKAER audits and the associated risks this presents for Hungarian taxpayers. These recent developments will be relevant to any taxpayers with VAT compliance obligations in Hungary.

Lesotho: The Lesotho Government has proposed a number of VAT amendments, including the introduction of a reverse charge mechanism for imported services.

Malaysia: On 23 October 2015, Malaysia released its 2016 Budget which extends GST zero-rating to cover medicines and certain food products and proposes penalties for the late payment of GST ranging from 5% to 25% of the tax due, depending on the outstanding period.

Panama: Panama has increased the number of entities that are required to act as VAT withholding agents. Entities not previously required to withhold VAT may now face this requirement.

Zambia: On 9 October 2015, Zambia's Minister of Finance presented the 2016 Budget, which includes a number of indirect tax measures. VAT on insurance business has been removed and a levy of 3% on insurance premiums has been introduced.
Brazil: The Sao Paulo State Government has announced a substantial change to the basis for calculating the state VAT (ICMS) on transactions involving the sale of software to Brazilian clients.

Poland: The recently elected Government has announced plans to introduce a new tax on larger retailers of up to 2% of sales.

Germany: The German Federal Tax Court has ruled that post-box and other postal addresses where suppliers have no business activity are not sufficient for the purposes of complete VAT invoices and input VAT recovery.

Further information:
EY has a global indirect tax practice which is experienced in providing support in relation to technical VAT issues. If you would like to discuss any case generally or in relation to your own circumstances, please speak with your usual EY indirect tax contact.