Welcome to the latest edition of EY VAT News, which provides a roundup of indirect tax developments over the summer. Headlines include the following:

- The CJEU has released two judgments concerning VAT deduction against incomplete invoices. In the Senatex case, the CJEU held that incomplete invoices can be adjusted retrospectively, such that the right to deduct VAT remains in the period in which the original invoice was raised. In the Barlis case, the CJEU held that VAT may still be deducted against invoices which are incomplete, as long as the tax authorities have available all the information necessary to establish that the supplier has accounted for VAT correctly and that the customer is entitled to deduct that VAT. Please contact Rosie Higgins for further information.

- EY will be holding the next EY indirect tax ReFIT Forum on Tuesday, 11 October, at our More London Place offices. The event is aimed at personnel working in finance, tax or VAT in a retail environment. If you would like to attend the event, please contact Simon Baxter.

- As previously advertised, EY will be holding an indirect tax breakfast seminar on Thursday, 29 September at our More London Place offices. We will assess the ripple effects of the Brexit vote on indirect tax as well as providing an update on other current indirect tax issues and developments. Please contact Alex Dixon to reserve your place.

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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Events

Indirect tax breakfast seminar

EY will be holding an indirect tax breakfast seminar on Thursday, 29 September at 8:30 am at our offices at 1 More London Place. Three months on from the EU referendum, the seminar will ask how indirect tax is being affected and what happens next. We will assess the ripple effects of the Brexit vote on indirect tax and provide an update on other current indirect tax issues and developments.

This interactive session will present an excellent opportunity to understand the important indirect tax challenges that businesses are dealing with.

If you have any particular issues you would like to be covered at the event please let us know. Please contact Alex Dixon for further information.

EY ReFIT Forum

On Tuesday, 11 October, we will be hosting the next EY ReFIT Forum at our More London Place offices.

ReFIT is an indirect tax forum for people working in Finance/Tax/VAT in a retail environment. The agenda is VAT focussed, but other tax issues which are relevant will also be covered. As well as helping to make sense of the latest changes, updates and caselaw, the event provides an opportunity to network with peers.

The event will run from 10:00am - 1:00pm and will finish with a buffet lunch. The agenda is set out below:

- Retail Sector Update
- Caselaw Update
- Vouchers directive – a detailed review
- Transfer Pricing – VAT pitfalls and opportunities
- Brexit update
- Hot Topics
- Open Forum

If you would like to attend the event, please contact Simon Baxter.

Webcasts

India : The implementation of the new Indian GST regime

On Tuesday, 27 September 2016 (7.00pm local time), we will be holding a webcast on the implementation of GST in India.

The implementation of India's new GST regime which takes effect from 1 April 2017, will require businesses operating in India, as well as overseas businesses liaising with their Indian counterparts, to overhaul their entire indirect tax processes. The magnitude and complexity of these changes, combined with the relatively short period for implementing them, will create challenges for businesses. To assist businesses with these changes, our panel will discuss the GST implementation and next steps in detail.

To register for the webcast, please click here.
Kuwait : Tax update

EY Kuwait is hosting a Tax update webcast on 21 September 2016. This webcast will cover proposed new tax laws and recent determinations and practices. Specifically from an indirect tax perspective, the webcast will cover the implementation of VAT in Kuwait and the proposed excise tax.

To register for the webcast, please click here.

Finance Acts

Finance Act 2016 receives Royal Assent

On 15 September 2016, the Finance Act received Royal Assent and has now come into force. The Finance Bill is available here.

Draft Finance Bill 2017 clauses

Jane Ellison, Financial Secretary to the Treasury, has announced that draft clauses to be included in Finance Bill 2017 will be published on Monday, 5 December 2016. This consultation on draft legislation will be open until Monday, 30 January 2017. This follows the Autumn Statement which is scheduled to take place on Wednesday, 23 November 2016.

Please contact Andrew Bradford for further information.

HMRC publications

Online marketplaces selling goods in the UK

Following Royal Assent of the Finance Bill, HMRC has issued guidance for overseas businesses using an online marketplace to sell goods in the UK.

Overseas online retailers must pay UK VAT on items they sell which are stored within the UK at the point of sale. The marketplaces they use can be held liable for the online sellers’ VAT.

Our tax alert provides further details.

Please contact Rosie Higgins for further information.

First Tier Tribunal

Decision: Whether the supply of a development site fell to be zero rated

This appeal covers whether at the time of the supply, where the only part of the development which had been constructed was a boundary wall, the supply could be zero rated. Although the taxpayer was unsuccessful, the case provides an interesting analysis regarding the concept of ‘building’ and the importance of planning consent timing.

TC05356 Cavendish Green Ltd and HMRC

The First Tier Tribunal (FTT) has released its decision in this appeal concerning the supply of a development site and whether it could be zero rated, when at the time of the supply, the only part of the development which had been constructed was a boundary wall.

In dismissing the appeal, the FTT concluded that whilst a boundary wall built as part of a development to include a house can constitute a ‘building designed as a dwelling’ for VAT purposes, it is necessary to consider all of the conditions provided by VATA 1994, Schedule 8, Group 5 in order to determine whether there has been a zero rated supply.
In order for there to be a ‘building designed as a dwelling’ for the purpose of Item 1(a) there must be planning consent in place in respect of that dwelling at the time of the grant and its construction must, so far as it has progressed at the time of the grant, be in accordance with that consent. At the time of the supply there was no valid planning consent in place and consequently the FTT held that Note 2(d), and therefore the conditions for zero rating, were not satisfied. The appellant made an exempt supply against which VAT recovery should be restricted.

Comment: An interesting case which explores the principles of what can be included as a ‘building’ and the importance of timing with regard to obtaining appropriate planning consent in order to meet the requirements for zero rating. The FTT refused to apply note 2(d) retrospectively once the building had been completed and planning consent granted.

Please contact Ali Anderson for further information.

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Court of Justice of the European Union (CJEU)

Judgment : Invoices require sufficient detail to confirm the nature and time of supply

C-516/14 Barlis

On 15 September 2016, the CJEU delivered its judgment in this Portuguese referral. Barlis received services from a law firm which issued its invoices with a generic description of ‘legal services rendered between specific dates’ or for ‘legal services to a present date’. Barlis sought to recover the VAT on the invoices but the Portuguese tax authorities rejected the claim on the grounds that the invoices did not meet the requirements provided for in the Portuguese VAT Code. The referring court asked whether the Portuguese tax authority was permitted under EU law, to deny input tax recovery under these circumstances where the business may, in accordance with the principle of collaboration, obtain the additional information which it deems necessary to confirm the existence and detailed characteristics of the relevant transactions.

In broad agreement with the AG, the CJEU held that:

- Article 226(6) of Directive 2006/112 must be interpreted as meaning that invoices providing only a broad description of the services eg ‘legal services’ with insufficient detail to determine the nature or VAT rate applicable to the supply, do not in principle comply with the requirements of that Article. It is however, for the national court to determine whether the description provides sufficient detail for this purpose, taking into account all available information.

- Article 226(7) requires the invoice to show the date of supply. For continuous supplies of services, this requires a start and end date. It must therefore be considered that an invoice referring only to ‘legal services rendered until the present date’, without specifying any starting date, does not satisfy the conditions required. Again, it is for the national court to determine whether the description provides sufficient detail for this purpose, taking into account all available information.

- In considering, the consequence of a failure to comply with Article 226(6) and (7), the court found that the right of VAT deduction is a fundamental principle of the common system of VAT. The principle of the neutrality of VAT requires deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some formal conditions. Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied, they cannot, in relation to the right of the taxable person to deduct that tax, impose additional conditions. It is therefore for the national court to take into account all the information included in the invoices at issue and in the annexes produced by Barlis in order to ascertain whether the substantive conditions for its right to deduct VAT are satisfied.

Comment: The judgment highlights the importance of ensuring that invoices and supporting documentation provide sufficient information to enable the nature and time of a supply to be properly established. In particular, the CJEU held that it is necessary to specify the start and end date of a continuous supply of services. However, it also provides clarification regarding the requirement for national courts to consider the substantive requirements for VAT recovery and to consider additional information/evidence. In light of the judgment, businesses may wish to consider their current invoicing processes. Businesses may also want to consider whether they have a claim opportunity where VAT recovery may have been denied in similar circumstances.

Please contact Rosie Higgins for further information.
**Judgment: Corrected invoices apply retrospectively**

**C-518/14 Senatex Gmbh**

On 15 September 2016, the CJEU delivered its judgment in this German referral. Senatex deducted input tax on the basis of incomplete purchase invoices, in the sense that they did not contain the supplier's VAT registration number. Following a VAT inspection, these invoices were rectified. Notwithstanding those corrections, the German tax authorities disallowed Senatex's input tax claims on the grounds that the initial invoices were not valid VAT invoices and the requirements for input tax deduction were not met until those invoices had been corrected. The effective net result was that Senatex incurred an interest charge reflecting the intervening period. In this regard, the tax authorities considered that it was not possible for the correction of an invoice to be given retrospective effect to the time the supply was made.

The referring court sought an answer as to whether an incomplete invoice can be corrected with retrospective effect, such that the right to deduct input VAT is retained on the basis of the original invoice and also asked whether Member States may place a time limit on the correction of invoices, failure to comply with which results in a taxable person being refused the right to deduct.

In agreement with the AG, the CJEU held that:

- Where the substantive conditions are met, the correction of formal requirements on an invoice (in the current case to show the correct VAT registration number on the invoice) should be allowed retrospectively, enabling the taxpayer to deduct VAT in the period in which the original invoice was received.

- Member States can impose penalties for failure to comply with the formal conditions for the exercise of the right to deduct VAT to ensure the correct collection of VAT and to prevent evasion, provided that those measures do not go further than is necessary to attain those objectives and do not undermine the neutrality of VAT.

- With regard to timing, the Court did not answer the question of whether, once a tax audit has commenced, input tax may be refused on the grounds that the correction of missing invoice requirements is too late. This was on the basis that the Court considered that the German Tax Authorities had already accepted the corrected invoices submitted.

*Comment: Businesses operating in Germany (and any other relevant member states such as Hungary and Cyprus) where interest has been charged as a result of input VAT recovery against a non-compliant VAT invoice may wish to challenge such charges and consider submitting claims.*

Please contact Rosie Higgins for further information.

**Judgment: Derogation does not apply to a non-economic activity**

**C-400/15 Landkreis**

On 15 September 2016, the CJEU delivered its judgment in this German referral. Landkreis is a local authority which acquired commercial vehicles and equipment which it used mainly for supplies in its capacity as a public authority. However, it also used the vehicles and equipment for supplies to third parties which amounted to 2.65% of the use. VAT was accounted for on these supplies. Landkreis sought to recover 2.65% of the VAT incurred but the tax authority refused the deduction on the ground that the extent of use for the purposes of the Landkreis's business was less than 10% and by derogation the VAT in such circumstances was not deductible.

This case proceeded to judgment without a written Advocate General's opinion.

The CJEU held that:

- It is necessary to consider whether the term 'non business within the derogation covers a situation, such as that in the main proceedings, in which Landkreis carries out activities which fall under its responsibility as a public authority. That is to say, non-economic activities, which fall outside the scope of VAT.
In accordance with the principle of fiscal neutrality, the deduction system is meant to relieve a business entirely of the burden of the VAT payable or paid in the course of all its economic activities, this requirement is not met, however, if the right to deduct is excluded where the extent of use of business goods for economic activities is less than 10%.

The derogation must be interpreted as meaning that it does not apply to a situation in which the goods or services that an undertaking acquires are used, to an extent greater than 90%, for non-economic activities, which fall outside the scope of VAT.

Comment: This judgment confirms that a distinction should be made between economic and non-economic activities and business use and non-business (private) use. Businesses may wish to consider whether this judgment provides an opportunity to claim for previously denied input tax recovery under the derogation. This could include non-profit making activities carried on by associations and charities, purchasing and holding shares in companies, non-occupancy of buildings etc.

Referrals

The CJEU website shows the following new referrals:

- **C-396/16 T-2** - Slovenian referral, asking various questions concerning whether arrangements with creditors, which have been approved by judicial decree, result in a requirement to adjust the amount of input VAT to be deducted.

- **C-308/16 Kozuba Premium Selection sp. z o.o.** - Polish referral asking whether Article 135(1)(j) of Council Directive 2006/112/EC precludes a national provision under which the supply of buildings and civil engineering works (or parts thereof) is exempt save where: the supply is made within the period of first occupation or prior to the first occupation; the period between the first occupation and the supply was shorter than 2 years following their erection or upgrade if the expenditure incurred on the upgrade constituted at least 30% of the initial value.

- **C-307/16 Stanisław Pieńkowski** - Polish referral asking whether national law which, under certain circumstances, excludes exemption on exportation is compatible with EU law.

- **C-273/16 Federal Express** - Italian referral asking whether under EU law, the only condition in order for connected services relating to the importation of goods not to be liable to VAT is that their value is included in the taxable amount, regardless of whether or not the goods in question were in fact subject to customs duties, at the time of their importation; and is it therefore incompatible with EU law if domestic rules provide that in every case, and therefore also in the case of imports that are not liable to VAT, that there has to be compliance with the additional requirement that those imports must in fact be liable to VAT (and customs duty must in fact be paid) at the time of the importation of such goods.

- **C-386/16 Toridas** - Lithuanian referral regarding the intra community supply of goods asking whether exemption applies where: the supplier is established in a member state; the customer is a taxable person in a second member state; and before the supply is entered into, the customer expresses an intention to sell the goods immediately (before removal) to a taxable person established in a third member state. The referral also asks whether the first question is affected in circumstances where part of the goods are subject to processing on instruction from the customer prior to transport.

- **C-387/16 Nidera B.V** - Lithuanian referral asking whether Article 183 of Council Directive 2006/112 read in conjunction with the principle of fiscal neutrality, should be interpreted as precluding a reduction in the interest that is normally payable under national law on a VAT overpayment (excess) which was not refunded (set off) in due time.

Calendar update

**Thursday 22 September 2016:**

**Opinion** – **C-471/15 Sjelle Autogenbrug** - Danish referral asking whether the sale of spare parts removed from redundant vehicles may be regarded as second-hand goods for the purposes of the VAT margin scheme.
Thursday 29 September 2016:

Opinion – C-592/15 British Film Institute - UK referral from the Court of Appeal asking whether the cultural services exemption under Article 13A(1)(n) of the Sixth Directive (now Article 132(1)(n) of the VAT Directive) has direct effect, so as to exempt the taxpayer's supplies (admission to showings of films), in the absence of any domestic implementing legislation. The referral also asks whether any discretion is given to Member States to discriminate between cultural services in their application of the exemption. Please contact Damian Shirley for further information. This case may be of interest to any eligible bodies which supply cultural services, but have been denied exemption by HMRC on the ground that the services in question are not listed in UK law.

Wednesday 5 October 2016:

Judgment – C-412/15 TMD - German referral asking whether the VAT exemption for the supply of human blood under Article 132(1)(d) of the VAT Directive also covers the supply of blood plasma obtained from human blood.

Thursday 6 October 2016:

Opinion – C-326/15 DNB Banka - Latvian referral asking various questions concerning the application of the EU VAT cost-sharing exemption. This exemption, which is provided for under Article 132(1)(f) of the VAT Directive, applies when two or more organisations (whether businesses or otherwise) with exempt and/or non-business activities join together on a cooperative basis to form a separate, independent entity - a cost sharing group (CSG) - to supply themselves with certain qualifying services at cost and exempt from VAT. The referral addresses various issues, including the consequences where the members of a CSG are established in separate EU Member States in which the exemption has been implemented differently, whether the fact that transactions may be subject to transfer pricing rules for direct tax purposes precludes the application of the exemption, and whether the exemption applies to services received from third countries. Please contact Simon Harris for further information.

Opinion – C-274/15 Commission v Luxembourg - infringement proceedings brought by the European Commission against Luxembourg over its domestic implementation of the EU VAT cost-sharing exemption. The Commission considers that various aspects of Luxembourg's current rules are incompatible with EU law. Please contact Simon Harris for further information.

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EY Global Tax Alerts

Mexico

The Mexican Tax Authority (SAT) has announced that e-audits will begin in full during September 2016. These audits will identify inconsistencies between the tax obligations reported by taxpayers and the financial information available to the SAT in its database.

On 8 September 2016, Mexico's President, Enrique Peña Nieto, presented the 2017 tax reform package (the Proposed Reform) to the Mexican Congress for approval. The Proposed Reform includes amendments to the Income Tax Law, Value Added Tax Law, Federal Fiscal Code, Hydrocarbons Revenue Law (HRL), and Federal Duties Law. The reform package must now be debated and approved by the two chambers of Congress. If passed and enacted, the reform will be effective as of 1 January 2017.

Italy

The Italian Government recently introduced an important measure designed to promote the use of electronic invoicing between taxpayers, which will apply as of 1 January 2017. The measure promotes the implementation between private businesses of: (a) electronic invoicing and (b) electronic transmission of payments.

India

The President of India has given his assent converting the Constitutional Amendment Bill to introduce the Goods and Services Tax (GST) into legislation. This follows the support of more than 15 Indian States ratifying the GST Bill. The roadmap and the potential timelines for next steps are outlined in our tax alert.
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.