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

- HMRC has set out its position on the use of tripartite contracts to evidence an employer’s entitlement to deduct VAT paid on services relating to the management of defined benefit pension schemes. Please contact Andrew Bailey for further information.
- The Court of Justice of the European Union (CJEU) has released the Advocate General’s opinion in the joined cases of Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG and Marenave Schiffahrts AG concerning the VAT recovery position of holding companies and the restriction of VAT grouping to legal persons. Our tax alert provides details of the opinion and its potential implications. Please contact Fiona Campbell for further information.
- The European Commission has released its long-awaited decision on whether certain exemptions from the UK aggregates levy constitute unlawful State aid. Please contact Paul O’Neill or Julian Bowden-Williams for further information.

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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Finance Bill 2015

Publication of pre-election Finance Bill and explanatory notes : Royal Assent

The Finance Bill 2015 (known formally as Finance (No. 2) Bill of the current Parliamentary session) was published on 24 March 2015, together with explanatory notes. Our tax alert provides an overview of the key matters contained in the material released on 24 March 2015, as well as highlighting those measures which are, subject to the forthcoming election, to be deferred to later Finance Bills.

The pre-election Finance Bill, which contains 127 Clauses, 21 Schedules and runs to 340 pages, can be accessed by clicking here. The legislation relating to indirect taxes can be found at Clauses 53 to 67 and Schedule 15. The explanatory notes, which run to 258 pages, can be accessed by clicking here.

The Finance Bill was passed by the House of Commons on 25 March 2015 without amendment. The Finance Bill subsequently completed its House of Lords stages and received Royal Assent on 26 March 2015, becoming the Finance Act 2015. The Finance Act can be accessed by clicking here. Parliament was dissolved on 30 March 2015.

Please contact Kyle Halliday for further information.

HMRC Material

Deduction of VAT on pension fund management costs : PPG and tripartite contracts

As foreshadowed in EY VAT News for the week to 9 March 2015, HMRC has now issued Revenue & Customs Brief 8/2015 setting out its position on the use of tripartite contracts to evidence an employer's entitlement to deduct VAT paid on services relating to the management of defined benefit (DB) pension schemes.

Note this Brief only relates to DB pension fund management services (i.e. the administration of DB pension schemes and the management of their assets), as pension fund management services provided in respect of defined contribution pension schemes should be exempt from VAT following the CJEU judgment in the case of ATP PensionService A/S (C-464/12) (see Revenue & Customs Brief 44/2014 for further information).

Following the CJEU judgment in the case of PPG Holdings BV (C-26/12), HMRC previously announced (in Revenue & Customs Brief 43/2014) that employers may deduct VAT paid on DB pension fund management services, subject to the normal partial exemption rules, provided the employer is a party to the contract for those services and has paid for them. This latest Brief outlines the specific circumstances in which HMRC will accept that tripartite contracts between the service provider, pension scheme trustees and employer meet the condition that the employer must contract for the services.

Where the tripartite contract demonstrates that the employer is the recipient of a supply of DB pension fund management services and it has been issued with a valid VAT invoice for the full cost of the supply which it pays to the service provider directly, the employer may deduct the VAT incurred on those services in line with its residual recovery position. In this latter regard, HMRC does not accept that an equivalent increase in contributions to the pension fund or any payment that is made by, or through, the pension fund constitutes payment by the employer. If the employer recharges the net cost of those services to the pension scheme, HMRC considers that the recharge is consideration for an onward taxable supply and VAT is due accordingly.

The transitional period announced in earlier Briefs during which the pension scheme and employer may continue to apply a 70/30 costs split in line with previous HMRC policy will continue until 31 December 2015.

HMRC will provide further guidance on the wider impacts of the PPG judgment in the summer.
Comment: Any employers operating a DB pension scheme may wish to review existing contracts with service providers for the provision and payment of pension fund management services and consider whether there is scope for making a retrospective VAT refund claim, or whether these contractual/payment arrangements may need to be revised going forward (in light of HMRC’s latest guidance) in order to maximise the recovery of VAT on related costs.

Please contact Andrew Bailey for further information.

Restricting the deduction of VAT relating to foreign branches: Draft legislation

At Budget 2015, a new measure was announced which will mean that supplies made by foreign branches can no longer be taken into account when calculating how much VAT incurred on overhead costs can be deducted by partly exempt businesses in the UK. This measure therefore seeks to restrict the ability of UK partly exempt businesses to recover VAT on overhead costs used to support foreign branches. It is intended that the new rules will have effect for partial exemption tax years beginning on or after 1 August 2015. Our Budget alert provides further details.

On 18 March 2015, HMRC published, for external comment, draft legislation (comprising a draft Statutory Instrument and Explanatory Memorandum) and a Tax Information and Impact Note (TIIN) in relation to this measure. The draft legislation sets out the changes to the VAT Regulations 1995 relating to input tax and partial exemption. Comments on the draft legislation are invited by 10 June 2015.

The draft Statutory Instrument, the Explanatory Memorandum and the TIIN can be accessed by clicking here, here and here respectively.

Please contact Simon Harris for further information.

VAT refunds for palliative care charities and medical courier charities

Autumn Statement 2014 announced that, from 1 April 2015, search and rescue charities and air ambulance charities will be eligible to claim a refund of VAT incurred on purchases of goods and services used for their non-business activities. At Budget 2015, it was announced that palliative care (hospice) charities and medical courier charities will similarly be eligible to claim VAT refunds in relation to their non-business activities. Tax Information and Impact Notes (TIINs) have been published in relation to these two Budget measures.

The TIINs can be accessed by clicking here and here respectively.

Comment: Clause 66 of the Finance Act 2015 makes provision for all of the aforementioned charities to claim VAT refunds in relation to their non-business activities.

Please contact Audrey Fearing for further information.

2015 EU VAT place of supply rule changes and the Mini One Stop Shop: Updated guidance

HMRC has issued updated guidance on the 2015 changes to the EU VAT place of supply rules for business-to-consumer (B2C) supplies of telecoms, broadcasting and electronic services (digital services) and the Mini One Stop Shop (MOSS). The updates include a revised version of the VAT MOSS flowchart (intended to help businesses decide if they are affected by the rule changes) and further guidance on the VAT implications of selling through third-party digital platforms. UK micro-businesses trading below the current UK VAT registration threshold who register for the MOSS can, until 30 June 2015, base their ‘customer location’ VAT accounting decisions on information provided by their payment service provider.

The updated guidance can be accessed by clicking here.

Please contact Rosie Higgins for further information.

Outcome of State aid investigation into UK aggregates levy exemptions

On 27 March 2015, the European Commission released its long-awaited decision on whether certain exemptions from the UK aggregates levy constitute unlawful State aid. The Commission has announced that, following its State aid investigation, all bar one of the aggregates levy exemptions are in line with State aid rules. The UK Government intends to reinstate these
lawful exemptions with retrospective effect, although it will have to recover any unlawful aid provided by the one exemption (part of the shale aggregate exemption) that was held to be contrary to State aid rules, subject to a de minimis threshold. Further details are provided below.

Background

In August 2013, the UK Government received notification that the Commission had decided to open a formal investigation into certain exemptions from the aggregates levy in order to determine whether any of these constituted unlawful State aid. In October 2013, HMRC issued Revenue & Customs Brief 31/2013 announcing the suspension of those exemptions under investigation from 1 April 2014. The Brief stated that these exemptions would be reinstated should they be found to be lawful and any aggregates levy paid on these materials would be refunded.

The decision

In its decision, the Commission has found that all of the exemptions are lawful, with the exception of certain elements of the exemption for shale. Where shale was used in the following circumstances, the Commission has decided that there was unlawful State aid:

- Material wholly or mainly consisting of shale that is deliberately extracted for commercial exploitation as aggregate, including shale occurring as a by-product of fresh quarrying of other taxed materials; and,
- Aggregate consisting wholly of the spoil from any process by which shale that is deliberately extracted for commercial exploitation as aggregate has been separated from other rock after being extracted or won with that other rock.

The Commission has ordered the UK Government to recover the unlawful aid from businesses which produced this type of shale aggregate between 2002 and 2014, although the decision makes clear that aid below specified thresholds does not need to be recovered where relevant conditions are met.

The Commission's press release can be accessed by clicking here.

What now?

On 27 March 2015, HMRC issued Revenue & Customs Brief 6/2015 and an accompanying press release confirming that all the exemptions found to be lawful will be reinstated retrospectively from 1 April 2014 and that shale will be exempted in a way that reflects the Commission's decision. HMRC also confirmed that aggregates levy paid on the now exempt materials will be refunded with interest and that full details of the repayment process will be released in the summer.

However, HMRC states that it will require evidence to demonstrate that claimants have not passed on the cost of the tax to their customers and that the aggregate producer would not be unjustly enriched by the repayment. Alternatively, HMRC will refund the overpaid aggregates levy but only on the basis that the aggregate producer will reimburse those customers with the tax charged.

Shale producers look to be particularly hard hit by the Commission's decision, facing a potential retrospective liability of twelve years' worth of aggregates levy on the tonnages of shale sold.

How EY can help?

EY has extensive experience of assisting businesses with the recovery of overpaid environmental taxes and overcoming HMRC's challenges in respect of unjust enrichment and unlocking withheld repayments for our clients. Our team of specialists is also shortly to be joined by Dave Fitzgerald, the former HMRC head of aggregates levy policy, which increases our capability to advise on and resolve aggregates levy issues for clients.

If you think you may have an issue which arises from, or is related to, these recent announcements by the Commission and HMRC (e.g. the reclaim of aggregates levy paid during the suspension period, unjust enrichment issues arising from this, etc.) or a more general aggregates levy query, please contact either Paul O'Neill or Julian Bowden-Williams.

Aggregates levy tax credits in Northern Ireland

HMRC has issued Revenue & Customs Brief 5/2015 which gives further information about the introduction of a tax credit for aggregate commercially exploited in Northern Ireland. Revenue & Customs Brief 41/2014 gave details about the introduction of an 80% aggregates levy credit for aggregate commercially exploited in Northern Ireland between 1 April 2004 and 30
November 2010 following its importation from another EU Member State. This latest Brief gives further information about how the new scheme will operate.

The Brief can be accessed by clicking here.

Please contact Paul O'Neill or Julian Bowden-Williams for further information.

**Displaying air passenger duty in air travel pricing : Call for evidence**

Following the announcement in the Autumn Statement 2014, the Government is seeking views on changes to the way air passenger duty (APD) is displayed in air travel ticket pricing.

The Government wishes APD to be identified and distinctly listed to provide clarity to consumers. In particular, this will allow consumers to see whether the taxes included in the air fare price relate to APD or to other countries’ taxes. It will also ensure that consumers have sight of the pass through of tax rate changes. The Government’s preferred approach is to mandate the separate display of APD by amending the Air Services (Pricing) Regulations. The amendment would widen the scope of the existing requirements to publish information about air fares by including a requirement that UK APD should be individually and distinctly indicated. The purpose of this call for evidence is to seek views and evidence which will assist in the preparation of an impact assessment and help the Government to implement any changes in the most appropriate way. Comments are invited by 19 May 2015.

The consultation document can be accessed by clicking here.

Please contact Kal Siddique for further information.

**Excise duty : Introduction of a new rebated fuel marker from 1 April 2015**

HMRC has issued Revenue & Customs Brief 4/2015 which provides information about the introduction of a new chemical marker for rebated fuel from 1 April 2015. Markers are used in off-road diesel (more commonly known in the UK as red diesel) and kerosene, primarily used as heating oil. The new marker, which will be used in addition to existing ones, is intended to boost HMRC’s fight against illegal fuel laundering.

The Brief can be accessed by clicking here.

**Gambling tax service: Online service guide for betting and gaming duties**

Organisations with obligations in respect of general betting duty, pool betting duty or remote gaming duty can use HMRC’s online gambling tax service. This allows organisations to register for the aforementioned betting and gaming duties, make changes to their registration details, submit returns and view their account. HMRC has provided guidance on how to register, file returns and keep details in the gambling tax service up to date.

The guidance can be accessed by clicking here.

**Upper Tribunal**

**Decision : Sale of motor cars on part-exchange terms : Value of supply of replacement car**

**N & M Walkingshaw Ltd v HMRC**

The taxpayer, which sold motor cars on part-exchange terms, failed in its attempt to argue that to the extent the negotiated allowance for the part-exchange car exceeded its trade value, this should be treated as a discount on the price of the replacement car.

The Upper Tribunal released its decision on 18 March 2015 in this appeal by N & M Walkingshaw Ltd against First Tier Tribunal decision TC02677 concerning HMRC’s refusal of the taxpayer’s Fleming claim for output tax allegedly overpaid on the sale of motor cars on part-exchange terms in the period 1978 to 1992.

Essentially, the disputed issue was the value of a supply of a motor car (the replacement car) by the taxpayer to its customer where the customer had offered a car in part-exchange (the part exchange car) and the taxpayer had paid a part-exchange
price in excess of the true value of the part-exchange car (referred to as an over-allowance). The taxpayer contended that what needed to be ascertained was the open market value of the replacement car, which should be determined by reference to the consideration in money that would otherwise have been payable in a cash transaction. According to the taxpayer, an equivalent cash transaction would have given rise to a discount on the price of the replacement car, and the best evidence of that discount was the amount of the over-allowance. The effect was to reduce the value of the supply of the replacement car by the amount of the over-allowance. HMRC contended that the value of the replacement car was what the taxpayer and the customer agreed it was. Those parties were independent, unconnected parties, acting at arm's length. The negotiated and agreed price of the replacement car between unconnected parties was, in HMRC's view, the best evidence of its open market value.

The First Tier Tribunal determined the disputed issue in favour of HMRC and dismissed the taxpayer's appeal. Specifically, the First Tier Tribunal held that the open market value of the replacement car was the price agreed for that car by the parties. The value of the consideration was the cash amount plus the agreed price for the part-exchange car, including the over-allowance. The taxpayer appealed against that decision. The Upper Tribunal observed that the First Tier Tribunal had found as a fact that the over-allowance was part of the agreed price for the part-exchange car and that the price for the replacement car was agreed without any discount. There was no scope for treating the value of the replacement car as having been discounted. Further, once it was accepted that the open market value had to be assessed in the context of the actual transaction concerned, the question was what amount in money a person at arm's length would pay for the replacement car in the context of a part-exchange transaction which had attributed an agreed price to the part-exchange car. The consideration depended on the amount of that agreed price and it was immaterial whether or not it included an over-allowance. For these reasons, the Upper Tribunal dismissed the taxpayer's appeal.

The full decision can be accessed by clicking here.

Court of Appeal

Littlewoods Retail: Availability of compound interest on overpaid VAT

Over the course of the last week, the Court of Appeal has been hearing HMRC’s appeal against the High Court’s judgment in favour of Littlewoods Retail Ltd and others. This case concerns the availability of compound interest on refunds of overpaid VAT, in circumstances where the VAT was paid and collected in breach of EU law. The High Court found against HMRC, holding that the Littlewoods claimants were entitled to compound interest where VAT had been overpaid. The Court of Appeal's judgment is expected later this year.

The High Court's judgment (released on 28 March 2014) can be accessed by clicking here.

Please contact Mitchell Moss for further information.

Court of Justice of the European Union (CJEU)

Opinion: VAT recovery position of holding companies: Eligibility for VAT grouping

C-108/14 Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG
C-109/14 Marenave Schiffahrts AG

The Advocate General considered the VAT recovery position of holding companies and whether entities which are not legal persons are eligible for VAT grouping.

On 26 March 2015, the CJEU delivered the opinion of Advocate General Mengozzi in these joined German referrals concerning the appropriate level of VAT recovery for a holding company which procures services in order to obtain finance for the purchase of shares in subsidiary companies, in circumstances where the holding company intends to, and does subsequently, provide taxable management services to those subsidiaries. The referrals also ask whether entities which are not legal persons (i.e. entities other than companies, such as partnerships) are eligible for VAT grouping under EU law. Our tax alert provides details of the opinion and its potential implications.

We await to see if the CJEU follows the Advocate General's opinion.

The full opinion can be accessed by clicking here.
Comment: These cases will be of particular interest in the UK. In September 2014, HMRC published revised guidance concerning the VAT recovery position of holding companies following the litigation involving BAA Ltd (see Revenue & Customs Brief 32/2014). At the time, HMRC acknowledged that the CJEU judgment in these German referrals would most likely be relevant to this guidance. HMRC will review its policy in the light of the CJEU judgment. Also, under UK law, only 'bodies corporate' are eligible for VAT grouping.

Please contact Fiona Campbell for further information.

Judgment : Compulsory sale of property : Requirement to calculate, collect and pay VAT

C-499/13 Marian Macikowski

The CJEU considered the person liable for payment of VAT on the supply of immovable property sold by a judgment debtor in a compulsory sale procedure.

On 26 March 2015, the CJEU delivered its judgment in this Polish referral concerning the compatibility with EU law of national provisions requiring a court enforcement officer, as paying agent, to calculate, collect and pay the VAT due on the enforced auction sale of immovable property owned by a debtor taxable person, without being able to deduct the input VAT paid by that taxable person in the tax period during which the sale took place. For completeness, the CJEU delivered the opinion of Advocate General Kokott on 6 November 2014. The CJEU agreed with the Advocate General that the relevant national provisions were compatible with EU law.

The full judgment can be accessed by clicking here.

Calendar update

Thursday 16 April 2015 - Judgment C-42/14 Wojskowa Agencja Mieszkaniami w Warszawie - Polish referral asking whether a landlord should be treated as making supplies for VAT purposes when it simply passes on third party costs of electricity, heating, water and waste collection to its tenants who directly use those goods and services and, if so, whether such amounts constitute further consideration for the supply of the accommodation (i.e. rent) or separate supplies (case proceeding to judgment without a written Advocate General's opinion). Please contact Ali Anderson for further information.

Tuesday 21 April 2015 - Judgment C-114/14 European Commission v Sweden - infringement proceedings against Sweden over its application of VAT on postal services. The Commission considers that Sweden applies VAT to some postal services which, under EU law, should properly be exempt from VAT (case proceeding to judgment without a written Advocate General's opinion).

Wednesday 22 April 2015 - Opinion C-126/14 Sveda UAB - Lithuanian referral concerning the right to deduct input tax on the acquisition by a taxable person of capital goods which are intended for use by members of the public free of charge, but which also constitute a means of attracting visitors to the taxable person's place of business.

Thursday 23 April 2015 - Judgment C-16/14 Property Development Company NV - Belgian referral concerning the calculation of the taxable amount of a deemed supply in circumstances where goods (presumably immovable property) forming part of a taxable person's business assets are used for non-business purposes (case proceeding to judgment without a written Advocate General's opinion).

Thursday 23 April 2015 - Judgment C-111/14 GST - Sarviz AG Germania - Bulgarian referral concerning the person(s) liable for payment of VAT - whether the supplier or the customer, exclusively or jointly - in circumstances where taxable supplies of goods or services are carried out by a taxable person who is not established in Bulgaria (the Member State in which the VAT is due) for a Bulgarian recipient (case proceeding to judgment without a written Advocate General's opinion).

Thursday 30 April 2015 - Judgment C-97/14 SMK Kft. - Hungarian referral concerning the place of supply rules in force until 1 January 2010 for services involving work on goods and the provision of EU law which shifted the place of supply to the Member State in which the customer was registered for VAT, provided this was different from the Member State in which the services were physically performed and the goods subsequently left the country of performance (case proceeding to judgment without a written Advocate General's opinion).

Thursday 30 April 2015 - Opinion C-105/14 Criminal proceedings against Ivo Taricco and others - Italian referral concerning VAT related criminal proceedings against a number of individuals and the application of domestic time limits.
**European Commission**

**VAT cross-border rulings pilot project extended to September 2018**

The European Commission has announced that the EU pilot project of VAT cross-border rulings, set up by the EU VAT Forum in June 2013 and previously scheduled to run until the end of 2014, will now continue to run until 30 September 2018. The pilot project allows taxable persons to obtain advance rulings on the VAT treatment of complex cross-border transactions involving two or more of the participating Member States. At present, 15 Member States participate in this project (Belgium, Estonia, Spain, France, Cyprus, Latvia, Lithuania, Malta, Hungary, the Netherlands, Portugal, Slovenia, Finland, Sweden and the UK). The Commission has also published updated (as of March 2015) details of those cross-border rulings where agreement was obtained from all VAT authorities concerned.

More detailed information on the pilot project and the current list of cross-border rulings can be accessed by clicking here and here respectively.

*Comment: There was some cynicism when the pilot project was set up as trying to get rulings on cross-border transactions can be challenging. However, it appears that the project is working well and businesses in the relevant sectors may find the existing rulings helpful. Others facing cross-border challenges in different Member States may also wish to consider the project in order to obtain clarification and certainty over the VAT issues and obligations.*

**Infringement proceedings : France : Reduced VAT rate : Products of agricultural origin**

As part of its monthly package of infringement decisions for March 2015, the European Commission announced that it has formally asked France to apply the standard rate of VAT to products of agricultural origin which are not intended for use in food products or in agricultural production. France applies a reduced rate of VAT to certain goods used in the production of non-food industrial products, which the Commission considers is contrary to EU law. The Commission's request takes the form of a reasoned opinion, the second stage of infringement proceedings. In the absence of France providing a satisfactory response within two months, the Commission may decide to refer the matter to the CJEU.

The Commission's announcement on its March infringements package can be accessed by clicking here.

**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.