Welcome to the latest edition of EY VAT News, which provides a roundup of indirect tax developments.

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

Previous editions of EY VAT News can be found here.

In this edition:

**Court of Justice of the European Union**

**C-471/15 Sjelle Autogenbrug**

**Judgment:** Spare parts removed from ‘scrapped vehicles’ are second-hand goods for the purpose of the VAT margin scheme

On 18 January 2017, the Court of Justice of the European Union (CJEU) released its decision in this Danish referral. Sjelle Autogenbrug (SA) operates as a vehicle recycling business whose main activity is the resale of motor vehicle spare parts removed from scrapped (redundant) vehicles purchased from private individuals or insurance companies. No VAT is charged on the purchase of the vehicles and SA requested permission from the Danish tax authority to apply the special margin scheme for second hand goods to the sale of the spare parts removed from these vehicles. The tax authority refused on the grounds that the VAT rules applicable to second hand goods do not apply to the resale of spare parts by an auto scrap dealer as the nature of the goods sold, differ to the original goods purchased, i.e. the vehicle changes in that it becomes spare parts.
The tax authority also contended that it would be impossible to calculate a margin on the sale of the parts as the buying price for each part could not be ascertained.

Agreeing with the Advocate General (AG), the CJEU has held that second hand goods are defined as movable tangible property that is suitable for further use as it is or, after repair. There is nothing in that definition or even in the body of the directive to suggest that the EU legislature intended to exclude property which originates from other property in which it was incorporated as a component. The fact that used property which forms part of other property is separated from the latter does not call into question the characterisation of the property removed as ‘second-hand goods’, to the extent that it may be reused ‘as it is or after repair’.

In order to be characterised as ‘second-hand goods’, it is only necessary that the used property has maintained the functionalities it possessed when new, and that it may, therefore, be reused as it is or after repair. That is the case of motor vehicle parts removed from a scrapped vehicle. Failure to apply these arrangements would be contrary to the objective of the special margin scheme which seeks to avoid double taxation and distortion of competition.

The CJEU recognised the difficulties in determining the appropriate margin for the goods sold but concluded that any practical difficulties in applying the profit margin scheme cannot justify excluding certain categories of taxable dealers from that scheme. In conclusion the CJEU found that used parts, from scrapped vehicles purchased from a private individual or insurance company, intended to be sold as spare parts, constitute ‘second-hand goods’, with the result that the supplies of such parts are subject to the application of the profit margin scheme.

For further information please contact Jamie Ratcliffe

C-37/16 SAWP

Judgment: Holders of reproduction rights do not make a supply of services to producers and importers of blank media and recording and reproduction devices

On 18 January 2017, the Court of Justice of the European Union (CJEU) released its decision in this Polish referral. The Society for performers of musical works with or without words (SAWP) had requested that the Minister for Finance adopt a position as to whether fees required to be paid on the value of blank media, recording and reproduction devices (“recording devices”) by the producers and importers of such devices are subject to VAT.

The fees in question are pursuant to Polish copyright law which requires that producers and importers of recording devices pay to a collective management organisation acting on behalf of authors, performers, phonogram producers, videogram producers and publishers, fees not exceeding 3% of the value of sales of those devices.

The Minister for Finance stated that the sums paid to SAWP constitute a payment for the use of the copyright or related rights that are connected with the sale of recording devices and that, therefore, those sums must be regarded as remuneration for the services supplied by the holders of copyright or related rights and must, as such, be subject to VAT.

The Regional Administrative Court allowed SAWP’s appeal against this decision but the Supreme Administrative Court subsequently referred the case to the CJEU.

The CJEU held that, in accordance with settled case-law, a supply of services is made for consideration only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. The remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

In the present instance, it does not appear that there is a legal relationship pursuant to which there is reciprocal performance between the holders of reproduction rights or, as the case may be, the organisation collectively managing such rights and the producers/importers of the recording devices. Indeed, the obligation to pay the fees, is owed by those producers and importers by virtue of the Polish legislation which also determines the value. The obligation to pay the fees cannot be regarded as resulting from the supply of a service for which it constitutes the direct consideration.

The fees are intended to finance fair compensation for holders of reproduction rights. However, the fair compensation does not constitute the direct consideration for any supply of services, because it is linked to the harm resulting for those rightholders from the reproduction of their protected works without their authorisation. Consequently, no transaction takes place in return for payment of the fees for the purposes of Article 2(1)(c) of the VAT Directive.
Comment: This case and the requirement to pay into a legislated ‘compensatory fund’ appears quite niche but consideration should be given if similar payments are made into funds where VAT is currently brought to account where potentially there is no supply.

Judgment: Road tolls charged by a public body are not taxable

C-344/15 National Roads Authority

On 19 January 2017, the Court of Justice of the European Union (CJEU) released its decision in this Irish referral. The case considers whether a public body, which operates a toll road, should be deemed to be in competition with private operators of different toll roads, such that treatment of the public body as a non-taxable person would lead to a significant distortion of competition.

The majority of national toll roads in Ireland are managed by private bodies on the basis of agreements concluded with the National Roads Authority, now Transport Infrastructure Ireland, (NRA). However, two of those roads, are managed by the NRA. VAT had been applied to the tolls charged for roads it operated but the NRA later requested a refund, arguing that, as provided by Article 13(1), Directive 2006/112/EC, as a body governed by public law, it is not a taxable person for VAT purposes and the charges should not have been subject to VAT.

The Irish Revenue Commissioners refused to repay the VAT on the grounds that its treatment as a non-taxable person would lead to significant distortion of competition pursuant to the second subparagraph of Article 13(1).

For the purpose of the judgment, as the CJEU had not been asked to consider the point, it was not disputed that the NRA, a body governed by public law, acts as a public authority in its activity of making the road infrastructure concerned available on payment of a toll.

In disagreement with the Advocate General, the CJEU held that the primary function of the NRA is to ensure the availability of a safe and efficient network of national roads. The NRA engages in its activity of making the road infrastructure available on payment of a toll within the legal scheme peculiar to it. That activity cannot be regarded as being carried out in competition with that, carried on by private operators collecting tolls on other roads. There is no potential competition either, in so far as the possibility of private operators carrying on the activity in question under the same conditions as the NRA is purely theoretical. As a consequence, as there is no competition, actual or potential, between the NRA and the private operators, VAT should not be applied to the tolls charged on the roads operated by the NRA in its capacity as a public authority.

Comment: The news that VAT should not be charged on toll roads operated by public bodies will be welcomed by motorists. This judgment is in line with the UK position where tolls payable to private sector operators are subject to VAT but those payable to public authorities are outside the scope of VAT.

Referrals

- A Bulgarian referral – C-552/16 Wind Innovation 1, asking whether the second paragraph of Article 176, Directive 2006/112/EC precludes an amendment to national law which provides for compulsory VAT deregistration of a business by reason of liquidation and the loss of the liquidator’s right to decide whether the business should continue to be registered until its removal from the companies register?

The referral also asks whether Article 176 precludes compulsory VAT deregistration where the business meets all conditions for compulsory re-registration for VAT, the business is party to current contracts and states that it has not ceased business and is carrying on an economic activity? If compulsory VAT deregistration is permissible under what circumstance can input tax be deducted on assets taxed upon deregistration?

- Slovakian referral - C-534/16 BB construct s.r.o, asking whether the objective of Article 273, Directive 2006/112/EC is to be interpreted as allowing the tax authorities to require the payment of a tax deposit, up to the value of EUR 500,000, in circumstances where the Director of the business is also a Director in another business with outstanding tax liabilities? Given the potential value of the tax deposit, may it be held that it is consistent with the freedom to conduct a business under Article 16 of the Charter of Fundamental Rights of the European Union (Charter), does not directly force the taxable person to declare bankruptcy, does not constitute discrimination under Article 21(1) of the Charter and does not constitute a breach, in the area of the levying of VAT, of the ne bis in idem principle or of the prohibition on retroactivity under Article 49(1) and (3) of the Charter?
• A Slovakian referral - C-533/16 Volkswagen AG asking whether Directive 2008/9/EC (VAT refunds to taxable persons not established in the member state of refund but established in another member state) and the right to a VAT refund must be interpreted as requiring the satisfaction of two conditions; The supply of goods or services and the inclusion of VAT on the invoice by the supplier? Is it possible for a taxable person who has not been charged VAT on an invoice to claim a VAT refund? Is it in accordance with the principle of proportionality or VAT fiscal neutrality for the time-limit for the tax refund to be calculated from a point at which not all the substantive conditions required to exercise the right to a tax refund were satisfied?

• A Polish referral - C-500/16 Caterpillar Financial Services Poland sp. z o.o asking whether, following the interpretation of the CJEU in its judgment of 17 January 2013 in C-224/11, BGŻ Leasing sp. z o.o, the principles of effectiveness, sincere cooperation and equivalence expressed in Article 4(3) of the Treaty on European Union, or any other principle laid down in EU law, preclude national legislation or a national practice which precludes the refund of an overpayment resulting from the collection of VAT contrary to EU law where, as a result of the action of the national authorities, an individual was unable to exercise his or her rights until after the limitation period for the VAT liability had expired?

• A Polish referral - C-499/16 AZ asking whether national law which determines the VAT rate applicable to pastry goods and cakes based solely on the criterion of the ‘use-by date’ and the ‘best-before date’, infringes the principle of VAT neutrality and the prohibition of unequal treatment?

Calendar Update

Thursday 26 January 2017

Hearing - C-101/16 Paper Consult - Romanian referral, continuing a long-running theme of referrals from Eastern European EU Member States, concerning the right of input tax deduction in respect of transactions considered by the tax authorities to be suspicious, in the presence of irregular conduct on the part of the supplier (specifically, on this occasion, where the supplier has been declared inactive by the tax authorities).

Wednesday 1 February 2017

Opinion – C-26/16 Santogal M-Comércio e Reparação de Automóveis - Portuguese referral concerning the scope of the exemption with credit (zero-rating) under Article 138(2)(a) of the VAT Directive for the intra-Community supply of a new means of transport.

Thursday 9 February 2017

Hearing– C-303/16 Solar Electric Martinique - A French referral asking whether the sale and installation of photovoltaic panels and solar water heaters on buildings, with a view to supplying electricity or hot water to buildings, constitutes a single transaction that may be characterised as works of construction.

Judgment – C-21/16 Euro Tyre – A Portuguese referral asking whether a supplier is entitled to zero-rate an intra-Community supply of goods in circumstances where the customer, whilst being registered for VAT in its Member State, is not registered in the VIES database nor is subject in that country to a system of taxation on intra-Community acquisitions of goods.

Wednesday 15 February 2017

Hearing – C-616/15 Commission v Germany - Action brought by the European Commission against the Federal Republic of Germany. The applicant claims that the Court should declare that, by restricting, to groups whose members exercise a limited number of professions, the exemption from VAT for the supply by independent groups of persons carrying on an activity which is exempt from VAT, or in relation to which they are not taxable persons, of services to their members for the direct purposes of the exercise of that activity where those groups merely claim from their members exact reimbursement of their share of the joint expenses, the Federal Republic of Germany has failed to fulfil its obligations under Article 132(1)(f) of the VAT directive.
House of Commons

Treasury Select Committee – Making Tax Digital

At Budget 2015, the government set out its vision for a transformed tax system. In December 2015 it launched the Making Tax Digital Roadmap which detailed how this would be achieved. The Government is proposing that, subject to a relatively small number of exceptions, all businesses will be required to keep their accounting records in a prescribed digital format and submit quarterly updates to HMRC. These updates will be followed by an end of year reconciliation to ensure that the entire year’s activities are properly recorded for tax. It is proposed that businesses will start this form of record keeping and reporting for Income Tax and National Insurance from 1 April 2018 or 1 April 2019, depending on their size, and for VAT from 1 April 2019.

The Government consulted on its proposals over the summer and early autumn of 2016.

On 14 January 2017, the Treasury Select Committee issued its report on HMRC's strategy.

Whilst the report notes that the Committee supports the overall idea of Making Tax Digital, it considers that introducing mandatory digitisation of tax records and quarterly reporting has not yet had its overall benefits proven. The Committee also raised serious concerns around the administrative and cost burden on businesses to introduce and maintain such digital records, as well as the current timescale HMRC is working towards. The report recommends a new approach, including raising the threshold before the regime applies, delaying the introduction, and extensive piloting of the end-to-end system before it is made mandatory for all businesses.

Also, the House of Lords Economic Affairs Committee has launched an inquiry into the draft Finance Bill 2017 clauses which are expected to be published before the end of January. They are seeking evidence on the impact of the MTD proposals on small businesses and landlords primarily.

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EY Global Tax Alerts

UK – In a much anticipated speech on 17 January 2017, the Prime Minister, Mrs. May, announced the UK's 12 priorities for Brexit negotiations. The resolution of the tension between maintaining access to the single market and controlling immigration had been a key unresolved political issue, as had the continuing membership of the Customs Union. The Prime Minister addressed both of these points while setting out her position on a number of other key issues.

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National Audit Office

VAT evasion by overseas online retailers

The National Audit Office is carrying out an investigation looking at the risk of VAT evasion by overseas online retailers. The investigation focuses on HMRCs' role in administering the UK VAT system, including managing and reducing risks to the collection of tax revenue.

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European Commission

Report by the High-Level Group on Own Resources proposes that the EU should be funded by tax revenues

On 17 January 2017, the High-Level Group on Own Resources (HLGOR), presented its report and conclusions on the future financing of the EU to the College of Commissioners. The report had already been presented to the European Parliament on 12 January 2017.

HLGOR, chaired by the former Italian Prime Minister, Mario Monti, was tasked in 2014 with reviewing how the EU budget could be financed without burdening the Member States, as at present 80% of the EU's budget comes from direct contributions by Member States based on their gross national income. The report notes that the current system has created a situation where Member States consider their contribution based upon whether they are net contributors or net beneficiaries,
ignoring the fact that EU-wide initiatives benefit all members. Consequently the report recommends that the costs and benefits of EU membership should be better reflected and focus on indicators other than net balances.

The report goes on to note that any reform of EU financing would not lead to an increase in the EU budget, but recommends the introduction of new ‘own-resources’ (ie, revenue that Member States have attributed to the EU for its financing, such as the current allocation of customs duties on entry into the Single Market) to reduce the reliance upon contributions by Member States. Possible new ‘own-resources’ could include energy or environmental taxes, a common corporate income tax, a reformed VAT or a tax on the financial sector. However, the report stresses that these would not be an ‘EU tax’, rather the taxes would be levied by the Member States and then applied to the EU budget. The report also recommends exploring other possible revenues, such as income from border control, the digital single market, the protection of the environment or energy efficiency.

The UK is currently a net contributor to the EU budget and consequently its departure will have an impact on the EU budget. It is recognised that this offers a window of opportunity to introduce reforms, including the elimination of correction mechanisms (‘rebates’), from which the UK, along with other countries such as Germany and the Netherlands, is benefiting.

Further details are available in the HLGOR’s Press Release, Memo and Factsheet.