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. If you have any feedback or comments on *EY VAT News*, please contact Ian Pountney.

Previous editions of EY VAT News can be found [here](#).

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**EY Events**

**EY Indirect Tax Perspectives – 9 January 2018**

The next EY Indirect Tax Perspectives event will be on the morning of Tuesday 9 January 2018 at 1 More London Place.

At this event we will be joined by a representative from HMRC who will be discussing the government’s Making Tax Digital initiative. Businesses will be required to use the Making Tax Digital system to meet their VAT obligations from April 2019. This is an excellent opportunity to understand and prepare for the changes and raise any questions or concerns.

We will of course also provide our usual update on current and future indirect tax developments.

If you would like to register for this event, please refer to our invitation and contact Olivia D’Silva.

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**Brexit**

**House of Lords European Union Select Committee – Report on Brexit: deal or no deal**

The European Union Select Committee published a report – Brexit: deal or no deal, on 7 December 2017, outlining the potential impact on the UK of leaving the EU without a deal, and examining the feasibility of a transition period immediately post-Brexit.

The report states that ‘no deal’ would not only be economically damaging, but would bring an abrupt end to cooperation between the UK and EU on issues such as counter terrorism, police and security and nuclear safeguards. It would also necessitate the imposition of controls at the Irish land border.

The Committee agrees with the Government that concluding all aspects of the negotiations before March 2019 would be the best outcome, but notes that the overwhelming weight of evidence suggests that this will be impossible. The Committee concludes that enshrining the Article 50 deadline of 29 March 2019 in domestic law would ‘not be in the national interest’.

The Committee questions whether a legally binding transition deal can be reached in time to prevent damage to the UK economy. The Committee notes that negotiations on the future relationship could last several years, and that a ‘standstill’ transition period may therefore be needed to buy time for negotiations to continue beyond March 2019.

The Committee notes that the only secure legal basis for transition may be to use one of the two options available under Article 50, either to extend UK membership of the EU for a time limited period, or to set a date later than March 2019 for withdrawal to take effect.

For further information please contact Andy Bradford.

**UK/EU joint report on progress during phase 1 of Brexit talks**

On 8 December 2017, the negotiators of the EU and the UK, jointly presented the Report on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union. Both Parties have reached agreement in principle across the following three areas under consideration in the first phase of negotiations, on which further detail is set out in the report: protecting the rights of Union citizens in the UK and UK citizens in the Union; the framework for addressing the unique circumstances in Northern Ireland; and the financial settlement.
Progress was also made in achieving agreement on aspects of other separation issues.

Ireland and Northern Ireland

- Both Parties agree that the Good Friday or Belfast Agreement reached on 10 April 1998 by the UK Government, the Irish Government and the other participants in the multi-party negotiations (the ‘1998 Agreement’) must be protected in all its parts, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the Agreement.
- The UK respects Ireland’s ongoing membership of the EU, in particular Ireland’s place in the Internal Market and the Customs Union. The UK also recalls its commitment to preserving the integrity of its internal market and Northern Ireland’s place within it, as the UK leaves the EU’s Internal Market and Customs Union.
- The report notes that the commitments and principles outlined will not pre-determine the outcome of wider discussions on the future relationship between the EU and the UK and are, as necessary, specific to the unique circumstances on the island of Ireland. They are made and must be upheld in all circumstances, irrespective of the nature of any future agreement between the EU and UK.
- The UK remains committed to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The UK’s intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the UK will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the UK will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.
- In the absence of agreed solutions, the UK will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the UK, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the UK will continue to ensure the same unfettered access for Northern Ireland’s businesses to the whole of the UK internal market. Both Parties will establish mechanisms to ensure the implementation and oversight of any specific arrangement to safeguard the integrity of the EU Internal Market and the Customs Union.
- The UK confirms and accepts that the Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland’s obligations under Union law, in particular with respect to free movement for EU citizens.

Other separation issues include

- On ensuring continuity, both Parties have agreed the principles that goods placed on the market under Union law before withdrawal may freely circulate on the markets of the UK and the Union.
- On ongoing Union judicial procedures, both Parties have agreed that the CJEU should remain competent for UK judicial procedures registered at the CJEU on the date of withdrawal, and that those procedures should continue through to a binding judgment.

The report has been put forward with a view to the meeting of the European Council (Article 50) of 14 and 15 December 2017. It is also agreed by the UK on the condition of an overall agreement under Article 50 on the UK’s withdrawal, taking into account the framework for the future relationship, including an agreement as early as possible in 2018 on transitional arrangements.

President Donald Tusk also released a statement, confirming that sufficient progress has been made to allow him to present the draft guidelines for the December European Council. Donald Tusk’s proposals include –

- That negotiations should start regarding the transition period
- Discussions should commence in order to explore the UK vision of its future relationship with the EU

Alongside the joint report, the EU Commission has sent an EU communication to the European Council which is interesting as it expands the EU’s thinking on a number of points in the joint report.

A Brexit alert is available here.

For further information please contact Andy Bradford.

Public Accounts Committee Report – Brexit and the UK border

The Public Accounts Committee has reported that government departments are assuming that the risks to managing the border will not change immediately when the UK leaves the EU, and that border checks will therefore be the same after March
2019 as they were before. They are therefore not planning for any major new physical infrastructure at the border by March 2019, and do not expect all new or updated IT systems to be ready by that date. Departments say they are planning for a no-deal scenario, but do not expect there to be many changes whatever the position in March 2019. The Committee is concerned that their assumptions are risky and do not allow for changes in behaviours by companies trading across the border or people crossing it. Particularly in the event of a no-deal scenario, the border could be exposed to risks on day 1 of the UK's departure. Officials are relying too much on there being a transitional period in order to have the time to develop the new systems and infrastructure that may be required. The current negotiations bring significant uncertainty, but the new Border Planning Group (the Group) and government departments need to step up and be prepared for the possibility of a no-deal scenario and for the costs of all potential options. It is worrying that the Committee was told that the Group could not plan for any challenges around the Irish border and the 300 crossing points, as it needed the political process to go further before it could fully understand the issue.

The report's conclusions and recommendations include –

- The Group's assumption that the risks to border activity will remain unchanged immediately post-Brexit is a risky approach. By March 2018 it should provide evidence to the Committee that its assumptions on border risks are realistic, take account of the possibility that stakeholders might change their behaviours, and are regularly reviewed.
- Departments’ current planning for the post-Brexit border relies too much on there being a negotiated transitional period. The Group must accelerate the detailed planning for managing the border in the event of a no-deal scenario and report back to the Committee by June 2018.
- In the lead up to Brexit, the Committee is not convinced that government departments have put in place the necessary clear leadership and accountability for effective border management, or are showing enough urgency. By March 2018 the Group should report back to the Committee with a summary of the activities it is carrying out, the programmes it is overseeing and the risks it is managing. It also expects someone to be put in charge and accept lead responsibility for co-ordinating the work of the Group.
- The Committee is concerned that HM Treasury's usual business model is inadequate for allocating Brexit funding to departments who are forced to operate together, at pace, to a hard deadline. HM Treasury should review its business model to ensure that it makes timely decisions about releasing money to departments so as to facilitate their preparations for Brexit.
- Government departments' poor track record of delivering critical border programmes, such as e-borders, leaves the Committee sceptical that they are up to the challenges of planning for the border post-Brexit, including having enough people to manage it. The readiness of the border to deal with the UK leaving the EU is a vital issue and the Committee will monitor progress closely. It expects all departments to be in a position to update it on progress at future evidence sessions.

For further information please contact Andy Bradford.

Court of Justice of the European Union

Calendar Update

Wednesday 13 December 2017

Hearing – C-665/16 Gmina Wroclaw – A Polish referral asking whether the transfer of ownership of immovable property owned by a municipality of the state in return for payment of compensation, where the property continues to be managed by the municipality, constitutes a taxable supply.

Hearing – C-544/16 Marcandi Limited T/A Madbid – A UK referral from the First-tier Tribunal asking whether the issue of ‘credits’ to ‘users’ of an online auction, by Madbid, in return for a monetary payment is a ‘preliminary transaction’ outside the scope of VAT or a supply of services, namely the grant of a right to participate in an online auction. If a supply of services, is it a supply made for consideration when it issues the ‘credits’, if not, is such a supply made at any other time?

The referral also asks what, in these circumstances and considering the answers to the initial questions referred, is the consideration received by Madbid for the supply of the goods; is the ‘credit’ a ‘payment on account’ and therefore
consideration for a supply of goods, what is the total value of the supply of the goods and what is the effect of unsuccessful bids and ‘credits’ used?

Comment: This is the same business as the Welmory CJEU referral, and the questions being referred this time are questions that were discussed by the AG in Welmory, but never addressed as the judgement went in a different direction. As well as similar businesses, this will be of interest to businesses offering vouchers and promotion schemes, where there may be a read across in terms of the scope and implications for ‘credits’.

For further information please contact Rosie Higgins.

Thursday 14 December 2017

Judgment – C-305/16 Avon Cosmetics A UK referral from the First-tier Tribunal in relation to the Avon Cosmetics case (TC03311), on the UK’s direct selling or ‘party plan’ derogation. Specifically, the case concerns a failure of the UK derogation, which deals with retail sales made through non-registered representatives, to provide for any VAT deduction in respect of costs borne by sales representatives, whilst requiring the taxpayer (on selling to those representatives) liable to VAT by reference to the retail open market selling price received by the representatives. The First-tier Tribunal referred the case to the CJEU on the question of whether the derogation was lawful in this respect, and expressed its own opinion that it was not.

In April 2016, HMRC issued Revenue & Customs Brief 19/14 which sets out its position following the First-tier Tribunal’s decision. In short, the Brief confirms that HMRC remains of the view that the derogation has been applied correctly and that VAT incurred by unregistered representatives of Avon (or other retailers) on their purchase of demonstration items cannot be offset against the VAT due on sales to final consumers.

For further information, please contact Mitchell Moss, Andy Richardson, Dermot Rafferty or Ethan Ding.

Wednesday 20 December 2017

Opinion – C-532/16 AB SEB Bankas – A Lithuanian referral asking various questions as to whether an adjustment to VAT is applicable, per Articles 184 to 186 of the VAT Directive, in circumstances where an initial deduction could not have been made because the transactions in question related to an exempt supply of land.

Judgment – C-462/16 Boehringer Ingelheim Pharma – A German referral, asking whether, following Elida Gibbs (C-317/94) and having regard to the principle of equal treatment, a pharmaceutical company is entitled to a reduction of the taxable amount, where:

- it supplies products to pharmacies via wholesalers;
- the pharmacies supply those goods to persons with private health insurance;
- the insurer reimburses the person insured; and
- the pharmaceutical company is required to pay a “discount” to the insurer pursuant to a statutory provision?

Judgment – C-500/16 Caterpillar Financial Services – A Polish referral 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?

Thursday 11 January 2018

Hearing – C-140/17 Gmina Ryjewo – A Polish referral asking whether a municipality has the right to deduct VAT on its investment expenditure (capital goods), via an adjustment, in circumstances where there is a change in use from non-taxable to also include taxable transactions? Is it relevant that the municipality’s intention to use the goods for future taxable transactions was not indicated clearly and that the goods will be used for both taxable and non-taxable purposes but it is not possible to apportion specific investment expenditure to either?

New referral

- A Dutch referral – C-568/17 Geelen – asking whether Article 52(a) of the VAT Directive (1 January 2010 version) covers the provision, in return for payment, of live interactive adult content webcam sessions? If answered in the affirmative, should the decisive factor regarding the place of supply of those services, be where the models perform the service or
where the visitors view the images, or could some other place be envisaged?

Can such services be deemed to be electronically supplied services, if so how should the place of supply of those services be determined?

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**Court of Appeal**

**Latest appeal updates**

- The Court of Appeal has provided notice that judgment is expected on 13 December 2017 in the case of **ING Intermediate Holdings Limited (ING)**. This is a complex case and concerns the **Upper Tribunal's** decision that ING's deposit taking activities amounted to the provision of VAT exempt financial services, such that related input VAT could not be recovered.

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**Court of Session**

**Judgment: VAT is recoverable on the purchase of Single Farm Payment Entitlement units**

**HMRC v Frank A Smart and Son Limited**

The Inner House of the Court of Session has released its judgment in the case of **HMRC v Frank A Smart and Son Limited (FAS)**. This case concerns the recovery of VAT on the purchase of Single Farm Payment Entitlement (SFPE) units.

FAS carried on a farming business and purchased a large number of SFPE units. These units, which were tradable, entitled FAS to receive Single Farm Payments (SFPs), being agricultural subsidies, under the EU Single Farm Payment scheme. The issue arising in this appeal was whether the SFPE units were services used or to be used for the purposes of FAS' taxable business supplies, so as to entitle it to repayment of the VAT charged on them.

Before the First Tier Tribunal (FTT), FAS contended that it purchased the SFPE units with a view to funding the expansion of its wholly taxable business. HMRC contended that the purchase of the SFPE units was simply a step to claim the SFPs themselves, which were outside the scope of VAT, and thus the VAT incurred thereon was not recoverable as it did not relate to the making of a taxable supply. The FTT considered that the circumstances in this case were on all fours with those in **Kretztechnik (C-465/03)**. The financing opportunity afforded by purchasing the SFPE units did not form a distinct business activity. Rather, given the intended application of the SFPs to fund the expansion of the taxable farming business, it was a wholly integrated feature (and a general business overhead) of the farming enterprise. The FTT therefore allowed FAS' appeal.

Before the Upper Tribunal (UT), the primary position adopted by HMRC was that the SFPE units had been acquired for the purpose of obtaining SFPs (i.e. for the purpose of a non-economic activity outside the scope of VAT). In such circumstances, no right of deduction arose. The acquisition and retention by FAS of SFPE units, in order to obtain receipts of SFPs, were transactions carried out for their own sake and thus for a purpose other than taxable transactions. That was the only use of the services supplied, and it gave no right to a deduction. Alternatively, HMRC submitted that the FTT had erred in law in holding that there was a direct and immediate link between the cost of acquiring the SFPE units and FAS' taxable economic activity so as to entitle it to a deduction of input tax. The UT rejected both of these arguments and dismissed HMRC's appeal.

In this latest decision, the Court of Session has upheld the FTT and UT decisions and dismissed HMRC's appeal. The Court held that both FAS acquired SFPE units in order to finance the development and diversification of its business. Consequently, the SFPE units are to be considered an input of FAS' business and their costs form part of its general overheads. The court considered that the receipt of the SFP payments is merely a consequence of the acquisition of the SFPE units and cannot be considered a separate business activity distinct from FAS' taxable business. The SFPE units are merely a form of investment with no business activity beyond providing additional finance for FAS.

The Court also considered a secondary argument put forward by HMRC; to the extent that any funds, acquired by FAS from SFP payments, were not used for the general purposes of its business, the VAT that had been reclaimed in respect of those funds would have to be repaid to HMRC. This was not disputed by FAS, it fully accepted that its right to VAT deduction would be nullified if and to the extent that the funds raised were spent for private or other non-business purposes. The Court agreed with this conclusion.

In summary, the Court held that both the FTT and UT reached the correct conclusion and dismissed HMRC's appeal.
**Upper Tribunal**

**VAT is not recoverable on iPhones purchased by ‘runners’ – Insufficient evidence of a supply to the taxpayer**

Scandico Ltd

The Upper Tribunal (UT) has released its decision in this appeal concerning the recovery of VAT on the purchase of iPhones where Scandico arranged to acquire the phones by engaging a large number of ‘runners’ to buy the phones on its behalf from Apple retail stores.

Scandico, a phone trader, specialised in acquiring the latest iPhones in the UK and selling them to customers in other countries where stocks of that particular model of phone had not yet been released for sale in Apple’s retail stores. Scandico engaged a large number of ‘runners’ to buy the phones on its behalf. The retail sales were duly recorded in the till receipts provided by Apple to the individual purchasers, all of which had been handed to and retained by Scandico. Whilst it was accepted that the till receipts were not valid VAT invoices, as they did not contain the required information, Scandico considered that HMRC might exercise its discretion to accept alternative evidence in support of its input tax claim.

HMRC considered that Scandico failed to provide records and documentation to establish an audit trail confirming that it had received the taxable supplies as described on the till receipts. Accordingly, the right to deduct the VAT was denied.

The First-tier Tribunal (FTT) held that the effect of the VAT agency provisions in section 47(2A) of the VAT Act 1994 was to undermine Scandico’s claim for an input tax deduction since the transactions in question were deemed to take place by indirect supplies to and by the unregistered runners, and Scandico could not derive an input tax deduction when buying from a non-registered person. Even if this conclusion was wrong, Scandico still had no valid VAT invoices, and the FTT held that HMRC acted perfectly reasonably in refusing to accept the limited alternative evidence provided in support of the claimed transactions.

In this latest decision, and dismissing the appeal, the UT held that the sole issue before it was whether the FTT was correct in concluding that the decision of HMRC, that it was not prepared to allow the tax credit on the basis of the information placed before it, was reasonable.

The European Court has stressed that where the tax authority has the information necessary to establish that the taxpayer is liable to VAT, the right to deduct must not be rendered ineffective by the imposition of additional conditions. The UT rejected that this is what either HMRC or the FTT was doing in this case. The UT considered that Scandico should have realised from the outset of its business that it would not receive VAT invoices from Apple because its business model depended on Apple not knowing the ultimate destination of the iPhones. It could have set up and operated its business in a way that enabled it to provide HMRC with clear and unequivocal information supporting its entitlement to a deduction. It did not, and HMRC was fully entitled to conclude, on the basis of the evidence before it, that it could not be satisfied that the supply of the phones to Scandico, for which a credit was claimed, had taken place, in other words HMRC could not be satisfied that the substantive conditions for the recovery of VAT had been met. HMRC was not setting an impossibly high standard for Scandico to meet in order to claim the deduction, nor was it imposing additional conditions. The UT considered that there is no basis on which it should interfere with the FTT’s conclusion and therefore dismissed the appeal.

Comment: A similar decision was reached in HMRC v James Edwin Boyce t/a Glenwood where the UT held that even if it was virtually impossible or excessively difficult for the taxpayer to obtain valid VAT invoices, in the circumstances, HMRC’s refusal to accept alternative evidence was not unreasonable and did not amount to a breach of the principle of effectiveness. The UT also considered that there was no tenable basis for contending that HMRC’s exercise of its discretion not to accept alternative evidence in lieu of proper VAT invoices, is one that no reasonable body of Commissioners could have reached, it was entirely justifiable. Businesses should ensure that they hold appropriate evidence to support the deduction of VAT.

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**First-tier Tribunal**
The novation of a contract for the sale of land is a taxable supply

TC06249 – Hanuman Commercial Limited

The First-tier Tribunal (FTT) has released its decision in this appeal concerning the novation of a contract for the sale of land, and whether it was an exempt supply within group 1 of schedule 9 VATA 1994.

Hanuman Commercial Limited (HCL) was incorporated in order to undertake a specific property transaction. In 2013 a project was identified which would involve the conversion of an office block (the Property) into residential flats. The owner of the Property (and one of the occupants), Sabre, entered into a contract to sell the Property to HCL on 2 January 2014. HCL paid Sabre a 5% deposit on exchange of the contracts.

Prior to completion, on 30 April 2014, HCL entered into a contract to sell the Property to Connect Centre Limited (CCL), the contract was unconditional and CCL paid a deposit of 5% on exchange of the contracts. HCL registered for VAT on 12 May 2014.

On 16 May 2014, a number of additional agreements were entered into. The first was between Sabre and HCL for variations to the contract, including an acknowledgement that HCL intended to assign the contract to CCL. The second agreement, between HCL and CCL, was for a variation of terms, in particular a removal of HCL's obligation to sell the Property to CCL and CCL's obligation to buy it, and to replace these obligations with an agreement that HCL and CCL would enter into a novation agreement and that CCL would pay to HCL a premium, less the deposit which CCL had already paid. The final agreement, a deed of novation, essentially resulted in Sabre selling the Property directly to CCL. Completion of the novated/amended contracts took place on 16 May 2014 together with all relevant payments.

HCL issued CCL with two VAT invoices; the first for the 'sale of the interest in the contract with Sabre' for £2.7m with VAT of £540,000, and the second was for 'varying the contract' for £25,400 with VAT of £5,080. However, HCL failed to file its return for the period and HMRC became aware of this when CCL sought to recover the VAT charged.

HCL subsequently decided that the VAT shown on the two invoices had been charged in error and raised two credit notes to CCL, HCL also issued a nil VAT return for the period. HCL considered its supplies to have been exempt, pursuant to group 1 of schedule 9 VATA 1994. HMRC disagreed and raised a VAT assessment for £545,080. HMRC considered that HCL supplied an ‘unexercised contractual right to purchase the Property’ from Sabre and that HCL could never have supplied an interest in the Property; it went direct from Sabre to CCL.

Dismissing the appeal, the FTT held that HCL acquired an equitable interest in the Property, when it entered into the Sabre contract, and the grant of an equitable interest in land is capable of falling within the exemption in group 1 of schedule 9 VATA 1994. When HCL entered into the CCL contract, it intended to supply an equitable interest in the Property to CCL. Had that contract been completed in accordance with its terms, HCL would have made an exempt supply of the Property to CCL. However, rather than completing the Sabre contract and the CCL contract, the parties chose to amend both of those contracts and to enter into a novation agreement. The effect of a novation is that the existing contract comes to an end and that a new contract comes into existence between, in this case, Sabre and CCL. As a consequence, Sabre supplied the Property to CCL and all that HCL supplied was the right or opportunity for CCL to enter into the contract with Sabre. This is not a supply of goods and must therefore be a supply of services subject to VAT at the standard rate. The original VAT invoices issued by HCL were therefore correct and the assessment to VAT, against which HCL appealed, was upheld.

Comment: A complicated sequence of events, which demonstrates the importance of ensuring that appropriate VAT advice is taken early when entering into property transactions.

For further information please contact Ali Anderson.

Legislation

SI 2017/1215 – The Indirect Taxes (Disclosure of Avoidance Schemes) Regulations 2017 – Details the requirements on promoters and users of, and others party to, indirect tax avoidance schemes and sets out, where appropriate, the time limits within which those requirements should be met. They also set out the circumstances when persons who would otherwise be treated as promoters of indirect tax proposals and arrangements are excluded from that definition.

SI 2017/1216 – The Indirect Taxes (Notifiable Arrangements) Regulations 2017 – Details the features (hallmarks) included in indirect tax arrangements which can lead to a disclosure of those arrangements to HMRC.
These Regulations, made under the provisions contained in Schedule 17 to Finance No. 2 Act 2017, and due to come into effect from 1 January 2018, provide the primary rules for reforming the way that indirect tax avoidance is notified to HMRC so that it more closely resembles the regime for direct taxes (the Disclosure of Tax Avoidance Schemes or DOTAS).

HMRC is expected to publish guidance on the new regime by the end of 2017.

HMRC Material

Revenue and Customs Brief 5 (2017): judgment of the Supreme Court – This brief explains HMRC’s position following the Supreme Court judgment in Littlewoods Retail Limited and others, handed down on 1 November 2017. The Supreme Court found in favour of HMRC, ruling that the statutory interest paid to claimants is adequate and it isn't necessary for compound interest to be paid.

Claims for compound interest on overpaid VAT or for any compensatory amounts, other than simple interest, under the provisions of the VAT Act 1994 will not be paid. HMRC will invite claimants to withdraw their claims and any related appeals to the Tribunal. There are a number of claims where the underlying tax litigation is not yet final. Those underlying issues should now proceed.

EY Global Tax Alerts

Italy – The Italian budget law for 2018 (the Draft) is currently undergoing parliamentary discussion and is expected to be adopted by 31 December 2017. According to the current version of the Draft, a new ‘Tax on digital transactions’, as well as other tax measures related to the digital economy, mostly affecting the concept of permanent establishment (PE), would be introduced.

The measures include:

- A new tax on digital transactions (Web Tax)
- A mandatory discussion with the competent tax office about the possible presence of an Italian PE for non-residents that in a six-month period have implemented more than 1500 transactions with an overall value of €1.5m
- An amended domestic definition of PE

Turkey – The Turkish Government has published, in the Official Gazette, Law No.7061 amending various tax laws with the objective of increasing tax revenues, stipulating procedural rules and eliminating some tax/fee applications. These changes were announced by the Minister of Finance in September.

Indirect tax measures include:

- Non-residents who engage in e-commerce activities are required to declare and pay VAT in Turkey relating to services provided electronically to non VAT registered individuals. This article also states that the Ministry of Finance is authorised to determine the scope of e-commerce services together with the procedures and principles of the article. The article will enter into force on 1 January 2018.

European Commission

Infringement proceedings – Commission refers Austria to the CJEU over the VAT treatment of resale rights of works of art

Article 258 of the Treaty on the Functioning of the European Union, gives the Commission the power to take legal action against a Member State that is not respecting its obligations under EU law.

The infringement procedure begins with a request for information (a ‘Letter of Formal Notice’) to the Member State concerned, which must be answered within a specified period, usually two months.
If the Commission is not satisfied with the information and concludes that the Member State in question is failing to fulfill its obligations under EU law, the Commission may then send a formal request to comply with EU law (a ‘Reasoned Opinion’), calling on the Member State to inform the Commission of the measures taken to comply within a specified period, usually two months.

If a Member State fails to ensure compliance with EU law, the Commission may then decide to refer the Member State to the CJEU.

In its latest listing of infringement decisions, the Commission has decided to refer Austria to the CJEU for incorrectly applying VAT to royalty payments paid to artists for the resale of works of art.

The resale right – which gives rise to what are commonly known as ‘royalties’ – is an unassignable and inalienable property right enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned. This right allows an artist, under certain conditions, to receive a percentage of the sale price of a work of art when it is resold.

Under Austrian law, royalty payments to an artist or to those entitled to royalties for the resale of an original work of art, are currently subject to VAT. This violates EU law according to which VAT is only due on goods or services ‘provided for consideration’.

In a previous judgement, the CJEU decided that when a person provides services without receiving a direct consideration, there is no basis of assessment or amount on the basis of which VAT can be applied. In the view of the Court, such services are consequently not subject to VAT (C-16/93 Tolsma). As royalty payments for resale rights are not paid in consideration for goods or services supplied by the artist, they should not be subject to VAT.

The European Commission sent a reasoned opinion to the Austrian authorities in July 2016. As Austria has failed to bring its legislation in line with EU law, the Commission has now decided to refer Austria to the CJEU.

**European Council**

**Modernising VAT for e-commerce, Economic and Financial Affairs Council**

Member States agreed on 5 December 2017, new measures to support the digital economy when it comes to VAT compliance, which can currently place heavy burdens on small companies operating online. The new rules are aimed at accelerating growth for online businesses, in particular start-ups and SMEs. The measures include:

- New rules allowing companies that sell goods online to take care of all their VAT obligations in the EU through a digital online portal (‘One Stop Shop’), hosted by their own tax administration and in their own language. These rules already exist for online sellers of electronic services (MOSS)
- Establishing a new portal for distance sales from third countries with a value below €150
- For the first time, large online marketplaces will be responsible for ensuring VAT is collected on sales on their platforms that are made by companies in non-EU countries to EU consumers. This includes sales of goods that are already being stored by non-EU companies in warehouses (so-called ‘fulfilment centres’) within the EU which can often be used to sell goods fraudulently, VAT free to consumers in the EU
- To support start-ups and micro-businesses, the introduction of a yearly VAT threshold of €10,000 under which cross-border sales to other countries within the EU are treated as domestic sales for online companies, with VAT paid to their own tax administration. This goes hand in hand with other initiatives such as single invoicing rules. The aim is to make trading in the single market as similar as possible to trading at home for these companies. On top of this, companies selling cross-border with less than €100,000 cross-border sales will benefit from simplified rules
- The removal of the current exemption from VAT for imports of small consignments worth not more than €22 from outside the EU

The European Commission says businesses currently operating outside of MOSS have to pay an average of € 8,000 a year to each Member State that they supply. An extension of the MOSS system could reduce regulatory costs for firms by €2.3 billion, while member states could see their VAT receipts rise by more than €7 billion annually.

The new rules will progressively come into force by 2021 and aim to ensure that VAT is paid in the Member State of the final consumer, leading to a fairer distribution of tax revenues amongst EU Member States. They will help to cement a new approach to VAT collection in the EU, already in place for sales of e-services, and fulfill a core commitment of the Digital
Single Market Strategy for Europe. The agreement also marks another step towards a definitive solution for a single EU VAT area, as set out in the Commission’s recent proposals for EU VAT reform.

Please refer to our alert.

Confédération Fiscale Européenne (CFE)

Opinion Statement on European Commission Proposals on the way towards a single European VAT area

The CFE, an umbrella organisation representing the tax profession in Europe, has published an Opinion Statement on the European Commission proposals published on 4 October 2017, seeking to follow up on the Action Plan on VAT towards a single EU VAT area.

The Opinion Statement examines the proposed cornerstones of the definitive VAT system and the introduction of the concept of a Certified Taxable Person. It also includes comments on the proposed “quick fixes”. The CFE has questioned whether the proposed regime will actually fight fraud or, instead, possibly create new means of perpetrating fraud. It suggests that an alternative approach at this stage, might be to consider making adjustments to the current system in order to minimize fraud and improve the system by implementing quick fixes.

Please refer to our earlier Alert for further details regarding the proposals.

For further information please contact Fiona Campbell or Ian Pountney.