What's On, Issue 4

Indirect Tax



21 December 2015

We welcome comments from our members – please email indirecttax@ciot.org.uk. We cannot always respond personally to all emails but do try to keep members informed of our activities

Engagment with HMRC and other policy makers

We have had a number of recent interactions with HMRC including:

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- On 28th September, Peter Dylewski, Alan Mclintock and Angela Fearnside met with HM Treasury VAT policy advisers. The aim of the meeting was to appraise issues the CIOT wishes to raise with the European Commission and coordinate efforts on common areas of interest. A follow up meeting is planned and members of the Indirect Taxes Sub-committee have been provided with confidential notes of the meeting.
- On 2nd October Alan Powell and Angela Fearnside met with Laura Pollard, HMRC Deputy Director and Peter Latham, HMRC Alcohol, Tobacco, Holding and Movements to discuss progress on the delays in approving excise duty warehouse applications following the CIOT's proactive submission in June

2015. HMRC provided an update of actions they have undertaken, including a full review of the application process and explained their plans for the future. A meeting note has been circulated to ITX Sub-committee members. We agreed a follow up meeting would be held in the new year.

- We have continued to provide additional support to HMRC's Joint VAT Consultative Committee (meeting on 4th December) working with our representative, Tony Jackson, to ensure the agenda items better reflect taxpayer-led issues.
- Our representative, Mike Arnold, attended HMRC's Land and Property Liaison Group on 28th October.
- Tarlochan Lall and Peter Mason continue to represent us on the VAT Expert Group set up by the European Commission. There was a meeting on 11th September to discuss the technical papers produced by the VEG on *Welmory*, *Skandia* and proof of export.
- The CIOT Indirect Taxes annual conference took place on 6th October with speakers from HMRC, Industry and tax chambers providing thought provoking comments on both VAT and Customs duty. We were also delighted to have Stéphane Buydens from the OECD give us his global perspective on the recently adopted VAT/GST guidelines. A full report of the conference will be in January 2016's edition of *Tax Adviser*.
- We are arranging discussions with the European Commission on a variety of VAT topics.

Deducting pre-registration VAT (Reg111 VAT Regs 1995)

The last 2 issues of ITV covered, in detail, the recent shift in HMRC's policy on pre-registration VAT. For many years HMRC have allowed a deduction in full for VAT incurred on goods acquired before registration but 'on hand' at the date of registration. However HMRC now require an apportionment to be made to reflect use of the goods prior to registration. There has not been any public announcement of a policy change and the guidance remains unclear. It also raises the question of whether there should be transitional period.

The ITX Sub-committee considers that the technical argument for apportionment is consistent with EU law and has written to HMRC to request:

1. that the legislation relating to VAT deductions and in particular those relating to a change in use of supplies should be amended to reflect properly what is required by the Principal VAT Directive;
2. that until the legislation has been clarified (or at least until a date is announced in a Revenue and Customs Brief) the previous practice of allowing a full deduction of pre-registration VAT without any apportionment should be restored (subject to normal exclusions for any avoidance activity that might take place to exploit any announcement); and
3. any discussions aimed at resolving the issue with pre-registration VAT on goods should also extend to VAT on services, regulations 108 and 109 and the capital items scheme.

Use and enjoyment

In the Summer Budget, the Chancellor announced his intention to extend the application of the 'use and enjoyment' provisions to certain services provided in connection with benefits-in-kind insurance and advertising. We understand the reasons for this targeted measure as a way to combat abuse and have no objections in principle. We are aware that HMRC will be consulting further on this issue and that work is ongoing as to the scope and detail of the proposals.

In advance of this, we have written to HMRC to highlight the need to consult on and explore what is meant by the separate terms "use" and "enjoyment"; referring inter alia to Professor Ben Terra and Julie Kajus's view that no Member State has yet provided any useful definition of these terms.

Proposed change to VAT regulations dealing with VAT referable to foreign branches

The CIOT has commented on HMRC's re-drafted legislation in response to the judgment in *Le Crédit Lyonnais* and its proposed restriction of deductible VAT in relation to foreign branches. We are pleased that HMRC have listened to

stakeholders' concerns and revised the original proposals, which we believe went too far and would have been contrary to the provisions of the Principal VAT Directive (article 169(a)). Our main comments on the revised legislation are that the UK's 'sector-based' special methods should not be confused with the references to sectors in the LCL case and if references to 'separate business accounts' and 'sectors' are retained in the final version of the UK legislation, the terms should be defined to ensure legal certainty and practical application. Consideration also needs to be given to the interaction with Skandia and the possibility that a foreign branch could be regarded as part of a separate taxable person.

More generally it seems to us that the legislation dealing with partial exemption is now particularly complex and is even more so when dealing with both business and non-business activity. We have suggested that there should be a more fundamental revision of the legislation with a view to its simplification.

NHS direct engagement models

The VAT treatment of supplies of staff made as principal and supplies of introductory services made as agent has been the subject of debate for some time (see Reed Personnel Services Ltd [1995] STC 588). The subsequent withdrawal of the staff hire concession (VAT Information sheet 03/09) resulted in all businesses that made supplies of staff as principal having to account for VAT on the full value of their supply including the salary, PAYE, National Insurance and pension contributions.

We understand that various 'Direct Engagement models' have come about as a direct result of the fundamental restructuring of some businesses to become agents, with the effect that VAT should be due on the agency's commission only rather than on the total employment costs. Under these employment models, NHS trusts use permanent contracts to engage staff who would previously have been taken on as temporary workers (eg locum doctors).

Following concerns raised by members regarding the legal and economic reality of some of these arrangements and the impact this is having on competition within the sector, we have written to HMRC to request they honour their previous commitment

to review the position and issue updated guidance to provide much needed clarity for taxpayers and advisers in this business sector.

Mini One Stop Shop (MOSS)

Whilst the UK has introduced facilitative measures for small businesses operating under the VAT registration threshold, this has not been explicitly legislated for. The ITX Sub-committee considers that the UK's incorrect adoption of the definition of "taxable person" contributed to complications for small businesses as well as the UK's use of the term "business" rather than the European term "economic activity." We have previously made this point to HMRC.

The committee has raised this issue with the Office of Tax Simplification.

EU Commission's VAT Expert Group

The VEG has released technical documents covering the issues raised in Skandia, Welmory and with proof of exports for Intra-EU supplies. These were discussed at a VEG meeting on 11th September and further consideration is being given to some of the points raised. In relation to Skandia the main points are:

(a) VAT grouping is an important simplification measure that should not be jeopardised;
(b) it was agreed that Skandia should be construed narrowly, specific to the facts;
(c) an EU-wide anti avoidance mechanism (akin to the UK's section 43 (2)(a) VATA 1994) is recommended; and (d) the idea of treating all head office to branch supplies as taxable is being removed from the paper.

The issues raised in the Welmory paper are to be discussed at the next VEG meeting in November. A request was made for examples of problematic situations arising relating to Welmory that can be used to facilitate discussion. For Intra EU Supplies, the Commission is considering the recommendations made by the VEG to use 3 bits of non-contradictory evidence for proof of export.

Option to tax delays

In recent months we have received numerous reports from our members of continuing and excessive delays in the time it takes for HMRC's Option to Tax National Unit to respond to notifications that have been made. With examples of it taking upwards of 40 working days to receive a response and HMRC acknowledging a peak of 30-60 days, we have written to HMRC's Indirect Tax Directorate seeking reassurance that they are committed to improving response times for taxpayers in the very near future.

We understand that HMRC are aiming to reduce waiting times back down to 15 working days by mid-November. We shall continue to monitor this situation and ask members to please provide feedback of where waiting times are improving or if delays are still causing difficulties.

We have previously raised this issue with the Land and Property Liaison Group and the Joint VAT Consultative Committee. We have requested that this issue remains on the agenda for forthcoming meetings so it can continue to be monitored.

Conforming approach to EU law - rapid sequence

The CIOT have recently written again to Ian Stewart, Head of the Indirect Tax Directorate at HMRC, in light of more recent case-law which in our view impacts on the decision. We are also considering raising the issues with the implementation of the exemption directly with the EU Commission.

Digital economy

Following the publication of the European Commission's consultation: Digital Single Market - Modernising VAT for cross border e-Commerce, the CIOT's draft response has been circulated to members of the ITX Sub-committee for comment prior to submission. The proposals are to:

- Extend the current single electronic registration (i.e. the Mini One Stop Shop) and payment mechanism to intra-EU and 3rd country online sales of tangible goods,
- Introduce a common EU-wide simplification measure (i.e. a VAT threshold) to help small start-up e-commerce businesses,

- Allow for home country controls including a single audit of cross-border businesses for VAT purposes, and
- Remove the VAT exemption for the importation of small consignments from suppliers in third countries (i.e. non EU Member States).

Environmental Taxes Working Group

The CIOT's ETWG, led by John Brewis, has been active in a number of areas:

1. Climate change levy (CCL) - Following the surprise announcement in the Summer Budget that the CCL exemption for renewable energy is to be removed we have called on the Government to produce an environmental taxes' 'roadmap' (along the lines of the business taxes plan adopted in the last Parliament) setting out its plans for the future of environmental taxes. Reinforcing our earlier submission and press release on the subject, we prepared a parliamentary briefing note that was referred to in the parliamentary debates on the Finance Bill.
2. Business Energy Tax - Responding to the recent HM Treasury consultation: Reforming the business energy efficiency tax landscape, the CIOT has backed the idea of a single climate tax on businesses but warned that an environmental taxes 'roadmap' is urgently needed to rebuild confidence around the ultimate objectives and direction of the Government's environmental tax policy. Consistent and long-term policy goals would boost support among businesses for a single coherent climate tax providing it would be simpler to administer, understand and pay than the present range of disconnected taxes and financial obligations. However, for it to remain an environmental tax there must be clear environmental objectives. We issued a press release on this issue and there will be a related article in the January edition of Tax Adviser (Technical Newsdesk).
3. The ETWG will be meeting on 17th December 2015 at 1.30pm at Artillery House to consider the group's priorities going forwards. If you would like to be involved in the Environmental Taxes Working Group please email indirecttax@ciot.org.uk.

Excise Duty update

1. **Alcohol Wholesaler Registration Scheme – action required but introduction delayed until 1 January 2016** – The AWRS has been delayed until 1 January 2016 due to pre-launch systems testing revealing some technical issues. However, most business-to-business vendors of duty-paid alcohol will still need to take action following this significant legislative change as they will require approval from HMRC as wholesalers of alcohol. Trading "wholesale" in this context means trading in any quantity of alcohol. In addition, retailers will have to check that their suppliers are approved by HMRC. Alan Powell explains this in further detail in a feature article for Tax Adviser – see below.

2. **Warehouse approval delays** – Following our recent submission on this issue, Alan Powell and Angela Fearnside met with HMRC's Laura Pollard (Deputy Director) and Pete Latham (Senior Principal) of Excise Policy to explore this issue further and discuss what action HMRC have taken to strike a balance between facilitating trade and exercising effective control over these regimes. A constructive meeting resulted in HMRC taking on board our suggestions and producing an action plan with short and longer term measures aimed at streamlining and improving the process for all involved. A new approach to approving applications will be announced along with improved Public guidance.

3. **Vapour Recovery Scheme** – In September, the CIOT responded to HMRC's excise duty consultation 'Vapour recovery scheme: options for replacing the Extra-statutory Concession (ESC)' commenting on the two proposed options affecting oil producers, fuel duty payers and businesses in the fuel supply chain such as petrol retailers. Currently acknowledged by HMRC as ultra vires, the Scheme has a wider reaching impact than just excise duty. There are difficulties with unjust enrichment and important commercial and (indirectly) VAT issues to overcome.