European branch: Indirect taxes conference round-up

Indirect Tax

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A round-up from the conference

IOT's European branch held its annual indirect taxes conference in London on 11 February. An impressive line-up of speakers discussed with delegates the impact of topical developments including Brexit, exports, real estate, dealing with tax authorities and case law as well as important customs and excise duty changes of which non-specialists need to be aware. Space does not permit full coverage of the conference so a brief summary follows.

Hot topics from the VAT Expert Group

Jo Bello and Mairhead Murphy of PwC discussed key issues arising from the European Commission's VAT Expert Group (VEG).

Jo introduced the issue of proof of export for intra-EU supplies of goods explaining that, as member states are given discretion on the obligations they may require and many take an increasingly robust approach, the balance between preventing fraud and facilitating trade could be improved to reduce the burden on business. The VEG recommends a more simplified and consistent framework and is proposing to the VAT committee that evidence should comprise three non-contradictory documents or elements and that suppliers should make a reasonable assessment of the customer (a lower burden of proof than current CJEU case law).

The Commission is expected to publish a proposal soon on the future definitive regime for intra-EU supplies of goods with the aim of reducing fraud and the cost of trading in the bloc. Jo explained the key issues included how best to identify the taxpayer and the place of supply while developing the concept of a 'certified taxable

person’; use of the reverse charge mechanism to shift the VAT accounting; and extending the MOSS regime to goods.

Mairhead discussed the case of *Welmory sp. z o.o. v Dyrektor Izby Skarbowej w Gdańsku* (C-605/12) and the concept of what is a fixed establishment in a digital economy, reporting that the VEG was now looking at its wider application. The real impact on business, particularly in relation to movements of goods, is the uncertainty and inconsistency of interpretation of what constitutes a fixed establishment between member states.

Working with HMRC – a customer-centric approach

Eileen Patching, deputy director for VAT at HMRC, looked at the changing approach of the department in its engagement with taxpayers.

Noting the cultural shift from an authority that dictated what taxpayers should do to one that now seeks to provide a service to customers, Eileen said HMRC was continuing to explore how it can better respond to taxpayers so that they can pay the correct tax at the right time. In doing so, it recognises that there is a diversity of taxpayers with different ways of working, different resources and different knowledge and skills.

Discussing HMRC’s targets for 2020, which are largely driven by the ‘Making Tax Digital’ agenda, Eileen recognised there would need to be exceptions in a small number of cases. However, making efficiencies and reducing the cost of collection remain key priorities.

HMRC recognises the important role of agents and is developing an online service for them. The Working Together programme continues through a rolling schedule of digital meetings jointly hosted by HMRC and agents. There is also a Talking Points programme in which agents hear from and ask questions of specialists (see more detail on these programmes in our report from the CIOT branches conference above).

Customs and Excise duties for the non-specialist

Jeremy White, a barrister at Pump Court Tax Chambers, is a regular presenter at CIOT conferences. Providing a fascinating history of excise duties – one of the oldest taxes around – he noted that there is an absolute liability unless they are relieved or refunded. Referring to the case of *Repertoire Culinaire v HMRC* (Case C-163/09), which concerned relief from duty for alcohol used to prepare food products, he raised the possibility of claims for refunds perhaps going back to the start of the European single market.

We were reminded of the significance of the new excise duty registration requirements for wholesalers of alcohol from 1 April 2017. These are part of an anti-fraud initiative affecting retailers and wholesalers trading in alcohol and introduce heavy penalties for non-compliance.

Turning to customs duty, Jeremy discussed the new Union Customs Code (UCC), which comes into force from 1 May 2016 as directly effective international law. The UCC replaces the Community Customs Code and will affect all goods importers. Although there are transitional provisions, persons affected need to be aware of how the changes will affect them. Disappointingly, there has been a distinct lack of clarity and guidance from the Commission in advance of the changes.

Place of supply of services connected with immovable property

Shraddha Rajdev of KPMG provided an overview of the place of supply rules of land-related services (Art 47 PVD) and looked at the comprehensive guidance available including that developed by the Commission, assisted by the VAT Expert Group and that produced by the CIOT.

The key issue is that the service has to be closely related to immovable property (Art 31a of Implementing Regulation 282/2011), under which, to be a land related service,

- it must derive from immovable property, which must make up a constituent element of the service and be central to and essential for the services supplied;
- where it is provided to, or directed towards, an immovable property, it must have as its object the legal physical alteration of that property.
- It is only if the service is site-specific that it can be a service relating to land.
- Shraddha examined several examples of what may or may not be a service relating to land and explored areas that still remain uncertain. These include legal advice, bundled supplies and the supply and installation of goods such as

solar panels.

EU case law update

European case law is always a popular subject at conferences and Daniel Lyons of Deloitte gave an engaging analysis of various cases, including

- *Mapfre*: second-hand car warranties
- *Sveda*: deduction of VAT on expenditure that is subsidised – cost components
- *Larentia + Minerva*: deduction of holding company VAT and VAT groups
- *Fiscale Eenheid X*: exemption for a property fund's management expenses
- *WebMindLicences*: place of supply of web-based services
- *Air France – KLM*: whether monies retained for 'no shows' is consideration
- *Commission v France/Luxembourg*: reduced rate and ebooks
- *Hedqvist*: liability to VAT of bitcoin trading

Daniel noted continuing problems with the lack of provision of English translations of Advocates' General opinions of important VAT cases – a subject that has been raised by the CIOT with the Court of Justice. This is especially relevant given about 80% of cases follow the AG's opinion although there is a worrying increase in the number going straight to judgment.

Perhaps the most interesting were *Larentia + Minerva* and *Sveda*, both of which are already having an impact in the UK.

In *Larentia*, the issue arose as to whether non-corporate bodies can or must be included in a VAT group if the member state provides for VAT groups. The Court of Justice concluded that they should, subject to conditions. Since the conference, the CIOT has provided some input to HMRC on how it believes the UK should respond – in essence that VAT groups should be able to include persons other than corporate bodies, and we await HMRC's formal consultation on VAT grouping. The case also deals with the deduction of VAT incurred in acquiring shares and so will have an impact on HMRC's current practice following cases such as *BAA Limited v The Commissioners for Her Majesty's Revenue and Customs*.

Sveda concerned the deduction of VAT on a tourist attraction. The taxpayer incurred expenditure, 90% of which was funded by public money. The tax authority sought to restrict the VAT deduction to 10% but the Court of Justice concluded that a full

deduction was permissible. This has greatly influenced HMRC’s policy argument on cost components in the area of partial exemption.

Brexit

With a referendum on the UK’s membership of the EU imminent, George Peretz QC and Tarlochan Lall, both of Monckton Chambers, examined some of the possible VAT consequences of an UK exit.

George referenced the government’s EU Balance of Competences Review, a comprehensive analysis undertaken in 2014 of the UK’s relationship with the EU.

Since the UK was likely to continue to trade with Europe, the question arose as to on what basis. Might the UK become a member of the EEA (the Norway option) or operate on a less formal basis such as Switzerland? Might state aid challenges increase? Alternatively, would the UK seek to negotiate a series of bilateral treaties?

George raised questions about what a Brexit would mean for VATA 1994. Would CJEU decisions remain binding? Which principle of statutory interpretation applies? How would differing UK/EU interpretations be resolved?

Tarlochan examined some of the practical issues of an UK exit, starting with the legal mechanism (as yet untested) within the Treaty of the EU (Art 50) which provides for a negotiated exit from the union. A two-year limit is given for agreement to be reached before the treaties cease to apply, although this may be extended. Thus despite all the questions that arose, it would seem unlikely that there would be any change for at least two years.

Tarlochan commented on core features of VAT systems operating in more than 100 countries:

- interpretation in accordance with its overall purpose, which is to tax consumption;
- staged collection of tax;
- burden on the final consumer on a destination basis, not on businesses in the supply chain;
- invoice system with full right of deduction.

If the UK retained a VAT system, which seems likely, it is also likely to conform to these principles and those being developed by the OECD. These include neutrality, efficiency, certainty and simplicity, effectiveness and fairness and flexibility.

The key message is that, should there be a Brexit, there will be uncertainty but it is unlikely that the VAT world would change quickly. ‘Euro think’ will remain for some time even if to inform and persuade but not legally bind.