What's on, June 2016

Indirect Tax | Tax voice



22 June 2016

Events

CIOT Indirect Taxes Conference – 27 September 2016

The annual CIOT conference on Indirect Taxes will be held at the Hilton Hotel Park Lane on 27 September 2016. This conference has a customs duty section in addition to a VAT section. Michael Conlon will chair the VAT part of the conference while Jeremy White has agreed to chair the Customs section.

We expect to cover issues such as the future of VAT (depending on what happens in the referendum), VAT deductions following the cases of *Sveda* and *Larentia and Minerva* and compliance issues.

Making Tax Digital webinar – 20 July 2016

Hold the date – the CIOT will be running a webinar on the Making Tax Digital proposals, which will affect how accounting records are maintained and VAT returns submitted, on 20 July between 10am and 1pm. Further details and precise timings will follow nearer the event.

Work-in-progress

Fulfilment houses and marketplaces

Budget 2016 announced that legislation would be introduced to stem VAT loss arising from VAT not being accounted for on goods sent from suppliers outside the EU into the UK using fulfilment houses such as Amazon. Legislation was included in Finance Bill 2016.

There has also been a consultation on a due diligence scheme on GOV.UK. We have drafted a submission which has been circulated to ITX sub-committee members for comment.

Disclosure of avoidance

Taxable persons that make use of certain VAT avoidance arrangements are required to make disclosure of them to HMRC. The relevant secondary legislation is underpinned by VATA 1994, Schedule 11A. HMRC have published a consultation that seeks to –

- Amend the scheme so that it will be the promoter of schemes that is responsible for disclosure and not the user; and
- Extend the scheme to other indirect taxes, notably insurance premium tax and gaming duties.

We have previously responded to a consultation by HMRC in 2014 on the strengthening of the tax avoidance disclosure regimes. In our response we commented at para 2.10 –

> "We do not think that any case has been made for changing the way in which VAT disclosures operate. We think that this part of the disclosure system should remain unchanged."

In reaching that conclusion, we noted that members reported very little appetite for packaged avoidance schemes in relation to VAT so the proposed changes would probably see fewer disclosures rather than more because what few schemes are being undertaken are more likely to be bespoke arrangements aimed at specific

situations and therefore not widely marketed schemes requiring disclosure by a "promoter".

Use and enjoyment

We have previously commented on the use and enjoyment provisions introduced recently in relation to services in the insurance industry eg motor repairs undertaken through an offshore supplier.

HMRC have indicated that they are examining the extension of the use and enjoyment provisions to advertising services. The application of these provisions to such services were considered in the classic *European Court of Justice case of Athesia Druck SRL v Ministero dell'Economia e delle Finanze, Agenzia delle Entrate* (Case C-1/08).

The potential concern with advertising is easy to understand. Consider a football match between a team from the UK and a team from outside the EU. A financial services or gaming company may purchase television advertising in connection with the match. The advertising may be aimed at an audience in either or both countries (and beyond) but under the ordinary B2B rules, the place of supply would be in the country where the advertiser is established. This could mean that VAT is not due even though the advertising is aimed (at least in part) at a UK audience.

However, if the firm advertising its services is based genuinely outside the EU and has a global customer base, how practical is application of use and enjoyment? At the time of supply how would one measure the extent of any UK VAT arising? By expected audience or proportional sales figures? If the firm is promoting just its brand, which products, sales and target market figures should be taken into account?

One questions how sensible it is to have multiple rules applying to different types of supplies. Would it be better to have a single generic rule covering all transactions that the PVD allows to be covered (see article 59a of the PVD)?

In our view, it is essential to have clear definitions of what is meant by the terms "use" and "enjoyment".

The consultation has not yet been published but it is expected some time after the EU referendum. We are happy to receive any input of the subject in advance of the consultation should members wish to provide it.

Deductions – the impact of the *Sveda* and the *Larentia and Minerva* cases

The recent cases of *Sveda* (Case C-126/14) and *Larentia and Minerva* (Joined Cases C-108/14 and C-109/14) raise interesting issues on the right to deduct. We are aware that HMRC have been examining the implications of both cases but do not yet know what final response they will make.

Sveda concerned the deductibility of VAT on costs incurred to construct a theme park. The construction was funded 90% by a grant. The tax authorities sought to treat the grant as a "non-business supply" and restrict the VAT deducted to that extent. HMRC have also in the past looked at restricting the deduction of VAT on expenditure subsidised by grant. The Court took the view that no restriction was required – the expenditure was incurred to make taxable supplies; how it was funded was irrelevant. Looked at from that perspective, it is not difficult to see what the Court was saying. It does not matter if you fund assets using, say, share capital or receiving a grant; the same principles apply – funding is not taken into account in determining VAT deductibility provided there is a sufficient nexus to onward taxable supplies.

Larentia and Minerva concerned VAT incurred on costs to acquire interests in limited partnerships (as well as the issue of eligibility to be a member of a VAT group). The Court considered that the VAT was deductible. The case adds to the already long litany of case law on the deductibility of VAT on the acquisition of interests in other bodies including holding companies.

We will wait to see what HMRC's view is but may make submissions on the issue in the future. If you have thoughts that you consider should be taken up with HMRC, feel free to contact us.

Distortion of competition

The PVD contains several provisions where a relief is subject to the condition that it may not be given where to do so would result in distortion of competition. The

subject was covered in an article by Ian Harris in the December issue of Indirect Tax Voice. The provisions subject to the condition include the exemption for local authorities, the cost sharing exemption and the sports exemption but there are others.

The First-tier Tribunal (Tax Chamber) in the case of London Borough of Ealing considered the exemption for supplies of sport and in particular the exclusion from exemption of supplies made by local authorities.

We plan to write to HMRC to request that they provide practical guidance on how they expect taxpayers to apply the distortion of competition exclusion.

Option to Tax notification delays

Following our submission to HMRC in October 2015 seeking reassurance that delays of 30-60 working days would be addressed, HMRC had committed to restore service levels to around 15 days by Nov 2015. We have monitored this through our representatives attending the LPLG and JVCC as well as in direct contact with the OTT National Unit and thanks to reports from members. Substantial delays have continued (reports of 30+ working days) and HMRC acknowledges it is not yet where it wants to be. We have been assured that extra resource has been deployed to the OTT team and that this is having an impact. HMRC's aim was to have a significant improvement in service levels by the end of February.

At our recent ITX Sub-committee meeting, members voiced frustration at the continuing delays and it was agreed that we would again raise the issue with HMRC.

As an interim form of acknowledgement, some of our members are including the VAT registration number and property details in the title of the email when submitting the notification to the OTT National Unit. This means that the automated response email from the OTT National Unit is fully referenced to the property and provides a degree of evidence that the notification has been received.

Excise duty – important cases

Repertoire Culinaire Ltd [2016] UKUT 0104 sees the potential for 'Fleming-style' claims because taxpayers are held to have a directly effective right to exemption which was not given effect by UK law. Alcohol products used in cooking are chargeable with duty but the duty may be refunded. Until recently, HMRC had

required the end user to claim the relief (or operate in an excise warehouse and claim the exemption on the finished foodstuff). HMRC now accept that the supplier of the alcohol product must pay the duty (if the products have been released for consumption) but may claim that duty back when the product is put to an eligible use. This could change the dynamic of the supply chain.

Euro Trade and another v HMRC (TC05052) – is UK law compliant with EU law? - The First Tier Tribunal in Euro Trade has made a reference to the CJEU regarding the UK's Warehousekeepers and Owners of Warehouse Goods Regulations 1999 (WOWGR) conditions. The judge's decision raises a number of important points for excise warehousekeepers and owners of goods in warehouse, including the legality of the WOWGR scheme itself (and certainly whether some of the conditions are (or were) proportionate) and whether it is actually fit for purpose.

Engagement with HMRC and other bodies

HMRC/HMT

There have been meetings of the following groups set up by HMRC/HMT of which we are members –

- Joint VAT Consultative Committee (JVCC) – Last meeting on 8 April 2016
- Land and Property Liaison Group (LPLG) – Last meeting on 7 April 2016
- HMT SME VAT Forum (SF) – Last meeting

Issues that have been raised include –

- Delays in acknowledging option to tax notifications (LPLG) – HMRC have directed extra resource to improve this but feedback from members is that delays are still adversely impacting transactions – see above.
- Pre-registration VAT – HMRC have withdrawn from two tribunal cases on this matter and have sought legal advice. They plan to make an announcement soon.
- Rewrite of Notice 742 – There has been a meeting of a sub-group of the LPLG to consider this issue. Issues raised in that meeting include the VAT liability of the "right to light".
- Representatives of the CIOT attended the SME Forum set up by HMT. Issues discussed included the EU VAT Action Plan. We were asked if CIOT members

working with microbusinesses could provide input into a study being undertaken for the Commission on small business issues such as the threshold, the flat rate scheme and other simplification measures.

We also attended a meeting with the Treasury/HMRC on 19 February 2016 concerning plans to consult on the VAT grouping rules (and cost sharing). We expect a consultation document to be published in the summer. The consultation is expected to be very wide-ranging.

We also had a follow up meeting on 15 March 2016 with HMRC to review progress against an action plan for improving warehousing application procedures. Progress is being made with revisions to guidance and a review of the whole procedure. However, HMRC's challenge is to balance improvements to the current system with reforming and creating a digital platform. We will continue to monitor and supporting improvements and have been invited to comment on the recently announced Alcohol Strategy.

CFE

The CFE is preparing an opinion paper on the question of whether or not directors undertake an independent economic activity, subject to VAT, when they act as a director of a company. We have made some submissions to the CFE but would welcome any input from members. In broad terms, we have suggested that a director may act in more than one capacity ie as a director or in some other capacity. When he acts solely as a director, he has a fiduciary relationship with the company of which he is a director that may preclude the activity from being independent.

VAT Expert Group

The CFE met on 2 May 2016. It is expected that a report on issues arising on place of supply from the Welmory case will soon be available.

Meetings

Indirect Taxes Sub-Committee

The ITX Sub-Committee met on 7 April 2016.

Environmental Taxes Working Group

The ETWG met on 17 December 2015 to discuss changes in the 2015 Budget, Autumn Statement and HM Treasury's consultation on a proposed single climate tax. The group also agreed its priorities for 2016:

- Recruit additional members to enable a proactive approach
- Seek greater engagement with HMRC and the Treasury to better understand the direction of this government's environmental taxes policy.
- Make a formal request for an environmental taxes framework or 'roadmap' to help businesses gain certainty and clarity in this area. Further details in the article '*What is an environmental tax?*'.

Following Budget 2016, we issued the following Press Release on the changes to CRC and CCL.

There is an open consultation on the Scottish replacement for Air Passenger Duty on which we will be making comments and we expect an HMT / HMRC Consultation on a simplified energy and carbon reporting framework in Summer 2016 for introduction by April 2019. Another consultation is expected from HMRC on Landfill Tax (Summer 2016) – seeking to clarify the definition of a taxable landfill disposal with the intention of changing the definition in Finance Bill 2017.

Blog

We posted an article on the EU Action Plan for VAT on the CIOT website.

Articles in Tax Adviser

Articles relating to indirect tax in *Tax Adviser* may be accessed on the following links.

January

Transaction flows and systems challenges

Green Taxes Roadmap essential before introduction of single climate tax

Location, location

February

What is an environmental tax?

Modernising VAT for cross-border e-commerce

CJEU still not providing opinions in English

A grey area of VAT

March

Draft Finance Bill 2016: round-up of submissions on draft clauses

VAT: option to tax notifications update

Published differences

VAT's your purpose?

April

Use and enjoyment

European branch: Indirect taxes conference round-up

May

VAT groups – changes coming?

VAT on room hire – an update

Scope of exemption

June

Tackling VAT evasion via online marketplaces

Will alignment of VAT disclosure with DOTAS be effective?

European Commission publishes VAT Action Plan to modernize the EU VAT system

Problems for small business consultants using the VAT flat rate scheme

The VAT album

No so simple