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De Voil Indirect Tax Intelligence

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NEWS IN BRIEF

Legislation

Finance Bill 2013: Public Bill Committee – 18 June

On 18 June, the Public Bill Committee agreed, amongst others, the following without amendment:

- Clause 179 (Rates of tobacco products duty);
- Clause 180 (Meaning of "tobacco products");
- Clause 181 (Rates of gaming duty);
- Clause 182 (Combined bingo);
- Clause 185 (VED rates for light passenger vehicles, light goods vehicles, motorcycles etc);
- Clause 186 (Not exhibiting licence: period of grace);
- Clause 187 (Vehicles not kept or used on public road);
- Clause 188 and Schedule 35 (Vehicle licences for disabled people);
- Clause 189 (Repayments of value added tax to health service bodies);
- Clause 190 and Schedule 36 (Valuation of certain supplies of fuel);
- Clause 191 (Reduced rate for energy-saving materials);
- Clause 196 (Standard rate of landfill tax);
- Clause 197 (Climate change levy: main rates);
- Clause 198 and Schedule 40 (Climate change levy: supplies subject to carbon price support rates etc);
- Clause 199 (IPT: Contracts that are not taxable).

The Committee will sit next on Thursday, 20 June.

Seehttp://services.parliament.uk/bills/2013-14/finance.html

Finance Bill 2013: Commons stages completed

The Finance Bill completed its Commons stages on 2 July. The date for the House of Lords stage has yet to be announced. No further amendments can now be made before Royal Assent.

The Denatured Alcohol (Amendment) Regulations 2013, SI 2013/1195

These amending regulations, which came into force on 1 July 2013, allow educational establishments to receive small amounts (up to five litres a year) of industrial denatured alcohol and trade-specific denatured alcohol without prior written authorisation from HMRC. They also alter the prescribed formulation for "completely denatured alcohol" in accordance with the proposed EU formulation with effect from 1 July 2013.

Value Added Tax (Finance) Order 2013, SI 2013/1402

This order came into force on 28 June 2013. It amends VATA 1994 Sch 9 Group 5 to include as an exempt supply the management of authorised contractual schemes ("ACS"), and provides that, for the purposes of applying the exemption, ACS are to be defined in accordance with section 237 of the Financial Services and Markets Acthttp://www.legislation.gov.uk/id/ukpga/2000/8. An ACS is a type of collective investment scheme established by amendments made to the Financial Services and Markets Act 2000 by the Collective Investment in Transferable Securities (Contractual Scheme) Regulations 2013 (SI/2013/000).

A Tax Information and Impact Note covering this instrument will be published on the HMRC website athttp://www.hmrc.gov.uk/thelibrary/tiins.htm.

Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013, SI 2013/1542

This order came into force on 25 June 2013. It extends powers of arrest, search of premises and seizure of evidence to criminal investigations by immigration officers and customs officials.

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The Excepted Vehicles (Amendment of Schedule 1 To The Hydrocarbon Oils Duties Act 1979) Order 2013, SI 2013/draft

This Order amends Schedule 1 to the Hydrocarbon Oil Duties Act 1979.

Article 3 amends the definition of agricultural tractors to include tractors used for spreading material on roads to deal with frost, ice or snow.

Article 4 makes a similar amendment to the definition of light agricultural vehicles.

A Tax Information and Impact Note covering this instrument will be published on the HMRC website atwww.hmrc.gov.uk/thelibrary/tiins.htm.

(There is a consultation on this draft legislation – see under "Government publications" below).

Government Publications

Revenue & Customs Brief 11/2013 VAT: portfolio management fees following ECJ decision in Deutsche Bank

HMRC has issued RCB 11/13 dated 24 June 2013. It announces a change in VAT treatment of fees charge for portfolio management services. The text of the Brief is set out in full below.

"VAT: Modified Treatment for Certain Portfolio Management Fees Following a European Court Ruling

Purpose of this Brief

This Brief modifies the current VAT treatment of certain supplies made by portfolio investment managers. This modification is needed to bring the current treatment into line with the European Court judgment in the case of Deutsche Bank (C-44/11).

Who needs to read this?

- Businesses providing portfolio investment management services
- Financial Advisors
- Businesses and other organisations, such as charities, that receive investment management services

Background to the Judgment

Deutsche Bank provided discretionary portfolio management services to individual investors. These services consisted of two elements:

(1) the activity of analysing and monitoring the assets owned by the investors in accordance with a strategy agreed with them, and
(2) the consequential activity of actually purchasing and selling financial securities on their behalf.

The investors paid a single annual portfolio management fee which included a separately identified charge for buying and selling securities. The issue before the Court was whether this charge constituted consideration for a separate exempt supply.

The Court decided that in the circumstances at issue in the case the two elements were parts of a single service and, as those elements were of equal weight and together formed a single supply of taxable portfolio management services, the entire fee was subject to VAT at the standard rate.

Revised VAT Treatment

Whilst all portfolio management services are subject to VAT, the UK currently treats separate charges for effecting the purchase and sale of securities as exempt from VAT on the basis that they are consideration for separate supplies. This policy is set out in Paragraph 1.6 of Notice 701/49 *Finance* and in section VATFIN5800 of the VAT Finance guidance manual.

As a result of the judgment, it is clear that fees charged by portfolio managers on an annual or other periodic basis for the purchase and sale of securities can no longer be treated as exempt from VAT, regardless of whether or not a separate charge is made.

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However, the ECJ in Deutsche Bank only considered the VAT position of periodic fees charged on a flat fee basis where there was no direct link to the transactions being executed. Where, therefore, fees are charged strictly on a transaction by transaction basis (that is, per purchase or sale of investments) exemption will continue to apply. This is conditional upon the portfolio management services being contracted for on that basis and the transaction charges being separately identified in any VAT invoice. This VAT treatment will apply irrespective of whether the portfolio is managed on a full discretionary or on an advisory basis.

Portfolio management services can be distinguished from other financial advisory services because there is an ongoing commitment to monitor and manage an individual client's investment portfolio to formulate investment decisions or recommendations. They should also be distinguished from investment fund management services (that is, the management of pooled investments within a fund structure) where VAT exemption is dependent upon the nature of the fund being managed.

Please see VATFIN7000 and VATINS5300 for guidance on VAT treatment of services provided by financial advisors and VATFIN5100–5400 for guidance on investment fund management services.

Date from which new treatment takes effect

This revised VAT treatment will apply from 1st December 2013.

Where you are in any doubt about the correct VAT treatment please contact the VAT Helpline on 0300 200 3700.

The HMRC guidance will be updated in due course.

HMRC June 2013"

Revenue & Customs Brief 13/2013 VAT: Loss-adjusting services for marine and aviation insurance claims

HMRC has issued RCB 13/13 dated 3 July 2013. It announces that loss-adjusting services supplied in the UK should always be standard rated. However, HMRC will not seek VAT on past supplies if businesses have applied the zero rate to loss-adjusting services relating to "qualifying" ships or aircraft where these services also involved a physical inspection. From 1 September 2013, HMRC will require all businesses to account for VAT on such services. This brief acknowledges that HMRC's existing guidance was misleading about services which required a physical inspection to be carried out.

The text of the Brief is set out in full below.

"VAT: Loss adjusting services supplied in connection with marine and aviation insurance claims – incorrect application of the zero-rate

Purpose of this Brief

This Brief confirms the VAT treatment of loss adjusting services supplied in connection with marine and aviation insurance claims and explains what action to take if you have failed to account for VAT in respect of such services in the past.

We are issuing this Brief because it appears that many businesses have been incorrectly treating such services as zero-rated surveys for VAT purposes.

Who needs to read this?

- Businesses that supply loss adjusting services in connection with marine or aviation insurance claims.
- Insurers that receive such loss adjusting services (including insurers that receive such services from abroad).
- Insurance brokers or agents acting in the marine and aviation insurance industry.

Action to take

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Businesses that supply the relevant loss adjusting services should ensure that they account for VAT at the standard rate where the services are treated as supplied in the UK in accordance with the place of supply rules, and should review their retrospective VAT treatment in accordance with this Brief.

Insurers that receive these services from abroad should ensure that they account for standard rated VAT under the "reverse charge" and should also review their retrospective VAT treatment in accordance with this Brief.

Place of supply and the reverse charge are explained in Notice 741A "Place of supply of services" (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_PROD1_029955&propertyType=document).

Background

The VAT Act 1994, Schedule 8, Group 8 provides that the zero-rate of VAT applies to certain services supplied in connection with "qualifying" ships and aircraft. HMRC's guidance on this subject is in Notice 744C 'Ships, aircraft and associated services' (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000169&propertyType=document).

Amongst other things, the zero-rate covers surveying services or classification services supplied in connection with a 'qualifying' ship or aircraft. This is explained in Notice 744C – paragraphs 9.5 and 9.6 (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000169&propertyType=document).

Some businesses have operated on the mistaken belief that loss adjusting services are zero-rated under this provision.

VAT liability – HMRC's view

Surveys

HMRC's view is that the zero-rate is restricted to surveys necessary to establish the seaworthiness, airworthiness or classification of a qualifying ship or aircraft to enable it to be registered and therefore meet the direct needs of the ship or aircraft. Such surveys by their nature require a physical inspection of the ship or aircraft. Certain surveys carried out under statutory authority may be outside the scope of VAT.

Loss adjusting

We do not consider loss adjusting services to fall within this zero-rate under any circumstances. It is our view that, although a supply of loss adjusting may contain an element of inspection, such inspections are not qualifying surveys for the purposes of the zero-rate.

In any event an inspection is just one of a number of elements that make up a supply of loss adjusting which will also include other elements such as establishing the facts, valuing the claim and determining the appropriate redress. The overarching or predominant nature of the supply is therefore not a surveying service. We consider the services to be single supplies of loss adjusting and liable to the standard rate of VAT to the extent that they are supplied in the UK. Such supplies do not meet the **direct needs** of the ship or aircraft; rather they meet the needs of the insurer in assessing the insurance claim.

Place of supply of loss adjusting services

The place of supply of a loss adjusting service is where the customer belongs. Therefore, loss adjusting supplies made to non-UK located insurers will be outside the scope of UK VAT.

It is necessary to complete EC sales lists in relation to supplies of goods and services made to business customers based in the EC if those services would be liable to VAT if supplied in the UK. For information about this, see Notice 725 'The single

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market' – Section 17 (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000152&propertyType=document).

Loss adjusting services received from abroad

If a UK insurer receives loss adjusting services from abroad, the UK insurer will be required to account for standard rated VAT on the receipt of the services under the 'reverse charge' procedure. For information about the reverse charge, see Notice 741A 'Place of supply of services' – Section 18 (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_PROD1_029955&propertyType=document).

What to do about past supplies

Services involving a physical inspection

We accept that our guidance about services which required a physical inspection to be carried out was misleading and that businesses had a legitimate expectation that these supplies were zero-rated.

Consequently, we do not require businesses to account for VAT on past supplies if they have incorrectly applied the zero-rate to loss adjusting services relating to 'qualifying' ships or aircraft that involved a physical inspection. Businesses that have not already started to account for VAT on such supplies should start to do so from 1 September 2013.

Services not involving a physical inspection

Businesses that applied the zero-rate to loss adjusting services that did not include a physical inspection are required to account for VAT, as set out in 1.6 below, unless they can demonstrate to their local Complaints Team that they were misled by HMRC and had a legitimate expectation that those supplies would be zero-rated. We would recommend businesses to contact their complaints team if they consider that they have been misled by HMRC in relation to the liability of their supplies have acted in accordance with the misleading representation would suffer real detriment if VAT was to be collected for past supplies.

However, we consider that legitimate expectation is less likely to apply to services not involving a physical inspection, because Notice 744C 'Ships, aircraft and associated services' has, since 1997, made it clear that physical inspection is an essential condition to the zero-rate. The matter of whether we accept, in any individual case, that a business had a legitimate expectation will depend on the facts of the case.

For information about our complaints procedure, go to www.hmrc.gov.uk (www.hmrc.gov.uk/), and under 'quick links', select 'Complaints'.

How to account for under declared VAT

If, in light of this Brief, you have not accounted for VAT correctly in the past, please see Notice 700/45 'How to correct VAT errors or make adjustments or claims' (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000077&propertyType=document) for guidance on how to make an adjustment.

We understand that some businesses will find it difficult to work out retrospectively to what extent their services were supplied in the UK, due to not having access to details of their insurance customers' locations. In cases of co-insurance, the issue is complicated further because there may be multiple customers based in multiple locations. HMRC will consider reasonable apportionment methods for any business that faces such difficulties – for example, apportionment based on sampling. Any proposal for an apportionment method should be submitted

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together with any error notification made in accordance with Notice 700/45."

VAT Information Sheet 6/2013 Notification of Vehicle Arrivals (NOVA)

HMRC have issued Information Sheet 6/13 dated 25 June 2013. It is an updated version of the Sheet issued in April 2013. Changes include transitional arrangements for imported vehicles bought from a UK supplier before 15 April 2013, and information on vehicles brought to the UK in parts.

For full details, seehttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType

=document&columns=1&id=HMCE_PROD1_032698

(See also CIP (13) 41 below)

Consultation on VAT Retail Export Scheme

HMRC are consulting until 30 September 2013 on improvements to the retail export scheme, better known as tax-free shopping. The Government, say HMRC "wants to encourage visitors to choose the UK as the best destination for shopping by making the scheme easy for customers to use. But it is also important to ensure that UK taxpayers do not subsidise those who misuse the scheme, so any proposed changes will look to ensure opportunities for error and fraud are minimised."

Full details of the consultation may be found athttps://www.gov.uk/government/consultations/vat-retail-export-scheme.

Notice 236 Customs: Importing returned goods free of duty and tax

HMRC have published a revised (June 2013) edition of Notice 236. The main change appears to be the inclusion of details of the NOVA (Notification of Vehicle Arrivals) scheme.

Notice 709/3 Hotels and holiday accommodation

HMRC have published a revised (June 2013) edition of Notice 709/3. The main change in this notice is in paragraph 4.2 which has been revised to reflect HMRC policy regarding accommodation and catering supplied to employees:

"If you supply your employees with accommodation or food and drink, in your establishment and they pay for it, the payments are treated as including VAT and you must account for it on your VAT return. Where employees pay for meals and so on from their pay including under a salary sacrifice arrangement employers must account for VAT from 1 January 2012 on such supplies unless they are zero-rated. Subject to the normal rules, the employer can continue to recover the VAT incurred on related purchases."

Notice 725: The Single Market

HMRC have published a revised (June 2013) edition of Notice 236**.** Para 16.19 has been amended to give details of changes to the format of the Irish VAT registration number, and the format for Croatia (from 1 July 2013).

Notice 742A Opting to tax land and buildings

HMRC have published a revised (June 2013) edition of Notice 742A. The notice has been updated to amend very minor errors in the previous edition. The changes are in:

- paragraph 13.1, where the word "to" was omitted under the first bullet point, and
- paragraph 13.8.3, where the formatting of the bullet points was incorrect.

VAT treatment of refunds made by manufacturers – consultation document

This consultation document, issued on 31 May 2013, concerns the VAT treatment of refunds paid by manufacturers

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directly to consumers, and seeks to discover the extent to which manufacturers make such payments; to consider how UK law needs to change to accommodate them; what impact that may have and what administrative burdens it may give rise to.

The consultation follows the announcement in the 2013 Budget that the Government intended to legislate to allow manufacturers to adjust their VAT to take account of refunds they make to final consumers. It does not appear to relate to *Elida Gibbs*-type situations, but where a consumer is entitled to refund in the case of:

- faulty products;
- damaged products;
- customer dissatisfaction.

The consultation started on 31 May 2013 and will end on 31 August 2013.

For further details, seehttps://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203281/VAT_treatment_of_refunds_made_by_manufacturers.pdf

Consultation outcome: VAT – Consideration of the case to extend the education exemption to for-profit providers of Higher Education

A summary of the responses to the government's consultation on extending the VAT education exemption to for-profit providers of Higher Education (HE) has been published. Commercial organisations favoured the extension but did not feel it went far enough. Concerns were raised over additional administrative burdens which may result and others argued the proposals did not address other equally important areas of training such as vocational training.

For the summary in full, seewww.gov.uk/government/uploads/system/uploads/attachment_data/file/205767/130606HE_CONDOCresponse-Final.pdf

New HMRC helpline numbers for VAT

New telephone numbers are being introduced for VAT helplines on 12 June 2013.

For most people the new numbers will reduce the cost of calling these helplines.

Line	Old Number	New Number
VAT Enquiries	0845 010 9000	0300 200 3700
VAT Online Services Helpdesk	0845 010 8500	0300 200 3701
VAT, Customs & Excise Welsh Language Line	0845 010 0300	0300 200 3705

For those with hearing or speech impairments, the new textphone number for both VAT Enquiries and VAT Online Services Helpdesk changes from 0845 010 8500 to 0300 200 3719.

0845 numbers will still be available for about the next 18 months.

Other 0845 numbers will change in the coming months as part of a rolling program to give customers cheaper access to HMRC helplines.

Customs Information Paper (13) 33 – Upgrade to the New Computerised Transit System (NCTS) and the Export Control System (ECS)

HMRC have issued CIP (13)33 dated 5 June 2013. It announces that an upgrade to the NCTS and ECS services is being implemented throughout the EU to take account of Croatia joining the European Union from the 1 July. The ECS and NCTS services will be unavailable from 08:00 until 23:59 on the 1 July 2013 to implement this upgrade.

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For full details, seehttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-33.pdf

Customs Information Paper (13) 34: Compliance with Community Transit

HMRC have issued SIP (13)34 dated 14 June 2013. It announces that the Central Community Transit Office (CCTO) is revising its procedures to help "customers" get their response to HMRC queries right first time.

Letters of inquiry will contain more detailed information and/or specific questions. In response, HMRC anticipate "customers" will provide HMRC with more detailed information, including an explanation of the circumstances giving rise to irregularities.

For full details, seehttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-34.pdf.

Customs Information Paper (13) 35: UK Balance of Competences Review

HMRC have issued CIP (13) 35 dated 14 June 2013. It invites comments by 6 August 2013 on the government's review of the effects of EU law on the UK's national interests.

The Balance of Competences review is a comprehensive Government audit of what the EU does and how it affects the UK. It is intended to make a serious contribution to the debate about how to modernise, reform and improve the EU, and HMRC are seeking comments views.

Among other things the review will be considering whether the EU strikes the right balance between regulating imports and exports and facilitating international trade; whether harmonisation of laws at EU level is beneficial to the UK; and what are the advantages and disadvantages of EU action on international trade.

This review provides a unique opportunity for everyone affected by EU rules on international trade to express their views and to submit evidence to the Government. The evidence received will then be used to write a report, setting out all the arguments about the advantages and disadvantages of EU action. These reports will help to inform the debate about the UK's relationship with the EU.

For full details, seehttp://www.hmrc.gov.uk/jccc/cips/cip-13-35.pdf.

Customs Information Paper (13) 36: Croatia Accession to the European Union

HMRC have issued CIP (13) 36 dated 14 June 2013. It announces that the entry into force and accession of Croatia to the EU is expected to take place on 1 July 2013. Croatia will become the 28th Member of the European Union, and seeks comments on transitional arrangements.

For full details, seehttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-36.pdf.

Customs Information Paper (13) 37: Tariff Preference – Derogation for certain products imported from Peru eligible for a quota

HMRC have issued CIP (13)37 dated 14 June 2013. It announces details of a retrospective derogation from the normal preferential rules of origin, effective 1 March 2013, for certain products imported from Peru.

For full details, seehttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-37.pdf.

Customs Information Paper (13) 38: The draft Union Customs Code

HMRC have issued CIP (13) 38 dated 21 June 2013. It announces that the European Commission has put forward a regulation postponing the effective date of the Modernised Customs Code from 24 June 2013 until 1 November 2013, while negotiations continue on the re-cast to create the Union Customs Code.

CIP (12)06 announced that work had commenced to recast the Modernised Customs Code (Regulation (EC)

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450/2008 of the European Parliament and of the Council of 23 April 2008) – known as the MCC.

That work has now largely concluded. The recast – the Union Customs Code (UCC) – has been agreed by the European Council and European Parliament. The text is still subject to (non-substantive) amendment by linguists to ensure all language versions are consistent, so cannot be considered final.

The UCC will not be published prior to 24 June 2013, so it will not repeal the Modernised Customs Code (MCC) before that Regulation is due to enter into effect. A proposal put forward by the European Commission to postpone the effective date of the MCC has also been agreed.

This Regulation – to change the 24 June date in the MCC to 1 November – will be published in the Official Journal around 19 June.

For full details,see http://www.hmrc.gov.uk/jccc/cips/2013/cip-13-38.pdf

(nb Since the release of this paper, the regulation – (EU) No 528/2013 has been published in the OJ)

Customs Information Paper (13) 39: Accession of Croatia to the EU – impact on transit and export procedures

HMRC have issued CIP (13) 39 dated 20 June 2013. It supplements CIP (13) 36 on the impact Croatia's accession to the EU on 1 July 2013 will have on transit and export procedures, and may be viewed in full at http://www.hmrc.gov.uk/jccc/cips/2013/cip-13-39.pdf.

Customs Information Paper (13) 40: Import Control System software release

HMRC have issued CIP (13) 40 dated 20 June 2013. This paper is to make users of the Import Control System aware of an issue where outstanding trader response messages have not been downloaded prior to the new software release on 1 July 2013.

The paper may be viewed in full at http://www.hmrc.gov.uk/jccc/cips/2013/cip-13-40.pdf.

Customs Information Paper (13) 41: Changes to the Notification of Vehicle Arrivals (NOVA) online service

HMRC have issued CIP (13) 41 dated 20 June 2013. It announces that, with effect from 1 July 2013, the NOVA system will cover commodity codes for all vehicle types. For a temporary period after launch in April 2013, the system was not able to cope with certain specialist vehicles.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-41.pdf

(See also VAT Information Sheet 6/2013 above).

Customs Information Paper (13) 42: Anti-dumping duty on Chinese ceramics

HMRC have issued CIP (13) 42 dated 28 June 2013. It states that the EU has imposed definitive anti-dumping duty on imports of certain ceramic tableware and kitchenware from China, which leaves a large number of security deposits requiring adjustment from the provisional duty imposed in November 2012. This paper invites traders who have more than fifty entries requiring adjustment to submit claims in a schedule.

Queries should be addressed to NIDACAdjustingTeam@HMRC.gsi.gov.uk or telephone 0161 261 5527.

Machine Games Duty first returns – penalties for late filing

HMRC has announced that they have decided not to apply penalties for late

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submission of the first returns of Machine Games Duty. No other penalties are affected.

For further details, seehttp://www.hmrc.gov.uk/news/mgd-first-returns.htm.

Excise Information Sheet 6/2013: Changes to denatured alcohol from 1 July 2013

The formulation for Completely Denatured Alcohol (CDA) is changing from the current formulation. The new formulation will be for every 100 parts by volume of alcohol mix 3 parts by volume of isopropyl alcohol, 3 parts by volume of methylethylketone and one gramme of denatonium benzoate.

The supply of free samples of Industrial Denatured Alcohol (IDA) and Trade Specific Denatured Alcohol (TSDA) will be possible without the current restrictions on supplying only to traders authorised to receive such products.

The requirement for educational establishments to be authorised to receive IDA or TSDA will be waived, providing they receive less than five litres per year.

The new formula will become the standard across European Member States on and after 1 July 2013. UK law will be changed with effect from the 1 July 2013 by means of a Statutory Instrument which will be laid before the House of Commons.

For further details, seehttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_032752

Excise Information Sheet 7/2013: Update on the accession of Croatia to the EU on 1 July 2013

HMRC have issued Excise Information Sheet 7/13 dated 26 June 2013. It announces that, from 29 June 2013 it will be possible to create export accompanying documents (eADs) to authorise movements to Croatia, but this must only be done for movements where the despatch date is on or after 1 July. Documents will not be transmitted to Croatia through the EU Gateway until Monday 1 July.

For full details, seehttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_ShowContent&propertyType=document&id=HMCE_PROD1_032793.

Report: Progress in tackling tobacco smuggling

HMRC are making use of a logical strategy for combating tobacco smoking but more can be done in enforcement and the reporting of limitations, a report from the National Audit Office has found. Progress is being made by building on overseas intelligence, although HMRC are still likely to fall short of its planned target in preventing revenue loss.

The report identifies the following key findings:

- HMRC's strategy for tackling tobacco smuggling is logical and includes a range of complimentary measures;
- HMRC's approach to deterring and disrupting the illicit market within the UK is not yet effectively integrated;
- HMRC have made progress against its key operational objectives but performance fell short of internal targets in 2012–13;
- HMRC's focus on building overseas intelligence is yielding success;
- HMRC are unlikely to achieve its plan to prevent revenue loss of £1.4bn from investment in new tobacco initiatives over the spending review period;
- HMRC's analysis shows a continuing problem of over-supply of genuine tobacco products to overseas markets despite the introduction of supply chain legislation in 2006;

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- inaccuracies in the reported impact of criminal investigations limit its usefulness as a performance measure.

The report makes the following recommendations regarding tackling tobacco smuggling:

- HMRC should develop their approach to tackling the trade in tobacco products within the UK by assessing the deterrent impact of enforcement action against people selling illicit tobacco and by further developing their collaborative work with police, trading standards and other local bodies.
- HMRC should evaluate the options for improving their methodology for estimating tax losses from tobacco fraud. They should continue to explore options including other sources of expertise, such as academic input.
- HMRC should improve the quality of their key performance information or disclose limitations in any public reporting. Teams must take a more consistent and evidence-based approach to estimating the revenue loss prevented from criminal prosecutions.
- HMRC should ensure projected benefits from key initiatives are fully tested before they are announced, with a more robust approach to challenging the feasibility of projects at an early stage.
- HMRC should establish why legislation has not yet resolved the problem of over-supply of tobacco overseas. A more robust stance should be taken in their enforcement activities with tobacco manufacturers where it establishes clear evidence of over-supply to foreign markets.

Seewww.nao.org.uk/wp-content/uploads/2013/06/10120-001-Tobacco-smuggling-Full-report.pdf

Allowing the use of rebated fuel when gritting roads – draft legislation for consultation

HMRC have published a draft amending order for consultation until 28 July, which will allow agricultural vehicles to use rebated fuel (or "red diesel") when gritting roads. The change is expected to come into force by 1 November 2013. HMRC first consulted in July 2012 on a legislative change to formalise this use of red diesel during severe weather.

HMRC invite general comments on the draft statutory instrument (for details of which see "legislation" above. It is intended that the changes will be introduced by 1 November 2013. Comments should be made to:

steve.clarke2@hmrc.gsi.gov.uk or:

Steve Clarke, HMRC Indirect Tax Directorate, 3W Ralli Quays, Stanley Street, Salford M60 9LA.

Report: HMRC disclosure compliance with criminal investigations

A report by HM Inspectorate of Constabulary (HMIC) examines the extent to which HM Revenue and Customs (HMRC) is meeting its statutory disclosure obligations under the Criminal Procedure and Investigations Act 1996. Overall, it finds HMRC has invested in processes to reduce the risk of unsuccessful prosecutions. However, improvement is needed in governance and oversight to improve understanding of the Disclosure Coordination Unit's role.

For details of the report, seewww.hmic.gov.uk/media/hmrcs-disclosure-compliance-with-criminal-investigations-20130610.pdf.

NAO report on HMRC's 2012/13 accounts

In its report on HMRC's latest set of accounts, the National Audit Office notes good progress made in reducing costs, but finds customer service levels still some

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way short of an "acceptable standard". The report also acknowledges the key role changes in international tax rules will play in enabling HMRC to meet increased revenue targets through anti-avoidance and anti-fraud measures.

For the full text of the report, see NAO 40/13 (www.nao.org.uk/report/hm-revenue-and-customs-2012-13-accounts-report-by-the-comptroller-and-auditor-general/).

European Commission

Commission requests United Kingdom to ensure private boats do not use lower taxed fuel

The European Commission has formally requested the United Kingdom to amend its legislation to ensure that private pleasure boats such as luxury yachts can no longer buy lower taxed fuel intended for fishing boats. Under EU rules on fiscal marking for fuels, fuel that can benefit from a reduced tax rate has to be marked by coloured dye. Fishing vessels for example are allowed to benefit from fuel subject to a lower tax rate but private boats must use fuel subject to a standard rate.

Currently the UK law does not impose fuel distributors to have two separate fuel tanks, one with marked fuel subject to a lower tax rate and the other with regular fuel subject to a standard tax rate. As a consequence, private leisure boats can not only use fuel intended for fishing vessels but also risk heavy penalties if they travel to another Member State and the ship is controlled by the local authorities.

The Commission's request takes the form of a reasoned opinion. In the absence of a satisfactory response within two months, the Commission may refer the United Kingdom to the EU's Court of Justice.

For further details, seehttp://europa.eu/rapid/press-release_MEMO-13-470_en.htm#PR_metaPressRelease_bottom.

Decisions concerning infringement procedures against nine EU countries

The European Commission has published a MEMO and two press releases on 20 June concerning infringement procedures in the fields of taxation and customs against nine EU Member States. For each case, the Member State(s) involved and the policy area are briefly mentioned below.

Belgium, implementation of key EU rules against tax evasion (IP/13/572);
Bulgaria, customs duty and tax relief and agreement with the USA (IP/13/573);
Finland, implementation of key EU rules against tax evasion (IP/13/572);
Greece, implementation of key EU rules against tax evasion (IP/13/572); discriminatory taxation on milk and meat (MEMO/13/585);
Italy, implementation of key EU rules against tax evasion (IP/13/572);
Poland, implementation of key EU rules against tax evasion (IP/13/572);
Portugal, discriminatory taxation of non-resident companies (MEMO/13/583);
Spain, discriminatory taxation of investments in non-resident companies (MEMO/13/583);

United Kingdom, VAT refunds from manufacturers to consumers (MEMO/13/583) (http://europa.eu/rapid/press-release_en.htm).

Court of Justice of the European Union

Staatssecretaris van Financiën v X BV, Case C-651/11; 30 May 2013 unreported.

Article 5(8) of EC Sixth Directive — transfer of "totality of assets"

In a Netherlands case, the shares in a company had been held by four different companies, before they were sold to a public company in 1996. One of the vendor companies (X), which had held a 30% shareholding, reclaimed input tax on

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the professional services relating to the sale. The tax authority issued an assessment to recover the tax, and X appealed. The case was referred to the ECJ for a ruling on the interpretation of Article 5(8) of the EC Sixth Directive. The ECJ held that the disposal of a 30% shareholding did not amount to "the transfer of a totality of assets" within Article 5(8), "irrespective of the fact that the other shareholders transfer all the other shares in that company to the same person at practically the same time". (The ECJ observed that, since a disposal of shares was an exempt supply under Article 13B(d)(5), "a right to deduct will exist only if the cost of the services supplied to X in relation to that disposal is part of the general costs relating to its overall economic activity, without being incorporated in the sale price of those shares". It was for the national court to determine whether that was the case.)

G Kostov v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite (Case C-62/12; 13 June 2013 unreported).

Bailiff – taxable person

In a Bulgarian case, the ECJ held that Article 9(1) of Directive 2006/112/EC "is to be interpreted as meaning that a natural person who is already a taxable person for value added tax purposes in respect of his activities as a self-employed bailiff must be regarded as a "taxable person" in respect of any other economic activity carried out occasionally, provided that that activity constitutes an activity within the meaning of the second subparagraph of Article 9(1)".

HMRC v P Newey (t/a Ocean Finance), ECJ Case C-653/11; 20 June 2013 unreported

The principle of "abuse"

A financial adviser (N), who was registered for VAT, was the controlling shareholder of a Jersey company (AC), which provided loan broking services in the UK. HMRC issued an assessment on N, charging VAT of more than £10,000,000, on the basis that he should be treated as supplying the loan broking services and was liable to a "reverse charge" under VATA 1994, s 8(1) in respect of advertising services supplied by another Jersey company (W). N appealed. The First-tier Tribunal allowed his appeal, but the Upper Tribunal directed that the case should be referred to the ECJ for a ruling on whether the national court should depart from a strict contractual analysis. The ECJ held that "contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services'". The contractual terms could be disregarded "if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine".

Re Promociones y Construcciones BJ 200 SL (Case C-125/12; 13 June 2013 unreported)

Persons liable for payment of VAT (Articles 193–205)

In a Spanish case, the ECJ held that Article 199(1)(g) of Directive 2006/112/EC "must be interpreted as meaning that every sale of immovable property by a judgment debtor carried out not only in the course of the liquidation of the debtor's assets but also in the course of insolvency proceedings occurring before such liquidation comes within the concept of a compulsory sale procedure, provided that such a sale is necessary in order either to settle creditors' claims or to enable the debtor to re-establish its economic or professional activities".

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Minister Finansów v RR Donnelley Global Turnkey Solutions Poland Sp. Zoo, ECJ Case C-155/12; 27 June 2013 unreported

Storage services

A Polish company (P) provided services for the storage of goods to undertakings established in other Member States of the European Union and in non-member States. Those services included admitting the goods to a warehouse, placing the goods on storage shelves, storing the goods, packaging the goods for the customer, issuing the goods, unloading and loading. The Polish tax authority issued a ruling that, where the warehouse was in Poland, the place of supply was in Poland and VAT was chargeable accordingly. P appealed, contending that its supplies should be treated as taking place where its customer was established. The case was referred to the ECJ for a ruling on the interpretation of Article 47 of Directive 2006/112/EC. The ECJ held that Article 47 "must be interpreted as meaning that the supply of a complex storage service, comprising admission of goods to a warehouse, placing them on the appropriate storage shelves, storing them, packaging them, issuing them, unloading and loading them, comes within the scope of that article only if the storage constitutes the principal service of a single transaction and only if the recipients of that service are given a right to use all or part of expressly specific immovable property".

Finanzamt Freistadt Rohrbach Urfahr v Unabhängiger Finanzsenat Außenstelle Linz, ECJ Case C-219/12; 20 June 2013 unreported

Photovoltaic installation

In an Austrian case, the ECJ held that "the operation of a photovoltaic installation on or adjacent to a house which is used as a dwelling, which is designed such that the electricity produced is always less than the electricity privately consumed by its operator, and supplied to the network in exchange for income on a continuing basis" was an economic activity.

Teritorialna direktsia na Natsionalnata agentsia za prihodite – Plovdiv v Rodopi-M 91 OOD, ECJ Case C-259/12; 20 June 2013 unreported.

Accounting (Articles 241–249)

In a Bulgarian case, the tax authority imposed a penalty on a company which had reclaimed input tax shown on a cancelled invoice. The company appealed, and the case was referred to the ECJ for a ruling on whether Articles 242 and 273 of Directive 2006/112/EC permitted the imposition of a penalty on "taxable persons who have allegedly failed to fulfil on time their duty to show circumstances in their accounts that are of significance to the calculation of VAT". The ECJ held that "the principle of fiscal neutrality does not preclude the tax authorities of a Member State from imposing upon a taxable person who has not fulfilled within the period prescribed by national legislation his obligation to record in the accounts and to declare matters affecting the calculation of the value added tax for which he is liable a fine equal to the amount of the value added tax not paid within that period where the taxable person has subsequently remedied the omission and paid all the tax due, together with interest". It was for the national court to determine whether the amount of the penalty imposed exceeded "what is necessary to attain the objectives of ensuring the correct collection of tax and preventing evasion".

European Commission v Kingdom of Spain (Case C-189/11; 6 June 2013 unreported) (Advocate-General's opinion)

Scope of Article 306

The European Commission took proceedings against Spain, seeking a declaration that it had failed to correctly implement Articles 306–310 of Directive 2006/112/EC. Advocate-General Sharpston expressed the Opinion that, by excluding "sales to the public, by retail agents acting in their own name, of travel

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services organised by wholesale agents; by authorising travel agents, in certain circumstances, to charge in the invoice an overall amount that is not related to the actual VAT charged to the customer, and by authorising the latter, where he is a taxable person, to deduct that overall amount from the VAT payable, and by authorising travel agents, in so far as they benefit from the special scheme, to determine their taxable amount globally for each tax period", Spain had failed to fulfil its obligations under the directive.

European Commission v Republic of Poland (and related applications) (Case C-193/11; 6 June 2013 unreported) (Advocate-General's opinion)

Tour operators

The European Commission formed the opinion that eight Member States had adopted an incorrect interpretation of the special scheme for travel agents provided by Articles 306–310 of Directive 2006/112/EC, in that they had failed to restrict the scheme to cases where the customer was the traveller (as was the case in Germany and the UK). The Commission took proceedings against the eight Member States, seeking a declaration that they had failed to fulfil their obligations. Advocate-General Sharpston delivered an Opinion rejecting the Commission's contentions. She reviewed the differences between the different language versions of the Directive, and observed that "it is hard to avoid the impression that the court is being called upon to decide a matter of VAT policy (and of legislative drafting) which has proved beyond the capabilities or the willingness of the Member States and the legislature".

TVI Televisão Independente SA v Fazenda Pública, (Case C-618/11; 11 June 2013 unreported) (Advocate-General's opinion)

"Consideration" (Article 11A1(a))

Portugal imposed a tax on television advertising, which the television companies paid (and recharged to the advertisers). The tax authority issued a ruling that this tax formed part of the companies' turnover for VAT purposes. A television company appealed, and the case was referred to the ECJ for a ruling on the interpretation of Article 11A1 of the EC Sixth Directive. Advocate-General Cruz Villalón expressed the Opinion that the tax should be included in the company's turnover "if the decisive fiscal relationship of public law character is between the tax authorities and the television operators", but not if "the decisive fiscal relationship of public law character runs between the advertisers and the tax authorities". It was for the national court to determine "which of these two understandings of the nature of fiscal substitution in the precise context of the screening tax is the correct one according to national law".

Supreme Court

HMRC v Aimia Coalition Loyalty UK Ltd (formerly known as Loyalty Management UK Ltd) (No 2) [2013] UKSC 42

Claim for deduction of input tax – HMRC inviting Supreme Court to make further reference to Court of Justice of European Union following judgment – Whether Court obliged by EU law to make reference – Whether issue of EU raised on which decision necessary

Following the decision in *HMRC v Aimia Coalition Loyalty UK Ltd (No 1), SC [2013] UKSC 15; [2013] STC 784*, HMRC made further written submissions contending that there should be a further

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reference to the ECJ. The Supreme Court unanimously rejected this contention.

Court of Appeal

Atlantic Electronics Ltd v HMRC (No 4), CA [2013] EWCA Civ 651

Notice of objection to Witness Statements

A company (E) reclaimed input tax of more than £1,000,000 on the purchase of a large number of mobile telephones. HMRC rejected the claim on the basis that the transactions formed part of an MTIC fraud, and E appealed. HMRC applied for several witness statements to be admitted in evidence. E objected to some of the statements. The First-tier Tribunal directed that statements by two of HMRC's witnesses should be excluded. HMRC appealed to the Upper Tribunal, which upheld the First-tier decision in respect of one of the witnesses. Judge Bishopp observed that "this was evidence HMRC wished to put in after the expiry of the time limit imposed by tribunal directions, already extended several times, and when they knew that an application for permission would be necessary. A litigant wishing to put in late evidence has a duty to make the application promptly and, in a case such as this where the evidence is being compiled, to forewarn his opponent: it is not a case in which doing so would undermine the purpose of the evidence. HMRC did not forewarn, and took an unexplained amount of time to produce the evidence." However Judge Bishopp allowed HMRC's appeal in respect of their other witness, whose statement related to the conviction of one of the people involved in the transactions on two counts of conspiracy to cheat the revenue. Applying the principles laid down by Lightman J in *Mobile Export 365 Ltd v HMRC*, the presumption "must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary". E appealed to the CA, which unanimously upheld Judge Bishopp's decision. Arden LJ observed that the statement was "relevant to explicate the convictions", and that "HMRC would be prejudiced by its exclusion".

High Court

R (oao GSTS Pathology Llp) v HMRC (and related applications), QB 21 June 2013 unreported

Partnership applying for information to be omitted for judgment

A limited liability partnership (G) had applied to the QB for judicial review of HMRC's proposal to alter the tax treatment of certain supplies. Following the hearing, it applied for certain information to be omitted from the published judgment, on the grounds that it was commercially sensitive. The QB rejected the application. Leggatt J observed that the information had been "contained in witness statements which were in evidence at the hearing", and that "the entire hearing took place in open court". He held that there was "no good reason to restrict publication of any information contained in (G's) unaudited accounts". On the evidence, it appeared that G "would prefer competitors and customers not to know that, if the proposed tax treatment of its supplies is implemented, (G) will be unable to continue to trade for long unless its business is restructured in a way that will itself have certain detrimental consequences". However, it was "important in the interests of open justice to explain the facts which justify the conclusion".

Tribunals

Upper Tribunal

WM Morrison Supermarkets Ltd v HMRC, [2013] UKUT 247 (TCC)

Supplies of disposable barbecues

A company (W) sold disposable barbecues. It accounted for VAT at the

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standard rate. It subsequently submitted a repayment claim on the basis that it should have treated part of the consideration as attributable to supplies of charcoal and as taxable at the reduced rate. HMRC rejected the claim and W appealed. The First-tier Tribunal dismissed the appeal, applying the principles laid down in *Card Protection Plan Ltd*. Judge Cannan held that "it is not open to a taxpayer to carve out an element of what would otherwise be treated as a single supply in order to apply a reduced rate to that element of the supply". The Upper Tribunal upheld this decision. Vos J held that "it is precisely because the domestic statute did not expressly identify "charcoal as part of disposable barbecues" as being worthy of a reduced rate that they do not attract one. The disposable barbecue is acknowledged to be a single supply. The result is neither surprising nor undesirable since disposable barbecues are leisure items, and are not likely to be used as a regular means of using solid fuel for domestic cooking".

HMRC v The Honourable Society of Middle Temple, UT [2013] UKUT 250 (TCC)

Lease of land — whether a separate supply of water

Trustees of certain land in the City of London leased several properties, used as barristers' chambers, to tenants. The trustees had opted to tax the properties. The tenants were supplied with water. In accounting for VAT, the trustees treated part of the rent paid by the tenants as attributable to a zero-rated supply of water. HMRC issued a ruling that the trustees were making a single supply of a leased property, and that none of the consideration qualified for zero rating. The Upper Tribunal upheld HMRC's ruling (reversing the First-tier decision). Judge Sinfield held that "in order not to disturb the functioning of the VAT system, account must be taken of the requirement that every transaction must normally be regarded as distinct and independent and a transaction which comprises a single supply from an economic point of view should not be artificially split". On the evidence, "the leasing of the premises and the supply of the water to those premises under the lease form a single economic supply which it would be artificial to split because, from the point of view of the typical tenant, both the premises and the water are equally indispensable and inseparable". Therefore "the provision of the premises and the cold water is an indivisible supply which it would be artificial to split".

First-tier Tribunal

L Swain v HMRC, (2013) TC02719

Conversion of barn into living accommodation

A county council had granted planning permission for the conversion of four derelict barns into holiday accommodation. However the work was not proceeded with, and the barns remained derelict. Subsequently a woman (S) purchased one of the barns and converted it into a house. The relevant planning permission provided that the occupation of the building "shall be limited to a manager or proprietor of the holiday accommodation business". S reclaimed VAT on the conversion. HMRC rejected the claim on the grounds that the effect of VATA 1994, Sch 8, Group 5, Note 2(c) was that the converted building was not "designed as a dwelling". The First-tier Tribunal dismissed S's appeal. Judge Poole specifically declined to follow Judge Kempster's decision in *Burton v HMRC* (TC02522). He observed that the effect of Town and Country Planning Act 1990 was that "any development carried out in breach of planning permission (and any non-compliance with a condition in a planning permission) are to be regarded as "prohibited" under planning law". (Judge Poole noted that HMRC had appealed to the Upper Tribunal against Judge Kempster's decision in *Burton*, and expressed the hope "that the Upper Tribunal will take

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this opportunity to bring some clarity and certainty to the law in this area".)

Taste of Thai Ltd v HMRC (2013) TC02721

VAT: penalty mitigated by 100%

A company (T) which operated a restaurant registered for VAT in 2006 but deregistered in 2008. In September 2010 its turnover again exceeded the registration threshold, so that it became liable to register for VAT from November 2010. It did not so until December 2011, and deregistered in March 2012 after a subsequent decline in its turnover. HMRC imposed a penalty, which they mitigated by 90%, for the delay in registration. T appealed. The First-tier Tribunal allowed the appeal. Judge Poole held that the circumstances did not constitute a "reasonable excuse", but directed that in view of the extent of T's disclosure, the penalty should be mitigated in full. (He observed that for the purposes of FA 2008, Sch 41 para 13(5)(a), the date when tax "first became unpaid" was 31 December 2010, being the date when T would first have been required to pay VAT if it had registered at the correct time.)

Bilal Jamia Mosque v HMRC (2013) TC02727

VAT: amount of penalty (FA 2007, Sch 24 paras 4–12)

A mosque registered for VAT in 2006.In 2008 it submitted a return claiming an input tax repayment of £36,747, relating to the costs of constructing the mosque. HMRC rejected the claim. In 2010 the mosque submitted a return claiming an input tax repayment of £42,214, which included the same input tax which HMRC had rejected two years earlier. HMRC again rejected the claim, and imposed a penalty under FA 2007, Sch 24, at the rate of 49% of the potential lost revenue. The mosque appealed against the penalty. The First-tier Tribunal reviewed the evidence in detail and allowed the appeal in part. Judge Cannan observed that, with regard to churches and mosques, "any business activity is usually incidental to the main non-business purpose of providing a place of worship", but that HMRC had agreed to allow most churches to recover 25% of their input tax. He also observed that the construction of a building which was used for a relevant charitable purpose could qualify for zero-rating. He found that, during discussions which had followed the submission of the 2008 return, the mosque had formed the impression that it might be possible to reclaim 65% of the input tax. On that basis, he held that 35% of the claim had been a "deliberate inaccuracy" and that 65% had been a "careless inaccuracy". He also held that the penalty should be imposed at 35% of the potential lost revenue relating to the deliberate inaccuracy and at 15% of the potential lost revenue relating to the careless inaccuracy (reducing the total penalty to 22% of the potential lost revenue).

The Open University v HMRC (No 2) (2013) TC02729

VAT: supplies of education (Article 13A1(i))

The BBC invoiced the Open University in respect of expenditure which it incurred in broadcasting television and radio programmes relating to Open University courses. Following the VAT tribunal decision in *The Open University v C & E Commrs* (*No 1*), *[1982] VATTR 29* (*VTD 1196*), these supplies were treated as subject to VAT up to 31 July 1994. (Customs accepted that, from August 1994, they qualified for exemption under VATA 1994, Sch 9, Group 6, Item 4.) In 2009 the BBC lodged a repayment claim with regard to the supplies made from 1978 to July 1994. HMRC rejected the claim and the Open University (as the recipient of the supplies) appealed, contending that the supplies qualified for exemption under Article 13A1(i) of the EC Sixth Directive. The First-tier Tribunal accepted this contention and allowed the appeal. Judge Sinfield specifically declined to follow the 1982 decision in

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The Open University v C & E Commrs (*No 1*), as the tribunal's reasoning in that case was inconsistent with the subsequent ECJ decision in *Stichting Regionaal Opleidingen Centrum Noord Kennemerland / West Friesland* (*Horizon College*) *v Staatssecretaris van Financiën, ECJ Case C-434/05*. He held that "the BBC had education of a type similar to that described in Article 13A1(i) of the Sixth VAT Directive as one of its objects". Accordingly the supplies had qualified for exemption under Article 13A1(i).

Sygma Security Systems Ltd v HMRC (2013) TC02732

Whether FA 2009, s 108 applicable

A company (S) appealed against a default surcharge, contending that it had entered into a deferred payment agreement under FA 2009, s 108. The First-tier Tribunal dismissed the appeal, finding that S had failed to comply with the terms of the agreement and holding that the circumstances did not constitute a reasonable excuse.

Lady Henrietta Pearson v HMRC (2013) TC02735

VAT: conversion of barn into residential unit — effect of planning permission

A woman (P) obtained planning permission for the conversion of two adjacent derelict barns into "a live-work unit", and claimed a refund of VAT under VATA 1994, s 35. HMRC rejected the claim on the basis that the work failed to meet the requirements of VATA 1994, Sch 8, Group 5, Note 2(c). The First-tier Tribunal allowed P's appeal. Judge Bishopp expressed the view that "it is not the province of HMRC or this tribunal to police the planning rules" and held that "there has been compliance with the spirit, even if not the strict letter, of the consent".

G Seeff (t/a TPL Associates) v HMRC, (2013) TC02738

Flat-rate Scheme: Reg 55B(1) — application for retrospective operation

A management consultant (S) voluntarily registered for VAT in 2007. However, his turnover never reached the registration threshold, and he deregistered from December 2011. In applying for deregistration, he requested that his VAT liability from 2007 to 2011 should be recomputed retrospectively, adopting the flat-rate scheme. HMRC rejected this request but the First-tier Tribunal allowed S's appeal. Judge Staker observed that S "need never have registered for VAT at all", and found that "in the present case there are exceptional circumstances justifying retrospectivity".

Colaingrove Ltd v HMRC (No 5) (2013) TC02746

VAT: sale of caravans — apportionment of consideration

A company which sold caravans supplied verandahs with some of the caravans which it sold. Initially it accounted for VAT on these verandahs, but it subsequently submitted a repayment claim on the basis that it should have treated the verandah as part of the supply of the caravan, and as zero-rated. HMRC rejected the claim and the First-tier Tribunal dismissed the company's appeal. Judge Hellier held that "the verandah was neither incidental to nor integral with the caravan".

Alexandra Countrywide Investments Ltd v HMRC, (2013) TC02751

Public house converted into two semi-detached houses

A company converted a public house into two semi-detached houses. It reclaimed input tax on the work. HMRC rejected the claim on the basis that, before the work, part of the public house had been used as a flat for a manager, so that the

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work failed to qualify for zero-rating. The First-tier Tribunal allowed the company's appeal against this decision, applying the CA decision in *C & E Commrs v Jacobs*, and declining to follow the VAT tribunal decision in *Calam Vale Ltd*. Judge Kempster held that "the fact that an additional dwelling has been created means that *Note 9* does not prevent the conversion coming within *Item 1*(*b*)".) He also held that there was no justification for distinguishing between claims under *s 35* (such as *Jacobs*) and claims under *s 30* (such as *Calam Vale*).

Miss DL La Roche v HMRC (2013) TC02758, [2013] UKFTT 356 (2013) TC02758.

Registration — Delay by Customs in processing application

A woman (L) purchased a retail shop in 2000 and traded from it until December 2008, when she closed the shop because she had been suffering from ill-health. She sent a form VAT7 to HMRC with a covering letter. HMRC did not acknowledge receipt. Subsequently HMRC issued estimated assessments and surcharges. L wrote to HMRC in February 2012, repeating her request for the cancellation of her registration. HMRC agreed to cancel her registration from February 2012, but refused to backdate the cancellation to December 2008. L appealed. The First-tier Tribunal allowed her appeal. Judge Walters found that, on the balance of probabilities, the letter and form VAT7 which L had sent in December 2008 "were received by HMRC and, presumably, mislaid by them".

EDITORIAL

Sailing Close to the Wind?

On 20 June 2013 the Court of Justice of the European Union ("CJEU") released its judgement in the case of *Paul Newey, t/a Ocean Finance* (*Case C-653/11*). The decision may – just may – prove to be a landmark decision and it will almost certainly affect other cases where there is a whiff of avoidance in the air. Opinions on the decision and its implications will be both varied and mixed. Indeed, I am personally torn between two opposing views: on the one hand thinking that the decision is a triumph for common sense in relation to its conclusion on substance over form (or "economic and commercial reality", as it is referred to in the decision) and, on the other, thinking it has gone too far in appearing to conclude that transactions can be re-characterised even if not (necessarily) contrary to the purpose of the Directive. What is clear is that, as a decision, *Newey* is in many respects an unsatisfactory one.

Essentially, I find myself thinking that there is something missing from this decision: a reasoned written Opinion of the Advocate General. For reasons which are unexplained, the five judges decided to proceed to judgement without such an Opinion and inevitably – or so it seems in cases where there is no Opinion – there are aspects to the decision which leave the reader with unanswered questions, such as "what precisely did the Court think was contrary to purpose?".

Before delving (or perhaps diving?) deeper it is perhaps worth reflecting on the facts of the case.

Background

Mr Newey (who traded as "Ocean Finance") was a loan broker established in Tamworth, in the UK. The broking services he supplied were exempt from VAT under what is now Article 135(1)(d) of the Principal VAT Directive. Advertising services (which some readers will recall included TV adverts featuring yachts sailing in clear blue skies and slight seas) supplied to Mr Newey were subject to VAT which was not recoverable.

In order to avoid incurring irrecoverable VAT on the advertising fees, Mr Newey incorporated Alabaster (CI) Ltd ("Alabaster") in Jersey. It was established as a loan

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broking company of which Mr Newey was sole shareholder and to which he granted the right to use the business name "Ocean Finance". Alabaster employed one person on a full-time basis and had its own management comprised of Jersey resident individuals who apparently had no direct experience of broking. As required by Jersey law, Mr Newey played no part in the management of the company. The broking contracts were concluded directly between the lenders and Alabaster, which received the broking commissions. As Alabaster did not have the wherewithal to process loan applications it entered into an agreement with Mr Newey who (with his employees) provided the services from his UK call centre, such services in essence covering all the processing tasks for the loan broking business. Under that agreement, Mr Newey had the power to negotiate the terms of the contracts concluded between Alabaster and the lenders.

Mr Newey received fees fixed of up to 60% of the gross commissions receivable in respect of each loan by Alabaster, plus certain expenses or disbursements. Potential borrowers contacted the UK call centre which processed and forwarded those applications which met the credit eligibility criteria to Alabaster's directors in Jersey for authorisation. The approval process took about one hour to complete and no request for authorisation was ever refused.

Advertising services were provided by a third party Jersey agency, Wallace Barnaby & Associates Ltd ("Wallace Barnaby") under a contract with Alabaster. Wallace Barnaby in turn obtained the advertising services from agencies established in the United Kingdom. Mr Newey had the power to approve the content of the advertisements and met with one of the UK agencies for that purpose. Following those meetings, the UK agency made recommendations to Wallace Barnaby who, in turn, made recommendations to Alabaster. None of those recommendations was rejected.

The Case before the Tribunal

HMRC's case was that, for VAT purposes, the advertising services were supplied to Mr Newey in the UK and so were liable to VAT under the reverse charge and, furthermore, that Mr Newey had supplied the loan broking services in the UK. In the alternative, they submitted that the arrangements amounted to an abuse of rights on the basis of *Halifax and Others* (*Case C255/02*) and must be re-characterised – that is, HMRC claimed the right to "redefine the contractual terms to re-establish the situation that would have prevailed in the absence of the transactions constituting the abusive practice" (thus removing its VAT advantage).

Under either analysis HMRC alleged that Mr Newey owed c. £11m of VAT for which it issued an assessment. Mr Newey appealed and in a decision of the First Tier Tribunal (FTT) on 23 April 2010 the appeal was allowed.

The FTT held as a finding of fact that Alabaster carried on the loan broking business and was the recipient of the advertising services. The FTT also held that, although the essential aim of the arrangement involving Alabaster was to obtain a tax advantage, there was no abuse since the arrangement was not contrary to the purpose of the Principal VAT Directive.

Unsurprisingly, the Commissioners appealed to the Upper Tribunal which decided to refer a number of questions to the CJEU for a preliminary ruling:

> "(1) In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position?
> (2) In circumstances such as those in the present case, if the contractual position is not decisive, in what circumstances should a national court depart from the contractual position?

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(3) In circumstances such as those in the present case, in particular, to what extent is it relevant:

(a) Whether the person who makes the supply as a matter of contract is under the overall control of another person?
(b) Whether the business knowledge, commercial relationship and experience rests with a person other than that which enters into the contract?
(c) Whether all or most of the decisive elements in the supply are performed by a person other than that which enters into the contract?
(d) Whether the commercial risk of financial and reputational loss arising from the supply rests with someone other than that which enters into the contracts?
(e) Whether the person making the supply, as a matter of contract, sub-contracts decisive elements necessary for such supply to a person controlling that first person and such subcontracting arrangements lack certain commercial features?

(4) In circumstances such as those in the present case, should the national court depart from the contractual analysis?
(5) If the answer to question 4 is "no", is the tax result of arrangements such as those in this case a tax advantage the grant of which would be contrary to the purpose of the Sixth Directive within the meaning of paragraphs 74 to 86 of [*Halifax and Others*]?
(6) If the answer to question 5 is yes, how should arrangements such as those in the present case be re-characterised?"

The decision of the CJEU

The CJEU decided to consider the Upper Tribunal's first four questions as one. It said that, in essence, these asked whether contractual terms are decisive for the purposes of identifying the supplier and the recipient in a case involving a supply of services and, if not, under what circumstances those terms may be re-characterised.

The Court re-affirmed that the term "supply of services" is objective in nature, that it applies without regard to the purpose or results of the transactions concerned and without it being necessary for the tax authorities to determine the intention of the taxable person (*Halifax and Others*, paragraphs 56 and 57). As to the importance of contractual terms, the CJEU referred to the decisions in the joined cases of *Loyalty Management UK and Baxi Group,* paragraphs 39 and 40 (cases C53/09 and C55/09) and, in particular, to the need to bear in mind that the economic and commercial realities is a fundamental criterion for the application of the common system of VAT.

The Court proceeded to explain that contractual terms do not always wholly reflect "the economic and commercial reality of the transactions" particularly where there is a "purely artificial arrangement" and that the purpose of the abuse of rights doctrine is to bar wholly artificial arrangements which do not reflect economic reality.

Notwithstanding the FTT's findings of fact (that, in accordance with the contractual terms, Alabaster supplied loan broking services to the lenders and received the supplies of advertising services) the CJEU suggested it was "conceivable" that the economic reality was that the advertising services were supplied to Mr Newey in the UK. It proceeded to confirm, however, that it was for the referring court to determine whether the contractual terms genuinely reflected economic reality or whether Mr Newey actually supplied the loan broking services and was the recipient of the advertising services. In the event of such a finding the CJEU confirmed that the contractual terms would have to be redefined so as to determine what the position would have

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been but for the transactions constituting the abusive practice. It concluded that, in this case, it would mean the Commissioners could legitimately regard Mr Newey (and not Alabaster) as the supplier of the loan broking services and the recipient of the supplies of advertising.

To summarise, the conclusion reached by the CJEU was that contractual terms are not decisive and may be disregarded if they do not reflect economic and commercial reality but constitute a wholly artificial arrangement set up with the sole aim of obtaining a tax advantage. This is something for the national court to determine although it seems clear that the CJEU itself considered that the arrangements involving Alabaster were indeed artificial and should be re-characterised.

Analysis of the decision

In reaching its conclusion, the Court said it had answered the first four questions asked by the Upper Tribunal. The reality is that it paraphrased those questions and proceeded to answer a question it had asked itself (and not the questions it had been asked). As a result we arguably have neither the clarity nor the depth of guidance which the Upper Tribunal was seeking; for example, we have no specific answer to the sub-questions posed at question three on the extent of Mr Newey's involvement and risk, other than the passing comment in paragraph 48 of the decision that those are matters of fact which should be taken into account.

From its questions, it seems clear that the Upper Tribunal was focused on two different issues:

- can a court determine the identity of a supplier by reference to the substance ("commercial and economic reality") as opposed to the legal (contractual) form; and
- are the arrangements adopted by Mr Newey contrary to the purpose of the Directive,

and yet the CJEU dealt only with the first of those. The Upper Tribunal's fifth question clearly contributed to this outcome as, unfortunately, it asked for an answer only if the answer to question 4 was "no". The Court, having concluded that the answer to that question was "yes", decided that it did not need to answer the remaining questions. Question 5, however, was a critical question and, perhaps with the benefit of hindsight, was one which should have asked for an answer irrespective of the answers to the preceding questions. Question 5 sought to determine whether or not the tax advantage obtained by Mr Newey was "contrary to the purpose" of the VAT Directive. The Court did not address this issue explicitly, if at all.

Implications of the decision

So where does the decision in *Newey* take the abuse debate? One view I have seen expressed is that the judgement takes the debate no further forward. Time will tell, but that view may prove to be far from the mark. It will be recalled that *Halifax* introduced a twofold test:

(i) there must be the accrual of a tax advantage contrary to the purpose of the Directive; and
(ii) the essential aim of the transaction must be to obtain a tax advantage.

The decision in *Newey* suggests a slightly different twofold test:

(i) there are wholly artificial arrangements in which the contracts do not reflect the economic and commercial reality; and
(ii) the arrangements are set up with the sole aim of achieving a tax advantage.

There is no suggestion in the first leg in *Newey* that the arrangements need to be "contrary to the purpose" of the Directive or even abusive. Perhaps that is because such arrangements should be viewed as being implicitly abusive and so therefore automatically contrary to purpose but the decision is silent on this point. If this is not the correct analysis then the alternative is that the CJEU has introduced a new test, separate and distinct from *Halifax*, a test in which one need determine

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only whether the arrangements reflect the "economic reality" and, if they do not, then, as with *Halifax*, the aim of the arrangement must be considered. Had there been an Opinion of the Advocate General there may have been substantially less uncertainty and greater clarity over what the Court intended.

The future

Undoubtedly this case will be argued further before the Upper Tribunal when it reconvenes to consider the judgement and its implications. Certainly when I first read the decision, my immediate reaction was that *Ocean Finance* was sunk but on further reflection I am not so sure. It will also be interesting to see what impact it will have in the case of *Pendragon*. Clearly the Court of Appeal has not had the benefit of hearing argument on the Newey decision and so – possibly irrespective of the decision of the Court of Appeal – *Pendragon* may well be destined for the Supreme Court. I can also perhaps foresee a further reference to the CJEU in which it is asked to clarify what it meant in *Newey*. What does seem clear is that the avoidance and abuse debate is set to continue for some time to come.

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INVOICES

The importance of being error-free

This article is concerned with two recent judgments, one from the Court of Justice of the European Union (CJEU) and one from the First Tier Tribunal, both of which permanently deny the right to deduct VAT to fully taxable persons who had received taxable supplies because they did not hold a valid VAT invoice. Whilst it is clear that Member States are entitled to require sufficient evidence of the right to deduct, primarily via a valid invoice, these cases represent a new hard line approach in that they deny the right of the taxpayer to remedy the situation.

Where a taxpayer is permanently denied the right to deduct VAT that has been properly incurred, the tax authorities enjoy a windfall in that the total VAT collected in the supply chain will exceed the VAT paid by the final consumer, in apparent contradiction of the principle of neutrality.

As some readers with an unusually keen interest in politics and economics may have noticed, we are living in a time of austerity where public spending, particularly in Europe, is coming under ever-increasing pressure in an attempt to cut budget deficits. It may be that this need to safeguard the public finances has insinuated itself into the judiciary leading to a tougher line being taken with those taxpayers who do not fully comply with the procedural rules governing tax deductions. Whether there is a policy reason or whether these cases have arrived coincidentally, they should sound a warning to all taxpayers to ensure that they obtain the correct documentation to support input tax recovery and that their accounting systems can identify and deal with incomplete invoices.

The traditional view of the right to deduct and the principle of neutrality

The right to deduct VAT incurred on the purchase of goods and services used to make taxable supplies has long been held by the CJEU and the national courts to be sacrosanct. The CJEU has developed a mantra to refer to this which is repeated through a chain of cases, each referring to the immediately preceding case making a golden chain stretching back to the infancy of the tax in the EU.

In the recent judgment in the case of *Bonik* (*C-285/11*), the mantra was stated in the following terms at paragraphs 25 to 27 (omitting the references in that case to the earlier case law):

> "25…It should be borne in mind that, according to settled caselaw, the right

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> of taxable persons to deduct VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by the relevant EU.
>
> 26…In that regard, the Court has consistently held that the right of deduction provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited. In particular, the right of deduction is exercisable immediately in respect of all the taxes charged on transactions relating to inputs.
>
> 27…The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject to VAT."

An example of the Court's view of the primacy of the right to deduct is the case of *Société Générale des Grandes Sources d'Eaux Minérales Françaises* (*Case C-361/96*). This was concerned with an Eighth Directive claim. EU law and its German implementation both required that an Eighth Directive claim be accompanied by the original invoice. The taxpayer said that the original invoice was lost in the post when it was sent to the lawyers drawing up the Eighth Directive claim. The taxpayer submitted a duplicate invoice but the claim was rejected by the German tax authorities. The taxpayer appealed and the matter was referred to the CJEU. The CJEU held that Member States were entitled to rely on presentation of a duplicate invoice where there was no risk of fraudulent repeated use of that invoice to make repeated claims. Further, the principle of non-discrimination required that if a domestic taxpayer could use a duplicate invoice, a taxpayer in another Member State could do so in similar circumstances to make an Eighth Directive claim.

Other cases have held that the failure to comply with a formal requirement cannot remove a substantive right. In *Collée* (*Case C-146/05*), the accounting entries necessary to demonstrate that an intra-Community supply had taken place were made late. The Court held that "the principle of fiscal neutrality requires … that an exemption from VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements". In *Vogtländische Straßen* (*Case C-587/10*), the Court held that a rule of German law that made exemption for intra-Community supplies of goods dependent on the provision of the VAT registration number of the purchaser was contrary to EU law if the supplier could provide sufficient alternative evidence to demonstrate that the purchaser was a taxable person.

The principle of neutrality has been applied in a number of different ways to ensure that taxpayers receive fair treatment. In *Elida Gibbs* (*Case C-317/94*), where a manufacturer gave cash to retail purchasers of its toothpaste on redemption of vouchers, the manufacturer was permitted to reduce the value of its taxable supply to wholesalers in order to ensure that the VAT collected in the supply chain by the tax authorities was not in excess of that paid by the customer, even though there was no reduction in the consideration paid by the wholesalers. In *Faxworld* (*Case C-137/02*), a partnership was established with the sole object of setting up a limited company. The partnership incurred VAT on various costs but did not make any supplies. The German authorities denied input tax recovery to Faxworld but the CJEU held that recovery must be permitted, holding that "from an economic point of view, it seems clear, a single business has been set up, going through various preparatory stages before becoming operational".

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These cases are examples of the way that the VAT system has traditionally been thought to work with substantive rights trumping procedural issues. Whilst it provides fairness for taxpayers, it also forms a basis for the principle of abuse – if input tax can be deducted where the substantive right is engaged but there is a procedural problem, it is a small step to reject the right to deduct where the procedural steps are followed but there is a substantive issue (as in the *Halifax* case itself). However, this balance between taxpayers and Member States appears to have taken a decisive shift in favour of the Member States with these recent judgments.

The Petroma case (C-271/12)

As set out in the CJEU's mantra, the right to deduct is an intrinsic part of the neutrality of the VAT system. However, it is now under attack. *Petroma* was concerned with the Martens group of companies in Belgium. Petroma Transports SA was the company which employed the majority of staff and it supplied them to a number of the other group companies.

During the relevant periods (1994 onwards), Belgian law required that VAT invoices state "the customary name of the goods supplied and the services provided, the quantity of those goods and services and the purpose of the services". These were not requirements of the Sixth Directive itself, but at the relevant time, the Directive permitted Member States to set additional criteria.

The Belgian authorities carried out inspections from 1997 onwards and questioned some of the invoices. These contained an overall price but neither a unit price nor the number of hours worked by the staff. The Belgian tax authorities disallowed the deductions made on the basis of these invoices.

Following this, the companies provided further information to the tax authorities but this was not accepted as sufficient to allow deduction. The taxpayer appealed and in February 2005, the Court of First Instance of Mons delivered judgment upholding the position of the tax authorities in respect of a certain number of the invoices.

For reasons not explained by the CJEU, the Court of First Instance then reopened the case, and with a demonstration of the speed and commerciality that endears the legal system to those lucky enough to enjoy an encounter with it, produced a further judgment within a scant five years, finding against the taxpayer (a mere 13 years from the time of the inspections).

The taxpayer appealed to the Belgian Court of Appeal which reacted with blistering pace, making the reference little more than two years later. The reference asked two questions.

1 Is a Member State entitled to refuse to allow a deduction by a taxable person that received services and has incomplete invoices, where those invoices have been supplemented by further information seeking to remedy the omission?
2 If the Member State is entitled to refuse deduction in such circumstances, must it repay the VAT to the supplier?

The CJEU cited the usual mantra as to the primacy of the right to deduct and set out the legislative rules governing invoices. In this regard, it noted that the Principle VAT Directive does not permit Member States to add their own requirements for invoices but that this case was concerned with the Sixth Directive which did.

The active part of the judgment is very short and is found at paragraphs 32 to 36.

> "32…It appears from the order for reference that the right to deduct VAT was denied to taxable persons, the recipients of services, on the ground that the invoices at issue in the main proceedings were not sufficiently accurate and complete. In particular, the national court notes that most of those invoices did not indicate the

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unit price or the number of hours worked by the staff of the companies providing the services, making it impossible for the tax authority to determine the exact amount of tax collected.

33…The appellants in the main proceedings argue that the fact that the invoices do not contain certain particulars required by national legislation is not such as to call into question the exercise of the right to deduct VAT when the occurrence, nature and amount of the transactions have been subsequently demonstrated to the tax authority.

34…It should be noted that the common system of VAT does not prohibit the correction of incorrect invoices. Accordingly, where all of the material conditions required in order to benefit from the right to deduct VAT are satisfied and, before the tax authority concerned has made a decision, the taxable person has submitted a corrected invoice to that tax authority, the benefit of that right cannot, in principle, be refused on the ground that the original invoice contained an error (see, to that effect, *Pannon Gép Centrum*, paragraphs 43 to 45).

35…However, it must be stated that, with regard to the dispute in the main proceedings, the information necessary to complete and regularise the invoices was submitted after the tax authority had adopted its decision to refuse the right to deduct VAT, with the result that, before that decision was adopted, the invoices provided to that authority had not yet been rectified to enable it to ensure the correct collection of the VAT and to permit supervision thereof.

36…Consequently, the answer to the first question is that the provisions of the Sixth Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the right to deduct VAT may be refused to taxable persons who are recipients of services and are in possession of invoices which are incomplete, even if those invoices are supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced after such a refusal decision was adopted."

The judgment proceeds on the basis that the supplies did take place (paragraph 43 states that it was confirmed in the main proceedings that the services were in fact provided). As such, the permanent denial of the right to deduct appears to run counter to the principles and mantra set out above.

Further, the CJEU did not ameliorate the impact by answering the second question to the effect that the VAT must be repaid to the supplier where it cannot be claimed by the recipient. The principle of neutrality did not provide any basis for a supplier that made taxable supplies being entitled to a refund of VAT that it was required to pay to the tax authorities.

The judgment of the CJEU that invoices can be amended before, but not after, the tax authorities have made a decision as to their validity is one that should be of significant concern to taxpayers. Where an invoice is accepted by a taxpayer and the VAT claimed on the next return, it is unlikely that any further inspection of that invoice will be carried out by the taxpayer. The only occasion it is likely to be looked at again is on an inspection by the tax authorities. If it is they who discover an error on the invoice, it is too late for it to be rectified, at least under Belgian law.

This judgment does not require Member States to refuse to permit invoices to be corrected or supplemented after errors have been discovered by the tax authorities; rather, it permits Member States to do so if that forms part of their national legislation. Fortunately, the current position in the UK is much more generous to taxpayers than appears to be the case in Belgium.

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Regulation 29 (1) of the VAT Regulations requires that a taxable person hold a valid invoice in order to deduct VAT "save as the Commissioners may otherwise allow or direct either generally or specially". This gives the Commissioners a broad discretion. In March 2007, they issued a statement of practice entitled "VAT Strategy: Input Tax Deduction without a Valid VAT Invoice". The document suggests that the first step should be to seek a valid invoice from the supplier. If this cannot be done, it sets out the basis on which the Commissioners will exercise their discretion to permit a deduction. Its paragraph 17 states that 'claimants will need to be able to answer most of the questions at Appendix 2 satisfactorily. In most cases, this will be little more than providing alternative evidence to show that the supply of goods or services has been made (this has always been HMRC's policy).'

Thus, the rigours of the Belgian approach do not currently apply in the UK. However, the Commissioners may change their policy and/or amend Regulation 29 and its grant of discretion in the future. Equally, in specific cases, they may consider that there are grounds for not applying their discretion. Therefore, taxpayers should be alert to the risks of invalid invoices both in the UK and in any other jurisdictions where they operate and take steps to identify and correct these before audit by the authorities.

The Taygroup case (TC02739)

Taygroup is a judgment of the First Tier Tribunal and is concerned with self-billing arrangements (whereby the customer issues invoices on behalf of its supplier and provides those invoices to its supplier so that the supplier can account for the VAT that is due). The taxpayer was in the business of road transport and needed to engage with small local haulage businesses. Many of these were owner-drivers with no tax/accounting infrastructure and therefore Taygroup decided to enter into self-billing arrangements with them.

However, some of these self-billing arrangements were flawed in a number of respects. The regulations provide that self-billing arrangements shall end within 12 months of their inception, or on the expiry of the contract between customer and supplier to which the arrangement relates. Taygroup's contracts with its suppliers had no set date of expiry. However, the self-billing agreements were typically stated to last for a period of approximately five years.

A more serious issue was that some of the suppliers were not, in fact, registered for VAT at the time that the supplies took place. The evidence was that the managers of Taygroup's local depot would obtain the relevant information from the owner-drivers, including VAT number, but that no checks were carried out to verify.

The Commissioners carried out a visit in 2008. During the visit, having established that no checks had been carried out by Taygroup, the officer checked the numbers using the Europa system and identified nine invalid VAT registration numbers.

The Commissioners issued assessments to recover the input tax claimed in respect of supplies from the suppliers with invalid registration numbers. Having discovered that the self-billing agreements were for periods that were not permitted (see above), they maintained that all of the self-billing invoices were invalid and did not evidence a right to deduct. However, where it could be established that the supplier was properly VAT registered, they were prepared to exercise their discretion to permit input tax deduction.

After a review of further evidence provided by Taygroup, the assessments were amended so that the sums assessed were only in respect of supplies where the supplier had not been shown to have accounted for output tax on the supplies in question.

For two of the suppliers, Taygroup had paid them fees in excess of the VAT registration threshold in the space of a

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year. For these two at least, it was clear that they were taxable persons, even if not registered, and therefore the supplies were properly subject to VAT.

The Tribunal held that the self-billing agreements were invalid both because they were for periods longer than a year and because the suppliers were not registered for VAT (registration being a condition of a self-billing agreement).

Taygroup argued that denying it input tax would breach its fundamental right to deduct under EU law. It relied on the line of case law referred to above in respect of breach of formal conditions not being sufficient to deny a substantive right. However, the Tribunal did not accept this. It held that self-billing is an exception to the general system of VAT invoicing that introduces risks to the revenue if the supplier de-registers. Given that the customer could carry out regular checks on the position of its suppliers, the Tribunal held that it was not disproportionate, and therefore not a breach of EU law, for the customer to bear the risk.

The final argument for the taxpayer was that the Commissioners should have exercised their discretion to allow the claims. The Tribunal held that it had jurisdiction to review whether the Commissioners had exercised their discretion reasonably and concluded that they had. It held that Taygroup should have confirmed its suppliers' registration position in all cases, including those where the suppliers were paid in excess of the registration threshold. The Tribunal accepted that the Commissioners were correct to deny input tax deduction where there was insufficient evidence that the suppliers had paid the output tax and that the taxpayer had not provided such evidence in respect of the assessed amount.

Conclusion

These two judgments demonstrate that receiving, and being able to evidence the receipt of, a taxable supply is now not necessarily sufficient to entitle a taxpayer to deduct input tax if the correct invoice is not held. Given the economic climate, it is likely that the Member States will increasingly seek to restrict input tax recovery where they are able to. Whilst the Commissioners currently apply a relatively generous regime in terms of accepting alternative evidence of the entitlement to deduct, the judgment in *Petroma* may lead them to reconsider. Further, the *Taygroup* judgment makes clear that customers are very much at risk in self-billing arrangements.

Taxpayers may wish to review their accounts payable procedures to ensure that invoices are checked for completeness and accuracy, and to review the VAT registration status of any suppliers with whom they have self-billing arrangements.

Mitchell Moss
Ernst & Young

CASE AND COMMENT

Paul Newey t/a Ocean Finance (Case C-653/11) Court of Justice of the European Union (CJEU)

The Decision

This case sought guidance from the CJEU on the factors to be taken into account when determining the correct recipient of supplies and also the situations when a national court should depart from the analysis set out in a contract.

In this case, Mr Newey ran a company which provided loans (Ocean Finance). He incorporated a wholly-owned loan broking company in Jersey (Alabaster), and supplies of advertising services were made to this company. This structure sought to mitigate irrecoverable input tax that was being charged to Ocean Finance when it contracted for advertising services itself.

HMRC challenged this structure and suggested that it was in fact Ocean Finance

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who was receiving the advertising services and providing the loan broking services. On this basis, the services received by Ocean Finance were subject to the reverse charge, with the related input tax being irrecoverable. HMRC argued alternatively that the arrangements fell foul of the "abuse of law" principle set out in Halifax.

The First-tier Tribunal ("FTT") had found that Alabaster, as a commercial entity in its own right, was the entity making the supplies of loan broking and receiving the advertising services. As Alabaster was a Jersey-based company, the supplies of advertising made to it fell outside the scope of UK VAT. The fact that Ocean Finance also indirectly benefitted from the supplies did not alter the FTT's conclusion on this point. Further, the FTT held that though the aim of the structure was to obtain a tax advantage, it did not go against the purpose of the Directive and was therefore not abusive.

HMRC appealed to the Upper Tribunal ("UT"), who subsequently referred a number of questions to the CJEU. These essentially asked the following.

1 What weight should be given to the contracts when determining the recipient of a supply?
2 If the contractual position is not decisive, when should a national court depart from this?
3 If the contractual analysis does result in a tax advantage and is contrary to the purpose of the Sixth Directive and the abuse of law principle, how should these arrangements be re-characterised?

The CJEU went straight to judgment in this case and gave the following guidance.

1 Contractual terms are a factor to take into account when looking to identify the supplier and the recipient, but are not definitive.
2 It is up to the national court in each individual case to determine whether these contracts reflect an artificial arrangement and whether they have been set up with the sole aim of obtaining a tax advantage.
3 If the national court considers that the contracts do not reflect reality, they can be disregarded when identifying the supplier and recipient.
4 If the contract terms are disregarded, the national court can redefine them to represent the reality of the situation, i.e. the national court can "look through" the contract.

Commentary

The CJEU seems to confirm what was already commonly understood, namely that the contractual arrangement is important when looking to identify the supplier and recipient, but is only one of a number of factors to be considered. Whilst there is no further guidance from the CJEU on the concept of abuse of law, the judgment does endorse the principles on the concept of abuse of law as set out in Halifax.

The comments of the CJEU in relation to when contracts can be disregarded serve to highlight to businesses the importance of ensuring that contracts reflect economic reality. Businesses therefore need to take extra care to evidence VAT arrangements effectively and consider any structures with an off-shore element.

X BV (C-651/11)

This case concerned (i) whether a disposal of a 30% shareholding in a company could be equivalent to a transfer of a going concern ("TOGC"); and (ii) whether input tax incurred by the transferor on fees relating to its share disposal was deductible.

Factual background

X BV (X) held 30% of the shares in another Dutch company A BV (A). X provided management services to A. The remaining shares in A were held by three other shareholders. At the end of 1996, all of the shareholders sold their shares to D

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Plc. In connection with that sale, X resigned from A's Management Board.

In conjunction with the sale of the shares in A, X incurred various fees upon which VAT had been charged. X deducted the VAT it incurred.

The Dutch tax authorities challenged the deduction on the basis that the VAT incurred by X related to an exempt supply of its shares in A. X considered that the supply was equivalent to a TOGC.

The Dutch national court referred several questions to the Court of Justice of the European Union ("CJEU").

1. Whether the disposal of 30% of the shares in a company – to which the transferor of those shares supplies services that are subject to VAT – is equivalent to the transfer of (part of) a totality of assets.
2. If the answer to Question 1 is no, whether the disposal is equivalent to the transfer of (part of) a totality of assets where the other shareholders, who also supply services that are subject to VAT to the company whose shares have been disposed of, transfer all the other shares in that company to the same person (almost) at the same time.
3. If the answer to the second question is also no, whether the disposal referred to in Question 1 can be regarded as the transfer of (part of) the undertaking taking into account the fact that that disposal is closely linked to management activities carried out for that participation.

The CJEU made the following comments in answering the questions posed by the national court.

- The CJEU noted that the mere acquisition and holding of shares in an undertaking does not amount to an economic activity. However, the case is otherwise where the holding company is directly or indirectly involved in management which is subject to VAT.
- Shareholders do not own the assets in an undertaking. They only own the shares in that company. Further, in the facts of the case referred, the transferor had only a limited amount of those shares (30%).
- The mere disposal of shares does not allow the transferee to carry on an independent activity as the transferor's successor. Therefore, the transfer of a 30% shareholding could not be regarded as a TOGC. As a result of this, the transfer of shares in a company could never be regarded as equivalent to a TOGC.
- The CJEU also held that it made no difference that all of the shareholders had sold their shares and stated that each transaction must be assessed individually and independently. It follows, therefore, that a disposal to a single person of all the shares in a company also cannot be regarded as equivalent to a TOGC.
- The CJEU did, however, note that the management activities could have been transferred as a TOGC if they consisted of an autonomous undertaking which could be operated separately by the transferee and for which the transferee paid separate consideration. Even if this were the case, however, the TOGC could only extend to the assets used for the purposes of the management activities and not the disposal of the shares. In this case, as A's management activities ceased immediately upon the sale of the shares there was not, on the facts, a TOGC of its management business.
- The CJEU went on to explain that, if the supply of shares was exempt, then it was necessary to establish which of the input tax would be directly attributable to that exempt supply. In this regard, the CJEU confirmed that a direct and immediate link will exist where the cost of the services on which the input tax was incurred is incorporated into the cost of the exempt supply of shares.

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Commentary

This follows a long line of case law addressing the VAT recovery position on deal fees incurred in relation to a share sale and is unlikely to be the last word on the subject. The case has not thrown a much light on the circumstances in which the principle set down in *ABSKF* (that a transfer of shares can be equivalent to a TOGC) will apply and as such the scope and applicability of that principle remains unclear. In this respect, it can be noted that CJEU did not address whether the principle could apply to a transfer of 100% of a shareholding from one single person to another single person. It seems likely that this point will be the subject of further litigation to come, as well as what it means for an input cost to be "incorporated" into the price of the shares.

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Deloitte LLP

H2O

Two elements, one molecule

I can remember when I was a VAT Trainee with HM Customs and Excise (as they then were). One of the trainers made a lasting impression on me when he invited us all to look out of the window from the 14th floor of a high rise office block in Leeds (not something we were normally encouraged to do as Civil Servants). He declared that almost everything we could see from that window (other than the natural features of the landscape such as the land itself and the sky) were there as a result of transactions (or in a VAT vernacular, they were there as a result of supplies of goods or services). The analysis, of course, is blindingly obvious but is as true today as it was then. Anyone looking out of the window during working hours nowadays would, however, probably be disciplined so it is not recommended. The point of recalling that event is to set the background. Millions of supplies are undertaken on a daily basis and, from a VAT point of view, the vast majority of them are pretty straightforward. A supplies X to B in return for consideration. X can be goods or services and, unless we can find a zero-rating, a reduced rating or an exemption for the supply of X, VAT is chargeable at the standard rate. What could be more simple?

It seems that my plea for simplicity (see my article entitled "Better than filing bits of paper" DVITI issue 190 March 2012) has, however, fallen on deaf ears! (or, more likely, perhaps the plea was a little naïve). If only all supplies were so simple to analyse! The old chestnut of compound or multiple supplies makes it very difficult for suppliers to classify their supplies correctly and a recent case has brought the problem back into sharp focus.

What's the issue?

As we often do (far too often really if my waistline is anything to go by), my wife and I will eat out at our favourite restaurant (The Epworth Tap in Epworth, North Lincolnshire (for anyone who may be interested)). A step by step analysis of the goods and services we receive from the moment we walk in to the restaurant goes something like this. Entering the premises, it could be argued that we are granted some kind of license (a service). When we order a pre-dinner drink from the bar, we are supplied with a mixture of the services of the barman and with the goods (the drink). The waitress takes our order and the chef cooks the meal (both services) and when the meal arrives, we are again supplied with both services (the serving) and with goods (the food (and exceptionally good food it is)). We order a bottle of wine (goods) and, at the end of the meal we settle our bill and the proprietor orders our taxi (services). In my view, nobody in their right mind could successfully argue that we had received the various supplies (of goods and services) as separate supplies. A correct analysis must be that we have received a single supply of a restaurant meal and that the various elements, whilst clearly capable of being

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supplied in their own right, are simply components that help us to enjoy the main or principal supply of the restaurant meal.

From a VAT perspective, it would be an absolute nightmare (if not impossible) if every element of a supply had to be isolated and taxed separately. Much better that there is a single supply and we only have to work out the VAT liability once! Or so you would have thought.

Middle Temple

In a recent case – *The Honourable Society of Middle Temple [2013] UKUT 0250* (hereafter Middle Temple) – the issue was whether there was a single supply of an interest in land (including supplies of water) by the landlord to the tenants or whether, in fact, there were two separate supplies. For historical reasons, supplies of water were made by Thames Water to Middle Temple which were metered but Middle Temple's supply of water to tenants under the lease was unmetered and charged for on the basis of floor space occupied by the particular tenant and not the quantity of water consumed. Middle Temple had opted to tax the particular property and, as a consequence its supply of land (the rent) was subject to VAT at the standard rate. However, as a separate supply of water can be zero-rated, this was how Middle Temple had classified that supply. HMRC contended that, in fact, there was a single supply of the interest in the land (which included water) and that, as a result, there was a single composite supply and VAT was due on the element of the single supply that Middle Temple had treated as zero-rated.

The First-tier Tribunal ("FTT") concluded that, on the facts, there were two distinct and separate supplies and not a single supply. The packaging of the water and the premises in a single contract did not result in either service losing its identity. Indeed, at paragraph 54 of the FTT's decision it concluded that 'The fact that two supplies are provided under one contract is not conclusive of a composite single supply being made'.

However, the Upper Tribunal disagreed and, referring to the now extensive case law of the Court of Justice, (including *Card Protection Plan* (*C-349/96*), *Levob* (*C-41/04*), *Deutsche Bank* (*C-44/11*), *Tellmer* (*C-572/07*), *Purple Parking* (*C117/11*), and *Field Fisher Waterhouse* (*C-392/11*)), it set out what it considered to be 12 key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies. These principles bear repetition.

1 Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
2 The essential features or characteristic elements of a transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
3 All cases are different and there can never be an absolute rule so, in every transaction, all of the circumstances must be considered.
4 Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.
5 There is a single supply where two or more elements are so closely linked that they form a single indivisible economic supply which it would be artificial to split.
6 In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.
7 The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

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8 There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the same tax treatment of the principal element.
9 A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.
10 The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
11 Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.
12 A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.

Whilst there will, undoubtedly, be some that will consider that this list is incomplete, in my view, the Upper Tribunal's summary of the 12 principles provides a fantastic starting point for those of us who are tasked with analysing such matters. Applying those principles to the facts in the Middle Temple case, the Upper Tribunal concluded that The First-tier Tribunal had erred in law when it ruled that the supply of the premises and the supply of the water were separate supplies.

In essence, Middle Temple provides the right to occupy the premises and, through an accident of history, also provides cold water to the tenants. This is somewhat unusual. However, having acknowledged that the two separate elements (premises and water) may be supplied separately in other circumstances, it was clear that, in this case, the tenants had no choice but to obtain water from Middle Temple. As both the premises and the water are essential if the tenants are to occupy and use the premises, the Upper Tribunal concluded that it had to be assumed that the tenants required a combination of those two elements if the premises were to fulfil their economic purpose. If that assumption was correct, then it followed that the leasing of the premises and the supply of the water to the premises under the terms of the lease form a single economic supply which it would be artificial to split because, from the point of view of the typical tenant, both the premises and the water are equally indispensable and inseparable.

The First-tier Tribunal had accepted that water was an indispensable element of the supply when it found that it was required for human life and that the lease of the premises would not have any practical utility without the water. Equally, a supply of water on its own would be pointless without the premises. Both are required if the tenant is to occupy and use the premises and, as a result, applying the analysis of the CJEU in *Deutsche Bank*, the Upper Tribunal concluded that the provision of the two elements is an indivisible supply which it would be artificial to split. The elements are not only inseparable but are indispensable and must be considered to be so closely linked that they form, objectively, a single indivisible economic supply.

Now, I am no scientist, but with all of this talk about elements, it seems to me that when undertaking any kind of analysis in relation to whether there is a single or multiple supply, it would be useful to keep this case in mind. The case is, partly, about water. From memory (and it is many years since I did my O levels), a water molecule is made up of two elements. There are two Hydrogen atoms and an Oxygen atom. Hydrogen on its own is one thing, Oxygen on its own is another but, by combining the two elements together in the correct proportions, something

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entirely different is created. One instinctively knows water when one sees it and one could never split the two elements and still call it water. You would simply be left with two distinct separate elements that are most definitely not water.

The answer to the question of whether there is a single or multiple supply is complex. To get to an answer not only should the 12 principles outlined by the Upper Tribunal be considered but perhaps it may also be useful to use the chemical analogy too. Just as it would be artificial to separate out all of the goods and services which go together to form a restaurant meal, it would equally be artificial when supplying water to say that what was being supplied was Hydrogen and Oxygen!

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LAND-RELATED SERVICES

A definition

In anticipation of the European Court of Justice ("ECJ") judgement in the case of *Minister Finansow v RR Donnelley Global Turnkey Solutions Poland Sp. Z.o.o.* (*C-155/12*), set out below are the latest thoughts on a most needed definition of what is a service connected with immovable property, or as we term in the UK, a land related service.

Legislative position

A comprehensive definition of services related to land is important as this type of service is one of the exceptions to the general place of supply rule, being subject to tax in the deemed place of consumption – where the land is situated.

At Article 47 of the Principal VAT Directive 2006/112/EC, it states that:

> "The place of supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with similar function, such as holiday camps or sites developed for use as camping sites, the granting of rights to use immovable property and services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision, shall be the place where the immovable property is located."

Despite the rather lengthy description contained in the Principal VAT Directive, the precise scope of what is within the term "service connected with immovable property" and what is not is not entirely clear.

It is recognised that the lack of clarity leads to the risk of double taxation on supplies of certain types of services; one Member State could view a service as falling under Article 47 and as taxable in their EU Member State, whilst another EU Member State may see the same service as falling under Article 44, the general rule. In the case of a B2B transaction a Member State with this interpretation could require the purchaser of such services to account for the reverse charge on the same transaction, thus leading to the potential for VAT being accounted for in both the supplier's and the recipient's Member States. Conversely the other faux pas of European VAT principles could occur, that of non taxation. As a result a more clear definition or set of guidelines is essential in order to avoid conflicting interpretations between Member States.

European case law

At a European level the only other aid to interpretation comes from ECJ case law and to date the best we have is the concept of "sufficiently direct connection" which was established probably most notably in the case of *Heger Rudi GmbH v Finanzamt Graz-Stadt* (*C-166/05*). This concept states that only supplies of services which have a sufficiently direct connection with immovable

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property fall within Article 47. But that is where the guidance ends since all subsequent cases considering services connected with immovable property have been decided by the ECJ on the very specific facts of each case.

The UK interpretation

The implementation of Article 47 into UK law can be found at Schedule 4A, Paragraph 1, VAT Act 1994. This takes the basics of Article 47 but splits the included services into six distinct types of services set out below in simplified form.

- Supplies of interests in or rights over land.
- Supplies of rights to call for or be granted an interest in or right over land.
- Granting of licences to occupy land including within holiday accommodation.
- Provision of hotel accommodation, etc.
- Construction works and other works undertaken to buildings
- Services such as are supplied by estate agents, auctioneers, architects, surveyors, engineers and others involved in matters relating to land.

It is this final category which in my view results in the most scope for conflict in the UK; the inclusion of "other involved in matters relating to land", the other five categories do appear to be quite tightly scoped.

UK guidance in the Place of Supply Notice 741A does not provide much assistance with regard to what the term land related service means. In addition to the staple "sufficiently direct connection" definition, the Notice merely provides a list of examples of what is included and what is outside HMRC's interpretation of the legislation. This is fine if the services in question are of a nature wholly within one of the examples. However, as we are aware real life situations very rarely fall neatly into a finite list of examples.

HMRC has relatively recently taken steps to make the UK position clearer and following discussions on this topic at EU level it issued Revenue & Customs Brief 22/2012. This outlined changes to HMRC's policy in relation to three specific types of services.

- Space at exhibitions and conferences – the new policy is if the supply is of a specific stand, the supply is deemed to be a supply of land and as such land related services. However, if there are accompanying services as part of a package, the supply is to be taxed under the general place of supply rule.
- Storage of goods – the old policy was to see all supplies of storage space as land related services; however this will now only be the case if the supplier grants a recipient the right to use a specific area of a warehouse for exclusive use of the customer to store goods. It should be noted that this is the service type akin to the one at issue in the case of *RR Donnelly* (which is discussed below); therefore it will be very interesting to see if the ECJ ultimately agrees.
- Airport lounges – the new policy is to view a supply of access to airport lounges as a land related service.

More importantly however, HMRC also took the opportunity to add to the term "sufficiently direct connection". From a UK perspective services with a sufficiently direct connection with a specific piece of land will include:

- services derived from land and where the land is a central and essential part of the service; and
- services intended to legally or physically alter a property.

The UK guidance, although providing more clarification on the UK interpretation, still does not help the real issue of conflicting European views and only a legislative change at EU level or ECJ case law will bind all Member States.

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Guidelines of the Advisory Committee on Value Added Tax

The discussions undertaken at EU level on this issue as referred to above, may relate to the guidelines released by the Advisory Committee on Value Added Tax, hereafter referred to as "the VAT Committee". Following the 93rd Meeting of the VAT Committee on 1 July 2011, the VAT Committee issued guidelines on the scope of the place of supply rule governing services connected with immovable property (Document A – taxud.c.1(2012)400557 – 707).

In addition to the VAT Committee being of the unanimous view that services connected with immovable property under Article 47 of the VAT Directive should only include services that have a sufficiently direct connection with that property, it similarly to the UK, opted to provide its views on a specific examples basis rather than providing any new definition or principles.

It should be noted that the VAT Committee are merely a consultative committee and the document caveats that their views are not an official interpretation of the European law and are not necessarily agreed by the European Commission. In other words these guidelines are not binding on any Member States.

AG's opinion in RR Donnelly (C-155/12)

The reference of the RR Donnelly case to the ECJ has provided real opportunity for the European Court to provide a definitive definition or set of principles once and for all. Indeed Advocate General Kokott commented in his opinion released on 31 January 2013 that this case "*provides a good opportunity to set out more precisely the Court's case-law on the place where a service in connection with immovable property is supplied. Going beyond the individual case, clarity should be provided, for the purposes of application of the law, as to what the Court understands by a 'sufficiently direct' connection*".

The case of RR Donnelly concerns, the activities of a Polish company which is engaged in the provision of storing goods for customers established in other EU Member States. Its services go beyond simple storage however and include admitting goods into the warehouse, placing goods on storage shelves, storing the goods, packaging the goods for the customer, issuing the goods and unloading and loading activities.

The Polish tax authorities were of the opinion that these services were services connected with immovable property and since the warehouse was located in Poland, the services should be taxed in Poland. RR Donnelly took a different view and considered that its services fell within the place of supply general rule at Article 44 and as such should be subject to tax in the EU customer's Member State. The specific question of whether the services listed above (described as complex services) constituted services connected with immovable property and as such fell into the provisions of Article 47 was therefore referred by the Polish courts to the ECJ

The AG concluded that the complex services in question were a single supply of services for VAT purposes for which the principal service was the storage of goods. The AG then set out the following principles on whether a service falls within the scope of Article 47.

1. It is not sufficient for any land or property to be required for the performance of the service, it must be specific land or property identified by the parties to the transaction.
2. The specific land or property must be the subject matter of the service, in other words the land or property must be the object of the supply.
3. The services explicitly listed in Article 47 are a guide to interpretation and using that list it is possible to determine when the immovable property is the subject matter of a service.
4. The immovable property is the subject matter of a service when it is:

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- used by the customer;
- when work is carried out on it; or
- when it is assessed.

5 Two services listed in Article 47 do not fall within the three above categories – estate agents and the preparation of construction work. These services do not have the immovable property as the subject matter but rather the contract for the purchase of immovable property or the planning documents for the work to carried out on the property. The inclusion of these services in Article 47 serves to extend the application of the rule for the purposes of simplification for these services only.

A possible definition?

In answering the question referred by the Polish court, the AG stated that:

> "*Application of Article 47… requires that the subject matter of the service be the use of, work on or assessment of specific immovable property or that the service be explicitly listed in that provision.*"

Consequently in terms of whether storage services fell within this definition – the AG concluded that such a service would only fulfil the requirements if the storage of goods is the principal service and it is connected with a right to use specific immovable property or a specific part of such property. This is entirely in line with the new policy announced by HMRC in Revenue & Customs Brief 22/12.

In my view this potential definition would be a significant improvement on what we have at the moment. Let us hope that the ECJ chooses to adopt it in its judgement so that harmony across Europe can be achieved at last (well, at least when it comes to the place of taxation of land related services).

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CUSTOMS

Update on reforms to the EU's Generalised System of Preferences

Further to our article "*Reforming the Generalised System of Preferences: EU Refocuses Trade Priorities in Favour of Poorer Countries*", dated 1 January 2013 and circulated by this publication, we provide an update on: the countries that are set to lose GSP beneficiary status from 1 January 2014; the status of the Free Trade Agreements ("FTAs") currently under negotiation with a number of these countries; Myanmar/Burma's reinstatement in the GSP; and the effects of the reformed GSP on regional cumulation (i e the system which allows products originating in one country to be treated as originating in another country within the same regional group).

By way of background, the new GSP regulation (Council Regulation (EU) 978/2012 Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008: http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf) provides for new tariff preferences to apply from 1 January 2014. The existing preferences will continue to apply until 31 December 2013 (Pursuant to Council Regulation (EC) No 732/2008, as extended by Council Regulation (EC) No 512/2011).

Change in the number of countries to benefit from GSP

As of 1 January 2014, the number of GSP beneficiaries will be reduced from 176 to 89 in order to "*focus the GSP preferences on the countries most in need*" (European Commission, 2011), specifically least developed countries (LDCs) and other poor economies with no preferential market access arrangement to the EU market. We set out below the countries that are to be excluded from the GSP.

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- Thirty-three Overseas Countries and Territories that already benefit from a special market access arrangement with the EU or belong to developed countries. The impact on these countries is, therefore, expected to be neutral.
  Anguilla, Netherlands Antilles, Antarctica, American Samoa, Aruba, Bermuda, Bouvet Island, Cocos Islands, Christmas Islands, Falkland Islands, Gibraltar, Greenland, South Georgia and South Sandwich Islands, Guam, Heard Island and McDonald Islands, British Indian Ocean Territory, Cayman Islands, Northern Mariana Islands, Montserrat, New Caledonia, Norfolk Island, French Polynesia, St Pierre and Miquelon, Pitcairn, Saint Helena, Turks and Caicos Islands, French Southern Territories, Tokelau, United States Minor Outlying Islands, Virgin Islands – British, Virgin Islands – US, Wallis and Futuna, and Mayotte.
- Thirty-four Partners that already have alternative market access arrangements with the EU, such as bilateral FTAs. The impact on these countries is also expected to be neutral.
  Euromed (6): *Algeria, Egypt, Jordan, Lebanon, Morocco and Tunisia.*
  Cariforum (14): *Belize, St. Kitts and Nevis, Bahamas, Dominican Republic, Antigua and Barbuda, Dominica, Jamaica, Saint Lucia, Saint-Vincent and the Grenadines, Barbados, Trinidad and Tobago, Grenada, Guyana and Surinam.*
  Economic Partnership Agreement Market Access Regulation (12): *Côte d'Ivoire, Ghana, Cameroon, Kenya, Seychelles, Mauritius, Zimbabwe, Namibia, Botswana, Swaziland, Papua New Guinea and Fiji.*
  FTAs (2): *Mexico* and *South Africa.*
- Twenty-two countries and territories that have been classified as 'high-income' or 'upper-middle income' economies by the World Bank's per capita income classification for the last three consecutive years (http://data.worldbank.org/about/country-classifications/country-and-lending-groups).
  High-income countries (7): *Saudi Arabia, Kuwait, Bahrain, Qatar, United Arab Emirates, Oman and Brunei Darussalam.*
  High-income territory (1): *Macao.*
  Upper-middle income countries (UMIs) (12):
  - Latin America (5): *Argentina, Brazil, Cuba, Uruguay and Venezuela.*
    Ex-USSR (3): *Belarus, Kazakhstan and Russia.*
    Other (4): *Gabon, Libya, Malaysia and Palau.*

  In addition, *Azerbaijan* and *Iran* will no longer be eligible for GSP as of 22 February 2014 following their classification by the World Bank as upper-middle income countries for a third consecutive year in July 2012 (http://data.worldbank.org/about/country-classifications/country-and-lending-groups).

All 176 countries (including those set to lose GSP beneficiary status) will, however, remain "eligible" for reinstatement as "beneficiary" countries. For example, if they cease to meet the relevant income thresholds or to benefit from a preferential market access arrangement.

Status of FTA negotiations with countries set to lose GSP status

A number of the countries and the trade blocs comprising countries that are set to lose GSP beneficiary status from 1 January 2014 are at various stages of negotiating bilateral or regional FTAs with the EU. We provide below an update on the status of these negotiations.

- Negotiations with the **Gulf Cooperation Council** (**GCC**), comprising the recently-upgraded high-income countries of **Bahrain**, **Kuwait**, **Oman**, **Qatar**, **Saudi Arabia** and **United Arab Emirates**, were suspended by the GCC in 2010. However, the EU is understood to remain committed to concluding an FTA with the GCC and informal consultations between the EU and GCC chief negotiators continue to take place (the

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next EU-GCC ministerial meeting understood to be taking place on 1 July 2013). Notably, the loss of GSP status will mean that the GCC countries will become subject to a 4.7% duty on jet fuel imported into the EU from the region from 1 January 2014. It is anticipated that this may prompt the renewal of the FTA negotiations.

- In February 2011, the EU suspended negotiations for an EU-**Libya** Framework Agreement as a result of the conflict (Libya and Syria remain the only Mediterranean countries not to have concluded FTAs with the EU).
- The EU's long-standing and on-going negotiations with the **MERCOSUR** (El Mercado Común del Sur) bloc, comprising Argentina, Brazil, Paraguay, Uruguay and Venezuela, have received renewed impetus. In January, it was agreed that market access offers on customs duties and quotas would be exchanged by no later than the last quarter of 2013 in time for discussion at a formal negotiating round in November 2013.
- The EU's negotiations with **Malaysia**, the second ASEAN FTA to be negotiated, were postponed due to Malaysia's domestic elections in early May 2013. It is anticipated that negotiations will resume before the end of 2013.
- Progress on negotiations for Deep and Comprehensive Free Trade Area Agreements (DCFTAs) with each of **Egypt**, **Jordan**, **Morocco** and **Tunisia** has been varied. Each of these countries have existing Euro-Mediterranean Association Agreements with the EU that provide for duty-free imports of most products into the EU. In response to the Arab Spring, the DCFTAs are intended to build on these agreements to ensure closer integration between the economies of these countries and the EU Single Market. Negotiations are most advanced with Morocco (a first round of negotiations took place in April 2013). By contrast, there has been no reported progress with Tunisia, exploratory discussions took place with Egypt in November 2012 and a scoping exercise was launched in March 2012 to assess Jordan's readiness to start DCFTA negotiations.

Reinstatement of Myanmar/Burma

On 12 June 2013, the Irish Presidency of the EU announced that the EU had co-signed the relevant legislation that would result in Myanmar/Burma's reinstatement in GSP, following the temporary withdrawal of its access to GSP in 1997 as a result of serious and systematic practices of forced labour. At the time of writing this article, the relevant regulation was awaiting publication in the EU's *Official Journal* (we understand the regulation will be published at the end of July 2013). It will take effect 20 days after publication and applyretrospectively from 13 June 2012.

Myanmar/Burma is a beneficiary of the GSP's special "Everything but Arms" (EBA) scheme for LDCs. Such countries benefit from full duty-free, quota-free access to the EU market for all "originating" products, except arms and ammunition. Companies that have imported such products into the EU on or after 13 June 2012 should consider filing a refund claim for any duties paid with the relevant EU customs authority following the regulation's entry into force.

Impact of these changes on regional cumulation for GSP countries

Amendments to the GSP rules of origin are expected to be published before the summer break, which will reflect the reformed GSP. The GSP's distinction between "eligible" and "beneficiary" countries will be reflected in the rules of origin: on import into the EU, preferential treatment and thus the rules of origin will be applied to GSP beneficiaries only. Regional cumulation will be available for GSP beneficiaries only, which will result in changes to the existing Cumulation Groups I, II and IV, as summarised below.

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Table B Cumulation Group	Existing Members	Impact of GSP Reforms
Group I	Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam	Myanmar/Burma to join (being a member of ASEAN) Brunei and Malaysia will no longer be in Group I due to being removed from the list of GSP beneficiaries Singapore will no longer be a member (there being no equivalent to Article 5(3) of Regulation 732/2008 in the new GSP)
Group II	Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Panama, Peru, Nicaragua and Venezuela	Venezuela will no longer be in Group II due to being removed from the list of GSP beneficiaries
Group III	Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka	No change
Group IV	Argentina, Brazil, Paraguay and Uruguay	Argentina, Brazil and Uruguay will no longer be in Group I due to being removed from the list of GSP beneficiaries Group IV will consist of one member only (Paraguay), which in practice will effectively bring Group IV (as it currently stands) to an end

While the new preferences apply from 1 January 2014, for goods in transition, the principles of general customs legislation will apply (i.e., the regime to apply will be the one that is applicable at the moment of acceptance of the customs import declaration). The impact of the loss of GSP beneficiary status will be as follows: goods originating in a GSP beneficiary country that leave the country prior to the date of application of the new GSP regime, but which are customs-cleared in the EU on or after 1 January 2014, will not benefit from GSP preferences if the country has lost its GSP beneficiary status as of 1 January 2014.

Conclusion

Those currently relying on GSP should consider the impact of the new GSP regime on their supply chain from 1 January 2014 and in the future, and plan appropriately. The impact that loss of GSP status may have on profit margins should be assessed, as well as sourcing materials and/or products from other jurisdictions that will continue to benefit from GSP or a preferential market access arrangement, such as an FTA.

Under the new GSP, the list of beneficiary countries will not remain static. For example, as highlighted above, any country that completes three consecutive years as a high-income or upper-middle income economy will cease to benefit from GSP beneficiary status and lose their preferential tariffs. While we are currently awaiting the publication of the World Bank's country income classification table, examples of countries that this may apply to include: China; Colombia; Costa Rica; Ecuador; Equatorial Guinea; Jordan; Maldives; Panama; Peru; Thailand; and Tunisia.

If the European Commission decides to remove a country's GSP beneficiary status, a transitional period will be applied to allow traders to adopt to the changes. For those countries that have completed three consecutive years as a high-income or upper-middle income economies, the loss of tariff preferences will apply from one year after the date of the entry into force of the relevant Commission delegated act. If a preferential market access arrangement is applied (even on a provisional basis), the changes will apply from two years after the date of application of the arrangement.

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Companies that currently claim GSP preference for their imports should closely monitor these changes so as to be aware at the earliest opportunity. It will then be vital to ensure that this information is disseminated at an early stage to the appropriate parts of the business, such as the procurement and supply chain divisions.

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