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CERTIFIED PUBLIC ACCOUNTANTS

VAT Newsletter | Q. 2 - 2019

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1 Local news

1.1 VAT Appeals decided by the Administrative Review Tribunal ("Tribunal")

On 20th June 2019 the Tribunal published the following decisions:

Case 52/2012 *XXX vs Kummissarju tat-Taxxa fuq il-Valur Mizjud* concerning an appeal against assessments. The appellant company claimed that the assessments were null in that the correct procedure was not followed and so requested the Tribunal to revoke them. In his counter reply, the Commissioner maintained that the assessments were valid at law and called for the Tribunal to reject the appeal. After examining the facts at issue, the Tribunal found that whereas the assessments were valid, the workings made by the Commissioner to calculate the estimated underpayment of output VAT and the applicable VAT rate were not convincing. As a result, it ordered the Commissioner to re-issue the assessments based on the amounts calculated by the Tribunal as outlined in the decision.

Case 48/2014 *XXX vs Kummissarju tat-Taxxi* concerning a question to the Tribunal relating to administrative penalties and interest incurred by XXX following a correction to a VAT return. Appellant company claimed that the administrative penalties and interest should have been waived by the Commissioner since the error was pursuant to a genuine mistake (error in transposing the input vat from xl. file to the VAT return) and they had acted in good faith. The Commissioner rebutted the company's claim on grounds that the waiving of administrative penalties in terms of Art. 42(1)(c) of the VAT Act was solely at his discretion and given that administrative penalties had already been waived on two previous identical defaults by the company it was decided to refuset the request for the cancellation of the penalties. The Tribunal agreed with the Commissioner by rejecting the company's request and confirming the administrative penalties and interest.

1.2 Court of Appeal (Inferior Jurisdiction) decisions in the field of VAT

On 15th April 2019 the Court published its decision in case 149/2012 *Eurochange Financial Services Limited vs Kummissarju tat-Taxxa fuq il-Valur Mizjud*, regarding services consisting in the storage, counting and packaging of coins which *Eurochange* provided as sub-contractor to the Central Bank of Malta. The Administrative Review Tribunal had ruled that the services amounted to financial transactions in terms of Item 3(3) and (4) of Part Two of the Fifth Schedule to the VAT Act and consequently were exempt without credit supplies. The Commissioner appealed this decision on grounds that the Tribunal had made an incorrect interpretation of the nature of the services which in his view were not "specific to and essential for the financial transaction" thus leading to a wrong decision. After considering the arguments of the contending parties and by reference to pertinent settled case law of the European Court of Justice, the Court ruled in favour of *Eurochange* by rejecting the Commissioner's appeal application and confirming the Administrative Review Tribunal's decision.

2 European News

2.1 European Commission – Taxation and Customs Union

On 10th May 2019 the Commission published a study on *"Domestic and cross border intra-EU VAT Refunds"* which evaluates the implementation of the current refunds regime by tax administrations and highlights potential problems encountered by taxable persons in making VAT refund claims. The Commission will carefully analyse the results and, in close cooperation with the EU Member States, seeks to put in place the best strategies and solutions to address possible inconsistencies of legislation so as to ensure an effective and uniform implementation of the law.

2.2 VAT Committee

2.2.1 On 6th June 2019 the VAT Committee published new guidelines on VAT. The guidelines are agreed in the VAT Committee following the examination of and discussion on questions concerning the application of EU VAT provisions raised by the Commission or a Member State. Whilst being a valuable guide for understanding the application of EU VAT law, it is pertinent to remind that the guidelines are merely the views of an advisory committee and as such do not constitute an official interpretation of EU VAT law and do not necessarily have the agreement of the Commission. Furthermore, they are not binding on Member States, that are free not to follow them.

2.2.2 In the 113rd Meeting held in Brussels on 3rd June 2019, the VAT Committee discussed Working Paper No. 968 presented by the Commission on the "Implementation of the Quick Fixes Package". The quick fixes legislative package, which is set to apply as from 1st January 2020, introduces new provisions for call-off stock, chain transactions and the exemption of intra-Community supplies. In the paper the Commission legal services set out their views on how to apply the provisions in particular scenarios such as handling small call-off stock losses; whether to consider a call-off stock warehouse to be a fixed establishment of the supplier; in chain transactions how to apply the Art. 141 simplification for triangular transactions; the VAT number of the customer becoming a substantive requirement for the purposes of exempting an intra-Community supply of goods as covered by Art.138(1)(a); the interaction with the VAT Refund Directive; the optional reverse charge provided in Art. 194; and, meaning of the term 'independent' in relation to proof of transport. The working paper may be downloaded via the following link:

https://circabc.europa.eu/sd/a/8e08ca08-307d-4f28-b14e-c980f9eaecab/WP%20968%20New%20legislation%20-%20Quick%20fixes%20package.pdf

3 Update of latest CJEU decisions in the field of VAT

3.1 Case C-235/18 *Vega International Car Transport and Logistic Trading GmbH*

On 24th January 2019, the CJEU released its judgement in this case as to whether the provision of fuel cards by a company to its subsidiaries, such as that at issue in the proceedings, amounted to negotiation and management of credit or else a chain transaction for the purpose of supplying fuel.

The Polish Tax authorities refused to refund Vega International (the parent company established in Austria) the VAT incurred on supplies of fuel made in Poland to its subsidiary Vega Poland. Vega International's operations consisted in the transport of commercial vehicles of well-known manufacturers directly to the customers and it provided the service via several subsidiaries with registered offices in different Member States, such as Vega Poland in Poland. For control and organisational purposes Vega International managed a fuel card system whereby the fuel cards were supplied to its subsidiaries for the latter to purchase the fuel required to carry out the vehicle transportation service. The fuel suppliers then invoiced Vega International for the fuel purchased using the fuel cards and in turn Vega International re-charged these costs plus an additional 2% charge to Vega Poland. The Polish Tax authorities considered that Vega International did not supply a good but a service, specifically the granting of credit, which is exempt under Art. 135(1)(b) of the VAT Directive and concluded that it had no right of deduction of input VAT.

In its question the referring Polish Supreme Administrative Court asked whether the transactions at issue in the main proceedings constituted a supply of good (the fuel) or a supply of a service (the granting of credit). As a preliminary point, the Court recalled that a supply of goods entailed the transfer of the right to dispose of tangible property as owner. From an examination of the facts at issue, it did not occur that the fuel suppliers transferred this right to Vega International since at the point of supply it did not have any say on the type or quality of the fuel or even from where it were to be supplied. As such it cannot be inferred that, on account that Vega International recharged the cost of these supplies to Vega Poland, it was actually buying the fuel from the suppliers and reselling it to Vega Poland. The Court concluded that the transaction carried out by Vega International with regard to its Polish subsidiary, which consisted in providing fuel cards for the purpose of re-fuelling the vehicles that the subsidiary transports does not constitute a supply of a good within the meaning of Art. 14(1) of the VAT Directive but a supply of a service. The Court held that in applying a 2% surcharge to Vega Poland, Vega International received a consideration in return for a service which consisted in financing in advance the purchase of fuel and therefore, acts, for that purpose, in the same way as an ordinary financial or credit institution.

The Court ruled that the provision of fuel cards by Vega International to its subsidiary Vega Poland, may be classified as a service of granting of credit which is exempt from value added tax.

3.2 Case C-225/18 *Grupa Lotos S.A.*

On 2nd May 2019 the CJEU published its judgment in this case concerning the right to deduct VAT on the purchase of overnight accommodation and catering services.

Grupa Lotos S.A. ("GL"), established in Poland, parent company of a group of companies active in the fuel and lubricant sector, contested a ruling by the Polish Ministry of Finance under which it was refused the right to deduct VAT paid by it on the purchase of overnight accommodation and catering services which it then resold to other VAT taxable persons (its subsidiaries). GL argued that given that it bought the services in its own name and resold them with VAT to its subsidiaries, then it had a right to deduct the Input VAT as it was not the final consumer of those services, but merely a service provider providing the services similar to a hotel or catering establishment. Under the Polish VAT rules, input VAT on overnight accommodation and catering services is blocked with the exception of ready-made meals prepared for passengers by taxable persons providing passenger transport services.

Essentially the Court was asked to interpret whether the refusal constituted a breach of the right of deduction by a taxable person which is an integral part of the VAT scheme and in principle cannot be limited or the exercise of the right of a Member State to apply the derogation represented by the standstill clause of Art. 176 of the VAT Directive regarding the expenditure in respect of which VAT is not deductible which a Member State was allowed to retain as on its date of accession into the EU Community (for Poland 01/05/2004). Under those rules, it was possible for operators supplying tourism services to claim the input VAT incurred to purchase those tourism services which included overnight accommodation and catering services. However, in 2008, Poland introduced an amendment under which this facility was withdrawn.

The Court ruled that Art. 168(a) of the VAT Directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for the scope of an exclusion from the right to deduct VAT to be extended, after the accession of the Member State concerned to the European Union, and which means that a taxable person, providing tourism services, is deprived, from the entry into force of that extension, of the right to deduct VAT paid on the purchase of overnight accommodation and catering services which that taxable person re-invoices to other taxable persons in the context of the provision of tourism services and not precluding national legislation, such as that at issue in the main proceedings, which provides for the exclusion from the right to deduct VAT paid on the purchase of overnight accommodation and catering services, that exclusion having been introduced before the accession of the Member State concerned to the European Union and maintained thereafter, in accordance with the second paragraph of Article 176 of the VAT Directive, and which means that a taxable person, who does not provide tourism services, is deprived of the right to deduct VAT paid on the purchase of such overnight accommodation and catering services which that taxable person re-invoices to other taxable persons.

Should you require further information on the above please contact Matthew Zampa on mz@zampadebattista.com or Charles Vella on cv@zampadebattista.com.

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