



VAT News

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Gabrielle Dillon presents topical VAT developments in Ireland, the EU and internationally.

Irish VAT News

The **VAT Directive Implementing Regulation** (No. 282/2011) came into legal effect on 1 July 2011 and, as it is a Regulation, it has direct effect here and does not require transposition into our VAT legislation. Revenue has recently published Guidance Notes to the Implementing Regulation. The Regulations deal in the main with the changes to the place of supply rules for services between 2010 and 2015, but they cover a number of other issues such as the persons liable to pay VAT.

The Information Leaflet on **medical services** was published by Revenue on 11 November 2011. The leaflet highlights the services that continue to qualify for VAT exemption, but it also identifies certain services that would be treated as taxable, even where provided by qualified medical practitioners. There are two key qualifying criteria to be satisfied in order for the exemption to apply – the person supplying the service must be a designated person, and the service supplied must satisfy the purposive test (which was enunciated by various ECJ cases). The change in Revenue interpretation is important for anyone advising clients in the medical sector (see the article by Richard Cowley in this issue).

The standard rate of **VAT increased** from 21% to 23% with effect from 1 January 2012. Such rate changes have an impact on invoicing and accounting for VAT, among other issues, and a leaflet outlining the rules applicable can be found on Revenue's website.

Certain **bread products** that were heretofore liable to VAT at 0% may now be liable to VAT at 23%. There is a specific definition for bread contained in the VAT legislation, and where a product falls within the specific parameters of the definition, the zero rate of VAT applies. The zero rate had applied to certain bread products although they fell outside the scope of the strict definition. Products that may be affected are bagels, garlic bread, croissants and brioches (e-Brief No. 70/2011 refers). This e-Brief also contains



clarification in relation to the application of the zero rate of VAT to certain food supplements. It lists the specific food supplements that qualify for the zero rate whether or not they are marketed as food supplements. However, it also lists specific substances that do not qualify even if they are labelled or marketed as food supplements.

ECJ Cases

The ECJ handed down its judgment in the case of **Commissioners for HMRC v The Rank Group plc** (joined cases C-259/10 and C-260/10) on 10 November 2011, which dealt with the important EU principle of fiscal neutrality (which requires that goods and services that are identical or similar be treated in the same way for VAT purposes). The case concerned the differing VAT treatment applied by the UK to mechanised cash bingo and slot machines. The Sixth Directive provides exemption for "betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State". Rank Group plc operates bingo clubs and casinos in the UK where customers can access slot machines and mechanised cash bingo ("MCB"). Rank paid VAT on certain types of MCBs and slot machines; however, other MCBs and slot machines that were similar were treated as exempt from VAT. It argued that this was in breach of the principle of fiscal neutrality.

The following questions were referred to the ECJ (the questions are numbered here according to the manner in which they were dealt with in the judgment), and all relate to the interpretation of the principle of fiscal neutrality.

Question 1 – Is a difference in treatment for VAT purposes of two supplies of services that are identical or similar from the consumers' viewpoint and that meet the same needs of the consumer sufficient to establish an infringement of the principle, or must there also be competition/distortion of competition between the services because of the different treatment?

The similar nature of two supplies of services means that they are in competition with each other. But in the court's view such competition does not constitute an independent and additional condition for infringement if the supplies are identical or similar from the consumers' viewpoint and meet the same needs of the consumer. The court held that it is sufficient for there to be different treatment to establish an infringement of the principle and that the existence of competition or distortion of competition is not necessary to establish such an infringement.

Question 2 – Where there is a difference in the treatment of two games of chance as regards the grant of VAT exemption, must account be taken of the fact that those two games fell into different licensing categories and were subject to different legal regimes relating to control and regulation?

Member States are provided with broad discretion in fixing the conditions and limitations applicable to the exemption. However, the court indicated that, in exercising that power, the Member State must respect the principle of fiscal neutrality. In considering this principle, one has to determine whether two supplies are similar, and to do so, account has to be taken of the typical consumers' viewpoint and the need to avoid artificial distinctions based on insignificant differences. The court indicated that the test is "whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other". It held that the "principle of fiscal neutrality must be interpreted as meaning that no account should be taken of the fact that those two games fall into different licensing categories and are subject to different legal regimes relating to control and regulation".

Question 3 – in assessing whether two types of slot machine are similar and require the same VAT treatment, must account be taken of the permitted stakes and prizes, the available formats and the possibility of interaction between the player and machine?

Member States can limit the exemption to certain forms of game of chance, but a difference in treatment cannot be based on differences in structural details or the arrangements/rules of the games that fall within the same category of game. The court held that it must be established whether the use of different types of machines is comparable from the consumers' viewpoint and whether they meet the same needs of the consumer. In establishing this, you can take into account the stakes, prizes and chances of winning.

Question 4 – can a taxable person reclaim VAT paid on certain services by relying on a breach of the principle where in practice the tax authority has treated similar services as exempt supplies although they were not exempt under the legislation?

Here the court held that a taxable person cannot reclaim VAT paid by relying on a breach of the principle where the tax authority has in practice treated similar services as exempt although they were not exempt under the legislation.

Question 5 – can a Member State contest a reclaim of VAT paid based on a breach of the principle by arguing that it responded with due diligence to the development of a new type of machine not meeting certain criteria?

Where a Member State has exercised its discretion, as permitted by the exemption, and exempts from VAT the provision of all facilities for playing a game of chance but excludes a certain category of machine that meets certain criteria, it cannot contest a reclaim by using the due diligence argument outlined above.

Other EU News

The European Commission published a Communication to the European Parliament and Council and the European Securities Committee in relation to the **future of VAT**. This follows on from the adoption of the Green Paper on the future of VAT by the Commission on 1 December 2010. The Communication sets out the fundamental features of the future EU VAT system and highlights the priority areas that require further action. The priority areas identified are: moving toward a simpler, more efficient, and more robust and fraud-proof VAT system tailored to the Single Market. The document also sets out a practical work programme to be undertaken by the Commission in the coming years.

A report by the Institute for Fiscal Studies and others on a retrospective evaluation of elements of the **EU VAT system** published on 1 December 2011 can be found on the European Commission website.

"VAT News" previously reported that Italy had been asked to amend its VAT legislation concerning its extensive **exemption for ships**. The VAT Directive provides exemption for supplies of goods for fuelling and provisioning vessels used for navigation on the high seas and also for the supply, modification, repair, maintenance, chartering and hiring of these vessels. Italian legislation provides exemption for commercial vessels that are not sailing on the high seas and for vessels intended for public bodies and hence goes

beyond what is permitted by the Directive. The Commission has now decided to refer Italy to the ECJ in relation to this issue, as its legislation has not been amended.

The following two Directives were to be implemented by EU Member States – Directive 2009/162/EU, in relation to the more **consistent application of certain VAT rules**, and Directive 2009/69/EU, in relation to **tax evasion linked to imports**. To date, Italy has failed to implement the Directives, and the Commission has issued a reasoned opinion requesting Italy to implement the rules. Failure to do so within two months may lead to proceedings before the ECJ.

Bulgaria operates different **time periods for VAT refunds** (which arise following a tax audit) for taxable persons engaged in domestic transactions and for taxable persons engaged in intra-Community transactions. The former are refunded at the end of the audit process, whereas the latter are required to wait twice as long. The Commission has requested Bulgaria to amend its legislation on the basis that it considers that the rules are incompatible with the VAT Directive and with the principle of proportionality.

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