VAT News

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

Irish VAT News

Revenue is implementing Phase 4 of the **mandatory electronic filing and payment** regime, and it will publish Regulations shortly to deal with the returns and payments that are to be made online via ROS with effect from 1 June 2012. The categories of people affected are all VAT-registered taxpayers and any individual taxpayers who avail of reliefs and exemptions (where they are not already required to file online).

Revenue published e-Brief No. 06/12 on 13 February 2012, which dealt with the **retention of tax records in electronic format**. It highlighted the fact that the IT and procedural requirements for the electronic, photographic and other methods of storing records were published in *Iris Oifigiúil* on 27 January 2012. There are two key updated requirements to note: it is no longer a requirement to retain the paper originals of any third-party record where an electronic copy of the original record is generated, recorded and stored in accordance with the requirements, and all electronic copies of records must be accessible to a Revenue official in paper or electronic form (the Revenue official will specify the method and format of delivery when the records are requested).

Revenue published e-Brief No. 16/12 on 22 March 2012, which related to the disclosure of information by Revenue to **mortgagees in possession, asset receivers and other receivers**. The instruction sets out the type of information that may be required by the foregoing and the type of information that Revenue may or may not be in a position to release. The purpose of the instruction is to enable mortgagees in possession, receivers etc. to comply with the VAT legislation in carrying out their duties.

ECJ Cases

The ECJ handed down its judgment in the case of *Kopalnia Odkrywkowa Polski Trawertyn P. Granatowicz, M. Wasiewicz spólka jawna v Dyrektor Izby Skarbowej w Poznaniu* C-280/10 on 12 March 2012. The case arose from a dispute between the tax office and a partnership regarding the **recovery of VAT on costs incurred by the partnership on transactions that occurred before the partnership was registered** in the companies register (in June 2007). The interpretation of Articles 9, 168 and 169 of the VAT Directive was at issue.

The individuals acquired an opencast stone quarry and incurred VAT on an invoice issued by a court official. Four months later, the individuals founded the partnership. They also incurred VAT on an invoice issued by a notary in respect of services associated with setting up the partnership. The partnership reclaimed VAT on both invoices. The tax office refused the repayment on the basis that the property was acquired by the individuals and not the partnership and the second invoice issued before the date on which the partnership was registered.

The partnership argued that the quarry was acquired with the intention of using it for taxable purposes, which was subsequently supported by objective evidence (creation of an economic entity and registration as a taxable person). It argued that it acted as a taxable person and that the right to deduct arose immediately the input VAT was incurred.

Two questions were referred to the ECJ – firstly, whether the VAT Directive precludes national legislation that does not permit individuals or their partnership from reclaiming VAT on costs incurred before registration of the partnership for the purposes of its economic activity and, secondly, whether it precludes national legislation under which VAT paid cannot be deducted by a partnership because the invoices were in the individuals' names and not the partnership's.

With reference to the first question, the court referred to the earlier, oft-quoted case law of *INZO* and *Rompleman* and stated that VAT

should be neutral as regards investment expenditure incurred for the purposes of commencing a business. Anyone who carries on investment transactions that are closely connected with and necessary for future exploitation of property is a taxable person. The court indicated that the partners were to be considered taxable persons and in principle were entitled to input credits. Notwithstanding the fact that the contribution of the quarry by the individuals to the partnership was exempt from VAT, the court followed the ruling in the earlier ECJ case of *Faxworld*. In that decision, it was held that a taxable person whose sole object is to prepare economic activity of another taxable person and who has not effected any taxable transaction may exercise the right to deduct in relation to taxable transactions carried out by the other taxable person. The court held that, in order to ensure the neutrality of the VAT system, the individuals must be entitled to take account of the investment transactions when deducting VAT.

The second question related to the formal requirements to be satisfied in exercising the right to deduct VAT, i.e. the claimant must hold a valid VAT invoice. The court indicated that the right to deduct VAT is dependent on compliance with conditions relating to the content of invoices as set out in the Directive – Member States cannot impose obligations over and above those set out in the Directive. It referred to the ECJ case of *Nidera Handelscompagnie,* where it was held that the principle of fiscal neutrality requires that deduction of input tax be allowed if the substantive requirements are satisfied, even if the taxable person had failed to comply with some of the formal requirements. It held that there are circumstances where data can be legitimately established by means other than an invoice, where full conformity with the invoice requirements as per the Directive would affect input entitlement. In this case, even though the invoice issued before the registration and identification of the partnership, it was issued in the name of the partners and the input credit was accordingly available.

On 29 March 2012 the ECJ gave its decision in the case of *Véleclair SA v Ministre du Budget, des Comptes Publics et de la Réforme de l'État* C-414/10. This case concerned the interpretation of Article 17(2)(b) of the Sixth Directive in light of **French legislation that made the exercise of the right to deduct VAT on importation conditional on the actual payment of the VAT by the taxable person**. Article 17(1) and (2) provide that "the right to deduct shall arise at the time when the deductible tax becomes chargeable" and "in so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay...value added tax due or paid in respect of imported goods within the territory of the country".

Véleclair imported bicycles from Vietnam, but French customs authorities were of the view that the goods originated in China, and as a result of a false declaration of origin Véleclair was subject to customs duties and anti-dumping duties, which were liable to import VAT. The VAT amount was not paid by Véleclair, and in the course of insolvency proceedings the French tax authority did not make its claim in relation to the VAT debt within the time limits. Véleclair sought a repayment of the VAT amount and argued that the exercise of its right to deduction could not be made conditional on the actual prior payment of the tax, as provided for in the national legislation.

The question referred to the ECJ was whether a Member State was permitted to make the right to deduct import VAT "conditional upon the actual prior payment of that tax by the taxable person where that taxable person is also the holder of the right to deduction". The court considered the exact wording of Article 17, which refers to VAT "due or paid". The Directive does not specify that the VAT must be paid before the right to deduct arises.

The court referred to the Advocate-General's opinion that the "term 'due' refers to an enforceable tax claim and therefore requires that the taxable person has an obligation to pay the amount of VAT which he seeks deduction of as input VAT". In order to exercise a right to deduct import VAT, the taxable person must hold an import document specifying the taxable person as consignee or importer and "stating or permitting the calculation of" the amount of tax due as per Article 18. It is up to the taxable person to prove that it satisfies the conditions for reclaiming VAT. If the tax authority later finds that the right to input credit was exercised fraudulently, it can seek repayment of said VAT.

The court held that the exercise of the right to deduct VAT is not conditional on the actual prior payment of VAT on importation, and the Directive does not allow a Member State to make it conditional. It also commented that importation of goods is not an operation that creates a heightened risk of tax evasion or abuse, a point that was argued by some Member States. The import of goods is a physical act that is witnessed and can be confirmed by the relevant authority from the presence of the goods at customs.

Other EU News

Luxembourg has been asked to amend its VAT rules by the European Commission. The request relates to the **rules that apply in Luxembourg in relation to independent groups of persons**. Under the VAT Directive, exemption is provided for services provided by an independent group of persons: "(being a group that is an independent entity established for the purpose of administrative convenience by persons whose activities are exempt from, or are not subject to, tax) for the purpose of rendering to its members the services directly necessary to enable them to carry out their activities, but only if the group recovers from its members the exact amount of each member's share of the joint expenses".

The services provided by an independent group to its members are completely free of VAT in Luxembourg, where the taxable activities of the members do not exceed 30% of their annual turnover (or 45%, under certain conditions). The legislation also permits group members to deduct VAT charged to the group on its purchases of goods and services, and activities by a member in his or her own name but on behalf of the group are regarded as non-taxable.

The European Commission is of the view that a ceiling for taxable activities is not in line with the Directive, nor is the entitlement of group members to reclaim VAT charged to the group.

Germany applies a reduced rate of VAT to all supplies of works of art and collectors' items and also to the letting of such goods. Under the VAT Directive, the standard rate of VAT must be applied to the supply of works of art and collectors' items, and not the reduced rate, as such items are not contained in Annex III of the Directive. The European Commission has therefore requested Germany to change its rules.