VAT News

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

Ireland

The Revenue Commissioners published a new Information Leaflet on **"VAT and Education and Vocational Training and Retraining Services"**. The leaflet outlines the criteria to be satisfied in order for the supply of education and vocational training services to qualify for exemption from VAT. It also highlights some specific types of training to which the exemption does not apply. The legislation in this area has not changed, but the leaflet provides useful guidance to determining the correct VAT treatment. It also covers ancillary supplies and the rules on place of supply for education and training services.

The Revenue Commissioners also published a new Information Leaflet on **"VAT Treatment of Services Connected with Immovable Property"**, with analysis and examples. The place of supply of services connected with such goods, or the grant of a right to use the goods, is the place where the goods are located. However, there are clearly instances where services are provided that are not directly related to a specific property, and the leaflet details those services that come within the scope of the aforementioned place of supply rule and those that do not.

Statutory Instrument No. 266 of 2012, VAT (Refund of Tax) (Touring Coaches) Order 2012, was signed by the Minister for Finance on 25 July 2012 and revokes SI No. 98 of 1996 (and subsequent amendments). The original Order provides for the **refund to exempt coach operators** of VAT paid on touring coaches of a certain age and size. The refund scheme is subject to certain conditions. The new Order includes additional measures that provide for the repayment by the coach operator of the VAT refunded where the conditions of the Order have not been fulfilled, and for interest and a penalty to apply in certain circumstances. This is in line with the amendments introduced by Finance Act 2012.

European Court of Justice

The decision of the ECJ in the joined cases of ***Balkan and Sea Properties ADSITs* C-621/10 and *Provadinvest OOD* C-129/11 *v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto"*** was given on 26 April 2012. The joined cases dealt with the interpretation of Article 80 of the VAT Directive, which outlines the circumstances in which Member States can impose the open-market-value rules on a supply, and it is, accordingly, an important decision. In the first case, Balkan and Sea Properties (whose business activity was the investment of funds collected by issuing property securities) purchased a property from a connected company, and VAT was accounted for on the purchase.

The national legislation provides that the open-market value is to be imposed on sales between connected persons. Two valuations were obtained (one by Balkan and Sea Properties and one by the tax authority), and the tax authority concluded that the open-market value of the property was lower than the actual sale price. Balkan and Sea Properties was denied an input credit based on the difference between the open-market value and the actual sale price. Balkan and Sea Properties argued that the national provisions were incompatible with Article 80 of the VAT Directive and sought the direct application of the VAT Directive.

In the second case, Provadinvest, which was involved in the leasing of agricultural land and steel structures used for polyethylene greenhouses, sold two plots of land with the polyethylene structures erected plus improvements to connected parties and did not charge VAT. The tax authority was of the view that the sales comprised an exempt sale of land and a taxable sale of installations, improvements and permanent crops. Similar to above, as the sales were between connected persons, the open-market value was to apply. The polyethylene structures were valued at a higher amount than that paid.

One of the questions referred to the ECJ was whether the conditions outlined in Article 80 of the VAT Directive were exhaustive or whether it is accepted that the taxable amount is the open-market value of the transaction between connected persons in cases other than those expressly provided for in Article 80, particularly where the taxable person has full input VAT recovery.

Article 73 of the VAT Directive lays down the general rule in the relation to the taxable amount, i.e. VAT is levied on the value actually received. Article 80 outlines the specific transactions to which the open-market value is applied and, as such, is an exception to the general rule, and the court indicated that it should therefore be interpreted strictly. The court held that the conditions of application as set out in Article 80(1) are exhaustive and, as a consequence, the national legislation cannot provide that the taxable amount is to be the open-market value of the transaction in cases other than those listed in Article 80, in particular where the supplier/acquirer has full input recovery.

The other question referred was whether Article 80(1) has direct effect and whether the national court can apply it directly to the cases at issue. The court stated that it is for the referring court "to interpret and apply national law in conformity with the requirements of EU law, and where such an interpretation is not possible, to disapply any provision of domestic law that would be contrary to those requirements". At paragraph 58, it stated that "Article 80(1) of the VAT Directive establishes unequivocally and exhaustively the conditions to be satisfied for a Member State to be able to provide in its legislation for the possibility of correcting the taxable amount of a transaction between connected persons". So if the transactions come within one of the situations outlined by Article 80, the Member State can make use of the option provided for in Article 80, i.e. to apply the open-market value. However, if the transactions do not come within the specific circumstances outlined in Article 80, companies can rely on it directly to oppose the application by the referring court of provisions of national legislation that are contrary to it.

On 5 July 2012 the ECJ handed down its decision in the case of ***DTZ Zadelhoff vof and Staatssecretaris van Financiën* C-259/11**. The case concerned the classification of a transfer of company shares that also entailed the transfer of ownership of property held by those companies as an exempt supply for VAT purposes. DTZ Zadelhoff, a real estate brokerage and consultancy business, was instructed by two vendors of properties in Amsterdam to find buyers for the properties. One vendor was going to sell the property by way of a transfer of shares in companies that indirectly owned it. The purchase price was based on the market value of the property. The other vendor was going to dispose of the property by way of either a share disposal or a sale of the legal interest in the property – ultimately, the shares were sold and transferred. DTZ Zadelhoff did not charge VAT on the fees charged to the vendors in respect of the services provided by it on the basis that either its services were exempt or the place of supply was not the Netherlands.

The main question was whether its services came within Article 13B(d)(5) of the Sixth Directive, which provides exemption for "transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding the rights or securities referred to in Article 5(3)". The court stated that, in the context of Article 13B(d)(5), "negotiation" refers to "the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contacts". The purpose of negotiation is to do all that is necessary in order for two parties to enter into a contract without the negotiator having any interest of its own in the terms of the contract. The court held that the purpose of the brokerage and consultancy activities carried out by DTZ Zadelhoff corresponded to "negotiation" in shares under Article 13B(d)(5), as its services consisted in finding buyers for property that was subsequently sold and transferred by means of a share transfer, to ensure that the vendors and purchasers concluded contracts without DTZ Zadelhoff having any interest in the terms of the contracts.

The ECJ delivered its judgment on 19 July 2012 in the case of ***A Oy* C-33/11**, which dealt with the concept of "operating for reward chiefly on international routes" in the context of the zero rating (exemption with credit) provided for the supply of aircraft used by airlines operating for reward chiefly on international routes. A Oy was assessed to VAT on its acquisition of aircraft. Under Finnish VAT legislation, VAT is not due on the sale of aircraft, spare parts or equipment for aircraft intended to be used by a trader operating for reward chiefly on international routes. A Oy (owned by an individual, X) purchased two jet aircraft from a French manufacturer. The French manufacturer declared the sales as intra-Community supplies. A Oy did not declare the purchases as intra-Community acquisitions in Finland. The aircraft were registered by A Oy, which was listed

as the owner, but B Oy (a connected company) was designated as the user of the aircraft. A Oy and B Oy entered into a contract whereby B Oy organised international charter flights and ensured the maintenance and management of the aircraft. B Oy invoiced A Oy for the costs of maintenance work and for flights. B Oy could also hire the aircraft from A Oy for its own commercial purposes. The Finnish Administrative Court found that the purchases were liable to VAT, that A Oy had not been operating flights, that the aircraft had not been used by B Oy in operating flights and that the aim of the arrangement was to look after the personal transportation needs of X (the principal owner of the companies).

The referring court asked a number of questions.

Firstly, is Article 15(6) of the Sixth Directive to be interpreted as meaning that the concept "airline operating for reward chiefly on international routes" also refers to a commercial airline operating for reward chiefly on international charter routes to meet the requirements of companies and private persons? In answer to this question, the court held that the provision is to be interpreted as "encompassing also international charter flights to meet demand from undertakings and private persons".

Secondly, is Article 15(6) of the Sixth Directive to be interpreted as meaning that the exemption provided therein applies only to a supply of aircraft made directly to an airline operating for reward chiefly on international routes, or does that exemption apply also to the supply of aircraft to an operator that does not itself operate for reward chiefly on international routes but makes the aircraft available for the use of such an operator? Here the court looked at the purpose of the provision and referred to the fact that Article 15(6) does not emphasise the identity of the recipient of the supply or the owner of the aircraft, but rather states that the aircraft being supplied must be "used by" an airline. This, therefore, does not exclude supplies of aircraft to an operator that acquires them solely for use by such an undertaking under a leasing agreement from the zero rating provision and provides for a broad definition of the concept.

Finally, given that the airline may also have used the aircraft for other flights, does the fact that the owner passes on the charge for the use of the aircraft to an individual who is its shareholder and who uses the aircraft, purchased chiefly for his own business and/or private purposes, affect the answer to the second question? The court at paragraph 59 stated that "the only criterion for determining whether the exemption provided for in Article 15(6) of the Sixth Directive is applicable is whether the aircraft in question is used by an airline operating for reward chiefly on international routes, which it is for the national court to assess". The court ultimately left it to the referring court to ascertain whether the actions pursued in the circumstances constituted an abusive practice.

Other EU News

On 12 May 2012 the European Commission published a proposal to update the EU VAT rules applicable to **vouchers**. Under the new rules, the categories of voucher will be clearly defined, together with their VAT treatment. It is proposed that the rules will come into effect on 1 January 2015; they will identify when VAT is due on vouchers and outline the rules applicable when vouchers pass through distribution chains and the general means of payment. The press release and impact assessment can be found on the website for the European Commission. (See also the article by Richard Cowley in this issue.)

Continuing with the voucher theme, the UK has introduced changes to the treatment of supplies made in connection with **single-purpose face-value vouchers**. The changes come as a result of the decision of the ECJ in the case of *Lebara Ltd and HMRC C*-520/10. Lebara, a UK company, provided telecommunications services and marketed telephone cards through distributors in other EU Member States. The cards were sold to persons established in those Member States who wished to make calls to third countries at inexpensive rates. The cards showed the face value in the currency of the distributor's Member State, together with access numbers to make a call and a concealed PIN code. The distributors purchased the cards from Lebara for an agreed price, which was lower than the face value of the card, and resold them to the end user.

The court held that Lebara supplied telecommunications services to the distributor for consideration but that it did not make a supply of services for consideration to the end user when the end user exercised his or her right to make telephone calls using the information on the card. The UK VAT legislation was incompatible with the VAT Directive. The UK VAT rules (Schedule 10A of VATA 1994) were amended with effect from 10 May 2012 whereby single-purpose face-value vouchers will be liable to VAT when they are issued. A single-purpose face-value voucher is defined in Revenue & Customs Brief 12/12 as "one that carries the right to receive only one type of goods or services which are all subject to a single rate of VAT". The new rules mean that each supplier in the chain will be required to

account for VAT on the sale of the voucher. (See also "Tax Cases" in this issue.)

At the Economic and Financial Affairs Council meeting of 15 May 2012, a press release on the **future of VAT** in general was released, stating that the Council:

> *"– RECALLS the Commission's Green Paper on 'The future of VAT – Towards a simpler, more robust and efficient VAT system' and ACKNOWLEDGES the wide public consultation of all interested parties conducted during the first half of 2011.*
>
> *– WELCOMES the subsequent Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on 'The future of VAT – Towards a simpler, more robust and efficient VAT system tailored to the single market".*
>
> *– SUPPORTS the objective of an EU VAT system which should be simpler, more efficient and neutral, robust and fraud-proof."*

The press release can be found on the website for the European Commission. The single key conclusion that has a deadline is the implementation in 2015 of the mini One-Stop-Shop with a view to reducing compliance costs and administrative burdens for businesses.

With effect from 1 August 2012 the standard rate of **VAT in Spain** will increase from 18% to 21%.

Law of Capital Acquisitions Tax and Stamp Duty, Finance Act 2012

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