INDIRECT TAX UPDATE

FEBRUARY 2016

NETHERLANDS

Proposed changes in treatment of long term property lease (sale and lease-back)

In a recent decision, the Court of Justice of the European Union ('CJEU') has clarified the conditions under which services related to the management of a collective investment fund that invests exclusively in property qualifies for VAT exemption under the EU's Principal VAT Directive ('PVD'); and whether VAT exemption extends to the management of the property.

The CJEU ruled that the management of funds that invest exclusively in immovable property that are subject to a specific government regulatory regimes in their respective Member States are in principle subject to VAT exemption, as they are in direct competition with other investments funds for instance funds that solely invest in securities or bonds, the management of which is also VAT-exempt. Member States can consider whether property management funds in their respective territories fall into that category.

The CJEU however also concluded that the actual management of the immovable property, such as the supervision of the immovable property, engagement of estate agents for empty properties and rent collection, does not qualify for the VAT exemption, on the basis that the activity goes beyond the various activities connected with the collective investment of capital and is aimed at preserving and increasing the value of the invested assets, something that is inherent to any type of investment.

What this means

The decision represents an opportunity for managers of all types of property investment funds to make a claim for VAT that might have been wrongly charged under European law on the basis of this decision – particularly if the recipient is not able to recover any such VAT. The exact facts should be assessed on a case by case basis. Based on this recent court case it is clear that discussions will continue with respect to the application of the VAT exemption with regard to collective investment funds and it will be interesting to see how individual member states interpret it.

Liesbeth de Groot, RSM Netherlands

SWITZERLAND

VAT registration of non-established businesses

By way of a reminder, businesses not established in Switzerland carrying out work on goods or installing them in Switzerland have been required to register for VAT in Switzerland under regulations effective from the beginning of last year i.e. 1 January 2015 if their annual turnover in Switzerland is equal to or exceeds CHF 100'000, in order to negate the competitive advantage previously held by such businesses. Previously such businesses would not have been required to register.

What this means

The Swiss Government has recognised, in changing these provisions, that businesses established outside of Switzerland enjoy competitive advantages over Swiss companies in not having to factor the cash flow cost to their customers of charging VAT on the 'goods' element of their charges. Businesses should therefore expect further legislative changes resulting on more non-established companies being required to register for VAT in Switzerland in the future.

Daniel Spitz, RSM Switzerland

BELGIUM

Extent of VAT exemption for welfare services

A recent CJEU ruling (Les Jardins de Jouvence) has provided some clarification of the extent to which welfare services for elderly people living independent lives but requiring levels of care and support. The taxpayer provides individual dwellings to residents aged 60 and above, together with some residential care services. The dwellings in question are designed for one or two people, comprising a fitted kitchen, a sitting room, a bedroom and a fitted bathroom. The CJEU has stated that it is irrelevant whether or not the operator of such a serviced residence receives a subsidy or any other form of advantage or financial

support from public authorities, or whether or not it is a 'for profit' organisation, it was for the member state (Belgium in this case) to determine whether the taxpayer was recognised as a body devoted to social wellbeing within the PVD.

In the CJEU's view the taxpayer was providing services 'closely related to welfare'. Although the provision of independent living required fewer services than residential care, nevertheless the residents were provided with certain services that were appropriate to their specific needs to bring them within the scope of the exemption eg catering services, cleaning of the private dwellings and attending to residents' personal laundry.

What this means

As regards the provision of other optional services available to both residents and non-residents alike (such as hairdressing and beauty services; bar restaurant; a physiotherapy room; occupational therapy activities; a laundry; a pharmacy and a blood collection point and a doctor's surgery), although it was for the national court to verify, it was not apparent that the national legislation required that serviced residences offer those services, nor does it appear to require that old people's homes do so, and thus such optional services could not be regarded as essential to the carrying out by a serviced residence of the transactions exempted from VAT.

Michael Annaert, RSM Belgium

FRANCE

VAT Due on 'No Show' Flights

From 1999, Air France decided to no longer account for VAT on the sale of tickets which passengers had not used and for which they could not claim a refund ('unflown revenues'). In addition, Brit Air, a subsidiary of Air France, performed air passenger transport services as a franchise agreement concluded with Air France-KLM, and received a flat-rate lump sum 'compensation' from Air France for such unflown revenues on its flights, but did not account for VAT on this lump sum. The French tax authorities raised assessments for undeclared output tax against both companies.

The CJEU notes firstly that VAT is payable where, first, the sum paid by the customer to the airline company is directly linked with a service (in the present case, air transport) and, secondly, that service is performed. However, the Court states that the consideration for the price of the ticket does not depend on the physical presence of the passenger at boarding, but that it consists of the passenger's right to benefit from the performance of the transport service, regardless of whether the passenger exercises that right. In other words, for VAT to be payable, it is sufficient that the airline company enables the passenger to benefit from the transport service. In that regard, the Court states that VAT becomes chargeable on receipt of payment of the ticket price irrespective of whether the flight is actually taken.

The Court adds that, in the event that a third party (Air France-KLM) sells the ticket of an airline company (Brit Air) in the context of a franchise agreement and pays that company a lump sum in respect of tickets issued but no longer valid, VAT is also applicable to that lump sum.

What this means

This case should be distinguished from an earlier case involving Société Thermale d'Eugenie-Les-Bains (Case C-277/05) where the CJEU determined that 'forfeited deposits' (a cancellation charge made when the customer cancels a booking) can be treated as compensation as in those circumstances, there is no 'supply'. In the present case, the CJEU determined there is a confirmed supply upon payment of the airline ticket as all information relating to the chargeable event and future performance are already known at the time of that payment. This is an area where the policies and terms and conditions attached to deposits and cancellation charges require careful consideration. It will therefore be relevant for any business, particularly in the leisure and entertainment sector when payments are made prior to the event itself.

It was also significant that in this later case, the customer paid the whole price requested for the service and not just a deposit, which was the element retained in the earlier Société Thermale case (the CJEU concluding that the payment of the deposit element was an optional payment within the parties' freedom of contract and therefore not a separate supply of the accommodation itself.

Alexandre Soumaille, RSM France

HUNGARY

Reverse charge for domestic supplies of staff

Recently Hungary has introduced a reverse charge on the domestic transaction involving the supply of staff, in other words VAT should not be charged but instead the recipient of supplies of staff would be liable for payment of the VAT due in relation to such supplies (e.g. supplies made by temporary employment agencies). This reduces the risk of VAT fraud and an opportunity for suppliers of such services to engage in fraudulent activities by not paying the VAT due to the tax authorities.

What this means

Businesses that provide staff to other VAT registered businesses in Hungary, should not charge VAT to VAT registered customers on the supply of staff. Instead they will need to ensure that their invoice has reference to the reverse charge (e.g. "subject to reverse charge under Section 140 of the Hungarian VAT Act" or similar wording).

This change will result in a cash flow advantage to the business. However there may be a risk of penalties if supplies are misclassified. If businesses are unsure on the correct classification of the supply or if contracts are unclear, they are advised to review contractual arrangements to minimize the risk of assessments and penalties being issued by the tax authorities.

Recipients of the supply of staff should not be charged VAT on invoices. Any VAT charged in such circumstances should not be recovered as input tax – so it would be important in such circumstances that suppliers are contacted to ensure VAT is not charged in error.

Introduction of reliable and risky taxpayer categories

Effective from 1 January 2016 the Hungarian tax authority has introduced new categories for taxpayers entered in the commercial register and taxpayers registered for VAT purposes in order to assess their potential risk rating.

Accordingly, this group of taxpayers may fall into one of three categories for the purposes of the tax authority:

- The currently existing "general" taxpayer, subject to the general rules i.e. essentially the default position
- The "reliable taxpayer", subject to rules that are more lenient/positive than the general rules
- The "risky taxpayer", subject to rules that are more stringent/negative than the general rules

To qualify as a reliable taxpayer, the business must have good taxpaying history (no major penalties), good tax compliance record and no liquidation ,bankruptcy, forced liquidation procedures in place. Reliable taxpayers will receive priority treatment from the tax authority, lower penalty rates, faster tax refund procedures and shortened tax audit periods.

On the other end of the spectrum, entities with bad tax history, poor tax compliance record, unpaid tax balance, illegal employment and other irregularities will be qualified as risky taxpayer. Risky taxpayers should expect scrutiny from the tax authority, longer tax audits and tax refunds and higher penalties.

What this means

These regulations are recognition that those businesses which take a more proactive approach to the identification and management of risk in their organisation will benefit directly from a more favourable approach by the authorities. If a business finds itself in a position where the authorities regard it as being of greater risk, it may have potential business implications as some of the clients may be discouraged from doing business with the downgraded entity.

Entities doing business in Hungary, including VAT registrations of foreign entities are advised to review the tax compliance and tax payment track record to avoid being downgraded to "risky taxpayer" category. RSM can assist in helping businesses identify and reduce levels of risk in the business.

Hungary's rules on invoicing software rules become stricter

Effective from 1 January 2016 the invoicing software of businesses registered for VAT in Hungary (this includes foreign businesses with Hungarian VAT number) must also be capable of collecting data in pre-defined format to the Hungarian Tax Authority in case of the tax audit. The Hungarian Tax Authority has issued detailed guidance on what the standard accounting file (SAF) should look like, which fields should be reported and how.

RSM

What this means

If the invoicing software used in the business is not in line with the new requirements or if it fails to report the invoicing software to the Hungarian Tax Authority, the business may face an administrative penalty of up to EUR 1 700. The probability of such penalty remains low during the introductory phase of the new regulation. However, if the administrative penalty is imposed frequently, the Hungarian Tax Authority may downgrade the taxpayer to "risky taxpayer" status and take a tougher stance during the tax refund requests and tax audits. Businesses are advised to check whether your invoicing software is in line with the guidance issued by the Hungarian Tax Authority and request internal or external IT team to fix gap. RSM Hungary can help to identify gaps by preparing a matching table between existing invoices and new invoicing software requirement.

Dániel Sztankó, RSM Hungary

ITALY

The reduction of the VAT rate for e-publications in Italy

The Italian Government has cut VAT on electronic publications, reducing the VAT rate from the standard 22% to 4%.

What this means

This means that, as of January 1st 2016, the reduced 4% VAT rate will apply also to newspapers, daily news, agency reports and online periodicals. This will undoubtedly give more appeal to electronic publications with undoubted benefits for the operators of the e-markets.

However, this measure closely follows the decision made by France and Luxembourg to charge the same VAT rates on digital and printed books. Since 1 January 2012 these two countries have applied reduced VAT rates of 5.5% and 3%, respectively, on e-books.

As a result, the European Commission took legal action against these two countries in 2013, claiming that the rates imposed by France and Luxembourg were illegal under the PVD and in its judgement dated 5 March 2015 of the CJEU ordered the two countries to apply the original VAT rates on the supply of e-books.

The Italian measure, openly in contrast with the European interpretation, can be seen as a way of urging the Commission to amend the legislation and to allow reduced VAT rates for all electronic publications.

Many countries are in fact raising concerns about the rules reducing VAT rates and are calling for an intervention in the European legislation allowing equal taxation of digital and paper publications. On the other hand we cannot exclude potential challenges from the European Commission for Italy in view of the rulings against France and Luxembourg.

Gianni Poggi

UK

Compound Interest

The Supreme Court in the UK has granted applications by Littlewoods and HMRC in an appeal and cross-appeal relating to the long running saga of Littlewoods' overpaid VAT levied incorrectly as a breach of EU law, and specifically whether interest due on the repayments should be on a simple interest basis (as argued by HMRC) or on a compound basis in order to provide proper restitution for the taxpayer (as argued by Littlewoods). HMRC had repaid the principal sums together with simple interest available under domestic UK VAT legislation, Littlewoods is seeking to recover in restitution the time value of the principal sums (in compound interest) which it claims exceeds the simple interest available.

What this means

This is an important legal principle and the granting of leave to appeal to the UK's Supreme Court was expected in the circumstances.

Review of zero-rating of airside sales at airports

The UK Government has launched a review to ensure that the benefits of VAT zero-rating enjoyed by 'airside' retailers at airports selling to customers departing the EU, are properly passed on to those customers.

The review, expected for completion in the early part of 2016 will also consider other airside taxes such as excise duty.

What this means

Currently the retailers claim VAT zero-rating on production of the customers boarding cards but typically do not reduce the prices charged, meaning that the VAT windfall is retained by the retailers and not passed on. It is estimated that some airside retailers retained up to 50p of every £1 of potential VAT savings under the current arrangements.

This will not affect sales of e.g. newspapers, books and cold takeaway sandwiches as such items are zero-rated anyway under UK legislation.

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