



KPMG's Indirect Tax Update

TAX

Highlights

This week's ITU is dominated by events at the ECJ. We report on the release of the Hearing reports in the two high profile UK cases of *Weald Leasing* and *Axa UK (Denplan)*. *Weald Leasing* looks at whether a leasing structure entered into by a heavily exempt VAT group to drip feed the irrecoverable VAT cost is abusive. Unsurprisingly, the Commission were of the opinion that the deferring of irrecoverable VAT by use of a leasing structure is not abusive. However, in *Weald Leasing* a third party was interposed between Weald and the exempt group. The Commission was of the opinion that abuse can exist where an artificial structure is used which prevents the tax authorities from applying an open market value to supplies. However, it is not immediately clear if the Commission consider this arrangement to be abusive. It made no comments on the concept of 'normal commercial operation' and how would the tax authorities work out an open market value on an arrangement that is not offered elsewhere? Even if the Court's ultimate responses convince the referring court that the arrangement is abusive, there is still the debate of how to redefine the transactions.

Early indications in the *Axa UK* case are positive, with the Commission siding with the taxpayer. The case concerns the payment handling services provided by Axa in collecting fees from patients and passing them on to dentists. The Commission was of the opinion that these were exempt transactions 'concerning payments' and falling within the exemption provided for in Article 13B(d)(3) of the Sixth Directive. It is interesting to see the Commission supporting a wider interpretation of an exemption. The Commission's analysis, which seems to be more in line with the *Sparekassernes Datacenter* case (C-2/95), was contrary to the submissions of the UK, German, Greek and Italian governments. However there is a long way to go in all of these cases and with Opinions potentially being delivered after the summer break it is possible we will not see Judgments until 2011.

Another ECJ Hearing that will no doubt attract submissions from a number of Governments is the *MacDonald Resorts Ltd* (MRL) case this week. MRL, a timeshare operator, introduced a points club where members bought timeshare rights in a variety of properties for varying amounts of time. The case looks at the treatment of supplies made by MRL in return for payments from its customers. MRL argues the place of supply is connected with immovable property whilst HMRC successfully argued before the Tribunal that the benefits are derived from membership of the club and always taxed in the United Kingdom.

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Finally, next week we have the Judgments in the medical exemption cases of *Copygene* (C-262/08) and *Future Health Technologies* (C-86/09). These cases will give some useful insight into the exemption of hospital and medical care under Article 132 1(b) and (c). There was an Opinion in *Copygene* where the AG found their services were 'closely related' to medical services but went on to highlight the other conditions which have to be met for exemption to apply. The Opinion firmly pushed the decision back to the referring Member State so it will be interesting to see if the Judgment is more specific.

Headlines

ECJ Hearing - Weald Leasing (C-103/09) – whether leasing structure to defer VAT abusive

Structure

Members of the Churchill VAT group historically purchased assets directly. With a VAT recovery of around one percent the VAT was almost entirely and immediately irrecoverable. The group entered into an arrangement whereby members of the group would provide interest free loans to Weald Leasing (Weald). Weald is a member of the Churchill commercial group but not the main VAT group. Weald buys assets and leases them to Suas (an unconnected company owned by a VAT adviser to Weald). Suas leases them back to the Churchill VAT group adding a small uplift. The leases are for a longer period than would normally be available in the open market.

Hearing

Various questions were asked of the ECJ about whether this was abusive, whether it mattered that the exempt trader did not engage in leasing transactions as part of its normal commercial operations, what was meant by normal commercial operations and how the structure should be redefined if it was abusive.

The Commission thinks that the deferring of irrecoverable VAT by use of a leasing structure is not abusive. However it considers that abuse may exist if there is an artificial structure which prevents the tax authorities from ensuring that transfers between related companies are carried out on terms corresponding to those which would apply between persons acting at arm's length on the open market. This is not very clear.

Suas is not related to Weald or the other Churchill companies – this was to ensure that no open market value direction could be made in respect of the lease charges levied by Suas. However, the leases Suas entered into with Churchill were on different terms to those available on the open market and it is therefore possible that the amounts charged did represent an arms length charge for that kind of lease, if it existed on the open market.

Where there is abuse, the Commission thinks that transactions must be redefined to re-establish the situation that would have prevailed in the absence of the abusive transactions. Presumably this does not necessarily mean, contrary to HMRC's assertion, outright purchase of the assets by the exempt companies, but could include leases of a kind available on the open market, with arms length charges being made? This would still defer the irrecoverable VAT, and give a better result than an outright purchase by the exempt group, but to a lesser extent than the current structure.

The Commission is silent on the meaning of normal commercial operations in the context of abusive practices. However, the responding Governments define normal commercial operations as operations that are not artificial, which have an economic rationale, (rather than being solely for the purpose of securing a tax advantage), and which reflect economic reality and are undertaken with a business like attitude. There is no suggestion that normal commercial operations preclude an activity just because it was not previously undertaken by the taxable person.

For more details of the report please contact your normal KPMG advisor.

ECJ Hearing – Axa UK (Denplan) (C-175/09) – whether handling charge for collecting dental fees VAT exempt

Under Denplan, patients agree to pay their dentist a fixed monthly sum which covers them for a specified level of dental care at no extra cost. Denplan agrees with the dentist to collect these sums from the patients by direct debit. After deducting an insurance premium and its own fee, Denplan transfers the balance to the dentist via BACS. Denplan's fee, which is the subject of the dispute, is on average 71p per monthly payment. Axa UK argued that the payment handling service was the principal supply and was exempt.

The Commission agrees with Axa and considers the payment handling services provided by Axa in collecting fees from patients and passing them on to dentists to be exempt transactions 'concerning payments'.

However, neither the UK, German, Greek or Italian governments agree with this view. They all think that because Axa is not responsible for the debit or credit of any account, its supplies cannot be exempt, that Axa's supplies are non financial, are administrative in nature and that they cause and result in a transfer of funds but are not the making of debits and credits directly. This does seem to be a narrow interpretation of the exemption.

It is impossible at this stage to take any view on the outcome of the case. However it is interesting to hear the views of the Commission as they are often a good indicator of the responses the Court may provide.

For more details of the report please contact your normal KPMG advisor.

News

HMRC Brief 25/10 – Pay-per-click charity advertisements – HMRC revised policy

HMRC have released a brief explaining their revised policy on the VAT treatment of pay-per-click (PPC) charity advertising on sponsored links and other associated services. The Brief explains how PPC is used by organisations on search engines to encourage searchers to click on the organisation's link in priority to any other links on the results page following a search. In return for this service, the organisation pays the search engine provider an agreed amount each time their website is accessed through the sponsored link.

Until now HMRC have taken the view that a PPC-sponsored link is not an advertisement itself but simply a means of access to the charity's website. Representations from charities suggested that such supplies are advertising and should be zero rated under VAT under Schedule 8, Group 15, Item 8 and 8A - 8C of VATA 94. Following a review HMRC have revised their policy and now accept that PPC-sponsored links appearing on search engine websites are advertisements for the purpose of Item 8 and 8A, and qualify for zero-rating when supplied to a charity. The Brief invites claims subject to the four year time limit and 'unjust enrichment provisions'. To read the Brief in full, click [here](#).

Update on GFKL ECJ reference concerning the VAT treatment of the transfer of non performing loans

In our Indirect Tax Update [19/10](#) we reported an interesting ECJ reference from the German courts. The *GFKL Financial Services* case (C-93/10) concerns the VAT treatment of non-performing loan (NPL) transactions. It is closely related to the *MKG* case ([C-305/01](#)) in which the ECJ ruled that 'true' factoring was not only an economic activity but also a service not covered by a VAT exemption. The *GFKL* reference seeks clarification whether *MKG* also applies to NPL transactions.

Further details of the case can be found in KPMG Germany's client newsletter – click [here](#) (see page 4). To read the questions referred, click [here](#).

ECOFIN 8 June - Political Agreement reached on Council Regulation on administrative cooperation and combating fraud

At the ECOFIN meeting on 8 June 2010 the Council has announced political agreement has been reached on the Council Regulation on administrative cooperation and combating fraud. The regulation will be adopted without discussion at a forthcoming Council meeting, once the text has been finalised.

This is a recast of the regulation 1798/2003 (the regulation for cooperation on VAT). A large number of aspects of the regulation remain unchanged but it is aimed at adding more effective measures to tackle cross border fraud and better collection of VAT. It is intended to improve the exchange of information between Member States by defining the cases in which they may not refuse to reply to a request for information or for an administrative enquiry. It specifies the cases in which Member States must exchange certain information spontaneously and lays down the requirement and procedures for Member States to feedback. The regulation also aims to specify the cases in which Member States may and must conduct multilateral controls.

Finally, it provides for the setting of precise objectives for the availability and operating procedures of the database system for the exchange of information. The new Regulation will come into force on the 20th day following its publication in the Official Journal.

Interestingly, in a note to the Council (click [here](#)) it was noted in paragraph 3 that 'the UK delegation recalled that it maintains its parliamentary scrutiny reservation. It would therefore abstain during the vote.'

The latest publicly available version of the Regulation can be found [here](#). Subsequent versions are currently unavailable.

Infringement proceedings - The Commission calls on Belgium to amend its legislation on the reduced VAT rate for certain transactions involving buildings

Belgium has been given two months by the European Commission to amend its legislation applying, subject to certain conditions, the six percent reduced rate to supplies of residential buildings and building works. Under Belgian law, a reduced rate is applied to the first EUR 50 000, while the balance of the taxable amount remains subject to the standard rate of 21 percent.

Under the VAT Directive, the operations which may be subject to the six percent reduced rate include the "provision, construction, renovation and alteration of housing, as part of a social policy". However, Belgian law applies the reduced rate of VAT to the first EUR 50 000 without any reference to 'social policy'. As a result, the Commission considers it to be too general in nature and therefore to be outside the scope of the restrictive list in the Directive.

The Commission considers that a taxable amount cannot be artificially split so that one part is subject to a reduced VAT rate and the other to a standard rate. Putting rate thresholds in place, such as the EUR 50,000 in Belgian law, would in practice lead to multiple rates. The VAT Directive provides, in principle, for the application of a maximum of two reduced rates in addition to the standard rate. To read more about these infringement proceedings, click [here](#).

In the Courts

Judgment - De Fruytier (C-237/09) – whether the transport of human organs and samples exempt from VAT - no

This case looks at the self-employed transport of human organs and samples for hospitals and laboratories and asks whether, under Article 13(A)(1)(d) of the Sixth Directive, this would constitute the 'supply' of human organs, blood and milk, which is exempt from VAT. In order to be a 'supply', Article 10 of the VAT Code stipulates that there must be a transfer of goods from one party to another, with the recipient party obtaining the right to dispose of those goods. The Court found that, since the case in hand merely concerned the physical transportation of the human organs and samples, which did not belong to the supplier of the transport services, it could not equate to a 'supply of goods' under Article 10, and could therefore not benefit from the exemption from VAT under the Directive. In Belgium the trading of human organs for gain is actually unlawful and so Ms de Fruytier was arguing that unless the exemption could apply to supplies related to the supply of goods, like the transport of human organs, the exemption in the Directive was ineffective. However, not all Member States adopt the same approach to human organs as Belgium, so even if the exemption cannot apply to transport of exempted goods, it is not wholly ineffective across the EU.

It is not surprising that the ECJ has declined to widen the scope of a pretty narrow exemption to include transport – but is this an indication of the way they may go in *Copygene* and *Future Health Technologies*, (due next week) where the question is whether collection and storage of stem cells can be exempt as 'closely related' to an exempt supply of healthcare? Arguably, the healthcare exemption is wider than the human organs exemption, in that it is not limited to goods alone, but just how far can it go?

To read the Judgment in full, click [here](#).

Judgment - Kalinchev (C-2/09) – VAT treatment of used motor vehicles brought into Member States

This case concerns the excise duty levied on used motor vehicles brought into Bulgaria. The Court has found that Member States can lay down provisions levying excise duty on the introduction of used motor vehicles to their territory (where no excise duty is payable on used cars which are already in the country and which were imported/acquired and subject to excise duty when new), but only if that system does not lead to border-crossing formalities between Member States.

It was found that the first paragraph of Article 110 of the Treaty establishing the European economic community must be interpreted to mean that used vehicles imported are considered as similar products to used vehicles already registered in that country which were brought in when new (regardless of origin). This prevents Member States from levying a different level of excise duty on used motor vehicles brought in to the country to used motor vehicles already registered in the country. How this will be applied by Bulgaria is unknown at present.

To read the Judgment in full, click [here](#).

ECJ Diary

Thursday 10 June

Judgments – Copygene (C-262/08) and Future Health Technologies (C-86/09)

CopyGene are a Danish stem cell bank and their reference concerns whether the services of the collection, transportation, analysis and storage of umbilical cord blood are exempt. The AG was of the opinion that CopyGene's services are 'closely related' to medical services as per Article 13A(1)(b) of the Sixth Directive but highlights the other conditions which have to be met for exemption to apply (for instance the establishment where the services were supplied had to be duly recognised as similar to a hospital or centre for medical treatment or diagnosis). The *Copygene* Opinion made reference to the similarity of the UK case of *Future Health Technologies (FHT)* but noted that since that case was at an early stage in the procedure the two cases could not be joined or dealt with together. The absence of an Opinion in *Future Health Technologies* and the fact the Judgments are being delivered on the same day suggests that both cases will be answered in similar fashion.

To access the Opinion and questions referred in *Copygene*, click [here](#).

To read the questions referred in *FHT*, click [here](#).

Hearing – Macdonald Resorts (C-270/09)

Macdonald Resorts Ltd (MRL) was originally heard in the Edinburgh Tribunal back in 2006. MRL runs a timeshare resort operation including selling timeshare interests in properties both in the UK and in Spain. MRL accounted for VAT at the standard rate for properties less than three years old, and exempted other properties. MRL set up a club whereby its customers could choose to exercise their 'timeshare right' in a variety of properties for varying amounts of time. Under the constitution of the club, on the payment of consideration (either by cashing in existing timeshare rights in properties or paying cash) members were issued with points. These gave the individual corresponding occupancy rights (right to exclusive use and occupation) of the club accommodation. HMRC successfully argued that, at the point of supply, MRL's customers were paying for membership rights and therefore VAT was charged at the standard rate (supply taxed where MRL belonged) adding that there could be no grant of an interest over land.

We have of course since had the *RCI Europe* case (C-37/08), however this looked more at RCI's facilitation services of exchanging timeshare rights, finding the place of supply of subscription, enrolment and exchange fees paid for timeshare exchange were all where existing timeshare is held. For more details of this case please see our Update 35/09, click [here](#). MRL is more concerned with the direct sale of timeshare rights to the customer.

To read the questions referred to the ECJ in *MacDonald Resorts Limited* click [here](#).

Judgment – Leo Libera (C-58/09)

The question asked whether under Article 135(1)(i) of the VAT Directive, Member States are permitted to have a rule which only exempts race betting and lotteries but not other forms of gambling. Unfortunately the Opinion was not available in English, but from a rough translation it appeared that the Advocate General is of the opinion that Member States can implement a rule exempting race betting and lotteries while all other forms of gambling, including slot machines, are subject to VAT. Thus the majority of gaming transactions in a Member State can in fact be taxable. It will be interesting to see if the ECJ confirms this. To read the Opinion (in various languages other than English, and the questions referred, click [here](#)).

Opinion – Commission v Poland (C-49/09)

This is the Commission's infringement proceedings against Poland for applying a reduced rate on the intra community acquisition of babies' clothing and children's footwear. The Commission argue that such items are not covered by any category with Annex III and Poland has no other derogation to support such treatment. To read the application to the ECJ, click [here](#).

Hearing - Repertoire Culinaire Ltd (C-163/09)

This case is an appeal against the seizure of cooking wine, port and cognac. HMRC refused to restore the goods to the appellant on the basis they were subject to excise duty. The goods themselves were purchased in France. Because of the confusion on the treatment of cooking liquors, France believe they are not covered by the Excise Directive and can circulate freely without payment of Excise Duty and need for accompanying documents. Paragraph 18 of the agreed statement of facts which are set out in Appendix 1, states there is no agreement within the Community as to how these products should be treated. The questions include asking whether such cooking liquors are subject to Excise duty under article 20 of Directive 92/83.

The questions then go on to ask whether the effect of restricting exemption to those who actually use the products in cooking and exemption thresholds breaches principles such as equal treatment and proportionality. The final question looks at the effect of the Member State where the products are manufactured releasing the goods into free movement.

For further information, including the questions referred, click [here](#).

From the Tax Authorities

Senior Accounting Officer (SAO) – Further Help with Common Issues

HMRC have released a note providing further information for Customer Relationship Managers (CRMs) to help them and their businesses to deal with some common queries and questions regarding SAOs. To read the guidance, click [here](#).

List of registered community sports clubs

HMRC have released an updated list of the registered community sports clubs. To view the list, click [here](#).

HMRC Notice 703/2 - Sailaway boats supplied for export outside the EC

This notice explains the procedures for zero-rating the supply of a 'sailaway' boat. To read the notice, click [here](#).

Customs import facilities

HMRC have released a notice outlining some of the more important customs import facilities and procedures businesses may be able to use when importing goods. To read the notice, click [here](#).

HMRC Notices 162 (May 2010) and 163 (May 2010) - Cider and wine production

These revised notices explain the effects of the law and regulations covering the production, storage and accounting for duty on cider, perry, wine and made-wine. To read notice 162 (cider and perry) click [here](#). To read notice 163 (wine) click [here](#).

HMRC Notice 199 (April 2010) - Imported goods: Customs procedures and Customs debt

HMRC have released a notice replacing Notice 199 (January 2004). The notice outlines the customs procedures which apply to the importation of goods into the UK from places outside the Community, from the time of their arrival until they are entered to free circulation or another customs procedure.

It also describes the rules governing the liability for customs debt and the procedures for collecting and recovering those debts. To read the notice, click [here](#).

HMRC revised Notices 196 (April 2010) and 197 (April 2010) – Warehousing excise goods

HMRC have released revised notices explaining the UK's requirements for the warehousing of excise goods held in duty suspension within the UK. To read notice 196 - Authorisation of warehousekeepers, click [here](#). To read notice 197 - Excise Goods: Receipt into and removal from an excise warehouse of excise goods, click [here](#).

Excise Movement & Control System (EMCS) Newsletter

HMRC have released their latest EMCS newsletter. To read the newsletter, click [here](#).

HMRC Tariff notices 15/10, 22/10 and 23/10

HMRC have issued three new Tariff notices.

To read notice 15/10 (UV light apparatus) click [here](#).

To read notice 22/10 (commodity codes and Taric breakdowns for infant drinks) click [here](#).

To read notice 23/10 (milk fat) click [here](#).

Recent JCCC (10) Papers

HMRC has released the following JCCC Customs Information Papers:

[39](#) - Information on basmati rice imported under EC Regulation 972/2006

[40](#) - Tariff Preference: changes to arrangements regarding imports from Egypt Ch 1-38

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