



# KPMG's Indirect Tax Update

TAX

## Highlights

Although short, the *Lookers* Tribunal case is probably the most interesting story this week, because the issues it deals with and the questions it leaves unanswered are extremely complex. They involve potential differences between UK and EU law and beg the question, what did the UK draftsmen mean when he used the phrase 'whether or not for consideration' in para 5(4) Schedule 4 VATA 1994.

In a nutshell *Lookers* sought to advance a tax point (by way of a payment) to a time before certain anti avoidance rules came into force. This was certainly an ingenious argument, and up to a point, secured the Tribunal's agreement. However the Appellant was scuppered by the catch all provisions of s6 (14), which allow the Commissioners to make regulations providing for different time of supply rules to apply in certain circumstances - one of which matched the *Lookers* fact pattern of business assets being put to private use by employees, where the time of supply is covered by regulation 81. Payment date was not therefore the time of supply as regulations said there was a supply at the end of every accounting period that the private use occurred (a recurring performance tax point). Therefore the supplies happened after the anti avoidance rules came in and so did not escape. The interaction between the provisions of the regulation which seemingly deem a performance tax point and the receipt of a payment which under s6(4) VATA 1994 overrides (i.e. advances) a performance tax point, also raises some interesting questions.

The Commission's proposal for the extension of the reverse charge is both optional and temporary, and since the UK has already acted to prevent emissions allowance fraud (the Commission's biggest concern) by zero rating such supplies, it is unlikely to be of major relevance to the UK.

Elsewhere in *Plazadome Ltd*, the Tribunal supported HMRC's contentions that if invoices did not properly describe what had been supplied, VAT deduction was not permissible, as the invoices were not valid evidence, even if the amounts shown as VAT had been paid to the supplier.

1 January 2010 looms ever closer. Are you up to speed with the UK's draft VAT Package legislation? Will you be able to extract the data needed to submit EC Sales Lists for reverse charge services, in the tight time frame allowed? Do you know which services you need to include and which you can omit? Can you identify when reverse charge VAT is due on the services you import? Would you be better off making your Eighth Directive refund claim before 1 January under the current system or waiting to use the portal? In short are you confident that your business and your systems are ready for the VAT Package? And are you ready for the rate change? Do you know if any of your supplies will be caught by the anti forestalling rules?

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How will you capture the supplementary charge data if you need to declare additional VAT? Do you want to generate client goodwill by considering if you can make a s88 election when you issue your January invoices, rather than risking being out of time to issue a credit note if you wait for your customer to point out that the basic tax point of the supply was before 1 January and so 15 percent can apply if you cite s88? Can you crystallise any VAT savings on purchases without triggering a supplementary charge demand from your suppliers? And if you can, how will you protect yourself to ensure that you receive the supplies you expect? These are not easy issues and it may be overly optimistic to expect HMRC to apply a light touch to anti avoidance rules. Their approach to an administrative error re Customs duty in the *Terex* case, where they insisted there was a debt and the declarations could not be changed to correct the error and remove the debt, so that Terex had to hope instead for remission of the debt if it was accepted Terex was not negligent, does not fill one with encouragement. So do talk to your KPMG adviser now, in good time to make sure you are fully cognisant and avoid any nasty surprises (and penalties) next year.

To access the highlights podcast, please click [here](#).

To access the full podcast, please click [here](#).

## News

### **KPMG VAT Package website – sign up now**

As a result of the implementation of the VAT Package across the EU, from January 2010, most business to business supplies of services will be taxed where the customer is established. VAT registered customers receiving services from abroad must account for VAT by way of reverse charge as a basic rule. Businesses will also be required to submit a return to their local tax authorities in respect of cross border services supplied, the 'EC Sales List for Services'. In addition, a new electronic foreign Eighth Directive VAT refund procedure will be in place.

**We have developed a free website for our clients that sets out the key changes in every EU Member State, provides contacts across Europe in all sectors, and gives you access to our latest thinking on the key issues. Please speak to your usual KPMG advisor to request access to the site.**

## From the Tax Authorities

### **Recent JCCC papers**

HMRC has released the following JCCC (09) Papers:

[60](#) CHIEF: Currency codes

[61](#) Centralisation of International Trade Authorising and Supervising Offices

### **Working Together - issue 37**

This issue from HMRC includes items on the resumption of the 17.5 percent standard rate of VAT, the VAT cross-border changes, compulsory online filing of VAT returns and electronic payments, IT related fraud, paying Self Assessment, the October filing deadline and the Single Farm Payment Scheme.

Click [here](#) to read the issue.

### **Community/Common Transit and TIR Newsletter - April 2009**

This HMRC newsletter concerns Paper Fallback Procedures, TIR Holder ID and Economic Operator Registration Identification Fields, a change of message types from 'A' to 'B' and Air/Sea simplified procedures.

Click [here](#) to read the newsletter.

## UK News

### Scrappage scheme to be extended

Lord Mandelson has announced that the £300m government initiative which had been due to end in February, or when the limit of 300,000 vehicles being scrapped was reached, will be extended. So far 227,750 orders have been placed through the scheme at a cost to the government of £1,000 per car meaning £227m has been spent. The extension means a total £400m will be committed to the scheme, which will still end in February at the latest.

Click [here](#) to read the article.

## EU News

### Commission proposal on optional and temporary application of the reverse charge mechanism to certain goods and services susceptible to fraud

The Commission has adopted a proposal for an optional and temporary introduction of a reverse charge for certain supplies of goods and services. The proposal covers five categories of fraud sensitive goods and services:

- Computer chips
- Mobile phones
- Precious metals
- Perfumes
- Greenhouse gas emission allowances

The Commission explained the move is a response to 'worrying fraud patterns reported by several Member States' and that the proposal will allow Member States to fight carousel fraud in a consistent manner across the European Union. The UK has had its derogation for computer chips and mobile phones since 2007 and the UK announced zero rating of emissions allowances with immediate effect from 31 July 2009 (meaning no need for a reverse charge). The Commission's press release made particular reference to the EU emission trading system (ETS) and a number of suspected cases of fraud in several Member States during the summer of 2009. Clearly the Council will try and get this Directive agreed with the Member States as soon as possible. It will take effect from the twentieth day following that of its publication in the Official Journal of the European Union and will have effect until 31 December 2014.

To read the press release click [here](#) and to read the proposal click [here](#). A FAQ memo also accompanies the release and can be found [here](#).

### Proposal to amend the rules on invoicing

Two more documents relating to the proposal to amend the European rules on invoicing have been made publicly available. They consist of the latest version of the proposal and a note from the Swedish presidency. The note is a special paper which the Presidency promised to present following discussions in the Tax Questions Group on 1 July. The paper describes the controlling aspects in relation to electronic invoicing as well as reflecting the current situation in Sweden; it also includes contributions from Finland and the UK. The documents were sent to the working party in August and with a view to discussions on 9 September. To access the paper click [here](#) and to read the latest proposal click [here](#).

## In the Courts

### ECJ

#### Terex Equipment, FG Wilson (Engineering) and Caterpillar C-430/08 & C-431/08 – Hearing

This combined case concerns HMRC's assertion that a customs debt will result from the use of an incorrect Customs Procedure Code on an export declaration which indicated the goods exported were community goods, despite the fact the goods concerned were actually subject to the Inward Processing regime. Full background on this case can be found in the *FG Wilson (Engineering) Ltd & Caterpillar EPG Ltd* Customs Tribunal which agreed a reference to the ECJ was necessary back in January 2008. To read this case click [here](#). To read the questions referred click [here](#) and [here](#). Click [here](#) to read the hearing report.

#### Background

Terex Equipment Ltd (Terex) manufactures kits of haulers and scrapers. It imports various items which are held under the inward processing regime and where those goods are re-exported in accordance with the conditions of the inward processing regime, no duty becomes payable. Between January 2000 and July 2002, Terex's Customs agents used incorrect customs procedure code on the export declarations of equipment sold by Terex to purchasers outside the Community. Instead of code 31 51, used for the re-export of goods which are in suspension of duties, they used code 10 00, which indicates the export of Community goods. The use of the incorrect code was due to the fact that Terex had not indicated to the freight forwarders that the goods in question were the subject of the inward processing regime.

The customs authorities took the view that the export declarations bearing the customs code 10 00 resulted in the goods being wrongfully granted the status of Community goods, which led to a customs debt pursuant to Article 203(1) of the Customs Code and Article 865 of the Implementing Regulation. In any event, a customs debt arose under Article 204(1) of the Customs Code, because there was no prior notification of the re-export of the engines, which is obligatory under the inward processing regime.

The tax authorities refused Terex's revised declarations and refused to amend that declaration on the basis that Terex's application seeks to change the customs arrangements applicable and secondly the situation may not be regularised because it is impossible to present retroactively a prior notification of re-export of goods. Terex also sought remission of the customs debt pursuant to Article 239 of the Customs Code. But this was refused by HMRC on the ground that Terex displayed 'obvious negligence' which precludes the application of that provision.

FG Wilson (Engineering) Ltd (Wilson) and Caterpillar EPG Ltd (Caterpillar) produce generating sets. Again they imported goods under the inward processing regime and the agents used the incorrect 10 00 code when re-exporting. The Tax Authorities issued post clearance assessments and again refused to amend the incorrect entries.

#### The Questions

A number of questions were referred to the ECJ in both cases and given similarities an order was made to have them heard together. However it is interesting to note that unusually as one of the taxpayers involved, Terex's opinions were absent.

#### Is there a Customs Debt under Article 203 of the Customs Code and Article 865 of the Implementing Regulation

Wilson and Caterpillar - the relevant goods are not to be considered as having been unlawfully removed from customs supervision. The hearing note states Wilson and Caterpillar are of the view that both questions 1 and 2 in case C-430/08 should be answered in the affirmative. This appears to be an error. The taxpayers are clear they do not see there being an unlawful removal and therefore no Customs debt arises.

The United Kingdom – are of the opinion that there is a Customs debt.

The Commission – In the circumstance when an incorrect Customs Procedure Code is indicated on a customs declaration relating to the exportation of goods under the Inward Processing Regime, the goods are removed from Customs supervision and by this reason, the removal will create a customs debt.

### **Circumstances under which a Customs Debt is incurred pursuant to Article 204 of the Customs Code (Terex only)**

The United Kingdom – A debt is incurred under Article 204 as Terex failed to give prior notification of the re-exportation to the Customs authorities but the UK did state there are grounds that Terex was not obviously negligent (despite the comments to the contrary by the authorities when the request for remission of the debt was made?)

The Commission are of the view that it was a matter for the national courts to decide whether the exporters in these circumstances were obviously negligent.

### **The possibility of regularising the situation pursuant to Article 78 of the Customs code**

Wilson and Caterpillar – Article 78(3) allows the revision of the declaration to correct the customs procedure code and obliges the customs authorities to amend the declaration and regularise the situation.

The United Kingdom is of the opinion that Article 78 does not allow or require the customs authorities to amend the declarations.

The Commission supported the taxpayer on this point finding the Customs Code permits the revision of a customs declaration to correct the Customs Procedure Code providing that the exporter is able to verify that the goods have been exported and have left the community. In the case when the exporter has sufficient proof of export, the Customs Authority is required to remedy the situation and allow the customs declaration to be amended unless the exporter was guilty of obvious negligence in submitting an incorrect customs declaration.

### **Remission of a Customs Debt under Article 239 of the code**

Wilson and Caterpillar – Given the complexity of the legal provisions and their conduct, they cannot be criticised for obvious negligence and therefore the debt should be remitted under Article 239.

The United Kingdom – as previously stated the United Kingdom is of the view that there are good grounds for considering no obvious negligence and that the debt may therefore be remitted.

The Commission – the national court should not decide on the application of Article 239 but should refer the matter to the Commission pursuant to Article 905 of the Implementing Regulation.

### **Summary**

It is impossible at this stage to take any view on the outcome of the case. However, whilst the views of the taxpayers and the UK tax authorities were already known, it is interesting in particular to hear the views of the Commission. Whilst the Commission are of the opinion that there is a Customs debt they appear in favour of remission and regularising under Article 78 and 239 of the Customs code providing certain conditions are met, namely verification that the obligations of the Inward Processing Regime were met.

## First Tier Tribunal

### **UKFTT 215 Lookers Motor Group Limited – Finds that a prepayment does not fix the time of supply in respect of the ongoing use of cars by employees of a motor dealer. HMRC have power to direct open market value for the period of supply since such powers were enacted – appeal dismissed**

The appeal is by motor dealers against a direction issued within the meaning of paragraph 1A(4) of Schedule 6 to the VAT Act 1994 to value the private use of cars by employees of motor dealers at market value. The Appellants had entered into agreements with the relevant employees to allow the employees to use their stock in trade cars at £1 per annum for the following ten years (to be paid in advance at the time of entering into the agreements). The Appellant's case is that paragraph 1A(1) does not apply because the time of supply of the service based on the actual tax point at section 6(4) (receipt of payment) was before January 2005 when the provision was enacted. In other words, as the full amount of £10 was paid at the time the agreements were entered into, the payment covered the whole supply of services for the full ten year period and the time of supply was therefore before 1 January 2005. The Appellants ran various arguments as to why the tax point fell outside the three year limit for a paragraph 1A(1) direction but lost their appeal.

All such arguments were defeated by s6(14) which empowers the Commissioners to make regulations for treating a supply as taking place at different times in specified circumstances (in this instance, supplies mentioned as 'separately and successively provided at prescribed times or intervals'). The case is short and quickly reaches the correct result. However it is interesting itself, because of the Tribunal's third reason for its decision; the fact that paragraph 1A intended to apply an open market value suggests that the value of the supply should be based on the value at the time of performance. This is because particularly over the period of nine years or so for which the Appellants contend the value is fixed, the market value may well fluctuate. As a consequence, the open market value must be intended to be established at different times and not once for all time at some particular point.

The decision raises some interesting questions about the interaction between the following and will be the subject of a further article at a later date:

- 1) The deeming provisions in paragraph 5(4), Schedule 4 VATA 1994 and the differences between those provisions and the relevant EU law (Articles 26 (1)(a) and (b) of the VAT Directive, formerly Articles 6.2(a) and (b) of the Sixth Directive;
- 2) The meaning of consideration for VAT purposes; and
- 3) The wording of paragraph 1A(a) 'consideration' and paragraph 1A(d) a "supply of services by virtue of sub-paragraph (4) of paragraph 5 of Schedule 4."

Click [here](#) to read the case in full.

### **UKFTT 229 Plazadome Ltd – HMRC found to be reasonable in their discretion not to allow evidence alternative to a valid VAT invoice to grant a deduction of input tax. The vires for the discretion is not engaged since no supply was deemed to have taken place in the first place. Furthermore, HMRC's reasons for a decision can be varied – Appeal dismissed**

The appeals concern the Commissioners' decisions to disallow the input tax credit claimed by Plazadome Ltd (Plazadome) in relation to the purchase of Sony Digital Video camcorders. The Commissioners had originally denied the input tax deduction based on the argument that the transactions were not part of any economic activity by Plazadome. However, they subsequently changed their Statement of Case contending that the invoices Plazadome received were invalid for VAT purposes as they did not contain a description sufficient to identify the goods (if any) supplied to Plazadome, contrary to Regulation 14(1)(g) of the VAT Regulations 1995.

The case itself goes into great detail to chart an intricate series of sale and purchase transactions, both in the UK and overseas, over the course of five deals with different entities. The fact that payments were made by Plazadome, including the VAT shown on the invoices, was agreed at the outset of the case.

## The Arguments

HMRC's policy as set out in "VAT Strategy: Input tax deduction without a valid VAT invoice - Statement of Practice July 2003" states that HMRC are obliged to determine the conditions and procedures whereby a taxable person may be authorised to make a deduction even if they did not have a valid invoice. Regulation 29(2) VATA 1994 affords HMRC the discretion to allow the use of documents other than a valid invoice. The Appellants contended that because the Commissioners were initially relying on the non-economic activity argument they failed to ask the questions referred to in Appendix 2 of the Statement of Practice which would help them determine the conditions and procedures allowing the deduction in the absence of a valid invoice. The Appellants argued that the Commissioners were unreasonable in their refusal to exercise their discretion to accept any other evidence of the charges to VAT.

HMRC put forward that there are two conditions to exercising the right to deduct input tax:

- The goods/ services must have been delivered/ performed (s24(1)(a) VATA1994)
- The claimant must hold a valid invoice or document which serves as an invoice (s24(6)(a) VATA 1994)

The Appellant bears the burden of proof as regards to both conditions (*Grunwick Processing Laboratores Ltd v C&E* (1986). *Regulation 29(2)* ), therefore, is not engaged unless the Appellant has first established that it received a taxable supply and the burden of proof as such lies with the Appellant. The Appellant has not discharged this burden since their evidence related entirely to supplies described on the invoices and the supply was wholly different from that described on the invoices. There were discrepancies in weight and pallet quantities, serial number anomalies and other concerns which meant that on the balance of probabilities what was purchased was not as described, so the invoices were not valid.

## The Decision

The Commissioners' duty under Regulation 29(2) was to consider all the relevant evidence and decide whether, on the balance of probabilities, the claimed supplies were made or not. The officers involved fulfilled this obligation and there was no evidence that they failed to consider any relevant evidence submitted by the Appellant before making their decision. The Tribunal heard how they undertook a verification exercise which involved gathering and considering the evidence from the Appellant, its suppliers, its freight forwarders, Sony and representations made by the Appellant. The Tribunal agreed that the Appellant had not received the supplies of Sony Camcorders.

In the circumstances, the Tribunal finds that there was no need for the Commissioners to ask the Appellant the questions in Appendix 2 of the Statement of Practice. This would only have arisen if the Commissioners were satisfied that the claimed supplies had been made. The Commissioners therefore acted reasonably in the circumstances.

Finally, in reference to HMRC's change in the basis of their decision to block the input tax, the case reiterates the point that the Commissioners have no statutory obligation to provide reasons for a decision (*BUPA Purchasing Ltd & Others v CEC (2)* (2008) STC 101 para 43-48 and *CEC v Alzitrans SL* (2003) All ER 288 (para 38-39). The Commissioners are entitled to change the reasons for their decision while maintaining the decision itself and such change neither alters the decision nor its validity in law.

Click [here](#) to read the case in full.

## ECJ Diary

**Tuesday 6 October**

### **Judgment C-267/08 - SPÖ Landesorganisation Kärnten**

This is a case concerning the nature of economic activities. SPÖ Landesorganisation Kärnten (SPO) is the provincial organisation of an Austrian political party. During various elections it acted as a central purchasing agency acquiring advertising material which was subsequently passed on to the district and local groups of the party in return for a fee. It also organised the annual party ball. Those activities were described as 'external advertising'. SPO declared this external advertising as taxable turnover and claimed related input tax.

The AG concluded in the opinion that the State funding received by SPO is not income from an economic activity and that the existence of public funding reinforces the position that the appellant's publicity activities are not economic activities involving consideration. The Austrian State funded the SPO precisely because it is not an ordinary economic 'actor' but a political group whose priorities are different from those of a commercial undertaking. It cannot be compared to a commercial advertising agency.

Click [here](#) to read the Opinion in full.

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