ZD | ZAMPA DEBATTISTA
CERTIFIED PUBLIC ACCOUNTANTS

VAT Newsletter | Q. 1 - 2019

Contents

1 Local news

1.1 Act VII (Budget Measures Implementation Act) 2019 *published on 22/03/2019*

In Part XII thereof, two amendments to the VAT Act are carried out:

- Art. 73(3) – a notice in terms of the VAT Act shall be deemed to have been properly addressed if it is addressed to any known business or private address of a person, or to an electronic address provided by a person for such a purpose.
- Art. 83(3) – deleted (as a result the Commissioner, in respect of any offence under the VATA, shall apply either an administrative penalty or institute proceedings that may result in Court fines, but not both for the same offence).

1.2 Guidelines by the Commissioner for Revenue *published on 28/02/2019*

The "Guidelines Regarding Item 12 of Part Two of the Third Schedule to the VAT Act" outline the terms and conditions under which the Commissioner may approve that a lease of a pleasure boat taking place in Malta and under which the service may be effectively used and enjoyed both within EU and outside EU territorial waters. The portion of the service deemed to be provided within EU territorial waters is subject to the Malta standard VAT rate whereas the portion of the service deemed to be provided outside EU territorial waters is considered as outside scope of EU VAT and hence not taxed. The guidelines lay down the lessor's compliance obligations regarding the taxation of the lease instalments which shall be calculated on such reasonable documentary and/or technological data of the use and enjoyment of the pleasure boat procured from the lessee at prescribed intervals for the duration of the lease.

The guidelines are available on the following link:

https://cfr.gov.mt/en/vat/guidelines_to_certain_VAT_Procedures/Documents/Guidelines%20re%20Item%2012,%20Part%20Two,%20Third%20Schedule%20to%20the%20VAT%20Act%20-%20280219.docx.pdf

In a Notice concurrently published with the Guidelines, the Commissioner notifies that the application of the guidelines was subject to his approval and that he reserves the right to, at any time withdraw such approval, if he reasonably considers that the calculations in terms of the guidelines have not been properly effected.

1.3 VAT Appeals decided by the Administrative Review Tribunal ("Tribunal")

- In case 89/2012 *XXX vs Commissioner for Value Added Tax* decided on 8th January 2019, the Tribunal ruled that the appeal lodged by the appellant against the VAT assessments issued to him by the Commissioner was unfounded and cannot be upheld. The VAT assessments were raised following a credit control exercise carried out by VAT Inspectors upon the closure of the business, as a result of which part of the closing stock was recalculated at the standard rate instead of the reduced rate. The Tribunal entirely confirmed the assessments with costs to be borne by the appellant.

- In case 5/2015 *XXX vs Direttur Generali (Taxxa fuq il-Valur Mizjud)* decided on 8th January 2019, the Tribunal found that on an examination of the facts at issue it was of the view that the appeal was not filed late as contested by the Commissioner in a preliminary plea raised during the hearing. Consequently, whilst dismissing the Commissioner's application to declare the appeal against the assessment as null and void, it ordered the resumption of the hearing of the appeal to be based on the merits of the case.

- In case 46/2012 *XXX vs Kummissarju tat-Taxxa fuq il-Valur Mizjud* decided on 11th February 2019, the Tribunal ruled in favour of appellant by ordering the cancellation and revocation of the assessments under appeal which assessments were raised by the Commissioner in connection with the VAT treatment of the leasing of an immovable property. Appellant company had treated the leasing as exempt without credit on grounds that the lessor was a public authority whilst the Commissioner considered that the service was taxable since it fulfilled the conditions set out in Item 1(1)(d) of Part Two of the Fifth Schedule to the VATA.

- In case 47/2012 *XXX vs Kummissarju tat-Taxxa fuq il-Valur Mizjud* decided on 11th February 2019, the legal merits of which were similar to case 46/2012, the Tribunal partly upheld the appeal by ordering a number of adjustments to the assessments under appeal. Appellant company had treated the leasing as exempt without credit on grounds that the lessor was a public authority whilst the Commissioner considered that the service was taxable since it fulfilled the conditions set out in Item 1(1)(d) of Part Two of the Fifth Schedule to the VATA. From an examination of the facts at issue the Tribunal established that a particular immovable property was sub-leased and used by a third- party company during the period to which the assessments refer, thus rendering the service taxable.

1.4 Court of Appeal (Inferior Jurisdiction) decisions in the field of VAT

- In case 343/2012 *Sovereign Hotels Ltd vs Direttur Generali (Taxxa fuq il-Valur Mizjud)*, the Court dismissed the appeal application by confirming the decision of the Administrative Review Tribunal

which had ruled that the Commissioner had correctly applied the provisions of Legal Notice 112 of 2012 on the Remission of Administrative Penalties and Interest when he declined an application for the remission of administrative penalties and interest submitted by the company on grounds that it did not meet the applicable conditions.

2 European News

2.1 ECOFIN meetings

In meeting of 12th March 2019, the Council agreed implementing rules for e-commerce adopted in December 2017. The new measures entail amendments both to Council Directive 2006/112/EC and Council Implementing Regulation (EU) 282/2011 and are intended to ensure a smooth transition to the new regime that comes into force in January 2021. The new rules cover supplies of goods or services facilitated by electronic interfaces and introduce special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods.

[*ECOFIN is the Economic and Financial Affairs Council configuration of the European Council and is composed of the economic and finance ministers of the EU Member States. It is responsible for implementing EU policy in the areas of economic policy, taxation and regulation of financial services as well as adopting (by unanimous vote) VAT directives, regulations and decisions.*]

3 Update of latest CJEU decisions in the field of VAT

3.1 Case C-165/17 *Morgan Stanley & Co International plc*

On 24th January 2019, the CJEU published its judgement in this case concerning the deduction of VAT incurred by the Paris Branch of Morgan Stanley first, in respect of expenditure used for the transactions of the principal establishment located in the United Kingdom and, secondly, in respect of the general costs used for both transactions of the principal establishment and those of the branch.

The French tax authorities considered that the VAT charged in respect of the acquisition of the goods and services used solely for internal transactions with the principal establishment located in the United Kingdom was not deductible, since these transactions fell beyond the scope of application of VAT but nonetheless allowed, by way of mitigation, deduction of a fraction of the tax at issue by deducting a proportion applicable to that principal establishment, subject to the exceptions for the right of deduction applicable in France. With regard to mixed expenditure, attributable to transactions carried out with both the principal establishment located in the United Kingdom and clients of the Paris branch, the tax authorities considered that they were only partially deductible and applied the deductible proportion applicable to that principal establishment, adjusted according to the Paris branch's turnover giving rise to the right to deduct, subject to the exceptions for the right of deduction applicable in France.

The Court ruled that in relation to the expenditure borne by a branch registered in a Member State, which is used, exclusively, both for transactions subject to value added tax and for transactions exempt from that tax, carried out by the principal establishment of that branch established in another Member State, it is necessary to apply a deductible proportion resulting from a fraction the denominator of which is formed by the turnover, exclusive of value added tax, made up of those transactions alone and the numerator of which is formed by the taxed transactions in respect of which value added tax which would also be deductible if they had been carried out in the Member State in which that branch is registered, including where that right to deduct stems from the exercise of an option, effected by that branch, consisting in making the transactions carried out in that State subject to value added tax. On the other hand, in order to determine the deductible proportion applicable to the general costs of a branch registered in a Member State, which are used for both transactions of that branch in that State and transactions of the principal establishment of that branch established in another Member State, account must be taken, in the denominator of the fraction which makes up that deductible proportion, of the transactions carried out by both that branch and that principal establishment, it being specified that it is necessary that, in the numerator of that fraction, besides the taxed transactions carried out by that branch, solely the taxed transactions carried out by that principal establishment must appear, in respect of which value added tax would also be deductible if they had been carried out in the State in which the branch concerned is registered.

3.2 Case C-531/17 *Vetsch*

On 14th February 2019 the CJEU published its judgment in this case which concerned the exemption from VAT on an importation of goods in Austria for onward supply to Bulgaria under 'Customs procedure 42'.

Vetsch, an Austrian company which operated a freight forwarding business, submitted declarations for the release "in free circulation" of goods imported into Austria, which goods were going to be onward supplied to taxable persons in Bulgaria in accordance with Art. 143(1)(d) of the VAT Directive. In relation to these declarations Vetsch was acting as the indirect representative of two companies established in Bulgaria, K and B. The goods concerned were released "in free circulation" without the payment of import VAT in Austria. However, by decision of 6 September 2011, the Customs Office in Austria requested Vetsch to pay import VAT on the goods concerned, in accordance with Article 204(1) of the Customs Code, on grounds that the conditions for the exemption claimed in the declarations were not met, namely that the recipients of the goods had become liable to tax evasion in Bulgaria when, whilst declaring the intra-Community acquisition of those goods had also incorrectly declared an exempt intra-Community supply of the goods to Vetsch. Vetsch thus became liable for payment of the VAT on the importation of the goods in Austria since according to Austrian national legislation, the exemption under Art. 138 of the VAT Directive shall not apply where tax evasion is linked to a transaction in which VAT was deducted or any transaction upward or downward of it.

The Court ruled that Article 143(1)(d) of the VAT Directive must be interpreted as meaning that the exemption from import value added tax laid down in those provisions may not be refused in respect of an importer designated or recognised as liable for payment of that tax, within the meaning of Article 201 of the VAT Directive, in a situation, such as that in the main proceedings, in which, first, the recipient of the intra-Community transfer of goods effected after that import commits tax evasion in connection with a transaction which is subsequent to that transfer and is not linked to that transfer and, secondly, there is no evidence to support the conclusion that the importer knew or ought to have known that that subsequent transaction entailed tax evasion on the part of the recipient.

Should you require further information on the above please contact Matthew Zampa on mz@zampadebattista.com or Charles Vella on cv@zampadebattista.com.

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