ZD | Zampa Debattista
Certified Public Accountants

VAT NEWSLETTER Q3-2019

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ABOUT US

Zampa Debattista is a boutique accounting and assurance firm primarily focused on international business. Its main areas of specialization are VAT, Audit and Assurance, and Financial Reporting. Zampa Debattista is in a position to offer its clients quality professional services whilst at the same time retaining a high level of partner involvement.

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LOCAL NEWS

1.1 GUIDELINES BY THE COMMISSIONER FOR REVENUE

On 16th July 2019, the Commissioner for Revenue published the following VAT guidelines by a notice in the Government Gazette:

- **Notice 838 – Guidelines on Item 5, Part Two of the Fifth Schedule to the VAT Act – Sports**

According to the guidelines, for the purpose of applying the exemption concerning *"the supply of certain services closely linked to sports or physical education by non-profit making organisations to persons taking part in sports or physical education"* the following conditions have to be met:

- the services must be provided by an entity which falls within the meaning of a "non-profit making organisation" as defined under Item 5 of Part Five of the Fifth Schedule to the VATA;

- the exemption applies only to such services that are closely linked to sport or physical education and where the services are provided to the person taking part in sport or physical education.

ZD Comment: *We understand that the scope of the guidelines is to eliminate the need for supplies under this item having to be approved by the Minister for the exemption to apply. Accordingly, the exemption shall now apply outright so long as the two conditions contained in the guidelines are met.*

- **Notice 839 – Guidelines on Item 11(4), Part Two of the Fifth Schedule to the VATA – welfare services**

The guidelines set out to clarify that for the exemption on welfare services to apply the services must be rendered by any of the following:

- a "government entity" which is a public authority as defined under Article 2 of the VATA;
- an "institution or organisation" recognised by the Commissioner as a non-profit making organisation as defined under Item 5 of Part Five of the Fifth Schedule to the VATA;
- an "institution or organisation approved by the Minister for the purpose of this paragraph as any institution whose activities fall within the social and welfare policy of government", being defined as an entity that is aligned with the legal requirements determined by the relative competent authorities to render such services.

ZD Comment: *The guidelines set out to define the entities that qualify to supply exempt welfare services under this item. Furthermore, "an institution or organisation" would be deemed to be approved by the Minister for the purposes of providing exempt welfare services insofar as it is aligned with the legal requirements determined by the relative competent (welfare services) authorities to render such services.*

1.2 COURT OF APPEAL (INFERIOR JURISDICTION - GOZO) DECISION IN THE FIELD OF VAT

On 26th September 2019 the Court published its decision in case 55/2017 Chris Galea (respondent) vs Kummissarju tat-Taxxa fuq il-Valur Mizjud (appellant), regarding the referral of a question to the Tribunal[1] in terms of Article 44 of the VATA. In the first instance, the Tribunal had ruled that the referral of the question was valid in that it considered that when Mr Galea had furnished the Commissioner with a request for review, that in itself was sufficient to meet the condition set out in Item 5(1) of the Ninth Schedule to the VATA, namely that any matter that is to be referred to the Tribunal must first be raised in correspondence with the Commissioner. The Court, overturned this decision as it considered that whereas the underlying disagreement was related to a VAT assessment raised by the Commissioner to address an overclaim of input VAT, the remedy for the taxpayer should have been an appeal in terms of Article 43 and not a question in terms of Article 44.

[1]The Administrative Review Tribunal constituted under the Administrative Justice Act (Cap. 490)

EUROPEAN NEWS

2.1 EUROPEAN COMMISSION – TAXATION AND CUSTOMS UNION DIRECTORATE (TAXUD)

During this calendar quarter TAXUD made the following announcements on its web portal:

- 11th July – *The launching of a new form for Customs import declaration of goods with a value not exceeding EUR 150 (applicable as from 01/01/2021)*

  This form has become necessary to complement the amendments to the VAT Directive, also coming into force on 01/01/2021, whereby an exemption- on the importation of goods the intrinsic value of which does not exceed EUR 150 carried out by a taxable person who facilitates the distance sale of the good through the use of an electronic interface such as a marketplace, platform, portal or similar means, will be introduced. For the exemption to apply, the taxable person must use this form to make a Customs import declaration relating to the goods being imported.

- 18th July – *Update on new VAT Cross Border Rulings*

  This is a pilot project set up by the EU VAT Forum[2] that has the scope of providing advance rulings to taxable persons regarding the VAT treatment of complex cross-border transactions. Several Member States participate, including Malta, with each participant MS setting out the procedure and conditions for a taxable person to be able to place a request. The updated list is available via the following link:
  https://ec.europa.eu/taxation_customs/sites/taxation/files/cross-border-rulings.pdf

[2]The EU VAT Forum offers a discussion platform where businesses and VAT authorities meet to discuss the implementation of VAT legislation with a view to improve its application in practice (constituted under EU Commission Decision (2018)4422).

- 4th September – *Publication of the VAT Gap Report for 2017*

The report, which is released annually, measures the so called VAT Gap, which is the theoretical shortfall between the expected VAT revenue and the VAT actually collected for the year in question, with the losses being generally attributable to tax evasion or fraud, bankruptcies, financial insolvencies and miscalculations or even inefficiencies of the tax administration. Whilst the Commission was pleased that a reduction in the VAT gap over the previous years is noted, yet it remains somewhat high and concrete action needs to be taken by Member States to reduce it further. During 2017, collected VAT revenues increased at a faster rate of 4.1% than the 2.8% increase of VAT Total Tax Liability. As a result, the overall VAT Gap in the EU Member States saw a decrease in absolute values of about EUR 8 billion or 11.2% in percentage terms. The full report is available by accessing the link:

https://ec.europa.eu/taxation_customs/sites/taxation/files/vat-gap-full-report-2019_en.pdf

2.2 VAT COMMITTEE MEETINGS

The VAT Committee did not meet during this calendar quarter.

2.3 VAT EXPERT GROUP[3] MEETINGS

At the 23rd meeting held on 19th September 2019, the VEG discussed a document titled "Explanatory notes on the 2020 Quick Fixes", which document the Commission then intends to publish for general application. The objective of the explanatory notes is to provide a better understanding of the recently introduced "Quick Fixes" amendments to the VAT Directive coming into force in 2020. They are intended as a guidance tool on how to carry out the practical implementation of the new rules. In a nutshell the quick fixes provisions relate to the treatment of call-off stock arrangements, chain transactions, and the exemption of intra-Community supplies (customer's VAT identification number now becoming a substantive element of proof as well as new rules governing the proof of transport of the goods). The document may be viewed or downloaded by accessing the following link:

https://circabc.europa.eu/sd/a/4019f24c-c331-4b3b-9903-0bffd2c9afe5/VEG%20084%20-%20Draft%20explanatory%20notes%20on%202020%20quick%20fixes.pdf

[3]The VAT Expert Group, set up by Commission Decision 2012/C of 26 June 2012, is a group of experts on VAT (appointed by the Commission for a two-year term following a public call for applications) with a remit to advise the Commission on the preparation of legislative acts and other policy initiatives in the field of VAT as well as to provide insight concerning their practical implementation. VEG meetings are held in Brussels and are chaired by a representative of the Commission.

UPDATE OF LATEST EUROPEAN COURT OF JUSTICE DECISIONS IN THE FIELD OF VAT

3.1 CASE C-26/18 *FEDERAL EXPRESS CORPORATION DEUTSCHE NIEDERLASSUNG*

On 10th July 2019, the ECJ (the "Court") released its decision in this case concerning the importation of goods and the incurrence of a customs debt and consequent VAT charge on importation.

FedEx shipped goods originating from third countries and delivered them by airfreight to different recipients in Greece. The goods first arrived at Frankfurt airport where they were placed on another aircraft destined for Greece. It transpired that the goods were "released in free circulation" upon their arrival in Greece, where the customs formalities including the payment of import duty and VAT were carried out. However, acting on information from their Greek colleagues, German Customs issued an assessment to FedEx on grounds that the goods entered the so called "economic network" of the EU in Germany and as a result in accordance with the Customs Code such unlawful introduction of these consignments had given rise to a customs debt upon their physical importation in Germany. FedEx paid the assessed import duties and German VAT but given that they had already paid import duties and Greek VAT in Greece filed a request for re-imbursement with the German Customs on grounds of double taxation, which request was refused leading to the dispute before the referring German national court.

The Court had to examine whether Articles 2(1)(d) and 30 of the VAT Directive must be interpreted as meaning that, where a good is introduced into the territory of the EU, the concept of "importation of goods" within the meaning of those provisions, means only the entry into the economic network of the EU of that property or if that concept also includes the risk associated with the entry of such goods in this economic network. According to the VAT Directive an importation is subject to VAT and importation of a good means the entry into the Community of a good which is not in free circulation. However, as per settled case law of the ECJ, VAT being by nature a tax on consumption, it applies to goods which enter the economic network of the Community and which may be subject to consumption.

As a result, the Court considered that once it was established that the import duties and VAT had been settled in Greece where the goods were actually consumed, then the risk associated with the importation of the goods in Germany was as a matter of fact hypothetical.

As a result the Court ruled that Article 2 (1) (d) and Article 30 of the VAT Directive must be interpreted as meaning that, when goods are introduced into the territory of the European Union, it is not sufficient for those goods to be the subject of infringements of the customs rules in a given Member State, which had given rise in that Member State to a customs debt on importation, to consider that the said goods had entered the economic network of the European Union in that Member State, where it is established that the same goods were dispatched to another Member State, their final destination, with the import VAT tax relating to those goods then arising only in that other Member State.

3.2 CASE C-273/18 *SIA KURSU ZEME*

On 10th July 2019 the ECJ released its decision in this case concerning the right to deduct VAT on a supply of goods in terms of Article 168(a) of the VAT Directive.

SIA Kursu Zeme ("Kursu"), a company established in Latvia, purchased goods from KF Prema, another company established in Latvia, in respect of which it deducted input VAT. During an inspection by the tax authorities of Latvia, it transpired that the goods in question had originally been sold by Baltfisher, a company established in Lithuania to another two companies established in Latvia before being acquired by KF Prema, which in turn supplied them to Kursu. Furthermore, it was established that the transport of the goods from Baltfisher's warehouse in Lithuania to Latvia was carried out by Kursu. On the basis of these findings the tax authorities were convinced that the absence of a logical commercial explanation for the chain transactions can only be construed that an abusive practice designed to obtain a tax advantage was in place. Consequently, they decided to treat the supplies at issue as intra-Community acquisitions by Kursu, proceeding to correct the relative VAT returns furnished by Kursu by including the value of the goods at issue in the value of goods received originating from other Member States.

This action resulted in an increase in the amount of VAT payable and a simultaneous decrease in the input VAT originally claimed by Kursu.

The referring Supreme Court of Latvia had asked whether Article 168(a) of the VAT Directive must be interpreted as precluding the refusal of the deduction of input VAT based solely on the fact that the taxpayer was knowingly involved in the arrangement of sham transactions but it is not indicated in what way the outcome of those specific transactions has been detrimental to the Treasury. The Court remarked that as already established in settled case law, the right of taxable persons to deduct the VAT due or already paid on goods or services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation. Such right of deduction is an integral part of the EU VAT scheme and in principle may not be limited. On the other hand, it is recalled that the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive. Given however, that EU legislation cannot be relied on to counter schemes set up for abusive or fraudulent ends, it is the role of the national courts and authorities to refuse the right of deduction, if it is shown, in the light of objective evidence, that that right is being relied on for such fraudulent or abusive ends. This is particularly relevant since the Court considered the case at issue as a potential abusive practice and not one concerning VAT fraud. The Court observed that it is apparent from the order of reference that the tax administration had neither established in what the undue tax advantage allegedly obtained by Kursu consisted nor identified any undue tax advantages obtained by the other companies participating in the chain of successive sale transactions of the goods at issue, for the purposes of ascertaining whether the real objective of those transactions was exclusively to obtain an undue tax advantage.

As a result, the Court ruled that that Article 168(a) of the VAT Directive must be interpreted as meaning that, for the purposes of refusing the right to deduct input VAT, the fact that an acquisition of goods took place at the end of a chain of successive sale transactions between several persons and that the taxable person acquired possession of the goods concerned in the warehouse of a person forming part of that chain, other than the person mentioned as supplier on the invoice, is not in itself sufficient to find the existence of an abusive practice on the part of the taxable person or the other persons participating in that chain, the competent tax authority being required to establish the existence of an undue tax advantage obtained by that taxable person or those other persons.

Should you require further information on the above please contact

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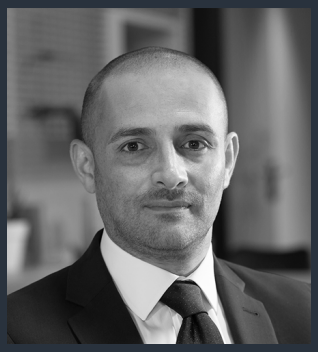

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