ZAMPA DEBATTISTA

VAT NEWSLETTER

Q4
2020

EXCELLENCE IS OUR AIM.
PRO-ACTIVENESS IS KEY TO OUR SUCCESS.

25TH JANUARY 2021

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ABOUT US

Zampa Debattista is an advisory firm with strong values of integrity and excellence which help us keep high levels of customer satisfaction. We have built our reputation by offering specialised services in the Indirect Taxation and Financial Reporting areas, but offer services in Direct Taxation and Assurance areas through dedicated teams.

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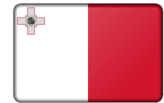
LOCAL NEWS



19 October 2020 – VAT measure - 2021 Budget Speech

The Minister for Finance announced that the Small undertakings VAT exempt threshold will be increased from the current EUR 20K to EUR 30K. This measure is intended to give a further boost to small undertakings and self-employed persons at a time when they have shown great resilience in facing the difficulties arising as a result of the current pandemic.

3 November 2020 – Council Implementing Decision (EU)2020/1662

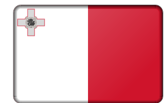
The Council of the European Union, acting on a proposal by the European Commission, has authorised Malta to extend up to the end of 31 December 2024, the application of the small undertakings annual threshold of EUR 20K, which was due to expire on 31 December 2020. The EUR 20K annual turnover threshold applies to the category of small undertakings whose economic activity consists principally in the supply of services with a low value-added (i.e., high inputs).

18 December 2020 – Legal Notice 463 of 2020

The legal notice amends the Sixth Schedule to the VAT Act (Cap. 406 of the Laws of Malta) as follows:

Regulation 2: The period during which a person registered under Art. 10 may be permitted to convert to an Art. 11 registration, is reduced from the current 36 months to 24 months. Furthermore, where it transpires that a person was first registered under Art. 10 instead of under Art. 11, that person may, before the lapse of six months or before the due date of the first VAT return, submit a request to the Commissioner to convert to an Art. 11 registration, which request may be accepted by the Commissioner if he is satisfied that the person qualifies as a small undertaking.
This regulation came into force on 1 January 2021.

Regulation 3: This regulation implements the VAT measure announced in the 2021 Budget speech by increasing the small undertaking annual entry threshold from EUR 20K to EUR 30K for other economic activities. Whilst the annual entry threshold for economic activities consisting principally in the supply of goods remains unaltered at EUR 35K, the two categories for economic activities consisting in the supply of services have been merged into one category under the title of "other economic activities" with an annual entry threshold of EUR 30K and an exit threshold of EUR 24K.
This regulation shall enter into force on such date as the Minister for Finance and Financial Services may, by notice in the Gazette, establish.



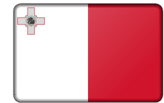
29 December 2020 – Legal Notice 477 of 2020

The legal notice amends the Fifteenth Schedule to the VAT Act (Cap. 406 of the Laws of Malta) to take account of the UK exit from the European Union as from 1 January 2021. However, supplies of goods made from or to Northern Ireland shall be treated as supplies originating in or intended for a Member State (as per EI-UK Protocol agreed between the UK and the EU), for the purpose of which a VAT identification number with a prefix "XI" must be used (by taxable persons established in Northern Ireland). In addition, transactions from or to the United Kingdom areas of Akrotiri and Dhekelia shall be treated as transactions originating in or intended for Cyprus.
These regulations came into force on 1 January 2021.

Administrative Review Tribunal

Appeal No 126/13 VG – Palm Court Limited vs Direttur Generali Taxxa fuq il-Valur Mizjud Preliminary ruling
Plaintiff ("PCL") appealed against assessments served on it by the Commissioner for tax periods starting June 2007 to November 2011 amounting to EUR 349,342 tax, EUR 69,868 administrative penalties plus interest on grounds that the input vat credit claimed in the original returns was due and correct and that they had submitted all the documentation requested by the VAT Department. In his counter reply, the Commissioner raised a preliminary plea invoking the application of Art. 48(5) of the VAT Act, in that according to him, PCL had, without a reasonable excuse, failed to furnish the documentation at the time it was requested by the Commissioner. After hearing the evidence put forward by the parties the Tribunal ruled that Art. 48(5) should apply. Consequently, it ordered the resumption of the hearing of the appeal on merit, with the plaintiff being precluded to produce before it any records/documentation connected with the assessments under appeal.

*[**ZD Comment:** In our view, Art. 48(5) of the VAT Act is not in line with the provisions of the VAT Directive, which view is supported by European Court of Justice settled case-law that generally establish that unless VAT fraud is involved, Member States cannot refuse the right of deduction, at best they can impose an administrative penalty. Last July, a Spanish High Court referred questions to the ECJ (Case C-294/20) for a preliminary ruling in connection with a case concerning the non-payment of a refund by the tax authority on grounds that the taxpayer did not furnish it, without a valid reason, with the pertinent documentation, and secondly, whether the tax authority abused its rights when it failed to pay the refund even after that the taxpayer had voluntarily made such documentation available at a later date to a review body or a court. ZD will be following closely this case which appears to mirror exactly the current situation in Malta, and we eagerly look forward to communicating the decision as soon as it is published.]*



Appeal No. 160/12 VG – XXX vs il-Kummissarju tat-Taxxa fuq il-Valur Mizjud

XXX filed an appeal against assessments spanning from August 2004 to January 2010, amounting to EUR 106,599 inclusive of the administrative penalties and interest, raised by the Commissioner pursuant to a VAT investigation triggered by a credit control exercise. According to the plaintiff, the assessments had not been raised properly, reasonably and fairly given that at the investigation stage the VAT Department had refused to consider the relevant documentation or accept their meaningful submissions in support of the correctness of the declarations contained in the original VAT returns, claiming that the assessments were thus the result of a number of wrongly drawn conclusions by the VAT Department. On its part, the Commissioner rebutted the arguments raised by the plaintiff, in that the assessments were based on a thorough investigation of the records and VAT declarations and that the assessments were calculated on a revised mark-up which according to him better-reflected plaintiff's line of business, namely the retail sale of high-end luxurious brand watches. After an in-depth analysis of the workings prepared in the scope of the investigation by the appellant and the VAT Department, the Tribunal concluded that the working that best treated the alleged mark-up shortfall was the one set by the VAT Department at the second review stage. As a result, whilst dismissing the plaintiff's claim regarding the alleged unfair treatment, the Tribunal ruled for the cancellation of the assessments under appeal and their re-issue containing the amounts set out by the VAT Department at the second review stage for a total of EUR 69,690 VAT (exclusive of administrative penalties and interest, which are to be added).

Appeal No. 91/12 VG – XXX vs Kummissarju tat-Taxxa fuq il-Valur Mizjud

XXX filed a question to the Tribunal in terms of Art. 44(h)(i) and (j) in connection with VAT refunds due to it by the Commissioner. It transpired that following a VAT investigation, the Commissioner had issued assessments pursuant to which the refunds being claimed were cancelled. Given that XXX had appealed against the assessments and the appeal has been decided (see Appeal No. 160/12 VG above) the Tribunal dismissed the question.

EUROPEAN NEWS

TAXUD news

28th October 2020 – COVID-19: Commission puts forward taxation and customs measures to support access to more affordable equipment, vaccines and testing kits

As a means of combating the ongoing coronavirus pandemic, the EU Commission adopted further measures in the area of taxation and customs that are intended to give the Member States better and cheaper access to the tools that are needed to prevent, detect and treat the coronavirus. The first measure consists of the prolongation, up to the end of April 2021, of the current temporary waiver of customs duties and VAT on imports of medical devices and protective equipment. As a second measure, the Commission is proposing to grant a VAT relief on sales of coronavirus vaccines and testing kits to hospitals and medical practitioners. Under the current VAT rules, Member States can apply reduced VAT rates on sales of vaccines, but cannot apply zero rates, whilst testing kits are subject to the standard rate.

7th December 2020 – Coronavirus response: Commission welcomes agreement on crucial VAT relief for vaccines and testing kits

The Member States agreed unanimously to adopt the Commission proposal of 28th October 2020 regarding relief from VAT on sales of vaccines, testing kits and closely related services made to hospitals, medical practitioners and individuals. The new rules will apply from the day after their publication in the Official Journal of the European Union and will remain in force the earlier of, either the end of 2022 or until an agreement is reached on the Commission's pending proposal for new rules on VAT rates.

18th December 2020 – Commission adopts a proposal to adapt the decision-making process for interpreting certain VAT concepts

The Commission adopted a proposal whereby certain decisions by the VAT Committee taken under the "comitology procedure" regarding the interpretation of certain concepts of the EU VAT Directive, will become binding on the Member States. The proposal is intended to create more legal certainty, minimise red tape and reduce cross-border related costs for businesses. Under its current constitution, the VAT Committee, made up of representatives of the Member States and of the Commission, examines issues related to the application of EU VAT provisions raised by the Commission or a Member State. However, being merely an advisory committee, it can currently only publish non-binding guidelines on the application of the VAT Directive.

22nd December 2020 – New guidance document on the import and export of low-value consignments

From 1 July 2021, the EU will introduce new VAT e-commerce rules to ensure fair competition for EU businesses and reduce VAT losses resulting from the importation of low-value consignments from third countries. The VAT Explanatory Notes contain detailed explanations and clarifications on the new e-commerce rules. This is further complemented by the Customs Guidance Document on the Importation and Exportation of Low-Value Consignments that provides further clarification and practical examples on customs rules, formalities and the respective processes.

The VAT Explanatory Notes can be accessed on the following link:
https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102020_en.pdf

VAT Committee Meeting

16/11/2020 – During the 117th Meeting of the VAT Committee, a number of working papers were discussed, mostly on questions raised by the Member States.

For further reading click on:
https://circabc.europa.eu/ui/group/cb1eaff7-eedd-413d-ab88-94f761f9773b/library/e5a8ccaf-1409-4725-b2ba-4601efdf047f?p=1&n=10&sort=modified_DESC

VAT Expert Group Meetings

05/10/2020 – At the 27th Meeting of the VAT Expert Group, the Commission made an oral presentation on the *'Action Plan for fair and simple taxation supporting the recovery strategy'* which had been adopted on 15 July 2020. The plan focused in particular on eight actions which would require a legislative proposal for amending the EU VAT Directive namely modernising VAT reporting obligations and facilitating e-invoicing, adapting the VAT framework to the platform economy, transforming the status of the VAT Committee and further extending the scope of the VAT One-Stop-Shop, amongst others. Other interesting matters were discussed notably, the state of play and feedback received from business stakeholders on the VAT E-Commerce Explanatory Notes, the transformation of the status of the VAT Committee into a comitology committee and the VAT treatment of the platform economy.

For further reading click on:
https://circabc.europa.eu/ui/group/cb1eaff7-eedd-413d-ab88-94f761f9773b/library/c9c26f7a-45c5-49df-b036-515359ce8bbc?p=1&n=10&sort=modified_DESC

30/11/2020 – During the 28th Meeting of the VAT Expert Group, several interesting presentations were made by the Commission namely on the Taxes in Europe Database (TEDB) for OSS which includes information for about 650 taxes, including VAT, applied by the EU Member States and serves as a single entry point for the Member States and on the outcome of the Fiscalis workshop which took place between the 23 and 25 of September 2020, concerning transactions based VAT reporting and e-invoicing and on certain aspects of the Action Plan for fair and simple taxation supporting the recovery strategy. A separate presentation was held by the VAT Expert Group on topics which they had identified for discussions such as Fixed Establishment, the Alignment with Sustainability Policies relating to Donations, Bad Debt Relief and Digitalisation Costs and Input Tax Deduction in certain exempt sectors such as education, health etc and Selected EJEU Rulings related to deduction.

For further reading click on:
https://circabc.europa.eu/ui/group/cb1eaff7-eedd-413d-ab88-94f761f9773b/library/c2040bd8-d3a2-4530-8f63-42cf048a0d27?p=1&n=10&sort=modified_DESC

The next meeting of the group is likely to take place at end of February 2021 (not yet confirmed).

Case C-405/19 – Vos Aannemingen BVBA – 01/10/2020

Vos Annemingen BVBA ("VA"), a Belgium company that operated a construction and property development business, deducted in full the input VAT charged to it for advertising services, administrative costs and estate agents' commission relating to apartment blocks it constructed and sold. The apartment blocks had been erected on land owned by third parties under an arrangement whereby the undivided shares in land corresponding to the apartments sold by VA were sold by the land-owners themselves. Following an inspection, the competent Belgian tax authority took the view that VA was not entitled to deduct the input VAT in full since third-parties (the land-owners) also benefitted from such transactions and consequently ordered VA to pay an amount of EUR 92,313 in tax, administrative penalties and interest.

The Belgium Court of Cassation stayed the proceedings and referred the case to the ECJ (the "Court") for a preliminary ruling as to whether the fact that expenditure incurred by a taxable person, such as that at issue in the main proceedings, also benefits a third party, precludes that taxable person from deducting in full the input VAT paid on that expenditure were, first, there was a direct and immediate link between the expenditure and the economic activity of the taxable person, and secondly, the benefit to the third party was ancillary to the taxable person's business purposes. Additionally, the Court was asked whether that principle also applied to costs attributable to specific output transactions (such as "taxable" sale of apartments, and "exempt" sale of land) and whether the fact that the taxable person can or is entitled to recharge the costs to the third party whom the expenditure benefits but does not do so, can have an impact on the question of deductibility of the VAT on those costs.

The Court recalled that according to its settled case-law the deduction system established in the VAT Directive is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of his economic activities, provided that those activities are themselves subject to VAT. In addition, for the taxable person to be recognised as having a right of deduction of input VAT and in order to determine the scope of such entitlement, the existence of a direct and immediate link between a particular input transaction and one or more output transactions giving rise to a right to deduct, is in principle, necessary. As a matter of fact, the right to deduct presupposes that the expenditure incurred in acquiring the goods/services was a component of the cost of the output transactions that give rise to the right to deduct. However, where such a direct and immediate link is not established, a taxable person would still be entitled to deduct the input VAT provided that the costs in question form part of that person's general business overheads. The Court, being satisfied with the existence of a direct and immediate link between the expenditure at issue in the main proceedings and the whole of the taxable person's economic activity, took the view that the fact that a third party also benefits from those services cannot justify the refusal of the right of the taxable person to deduct the input VAT corresponding to those services particularly since the benefits derived by the third party can be classified as ancillary to the taxable persons' economic activity (the sale of apartments).

In the light of the foregoing, the Court ruled that the taxable person had a right to fully deduct the input VAT incurred on the expenditure at issue in the proceedings. Regarding the second question, the Court ruled that the fact that a third party derived benefits does not preclude or limit the taxable person's right of deduction and regarding the third question, namely that fact that the taxable person could have recharged the costs to the third party but did not, left it to the referring court to consider whether as constituting one of the elements necessary for the taxable person to exercise his right of deduction.

Case C-331/19 – X – 01/10/2020
X, a taxable trader established in the Netherlands, operated a sex shop selling amongst other, products of animal or vegetable origin that were intended for human consumption (to be taken orally) and that was claimed to trigger an aphrodisiac effect when ingested. Based on his understanding of the reduced rate as applied to foodstuffs in Netherlands VAT law, X applied a reduced rate on the sale of these products. On the other hand, the tax authorities disputed the application of the reduced rate on grounds that in their view the products at issue did not constitute "foodstuffs" within the meaning of the relevant provisions in the VAT legislation and consequently issued additional assessments to cover the shortfall for sales between 2009 and 2013.

The referring Netherland Court asked the ECJ whether the term "foodstuffs for human consumption" used in point 1 of Annex III of the VAT Directive must be interpreted as covering "any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans, and if not, how must the term be defined". Additionally, on the basis of which criteria, "edible products that are not regarded as foodstuffs but that are normally used to supplement foodstuffs or as a substitute for foodstuffs", are to be assessed.

The Court remarked that in the absence of definitions of the concepts of "foodstuffs for human consumption" and "products normally used to supplement foodstuffs or as a substitute for foodstuffs" in VAT legislation, any interpretation thereof must be construed by taking into account (i) the textual meaning (i.e., the usual meaning of the words in everyday language); (ii) the context in which they occur; and (iii) the purpose of the rules of which they are part. It should be observed that in principle, as understood in the everyday language of the words the term "foodstuffs for human consumption" refers to all products that contain nutrients which serve as building blocks, generate energy, and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which are consumed for such a purpose. Whereas the term "supplements for foodstuffs" in the everyday language of the words refers to products having the same characteristics of "foodstuffs for human consumption" applying a different VAT treatment would be unreasonable. Regarding the context of the use of the products, whether that product has health benefits, its ingestion entails a certain pleasure for the consumer, or its use is part of a certain social context was, according to the Court, irrelevant. Finally, the aim pursued by the legislator in establishing the optional application of reduced rates by the Member States to the products/services listed in Annex III of the VAT Directive was to render such products/services less onerous and thus more accessible to the final consumer.

The Court thus ruled that the concepts of "foodstuffs for human consumption" and "products normally used to supplement or as a substitute for foodstuffs" set out in point 1 of Annex III of the VAT Directive must be interpreted as meaning that they refer to all products containing nutrients which serve as building blocks, generate energy and regulate its functions, which are necessary to keep the human body alive and enable it to function and develop, and which are consumed in order to provide it with those nutrients.

DISCLAIMER

While every effort was made to ensure that the contents of this newsletter are accurate and reflect the current position at law and in practice, we do not accept any responsibility for any damage which may result from a change in the law or from a different interpretation or application of the local law by the authorities or the local courts.

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