FYI

Indirect TAXES NEWS

Analysis of a Court Judgment

and more current information

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UK vs. Paul Newey

Analysis of a Court Judgment

By Raluca Tutu

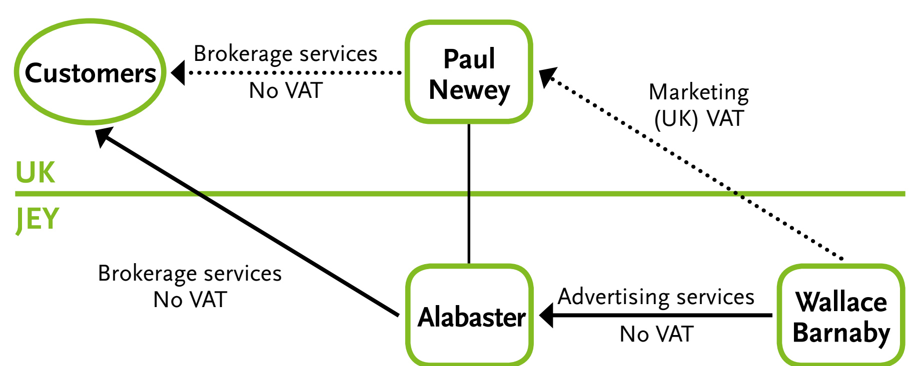
Analysis of the Court Judgment on 20 June 2013, Case C – 653/11, in the proceedings Her Majesty's Commissioners of Revenue and Customs vs. Paul Newey, trading under the business name Ocean Finance.

When assessing the case, the UK authorities argued that the advertising services are supplied to Paul Newey in the UK and are therefore taxable in the UK. Further to this, the brokerage services are supplied by Paul Newey in the UK. If Alabaster is to be regarded as the recipient of the advertising services and the supplier of the loan brokerage services, the arrangements should be recharacterised as per the prohibition of the abuse of rights principle.
Consequently, under these circumstances, the following questions have been referred to the European Court of Justice (ECJ):

- What weight should be given to contracts in determining the question of which person made a supply of services for VAT purposes? (i.e. is the contractual position decisive?)
- If the contractual position is not decisive, in what circumstances should the Court depart from the contractual position?

When deciding a pending case, the ECJ looks at the abuse test, which is two-

Facts and road map



- Paul Newey grants rights to use the trade name to Alabaster
- Alabaster formally concludes contracts with customers
- Alabaster has no substance (1 FTE, no management or business experience)
- Paul Newey is subcontractor of Alabaster
- In fact, Alabaster performs "nearly all" aspects of brokerage activities
- Paul Newey has power to negotiate contracts between Alabaster and customers
- All contracts are rubberstamped by Alabaster (no exceptions)
- Paul Newey receives 50% to 60% of Alabaster's fees
- Alabaster formally enters into a contract for advertising services with Wallace Barnaby
- Marketing represents a considerable part of the costs for Alabaster
- Paul Newey is not liable for payment toward Wallace Barnaby
- Paul Newey was the empowered person to approve content of advertising/made recommendations (to Alabaster)
- Alabaster never rejected this approach

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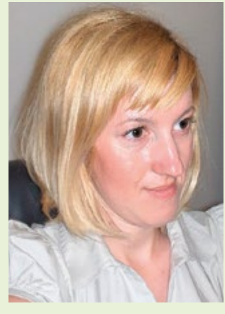
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fold: (i) an objective test that always has a neutral purpose in VAT issues and (ii) a subjective test that reflects the economic reality in VAT issues. The ECJ took this approach and argued that the relevant contractual terms constitute a factor to be taken into consideration, mainly due to the fact that this normally reflects the economic and commercial reality of the transactions and satisfies the requirements for legal certainty.
However, there is an abuse of law when the transaction is characterised as wholly artificial. In this particular case, the ECJ stated that contractual terms are not decisive and may as well be disregarded if it becomes apparent that they do not reflect the economic and commercial reality and that the structure was set up with the sole aim of obtaining a tax advantage. Under these conditions, it is obvious that the effective use of the services took place in the UK.
Nevertheless, the ECJ ruled that the contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and recipient of a supply of services. In particular, they may be disregarded if it becomes apparent that they do not reflect the economic and commercial reality and were set up with the sole aim of obtaining a tax advantage, which is to be determined by the national court.
In short, the ECJ adopted the substance over form approach, which has become a contentious issue at the present time, and it is also widely argued via the base erosion and profit shifting (BEPS) action plan initiated by the OECD.

VAT exemption for export not subject to strict time limit

By Stefano Quaglia and Elio Sbisà

In Case C-563/12, the European Court of Justice (ECJ) deals with VAT exemption for the supply of goods being exported outside the European Union (EU) with impact on the harmonisation of the laws within Member States.

The case refers to the Hungarian Tax Authority's refusal to apply the VAT exemption for supply of goods being exported outside the EU because the taxpayer was not compliant with the 90-day time limit imposed by Hungarian tax laws. The ECJ issued a preliminary ruling on the interpretation of

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Article 146 (1) (b) of the Principal VAT Directive 2006/112 (Directive) in conjunction with Member States power under Article 131 of the Directive to prevent any possible tax evasion, avoidance and abuse.

The ECJ deemed that Article 146 (1) (b) conditions the VAT exemption exclusively to two events: (i) passing of ownership of the goods to the purchaser and (ii) the supplier's proof that the goods "physically" left the territory of the EU with their dispatch.

According to the ECJ, it is fundamental that Member States oversee and verify the effective transportation of the goods to prevent tax abuse by giving vendors of the goods a "reasonable" time limit for export.

However, failing to comply with a specific time limit (90 days) may not cause the taxable person a definitive loss of the right to the exemption, in the event that proof of export is undisputed.

In light of the ECJ's judgment, Member States must revise their legislation. For example, the Italian VAT laws are similar to those in Hungary. This decision will solve the ambiguous interpretation by our local tax authority in past.

Intra-community acquisitions and the VAT ID Number

Negative consequences of using the wrong VAT ID

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By Carina Langegger and Manfred Leitinger

The ECJ decision issued on 22 April 2010 (Case C-539/08) regarding intra-community acquisitions between and Facet BV/Facet Trading BV showed that small formal invoicing mistakes can have significant implications for tax. The consequence of a purchaser using a VAT ID differing from the VAT ID of the country where the supply ends is that the purchaser becomes liable for VAT in both countries (where the supply ends and in the country of the VAT ID which was used). However, the right of VAT deduction would only be granted in the country where the delivery ends.

In such cases, in order to avoid penalties, the purchaser has to provide a document as proof to support the claim that acquisition tax was accounted for in the Member State where the delivery ended.

This rule also applies if the supplier uses an incorrect VAT ID. If A1 delivers goods from Austria to A2 in France and A2 uses its Austrian VAT

ID, A2 becomes liable for an additional acquisition tax without the right of deduction in Austria. Documented proof that the acquisition tax was paid in France is required to avoid a VAT adjustment.

Following the interpretation by the Austrian fiscal authorities, even the mere display of an incorrect VAT ID on the invoice (even if the purchaser does not use the displayed VAT ID) is considered to be destructive. As a result, every display of the incorrect VAT ID leads to additional acquisition tax without the right of deduction.

The upshot with regards to chain/triangular transactions is that it is now even more important to monitor the compliance of formal invoicing requirements in order to avoid double taxation.

Belgium: new and simplified rules for VAT "self-billing"

By Filip Camps

From 1 January 2013, a new law entered into force[1] that changed the Belgian VAT Code. In particular, it regulates the new measures regarding invoicing rules and changing the applicable rules in relation to self-billing. The VAT authorities consequently issued an official announcement in 2013 on the subject of the simplified self-billing rules in which the amended measures were explained.[2]

The self-billing rules are an exemption to the basic principle that suppliers of goods and services issue the invoice to customers. Provided the conditions are met, customers are authorised to draw up and issue a self-bill.

Article 53 §2, al. 2 of the Belgian VAT Code allows self-billing by the "contracting partner", provided there is an agreement in advance between both parties and each self-billing document is accepted by the supplier.[3] These conditions have to be met in order for the self-billing document to be categorised as an invoice in accordance with VAT regulations, thereby allowing the customer to deduct the VAT.

In this respect, the VAT authorities explained in its official announcement that the acceptance by the supplier of the self-bill can be implicit as well as explicit, and that a credit note can be issued through self-billing or by suppliers and customers.

1) Law of 17 December 2012, changing the Belgian VAT Code, BS 21 December 2012

2) Circulaire AFZ nr. 02/2013 dated 23 January 2013 (AFZ/ 2011-0272). First announcement regarding the change in law in December 2012, which affects the Belgian VAT Code.

3) Same conditions are applicable for self-billing between parties with a VAT consolidation.

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The Netherlands optimising procedures

Competitive customs and VAT climate

By Toon Hasselman

The Customs Administration of the Netherlands is known for its practical and pro-active approach towards facilitating international trade and optimising customs and VAT procedures.

Since the abolition of the internal border in 1993, the authorities have issued regulations to facilitate the import and distribution of goods into the EU via the Netherlands.

One of these measures avoids the actual cash payment of VAT on importation (Article 23). Under this measure, the import VAT that falls due is deferred to the VAT return of the goods recipient holding this assignment. This deferment scheme is only directly available to Dutch companies and foreign companies with a VAT-permanent establishment in the Netherlands. A foreign company can benefit from this deferment scheme at any time if it appoints a VAT fiscal representative (Article 33g NL VAT Act) with a general or limited licence. Most logistic service suppliers provide the benefits of the limited licence and will report the VAT consequences of the import and the first taxable event after import on a specially issued VAT ID. As they are fully liable for any VAT mishap, they will want to control the supply chain for that part. A general licence means that the company obtains its own VAT ID and assignment and must provide a guarantee amount (roughly 5 x 5%xVAT rate of the value of quarterly import and acquisitions).

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Streamlining the VAT registration process

By Graeme Saggers

With effect on 1 April 2014, South Africa has amended sections of the Value-Added Tax Act in an attempt to clarify and streamline certain registration requirements.

Registration for VAT in South Africa is either compulsory or voluntary. Businesses are required to register for VAT when their turnover is greater than ZAR 1 million per year but they may voluntari-

ly register for VAT when their turnover is less than ZAR 1 million but greater than ZAR 50,000 a year. The confusion regarding the timing of the ZAR 1 million compulsory registration threshold has now been clarified and compulsory registration will only be required when businesses have reached the threshold in the preceding 12 months or have a written contractual commitment which means they will reach it in the next 12 months.

For voluntary registration, businesses must currently prove that they have made taxable supplies of at least ZAR 50,000. This creates a chicken and egg situation as businesses need to register to trade but cannot register until they have proof of trading. The legislation has been amended such that it allows businesses who can reasonably be expected to make taxable supplies of at least ZAR 50,000 in the next 12-month period to register voluntarily. This option requires that businesses administer their VAT on the cash basis as opposed to the accrual basis until such time as they reach the ZAR 50,000 threshold.

It is hoped that the removal of subjective requirements from registration will streamline the process, which can help save time, money and stress and therefore truly add value to value-added tax.

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Foreign companies in Switzerland

By Abdullah Demir

Tax liability – Any persons operating a business with a commercial activity and acting externally under their own name are liable for taxation. This also applies to companies who have their registered office abroad but are active in Switzerland. Any persons with a turnover below CHF 100,000 from taxable services are exempt from tax, unless they have waived the right to tax exemption and are entered in

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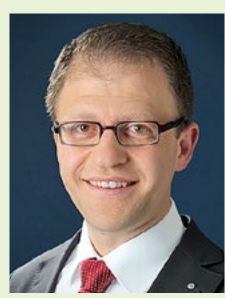
the Register as a taxable person. Those excused from the obligation to pay tax are inter alia companies with their registered office abroad that are performing services in Switzerland and are only subject to service import tax.

Must a tax representative be appointed in Switzerland? – If a foreign company is commercially active and taxable in Switzerland, it must have a representative to give the company a domicile status through which all transactions concerning VAT can be conducted. Any natural or legal persons with residential or business domicile in Switzerland can be recognised as a representative. They do not have to be a trust company, lawyer or any particular type of professional, and may be a private person. With the exception of liability for tax debts and the payment of such debts, the representative assumes the obligations of the taxable person.

Registration for foreign companies with no Swiss subsidiary – If a business satisfies the pre-requisites stated, it must register with the Swiss Federal Tax Administration (ESTV). In addition, for the monetary claims required by law, a joint security without time constraint must be guaranteed by a bank domiciled in Switzerland or a cash deposit must be made.



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India's General Elections – to give impetus for GST

"Hope lies eternal in the human breast"

By Aditya Kumar

A decisive mandate coupled with a perceptible freedom from the shackles of coalition politics has led to the generation of a lot of positive energy as evidenced by the movements in the capital markets, strengthening of the rupee, increased FDI and a general optimism in the market. Riding on the back of these parameters is the revived hope for not just a renewal of but an acceleration in the pace of economic reforms. There is also optimism in the air regarding the introduction of GST. The basis of such optimism was the unequivocal and emphatic recommendation of Standing Committee of Parliament on Finance on the implementation of the Dual GST structure and its Constitutionality. However, with the States arguing endlessly about the items to be taxed and taxes to be subsumed in the GST, the wheels of

the Chariot got stuck again only to wait for the new Government to push the reforms. It seems that the new Government could well consider the recommendations of Sijbren Cnossen, an international expert on GST whereby the Centre can plan its own GST, as a broad based measure encompassing almost all the Central indirect taxes, and covering all goods in the Union List thereby requiring the taxpayers to pay only one Central indirect tax and face only one tax authority. This measure will not warrant any Constitutional Amendment, and can be thought of as an alternate measure.

Of course the broad political consensus necessary for such a measure to come into force would be possible only when the entire political spectrum exhibits a higher degree of sagacity, prudence and pragmatism the hope for which has risen with the elections now out of the way and a decisive mandate in place.

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Contracting out of GST?

By Lisa Handfield

The British Columbia Supreme Court, Yoshizawa, N. et al. vs. Beaton, recently heard a case relating to goods and services tax (GST), which is Canada's version of the VAT. As a rule, Canada imposes GST at a rate of 5% to most goods and services sold/rendered within the country. However, there are exceptions including used residential property.

The Yoshizawas (the "Sellers") sold lands which consisted of a home and a nursery business (the "Property") to the Beatons (the "Purchasers"). There was an addendum to the sale agreement which stated that the Purchasers would pay GST related to the transaction. On closing, the Sellers provided the Purchasers with a GST exemption

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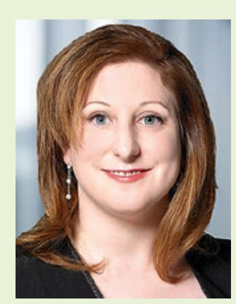

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certificate (the "Certificate") which stated that no GST was payable on the transaction as this was a sale of used residential property. After closing, concerns about GST arose resulting in the Sellers suing for the recovery of GST paid.

Section 194 of the Act Excise Tax Act (Canada), R.S.C. 1985, c. E-15, as amended (the "Act"), states that when property is sold and a seller certifies that the supply is an "exempt supply", the supplier is responsible for payment of GST from the sale proceeds. However, if the purchaser knows or ought to know that the supply is not an "exempt supply", then the purchaser is responsible for the GST.

The Court noted Section 194 of the Act, but held that the Certificate did not override the Purchasers' agreement to pay GST and there was no misrepresentation by the Sellers as to what was sold. Unless the Court implicitly held that the Purchasers knew or ought to have known the supply was not an exempt supply, the Court essentially allowed the parties to contract on a basis different from the legal treatment of GST in the Act. It is of course arguable whether the Sellers ought to have known of the taxable status of the supply of the property. This raises the more interesting question of what evidence a party needs to produce in order to demonstrate that the other party should not have relied on an exemption certificate.

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