

# Indirect tax update

[03/2018]

14 March 2018

## Summary

Welcome to this week's Indirect Tax Update.

This week, we take a look at the Advocate General's opinion in a UK referral to the Court of Justice. The case was referred to the Court by the First-tier Tax Tribunal and relates to the operation of an online auction site known as 'Madbid'. The question to be resolved was whether the sale of credits to customers should be regarded as a preliminary transaction that is outside the scope of VAT or as a payment in advance for the supply of goods won at the auction.

The European Commission has flexed its muscles and has issued 'proceedings' against a number of Member States (including the United Kingdom) for what it perceives to be infringements of EU law. The UK's alleged infringement relates to the operation of zero-rating in relation to supplies on terminal markets (financial derivatives).

Finally, we look at a case from the First-tier Tax Tribunal on the difficult topic of whether a property transaction constituted a transfer of a going concern (TOGC).

The case relates to the supply of four properties where the vendor had opted to tax (or elected to waive the exemption). The question was whether, at the point where the purchaser paid a deposit, the necessary TOGC conditions were met so that the transfer of the property from vendor to purchaser could be treated as neither a supply of goods nor a supply of services.

The Tribunal found that in the case in question, the conditions had not been met (in relation to three of the properties) but had been met in relation to one property.

## Marcandi Ltd t/a Madbid Case C-544/16

### Court of Justice of the European Union Judgment 7 March 2018

This is a UK referral to the Court of Justice of the European Union (CJEU). The case relates to the operation of an auction website and asks whether money paid by customers for 'credits' which allow them the right to participate in online auctions should be regarded as 'preliminary transaction' that is outside the scope of VAT or as a payment in advance in relation to goods purchased through the trader's online store.

The concept of a 'preliminary transaction' was considered by the CJEU in an earlier case involving MacDonald Resorts Ltd (Case C-270/09). In that case, which involved the supply of timeshare points to customers, the Court was asked to rule on whether the allocation of points in return for a fee constituted a supply for consideration falling within the scope of VAT. The Court held that as the customer had no idea which resort or property he would choose to occupy for his holiday, the allocation of points to the customer was simply a preliminary transaction in the wider supply of the timeshare accommodation.

Using the MacDonald Resorts judgment as an analogous scenario, Madbid argued that the allocation of auction credits to the customer was, similarly, a preliminary transaction. Madbid took the view that, as there was no certainty as to which goods (if any) the customer might successfully bid, the supply of the credits must be a preliminary transaction that is outside the scope of VAT.

However, the Advocate General did not accept the analogy. Without any credits, the customer would not be able to participate in the online auctions. The credits were a necessary element to enable the customer's participation in the auction and, as such, they were, in effect, a means to an end in themselves. In the Advocate General's opinion, the allocation of credits against payment was simply a supply of the right to participate in the online auction that was squarely within the scope of VAT.

Madbid also put forward an alternative argument that the payment it received for the supply of credits was, in fact, a pre-payment for the supply of goods that the customer had won at the auction. However, the evidence before the court suggested that where an auction item was purchased by the winning bidder, they were required to pay the winning bid price in full along with any shipping costs. As such, it could not be said that the credits were used as part payment towards those goods. Madbid also pointed out that in the event that a customer was unsuccessful at an auction, he could then use the value of the credits he had spent bidding as a discount against the price of any goods purchased at the company's online store. They contended that this further demonstrated the 'preliminary transaction' nature of the supply of credits. Again, the Advocate General re-iterated the point made earlier that, in his view, the allocation of the credits in return for payment constituted a supply of services in its own right. That supply was within the scope of VAT and, as such, VAT was due at the time that supply was made (ie receipt of payment).

**Comment – This case highlights the VAT complexities that can arise as a result of the ever changing world of online commerce. It demonstrates the need for businesses to consider the VAT implications at an early stage and to agree, where possible, the correct VAT treatment with the relevant tax authority in advance. This opinion is a step in the proceedings between Marcandi t/a Madbid and HMRC. In the majority of cases, the full court will follow the Advocate General's opinion when, in due course, it delivers judgment. However, there is always a possibility that the court will disagree with the Advocate General and come to a different conclusion. Judgment should be available with approximately four months of the opinion.**

## European Commission flexes its muscles

### Latest round of infraction proceedings announced

Under the system of European law, Member States are required under the Treaty to implement the provisions of an EU Directive into its domestic laws. Where a Member State fails to do so, or it fails to implement the law correctly, the European Commission may take enforcement action against the Member State(s) concerned. In effect, the Commission acts as a guardian of European law.

This week, the Commission has announced a number of proceedings against Member States in the field of taxation. In particular, it has issued formal letters to Cyprus, Greece and Malta in relation to the operation of VAT schemes for supplies of yachts. These countries offer arrangements to yacht owners whereby the amount of VAT payable is significantly less than it would be if the yacht was purchased in a different Member State. In essence, the amount of VAT due is calculated by reference to the size of the vessel and an arbitrary assumption that the greater the size, the less time the yacht would spend in EU waters. According to the Commission this is contrary to the provisions of the VAT Directive and creates distortion of competition. Accordingly, the Commission has sent formal letters to the three Member States (the first step in the official proceedings) and the Member States have three months to respond. Ultimately, if the Member States do not comply with the requirements imposed by the Commission, the matter is likely to end up with a hearing at the Court of Justice.

The Commission has also written to the United Kingdom as it considers that the UK's implementation of a derogation relating to VAT zero-rating for certain commodity derivatives under the UK's Terminal Markets Order is contrary to EU law. The UK has two months to respond.

### Comment

Infringement proceedings can be commenced by the European Commission either on its own volition or as a result of complaints received from Member States, businesses or individual citizens. There is a formal procedure to follow which starts with the issue of formal letters.

If a Member State either fails to respond or fails to respond adequately, the Commission can then proceed to issue a reasoned opinion. Ultimately, the Commission may commence proceedings against a Member State in the Court of Justice.

In the yacht cases, it has been a long-held view that the VAT arrangements offered by the Member States in question were contrary to EU VAT law and it will be interesting to see how they respond to these formal proceedings.

## Clark Hill Ltd

### First-tier Tax Tribunal

In the world of VAT, the general rule is that a transaction for consideration (ie the provision of goods or services in return for payment) must be regarded as a 'supply' of those goods or services. However, there is an important exception to that rule where goods are transferred by a business as part of the transfer of a going concern (TOGC). In such cases, and subject to meeting certain conditions, the transfer of the assets of the business are not regarded as having being 'supplied' in a VAT sense. Without a 'supply' there can be no VAT due.

These rules apply equally to property (ie real estate) assets that are transferred. However, there are additional complex conditions to meet if the transfer of an 'opted' property (ie where the vendor has opted to tax) is to be treated as not being the subject of a supply. In simple terms, where an 'opted' property is to be transferred, the purchaser must also opt to tax the property. In addition, the purchaser must notify the seller that the option to tax he has exercised will not be disapplied by the anti-avoidance provisions of the VAT Act. These two conditions must be met before the 'relevant' date. The relevant date is the date upon which the property is transferred or, if earlier, the date on which any payment is received by the vendor (including a deposit). In this case, the Tribunal found that the payment of a deposit by the purchaser occurred before the two requisite conditions had been met. Accordingly, the transfer of the properties in question could not benefit from the transfer of a going concern provisions. In other words, as payment of the deposit crystallised a VAT tax point before the TOGC conditions were met, the transfer of the properties in question were regarded as a supply of the properties for VAT purposes. As the vendor had opted to tax the properties, VAT was due on the value received.

### Comment

Determining whether a transfer of assets can benefit from being treated as a TOGC can often be a difficult exercise. Case law has determined that one has to weigh up the factors of each case and come to a conclusion one way or the other.

Throw into the mix the complexities of property transactions – especially where an option to tax has been exercised – and it is easy to see how expensive mistakes can be made. To be treated as a TOGC there are a number of vital conditions that must be met including the need for the purchaser to both opt to tax the property himself and to issue a notice to the vendor that the option to tax will not be disapplied. Failure to do so can, as here, lead to an unexpected and unnecessary VAT bill along with the imposition of an unexpected penalty and interest charge.

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