VAT Update October 2015

31 October 2015

FROM THE COURTS

CASE 1

Copthorn Holdings Ltd v HMRC FTT: TC 04585

Copthorn Holdings Ltd ("Copthorn") operates a business model whereby it acquires land for housing development which it subsequently sells to subsidiary "special purpose vehicles" ("SPVs").

Copthorn is a member of a VAT group meaning that any supplies it makes to SPVs also within the VAT group are disregarded for VAT purposes.

The case in question concerned the supply of land made to one particular SPV which was not in the VAT group. Copthorn did not charge VAT on the supply of land to the SPV. This was either because Copthorn had no option to tax in place over the land or because it was assumed that the SPV was within the VAT group: the precise reason for this was not clear within the evidence presented at the Tribunal.

Copthorn had incurred VAT on the purchase of the land in question and had attempted to recover it. HMRC blocked recovery on the basis that the sale to the SPV was an exempt supply.

In an attempt to recover the input tax incurred on acquisition of the site (amounting to over £2m), Copthorn asked HMRC to apply its discretion, conferred on it under the VAT Act, to allow the SPV to be admitted retrospectively to the VAT group. VAT would then be recoverable because the transfer of the property from Copthorn to SPV is disregarded for VAT purposes and on the basis that the future supplies to be made by the SPV (on behalf of the VAT group) would be zero-rated.

HMRC refused on the basis that its policy limits the circumstances within which its discretion is to be applied. On appeal to the First Tier Tribunal, Copthorn was successful in overturning this decision, with the Tribunal opining that HMRC had not sufficiently considered the fairness of the limitations it had set on its statutory discretion.

CASE 2

Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham (C-108/14) and Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG CJEU: (C-109/14)

Following the Advocate General's opinion earlier in the year, the CJEU issued its decision in the combined Larentia + Minerva and Marnarve cases concerning the deductibility of input tax by holding companies.

Both companies had incurred costs in raising funds to acquire shares in limited partnerships. The VAT on these costs had been substantially disallowed by the German authorities and the German courts referred the question to the CJEU as to what extent the VAT should be recoverable.

Earlier cases concluded that, where holding companies have an active role in managing subsidiaries, costs associated with the acquisition of the subsidiary would be deductible. In contrast, holding companies which have no activity other than the passive holding of the investment would have no means of recovering input tax.

The question that the German courts put to the CJEU was how to apportion input tax where a holding company undertakes both economic (e.g. management) activities and non-economic (i.e. investment) activities in respect of its subsidiaries. In its decision, the CJEU confirmed that a holding company which undertakes economic activity in respect of a particular subsidiary has the right to deduct input tax incurred in relation to the acquisition of that subsidiary, restricted only according to the nature of management services it will provide to that subsidiary (for example, where exempt insurance services are provided). In these circumstances, it confirmed that receipt of dividends should be ignored altogether.

A holding company with multiple subsidiaries is nevertheless required to apportion its input VAT between economic and non-economic activity to the extent that some subsidiaries are held purely as investmentswhilst others receive management services.

HMRC's current position is at odds with that of the CJEU; HMRC's view is that apportionment should take into account dividend income received from subsidiaries to which holding companies provide management or other active services, not just income generated from the provision of those services.

HMRC have yet to comment on the decision.

CASE 3

Amor Interiors Ltd v HMRC FTT: TC 04542

This case serves as a reminder that 'transfer of going concern' (TOGC) treatment is mandatory when the relevant conditions are met.

Old Mill Furniture Limited (Old Mill) operated an upholstery and interior design business. Amor Interiors Ltd (Amor) operated a similar business, albeit supplying to retail customers; Old Mill supplied to trade customers. The two companies had a common director and shareholder.

In the latter half of May 2011, Old Mill issued sixteen invoices to Amor for various business assets, including 'computer, all fixtures and fittings, desks, signs including external... various stock', 'all wallpaper pattern books and pain samples', and 'new stock'.

Both companies were registered for VAT; Old Mill charged VAT on each invoice and Amor sought to recover the VAT from HMRC. However, since Old Mill did not pay the VAT to HMRC, Amor was not able to rely on HMRC's power to repay incorrectly charged VAT where no tax is at risk. This prompted HMRC to look at the question of whether the transaction met the TOGC provisions.

HMRC contended that Old Mill could not continue to trade having transferred all, or substantially all, its assets to Amor, and the series of invoices therefore documented a transfer of a business as a going concern.

Amor argued that there was no intention for Old Mill to cease trading at the time of the transactions and therefore this could not be a transfer of a business.

However, the Tribunal could find no evidence as to how trading could continue. It found that the conditions for TOGC treatment were met and the Amor's appeal was dismissed.

UPDATES TO VAT NOTICES

VAT Notice 700/45: How to correct VAT errors and make adjustments or claims has been updated.

MISCELLANEOUS

SINGLE-USE CARRIER BAGS

The compulsory charge on single-use carrier bags provided to customers by retailers with 250 or more employees, which came into force in England on 5 October 2015, of 5p per bag is inclusive of VAT.Thus 0.83 pence of every 5p must be declared as output tax.

INSTALLATION OF ENERGY-SAVING MATERIALS

The UK has lost infraction proceedings brought by the European Commission concerning the application of the reduced rate of VAT to the installation of energy saving materials.

UK law was found to have applied the reduced rate afforded by the European VAT Directive too widely.

Currently, the installation of qualifying materials, which includes insulation, solar panels and wood-fuelledwood-fuelled boilers, is eligible for the reduced rate when installed in any residential accommodation. This addresses environmental concerns rather than social policy for which the CJEU state it was intended.

Changes to the UK legislation to bring it in line with EU law are currently under consideration. Changes will not be implemented before Finance Act 2016.

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