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Welcome to the Baker & McKenzie Global VAT/GST Newsletter. The newsletter provides updates from Baker & McKenzie's European (and other) VAT departments on recent VAT and legal developments - both on a regional and a local country basis.

For further information on any of the featured articles please contact the author listed. To unsubscribe, please click on the opt out link at the bottom of this newsletter.

We hope you enjoy this and future editions of the Global VAT/GST Newsletter.

Should you have any comments, please do not hesitate to contact us.

Kind regards,

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Conference Invitation

4th Annual Asia Pacific VAT/GST/Customs Conference

Date - Wednesday 26 August 2009

Location - Baker & McKenzie, Hong Kong

Baker & McKenzie is pleased to present its 4th Annual Asia Pacific GST/VAT/Customs Conference in Hong Kong this year. The conference is aimed at tax managers and international trade specialists in multinational corporations who wish to stay on top of the changing legislation and to refine their skills.

For further details on the conference agenda please click [here](#). To register for the conference please complete the registration page contained in the invitation.

For all other enquiries regarding the conference please contact:

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European Union

RLRE Tellmer Property sro - VAT treatment of service charges related to letting of immovable property

On 11 June, 2009 the European Court of Justice ("ECJ") has ruled in the case RLRE Tellmer Property sro (C-572/07). The case concerned the VAT treatment of service charges in relation to letting of immovable property.

RLRE Tellmer Property sro ("Tellmer"), a Czech company, is the owner of apartment blocks that are let to private individuals. In addition to the rent Tellmer separately invoices the tenants for the costs for cleaning of the common spaces of the building. These cleaning services are performed by employees of Tellmer. The questions referred to the ECJ concerned the VAT treatment of these cleaning services. More in particular the questions focussed on whether these cleaning services could fall within the scope of the VAT exemption applicable for the leasing or letting of immovable property.

The ECJ first reconfirms that VAT exemptions are to be interpreted strictly, since these exemptions constitute exceptions to the general principle that VAT is to be levied on all goods or services. Thereafter, the ECJ states that based on the case law, every transaction must normally be regarded as distinct and independent. Subsequently the ECJ rules reconfirms its set case law that, in certain circumstances, several formally distinct services, which could be supplied separately (and thus give rise, in turn, to taxation or exemption), must be considered to be a single transaction when they are not independent.

According to the ECJ the letting of immovable property essentially consists in the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right. The cleaning services of the common parts of an apartment block accompany the use of the property let, and do not necessarily fall within the aforementioned concept.

Tellmer invoiced the sum for cleaning services separately and the tenants were in the position to acquire the cleaning services from a third party supplier. Based on this information the ECJ judged in this specific case that the cleaning services are rendered distinct and independent of the letting of immovable property. Therefore, the VAT exemption for leasing and letting of immovable property is not applicable; the cleaning services rendered by Tellmer are subject to VAT.

We note that the ECJ has based its judgment on the specific facts and circumstances of the Tellmer case. In our view this case does therefore not necessarily lead to a general exclusion for all service charges from the VAT exemption for leasing and letting of immovable property. The application of the VAT exemption should be determined on a case by case basis.

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European Court of Justice Stadeco - reclaim of incorrectly charged VAT

In its judgement of 18 June, 2009, (C-566/07, Stadeco) the European Court of Justice (“ECJ”) has provided further guidance in relation to the possibility to reclaim incorrectly charged and invoiced VAT.

Background

Stadeco is a company established in the Netherlands which is in the business of renting, constructing and dismantling stands for trade fairs and exhibitions. Stadeco supplied these services in Germany to Dutch public body (“EVD”). The EVD used the services of Stadeco solely for activities not subject to VAT in the Netherlands and was therefore not entitled to deduct input VAT on costs.

Stadeco mentioned Dutch VAT on the invoice issued to EVD and remitted this VAT to the Dutch Tax Authorities. During a later audit the Dutch Tax Authorities discovered the error and informed Stadeco on this. Stadeco subsequently received a reimbursement of this VAT under the condition that it corrected the invoices issued to EVD. In order to support this Stadeco provided the Dutch Tax Authorities with copies of credit invoices which they claimed to have sent to EVD. During a later audit the Dutch Tax Administration learned that Stadeco did in fact not issue the credit invoices to EVD nor did it make a repayment of the incorrectly charged VAT to EVD. For this reason, the Tax Authorities issued a supplementary tax notice for the entirety of the reimbursed taxes.

Questions referred to ECJ

The case was brought before the Dutch Supreme Court which referred preliminary questions to the in its turn raised questions to the ECJ. These related to whether the issuer of an invoice stating VAT incorrectly should remit the VAT in its country of establishment if, based on the ‘place of supply’-rules these supplies are not taxable in that country. In addition the Dutch Supreme Court asked whether local authorities are allowed to require that the invoice is corrected before granting an actual refund.

Considerations ECJ

The ECJ decided that any person who mentions VAT on an invoice is liable to pay that VAT, regardless whether the underlying transaction qualifies as an economic activity subject to VAT. In this respect, it is not relevant whether the place of supply of the underlying transaction is in another country. It is the country of which the VAT is mentioned on the invoice that is entitled to collect the incorrectly charged VAT, as the risk of loss of tax revenue because the recipient of the invoice could apply for a refund lies with that member state. The VAT of which specific country is mentioned on the invoice should be determined on the basis of all the relevant circumstances of the case (e.g. the rate mentioned, the currency and the language used on the invoice as well as the place of establishment of the issuer of the invoice).

In relation to the second question the ECJ ruled that since the EU VAT regulations do not provide for a system to correct erroneously charged VAT, it is for the Member States to provide for a solution. As such making the refund of the VAT mentioned on an invoice subject to the requirement that that invoice be corrected is allowed.

In addition the ECJ ruled that the Dutch authorities are allowed to set the requirement of repayment of the reimbursed VAT to the customer if not setting this requirement would lead to unjust enrichment of the issuer of the invoice.

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Customs duty relief for joint cargo small consignment shipments; Irrespective of location seller

On 2 July, 2009, the European Court of Justice (“ECJ”) made a judgement in the case *Har Vaessen Douane Service BV vs Staatssecretaris van Financiën* (ECJ C-7/08). In this case the ECJ addresses the reach of the customs duty relief for small value consignment shipments in the event the dispatch of such consignments is bundled in a joint cargo shipment while coming from outside the EU.

Facts of the case at hand

A Dutch transportation company/dispatching agent (“HV”) handled declarations under the authority of another Dutch company (“ECS”) concerning the import of cd’s and tapes which were ordered by individual customers from ECS’ parent company, ECI. In practice, the individual customers have ordered goods from ECI with an individual value of less than €22. The goods sold were shipped from the Netherlands to a distribution centre in Switzerland for packaging and labelling and subsequently shipped to the consumers that ordered them. The Swiss distribution centre was run by ECS. This Swiss centre parcelled each individual order ready for shipping (including providing each package with the customers’ address and invoice), and for transport purposes handed these goods over to HV. HV arranged for joint cargo dispatch of these goods to the Netherlands where they were distributed via the Dutch Post Office to all individual customers involved.

Upon importation on behalf of the customers, HV applied the customs exemption for shipments with negligible value (below €22). In such event, the Dutch VAT legislation provides for an automatic exemption for import VAT purposes as well since the Dutch VAT Act is linked to the customs regulations at this point.

However, since these goods entered the Netherlands as joint cargo, the Dutch authorities refused the above stated exemptions on the basis of the fact that the joint cargo is initially sent to only one address (the Dutch distribution centre) and not directly to the customers. Moreover, the customers themselves were not involved in the declaration process.

The Dutch Supreme Court had doubts about the joint cargo shipment being exempted from customs duties and import VAT for the following reasons:

- The purpose of the Regulation (which is to achieve an administrative relief) may not justify exemption of joint cargo supplies, because the administrative handling and costs are in this case limited, e.g. not higher than the collection of customs duties (which would typically be the case if the items were imported individually).
- To avoid abuse, the concept of a “direct dispatch” (condition for the aforementioned exemption) may have to be interpreted as being limited to cases where the supplier/sender is located in a third country: In this case the seller/supplier (i.e. ECS) is a Dutch Company.

Considering the doubt the Dutch Supreme Court had, a preliminary ruling from the ECJ was requested regarding the following [quote]:

1. *Is the Regulation to be interpreted as meaning that the relief may be claimed in respect of consignments made up of goods which are individually of negligible value but are dispatched as a grouped consignment with a combined intrinsic value which exceeds the value threshold of €22?*
2. *Should the Regulation referred to be applied on the basis that ‘dispatched direct from a third country to a consignee in the Community’ also covers a situation in which the goods are in a third country before being dispatched to the consignee but the consignee’s contractual partner is established in the Community?*

Ad.1:

During the Court Hearing in this case, the European Commission stated that the Regulation provides for the application of a small consignment relief also if this consignment contains multiple goods, as long as the value of each individual good doesn’t exceed the €22 threshold. According to the European Commission, the customer should further be considered the final person for consignment, and not the Dutch distribution centre (i.e. HV or the postal services that are only a link in the logistics services chain). Also, the way the actual declaration took place regarding the import of the goods shows that the individual customers are considered the final addressees. A list containing all individual customers and the individual value of all goods was attached to the declaration.

In the opinion of Advocate General Kokott at the ECJ (“AG”) it doesn’t matter whether the Swiss Post Office would bundle the goods and sends them over to the Dutch Post Office, or a party like HV would do so. According to the AG the Regulation does not allow preferential treatment to certain sending methods. The exemption should thus apply irrespective of the method of transport.

The AG argued further that the Dutch Post Office can indeed not be seen as the final addressee in this case. According to the AG the final addressees, mentioned on every individual package, are the individual customers. The Dutch Post Office merely is indeed just a link in the logistics chain and not a recipient of the goods in question. Not important in this respect is the fact that the import declaration itself refers to Postal Services as addressee.

Moreover, the statement of the Dutch Supreme Court that the administrative costs are in this case not higher than the collection of customs duties when goods are sent in joint cargo doesn’t find any support in the text of the relevant article in the Regulation.

ECJ ruling on the first question:

The ECJ followed the opinion of Advocate General Kokott, and stated the following:

With regard to the determination of the value of the consignments as stated in this case, the identity of the consignees of the goods must be taken into account when applying article 27 of the Regulation. The identity of this consignee is the final customer, being the individual customer of ECI/ECS since these goods are intended to be used ultimately by these customers and the goods were ordered individually from ECI by these customers who can be considered as users unlike HV and the Dutch Post Office. The latter are transporters and thus merely a link in the logistic services chain between ECI and the final customer.

The fact that HV, for logistical reasons, groups individual goods in order to transport them can not result in those goods being denied admission free of duty, also if they subsequently are not dispatched by mail. A condition laid down for the customs relief is that on every individual package, the name and address of the final customer should be mentioned.

Moreover, with regard to the administrative simplification (which is one of the main purposes of the Regulation) for consignments with a negligible value, the ECJ states that it should not be advisable to refuse the customs duty relief for such joint cargo consignments; This could lead to the situation where a consignor would present each parcel individually to customs in order to be able to obtain customs relief, leading to the opposite of the purpose of the Regulation; yet more administrative burdens for the customs offices.

Ad.2:

With regard to the second question, the Advocate General's opinion is as follows:

The relevant article in the Regulation doesn't state that an exemption of customs duties is only applicable when there is a contractual relationship between the actual sender and receiver of the goods. The regulation aims at the pure factual circumstances of dispatch and only states that these goods have to be sent from a third Country directly to a Member State. It is not relevant where the contractual partner of the addressed customer is established. However, if the goods have already been placed under customs control, exemption of customs duties will be denied.

The argument from the Dutch government that abuse of law takes place regarding the import exemption relating to import VAT is not convincing either, since the connection of the customs duties exemption and Dutch import VAT exemption is the consequence of Dutch legislation. Undesirable use of an import VAT exemption can be avoided by using the option of the regulation which states that goods imported within the scope of mail orders can be excluded from the small consignment relief. The Netherlands however haven't used this option. In addition, abuse of law case-law from the ECJ can be applied in order to determine whether or not the import VAT exemption itself is applicable at all in addition to the customs relief for small consignments. These ECJ cases provide for a framework for member states to refuse the grant of a VAT advantage when it is obtained with abuse. This relates to VAT however and therefore does not regard the application of the small consignment relief Regulation for customs duty purposes.

ECJ ruling on the second question:

The ECJ states that the customs duty relief is not applicable on consignments which were prior placed under another customs procedure (in our view only customs bonded storage is meant here also taking into account the shipments themselves took place under T1 documentation). According to the Court, the customs relief applies to small consignments dispatched directly from a third country to a natural or legal person in the Community. The actual text of article 27 of the Regulation does not lay down any condition that the opposite party of the addressed customers should be established outside the Community.

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Canada

The Supreme Court of Canada makes a special delivery to UPS

In the July 2008 issue of the Global VAT/GST Newsletter, we reported on the Federal Court of Appeal (“FCA”) decision in *Canada v. United Parcel Service Canada Ltd.*¹ in which the FCA denied a customs broker the right to directly recover GST it had remitted in error as agent on behalf of its customers even though the customs broker was the person “out of pocket” for the GST overpayments. Many taxpayers will now have reason to celebrate as the Supreme Court of Canada (“SCC”) recently reversed the FCA decision.

The SCC’s landmark decision in *United Parcel Service Canada Ltd. v Her Majesty the Queen*² represents a huge victory for taxpayers over the Canada Revenue Agency (the “CRA”) as it broadened the scope of persons eligible to recover GST that had been paid in error. The SCC held that United Parcel Service Canada Ltd. (“UPS”) was entitled to claim rebates under section 261 of the *Excise Tax Act* (the “ETA”), to recover the GST it had paid in error to the Canada Border Services Agency (the “CBSA”) in the course of acting as a licensed customs broker on behalf of its customers. In its decision, the SCC effectively rejected all of the CRA’s arguments, many of which were previously upheld by the FCA.

UPS provided its parcel delivery services both to persons outside Canada who requested that goods be picked up at a location outside Canada and delivered to an address in Canada (referred to as “shippers”) and to persons in Canada who received delivery of goods that were shipped from outside Canada to a location in Canada (referred to as “consignees”). In addition to providing delivery services, UPS acted as a licensed customs broker to facilitate the importation of its customers’ goods into Canada. In the course of acting as a customs broker,

¹ 2000 FCA 48.

² 2009 SCC 20.

UPS made overpayments of GST to the CBSA for various reasons including using the wrong value for duty, having shipments refused by the consignee, and paying GST on goods that were not subject to GST. The errors may have been the fault of UPS or its customer.

Generally, after discovering the error, UPS would credit the customer's account for the amount of the overpayment and deduct the same amount from its own GST liability on its monthly GST return. Accordingly, the customer was only charged for the correct amount of GST by UPS.

While the FCA had determined that UPS was not entitled to claim rebates to recover the amount of the GST overpayments under section 261 of the ETA because UPS "was not the person liable to pay the tax", the SCC concluded that there was no requirement under the ETA to inquire into the liability for payment of the tax. Accordingly, the SCC rejected the CRA's argument that UPS was not entitled to claim the rebate on the basis that it was not the person liable to pay the tax. The SCC stated the following:

"Actual liability is not relevant in this context since there is no liability to pay tax that was paid in error. If the Minister's argument were correct, a stranger who mistakenly paid GST on goods imported by someone else (perhaps because the names of two importers were similar) could not obtain a rebate. It cannot have been the intention of Parliament that persons who were not liable for GST but paid GST in error could not obtain a rebate."

In concluding that UPS was entitled to claim the rebate under section 261 of the ETA, the SCC noted that while the consignees may have had the liability to pay the GST, "it does not detract from the fact that in actuality it was UPS - and UPS alone - who paid and was out of pocket for the GST."

It is interesting to note how the SCC disposed of the Minister's overriding argument opposing UPS's entitlement to the rebate - namely that one of UPS's customers could fraudulently claim a rebate or an input tax credit knowing that UPS had already made a claim for the same rebate. The SCC noted that a person who fraudulently seeks a rebate of a GST overpayment or an input tax credit would be subject to criminal sanctions. The SCC concluded:

"With respect, I do not think it lies in the mouth of the Minister to raise such an argument on the facts of this case where he has agreed that there has been an overpayment and where his position is that he is entitled to retain overpaid GST. In any event, if this is a matter of concern to the Minister, he may ask Parliament to amend the *Excise Tax Act* to address it."

Looking at the facts through an equitable lens, one could reasonably agree with the SCC's conclusion that a person who clearly paid tax in error and was out of pocket for the overpayment should have the right to recover the tax - particularly if the person to whom the tax was paid would be unjustly enriched.

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China

Export Value-Added Tax (“VAT”) refund rates of light textile and electronic information products raised

On 27 March, 2009 the Ministry of Finance and State Administration of Taxation issued the *Circular on Raising the Export VAT Refund Rate of Goods Including Light Textile and Electronic Information Products* (“**Caishui [2009] No. 43**”). The purpose of this circular is to increase export VAT refund rates for some commodities.

According to *Caishui [2009] No. 43*, effective from 1 April 2009, the export VAT refund rates (“**EVR**”) of 225 products are raised, ranging from 5% to 17%. The products include various textiles, clothing, television parts, leather products, paper products, glass products, wood products, electronic products, steel products, plastic products, chemical products and others.

Please refer to <http://xzzf.mof.gov.cn/shuizhengsi/zhengwuxinxi/> for further details of the products which are covered by *Caishui [2009] No. 43*.

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State Administration of Taxation to strengthen the administration of export value - VAT refunds for certain electronic products

On 12 May, 2009 SAT issued the *Circular on Strengthening the Administration of Export VAT Refunds (Exemption) on Exports of CPUs and Other Electronic Products* (“**Guo Shui Han [2009] No. 245**”). According to *Guo Shui Han [2009] No. 245*, SAT will be strengthening its administration of export VAT refunds for certain electronic products. It applies to enterprises which are currently applying for export VAT refunds for these products or which have obtained export VAT refunds for these products since 2007.

Products with the following PRC Tariff Numbers are stipulated in *Guo Shui Han [2009] No. 245* as coming under this administrative focus:

8471300000	8471491000	8471492000	8471504000	8471604000
8471609000	8471701000	8471709000	8471800000	8473301000
8542310010	8542310090	8542320000	8542330000	8542390000
8542900000	8471419000	8471607100	8471607200	8471709000
8471900090	8473309000	8504409990	8517623500	8517623900
8517629900	8518220000	8523511000	8525801390	8531109000
8542310000	8544421900	8708299000		

In addition, certain electronic products which do not have PRC Tariff Numbers set out above may nevertheless be subject to *Guo Shui Han [2009] No. 245* if they have the following characteristics: (i) small volume; (ii) high value; (iii) high export VAT refund rate; (iv) high export quantity; and (v) unusual increase in exports.

Therefore, enterprises which are currently applying for or which have obtained export VAT refunds after 2007 for the products with the PRC Tariff Numbers or the characteristics set out above should expect greater administrative scrutiny, including closer review of their application documents and accounting records.

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State Administration of Taxation is investigating cases where export VAT refunds for Central Processing Unit (“CPU”) products were fraudulently obtained

On 18 March 2009, SAT issued the *Circular on Investigating and Punishing Offences Where Export VAT Refunds for CPU Products Were Fraudulently Obtained* (“**Guo Shui Han [2009] No. 130**”). *Guo Shui Han [2009] No. 130* requires local tax bureaus to investigate export VAT refunds for CPU products which were obtained by enterprises from 1 January 2006 to the present.

In particular, *Guo Shui Han [2009] No. 130* states that enterprises located in Beijing, Shanghai, Guangdong, Jiangsu, Zhejiang, Fujian, Xiamen, Ningbo, Dalian and Qingdao are the primary focus of the investigations.

In addition, the investigations will also focus on situations which have the following characteristics:

- The tax burden on the enterprise is low.
- The export destination is Hong Kong (in particular, exports by land transportation via Shenzhen).
- The income is usually high and inconsistent with the enterprise's business operation and scale of operations.
- The logistical flow of goods appears unreasonable.
- The working capital of the entity exporting these types of goods appears unusual.

In addition, these investigations will also be conducted on electronic products (e.g. hard disks) which are similar to CPU products and which have the following characteristics: (i) small volume; (ii) high value; and (iii) high export VAT refund rate.

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Germany

German Federal Court of Finance tightens invoicing criteria

If a supplier fails to sufficiently describe the service in his invoice, the German Tax Authorities are allowed to deny the input VAT refund claim of his business customer. By way of background, German VAT law generally grants the customer a refund of the input VAT charged by his service provider. However, the customer, needs an original invoice compliant with the German invoicing rules to be allowed to apply for the refund. The invoice must contain a trade typical description of the supplied service. The BFH has now confirmed the strict criteria applied by German Tax Authorities: In the case at hand the supplier invoiced for: "Technical Consulting and technical control in the year 1996". The BFH was of the opinion that this description fell short of the statutory requirements, which demanded the service description to give sufficient indication on the nature, place and time of the invoiced supply. It appears the BFH considered the above description as too generic to meet such criteria.

This judgment may serve as reminder for businesses not to lose sight of the notorious German formalism regarding proper VAT documentation and invoicing. The business customer would be well advised to refuse improper invoices before approving the VAT payment to his supplier.

One legally allowed way for the supplier to provide proper service descriptions is to make express reference in the invoice to other commercial documents that contain the required information (such as purchase orders or contracts describing the service levels in sufficient detail).

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Federal Office of Finance Decree on “IMEI-number” and Input VAT Refunds (Mobile phones)

The German Tax Authorities have commented on the VAT impact of the IMEI-numbers (International Mobile Equipment Identity Number) for mobile phones.

The IMEI number is not a necessary invoicing requirement so that the supplier may provide the required “trade-typical” description of the sold mobile phones without mentioning the IMEI-numbers. In consequence, even without IMEI-number the business customer may get the invoiced VAT refunded (under the usual conditions for input VAT deduction).

On the other hand, the customer is only entitled to the input VAT refund if there was an actual sale of the mobile phones. The Tax Authorities explain that they may assume that no actual sale took place if the customer has not recorded the IMEI-number in his books.

The Tax Authorities further explain that the lack of the IMEI-number may be taken as indication for an involvement of the customer in a VAT fraud (or for his gross negligent ignorance of that fact). This may lead to criminal investigations also against the customer.

For the above reasons the business customer should make sure to receive an invoice with the IMEI-numbers of the sold mobile phones so as to avoid losing the input VAT refund after a tax audit or even being investigated for involvement in a VAT fraud.

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Italy

Omitted application of the reverse charge on purchase invoices

The Italian Tax Administration, with Ministerial Resolution no. 56/E of 6 March, 2009, provided clarifications on the consequences regarding the violation of the VAT reverse charge system obligations, aligning its position with the European Court of Justice principles.

Indeed, in case of lack of application of the reverse charge system, the Tax Administration used to impose very severe penalties, requiring the payment of output VAT due on the invoice (implicitly denying the right of deduction of input VAT on purchases), plus the payment of penalties equal to 100% the above-mentioned VAT amount.

The above position of the Tax Administration seemed to be unreasonable for taxpayers, since the behaviour resulted in a mere formal violation with no damage for the revenue service, due to the fact that the reverse-charge system has the benefit of neutralise VAT on certain transactions.

The reverse charge mechanism states that, when a transaction is carried out by a foreign entrepreneur and VAT is due in Italy, in case the foreign supplier does not have a VAT number in Italy, the invoicing formalities must be complied with by the Italian resident purchaser through the issuance of a self invoice that includes the due VAT amount. Such invoice must be recorded both on the purchases and sales register, so that output VAT is offset against input VAT with neutral effect from a cash flow standpoint.

Irrespective of the fact that the violation implies only a mere formal negligence, the legislation in force provides that infringements regarding the violation of the reverse charge system are subject to a penalty ranging from 100% to 200% of the VAT not paid.

The above issues have been brought to the attention of Italian tax courts that issued conflicting decisions. Indeed, while in some cases the violation was subject to the severe penalties mentioned above (i.e., denial of deduction of VAT on purchases, plus full penalties), in other cases, the violation was considered subject only to a fixed penalty provided for formal infringements.

The Ministerial Resolution issued by the Tax Administration clarifies the position that will be held in the past during tax audits. In particular, the Tax Administration making reference to the decisions of the Court of Justice issued in similar cases (i.e., C95/07 and C96/07) indicated that the neutrality principle should be respected, especially in cases where the violation is merely formal.

However, although the right of VAT deduction should be in any event recognised (if the taxpayer is entitled to fully VAT deduction), even though a violation of the reverse charge principle is assessed, proportional penalties are in any event due in the range from 100% to 200%.

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VAT treatment related to the sale of Green and CO2 certificates

The Italian Tax Administration, with Ruling no. 71/E of 6 March, 2009, issued important instructions as to the VAT regime for the sale of Green and/or CO2 certificates.

In the past, there was uncertainty as to the qualification of the transaction concerning the sale of CO2 or Green certificates from a VAT perspective.

With the above-mentioned ruling, the Tax Administration qualified such transaction as a supply of a service and assimilated it to those services related to the “transfer or license of copyrights, industrial invention, know-how, trademark, etc.” (art. 3.2.2 of Presidential Decree n. 633/1972).

As a result, the VAT treatment should be in line with that applied to the above type of services with the consequence that the sale made by an Italian entity to a purchaser resident outside the EU will be subject to VAT in Italy only in case the relevant services is used and enjoyed in Italy.

With respect to the sale of CO2 certificates, the Tax Administration indicated that, a case by case analysis should be made in order to check whether the use and enjoyment rule would apply, with the consequence that, if CO2 certificates are sold to an entity resident out of EU, VAT will not apply if the same are used outside Italy.

With respect to Green certificates, instead, since based on the current Italian legislation they could be used only on the Italian territory, there is no doubt that the relevant sale should be subject to VAT in Italy even if the purchaser is located outside the EU.

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The Netherlands

Dutch government comes with additional anti-crisis measures

Previously we mentioned the anti-crisis measures introduced by the Dutch government with a view to support entrepreneurs combating the financial effects of the current economic crisis. This measure concerned the possibility for entrepreneurs to file VAT returns on a quarterly basis rather than on a monthly basis and thus realize a cash-flow and interest advantage for business. In addition to these measures the Dutch government has issued a decree with two additional anti-crisis measures effective as of immediately.

The first measure concerns the deferment of payment of taxes due by entrepreneurs that experience payment difficulties as a result of the financial crisis. The measure sets more lenient rules for the application for a payment deferral for entrepreneurs that are economically viable and are implemented in addition to the current rules for payment deferral. In order to apply for a deferment, a qualified third party like an external consultant, accountant or an industry organisation has to provide a statement on the nature of the financial difficulties of the entrepreneur. The third party has to argue convincingly that the financial difficulties of the entrepreneur (i) are real, (ii) are caused directly by the financial crisis, (iii) are temporary and (iv) will be solved before a specified moment in the future.

The second measure concerns the possibility for the Dutch Tax Administration to postpone the actual date of execution of seized assets of entrepreneurs. The Dutch Tax Authorities will only agree with such postponement in the event the entrepreneur is economically viable and has a favourable outlook on the fulfilment of the overdue payment. As part of this special measure, the Tax Authorities can decide to disregard the maximum period of four months and give the entrepreneur a specified term in which the overdue payments should be fulfilled.

These special anti-crisis measures are temporary and will be withdrawn as soon as the economic situation allows this.

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Singapore

MAS Issues Circulars on GST Remission for Prescribed Funds and Changes to the Fund Management Tax Incentive Schemes

Goods and Services Tax Remission on Prescribed Expenses for Prescribed Funds Managed by Prescribed Fund Managers in Singapore

In the 2009 Budget Statement, the Minister for Finance introduced a new Goods and Services (“GST”) remission for prescribed funds managed by prescribed fund managers in Singapore. On 3 April, 2009 the Monetary Authority of Singapore (“MAS”) issued a circular, which provided details of the GST remission.

More details of the MAS circular are set out in our standard memorandum “Singapore Fund Incentives”, updated as at May 2009.

Changes to the Fund Management Tax Incentive Schemes:

(I) Introduction of an Enhanced-Tier Fund Tax Incentive Scheme

- (II) Expansion of the ‘Designated Investments’ and ‘Specified Income’ Lists
- (III) Extension/Introduction of a Sunset Clause to the Existing Fund Vehicle Tax Exemption

In the 2009 Budget Statement, the Minister for Finance introduced a new Enhanced-Tier Fund Tax Incentive Scheme, and made several changes to existing fund management tax incentive schemes. On 30 April 2009, the MAS issued a circular, which provided details of the changes.

More details of the MAS circular are set out in our standard memorandum “Singapore Fund Incentives”, updated as at May 2009.

If you wish to obtain a copy of our “Singapore Fund Incentives” memorandum, please contact us.

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Spain

New criteria of the Spanish General Directorate of Taxes: Branch vs. PE for VAT purposes

The Spanish General Directorate of Taxes has recently issued a new doctrine regarding the consideration of a branch in Spain of a foreign entity as a permanent establishment (“PE”) for the purposes of Spanish VAT (Rulings V2508-08 and V0374-09, of 29 December, 2008 and 23 February, 2009 respectively).

In both cases, there is a British entity that must set up a branch in Spain merely for the purpose of obtaining the corresponding administrative authorisation to carry out its activity of distribution and sale and purchase energy in such country, but without arising to such branch any human or material resource.

The Spanish General Directorate of Taxes, following the provisions of the European Court of Justice (“ECJ”) in Berkholz and DFDS cases (C168/84 and C 260/95), states that, as long as the British entity has a branch at the mere purpose of performing its activity of distribution and sale of energy (to obtain the corresponding authorisation) and has not other assets, nor human, technical or material resources to perform its activity in Spain, the referred branch should not fall under the consideration of permanent establishment for Spanish VAT purposes.

Therefore, the General Directorate of Taxes concludes that such foreign entity is not considered established in Spain, despite of the fact of having a branch in Spain.

In this regard, it must be noted that the Spanish VAT Law states an open list of those cases that can be considered as a permanent establishment, including among them the branches of foreign entities. According to the above, it seems that the Spanish General Tax Directorate has opted for moving away from the

literal wording of the Law concerning permanent establishment in order to follow the ECJ definition of PE and then requiring now a minimal degree of consistency through the reunion of human and technical resources.

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The Spanish Supreme Court starts to soften the VAT formal requirements in order to allow VAT deduction (Holding of 26 November, 2008)

The Spanish Supreme Court has recently issued a sentence by which, for the first time and continuing with the criteria set by some lower Courts, rules the deductibility of VAT can not be denied because of lack of minor formal requirements in the corresponding invoice (in this case, the VAT number of the recipient was not included in the invoice), when it is possible to evidence the data and conditions of the recipient by other means of proof.

This is a very relevant precedent taken into consideration the extraordinary formalistic criterion traditionally applied by the Tax Authorities, based on a strict and literal interpretation of the Spanish VAT Law.

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Draft change on Spanish VAT rate for rent with option to buy dwelling

The Economy and Tax Commission of the Spanish Parliament has approved the modification of the VAT rate applicable to certain specific activities. Such change still has to be legally implemented. At this stage, the change has been included in the draft of the Spanish REIT's regulations.

The draft establishes that the applicable rate for *renting with option to buy dwelling* will be 7%, instead of the current 16%. Likewise the applicable rate for *renting with option to buy officially protected dwelling* will be 4%, instead of the current 7%.

This measure is intended to promote an alternative to real estate investment (currently falling down) in order to reduce the increasing stock of real estate properties on sale in Spain.

The REITs draft regulations have also included the dwelling restoration as one of the REITs potential business purposes. This measure is also intended to reactivate the real estate sector in Spain.

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Sweden

Insurance premiums - ancillary to car rental

The county administrative court in Stockholm has, in a ruling dated 2 April 2009 (case No 23292-08 23294-23298-08), decided that damage waivers (insurance premiums) supplied in connection with car rental are considered as ancillary services to the car rental service and the supply as whole is VAT liable.

When renting a car the customer can choose to include insurance (damage waivers). According to the court the insurance service is not supplied separately (even though there are other external service providers from which these services can be acquired). With reference made to e.g. the European Court of Justice ruling in Card Protection Plan (C-349/96) the Court argues that the insurance service must be regarded as ancillary to the principal service since it does not constitute for customers an aim in itself, but only means of better enjoying the principal service supplied, i. e. the car rental.

The insurance premium must, according to the court, thus be ancillary to principal supply that is VAT liable.

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Right to VAT deductions - Acquisitions of companies with net operating losses

The Administrative Supreme Court has on 20 May 2009 (case 7960-08) confirmed the ruling from the Council for Advance Tax Rulings (*Sw: Skatterättsnämnden*) that VAT on costs of the services acquired (legal fees, due diligence etc.) related to the acquisition a company with net operating losses, "NOL's" are deductible. The purpose of the acquisition was for the Applicant to utilise the tax losses carried forward in the acquired company to set off against profits in the Applicant. Thereby the tax burden of the Applicant would be mitigated.

The Tax Agency appealed the ruling (Dnr 56-07/I) from the Council for Advance Tax Rulings dated 4 November 2008 according to which VAT on costs related to the acquisition of companies with NOL's were deductible. According to the Tax Agency Applicants acquisition was not done with the purpose of expanding its business or to supply taxable services and no right to VAT deductions should thus be at hand.

The Administrative Supreme Court however shared the position taken by the Council for Advance Tax Rulings. The acquisition of the company with NOL's was carried out in order to increase its capital (reduce tax burden) for the benefit of its economic activity in general, why it must be considered that the costs of the services acquired by the Applicant in connection with the acquisition form part of its overheads and are therefore, as such, component parts of the price of its products. Those supplies have a direct and immediate link with the whole economic activity of the taxable person should thus entail a right to VAT deductions.

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Switzerland

The parliament revised the Swiss VAT Law - Expected change for 2010

On 12 July, 2009 the Swiss parliament finalised the revision of the VAT Law.

The changes concern more than 50 items which primarily intend to facilitate certain formalities for taxpayers and reduce the number of exceptions (even if that will not always be the case in practice). A second revision will be discussed at a later stage by the parliament (covering the single rate and the elimination of most of the exceptions concerning exempt supplies).

The changes that are expected for 2010 are, among others, the following:

Change of the rules defining the place of supply of services - the general rule becomes the rule of taxation at the place of the recipient of the service. Exceptions: services for which the supplier and the recipient are generally present in person (taxable at the place of the supplier); travel agencies (taxable at the place of the supplier); cultural, artistic, entertainment, sports, science, teaching and similar services, as well as restaurants (place where the activity is carried out); passenger transportation (where the transport is realised); services connected to real estate (where the real estate is located); international cooperation (where the service should be used).

Non-Swiss computer and e-commerce companies - New duty to register in Switzerland if the Swiss turnover is higher than CHF 100'000 per year (for private clients) - this duty only existed for telecommunication companies in the past. It will be very burdensome for the non-Swiss suppliers as the registration requires the appointment of a Swiss fiscal representative and the deposit of a bank guarantee.

New turnover thresholds for becoming a taxpayer - ordinary (CHF 100'000) and special threshold for certain organisations, associations and foundations (CHF 150'000).

The parliament has clarified the definition of the operations which do not represent a supply - and which do not have any impact on the input tax deduction. Within this context, it has newly decided that the receipt of gifts shall not anymore imply any correction of the input tax deduction. This will have an interesting impact on certain contributions within groups of companies which were sometimes assimilated to gifts in the past.

The parliament has also set a new definition of a “related party” - which has an impact on the taxable base for certain transactions. A “related party” is a person or company who owns a participation of at least 10% of the capital or having a value of CHF 1 million.

Slight extension of the concept of intermediary (if it results from the circumstances that an agent acts in the name and on behalf of a third party) - this issue has already led to numerous court cases and we should follow how this provision will be interpreted by the Tax Authorities.

Extension of the possibility to elect for a taxation of an exempt supply, for each transaction, except in financial, gambling and insurance matters (no option for these types of supplies). There is also no possible election for private use of real estate.

The taxation according to the “margin method” is replaced by a deemed deduction of the input tax - this applies mainly to used goods, for instance cars which are sold by a non-taxpayer to a taxpayer.

The special rate for **hotels** is maintained until the end of 2013 (3.6%).

Certain formalities for obtaining the input tax deduction have been simplified - this applies, among others, to start-ups, formal requirements in matter of invoices, means of proof which are not anymore limited to documents, etc.

The concept of self-supply related to a construction work realised by the taxpayer for himself has been abolished.

The criminal provisions related to the VAT have been completely revised - the parliament tried to disregard certain cases of light negligence, but reinforced at the same time the measures for the more serious offenses.

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United Kingdom

Extension of anti VAT fraud reverse charge

With effect from 1 June, 2007 the reverse charge on supplies of mobile phones and integrated circuit devices was implemented with the view to eliminating the risk of VAT fraudsters using these goods to carry out missing trader intra-community carousel fraud.

The UK has a derogation from EC law to apply this anti-fraud measure, which expired on 30 April, 2009. In its 2008 Pre-Budget Report, the Government announced it had applied for the derogation to be renewed.

HMRC recently announced that the EC Economic and Financial Affairs Committee has extended the derogation until April 2011, and that this decision has now been formally ratified.

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Rank Group PLC - Bingo and slot machine claims

This decision will be of interest to businesses operating in the gaming sector.

This case concerns the VAT treatment of mechanised cash bingo and slot machines. Under UK law, some gaming and bingo machines are exempt from VAT, whilst similar machines are subject to VAT.

The High Court followed the UK Tribunal's recent decision that it is unlawful to apply VAT to particular machines and not to other comparable machines. This is based on the principle of fiscal neutrality, derived from EC law, which requires that supplies that are the same or similar, which service the same purpose, should be treated equally for VAT purposes.

The High Court held that the inconsistent application of VAT to interval bingo and gaming machines breached the principle of fiscal neutrality, and caused a distortion of competition.

We understand that HMRC had until 29 June, 2009 to appeal this decision to the Court of Appeal.

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Draft EC sales list legislation

HMRC recently published draft legislation relating to the introduction of the EC sales list requirement for cross-border services. The legislation will enter into force on 1 January, 2010. This requirement will affect all businesses, which supply cross-border services.

In particular, the draft legislation confirms that:

- (a) The filing deadlines for EC sales lists for services and goods, will be 14 days after period end for paper returns, and 21 days for electronic declarations (with the exception of declarations of supplies of new means of transport, which should be filed within 14 days from the end of the quarter in which the supply takes place);
- (b) Where a businesses' quarterly value of supplies exceeds £70,000 (excluding VAT), it will be required to file monthly ESL declarations if it makes intra-community supplies of goods (the £70,000 threshold will be reduced to £35,000 as of 1 January, 2012); and
- (c) Services which are subject to a discretionary reverse charge should not be declared.

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International Trade Compliance Update

The Global Customs Update has been changed to the International Trade Compliance Update. This change has been made to reflect expanded coverage of export controls, sanctions, Customs and other import requirements, trade remedies and WTO matters. In addition we intend to include coverage of anti-corruption matters that affect international trade.

To view the International Trade Compliance Update please click [here](#).

We hope you enjoy this publication and if you have any queries regarding the International Trade Compliance Update please contact:

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