# Global Indirect Tax News

Your reference for indirect tax and global trade matters

Welcome to the February 2017 edition of GITN, covering updates from the Americas, Asia Pacific and EMEA regions.

Features of this edition include cases from France and the UK regarding the VAT treatment of 'points based' loyalty schemes, a report from Russia on foreign companies registering to pay VAT on e-services, and some details on VAT registration and compliance in the UAE.

If you have any queries or comments about the GITN, I would be delighted to hear from you.

**David Raistrick**
Deloitte Global Leader – Indirect Tax

In this edition of GITN:



**Back to top**

# Country summaries

## Americas

| | | |
|---|---|---|
| **Costa Rica** | The Free Trade Zone Regime Bylaw has been amended.<br><br>There is an update on excise duties applied to beverages with alcoholic content, and fuel and gas. | **Read More** |

## Asia Pacific

| | | |
|---|---|---|
| **China** | In early January 2017, the General Administration of Customs announced special supporting measures for the import of certain products originating from New Zealand and Australia into China. | **Read More** |
| **India** | Budget 2017 was presented on 1 February.<br><br>Units in SEZs are now allowed to provide legal and accountancy services.<br><br>The Central Board of Excise and Customs has prescribed the procedure for online registration and payment in respect of OIDAR providers located in non-taxable territories.<br><br>Service tax has been extended in respect of ocean freight on the import of goods.<br><br>Hotel aggregators have been excluded from the definition of 'aggregators'. | **Read More** |
| **Malaysia** | The Designated Area and input tax credit guides have been updated.<br><br>There is discussion on the impact of transfer pricing adjustments on the valuation of goods for import declaration purposes.<br><br>There has been a decrease in the import duty charged on goods imported on/with or in personal baggage. | **Read More** |

| | | |
|---|---|---|
| **New Zealand** | A number of GST amendments will soon come into force, including the following:<br>• More businesses will be able to claim GST on capital raising costs.<br>• More services relating to New Zealand land will be subject to GST at 15%.<br>• Nonresident businesses will have a greater opportunity to 'GST-only' register in New Zealand and claim input GST.<br>• Large, partially exempt businesses will be allowed to obtain approval from the tax authorities for their method of apportionment. | **Read More** |

**EMEA**

| | | |
|---|---|---|
| **European Union** | Customs authorities are increasingly focussing on export controls. | **Read More** |
| **Denmark** | There has been a CJEU judgment on the application of the VAT secondhand goods scheme for parts removed from 'end of life' cars. | **Read More** |
| **Finland** | A court has ruled on the VAT treatment of acquiring services provided to a bank. | **Read More** |
| **France** | There has been a reference to the CJEU regarding the application of the C3S.<br><br>A recent court decision held that there was no deductibility for VAT invoiced by participating companies to loyalty program managers.<br><br>A recent court decision held that ski rental associated with insurance and transport services was a complex supply for VAT purposes. | **Read More** |

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|---|---|---|
| **Germany** | The Federal Court has ruled on the VAT treatment of supplies via call off stock; supplies via call off stock can be zero rated intra-Community supplies if certain conditions are fulfilled. | **Read More** |
| **Hungary** | The CJEU has ordered that input tax should be restricted for a holding company. | **Read More** |
| **Ireland** | There has been a CJEU judgment on the application of VAT to road tolls. | **Read More** |
| **Italy** | Following the approval of the Commission for Constitutional Affairs, the legislative decree of DL *Milleproroghe* (the annual decree extending the life of various government measures) has passed under the examination of the Parliament. The proposed amendments, including VAT amendments, are planned to be definitively approved by the end of February.<br><br>A number of government agencies have issued a press release regarding the declaration of intra-Community acquisitions for January 2017.<br><br>The tax authorities have provided the first guidelines regarding the technical requirements to satisfy for the periodical e-submission of invoices issued/received.<br><br>The first clarifications have been issued regarding the amended VAT warehouse regime.<br><br>A number of acts were issued by the Customs and Monopoly Agency in January and February 2017 in light of the Union Customs Code. | **Read More** |
| **Russia** | The first statistical data regarding foreign providers of e-services registered with the tax authorities is available. | **Read More** |

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| | The Federal Tax Service has clarified the procedure of VAT application for the transfer of rights to use the additional functions of a computer online game.<br><br>The Federal Tax Service has clarified the application of VAT upon acquisition from a foreign entity of rights to use a database through the Internet.<br><br>The Ministry of Finance has clarified the application of VAT with respect to the issuance by a Russian entity of a guarantee in favor of a foreign entity.<br><br>The Federal Tax Service has summarized court practice on tax issues for the second half of 2016.<br><br>The Federal Customs Service has summarized practice on disputes considered by the Service in 2016.<br><br>There have been changes in the administrative responsibility for non-submission, late submission or submission of incorrect statistical forms for movement of goods within the EEU. | |
| **South Africa** | An environmental levy on tyres has come into effect.<br><br>The customs duty rate on certain sugar has been reduced to free of duty.<br><br>There has been a protest regarding the perceived dumping of chicken originating from the EU. | **Read More** |
| **UAE** | The Ministry of Finance recently published details on its website of VAT registration and compliance requirements. | **Read More** |
| **United Kingdom** | There has been a court judgment on the VAT treatment of vouchers given away with newspapers.<br><br>There has been a court judgment on the VAT treatment of ‘points based’ reward schemes. | **Read More** |

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| | There has been a court judgment on the VAT treatment of student recruitment services supplied to universities.<br><br>The results of a Deloitte UK survey on the likely indirect tax consequences of Brexit are available. | |
| **Eurasian Economic Union** | Zero import customs duty has been introduced for certain goods.<br><br>New requirements have entered into force for the marking of explosives. | **Read More** |

**Back to top**

# Americas

## Costa Rica

### Reform to Free Trade Zone Regime Bylaw

Through Executive Decree N° 40141 COMEX-H, published in the Official Gazette N° 18 on 25 January 2017, the President of the Republic, the Foreign Trade Minister and the Treasury Department Minister decreed reforms to articles 4, 6, 10-12, 14, 25, 26, 29, 31, 35, 38, 39, 41, 45, 50-53bis, 62, 67, 68, 76 of the Free Trade Zone Regime Bylaw (Executive Decree N° 34739-COMEX-H from 29 August 2008). Furthermore, articles 67bis, 76bis, and 122bis were included in the mentioned Bylaw.

The main reforms are as follows:

- Procedures simplification.
- Exclusion of the National Added Value (NPV) of Free Trade Zone Regime requirements.
- New compliance deadlines.
- New Regulations for Free Trade Zone Park administrations.
- Provision of other services such as childcare, parking lots, among others.

The reform entered into force on 25 January 2017.

### Update of excise duties applied to beverages with alcoholic content

Through resolution N° RES-DGH-002-2017, published in the Official Gazette No. 20 on 27 January 2017, the Treasury Department advised the latest update of excise taxes, applied to beverages with alcoholic content.

This update is undertaken on a quarterly basis, according to the consumer price index, and entered into force from 1 February 2017, with the below changes:

| % of alcoholic content | Excise tax (CRC per alcohol unit) |
|---|---|
| Up to 15% | ¢3.21 |
| Above 15% up to 30% | ¢3.84 |
| Above 30% | ¢4.47 |

**Update of excise duty applied to fuel and gas**

Through Decree N° 40171-H, published in the Official Gazette No. 21 on 30 January 2017. The Treasury Department advised the latest update of excise duties applied to fuel and gas, which entered into force on 1 February 2017.

Imports and sales are impacted according to the type of fuel. The changes are detailed below:

| Fuel type | (CRC per liter ) |
|---|---|
| Regular gasoline | ¢235.50 |
| Super unleaded petrol | ¢246.25 |
| Diesel | ¢139.00 |
| Asphalt | ¢47.75 |
| Bitumen emulsion | ¢35.50 |
| Bunker | ¢22.75 |
| LPG | ¢47.75 |
| Jet Fuel A1 | ¢141.00 |
| Av Gas | ¢235.50 |
| Kerosene | ¢67.25 |
| Heavy diesel | ¢45.70 |
| Heavy Nafta | ¢33.75 |
| Light Nafta | ¢33.75 |

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**Back to top**

# Asia Pacific

## China

### China-New Zealand and China-Australia FTA update

***China-New Zealand FTA***

In early January 2017, the General Administration of Customs (GAC) issued four announcements (Announcement of GAC [2017] No. 1, 2, 4, and 5) to implement special supporting measures for the import of selected agricultural products originating from New Zealand into China. Due to the fact that the import amount of certain products has exceeded the triggering standards of the special supporting measures under the China-New Zealand Free Trade Agreement (FTA) in 2017, the import duties will be levied at the MFN rate – 12 HS codes of agricultural products are affected and summarized as follows:

| Product description | HS Code | Triggering standard (ton) | Conventional duty rates | MFN | MFN effective date |
|---|---|---|---|---|---|
| **Cheeses** | 04061000<br>04063000<br>04069000 | 5,585 | 0 | 12% | 5 January 2017 |
| **Parts of non-condensed milk and cream** | 04012000<br>04014000<br>04015000 | 2,017 | 0 | 15% | 5 January 2017 |
| **Butters and other fat and oil** | 04051000<br>04059000 | 14,582 | 0 | 10% | 11 January 2017 |
| **Solid and non-solid but condensed milk and cream** | 04021000<br>04022100<br>04022900<br>04029100 | 147,376 | 1.7% | 10% | 12 January 2017 |

***China-Australia FTA***

On 6 January 2017, GAC issued Announcement of GAC [2017] No. 3 to implement special supporting measures for the import of selected products originating from Australia into China in 2017. The announcement set the threshold amount of two main agricultural products (beef and milk powder, covering 8 HS codes) meaning that, when the import amount of the selected products has exceeded the threshold, the import duties of these products will be levied at the MFN rate in 2017. Please see the below summary for details:

| Product description | HS Code | Triggering standard (ton) | Conventional duty rates | MFN |
|---|---|---|---|---|
| **Beef** | 02011000 | 170,000 | 14% | 20% |
| | 02012000 | | 8.4% | 12% |
| | 02013000 | | 8.4% | 12% |
| | 02021000 | | 17.5% | 25% |
| | 02022000 | | 8.4% | 12% |
| | 02023000 | | 8.4% | 12% |
| **Milk powder** | 04022100 | 19,294 | 7.5% | 10% |
| | 04022900 | | 7.5% | 10% |

### Comment

New Zealand and Australia are the two large exporters of agricultural products for China. Given the day-to-day nature of the products covered in these GAC announcements, the import volume is expected to remain high. Potentially affected companies are recommended to take the following steps:

- Companies that import agricultural products from New Zealand and Australia should review whether any of the above products are involved, and assess the potential impact on their supply chain cost.

- Additionally, companies in affected industries should closely monitor developments and take steps to prepare for potential financial impacts and the need to make changes to pricing/tax-related contractual arrangements.

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## India

### Highlights of Budget 2017 presented on 1 February 2017

- The Government has re-affirmed the commitment to introduce GST; IT preparedness is on track for GST implementation; efforts to sensitize trade and industry are to commence from 1 April 2017.

- There were indirect tax proposals aimed at correcting anomalies, rectifying inverted duty structure, incentivizing make in India, easing doing business, and promoting renewable energy and digitization.

- There was no change in the headline rate for service tax and the standard ad-valorem rate for excise and customs duty was maintained.

## Units in SEZ allowed to provide legal and accountancy services

In order to attract investments in Special Economic Zones (SEZs) and create more employment opportunities, the Ministry of Commerce and Industry, Government of India has amended the rules governing such SEZs, thereby including legal and accounting services in the scope of services for export.

The amendment will enable Indian and foreign professionals, including the International Financial Service Centre (IFSC), in the legal and/or accounting sector to set up units in SEZs and provide services for export, i.e. providing services out of India, or supplying services from one unit of an SEZ to another unit or developer in the same or different SEZ. Such professionals will be entitled to all the fiscal benefits that are available to notified units in SEZ.

## Procedure for online registration and payment in respect of OIDAR providers located in non-taxable territory

As per earlier amendments, the liability to discharge service tax had been cast on service providers located outside India and providing Online Information Database Access or Retrieval (OIDAR) services to certain categories of recipients of such services in India, thereby requiring the foreign service provider to obtain registration under service tax.

The Central Board of Excise and Customs has prescribed the procedure for registration and payment of the tax liability by such taxpayers located in non-taxable territory. Such taxpayers are required to file an application in Form ST-1A whereupon Form ST-2A (Registration Certificate) will be generated automatically. With regard to payment process, service tax providers can discharge service tax liability either through SWIFT transfer to a designated account with HDFC Bank or through internet banking. The taxpayer must have an internet banking account with one of seven prescribed banks, i.e., BNP Paribas, Citibank, DBS, Deutsche Bank, HSBC, Standard Chartered, and Bank of America. The payment will be routed through a replica of the EASIEST e-payment portal. Using the EASIEST web portal, the taxpayer can view/download challan evidencing payment of service taxes.

Separately, the authorities also extended the due date for payment of service tax liability for the month of December 2016 and January 2016 until 6 March 2017, following which, interest and penalties would be levied on the taxpayer.

## Taxation on ocean freight on import of goods

As per the recent service tax amendment made by the Government, see the notification effective from 22 January 2017, service tax has been extended to the services provided in respect of the transportation of goods by a vessel from a place outside India to the customs station of clearance in India, which is provided by any person located in a non-taxable territory to a person located in a non-taxable territory.

The notification further notifies that the service tax must be discharged by the person in charge of the vessel or the agent appointed by such person in charge under the reverse charge mechanism.

The purpose of this notification is to bring Indian and foreign shipping lines into par.

**Government excludes hotel aggregators from definition of aggregators**

The Government has amended the definition of ‘aggregators’ to exclude the person who enables a potential customer to connect with persons providing services by way of renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes, subject to certain conditions.

The conditions on the basis of which the booking companies would be excluded from the definition of aggregator are as follows:

- The person providing the services has service tax registration;

- The consideration for services provided by such a service provider is received directly by the provider and no amount that forms part of the consideration for such services is received by the aggregator directly from the recipient of the service or their representative.

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## Malaysia

**Designated Area guide**

The Royal Malaysian Customs Department (RMCD) has updated the guide on Designated Area (DA), largely to reflect the changes arising from the Finance Act 2017 and other relevant GST orders, which was revised on 1 January 2017. Highlighted below are some of the major changes.

Paragraph 10 was updated to reflect the change in concept of goods being ‘supplied’ versus ‘removed’ from the DA. The goods removed from a DA to another DA through the Principal Customs Area (PCA) are treated as an importation into Malaysia and subject to GST. However, suspension of GST would be given for such movement of goods, similar to goods removed from a DA to a free zone and warehouses under the Warehousing Scheme through the PCA. FAQ 13 was also added to illustrate this.

Paragraph 20 was updated to clarify that the service provided by a service provider in a DA to Malaysia or a service provider from Malaysia to a DA is regarded as a local supply and subject to tax under section 156(b) of the GST Act.

New paragraphs 23 to 25 were added to clarify the entitlement to an input tax credit for taxable supplies made within or between DAs. Notably any input tax incurred in relation to taxable supplies is claimable, including taxable supplies not subject to GST. However, input tax incurred in relation to exempt supplies and mixed supplies is subject to exclusion or apportionment.

Lastly, the RMCD removed FAQ 18, which was dealing with the issue of imported services that were not GST-chargeable.

***Comment***

The GST treatment for movement of goods between DA and PCA, free zones and certain warehouses may have changed fundamentally; however, suspension of GST at different points may give rise to the same current GST effect. Nonetheless, businesses should review any such transactions and determine the appropriate GST treatment for reporting purposes.

Another welcome clarification is on the ability to claim input tax credits on taxable supplies made within and between DAs. Although no GST is charged on such supplies within and between DAs, they are still considered as taxable supplies and input tax credits should rightfully be allowed.

**Input tax credit guide**

The RMCD has updated the input tax credit guide, which was revised on 4 January 2017.

An amendment to paragraph 14(j) was made that has finally shed light on the interpretation of an investment holding company (IHC), when considering certain exempt financial supplies to be incidental or otherwise. This has a critical impact on the claim ability of the related input tax credits and also if a business is considered as a mixed supplier. It is stated that an IHC refers to a company whose principal activity is in the making of investments, such as properties, shares of other companies, and holds assets in an investment portfolio such as securities for the purpose of maximizing income and capital appreciation. Exempt financial supplies made by a qualifying IHC are not treated as incidental and input tax must be apportioned.

Paragraph 26(c) and example 46 were removed, confirming that deemed input tax is not claimable for insurance or takaful cash payments made pursuant to an insurance policy or takaful contract in relation to medical or personal accident insurance policy provided to the insured registered person, and the registered person is disallowed to claim any input tax (blocked input tax, e.g. medical expenses). This is consistent with the amendment to the law.

Also, new paragraphs 57 to 59 were added to provide further clarification on claiming input tax on goods purchased before GST registration. A registered person must obtain approval from the Director General (DG) before a claim for input tax can be made under Regulation 46 of the GST Regulations 2014 on goods acquired before registration. Furthermore, in the case of capital goods, they must have been capitalized according to the standard accounting principle in Malaysia before the date the person is registered in order to be eligible to claim the input tax. Any GST incurred on services related to capital goods is not claimable under Regulation 46 of the GST Regulations 2014 unless it can be capitalized according to the standard accounting principle in Malaysia before the date the business is required to be registered for GST.

***Comment***

With the clearer definition of IHC in the guide, businesses can better assess the principal activity of their company to determine whether it falls within the meaning of IHC as per the RMCD's interpretation. Subject to the *de minimis* rule, input tax incurred on making exempt financial supplies may be disallowed from claiming credits, and a mixed supplier may be required to carry out partial exemption calculations in relation to the residual input tax incurred. This, whilst not overly complex, remains an area prone to errors and unnecessary difficulty for businesses that are not principally making exempt supplies but are included in this provision.

The removal of paragraph 26(c) and example 46 are aligned with Regulation 6(c) of the GST (Amendment) Regulations 2016, where insurance or takaful cash payment relating to the supply of medical or personal accident insurance or takaful for which input tax is disallowed under Regulation 36 of the GST Regulations 2014, would not be entitled to deemed input tax. From 1 January 2017, insurance companies should take note of this, as there is less input tax that could be recovered in this area.

The claiming of GST on pre-registration costs continues to be a difficult area. The confirmation that it would be possible to recover the GST on service costs that are capitalized is a positive outcome. However, the denial of input tax on pre-registration capital costs unless the items are capitalized pre-registration is problematic and is arguably not supported by the law.

For further information on key amendments to GST orders and implementation from 1 January 2017, see GST Special Alert 1/2017.

**Impact of transfer pricing adjustments on valuation of goods for import declaration purposes**

Companies may adjust the value of goods for cross-border transactions for transfer pricing (TP) reasons. The adjustment may be upward or downward and may impact the value of goods (for customs duties and GST/VAT purposes) that was initially declared by the importing company.

It is a common practice in some countries to obtain an upfront approval/ruling from the customs authorities for the valuation of imports that may potentially be impacted by TP adjustments. Nevertheless, TP seems to be the least explored area from a customs perspective at this stage in Malaysia.

It may only be a matter of time before the RMCD formally adopts the approach taken abroad and requests an upfront approval or ruling. Given that generally customs import values should be based on transaction values between related companies that are not influenced by their relationship, it would be important for companies to prepare to consider these aspects for import valuation purposes.

This is especially so when there is a rising trend of post-import valuation audits conducted by the RMCD, even on import duty-exempted items, as GST is now imposed on most imported goods. Whether any additional GST or customs duties would need to be paid as a result of such adjustments also remains a matter of concern.

**Duty rate lowered for goods imported in personal baggage**

From 1 January 2017, the flat rate of import duty imposed on dutiable goods imported on/with or in the baggage of a person entering Malaysia for non-commercial use has been reduced from 30% to 10% with the amendment of the Customs Duties Order 2012. This applies regardless of preferential rates granted under the ASEAN Trade in Goods Agreement (ATIGA).

This excludes the import of motor vehicles, alcoholic beverages, spirits, tobacco and cigarettes.

The Customs Duties Order 2012 will be replaced by the Customs Duties Order 2017 with effect from 1 April 2017.

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## New Zealand

### GST amendments

The latest amendments to the Goods and Services Tax Act (GSTA) will soon come into force. The majority of these changes will apply from either 1 April 2017, or on the date of enactment of the amending legislation.

The main changes are as follows:

1. More businesses will be able to claim GST on capital raising costs.

2. More services relating to New Zealand land will be subject to GST at 15%.

3. Nonresident businesses will have a greater opportunity to 'GST-only' register in New Zealand and claim input GST.

4. Large, partially exempt businesses will be allowed to obtain approval from the tax authorities for their method of apportionment.

5. Secondhand goods GST deduction will be available for some goods made from platinum, gold or silver.

6. Owners of boats and aircraft exported by own power will benefit from zero-rating of goods and services used for repairing, renovating, modifying or treating of their craft.

***1. Claiming GST on capital raising costs***

Probably the most welcomed change is that businesses will be allowed to claim an input tax credit for GST on costs that relate to capital raising, to the extent the capital raising is for making their taxable supplies. This change should come into effect on 1 April 2017.

### *2. No zero-rating for certain supplies relating to New Zealand land*

The scope of services that can be zero-rated when provided to nonresident customers will be narrowed by requiring that tax at 15% is charged to services that are **in connection** with New Zealand land or improvement on this land, where those services **are intended to enable or assist a change in the physical condition, ownership or legal status of the land or improvement**.

The current test requires that tax at 15% is charged on services provided **directly in connection with** land.

The new rule will impact overseas owners of New Zealand real property, as many more New Zealand providers will be charging GST at 15%, such as real estate agents and lawyers.

The precise scope of services that will be captured by this change is not yet fully clear and a Tax Information Bulletin is expected to be published by the tax authorities before the law comes into effect.

This change should come into effect on 1 April 2017.

### *3. 'GST-only' registration in New Zealand and claiming input GST*

Overseas businesses should have a greater opportunity to register under a nonresident GST registration and claim New Zealand GST due to the change in the respective GSTA provision.

This change could have a significant impact on how New Zealand GST claims are administered, reduce nonresident 'standard' GST registrations and related administrative and compliance costs, and improve GST neutrality for cross-border business by allowing more New Zealand GST to be refunded.

If this amendment comes into force with a retrospective effect, on 1 April 2014 (which is the currently proposed date), businesses would be able to consider a retrospective registration and related GST claims.

### *4. Approval of large partially exempt businesses' method of apportionment*

Large (with a turnover over NZD 24 million), partially exempt businesses will be able to agree with the Commissioner of Inland Revenue an alternative method of apportioning and making adjustments to their input GST deductions. The agreed method must be fair and reasonable. This was previously available only to financial services providers.

This change should come into effect on the date of the enactment of the legislation.

***5. Secondhand goods GST deduction for some goods made from platinum, gold or silver***

Taxpayers will be able to deduct GST on secondhand goods composed fully or partially of gold, silver and platinum, which are of a kind manufactured for sale to the public.

This amendment should come into force on the day of enactment with a retrospective application (four year), providing an opportunity for claiming GST, where applicable.

***6. Zero-rating of goods and services used for work on boats and aircraft exported by own power***

GST zero-rating will be extended to goods and services used for boats and aircrafts exported from New Zealand under their own power.

Previously, these goods and services were taxed at the standard rate of 15%.

This change should come into effect on the date of the enactment of the legislation.

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**Back to top**

# EMEA

## European Union

### Customs authorities increasingly focus on export controls

The customs authorities are responsible for enforcing certain measures at EU borders on behalf of other competent authorities. When declaring goods for export, a consolidation table will determine if the declared goods could be considered as dual use goods. If so, the exporter or declarant will have to state that the goods are not subject to dual use control measures, or provide an export authorisation.

Recent cases have shown that customs authorities go further, by taking into account export control measures during their audits and Authorized Economic Operator (AEO) reviews.

The latter goes hand in hand with the EU Commission proposal for an updated 'dual use regulation', introducing some significant changes in the control over dual-use items exports.

***Facts***

The new regulatory settlement seeks to enhance the control on certain products and activities and to optimize the existing licensing architecture. The proposal, if accepted, will increase obligations for the private sector regarding compliance. The implementation of an Internal Compliance Program will be an obligatory element in order for companies to make use of simplified licensing mechanisms such as global licenses or general authorizations. In return, the existing simplification will be significantly expanded.

The Internal Compliance Program is used to assure that companies act in accordance with export control laws. On the other hand, the purpose of AEO status is to build confidence that a business will comply with customs requirements. Both programs provide the status of ‘reliable exporter’ and offer benefits related to simplified export procedures. Nevertheless, the two sets of procedures are currently not officially related.

The proposal also brings a new ‘human security’ approach, leading to an additional category of controlled goods to cover cyber-surveillance technologies, particularly the export of certain monitoring centres and data retention systems. Further to this, the EU proposal imposes targeted catch-all provisions in order to assure the control over non-listed products in certain ‘risk sectors’ related to data privacy and depending on the export destination. This may include additional control over certain telecommunication equipment, biometrics, location tracking devices, etc. These expanded catch-all provisions could create an additional layer of uncertainty which can only be mitigated by proper due diligence by the company itself.

***Implications***

Although not completely overlapping, the convergence of the AEO status with the Internal Compliance Program could reduce duplication of controls required in companies’ structures and avoid inefficiencies.

In addition, in order to include the export control measures as part of their AEO status, companies should maintain specific compliance procedures related to staff training, products classification, licence applications, additional databases and sanctioned party screening tools. The Internal Compliance Program will introduce additional due diligence and disclosure requirements, including the reporting of suspicious transactions.

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## Denmark

### CJEU judgment on application of VAT secondhand goods scheme for parts removed from 'end of life' cars

In the case of *Sjelle Autogenbrug I/S*, the Court of Justice of the European Union has endorsed the opinion of Advocate General Yves Bot, and ruled that the sale of spare parts salvaged from cars that are going to be scrapped should be dealt with under the margin scheme. The tax authorities took the view that the salvaged parts were a by-product created when the car was scrapped, and therefore that VAT should be charged on the full resale proceeds.

However, the CJEU observed that a car is made up of a number of parts, which do not change their nature when they are removed from a vehicle, so the sale of parts should be dealt with under the margin scheme. The ruling creates more equal competition between, especially, scrap companies in Denmark (Copenhagen) and Sweden (Malmoe) as Sweden already allowed the treatment now made clear by the CJEU.

The CJEU's judgment potentially creates some complex VAT accounting requirements, e.g. over the allocation of the cost of scrap cars across a potentially significant number of parts, many of which may not be sold separately.

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## Finland

### Acquiring services provided to bank were considered VAT exempt financial services by court

On 3 February 2017, the Supreme Administrative Court (SAC) gave a ruling KHO:2017:18 in relation to acquiring services provided to a bank by Company A. The services, where a merchant made an agreement for accepting card payments with the bank, provided by A consisted of the following:

- Setting up the merchant for the acquiring system of Company A
- Authentication requests of the card payment transactions via Company A's system to Visa and MasterCard
- Sending the response received from Visa and MasterCard to the merchant's payment terminal
- Receiving the information on the card payment transactions provided by the merchant at the end of the day
- Preparing an accounting message for the transfer of funds and forwarding it to Visa and MasterCard
- Calculating the settlements and service fees and preparing a Payment File delivered to the bank.

Charges and settlements between the merchant and the bank were realized via the Payment File without input from the bank, but money did not pass through the bank accounts of Company A.

According to the ruling, the acquiring services were, in this case, considered to form a distinct whole and fulfill in effect the specific, essential functions of a financial service. Since the provided services factually had the effect of transferring funds and entailed changes in the legal and financial situation, they were deemed as VAT exempt financial services. Therefore, the bank acquiring the services was not required to account for reverse charge VAT for the services.

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## France

### Reference to CJEU regarding C3S

By way of background, the Social Security and Solidarity Contribution (C3S) is based on the total revenue of a company for the previous year at a rate of 0.13% + 0.03% (additional contribution). In 2017, a new additional contribution is to be introduced (see the January 2017 edition of this newsletter).

Article L.651-5 Paragraph 1 of the French Social Security Code defines the C3S base:

> "*companies subject to this contribution have to annually declare to the Authorities responsible for its recovery (RSI) the amount of their total turnover declared to the tax authorities, calculated excluding turnover taxes and related taxes [...]*".

The key question is to determine whether EU transfers of goods are to be included in the C3S taxable basis.

In 2013, the Court of Cassation confirmed that transfers of stocks had to be taken into account for the calculation of the C3S (*Soitec* decision n°12-25776).

However, on 19 January 2017, the following question was referred by the Court of Cassation to the Court of Justice of the European Union (*Lubrizol France* (Cour de Cassation, 19 January 2017, n°15-26723*)*: Is the application of C3S to these transfers of stock between Member States contrary to the principle of free movement of goods, since it introduces a tax having an effect equivalent to a customs duty only for the flows of goods between France and EU Member States, which is formally prohibited by articles 28 and 30 of the TFEU?

In the light of the new arguments set out in the *Lubrizol* case and referred to the CJEU, it is recommended that businesses review this issue, to avoid the consequences of statutory limitations for C3S paid in 2014. Taj is able to assist on this matter.

**No deductibility for VAT invoiced by participating companies to loyalty program managers**

Marriott Rewards LLC, a company established in the US, manages the loyalty program of the Marriott hotel group, which enables hotels in the group to issue loyalty points to their customers. When customers use their points, the hotels invoice Marriott Rewards for the nights provided to customers under the loyalty program.

Marriott Rewards requested a refund of the French VAT included on these invoices. The Conseil d'Etat cancelled the lower court judgment which held that there was a direct link between the benefits of the members of the program and the manager's activity, thus authorizing VAT recovery based on the overhead costs theory.

The Conseil d'Etat (*Marriott Rewards* (Conseil d'Etat, 7 December 2016, n°396460) considered that the loyalty program managers' right to deduct VAT had already been resolved by the Court of Justice of the European Union judgments in *LMUK* and *Baxi Group* (C-53/09 and C-55/09), and held that payments made by the manager should be considered as the counterpart to the operations carried out by the members for the benefit of their customers. Consequently, the related VAT cannot be recovered. Only VAT relating to a supply separate from the accommodation provision rendered to the program manager would be eligible for VAT recovery.

The case has been referred to the Versailles Administrative Appeal Court. The referral decision will be of considerable interest, as it will enable determination of whether there is, apart from the accommodation provision, another service supply (such as commercial cooperation, potentially outside the territorial scope of French VAT).

**VAT complex supply – ski rental associated with insurance and transport services**

A company renting ski equipment as its principal activity was audited and the tax authorities issued tax reassessments relating to the insurance and transport services provided in addition to the main leasing activity, considering that the insurance services should be subject to VAT and that the 20% rate should be applied to the transport services.

Based on the well-established line of reasoning deriving from CJEU case law, the Court rejected these reassessments (Lyon Administrative Court of Appeal, 13 December 2016, N°15LY01413 – C). In particular, the Court pointed out that these two services are optional and may be provided by other operators. Insofar as they are not essential to the equipment leasing main activity, they become an end in themselves for the customers.

The mere fact that such services are not offered apart from the equipment leasing is not sufficient to establish that they would objectively form a single economic operation.

The Court upheld the company's position, which had not applied VAT on the insurance and had applied the VAT reduced rate to the passenger transport services.

Although this decision appears favorable to the taxpayer, it should be noted that it does not detail the practical conditions for the implementation of these insurance and passenger transport services related to the equipment leasing. To date, no appeal to the *Conseil d'Etat* has been filed.

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## Germany

### Federal Court rules on VAT treatment of supplies via a call-off stock – supplies via call off stock can be zero-rated intra-Community supplies if certain conditions are fulfilled

The Federal Tax Court (BFH) issued a decision on 20 October 2016, V R 31/15, on the VAT treatment of supplies made via a call off stock. The BFH confirmed the 2015 decision of the lower Hessian tax court (*FG Hessen* of 25 August 2015, 1 K 251910 1 K 2519/10), in which that court disagreed with the tax authorities' position regarding supplies via German call off stock. According to the tax authorities, the supply of goods from other EU Member States via consignment stock located in Germany should be deemed to be an intra-Community supply of goods followed by a domestic supply by the supplier. This in general results in VAT reporting obligations for the supplier in Germany.

The case before the BFH involved a Spanish trading company that sold goods to a German company. The goods produced in Spain were supplied via call off stock located in Germany. The German customer had a service agreement with the warehouse operator, under which the warehouse services were contracted on behalf of, and for the account of, the supplier. The customer had dictated these terms to the supplier. The warehouse operator was required to provide services, such as storage, unloading, etc., relating to the stored goods, and the German customer had been granted free access to the goods. The central supply agreements contained terms relating to the goods to be supplied, the terms of delivery, price and payment. The quantity and dates of supply were determined by call off schedules forwarded by the German customer on a daily basis. Only these schedules had a legally binding effect. The quantities shipped to the warehouse were required to cover the demands of the customer during the coming weeks and months.

The BFH ruled that a supply via call off stock where the final customer was identified at the beginning of the transport from the EU Member State of dispatch and where a binding order existed on that date should be considered a direct intra-Community supply. It is irrelevant that the right to dispose of the goods was only transferred in Germany.

The BFH stated that its decision is in line with the 2009 decision of the Court of Justice of the European Union (*X*, C-84/09). Based on this decision, the classification of a transaction as an intra-Community supply or acquisition cannot be made contingent upon the observance of a specific time period during which the transport of the goods supplied or acquired must begin or end. However, to make such a classification and to determine the place of acquisition, there must be a temporal and material link between the supply of the relevant goods and the transport of the goods, as well as continuity in the transaction.

The BFH pointed out that the temporal and material link requirement is not affected by a short temporary interim storage of the goods, as in the current case. The BFH also held that the tax authorities' view, which is based on the guidance issued by the OFD (higher local tax authority) of Frankfurt dated 15 December 2015, that the transfer of goods from another EU Member State to a German consignment stock will trigger a deemed intra-Community acquisition of the goods by the seller in Germany, followed by a domestic taxable supply, is incorrect.

***Comment***

The BFH decision does not include any new guidance as to how storage contracts should be drafted to ensure the assumption of a binding order before transport commences. Although the BFH does not follow the position taken by the tax authorities for nonresident taxpayers, potentially affected parties should continue to register for VAT in Germany in the case of supplies via call off stock since it is unclear if and when the tax authorities will implement the BFH decision in practice. It is hoped that the tax authorities will take steps soon to implement a change in practice which would lead to fewer registration duties for nonresident taxpayers.

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## Hungary

### CJEU orders input tax restriction for holding company

MVM, a Hungarian state-owned energy company, incurred VAT on professional costs relating to the acquisition and management of subsidiaries that generated electricity. It did not form a VAT group with the subsidiaries, and did not charge them for management services until several years later.

The Court of Justice of the European Union has ordered that MVM should not be able to recover this VAT as input tax. It confirmed that the activity of managing subsidiaries cannot be an economic activity unless it involves carrying out transactions that are subject to VAT. In other words, managing subsidiaries for free does not allow a holding company to recover input tax. The CJEU further indicated that the costs were unlikely to have a direct and immediate link to MVM's other business activities (such as leasing power plants), and could not be linked to charges made several years later.

This decision does not break new ground in relation to the treatment of costs incurred by holding companies, but is a reminder of the need to take care when considering their supplies and VAT group membership.

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## Ireland

### CJEU judgment on application of VAT to road tolls

Eight of the ten toll roads in Ireland are run by private operators who charge VAT on the tolls. The Dublin tunnel and Westlink motorway, however, are operated by the National Roads Authority (NRA), which has overall responsibility for providing a safe and efficient national road network in Ireland.

In the Court of Justice of the European Union case of *National Roads Authority*, Advocate General Szpunar suggested that the NRA should also charge VAT on its tolls, but the CJEU has now ruled that it should not. Public authorities need not charge VAT on their core activities, provided that they are not in competition with private providers. In this case, there was no actual competition (the toll roads all followed different routes), and there was no realistic possibility of a private toll road setting up in competition with the NRA's toll roads. The CJEU concluded that the purely theoretical possibility that a private operator might wish to compete with the NRA toll roads was insufficient to demonstrate that the authority should charge VAT.

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## Italy

### Legislative decree of DL *Milleproroghe* under examination

Following the approval of the Commission for Constitutional Affairs, the legislative decree of DL *Milleproroghe* (the annual decree extending the life of various government measures) has passed under the examination of the Parliament. The proposed amendments are planned to be definitively approved by the end of February.

In particular, the following VAT amendments have been proposed:

- **Intrastat obligations for EU acquisitions** – extension until 31 December 2017 of the obligation to declare intra-Community acquisitions for Intrastat purposes. The expected removal should be effective as of January 2018.

- **Quarterly communications of invoices and customs bills (i.e. new quarterly *Spesometro*)** – this new periodical reporting obligation should become a quarterly VAT fulfilment starting from FY2018. During FY2017, only two half-yearly *Spesometro* should be submitted within the following deadlines:

    - 16 September 2017 for the first *Spesometro* (January-June 2017);

- In February 2018 for the second *Spesometro* (July-December 2017).

**Intrastat forms for intra-Community acquisitions**

Due to the approach of the deadline for the submission of January 2017 Intrastat forms, and in particular considering the need for clarity regarding the declaration of intra-Community acquisitions for January 2017 following the recent VAT law changes, on 17 February 2017, the tax authorities, the customs authorities and the National Institute of Statistics (Istat) jointly issued an official press release on this topic.

Pending the approval of the legislative decree *Milleproroghe* (which, as discussed above, should extend the obligation to declare intra-Community acquisitions for Intrastat purposes to 31 December 2017), the authorities officially confirm that Istat is in any case obliged to collect the statistical information related to intra-Community acquisitions of goods for the month of January 2017, according to Regulation (EC) No 638/2004 of the European Parliament and of the Council of 31 March 2004 on Community statistics relating to the trading of goods between Member States.

Therefore, in order to fulfil the statistics obligations under Regulation (EC) No 638/2004, the Intrastat forms relating to January 2017 intra-Community acquisitions (i.e. INTRA-2 forms) must be e-submitted, based on the ordinary procedure and deadline (27 February 2017), only by the following taxpayers, who:

- Are already required to submit, on a monthly basis, the Intrastat forms related to intra-Community acquisitions of goods;

- Have made intra-Community acquisitions of goods for an amount higher than EUR 50,000 during January 2017 or the IV quarter of 2016.

**Technical guidelines for periodical e-submission of invoices issued/received**

In Circular Letter n° 1/E dated 7 February 2017, the tax authorities provided the first guidelines regarding the technical requirements to satisfy for the periodical e-submission of invoices issued/received, in compliance with the VAT law provisions recently introduced.

**First clarifications regarding amended VAT warehouse regime effective from 1 April 2017**

In Resolution n° 4/E dated 17 January 2017, the tax authorities released the first explanations regarding the application of VAT under the new VAT warehouse regime (effective as of 1 April 2017). In particular, they have confirmed that the VAT payment will be actually due only when goods have been extracted from the VAT warehouse in order to be sold within Italian territory; in this case, the VAT shall be paid by the VAT warehouse keeper in the name and on behalf of the VAT subject extracting the goods, and no VAT offsetting between VAT debts and VAT credits will be allowed.

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### Union Customs Code update

A number of acts were issued by the Customs and Monopoly Agency in January and February 2017 in light of the Union Customs Code and relevant legal package, entering into force from 1 May 2016.

Firstly, they specified the application criteria to meet the "practical standards of competence or professional qualifications" required by art. 39, let. d) of the UCC in order to obtain Authorized Economic Operator (AEO) status, i.e. in particular, with reference to the successful completion of training covering customs legislation, stated by art 27, par. 1, let. b) of Implementing Regulation (EU) 2015/2447.

Moreover, operative guidelines have been provided in order to apply authorizations for the comprehensive guarantees to be used in more than one Member State, according to art. 89, par. 1, let. b) of the UCC.

Furthermore, the Agency affirmed that, in light of art. 214 of the UCC, relating to the records to be kept within customs procedures, there is no longer an obligation to lodge inventory of the goods under customs warehousing authorization where the applications have been filed after 1 May 2016 (i.e. such fulfillment being instead still required with reference to customs warehousing authorizations in force at such date until the relevant reassessment).

Finally, a Note has been issued aimed at summarizing all the guidelines previously published by the Customs and Monopoly Agency with reference to transit procedures.

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## Russia

### First statistical data regarding foreign providers of e-services registered with tax authorities

It is reported by the Federal Tax service that 74 foreign companies, including Apple, Google, Microsoft, Netflix, Samsung, Bloomberg, Wargaming Group, Amazon, Oxford University, eBay, Valve Corporation, Nintendo, Avangate, Netors, AIRBNB, Formula One, Badoo, Booking, Alibaba have submitted applications for registration with the tax authorities to pay VAT on e-services.

28 companies have been already registered; applications from other companies are currently under consideration. Shortly, the list of all foreign companies registered with the tax authorities to pay VAT on e-services will be published on the official website of the Federal Tax Service.

### Federal Tax Service clarifies procedure of VAT application for the transfer of rights to use the additional functions of a computer online game

The Federal Tax Service in its Letter No. CD-4-3/988@ dated 23 January 2017 clarified the procedure of VAT application when there is the transfer of rights to use data and commands of a computer online game including the audio-visual images.

In particular, the Federal Tax Service stated that in accordance with the court practice, the provision of the possibility to use the additional functions of the game for facilitating the gaming process is in its essence the provision of paid services based on the agreement on the provision of services. These services are not subject to VAT exemption provided with respect to the provision of rights to use software and database based on the license agreement (case of OOO ‘Mail.Ru Games’ No. A40-194444/2015 and A40-56211/2014).

At the same time, the Federal Tax Service clarified that when a company provides to individuals on the basis of a simple non-exclusive license the rights to use a computer game in the scope determined by the respective agreement whereas the game is the software and is the aggregation of data, commands and audiovisual images activated subsequently so that the licensee achieves the certain result envisaged by the game without payment (activated data and commands) and after payment (non-activated data and commands), the operations on the transfer of non-activated data and commands may be subject to VAT exemption.

**Federal Tax Service clarifies application of VAT upon acquisition from a foreign entity of rights to use database through Internet**

The Federal Tax Service in its Letter No. CD-4-3/950@ dated 23 January 2017 clarified that services on the provision of databases through the Internet, including by provision of remote access, should be considered as electronic services. Where the taxpayer concludes agreements on the provision of such rights that are not license agreements, the VAT exemption cannot be applied.

In accordance with the Russian Tax Code if a foreign entity renders e-services the place of supply of which is considered to be Russia to entities registered with the Russian tax authorities, the VAT should be accounted for and paid to the tax authorities by the latter entities acting as tax agents.

**Ministry of Finance clarifies application of VAT with respect to issuance by Russian entity of guarantee in favor of foreign entity**

The Ministry of Finance in its Letter No. 03-07-08/2120 dated 19 January 2017 stated that the place of supply of services on the issuance of guarantees rendered by a Russian entity in favor of a foreign entity is considered to be Russia. At the same time, from 1 January 2017, the operations on issuance of guarantees by taxpayers not being banks are exempt from VAT. Therefore, the fee obtained by the Russian entity for issuance of the guarantee in favor of a foreign entity is not subject to VAT starting from 1 January 2017.

**Federal Tax Service summarizes court practice on tax issues for the second half of 2016**

The Federal Tax Service issued Letter No. CA-4-7/24825@ dated 23 December summarizing the court practice on tax issues for the second half of 2016.

The following court cases on VAT issues were included in the summary:

- Obtaining an unjustified tax benefit due to manipulation of the transaction value – in particular, the summary includes a case on the overestimation of the value of a land plot with a simultaneous underestimation of the value of the realty object located on this land plot for the purpose of increased VAT recovery (case No. A40-71974/2015).

- Separate VAT accounting – VAT related to the acquisition of goods/work/services used exclusively for non-VATable operations could not be claimed for recovery, even where 5% barrier has not been exceeded (case No. A40-65178/2015).

- VAT related to developer services with respect to nonresidential premises in a block of flats – the court stated that the block of flats is an object of non-production purposes regardless of the fact that there are nonresidential premises, therefore, the developer's services with respect to nonresidential premises in a block of flats are exempt from VAT (case No. A78-10467/2015).

- Recovery of VAT related to aircraft ground handling – recovery of VAT is possible provided that the VAT is separately indicated in the respective VAT invoice (case No. A40-79255/2014).

**Federal Customs Service summarizes practice on disputes considered by the Service in 2016**

On 27 January 2017, on the official website of the Federal Customs Service (http://customs.ru/) was published an overview of the practice on disputes considered by the Federal Customs Service in 2016.

Among detailed requirements on customs control of the country of origin, classification of imported goods, netto weight of imported goods and exemption from VAT of medical equipment, the Federal Customs Service issued a new position on customs control of the customs value of imported goods.

In particular, according to the position of the Federal Customs Service, customs value cannot be adjusted based on arguments of incorrectness or lack of confirmation of the declared customs value which were known to the customs authority at the stage of additional verification of customs value, but were not indicated in the relevant decision (including the fact that no documents were requested by the customs authority with regard to such arguments).

**Changes in administrative responsibility for non-submission, late submission or submission of incorrect statistical forms for movement of goods within the EEU**

According to the legislation, companies should submit to the customs authorities statistical forms on the movement of goods between the countries of the Eurasian Economic Union (EEU).

The deadline for the submission of the statistical form is the 8th business day of the month following the month of the goods' shipment. The form may be submitted, in particular, via the Russian Federal Customs Service's website.

From 29 January 2017, for the non-provision, late provision or provision of a statistical form containing incorrect information, companies may be liable for an administrative fine from RUB 20,000 to RUB 50,000 for the first omission, and from RUB 50,000 to RUB 100,000 for repeated omissions.

Companies moving goods within the EEU should carefully check the data indicated in statistical forms, in particular, to avoid discrepancies with other reporting forms. It is also recommended to comply with the terms and procedure of provision of statistical forms to the customs authorities to avoid, in particular, the risk of administrative liability.

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## South Africa

### Implementation of environmental levy on tyres

An environmental levy on tyres announced by the Minister of Finance of South Africa in his 2016 budget speech came into effect on 1 February 2017.

This levy applies in addition to any other customs duties currently applicable to all imported or locally manufactured, new or rethreaded and pneumatic tyres.

### Amendment of customs duty rate on sugar

Customs duty on sugar classifiable under tariff subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 has been reduced from 31.89c/kg to free of duty in terms of the existing variable tariff formula.

### Strike action over EU chicken

On 1 February 2017, a protest was held by South African workers, trade union members and representatives from the poultry industry against the perceived dumping of chicken originating from the EU. A list of demands was delivered by the protesters to the European Union offices in Pretoria, South Africa, which vehemently denied allegations of dumping but pointed to the drought and structural issues experienced in South Africa having more of an impact on the industry.

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## UAE

### VAT registration and compliance requirements

The Ministry of Finance recently published details on its website of VAT registration and compliance requirements. The MOF stated that:

> *"Registration for VAT is expected to be made available to businesses that meet the requirements criteria three months before the launch of VAT. Businesses will be able to register online using eServices".*

The expectation following this announcement is that VAT registration applications may be filed from October 2017.

Registered businesses will be expected to submit VAT returns on a regular basis, with most businesses required to file quarterly. Businesses should keep sufficient records to enable the authorities to identify the details of the business activities and review transactions to determine whether the correct amount of VAT has been paid. The specifics regarding the documents which will be required, and the time period for keeping them, are yet to be confirmed.

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## United Kingdom

### Court judgment on VAT treatment of vouchers given away with newspapers

Associated Newspapers Ltd ran a promotion giving away a retailer's vouchers to people who bought the Daily Mail and Sunday Mail newspaper for three months.

The Court of Appeal has been considering the VAT treatment of these vouchers, and has upheld the conclusions reached by the Upper Tribunal. It decided that ANL was entitled to recover input tax where it procured vouchers through intermediaries, as the cost of the vouchers was part of its general business overheads. ANL might have been giving the vouchers away, but this was for a business purpose and was not caught by deemed supply rules, so ANL did not need to account for output tax when it handed the voucher to readers.

ANL also sought to reclaim VAT on vouchers bought direct from the retailer. The Court of Appeal agreed with the Upper Tribunal that no VAT was charged on these retailer vouchers, and to that extent no input tax recovery was possible.

As it stands, the judgment casts doubt on sections of the tax authorities' guidance on how to deal with vouchers.

**'Points based' reward scheme appeals refused**

The UK First-tier Tribunal has dismissed appeals by Marriott Rewards LLC and Whitbread Group Plc in relation to points based reward schemes run by Marriott.

When members of the loyalty scheme redeem points in exchange for a 'free' stay, the hotel makes a charge to the points company. The First-tier Tribunal agreed with the appellants that, as was the case in the 'Nectar points' case of *Aimia Coalition Loyalty UK Limited*, the redeemers made supplies to the scheme operator (Marriott Rewards LLC in the case). However, it decided that the supplies consisted of the agreement to provide reward stays generally, and that the refunds of VAT claimed by Marriott were not payable as the relevant supplies were outside the scope of UK VAT, while the refunds of output tax charged by Whitbread (in connection with supplies made before January 2010) were not due because the supplies made at that time were correctly chargeable with UK VAT. Accordingly, both appeals were dismissed.

However, the decision indicates that VAT recovery may be possible in relation to many 'points based' reward schemes.

**Court judgment on VAT treatment of student recruitment services supplied to universities**

An increasing number of students at UK universities now come from outside the EU. To attract such students, Newcastle University engaged local agents (e.g. in Malaysia) to handle non-EU student recruitment. The First-tier Tribunal has now ruled that the agents' services were made to the University, and not (in part) to the student. The University should therefore account for VAT on the full value of services received since 2010 under the reverse charge (although before 2010 different rules on place of supply applied). Moreover, the University was not entitled to any VAT recovery on the services (even as residual input tax).

Given the increasing internationalization of universities and the competitiveness of the education market, overseas agents have become a key part of international strategy, although new recruitment models have been increasingly used in recent years.

**Brexit and Indirect Tax Survey**

The results of a survey conducted towards the end of 2016 on the likely indirect tax consequences of Brexit are now available: Brexit and Indirect Tax Survey. Responses indicate that most businesses are starting to consider the impact of Brexit, even though considerable uncertainty remains. Significant areas of concern include possible changes to current Customs duty rules with resulting duty cost implications, losing the ability to rely on EU VAT principles, and more complex supply chains for goods and services in relation to potential non-tax impacts of Brexit.

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**Back to top**

# Eurasian Economic Union

### Introduction of zero import customs duty rates for certain goods

Decision of the Council of the Eurasian Economic Commission of 18 October 2016 No. 111 introduces 0% import customs duty with regard to fibers of artificial viscose, classified under the classification code 5504 10 000 0, from 2 January 2017 to 31 December 2019.

Decision of the Council of the Eurasian Economic Commission of 30 November 2016 No. 130 introduces 0% import customs duty with regard to certain types of polyethylene classified under classification code 3901 20 900 1 from 1 January 2017 to 31 December 2017.

Decision of the Council of the Eurasian Economic Commission of 30 November 2016 No. 127 introduces 0% import customs duty with regard to certain types of chemical compounds classified under classification codes 2812 90 000 0, 2850 00 200 0 and 2931 90 800 9 from 22 January 2017 to 31 December 2019.

Decision of the Council of the Eurasian Economic Commission of 18 October 2016 No. 112 introduces 0% import customs duty with regard to certain types of fruit purees classified under classification codes 2007 99 from 2 January 2017 to 31 December 2018.

Decisions No. 111, No. 112 and No. 130 came into effect on 2 January 2017. Decision No.127 came into effect on 22 January 2017.

### Entry into force of requirements on marking of explosives

Decision of the Council of the Eurasian Economic Commission of 20 July 2012 No. 57 introduces technical regulation on the safety of explosives and goods made from explosives.

While most of this technical regulation is effective from 1 July 2014, the part of the technical regulation on the marking of explosives is effective from 1 January 2017.

In particular, the explosives are to be marked by the introduction of marking substances and micro carriers into the explosives, which allow remote detection of explosives and identification of the country of origin, type of goods, producer, shipment and date of production.

Also published on the website of the Eurasian Economic Commission is a list of explosives that are not subject to marking, e.g., testing samples of explosives not released into free circulation.

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**Back to top**

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