

The Deloitte logo is positioned in the top left corner of the slide. It consists of the word "Deloitte" in a bold, blue, sans-serif font, followed by a small green dot.

Deloitte.

Indirect Tax Conference 2015

Real Estate

Mark Annear
Richard Smith
Ben Tennant

11 November 2015



Contents

Annual update	3
TOGC's – case law developments	11
Cross-border issues	19

Annual update

Overview

What's been happening?

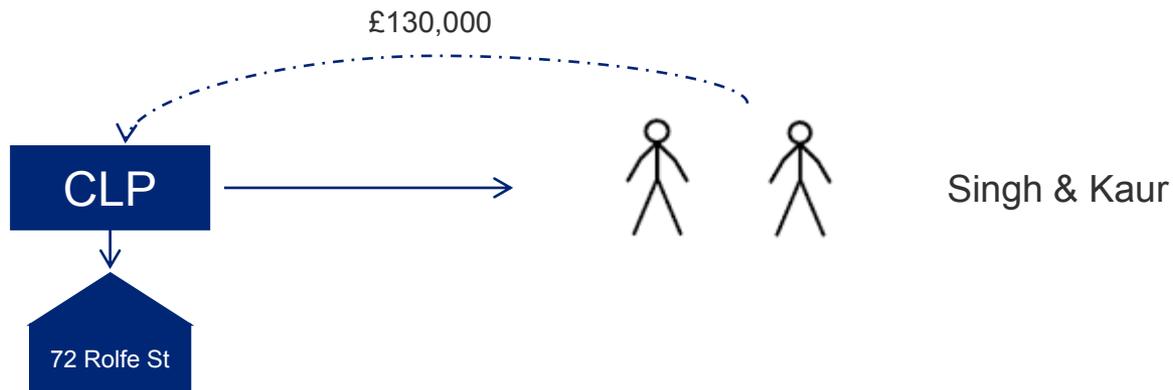
- HMRC
- Cases
- Questions?

HMRC

- New policy holder
- Options to tax
- VAT clearances
- Technical discussion groups
- Revenue & Customs Briefs

CLP Holding Company Ltd v Singh [2014]

Could VAT be added to the price?



- 4th edition of Standard Conditions:
 - “Sums payable are exclusive of VAT”
- Contract:
 - Price defined as “£130,000”

Roy Shields [2014]

Occupancy restriction, whether a dwelling?

- The law:
 - “...the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision...”
- Planning permission:
 - “The occupation of the dwelling shall be limited to a person solely employed by the equestrian business at 274 Bangor Road, Newtownards, and any resident dependents.”

Astral Construction Ltd [2015]

Was a new building constructed?

- Care home “constructed”
- Linked to disused church

Institute for Orthodox Christian Studies [2015]

Whether property used for a relevant charitable purpose?

- Charity acquired premises
- Seller had opted to tax
- Charity would occupy premises and temporarily sublet some rooms

Taylor Wimpey plc

“White goods” blocking order

- HMRC won at First-tier Tribunal ...
- ... appeal listed at Upper Tribunal ...

TOGC's – case law developments

TOGC's

Basics

- A TOGC is the sale of a business (or part of a business) which is treated as neither a supply of goods nor a supply of services and is therefore outside the scope of VAT.
- Additional conditions are required to be met where land and property is being disposed of. (e.g. mirrored option to tax, notification from buyer that option to tax will not be dis-applied etc.).
- TOGC treatment is beneficial for a vendors cash flow and for VAT sensitive buyers.
- TOGC treatment also reduces the amount of SDLT payable by the buyer (as SDLT is payable on the VAT inclusive consideration)

Zita Modes [2005]

Same kind of business?

- Luxembourg retailer sold the assets of a retail clothing business VAT-free as a TOGC.
- LTA : purchaser “*had no administrative authorisation to trade in the relevant sector*”.
- ECJ : (1) the assets transferred must form “*a sufficient whole to allow the pursuit of an economic activity and that activity must be pursued by the transferee*”; and
(2) Buyer’s intention post transfer must relate to an activity that will have a degree of continuity or similarity to that of the seller pre-transfer.
- But no requirement under Art. 5(8) for the buyer **to operate the same kind of business** as that carried on by the seller prior to the transfer.

Dartford Borough Council [2006]

Agreements for Lease

- Development Agreement followed by tri-partite Agreement for Lease, followed by a freehold land disposal.
- HMRC assessed for output tax as did not agree TOGC. Taxpayer appealed.
- Tribunal accepted the appeal and found that “*at the time of sale the appellant was carrying on an economic activity in relation to the site*” which the buyer would carry on.
- Tribunal strongly criticised HMRC for failing to understand “*the nature of an agreement for lease*”

Robinson Family Limited [2012]

Sale of inferior interest?

- Robinson purchased a site and re-developed it constructing six new commercial units. One unit sold via a long lease (as a TOGC) to an insurance broker.
- HMRC view pre-litigation was no TOGC (just the creation of a new asset) where an inferior interest granted.
- HMRC now accept that where a vendor retains a small reversionary interest in a property being transferred does not prevent transaction from being a TOGC.
- Sale of inferior interest in a property letting business can therefore be a TOGC providing the interest retained is small enough not to disturb the substance of the transaction.
- Subsequent change in HMRC policy (see HMRC Brief 30/12).

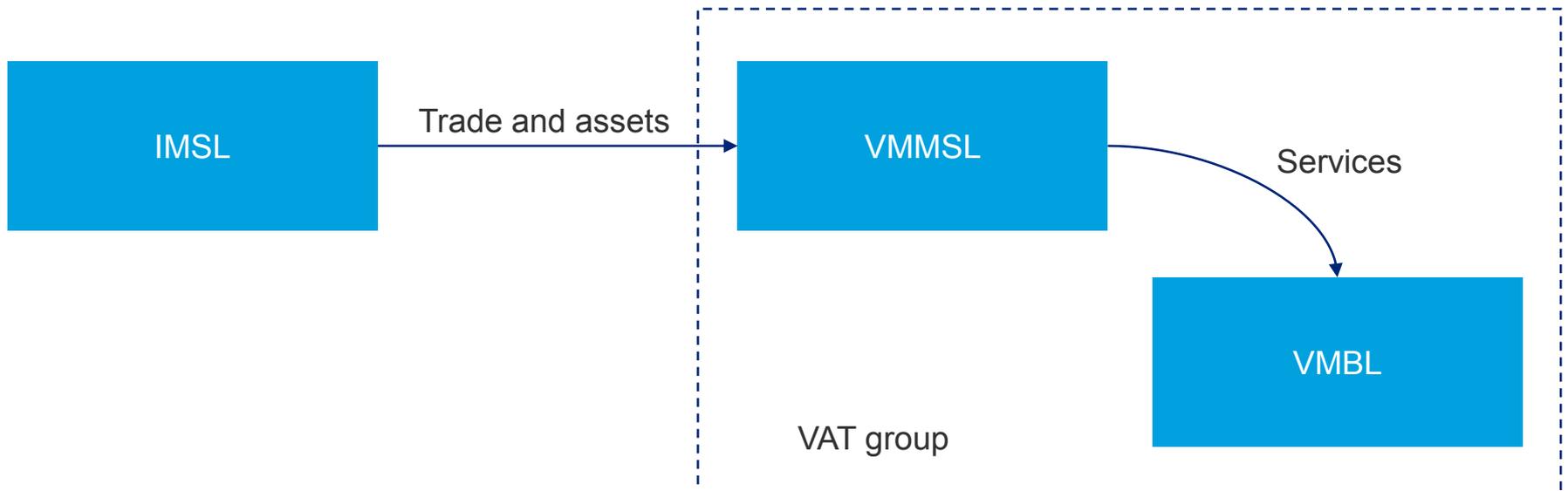
Royal College of Paediatrics [2015]

TOGC where buyer introduces tenant?

- College partially exempt.
- College wanted new premises – opted to tax.
- College introduced tenant to seller.
- Letting conditional on exchanging sale contract.

Intelligent Managed Services Ltd [2015]

TOGC where customer in buyer's VAT group?



- IT banking services.
- VAT group provided retail banking services.

Intelligent Managed Services Ltd [2015]

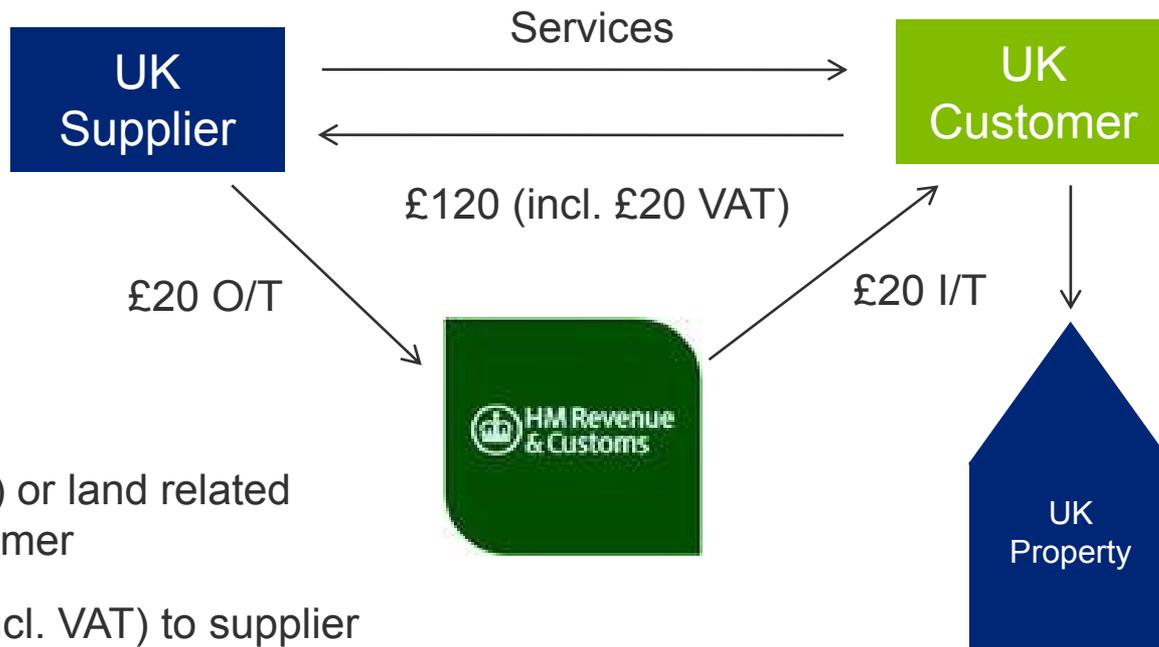
What next?

- Sales of properties where only tenant VAT-grouped with seller or buyer?
- Sale and leasebacks?
- Tenants purchasing their rented premises?

Cross-border issues

Principles of VAT

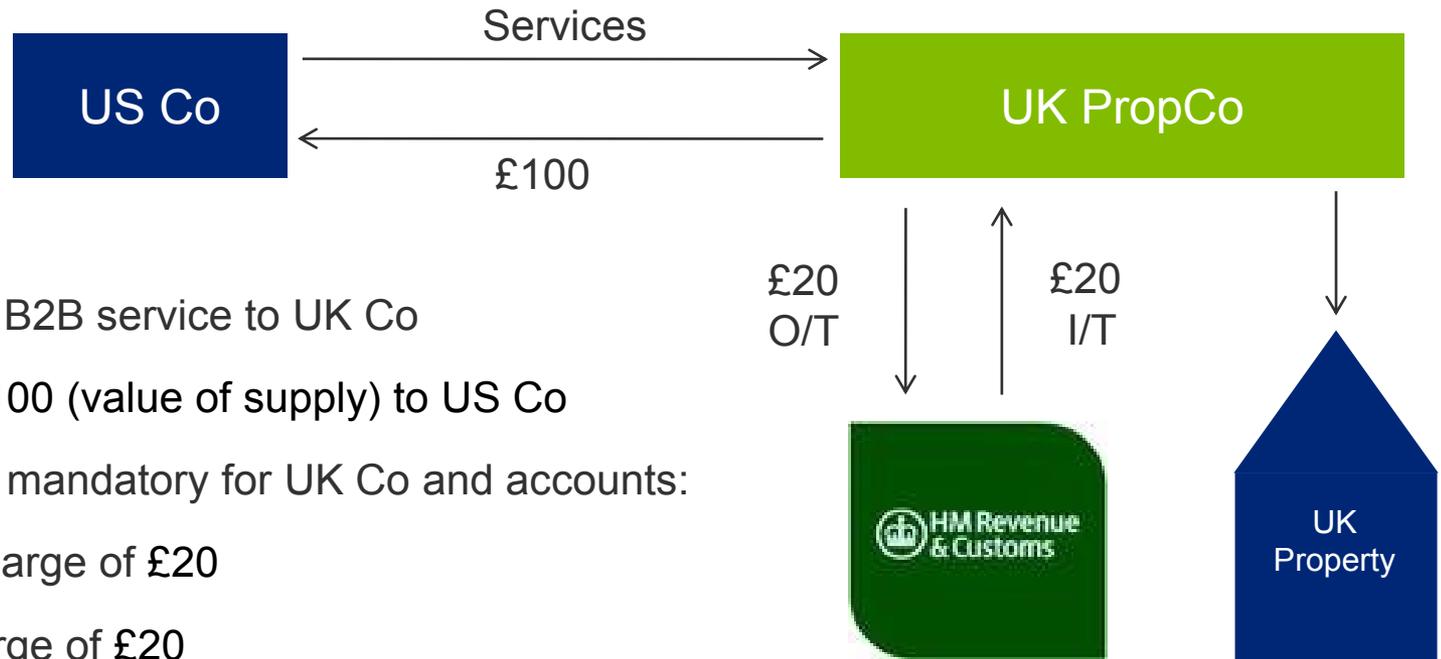
VAT on domestic supplies



- B2B service (e.g. tax advice) or land related service supplied to UK customer
- UK customer remits £120 (incl. VAT) to supplier
- UK supplier accounts for £20 output tax to HMRC
- UK customer recovers £20 input tax from HMRC (assume fully taxable)

Principles of VAT

Reverse charge



- US Co provides B2B service to UK Co
- UK Co remits £100 (value of supply) to US Co
- Reverse charge mandatory for UK Co and accounts:
 - Output tax charge of £20
 - Input tax charge of £20
- Reverse charge **mandatory** for UK Co if registered for UK VAT and receiving **UK land related** services.

Principles of VAT

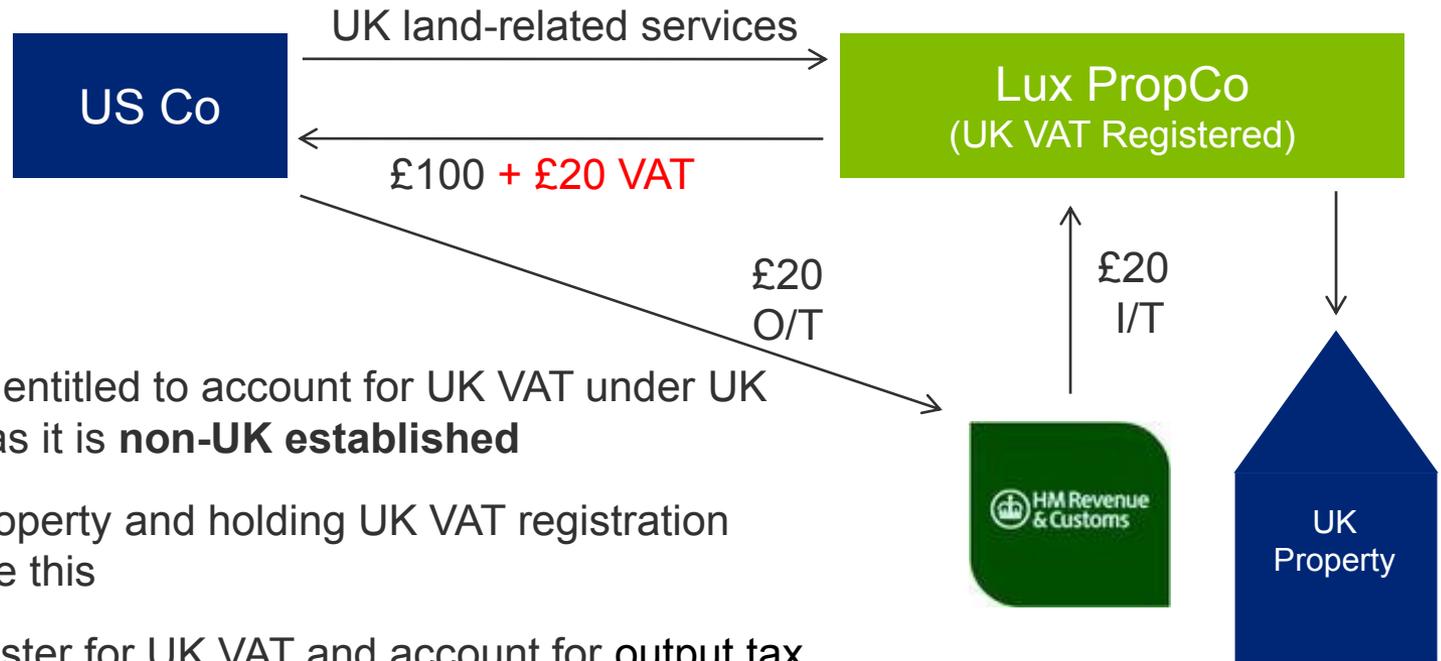
Reverse charge issues: Establishment



- US Co provides UK land related service to Lux PropCo
- Lux PropCo registered for UK VAT (owns UK Property)
- **Is Lux PropCo entitled to account for UK VAT under the UK reverse charge provisions or is US Co required to register for UK VAT?**

Principles of VAT

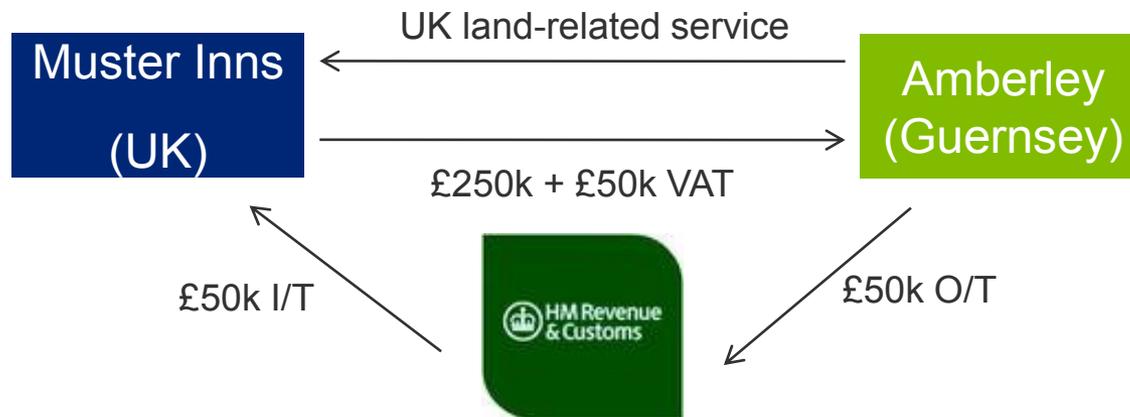
Reverse charge issues: Establishment



- Lux PropCo **not** entitled to account for UK VAT under UK reverse charge as it is **non-UK established**
- Exploiting UK property and holding UK VAT registration does not override this
- US Co must register for UK VAT and account for output tax.
- Creates registration obligation for non-established traders (e.g. land-related professionals)
- Risk of disallowance of input tax recovery if reverse charge applied incorrectly

Cross-border issues

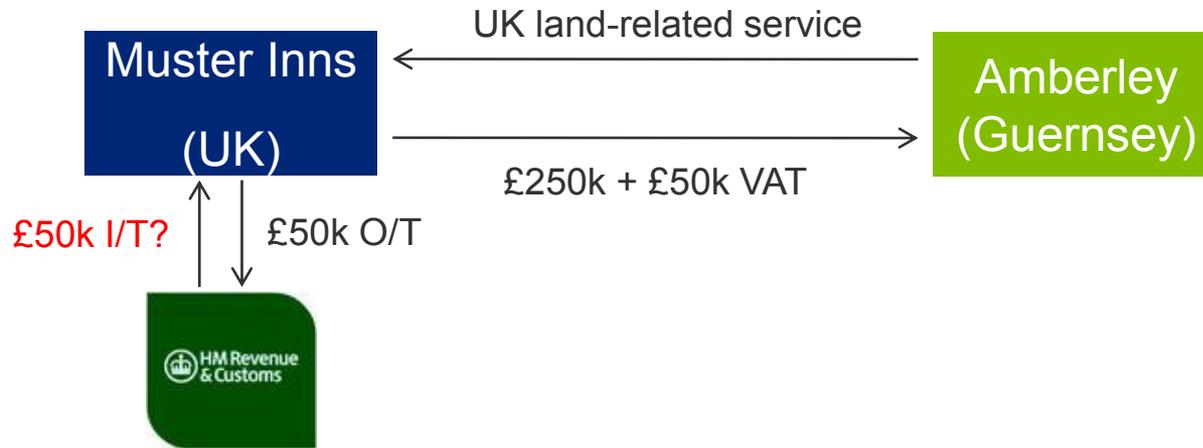
Case law – Muster Inns Ltd



- Muster Inns wanted to refurbish public house/restaurant
- Engaged with Amberley Construction Ltd (non-UK) for construction services
- Amberley registered for UK VAT and accounted for output tax on supply
- Muster Inns sought to recover input tax incurred. HMRC reviewed, then paid.

Cross-border issues

Case law – Muster Inns Ltd



- HMRC decided to cancel Amberley's VAT registration with retrospective effect
- No fixed establishment as UK human & technical resources were temporary in nature
- Muster Inns should have instead applied reverse charge; HMRC issued assessment
- Muster Inns suffered fixed cost with recourse only to Amberley
- Did Amberley get a refund?

Land-related services

Services connected to immovable property

What is immovable property? (Art 13b of Reg 282/2011)

Land – a specific part of earth above or below over which title and possession can be created

A building or construction affixed to land (above or below sea level) that cannot easily be dismantled or moved

Any item that makes up an integral part of the building

Machines permanently installed in a building that can not be moved without destroying or altering the building or construction

Land-related services

Services connected to immovable property

What is a service connected to immovable property?

- A service is connected to immovable property where there is **sufficient direct connection** with that property
- **Sufficient direct connection** exists where a service is:
 - derived from an immovable property and that property makes up a constituent element of the service and is central to, and for, the service provided; or
 - provided to, or directed towards, an immovable property, having as their object the legal or physical alteration of that property.

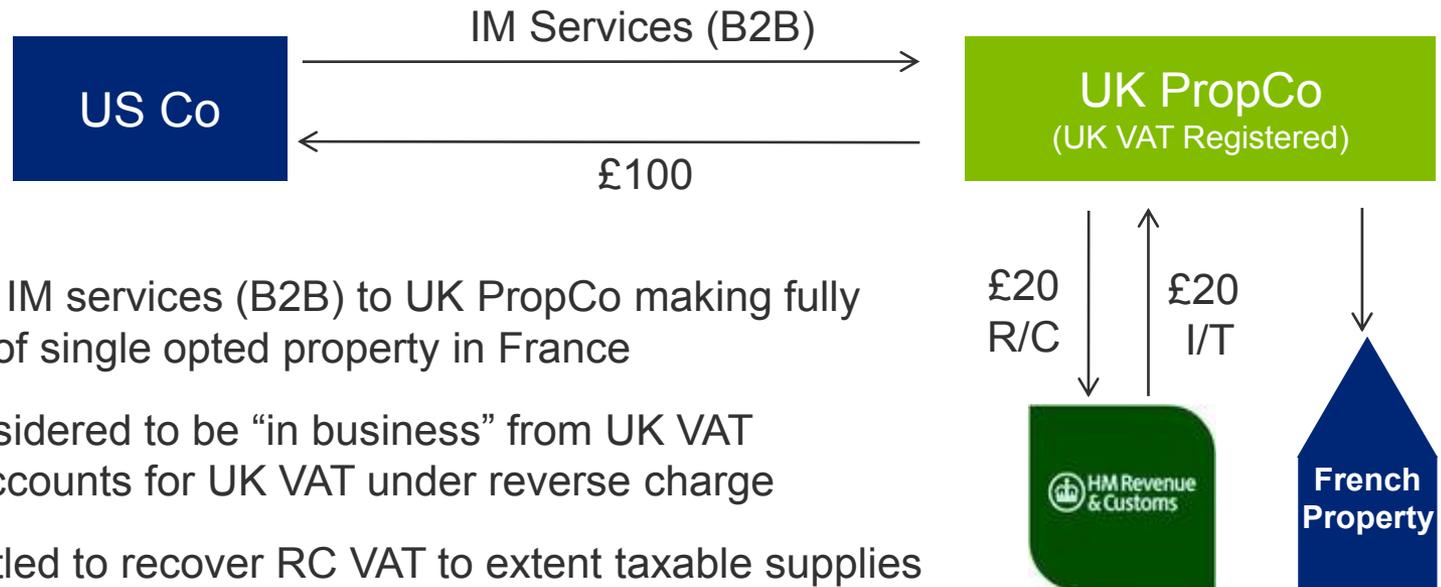
Land-related services

Services connected to immovable property

Art. 31a2: Services connected to immovable property	Art. 31a3: Services <u>not</u> connected to immovable property
Leasing or letting of immovable property	Provision of stand location at fair/exhibition with other related services to enable exhibitor to display items
Legal services relating to transfer of title to immovable property, establishment or transfer of interests in property	Legal services connected to contracts where not specific to transfer of title etc
Property management	Portfolio management of investments in real estate
Intermediation in the sale, leasing or letting of immovable property	Intermediation in the provision of hotel accommodation or similar
Construction and maintenance of buildings and other permanent structures	Installation, maintenance etc of machines and equipment which is not, or does not become, part of the property
Valuation and surveying services	Advertising

Land-related services: Examples

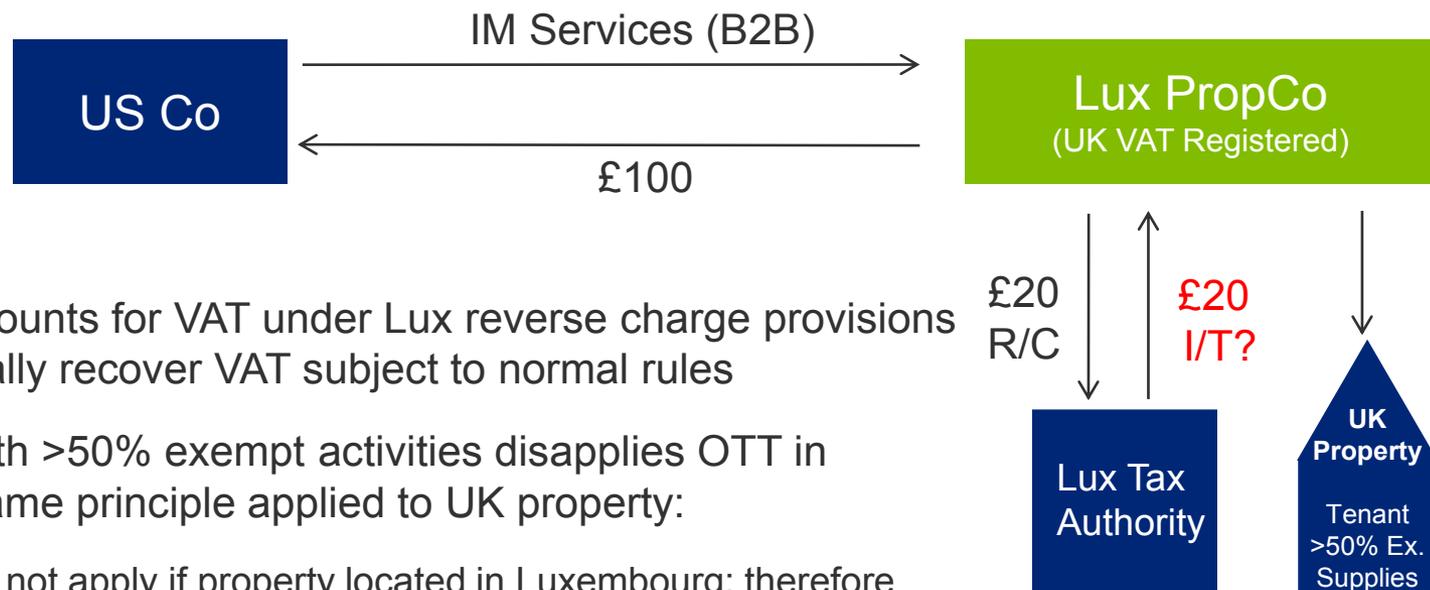
Investment Management Fees



- US Co provides IM services (B2B) to UK PropCo making fully taxable lettings of single opted property in France
- UK PropCo considered to be “in business” from UK VAT perspective – accounts for UK VAT under reverse charge
- UK PropCo entitled to recover RC VAT to extent taxable supplies of French property would be taxable in UK
- **Same treatment across the EU?**

Land-related services: Examples

Investment Management Fees

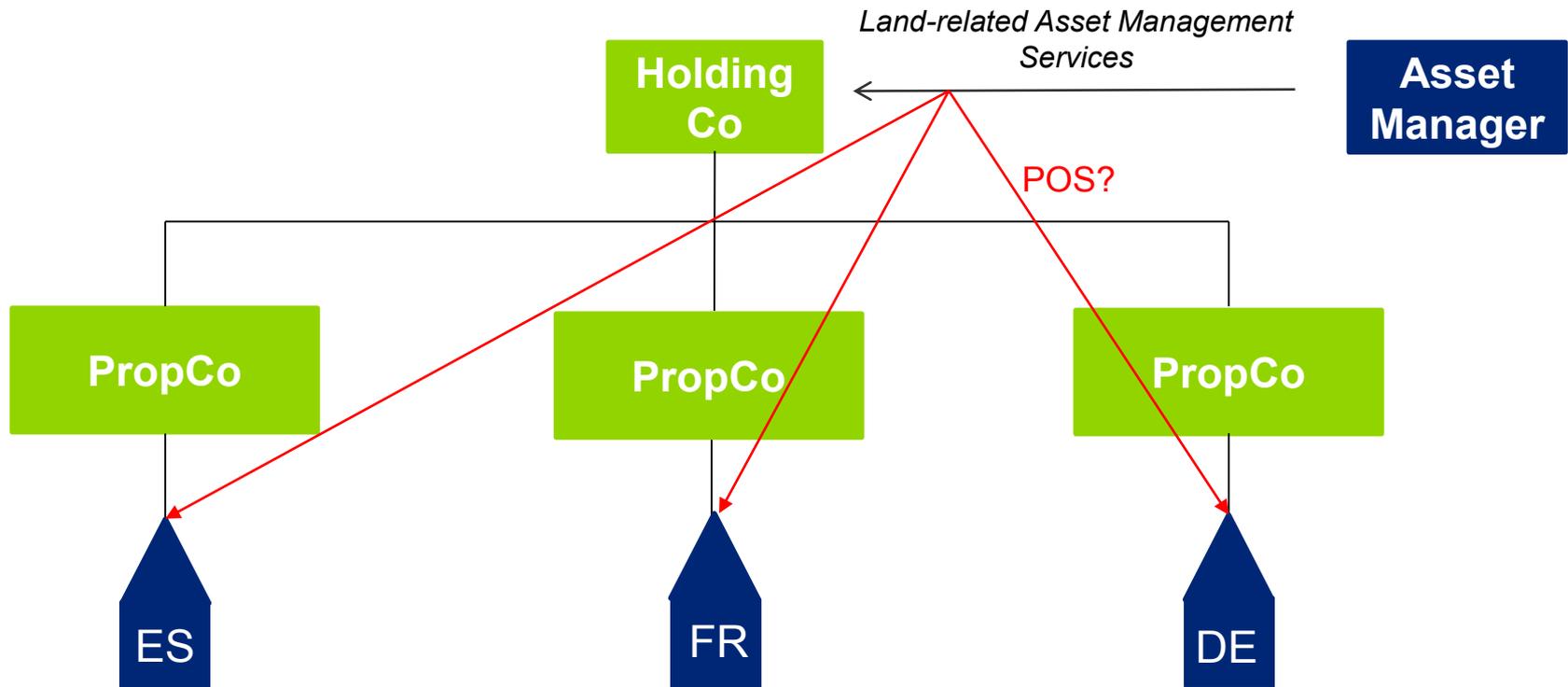


- Lux PropCo accounts for VAT under Lux reverse charge provisions and can potentially recover VAT subject to normal rules
- BUT a tenant with >50% exempt activities disappplies OTT in Luxembourg. Same principle applied to UK property:
 - Lux OTT would not apply if property located in Luxembourg: therefore
 - Recovery of RC VAT in Lux disallowed (regardless of effect of UK OTT)
- Differing applications in the EU for example:
 - Germany
 - Netherlands
 - France

Land-related services: Examples

Asset Management Services – Global contracts

- Asset manager provides AM services with land-related element relating to portfolio of properties across EU jurisdictions
- Single supply of B2B services or separate supplies comprising a mix of B2B and land-related services?
- Where is the **place** or **places** of supply?



Land-related services: Examples

Asset Management Services – Global contracts

- European Commission (explanatory notes 1042/2013):
“Services linked to several immovable properties can not be considered as lacking a sufficiently direct connection with immovable property simply because these immovable properties are located in different Member States”

However

“Where more than one immovable property is involved in the supply, each of them has to be clearly identified”

- No guidance exists on method of how to treat or split such services for VAT purposes.
- Possible solution?
 - Attribute land-related element?
 - Supply services directly?

Land-related services

Key points

- Make sure the VAT is correctly charged
- Apply the reverse charge where required
- Beware the risk of assessment
- Get a replacement invoice if it's incorrect
- Consider where the service should be supplied to mitigate sticking VAT cost

Come to VAT Club!

- To discuss more in depth about and the implications of the recent Commission guidance, land related supplies & liabilities, and should you be paying VAT on broker fees when buying shares?
- Contact us to find out more!



Ben Tennant

Senior Manager

Email: btennant@deloitte.co.uk



Richard Smith

Senior Manager

Email: rxsmith@deloitte.co.uk



Mark Annear

Senior Manager

Email: mannear@deloitte.co.uk



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.co.uk/about for a detailed description of the legal structure of DTTL and its member firms.

Deloitte LLP is the United Kingdom member firm of DTTL.

This publication has been written in general terms and therefore cannot be relied on to cover specific situations; application of the principles set out will depend upon the particular circumstances involved and we recommend that you obtain professional advice before acting or refraining from acting on any of the contents of this publication. Deloitte LLP would be pleased to advise readers on how to apply the principles set out in this publication to their specific circumstances. Deloitte LLP accepts no duty of care or liability for any loss occasioned to any person acting or refraining from action as a result of any material in this publication.

© 2015 Deloitte LLP. All rights reserved.

Deloitte LLP is a limited liability partnership registered in England and Wales with registered number OC303675 and its registered office at 2 New Street Square, London EC4A 3BZ, United Kingdom. Tel: +44 (0) 20 7936 3000 Fax: +44 (0) 20 7583 1198.