



# Indirect tax update

Edition 16/2020 – 7 May 2020

## Summary

Welcome to this week's Indirect Tax Update.

This week, the Court of Justice has issued an interesting judgment in the case of Dong Yang Electronics Sp z.o.o. (Dong Yang). This is a referral from the Polish courts and concerns the VAT 'Place of Supply' rules - (the rules which determine where a supply of goods or services takes place).

In this case, Dong Yang had a contract to supply services to a South Korean company. However, the Korean company (LG Display Ltd) also had a subsidiary in Poland (LG Poland). Dong Yang's contract was to assemble parts that belonged to LG Display Ltd and after assembly, the parts were then moved to LG Poland. LG Poland provided storage and logistic services under contract to LG Display Ltd. Finally, when all the goods were ready for market, the goods were sold by LG Display Ltd to a 2<sup>nd</sup> Polish subsidiary (LG Poland Sales) which then sold the completed product on the EU market.

The Polish tax authority considered that, through its subsidiary LG Poland, LG Display Ltd had a fixed establishment in Poland and that Dong Yang had supplied its assembly services to that fixed establishment rather than to LG Display Ltd's South Korean establishment. This meant that the supply of services would have been liable to Polish VAT whereas Dong Yang had treated the supply as being made to the South Korean establishment and was, thus, outside the scope of EU VAT.

The Court has concluded that (i) the presence of a subsidiary in a Member State does not infer that there is a fixed establishment of the parent company in that Member State and (ii) there is no requirement in EU VAT law for the supplier to make extensive enquiries into the contractual relationships between a customer and its subsidiaries in order to determine whether a fixed establishment exists.

HMRC has also announced this week that it is to extend zero-rating on a temporary basis to supplies of PPE and it has brought forward the introduction of zero-rating for supplies of digital publications. The zero-rating for PPE will continue until 31 July 2020 and the zero-rating for digital publications is effective from 1 May 2020.

## Court of Justice of the European Union – Dong Yang Electronics sp Z.o.o

*Whether existence of a subsidiary in a Member State creates a fixed establishment of the parent company*

The 'Place of Supply' rules – the rules that determine where, for VAT purposes, a supply of goods or services takes place are set out in the VAT Directive. These rules are then expanded in EU regulations that are designed to ensure a common interpretation of the VAT Directive throughout the EU. Article 44 of the Directive sets out the general rule for supplies of services and states that in a situation where the customer is a business, the place of supply of services is where the customer is established, has a fixed establishment or in the absence of either, where he usually resides. The implementing regulations then provide further details on how to determine where a person is established or has a fixed establishment.

In this case, Dong Yang is a Polish company with an establishment in Poland. Its customer, LG Display Ltd is established in South Korea. LG Display Ltd also has two subsidiaries in Poland (LG Poland and LG Poland Sales). Under the terms of the contract with LG Display Ltd, Dong Yang was required to provide services (the assembly of parts belonging to LG Display Ltd). Once the parts had been assembled, the goods were 'shipped' to LG Poland which, under a separate contract with LG Display Ltd, provided storage facilities and logistic services and when the goods were 'complete' they were then sold by LG Display Ltd to LG Poland Sales for onward supply to the EU market.

Although it was registered for VAT in Poland, LG Display Ltd advised Dong Yang that it did not have any business establishment or a fixed establishment in Poland and, in accordance with Article 44 general place of supply rule, Dong Yang considered that the place of supply was in South Korea where LG Display Ltd did have its establishment. However, the Polish tax authorities took the view that through its contractual arrangements with its subsidiaries in Poland, LG Display Ltd had an establishment in Poland and that Dong Yang's services were, in fact, supplied to that Polish establishment. The Polish tax authorities thus sought to subject the supply of services to Polish VAT considering that the place of supply was Poland and not South Korea. Dong Yang appealed that decision and the Polish court sought clarification on the law from the Court of Justice.

In its judgment issued 7 May 2020, the Court of Justice has confirmed that Article 44 of the VAT Directive and Article 11(1) and Article 22(1) of the implementing regulations must be interpreted such that the existence of a permanent establishment of a company established in a third State cannot be deduced by a service provider simply because that company has a subsidiary there.

Moreover, the supplier cannot be required to make extensive enquiries into the contractual relationships and obligations between its customer in a third State and its subsidiaries in the Member State. The Directive and the implementing regulations require a taxable person to exercise a reasonable degree of care in determining the correct place of supply. However, this does not include seeking out and verifying inaccessible contractual relationships between his contracting party and that party's subsidiaries.

**Comment – determination of the place of supply is one of the fundamental requirements of the EU VAT system as it determines not only where the tax becomes chargeable, but also confirms which tax jurisdiction is entitled to collect the tax. Here, the Polish tax authority considered that, in light of the contractual arrangements and obligations that subsisted between LG Display Ltd and its Polish subsidiaries, (facts that were unknown to Dong Yang), Dong Yang's supplies were, somehow made to a fixed establishment of LG Display Ltd in Poland and subject to Polish VAT. The Court of Justice has confirmed that the existence of a subsidiary in a Member State does not create a business establishment of the third State parent company. It also confirms that the supplier cannot be required to do more than take reasonable steps to determine the correct place of supply.**

## Revenue & Customs Brief 4/2020 – issued 30 April 2020

### Temporary Zero-rating for PPE

On 30 April 2020, HMRC issued Revenue & Customs Brief 04/2020 which announced a change to UK VAT law to introduce a temporary VAT zero-rate for supplies of Personal Protective Equipment (PPE).

With immediate effect (from 1 May 2020), supplies of PPE recommended for use in connection with protection from infection with coronavirus in guidance published by Public Health England, is to be zero-rated for UK VAT purposes.

This temporary measure will apply to all supplies made between 1 May 2020 and 31 July 2020 and includes supplies of disposable gloves, disposable plastic aprons, disposable fluid-resistant coveralls or gowns, surgical masks, filtering face piece respirators and protection devices for eyes and faces including single use or reusable full face visors or goggles.

The zero-rate will apply to supplies of all of these products (even from existing stock) if they are recommended for use by Public Health England in its guidance dated 24 April 2020 entitled "Guidance, Covid-19 personal protective equipment (PPE)". The changes will not apply to supplies covered by the zero-rate for goods donated by charities etc or that would be exempt from VAT under the existing 'health and welfare' provisions of UK VAT law.

The temporary relief is being introduced as an urgent response to the coronavirus emergency. Its main objective is to relieve businesses, particularly in the healthcare and residential care sectors, of the burden of tax on essential infection protection equipment needed to deal with the emergency.

### Comment

*This measure, which is aimed at reducing the burden of VAT in relation to the purchase of PPE during the coronavirus outbreak, is to be welcomed.*

*Care homes and other similar institutions will be able to purchase qualifying goods without having to pay VAT which, in many instances would not have been reclaimable due to the exempt nature of the caring activities.*

*Goods that are supplied as part of an exempt supply of welfare services will however continue to be exempt from VAT.*

*The new zero-rate will relieve the burden of VAT on the price of PPE sold in the UK and will also assist the NHS – a major purchaser of such equipment – by ensuring that there is no additional cost incurred by the imposition of standard rate VAT.*

## Revenue & Customs Brief 03/2020 – issued 30 April 2020

### Zero-rate for digital publications implemented with immediate effect

On 30 April 2020, HMRC also announced that it is to bring forward a proposal to introduce the zero-rate of VAT to electronic (or digital) publications. The Chancellor of the Exchequer announced in the Budget in March that the Government intended to introduce the zero-rate for digital publications with effect from 1 December 2020. However, following the outbreak of the coronavirus in the UK and the need for people to stay at home, the Government has announced that the measure is to be implemented with immediate effect (from the next day – 1 May 2020).

Previously, the supply of electronic publications was liable to VAT at the standard rate of 20% but, with effect from 1 May 2020 the supply of electronic or digital books, booklets, brochures, pamphlets, leaflets, newspapers, journals and periodicals (including magazines) and children's picture and painting books will become zero-rated.

HMRC has stated that the supply of audio books will continue to be liable to VAT at the standard rate as will any e-publication that is predominantly devoted to advertising. HMRC has also confirmed that e-book readers and other 'Apps' designed to facilitate the reading of e-books etc will not qualify for zero-rating as they are not, themselves, digital publications.

The zero-rate will apply to all supplies of e-books etc that are supplied 'electronically'. The current VAT law does not define what this means and so HMRC has confirmed that the term must be interpreted in accordance with its generally accepted meaning but it includes supplies that are made over the internet and by email.

### Comment

*Again, the introduction of a zero-rate for e-publications is welcomed. There have been many calls over the last decade or so for the supply of digital publications to be put on the same footing for VAT purposes as the supply of the physical paper versions.*

*The measure addresses the issue going forward but still leaves the historical position 'in the air'. HMRC has appealed the Upper Tribunal's judgment in the case of Newscorp – which ruled that UK VAT law must be interpreted to have always applied the zero-rate to the supply of electronic newspapers. In that case, the Tribunal found that where technological developments – such as the digitalisation of printed matter – were not envisaged when the law was written, the courts must adopt an 'always speaking' view of the law.*

*The Court of Appeal will consider that view when the case is heard in due course.*

## Contacts

### Karen Robb

T +44 (0)20 7728 2556  
E karen.robbs@uk.gt.com

### Nick Warner

T +44 (0)20 7728 3085  
E nick.warner@uk.gt.com

### Alex Baulf

T +44 (0)20 7728 2863  
E alex.baulf@uk.gt.com

### Daniel Sherwood

T +44 (0)1223 225616  
E daniel.sherwood@uk.gt.com

### Nick Garside

T +44 (0)20 7865 2331  
E nick.garside@uk.gt.com

### Paul Wilson

T +44 (0)161 953 6462  
E paul.m.wilson@uk.gt.com

### Claire Hamlin

T +44 (0)161 953 6397  
E claire.a.hamlin@uk.gt.com

### Morgan Montgomery

T +44 (0)121 232 5126  
E morgan.montgomery@uk.gt.com

© 2020 Grant Thornton UK LLP. All rights reserved.

Grant Thornton' refers to the brand under which the Grant Thornton member firms provide assurance, tax and advisory services to their clients and/or refers to one or more member firms, as the context requires. Grant Thornton UK LLP is a member firm of Grant Thornton International Ltd (GTIL). GTIL and the member firms are not a worldwide partnership. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another's acts or omissions. This publication has been prepared only as a guide. No responsibility can be accepted by us for loss occasioned to any person acting or refraining from acting as a result of any material in this publication.