

# Indirect Tax Update

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## Summary

We have several cases from the Court of Justice of the European Union with Germany and Romania again incurring the displeasure of the Judges by refusing refunds of VAT through unlawful procedures.

In a curious case of double taxation of IT support services between Hungary and Portugal, both tax authorities are claiming that VAT is due. The CJEU has been asked to rule, even though the VAT appears to be recoverable by the customer. The AG has simply said that the supplier must look at the legal relationship, and who pays to determine the place and liability for VAT.

The Court of Appeal has confirmed that bad debt relief claims must be underpinned by accounting records that adhere to the rules; and the Upper Tribunal has provided some preliminary guidance to the First Tier Tribunal, that may be helpful in the VAT grouping disputes of HSBC and Barclays.

Finally the contentious Revenue and Customs Brief 12/20 has been replaced with RCB 02/2022 on termination payments.

## News from the CJEU

### [Case C-9/20](#) Grundstücksgemeinschaft Kollaustraße 136 - Germany

On 10 February 2022 the Court ruled that Germany's rules on cash accounting are not in accordance with the Principal VAT Directive.

Comment: the AG's opinion in this dispute was reported in ITU 22/2021. A landlord and tenant both opted to use cash accounting in connection with the lease. The tenant had financial difficulties so did not pay the rent according to the original schedule, and some years later the landlord forgave some of the instalments. The tenant eventually made payments and claimed input tax, but the tax authority argued that the time of supply was the date of the original invoice, and the input tax was claimed out of time. The AG was not impressed by Germany's stance, and it is reassuring to see the Court has agreed with the AG.

[Case C-487/20](#) Philips Orăștie S.R.L – Romania. It seems that the Romanian tax authority held up a significant repayment of input tax on what we would consider spurious grounds. As those rules do not apply in the UK, and the court has found in favour of the taxpayer no further comment is considered necessary.

[Case C-515/20](#) - B AG - Germany. The Court has ruled that Germany's rules taxing wood chips at a different rate to other types of wood held out as only suitable for firewood offends fiscal neutrality.

[Case C-596/20](#) DuoDecad Kft – Hungary. This dispute involves potential double taxation in that both the Hungarian and Portuguese tax authorities say VAT is due on IT support services in their member state. Although it is not clear why, the Hungarian tax authority seem to suggest there is a motive of abuse. This seems odd since the recipient of the services, whether in Hungary or Portugal would appear to be entitled to VAT recovery.

The AG has gone back to basics, saying the supplier must look at the legal relationship and who must bear the cost of the supply and this will determine who is liable for the VAT, and that any suggestion of abuse will not affect this result.

## Further News from the Courts and Tribunal

[\[2022\] EWCA Civ 103 - Court of Appeal - Regency Factors](#). This is the third bite at the cherry by the taxpayer in this dispute. Having previously lost its argument at the First and Upper Tribunal, it again failed to persuade the Court of Appeal of the merits of its claim for bad debt relief. The most telling comment from LJ Lewison is in paragraph 39 of the report: "Regency's accounting system maintains a running account for each client containing "an admixture of funds" which makes it "impossible to apportion credits to particular invoices submitted by a client and receipts from their customer." Instead, the claim for bad debt relief was made on what Regency described as a "pari passu" basis. There is, in my judgment, no foundation for such a claim in the legislation."

### [\[2022\] UKUT 41 \(TCC\) HSBC Electronic Data Processing \(Guangdong\) Ltd and others](#)

This is another in what may be a series of judgements relating to HMRC's exclusion of several companies from the HSBC VAT group with effect from 1 October 2013. Unusually, this judgement of the Upper Tribunal is made in respect of preliminary issues in the First Tier Tribunal appeal.

Readers may recall that Barclays have a similar appeal where HMRC refused to admit companies to the VAT Group for similar reasons to those in HSBC.

The main points from this preliminary judgement are that the Tribunal rejected the appellants' creative interpretation of the condition that group members should be 'established' in the member state in question as requiring only that the links between the members of the group be 'forged in' that state. It also rejected their argument that the measures that a member state could adopt in relation to groups to pre-vent tax evasion or avoidance were limited to those needed to prevent abusive practice within the Halifax principles.

#### Other news

HMRC have published Revenue and Customs Brief 2(2022) on the VAT treatment of early termination fees and compensation payments. We have written a detailed commentary in our VAT alert.

#### Comment:

Failure to maintain a "refunds for bad debts account" in accordance with regulation 168 has again proved fatal for Regency Factors. Since this is a tax relief, HMRC with the support of the Court feel justified in insisting that the rules are followed before allowing a tax refund.

#### Comment:

The FTT's request for preliminary issues to be dealt with by the Upper Tribunal is reminiscent of referrals to the CJEU. Sometimes we see the CJEU dodge the questions and send the case back to the national court to decide on the facts. We see the same philosophy in this case, with the UT saying the FTT will be better placed (as the primary finder of facts) to decide on several of the issues.

We predict that the course of this dispute will be long and winding. We will keep you informed.

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