

# Constable VAT Consultancy

## VAT Focus 30 October 2012

### Reasonable Excuse?

A company, Uniglaze 2 (East Anglia) Limited (Uniglaze) was late paying VAT due on several occasions as a result of difficulties obtaining funds from invoice discounting firms (where funds are borrowed from finance companies based on invoices issued by a business) and a large proportion of bad debts. As a consequence Uniglaze received several default surcharges for late payment of monies shown as due on their VAT returns.

The business was able to demonstrate in several instances (although not all) that either HMRC had agreed to deferment of payment or that the lack of funds was beyond the control of the taxpayer. In these periods the Tribunal found that the default surcharge was not payable, which affected the default rates payable in the other periods. This is a useful reminder that reasonable excuse can include lack of funds in certain circumstances.

### ECJ considers concept of 'fixed establishment' in refund case

Daimler AG (D) manufactured cars and tested them in Sweden. It applied to the Swedish tax authority for a refund of input tax on expenditure relating to this via the 'eighth directive' refund scheme. One of the conditions that must be met in order to obtain such a refund is that the claimant does not have a fixed establishment in the country of refund. The tax authority rejected the claim on the basis that D did have a fixed establishment in Sweden and as such was not eligible to make such a claim. D appealed, contending that it only carried out research in Sweden and did not make any taxable supplies in Sweden, as a result it should not be treated as having a fixed establishment there.

The case was referred to the ECJ for a ruling on the interpretation of the expression 'fixed establishment from which business transactions are effected' in *Article 1* of the *Eighth Directive*. The ECJ held that 'a taxable person for VAT established in one Member State and carrying out in another Member State only technical testing or research work, not including taxable transactions, cannot be regarded as having in that other Member State a "fixed establishment from which business transactions are effected" within the meaning of *Article 1*'.

The ECJ also held that 'the interpretation given to the concept of "fixed establishment from which business transactions are effected" is not affected by the fact that the taxable person has (as in the case of D), in the Member State where it has applied for refund, a wholly-owned subsidiary, the purpose of which is almost exclusively to supply the person with various services in respect of its technical testing activity'. The Court further observed that the wholly owned subsidiary is a taxable person in its own right and the purchases of the goods at issue in the case were not made by it.

### Onerous direction

HMRC suspected Demazda International Ltd (DIL) of being involved in MTIC transactions and directed that a company kept certain records including the serial numbers of any goods bought or sold. DIL appealed against the need to keep such detailed records on the grounds that HMRC's demands in this case offended the EC law principle of proportionality.

The Tribunal ruled that whilst HMRC were justified in making a direction as there was strong connection between DIL's trading and transactions involving tax loss, the specific detail of the direction was ambiguous and therefore defective. As a result the taxpayers appeal was allowed.

### ECJ considers 'destruction of property'

In the Bulgarian case of TETS Haskovo (TETS) the ECJ considered a situation where TETS had acquired some buildings as part of a TOGC. The vendor of the property had recovered VAT on the original acquisition. TETS demolished three of the buildings acquired in order to build new facilities for the generation of taxable supplies of energy.

The Bulgarian authorities sought to assess TETS for the input tax previously claimed by the vendor (TETS assumed liability as successor to the vendor). The tax authority's view was that the deliberate destruction of some of the properties constituted a change in use of the buildings triggering a VAT adjustment. The ECJ ruled that this was not the case as the replacement of the original buildings with more modern buildings to be used for the same purpose did not constitute a change of use.

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Thinking outside the box