VAT update

February 2017

In this month's update we report on HMRC's withdrawal of three VAT extra-statutory concessions, the National Audit Office's investigation into VAT evasion by overseas online retailers and HMRC's responses to the various "Making Tax Digital" consultations. We also comment on three recent cases involving the recovery of VAT input tax on tax planning advice, whether a motor home is a caravan for VAT zero-rating purposes and whether the prepayment rules for VAT appeals infringe the EU law principle of equivalence.

News

Withdrawal of three VAT extra-statutory concessions

On 10 January 2017, HMRC published a technical note and call for evidence on a proposal to withdraw four extra-statutory concessions (ESCs). Three of the concessions concern VAT. more›

National Audit Office (NAO) – VAT evasion by overseas online retailers

The NAO has announced that it is carrying out an investigation into the risk of VAT evasion by overseas online retailers. more›

Making Tax Digital

On 31 January 2017, HMRC published its summary of its six consultation documents regarding "Making Tax Digital". more›

Cases

Doran Bros (London) Limited – VAT on tax planning scheme deductible

In *Doran Bros (London) Limited v HMRC*, the First-tier Tribunal (FTT) found that input VAT on tax planning advice given to a company, which also greatly benefited its sole director, was recoverable. more›

Oak Tree Motor Homes – is a motor home a caravan?

In *Oak Tree Motor Homes v HMRC*, the Upper Tribunal (UT) found that "motor homes", "motor caravans" and "campervans", are not "caravans" for the purposes of Value Added Tax Act 1994 (VATA) Schedule 8, Group 9, Item 1 and accordingly, they could not be zero-rated. more›

Totel Limited v HMRC – requirement to pay disputed VAT before appeal not contrary to EU law

In *Totel Limited v HMRC*, the Court of Appeal held that the VAT prepayment rule in section 84(3), VATA, does not breach the EU law principle of equivalence. more›

Any comments or queries?

Adam Craggs
Partner
+44 20 3060 6421
adam.craggs@rpc.co.uk

Robert Waterson
Legal Director
+44 20 3060 6245
robert.waterson@rpc.co.uk

Michelle Sloane
Senior Associate
+44 20 3060 6255
michelle.sloane@rpc.co.uk

About this update

The VAT update is published on the final Thursday of every month, and is written by members of RPC's Tax Dispute team.

We also publish a Tax update on the first Thursday of every month, and a weekly blog, RPC Tax Take.

To subscribe to any of our publications, please click here.

News

Withdrawal of three VAT extra-statutory concessions

On 10 January 2017, HMRC published a technical note and call for evidence on a proposal to withdraw four extra-statutory concessions (ESCs). Three of the ESCs concern VAT. The VAT ESCs that HMRC want to withdraw relate to the following:

- zero-rating of the central processor in a computer system which allows a central processor to be zero-rated if sold as part of a computer system with software installed to enable a disabled person to use it
- composite rate for computer systems sold to disabled people which allows a trader supplying disabled people with complete computer systems containing significant specialist items for use by the disabled to use a composite VAT rate
- affiliation fees for profit-making commercial sports clubs which allows profit-making sports clubs to treat charges made to their members in respect of these fees as though they were disbursements, to align with the exemption for non-profit-making clubs.

HMRC seeks to gather evidence from those who have relevant data about the potential impact of withdrawing these ESCs. The three VAT ESCs will be withdrawn from 1 April 2018.

Responses to the call for evidence are requested by 7 March 2017.

A copy of HMRC's consultation document can be found here.

back to contents›

National Audit Office (NAO) – VAT evasion by overseas online retailers

The NAO has announced that it is carrying out an investigation into the risk of VAT evasion by overseas online retailers. The investigation focuses on HMRC's role in administering the UK VAT system, including managing and reducing risks to the collection of tax revenue. The investigation will examine how this particular type of tax evasion can occur, estimates of the size of the problem, how and when HMRC has responded to this particular type of tax evasion, and HMRC's plans to keep this type of evasion in check in the future. The NAO have advised that anybody who wishes to contribute can email their representations to enquiries@nao.gsi.gov.uk.

A copy of the NAO announcement can be found here.

back to contents›

Making Tax Digital

On 31 January 2017, HMRC published their summary of six consultation documents regarding "Making Tax Digital". Making Tax Digital is part of the Government's initiative to bring tax into the digital age. During the consultation period, HMRC ran a series of public events throughout the UK to obtain feedback and they received over 1200 responses to the consultation.

After considering the responses, HMRC has confirmed:

- businesses will now be able to continue to use spreadsheets for record keeping, but they must ensure that their spreadsheet meets the necessary requirements of Making Tax Digital for Business – this is likely to involve combining the spreadsheet with software
- businesses eligible for three line accounts will now be able to submit a quarterly update with only three lines of data (income, expenses and profit)
- free software will be available to businesses with the most straightforward affairs
- the requirement to keep digital records does not mean that businesses have to make and store invoices and receipts digitally
- activity at the end of the year must now be concluded and sent either by ten months after the last day of the period of account or 31 January, whichever is sooner
- charities (but not their trading subsidiaries) will not need to keep digital records
- for partnerships with a turnover above £10 million, Making Tax Digital for Business is deferred until 2020.

A copy of HMRC's consultation summary can be found here.

back to contents>

Cases

Doran Bros (London) Limited – VAT on tax planning scheme deductible

In *Doran Bros (London) Limited v HMRC*[1], the First-tier Tribunal (FTT) found that input VAT on tax planning advice given to a company, which also greatly benefited its sole director, was recoverable.

Background

Doran Bros (London) Limited (the Appellant) was a building company. Mr Doran was the sole employee, director and shareholder of the Appellant. Mr Doran, on behalf of the Appellant, obtained advice from Quibic Tax in relation to an Employee Benefit Trust (EBT) arrangement. As a result of that advice, the Appellant purchased £6.1m of investment gold which was put into an EBT for the benefit of Mr Doran. The Appellant paid Quibic Tax £50,000 plus £10,000 VAT for its services and claimed the input tax from HMRC. HMRC denied the input tax on the basis there was an insufficient connection between the tax advice received and the taxable activities of the Appellant which related to building, renovation and construction services.

FTT's decision

The FTT allowed the appeal.

The FTT found that the advice given to the Appellant related to minimising the tax and national insurance contributions (NICs) which were payable by the Appellant if it chose to reward Mr Doran. The FTT accepted HMRC's contention that Mr Doran had benefited from the advice but found as a matter of economic reality, the services had been supplied to the Appellant pursuant to the contractual terms of the engagement. In relation to whether there was a sufficient connection between the expenditure incurred for the tax advice and the taxable activities of the Appellant, the FTT found that the fact that it also benefited Mr Doran, did not preclude it from being for the purposes of the business of the Appellant. The FTT concluded that advice given to a taxable person on how it can reduce its tax and NICs liabilities on making payments to its employees, is advice for the purposes of its business and a general overhead of the business.

Comment

The FTT associated the expenditure on the tax planning arrangements with normal payroll expenditure. This is a helpful case for businesses incurring expenditure in relation to the remuneration of their employees. It will be interesting to see whether HMRC will take this case further given their general attitude towards tax avoidance arrangements. In order to succeed on appeal, HMRC will need to show that there was an insufficient link between the tax planning advice and the underlying taxable supplies of the Appellant.

A copy of the decision can be found here.

back to contents›

Oak Tree Motor Homes – is a motor home a caravan?

In *Oak Tree Motor Homes v HMRC*[2], the Upper Tribunal (UT) found that "motor homes", "motor caravans" and "campervans", are not "caravans" for the purposes of Value Added Tax Act 1994 (VATA) Schedule 8, Group 9, Item 1 and accordingly, they could not be zero-rated.

1. [2017] TC 05554.
2. [2017] UKUT 27 (TCC).

Background
Oak Tree Motor Homes Limited (the Appellant), sells vehicles commonly called “motor homes”, “motor caravans” and “campervans” (the Vehicles). The Appellant considered the Vehicles to be caravans for the purposes of VATA and treated them as zero-rated. HMRC disagreed.

The Appellant’s appeal to the FTT was dismissed. The FTT was of the view that the Vehicles tended to include facilities similar to those in residential accommodation and that those facilities were very similar in type and extent to those included in non-motorised touring caravans. However, the FTT also concluded that, in ordinary English usage and disregarding the legislative context, the word “caravan” did not include motorised vehicles. In the FTT’s view, “caravans” are vehicles that depend on an external source of locomotive power, rather than self-propelled vehicles. Such a view is supported by the legislative context and the reference in VATA to size limits for trailers that can be towed by motor vehicles on the roads.

The Appellant appealed to the UT on three grounds:

1. the FTT erred in law when it determined the meaning of “caravans” based on the ordinary usage of the English language without regard to the definition of “caravan” provided in the Caravan Sites and Control of Development Act 1960 (the 1960 Act)

2. even if it is correct to disregard the definition of “caravan” in the 1960 Act, the FTT misconstrued the term caravans as that term is ordinarily understood and, in particular, should not have limited its meaning to caravans that are not self-propelled

3. the FTT was wrong to find that caravans do not include vehicles that are motorised.

UT’s decision
The Appellant’s appeal was dismissed by the UT.

In the view of the UT, “caravan” is an ordinary word in the English language and therefore its meaning is a question of fact not law. A decision on a question of fact could only be challenged in the UT if the FTT’s conclusion was unreasonable, in the sense that no tribunal could reasonably have reached that conclusion.

The UT was of the view that the FTT had been entitled to conclude that the Vehicles were not “caravans” for the purposes of VATA.

The FTT had also been correct to take account of the fact that the minimum size requirement in VATA referred to trailers towed by motor vehicles and did not refer to self-propelled vehicles. That was an indication that VATA was directed at vehicles that depended on an external source of locomotive power rather than self-propelled vehicles.

In case it was mistaken in its view that the meaning of “caravans” was a question of fact, the UT also considered the meaning if it was a question of law, and concluded that the outcome would be no different. There was nothing in the context and purpose of VATA to suggest that the word “caravans” was intended to apply to vehicles (whatever their size) that were capable of moving independently under their own power. The UT considered the purpose of VATA was to provide relief for caravans that performed the same function as houses or similar accommodation.

Comment

This case demonstrates the difficulty in identifying whether a particular question is one of fact or law. An appeal from the FTT to the UT can only be brought in relation to a question of law. Businesses seeking to claim a VAT exemption for the sale of vehicles under the caravans exemption will need to consider whether their vehicles are "self-propelled" as this element is central in determining whether a vehicle meets the definition of "caravans" in VATA.

A copy of the decision can be found here.

back to contents›

Totel Limited v HMRC – requirement to pay disputed VAT before appeal not contrary to EU law

In *Totel Limited v HMRC*[3], the Court of Appeal held that the VAT prepayment rule in section 84(3), VATA, does not breach the EU law principle of equivalence.

Background

Totel Limited (the Appellant) is a VAT-registered trader. HMRC determined that it was liable to pay sums amounting to £1,474,351.38, said to have been wrongly treated as input VAT in its VAT Returns. The Appellant wished to appeal HMRC's assessment to the FTT, however, VAT appeals are, pursuant to section 84(3), VATA, subject to a "prepayment rule" which means that before the taxpayer can appeal, it must first pay the VAT in issue.

Before the Court of Appeal, the Appellant sought to argue that the prepayment rule for VAT appeals infringed the EU law principle of equivalence. Based on long-standing jurisprudence in the Court of Justice of the European Union (CJEU), the principle of equivalence "requires that the rules regulating the right to recover taxes levied in breach of EU law must be no less favourable than those governing similar domestic actions" (no most favourable treatment)[4].

The Appellant argued that the prepayment rule breached the equivalence principle because VAT appeals are not treated the same as income tax appeals and some domestic indirect tax appeals, such as stamp duty land tax.

The Appellant did not rely on the "equivalence principle" before the UT, and so the UT did not consider it in its decision, from which the instant appeal was brought. However, the UT gave permission to appeal on this point because, being a properly arguable point of EU law, the question was one which the Court of Appeal could properly consider.

Court of Appeal's decision

The Court of Appeal dismissed the Appellant's appeal.

The Court noted that the application of the equivalence principle involves the following two-stage process:

1. identify the similar domestic action

2. if that domestic action is governed by different procedural rules, examine the justification for the difference.

3. *Totel Limited v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 1310, Case No: A3/2015/1980.
4. Test Claimants in the *FII Group Litigation v Revenue and Customs Comrs* [2012] 2 AC 337 at 21.

The Court held that the “no most favourable treatment” proviso was an established feature of the “equivalence principle”, which meant that a Member State would not be required to extend its most favourable rules to actions to enforce EU rights, provided it did not single out EU-derived claims for the most unfavourable treatment. Accordingly, it was open to a Member State to apply any available set of rules, which were already applied to similar claims, to an EU-derived claim provided than an EU-derived claim was not selected for less favourable treatment.

Furthermore, given the lack of harmonisation at EU level of the remedies for overpayment of taxes, and the diversity in the procedural rules set by Member States, there had to be some flexibility in the application of the “equivalence principle”. VAT appeals were no different from a range of other appeals, and there was therefore no need for HMRC to justify the different treatment of other appeals.

Notwithstanding the fact that the Court concluded that the appeal would have failed on the “no most favourable treatment” proviso alone, the Court went on to consider whether a taxpayer’s remedies for overpaid VAT could be treated as “similar” to the remedies for other unpaid taxes. In the Court’s view they could not. CJEU jurisprudence did not make clear how a national court should determine whether an action was “similar” to some other action, and what constituted “similarity” was therefore a matter for national courts. In the UK’s case, VAT was a very different tax from income tax or stamp duty land tax. It was levied on the ultimate consumer but accounted for by a trader. The fact that all appeals were in the first instance determined by the FTT was not sufficient.

Comment

This judgment provides an interesting discussion on the EU law principle of equivalence and provides practitioners with a helpful summary of its application. It would be surprising if this case progressed to the Supreme Court.

A copy of the judgment can be found here.

back to contents>

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 79 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern City legal services business."

At RPC we put our clients and our people at the heart of what we do:

- Best Legal Adviser status every year since 2009
- Best Legal Employer status every year since 2009
- Shortlisted for Law Firm of the Year for two consecutive years
- Top 30 Most Innovative Law Firms in Europe

We have also been shortlisted and won a number of industry awards, including:

- Winner – Law Firm of the Year – The British Legal Awards 2015
- Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015
- Winner – Law Firm of the Year – The Lawyer Awards 2014
- Winner – Law Firm of the Year – Halsbury Legal Awards 2014
- Winner – Commercial Team of the Year – The British Legal Awards 2014
- Winner – Competition Team of the Year – Legal Business Awards 2014
- Winner – Best Corporate Social Responsibility Initiative – British Insurance Awards 2014

Areas of expertise

- Banking
- Commercial
- Commercial Litigation
- Competition
- Construction
- Corporate
- Employment
- Insurance
- Intellectual Property
- Media
- Outsourcing
- Pensions
- Private Equity
- Real Estate
- Regulatory
- Reinsurance
- Tax
- Technology

000000

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000

RPC