VAT update

July 2017

In this month's update we report on HMRC's recent guidance on its approach to supply splitting; the Supreme Court hearing in the *Littlewoods* compound interest case; and the revised timetable for "Making Tax Digital". We also comment on three recent cases involving overpayments of car parking charges; whether the right to deduct VAT is dependent on compliance with conditions relating to the content of invoices; and the correct tax treatment of commission fees for exchanging cash for vouchers.

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Spotlight 38: supply splitting

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Compound interest case: Supreme Court reserves judgment

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Making Tax Digital and the Finance Bill

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RGEX: VAT invoices and the right to deduct input tax

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Any comments or queries?

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About this update

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

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

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Coinstar: exchange of cash for vouchers

In *HMRC v Coinstar Limited* [2017] UKUT 256 (TCC), the UT held that services which consisted of exchanging coins for more convenient vouchers were exempt under item 1, Group 5, Schedule 9, Value Added Tax Act 1994 (VATA). More>

News

Spotlight 38: supply splitting

On 26 June 2017, HMRC published guidance on its approach to situations where supply splitting is considered to have taken place.

HMRC views all VAT supply splitting arrangements that have been designed to reduce the amount of VAT owed as tax avoidance. It has confirmed that it will continue to challenge such arrangements.

Businesses who believe they may be supply splitting should review their arrangements and take appropriate action.

A copy of Spotlight 38 is available to view here.

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Compound interest case: Supreme Court reserves judgment

As reported in our June newsletter, the Supreme Court began hearing HMRC's appeal in the *Littlewoods* compound interest case on 4 July 2017. The principal issue before the Supreme Court for determination was whether the UK's interest provisions provide claimants with "adequate indemnity".

On 5 July 2017, the Supreme Court halted proceedings, indicating that it was inclined either to find in favour of HMRC on both of the issues before it, or to refer questions to the CJEU on the meaning of "adequate indemnity". A finding in HMRC's favour would mean Littlewoods would have to establish that payment of simple interest is contrary to EU law. If, however, a reference is made, this issue is likely to fall away.

The Supreme Court's judgment is expected in Autumn 2017.

A copy of the Court of Appeal's judgment in *Littlewoods* is available to view here.

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Making Tax Digital and the Finance Bill

On 13 July 2017, the Government announced the new timetable for Making Tax Digital – the initiative intended to bring the tax system into the 21st century by providing businesses with a modern, streamlined system to store their tax records and provide information to HMRC.

The Government has revised the expected roll out to ensure businesses have plenty of time to adapt to the changes. Under the new timetable:

- only businesses with a turnover above the VAT threshold (currently £85,000) will have to keep digital records and only for VAT purposes
- they will only need to do so from 2019, and
- businesses will not be asked to keep digital records, or to update HMRC quarterly, for other taxes until at least 2020.

Making Tax Digital will be available on a voluntary basis for the smallest businesses, and for other taxes. All businesses and landlords will have at least two years to adapt to the changes before being asked to keep digital records for other taxes.

The Government also confirmed that the Finance Bill will be introduced as soon as possible after the summer recess. This will legislate for all policies that were included in the pre-election Finance Bill. All policies originally announced to start from April 2017 will be effective from that date.

The Government's announcement is available to view here.

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Cases

National Car Parks: overpayments of car park charges

In *National Car Parks Limited v HMRC* [2017] UKUT 247 (TCC), the Upper Tribunal (UT) upheld a VAT assessment, confirming that VAT is due on the amounts actually paid by customers on car park fees, regardless of whether there had been overpayments made by customers on those fees.

Background

National Car Parks Limited (NCP) carries on a business of operating "pay and display" car parks. A person who parks his car in one of NCP's car parks is required to display a ticket in the car which shows that it is permitted to be in the car park for a specified time. The ticket is obtained from one of the ticket machines in the car park. Different amounts are payable for tickets at different times and depending on how long the car is to be parked. The amounts payable are set out on tariff boards in the car park.

Where customers do not have the correct change to pay the exact amount they must, if they wish to park, put into the ticket machines more than the amount due as the ticket machines do not provide change.

In October 2014, NCP made a claim to HMRC for repayment of overpaid VAT in respect of overpayments of car park tariffs by customers using NCP's pay and display car parks. HMRC refused the claim on the ground that the overpayments "should be regarded as consideration [for the right to park] and are therefore taxable". NCP appealed to the First-tier Tribunal (FTT) on the ground that the overpayments were not consideration for any supply but ex gratia payments outside the scope of VAT.

The FTT dismissed NCP's appeal and held that the full amount, including any excess, paid by the customer was consideration for the taxable supply of the right to park in the car park for a particular period of time.

NCP appealed to the UT.

UT's decision

NCP's appeal was dismissed.

The issue before the UT was whether NCP was required to account for VAT on the payments in excess of the charges for car parking shown on the ticket machines. This turned on whether such payments were consideration for a supply of services by NCP for VAT purposes.

The UT said that it was clear from the case of *Tolsma v Inspecteur der Omzetbelasting Leuwarden* [1994] STC 509, that there is a supply of services for VAT purposes where there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance.

The UT also commented that Article 73 of Council Directive 2006/112/EC states that the taxable amount is everything which constitutes consideration obtained, or to be obtained, by the supplier from the customer or a third party in return for the supply. For example, a customer who paid £1.50 to obtain a ticket which allowed him to park for up to an hour could

have obtained the same right in return for a payment of £1.40. When determining the taxable amount, the UT said that the question posed by Article 73 was not: could the customer have obtained the same service for less? Instead, Article 73 required the Tribunal to ask what consideration was received or was to be received by the supplier from the customer in return for the supply.

In the view of the UT, the meaning of consideration for VAT purposes is clear from cases such as *Staatssecretaris van Financiën v Association Coöperatieve Aardappelenbewaarplaats GA* [1981] ECR 445 and *Campsa Estaciones de Servicio SA v Administración del Estado* [2011] ECR-I 5059. It is the value actually given by the customer (or a third party) in return for the service supplied and actually received by the supplier and not a value assessed according to objective criteria. The service and the value given, or to be given, in return for it may be ascertained from the legal relationship between the supplier and the customer.

Under the contract between NCP and the customer, which was formed when the customer inserts money into the ticket machine and receives a ticket, NCP grants the customer the right to park his car for one hour in return for inserting not less than £1.40. If the customer wishes to park for up to three hours then he must pay not less than £2.10. It followed that NCP agrees to grant a customer the right to park for up to one hour in return for paying an amount between £1.40 and £2.09. If a customer pays £1.50, that amount is the value given by the customer and received by the supplier in return for the right to park for up to one hour. Accordingly, the UT held that this is the taxable amount for VAT purposes and therefore upheld the VAT assessment, confirming that VAT is due on the amounts actually paid by customers on car park fees, regardless of whether there had been overpayments made by customers on those fees.

Comment

This case serves as a useful reminder that VAT is due on everything which constitutes consideration obtained, or to be obtained, by the supplier from the customer or a third party in return for the supply, irrespective of whether there has been an overpayment made by the customer for that supply.

A copy of the decision is available to view here.

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RGEX: VAT invoices and the right to deduct input tax

In *RGEX GmbHc v Finanzamt Neuss* (Case C-374/16) and *Finanzamt Bergisch Gladbach v I Butin* (Case C-375/16), the German tax authorities sought to deny input VAT because the suppliers' invoice addresses were not where they carried on their business.

Background

RGEX GmbHc (RGEX) sold cars out of Germany. It had purchased cars from EXTEL GmbH (EXTEL) and the input tax deductions claimed on the basis of invoices issued by EXTEL had been refused, because EXTEL was considered a "ghost company" which did not have any establishment at the address shown on the invoice.

Similarly, Mr Butin ran a car dealership in Germany and relied on invoices to deduct input VAT for a number of vehicles acquired from a third party for resale. The German tax authorities refused claims for deduction of input tax on the ground that the address stipulated on the invoices issued by the third party was incorrect. The address served as a letterbox address from which the third party collected its post.

The taxpayers lodged their respective appeals. The national court, having doubts as to the correct interpretation of Article 226(5) of the VAT Directive, decided to refer questions to the CJEU for a preliminary ruling.

Advocate General's opinion
Advocate General Wahl (AG) delivered his opinion on 5 July 2017 and confirmed that the fact that the address indicated on an invoice was a mere letterbox address did not justify the denial of the right to deduct input tax.

In reaching his decision, the AG observed that the right to deduction was a key element of the VAT system and, as such, should not in principle be limited. He confirmed that member states may not make the exercise of the right to deduct VAT dependent on compliance with conditions relating to the content of invoices, which are not expressly laid down in the VAT Directive. In his view, the Court had consistently adopted a 'realistic and pragmatic' approach to the interpretation of the VAT rules, rather than a formalistic one.

In the view of the AG the strict approach adopted by the German tax authorities was not justified on a literal interpretation of Article 226(5), which referred to any type of address, including a letterbox address, provided that the trader could be contacted at that address. The approach of the German authorities could not be justified by a purposive interpretation of the VAT system. The purpose of the requirement for an address was simply to identify the trader. A tangible presence of the trader's business at that address was therefore not strictly necessary.

Comment
Questions concerning the formalities of VAT invoices and the denial of deduction of input tax are a common theme in recent case law. The AG has confirmed that the fact an address referred to on an invoice is a mere letterbox address does not justify the denial of a right to deduct input tax.

Tax authorities of member states cannot adopt an unrealistic or non-purposive approach to statutory construction in an attempt to deny taxpayers the right to deduct input tax.

A copy of the AG's opinion is available to view here.

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Coinstar: exchange of cash for vouchers
In *HMRC v Coinstar Limited* [2017] UKUT 256 (TCC), the UT held that services which consisted of exchanging coins for more convenient vouchers were exempt under item 1, Group 5, Schedule 9, Value Added Tax Act 1994 (VATA).

Background
Coinstar Limited (Coinstar) operates around 2,000 self-service coin kiosks in major supermarkets throughout the UK. Customers deposit loose coins in the machines in exchange for either a cash voucher or to make a donation to charity. The display screen indicates to the customer that the cash voucher option is subject to a service fee. If the cash voucher option is selected, Coinstar charges a 9.9% commission fee.

The kiosk contains sensors which detect the number of valid UK coins that have been inserted. This information is shown to the customer on the display screen. If the customer opts to receive a cash voucher, it is printed for the face value of the coins less the service fee. The voucher can then be redeemed at the supermarket's cashier for cash, or used as part payment for the customer's supermarket shopping.

In 2000, HMRC advised Coinstar that where a voucher was issued it considered the supplies made by Coinstar to be exempt from VAT under item 1, Group 5, Schedule 9, VATA. This view was confirmed later in 2001, although HMRC added that where vouchers were used to pay for goods there could be a taxable supply within paragraph 5, Schedule 6, VATA.

Since Coinstar had no way of knowing whether the customer would redeem the voucher for cash or goods, it took the pragmatic approach to exempt the whole commission. However, following a VAT inspection, in July 2015 HMRC changed its position and advised that the commission fee supplies were not exempt. Coinstar appealed this decision to the FTT.

The FTT allowed Coinstar's appeal and held that there was a single exempt overarching service of exchanging coins for a voucher and that was a VAT exempt transaction in securities for money within item 1, Group 5, Schedule 9, VATA.

HMRC appealed to the UT.

UT's decision
HMRC's appeal was dismissed.

Although it was common ground between the parties that the FTT had correctly concluded that Coinstar made a single overarching taxable supply, HMRC argued before the UT that the FTT had failed to consider the contractual analysis in its decision and the agreement was for a coin counting service. HMRC also argued that the FTT had incorrectly concluded that the transaction fell within the terms of the finance exemption.

With regard to the contractual arrangements, the UT confirmed that it was clear from the FTT's decision that it had had the contract firmly in mind and that the customer's election to take vouchers or donate to charity demonstrated that the customer was contracting with Coinstar to receive vouchers in consideration for payment rather than a coin counting service.

The UT held that, as a matter of economic reality, the transaction was not simply limited to coin counting. The 9.9% fee was consistent with that analysis. As the FTT correctly observed, the kiosk did not return the coins and a customer would not pay 9.9% of the value of the coins just to have them counted and returned. The mere fact that the service provided by Coinstar included the counting of coins did not mean that the overarching supply was one of coin counting.

The UT dismissed HMRC's argument that the FTT had mis-characterised the supply. It agreed with the FTT's analysis that the coin counting aspect was merely the necessary pre-condition to the issue of the voucher (which was the main aim of the transaction). It was clear to the UT that in this case the typical customer was seeking to exchange inconvenient loose change for a more convenient voucher and that the counting of the change was necessary to ensure that a voucher in the correct amount was issued.

HMRC also sought to challenge the FTT's conclusion that there was no relevant difference between Coinstar's transaction and a foreign exchange transaction. The UT said that the FTT was entitled to reach this view. There was no material difference between exchanging one currency for another and exchanging one form of Sterling (coins) for another form of Sterling (vouchers).

Finally, the UT rejected HMRC's view that the VAT finance exemption was restricted to situations where the tax base was difficult to determine. That was clearly not the intention of the CJEU in *Velvet & Steel Immobilien und Handels GmbH* (C-455/05). If that were so, all financial services supplied in consideration for an identifiable fee would fall outside the exemption. The UT derived support for its view from *Skandinaviska Enskilda Banken AB Momsgrupp v Skatteverket* (C-540/09) where the CJEU applied the VAT finance exemption even though there was no difficulty in determining the tax base and despite referring to *Velvet & Steel*.

Comment
The UT confirmed that the FTT had been correct in concluding that the economic reality was that the arrangement was one for obtaining vouchers and the level of commission charged meant that the supply went beyond just a coin counting service and was a single supply of exchanging coins for a more convenient payment format in the form of vouchers. Nothing in the VAT Directive prevents the scope of the exemption from applying to a service consisting of exchanging Sterling in one denomination for Sterling in another.

A copy of the decision is available to view here.

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