VAT update

April 2019

In this month's update we report on (1) HMRC's updated guidance on intra-group VAT reverse charge; (2) draft regulations which will tighten the rules on when VAT adjustments may be made following a change to the price of goods and services; and (3) HMRC's updated policy paper which provides an overview of Making Tax Digital for VAT.

We also comment on three recent cases relating to (1) whether the model VAT grouping in sections 43 and 44, Value Added Tax Act 1994, is compliant with article 11, Directive 2006/112; (2) whether a commercial provider of university education was a 'college of a university' for the purpose of note 1(b), item 1, Group 6, Schedule 9, Value Added Tax Act 1994; and (3) the meaning of 'financial extremity', for the purpose of section 85B, Value Added Tax Act 1994.

News

Updated guidance on intra-group VAT reverse charge

On 19 March 2019, HMRC updated VAT Notice 700/2, which sets out guidance for group and divisional VAT registration, to clarify the meaning of 'bought-in services' for the purpose of section 43(2A), Value Added Tax Act 1994. more›

Draft regulations to amend VAT adjustment rules following change to consideration

On 19 March 2019, HMRC published a draft statutory instrument – The Value Added Tax (Amendment) Regulations 2019 – which will amend the rules governing when VAT adjustments may be made following a change to the price of goods and services. more›

Updated policy paper on Making Tax Digital for VAT

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Cases

Lloyds Banking Group – only representative member of a group can reclaim overpaid VAT under section 80, Value Added Tax Act 1994

In *Lloyds Banking Group Plc and others v HMRC*, the Court of Appeal has held that the VAT grouping model outlined in sections 43 and 44, Value Added Tax Act 1994 is compliant with article 11, Directive 2006/112 (PVD). more›

Any comments or queries?

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SAE Education Ltd – Supreme Court paves the way for commercial higher education providers to claim VAT exemption

In *SAE Education Ltd v HMRC*, the Supreme Court has set out the correct approach to determining whether a provider of education was a 'college of such a university' within the meaning of note 1(b), item 1, Group 6, Schedule 9, Value Added Tax Act 1994 (note 1(b)). **more›**

Snow Factor Ltd – meaning of the phrase 'financial extremity'

In *Snow Factor Ltd v HMRC*, the UT has determined the meaning of the phrase 'financial extremity might be reasonably expected to result from that decision of HMRC' in section 85(B), Value Added Tax Act 1994. **more›**

About this update

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

Updated guidance on intra-group VAT reverse charge

On 19 March 2019, HMRC updated VAT Notice 700/2, which sets out guidance for group and divisional VAT registration, to clarify the meaning of 'bought-in services' for the purpose of section 43(2A), Value Added Tax Act 1994.

Section 43(2A) ensures that services are correctly taxed in the UK by imposing a VAT charge due on the whole of the intra-group supply when a UK VAT group acquires certain services through an overseas member of the same VAT group. The value of the supply can be reduced to the amount of the bought-in services used in the making of the onward supply under paragraph 8A, Schedule 6, Value Added Tax Act 1994.

Bought-in services are services that:

- would be taxable in the UK if made to a business belonging to the UK;
- are received by the overseas establishment of a VAT group member; and
- are subsequently used to make a supply of the UK establishment of another member of the VAT group.

From 1 April 2019, services bought-in by the business which, due to an intra-group charge, become a cost directly linked to supplies made by UK establishments, will be subject to VAT. Such services include costs for wages and remuneration of the overseas business' own directly employed staff.

A copy of VAT Notice 700/2 can be viewed here.

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Draft regulations to amend VAT adjustment rules following change to consideration

On 19 March 2019, HMRC published a draft statutory instrument – The Value Added Tax (Amendment) Regulations 2019 – which will amend the rules governing when VAT adjustments may be made following a change to the price of goods and services.

Regulation 38 of the Value Added Tax Regulations (SI 1995/2518) (the VAT regulations) will be amended to provide that a VAT adjustment may only be made following an increase or decrease in consideration for a supply if the supplier provides a debit or credit note containing the information specified in new regulation 15C.

New regulations 24A to 24C will be inserted into the VAT regulations to specify the circumstances in which an increase or decrease in consideration occurs and when it is treated as occurring. Any increase or decrease must be accompanied by a payment or a liability to make a payment.

HMRC is currently consulting on the draft statutory instrument which is due to come into effect on 1 September 2019.

A copy of the statutory instrument can be viewed here.

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Updated policy paper on Making Tax Digital for VAT

On 1 April 2019, HMRC published an updated policy paper which provides an overview of Making Tax Digital for VAT.

VAT registered businesses with a taxable turnover above the VAT threshold are now required to keep digital records and submit tax returns for VAT periods starting after 1 April 2019 using the Making Tax Digital software. Information from their digital records is sent directly to HMRC which should reduce the amount of tax lost due to avoidable errors.

There are a small number of VAT registered businesses whose circumstances are complex and these businesses will not be subject to the Making Tax Digital requirements until 1 October 2019.

A copy of the updated policy paper can be viewed here.

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Cases

Lloyds Banking Group – only representative member of a group can reclaim overpaid VAT under section 80, Value Added Tax Act 1994

In *Lloyds Banking Group Plc and others v HMRC*[1], the Court of Appeal has held that the VAT grouping model outlined in sections 43 and 44, Value Added Tax Act 1994 is compliant with article 11, Directive 2006/112 (PVD). Only the representative member of the VAT group which accounted for the group's VAT to HMRC can bring a claim for repayment of VAT.

Background

The proceedings involved a number of conjoined cases for the recovery of overpaid VAT from HMRC pursuant to section 80, Value Added Tax Act 1994. The taxpayers relied on the *San Giorgio*[2] right to claim reimbursement of VAT which was levied unlawfully due to HMRC's misinterpretation of the law.

Pursuant to article 11, PVD and sections 43 and 44, Value Added Tax Act 1994, where a number of companies join together to create a VAT group, that group appoints a representative member. The representative member deals with all the VAT payments in respect of the other members of the VAT group.

The issue was who has a right to claim back the tax in a situation where the goods or services on which the tax was wrongly levied were supplied by a company which belonged to a VAT group (so that the input tax was accounted for by the representative member) and the real world supplier has left the VAT group at the time the claim is made.

HMRC had accepted the claims for the refund of overpayments made by the representative member but had refused claims by real world suppliers that had left the VAT group.

The taxpayers appealed to the First-tier Tribunal (FTT).

In each of the appeals, the FTT upheld HMRC's interpretation of the law that, in accordance with article 11, PVD and sections 43 and 44, Value Added Tax Act 1994, only the representative member of the VAT group, not the real world supplier, is entitled to the *San Giorgio* right. Where a VAT group has dissolved, the *San Giorgio* right rests with the last representative member. Additionally, the FTT held that in a situation where a real world supplier left the VAT group to join a different VAT group, the real world supplier could assert accrued section 80 rights.

The taxpayers appealed to the Upper Tribunal (UT).

The UT dismissed the appeals and upheld HMRC's interpretation. Its decision was strengthened by the recent Supreme Court decision in *HMRC v Taylor Clark Leisure Plc v HMRC*[3]. Although the taxpayers accepted that the Supreme Court's decision in *Taylor Clark* was binding, they contended that sections 43 and 80, Value Added Tax Act 1994, infringed EU law (an issue not considered by the Supreme Court) and should therefore be construed to bring them in compliance with EU law (applying *Marleasing SA v La Comercial International de Alimentaciou SA* C-106/89).

The taxpayers appealed to the Court of Appeal.

1. [2019] EWCA Civ 485.
2. *Amministrazione delle Finanze Stato v San Giorgio SpA* (199/82) EU: C:1983:318.
3. [2018] UKSC 35.

Court of Appeal judgment
The appeals were dismissed.

The Court held that article 11, PVD, does not provide that the single taxable person created by the VAT grouping provisions operates in such a way that any *San Giorgio* rights are held by the real-world suppliers, so that those suppliers take the rights with them when they leave the VAT group. Sections 43 to 44, which provide that only the representative member can make a section 80 claim, therefore comply with article 11. It said that a court may need to consider a claim brought against a representative member by a real-world supplier that has reimbursed the VAT to its own customers and seeks a remedy against the representative member that accounted for that VAT to HMRC. However, none of the taxpayers were in that position.

The Court confirmed that in circumstances where the group has been dissolved, the last representative member can bring a claim, whether or not it is the same legal entity as fulfilled that role at the time of the supplies and whether or not it is still a taxable person.

Comment
This judgment confirms that, where collective companies sit within a VAT group, it is only the representative member which is entitled to the *San Giorgio* right to make a claim for repayment of overpaid tax pursuant to section 80, Value Added Tax Act 1994. This is the case even if the real world supplier leaves the VAT group. The real world supplier cannot take the *San Giorgio* right with it. Where a VAT group is dissolved, the last representative member is the only entity which can seek recovery of overpaid VAT.

A copy of the judgment can be viewed here.

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SAE Education Ltd – Supreme Court paves the way for commercial higher education providers to claim VAT exemption

In *SAE Education Ltd v HMRC*[4], the Supreme Court has set out the correct approach to determining whether a provider of education was a 'college of such a university' within the meaning of note 1(b), item 1, Group 6, Schedule 9, Value Added Tax Act 1994 (note 1(b)). To be such a college, the provider did not have to form a constituent part of the university. Its objects and the nature of its educational services had to be examined in order to determine whether there was such a level of integration that the provider was imbued with the objects of the university.

Background
SAE Education Ltd (SEL) provides education in audio and digital media technologies. Middlesex University (MU) was a university within the meaning of note 1(b). Although it had never had any financial interest in SEL and no MU employee had ever been a director of SEL, the relationship between MU and SEL was very close. In 1998, SEL and MU agreed a memorandum of cooperation which provided for the teaching by SEL of Bachelor of Arts degree courses in Recording and Multimedia Arts at specified MU campuses. These courses were described as 'validated collaborative programmes' of MU. Overall responsibility for the courses was retained by MU but their day-to-day direction was undertaken by employees of SEL. The students were taught by SEL subject to MU's quality safeguards, were assessed in accordance with MU's regulations and were considered members of MU.

4. [2019] UKSC 14.

SEL appealed against HMRC's assessments to VAT on the basis that supplies of education which it made were exempt from VAT under note 1(b), as they were supplies of education made by 'a university, or any college of such a university'.

The FTT found for SEL and held that the 'integration' test expounded in *School of Finance and Management (London) Ltd v Customs and Excise Commissioners*[5], meant that it was a 'college of' the university within the meaning of note 1(b) and that its supplies of education were therefore exempt from VAT.

The UT disagreed and the Court of Appeal upheld the UT's decision, holding that a body seeking to show that it was a college of a university within note 1(b) had to demonstrate the existence of some legal relationship which confirmed that it was a constituent part of the university in a constitutional or structural sense.

SEL appealed to the Supreme Court.

Supreme Court judgment
The appeal was allowed.

The Court noted that the starting point for a consideration of the proper interpretation of note 1(b) was articles 131 to 133 of PVD. These make clear that member states must exempt transactions involving the provision of, among other things, university education by bodies governed by public law having such education as their aim. Member states must also exempt transactions by other organisations which they have recognised as having similar objects to those governed by public law and which also have education as their aim. The general objective of the exemptions is to ensure that access to the higher educational services is not hindered by the increased costs that would result if those services were subject to VAT.

The Court said that Parliament had chosen to exercise the discretion conferred upon it by exempting from VAT the provision of education by a UK university and any college of such a university. The term 'university' is not defined in the Value Added Tax Act 1994. However, the conditions under which a body in the UK is entitled to use the word university in its title are regulated by statute.

The Court made the following observations:

First, for its activities to fall within the scope of note 1(b), any college of a university, as an eligible body, must provide education. Secondly, the supply of educational services is exempt only if it is provided by bodies governed by public law, or by other bodies recognised by the member state as having similar objects. Thirdly, there is nothing in note 1(b) which would justify limiting the scope of the phrase 'college of such a university' to colleges which are a constituent part of a university in a constitutional or structural sense. On the contrary, the Court noted that if satisfaction of such a constituent part test were required, it would effectively exclude commercial providers from the exemption as it is a test they will rarely, if ever, be able to satisfy. Fourthly, it is necessary to examine the characteristics of those educational services and the context in which they are delivered rather than the precise nature of the legal and constitutional relationship between the body that provides them and the university.

5. [2001] STC 1690.

In assessing whether a body is a "college of such a university" the following five questions are relevant:

1. whether there is a common understanding that the body is a college of the university;
2. whether the body can enrol or matriculate students as students of the university;
3. whether those students are generally treated as students of the university during the course of their period of study;
4. whether the body provides courses of study which are approved by the university; and
5. whether the body can in due course present its students for examination for a degree from the university.

In the view of the Court, the findings of fact of the FTT were sufficient to justify its conclusion that SEL's activities were integrated into those of MU and that it shared the objects of MU. The FTT was entitled to find that SEL was a college of MU, within the meaning of note (1)(b).

Comment
This decision provides much needed clarity for those commercial higher education providers who must collaborate with UK universities because they do not have degree awarding powers.

If a body can establish the presence of each of the above five features, then it is likely to be considered a college of the university within the meaning of note 1(b). The Court made it clear that there may be cases where the degree of integration of the activities of the body and the university is such that it may properly be described as a college of the university notwithstanding that not all of the above five features are present.

Private colleges providing university education as a college of a university who wish to claim VAT exemption should ensure that they are integrated with the university of which they are a college. While not needing representation on one another's boards, they should ensure that they have and document an academic agreement. One of HMRC's objections in this case was that the academic agreement with MU was not UK specific, but established a global relationship with the university via a Dutch subsidiary of an Australian company. This criticism was considered by the Court not to be fair, but a UK specific academic agreement may be advisable in documenting a common understanding of a college relationship.

A copy of the judgment can be viewed here.

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Snow Factor Ltd – meaning of the phrase 'financial extremity'

In *Snow Factor Ltd v HMRC*[6], the UT has determined the meaning of the phrase 'financial extremity might be reasonably expected to result from that decision of HMRC', in section 85(B), Value Added Tax Act 1994.

Background
Snow Factor Ltd (the applicant), was unsuccessful in its appeal against two VAT assessments in the sum of £274,715 before the FTT. The appeals concerned the rate of VAT applicable in respect of receipts relating to lift passes sold by the applicant in running its indoor snow dome. The FTT

agreed with HMRC that the rate of VAT to be applied was the standard rate rather than 5% as contended for by the applicant.

The applicant appealed the FTT's decision to the UT.

HMRC decided that, pending the determination of the applicant's appeal in the UT, the applicant should pay the VAT due in three equal instalments. In response, the applicant made an application to the UT under section 85B, Value Added Tax Act 1994, to not have to pay the VAT in dispute pending determination of its appeal on the ground that it would suffer 'financial extremity'.

UT decision

The UT considered the meaning of section 85B(5)(c), focusing on whether 'financial extremity might be reasonably expected to result' from HMRC's decision. The UT noted that:

- financial extremity was a more onerous test than 'hardship' and 'financial extremity' was at the very far end of financial health;
- what might be 'reasonably expected' was something more than a theoretical possibility and there had to be some reasonable basis that it might occur;
- the matter had to be decided on the basis of what might reasonably happen if the VAT was paid in advance of the appeal hearing;
- The financial extremity had to 'result' from HMRC's decision and there has to be a causative link between the decision requiring the payment of some or all of the disputed VAT and the financial extremity

In the view of the UT, the test of reasonableness was, in essence, an objective one. Having regard to all the circumstances, what steps would it be reasonable to expect to be taken in order to meet the tax liability. The UT also considered the test has certain subjective elements and account should be taken of the particular circumstances affecting the taxpayer concerned and the way in which it had chosen to carry on its business.

The UT noted that section 85B(5)(c) was silent as to the person who had to be in a state of financial extremity, therefore, this could extend to include a group of companies affected by HMRC's decision.

The UT further noted that it had power under section 85B(6)(a) to replace, vary, or supplement, HMRC's decision. The UT concluded that the conditions in section 85B(5)(c) were satisfied and considering the applicant's financial circumstances, it should pay £155,000 of the disputed VAT to HMRC within 30 days.

Comment

This decision provides helpful guidance on the test to be applied when considering 'financial extremity' for the purpose of an application under section 85B(5)(c). This is the first time the UT has considered the test in any detail and it has made clear that 'financial extremity' is more than financial hardship. Taxpayers cannot therefore assume that if HMRC or the FTT have granted relief from payment of the disputed VAT on the grounds of 'hardship' under section 84(3), Value

6. [2019] UKUT 77 (TCC).

Added Tax Act 1994, they will automatically not have to pay the disputed tax should the matter proceed on appeal to the UT, or higher courts, on the basis of financial extremity.

A copy of the decision can be viewed here.

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