VAT update

June 2019

In this month's update we report on (1) amendments to the reduced VAT rate for energy-saving materials; (2) HMRC's guidance on the VAT reverse charge on construction services; and (3) HMRC's updated VAT Notice 700/1 – who should register for VAT.

We also comment on three recent cases relating to (1) whether overpayments are consideration for VAT purposes; (2) the validity of a default surcharge notice; and (3) whether a salary sacrifice scheme under which cars were leased to employees was an economic activity.

News

Amendments to the reduced VAT rate for energy-saving materials

On 20 May 2019, the Value Added Tax (Reduced Rate) (Energy Savings Materials) Order 2019 (SI 2019/958) was made, amending the scope of the reduced VAT rate of 5% for energy-saving materials to ensure consistency with EU law. more›

HMRC Guidance on the VAT reverse charge on construction services

On 7 June 2019, HMRC published Guidance on the VAT domestic reverse charge for building and construction services that comes into effect on 1 October 2019. more›

Updated Notice on who should register for VAT

On 13 June 2010, HMRC updated VAT Notice 700/1 – who should register for VAT. more›

Cases

National Car Parks – are overpayments consideration for VAT purposes?

In *National Car Parks Ltd v HMRC* [2019] EWCA Civ 854, the Court of Appeal has confirmed that excess amounts paid by customers at pay and display car parks were consideration for VAT purposes. more›

Gravitas – default surcharge liability notice was valid

In *Gravitas Group Ltd v HMRC* [2019] UKFTT 324 (TC), the FTT has dismissed the taxpayer's appeal against a VAT default surcharge, despite finding that the subsequently withdrawn surcharge liability notice (SLN) had been issued erroneously by HMRC. more›

Northumbria Healthcare – salary sacrifice car leasing scheme not an economic activity

In *Northumbria Healthcare NHS Foundation Trust v HMRC* [2019] UKUT 170, the UT has found that the effect of the VAT (Treatment of Transactions) Order 1992/630 (the de-supply order), was that a trust, which provided leased cars to employees, was not carrying on an economic activity. more›

Any comments or queries?

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

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

Nicole Kostic
Senior Associate
+44 20 3060 6340
nicole.kostic@rpc.co.uk

News

Amendments to the reduced VAT rate for energy-saving materials

On 20 May 2019, the Value Added Tax (Reduced Rate) (Energy Savings Materials) Order 2019 (SI 2019/958) was made, amending the scope of the reduced VAT rate of 5% for energy-saving materials to ensure consistency with EU law.

Following the Court of Justice of European Union's decision in *Commission v United Kingdom* (C-161/14), that the UK's application of the reduced VAT rate was too broad and breached EU law, the UK announced it would implement measures to amend the scope of the reduced VAT rate. Draft legislation was published on 8 April 2019 and the final Order is identical to the draft legislation.

The Order has effect for supplies made on or after 1 October 2019, except for supplies paid for, or supplies made under a contract entered into, before that date.

The Order can be viewed here.

Back to contents›

HMRC Guidance on the VAT reverse charge on construction services

On 7 June 2019, HMRC published Guidance on the VAT domestic reverse charge for building and construction services that comes into effect on 1 October 2019.

The changes will affect businesses who supply specified services that are reported under the Construction Industry Scheme. The guidance sets out how those affected should prepare for the changes.

HMRC acknowledges that implementing the reverse charge may cause some difficulties. As a result, it has confirmed that it will apply a "light touch" in dealing with any errors made in the first 6 months of the new legislation coming into force, provided businesses are trying to comply with the legislation and have acted in good faith.

The Guidance discusses, amongst other things, when the charge may result in a business becoming a repayment trader, and how minor elements of single supplies could bring the entire supply within the ambit of the reverse charge. It also considers specific businesses such as employment agencies and joint ventures providing staff.

The Guidance can be viewed here.

Back to contents›

Updated Notice on who should register for VAT

On 13 June 2010, HMRC updated VAT Notice 700/1 – who should register for VAT. The criteria used to decide whether an individual is a fit and proper person to act as a VAT representative for a Non-Established Taxable Person have been updated – see paragraph 11.4 of the Notice. The criteria listed has increased from five to eleven.

The Notice can be viewed here.

Back to contents›

Cases

National Car Parks – are overpayments consideration for VAT purposes?

In *National Car Parks Ltd v HMRC* [2019] EWCA Civ 854, the Court of Appeal has confirmed that excess amounts paid by customers at pay and display car parks were consideration for VAT purposes.

Background

National Car Parks Ltd (NCP) operates 'pay and display' car parks in which ticket machines take cash. A board will specify the amounts that must be paid to park for different lengths of time. A person wishing to leave a car for a particular period has to insert coins to the value of at least the figure given for that period in order to obtain a ticket which must be placed in the vehicle in a manner which enables it to be read from outsider the vehicle. Once the requisite coins have been accepted by the machine, the customer will be able to obtain the ticket by pressing a button. Each machine indicates that no change is given and that 'overpayments' are accepted.

In October 2014, NCP made a claim for repayment of overpaid VAT of £488,669, in respect of overpayments of car park tariffs by customers using NCP's car parks. HMRC refused the claim on the ground that the overpayments represented consideration for the right to park.

Both the First-tier Tribunal (FTT) and the Upper Tribunal (UT) agreed with HMRC and held that the taxable amount was the full price actually paid, including any overpayment.

NCP appealed to the Court of Appeal.

NCP argued before the Court of Appeal that:

1. the "direct link" requirement, between the service provided and the consideration received, has a quantitative aspect as well as a causal one. A payment by a customer to a supplier could only represent consideration if and to the extent there is a direct link to the supply. The overpayment was voluntary and so it was not part of the consideration for the supply; and
2. the UT was mistaken in its analysis of the contractual position. The customer is contractually obligated to pay no more than the set tariff (£1.40) for up to an hour's parking. Whilst in practice it would have been difficult to recover any excess payment from NCP, in principle, any excess payment could be recovered.

Court of Appeal judgment

The appeal was dismissed.

The Court commented that English law generally adopts an objective approach when deciding what has been agreed in a contractual context.

The Court was of the view that, taken together, the tariff board and the statement that overpayments were accepted and no change given, indicated that NCP was willing to grant an hour's parking in exchange for coins worth at least £1.40. The precise figure was settled when customers inserted their money into the machine and then elected to press the green button rather than cancelling the transaction. The contract was therefore brought into being when the green button was pressed. By pressing the green button the customer accepted an offer by NCP in return for the coins that the customer had by then paid into the machine.

The Court also noted the view expressed by the UT that *King's Lynn and West Norfolk BC v HMRC* [2012] UKFTT 671 (TC) had been wrongly decided by the FTT. That case concerned car parks operated by a local authority where the scale of charges was laid down in a bye-law. Having heard no arguments on the bye-law, the Court commented that it was not in a position to take a view on the correctness of the FTT's decision in that case, but nor did the Court wish to be seen to be endorsing that decision.

Comment

Given the development of contactless payments, the implications of this decision going forward may be limited. However, the decision will be relevant to businesses who operate systems where customers may pay more than the required price for a supply.

After three adverse judicial decisions, it is unlikely that NCP will seek to appeal to the Supreme Court.

The judgment can be viewed here.

Back to contents>

Gravitas – default surcharge liability notice was valid

In *Gravitas Group Ltd v HMRC* [2019] UKFTT 324 (TC), the FTT has dismissed the taxpayer's appeal against a VAT default surcharge, despite finding that the subsequently withdrawn surcharge liability notice (SLN) had been issued erroneously by HMRC.

Background

Gravitas Group Ltd (GGL) entered the default surcharge regime for its 09/15 period due to late payment of its VAT. It then subsequently defaulted in the periods 12/15, 03/16, 09/16, 09/17, 03/18 and 06/18. HMRC issued a number of SLNs, to GGL as a result of these defaults, pursuant to section 59, Value Added Tax Act 1994 (VATA).

GGL wrote to HMRC regarding the surcharge it had imposed for late payment at the rate of 15% (amounting to £605.70) for the period 06/18. HMRC treated this as a request for review of its decision to impose the SLN.

On review, HMRC upheld its decision to issue the SLN in respect of the period 06/18 and GGL appealed to the FTT.

Before the FTT, GGL argued that the due date for payment of the 06/18 return had been whilst Mr Amar Saleem, a director of GGL, was on leave and it had made the payment the first day he was back (payment was made 6 days late). As a 'one man' business, there was nobody in place who could make the payment in his absence.

At the time of preparing its Statement of Case, HMRC concluded that earlier surcharges (for the periods 09/15 and 12/15) needed to be withdrawn and the surcharge under appeal reduced from 15% to 10%. HMRC wrote to GGL informing it of the position. This adjustment raised an issue as to whether the relevant SLN had been validly issued.

FTT decision
The appeal was dismissed.

The FTT considered that section 59, VATA, was drafted in such a way that no liability would arise if the SLN had not been served. Following *Customs & Excise Commissioners v Medway Draughting & Technical Services Ltd*; *Customs & Excise Commissioners v Adplates Offset Ltd* [1989] STC 346, the FTT agreed that Parliament intended for a warning in the form of an SLN to be given before a surcharge could be levied. In this case, the re-characterising of the earlier defaults did not change the fact that the various SLNs had been sent to GGL in accordance with HMRC's original view of the defaults. The SLNs were sent and receipt was not challenged.

To the extent the purpose of the SLNs were to put GGL on notice that the surcharge regime applied, the FTT concluded that this had been achieved. The withdrawal of the default surcharges by HMRC for 09/15 and 12/15, did not render the original notice invalid or of no legal effect. Even if this was not the case, the FTT commented that the standard language quoted by HMRC's "VAT Surcharge liability notice extension" in subsequent notices sent to GGL would fulfil the statutory requirements of a SLN.

Having concluded that the SLN in dispute had been validly issued, the FTT went on to consider whether GGL had a reasonable excuse. The correct test for considering whether a person has a reasonable excuse was to assess the taxpayer's behaviour against the standards of a responsible taxpayer, taking into account the specific circumstances of the conduct. It was confirmed in *Perrin v HMRC* [2018] UKUT 156 (TCC), that the relevant facts were to be ascertained, proven and then viewed objectively. Applying that approach in the instant case, the FTT held that failure to put in place alternative arrangements to ensure the VAT was paid whilst the sole director of GGL was on leave for three weeks was not reasonable behaviour.

In the grounds of appeal, GGL also indicated that the surcharge was a substantial amount of money. The FTT took this to be a challenge to the fairness or proportionality of the default surcharge regime. In *Total Technology (Engineering) Ltd v HMRC* [2012] UKUT 418 (TCC) and *Trinity Mirror PLC v HMRC* [2015] UKUT 421 (TCC), the UT confirmed that in the absence of exceptional circumstances, the VAT default surcharge regime is proportionate. GGL's case was not an exceptional case as it was familiar with the default surcharge system and had not argued that the surcharges were unusual. Accordingly, the exception did not apply.

Comment
This decision serves as a reminder that taxpayers need to be aware of the effect of a SLN, even where it is considered that the SLN has been issued erroneously, or if it is subsequently withdrawn by HMRC.

The decision can be viewed here.

Back to contents>

Northumbria Healthcare – salary sacrifice car leasing scheme not an economic activity

In *Northumbria Healthcare NHS Foundation Trust v HMRC* [2019] UKUT 170, the UT has found that the effect of the VAT (Treatment of Transactions) Order 1992/630 (the de-supply order), was that a trust, which provided leased cars to employees, was not carrying on an economic activity.

Background

Northumbria Healthcare NHS Foundation Trust (the Trust) had acquired cars to provide to its employees and employees of other NHS trusts under a salary sacrifice scheme (the car scheme). The trust claimed input tax of £14,066,191, under section 41(3), VATA (application to the Crown), on the supply of the cars in the period 1 January 2012 and 31 January 2017. HMRC had restricted recovery to 50% on the ground that the VAT had been incurred for the purpose of a business carried on by the Trust, so that the VAT (Input Tax) Order 1992/3222 (the blocking order) applied. HMRC also contended that, if the Trust was entitled to any refund, the amount claimed from 1 January 2012 to 30 September 2012, was time barred.

It was common ground that a claim under section 41(3) did not fall within the scope of section 83(1), VATA, or any other provision conferring a right to appeal. In the absence of a statutory right of appeal, the Trust applied to the UT for permission to apply for judicial review, which was granted.

The Trust's primary argument was that where an employer provides a leased car by way of a salary sacrifice scheme, it is 'de-supplied' for VAT purposes by the de-supply order so that the supply is deemed not to have taken place. Accordingly, no output tax was due on the provision of a car by the employer to the employee so that the condition in section 41(3)(a) (that the supply must not be for the purpose of any business carried on by the Trust) was satisfied. HMRC considered that the effect of the de-supply order was that the de-supplied transactions were no longer supplies for consideration, but remained part of an economic activity.

UT decision

The Trust succeeded in its claim, to the extent that it related to the period 1 October 2012 to 31 January 2017. HMRC's decision was quashed and HMRC was ordered to pay the amount claimed within 28 days of the date of release of the UT's decision.

In the view of the UT, the provision of the cars by the Trust to the employees under the car scheme was not an economic activity because it had been de-supplied by the de-supply order. Since the effect of the de-supply order was that any 'business' or 'economic activity' relating to the car scheme was to be ignored for VAT purposes, the Trust was deemed to be a purely non-business operation. The terms of section 41(3) were therefore satisfied.

The UT commented that this conclusion was clear from the ordinary meaning of Article 9 (1) of the Principal VAT Directive. There is nothing in Article 9 to suggest that a person who does not supply any services (whether as a matter of fact or by operation of a deeming provision) should or could be regarded as carrying on an economic activity.

The UT did, however, confirm that, but for the effect of the de-supply order, the leasing of cars for consideration is an economic activity.

With regard to the time bar issue, the UT agreed with HMRC that the time limit applicable to the Trust at the time it made its claim was set down in HMRC's publicly available manual 'VAT Government and Public Bodies'. The UT held that a statement in a publicly available guidance document was sufficient to set a time limit of four years. The time limit simply put government departments and public bodies in the same position as ordinary taxable persons making claims under section 80, VATA. A four year time limit was reasonable so the claim in relation to the period 1 January 2012 to 30 September 2012, was time barred.

Comment

In the absence of section 41(3), input tax recovery would have been limited to 50% under Article 7 of the blocking order, as HMRC had claimed. This decision will be welcomed by public sector operators of car salary sacrifice schemes. The decision illustrates how widely deeming provisions will be construed, even where this creates asymmetry – the Trust was entitled to full input tax deduction in relation to the cars but did not have to charge VAT on the leasing.

The decision can be viewed here.

Back to contents>

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 83 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 – Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17**
- **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**

Areas of expertise

- Competition
- Construction & Engineering
- Corporate/M&A/ECM/ PE/Funds
- Corporate Insurance
- Dispute Resolution
- Employment
- Finance
- Insurance & Reinsurance
- IP
- Media
- Pensions
- Professional Negligence
- Projects & Outsourcing
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Technology

19197

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

38/F One Taikoo Place
979 King's Road
Quarry Bay, Hong Kong
T +852 2216 7000

12 Marina Boulevard
38/F MBFC Tower 3
Singapore 018982
T +65 6422 3000