VAT update

April 2020

We hope you are all staying safe and have settled into your new way of working. Next month will see a change to the way we update you on developments in the world of VAT. We will be launching a new publication, V@, which will be a one stop shop for developments in VAT that may impact your business. We hope you enjoy reading our new publication and we would welcome any feedback on the content or new format that could improve it.

In this month's update we report on (1) the Value Added Tax (Finance) Order 2020 (SI 2020/209), which amends the fund management exemption; (2) HMRC's guidance on the deferral of VAT payments due to COVID-19; and (3) HMRC's guidance on how importers can pay no import duty and VAT on medical supplies, equipment and protective garments.

We also comment on three recent cases which consider (1) the deduction of input VAT on supplies of postal services mistakenly treated as VAT exempt; (2) penalties imposed for deliberate inaccuracies in VAT returns; and (3) whether the principle of fiscal neutrality is breached by treating state-regulated service providers differently from non-state-regulated providers.

News items

Treasury makes Value Added Tax (Finance) Order 2020 (SI 2020/209) amending the fund management exemption

On 3 March 2020, the Treasury made the Value Added Tax (Finance) Order 2020 (SI 2020/209) to (i) bring "qualifying pension funds" within the fund management exemption, and (ii) remove the requirement that closed-ended collective investment undertakings must invest wholly or mainly in securities. more›

HMRC publishes guidance on deferral of VAT payments due to COVID-19

On 26 March 2020, HMRC published guidance (updated on 3 April 2020) in relation to temporary changes to the VAT payments due between 20 March 2020 and 30 June 2020 (the deferral period) to help businesses manage their cash flow during the current COVID-19 crisis. more›

Any comments or queries?

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About this update

Our 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.

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

HMRC publishes guidance on how importers can pay no import duty and VAT on medical supplies, equipment and protective garments

On 31 March 2020, HMRC published guidance on how importers can pay no import duty and VAT on protective equipment, relevant medical devices or equipment brought into the UK from non-EU countries during the COVID-19 crisis. more›

Cases

Zipvit – Supreme Court considers deduction of input VAT on supplies mistakenly treated as VAT exempt

In *Zipvit Ltd v HMRC* [2020] UKSC 15, the Supreme Court has referred a number of questions to the Court of Justice of the European Union (CJEU) regarding the correct interpretation of Article 168 of the Principal VAT Directive, in connection with the question of whether a recipient of postal services may deduct input VAT in relation to those supplies where both parties and HMRC had mistakenly treated the supplies as exempt from VAT. more›

Booth – Penalty appeal struck out

In *CF Booth Ltd v HMRC* [2020] UKFTT 35 (TC), the FTT struck out the taxpayer's appeal against penalties imposed for deliberate inaccuracies in its VAT returns, on the basis that the appeal amounted to an "abuse of process". more›

LIFE Services – fiscal neutrality not breached by differences in regulation status

In *LIFE Services v HMRC* and *TLC v HMRC* [2020] EWCA Civ 452, the Court of Appeal held that the principle of fiscal neutrality is not breached by treating state-regulated service providers differently from non-state regulated providers for the purposes of the exemption from VAT of the supply of welfare services, regardless of whether the regulation regime is consistent across the UK. more›

News items

Treasury makes Value Added Tax (Finance) Order 2020 (SI 2020/209) amending the fund management exemption

On 3 March 2020, the Treasury made the Value Added Tax (Finance) Order 2020 (SI 2020/209) to (i) bring "qualifying pension funds" within the fund management exemption, and (ii) remove the requirement that closed-ended collective investment undertakings must invest wholly or mainly in securities.

The Order amends Group 5, Schedule 9, Value Added Tax Act 1994, by:

- inserting a new paragraph (k) in Item 9, to bring qualifying pension funds within the fund management exemption, and amending Note 6 and inserting a new Note 6B to define a "qualifying pension fund", and
- amending the definition of "closed-ended collective investment undertaking" in Note 6, to remove the requirement that closed-ended collective investment undertakings must invest wholly or mainly in securities.

The Order came into force on 1 April 2020.

The Order can be viewed here.

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HMRC publishes guidance on deferral of VAT payments due to COVID-19

On 26 March 2020, HMRC published guidance (updated on 3 April 2020) in relation to temporary changes to the VAT payments due between 20 March 2020 and 30 June 2020 (the deferral period) to help businesses manage their cash flow during the current COVID-19 crisis.

The guidance provides that UK VAT registered businesses which have a VAT payment due during the deferral period have the option to (a) defer the payment until a later date, or (b) pay the VAT due as normal. This does not cover payments for VAT MOSS or import VAT.

The guidance provides that HMRC will not charge interest or penalties on any VAT payment deferred. If businesses choose to defer their VAT payments as a result of COVID-19, they must pay the VAT due on or before 31 March 2021.

Businesses do not need to inform HMRC that they are deferring their VAT payment, but they will still need to submit their VAT returns to HMRC on time. HMRC will continue to process VAT reclaims and refunds as normal during the deferral period.

The guidance can be viewed here.

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HMRC publishes guidance on how importers can pay no import duty and VAT on medical supplies, equipment and protective garments

On 31 March 2020, HMRC published guidance on how importers can pay no import duty and VAT on protective equipment, relevant medical devices or equipment brought into the UK from non-EU countries during the COVID-19 crisis.

The relief applies to items identified in the COVID-19 Community Codes List.

To qualify for the relief, the goods must be imported by or on behalf of an organisation based in the UK which is (a) a state organisation, including state bodies, public bodies and other bodies governed by public law, or (b) another charitable or philanthropic organisation approved by the competent authorities.

The goods must be imported for free circulation and intended (a) for distribution free of charge to those affected by, at risk from, or involved in combating the COVID- 19 outbreak, or (b) to be made available free of charge to those affected by, at risk from, or involved in combating, the COVID-19 outbreak, while remaining the property of the organisations using them.

If the relevant goods stop being used by those affected by COVID-19, importers cannot loan, hire out or transfer the goods, for consideration or free of charge, unless HMRC is notified in advance. Importers will need to pay import duties and VAT if they loan, hire out or transfer their goods to organisations or individuals not affected by the coronavirus outbreak.

The relief applies to imports into the UK until 31 July 2020. It does not affect VAT on domestic supplies.

The guidance can be viewed here.

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Cases

Zipvit – Supreme Court considers deduction of input VAT on supplies mistakenly treated as VAT exempt

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Background

Zipvit Ltd (Zipvit) carries on the business of supplying vitamins and minerals by mail order. During the period 1 January 2006 to 31 March 2010, Royal Mail supplied Zipvit with a number of business postal services under contracts which had been individually negotiated with Zipvit. These included supplies of Royal Mail's "multimedia®" service (the services).

The total price payable by Zipvit under the contract for the services was the commercial price plus the VAT element (insofar as VAT was due in respect of the supply). Both Royal Mail and HMRC understood the services to be exempt from VAT. Royal Mail therefore set out no charge for VAT in its invoices and did not account to HMRC for any sum relating to VAT in respect of the supply of the services. HMRC did not expect, or require, Royal Mail to account to them for any such sum.

In *R (TNT Post UK Ltd) v HMRC* (Case C-357/07), the CJEU held that the postal services exemption in Article 132(1)(a) of the Principal VAT Directive (2006/112/EC) (the Directive), applied only to supplies made by the public postal services acting as such, and did not apply to supplies of services for which the terms had been individually negotiated.

In light of the *TNT Post* judgment, Zipvit made two claims to HMRC for deduction of input VAT in respect of the services. These claims were calculated on the basis that the prices actually paid for the services must be treated as having included a VAT element. HMRC rejected Zipvit's claims on the basis that Zipvit had been contractually obliged to pay VAT in relation to the commercial price for the services, but it had not been charged VAT in the relevant invoices and had not paid that VAT element. HMRC upheld their decision following an internal review.

Zipvit appealed against HMRC's review decision to the First-tier Tribunal (FTT).

FTT decision

The appeal was dismissed.

The FTT held that the services were standard rated as a matter of EU law, as the judgment in *TNT Post* indicated, and that the postal service exemption in national law should be interpreted in the same way, so that the services were properly to be regarded as standard rated as a matter of national law.

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The FTT held that:

- HMRC had no enforceable tax claim against Royal Mail because Royal Mail had not declared in its VAT returns any VAT in respect of its supply of the services, had made no voluntary disclosure of underpaid VAT, had not issued any invoice showing the VAT as due, and HMRC had not assessed Royal Mail as liable to pay any VAT. In those circumstances there was no VAT "due or paid" by Royal Mail in respect of the supply of the services, for the purposes of article 168(a) of the Directive (the due or paid issue)
- in any event, since Zipvit did not hold valid tax invoices in respect of the supply of the services, showing a charge to VAT, it had no right to claim deduction of such VAT as input tax (the invoice issue)
- although HMRC have a discretion under national law to accept alternative evidence of payment of VAT in place of a tax invoice (under regulation 29(2) of the Value Added Tax Regulations 1995 (SI 1995/2518)) (regulation 29(2)), which HMRC had omitted to consider in its decisions, on due consideration whether to accept alternative evidence, HMRC would inevitably and rightly have decided in the exercise of its discretion not to accept Zipvit's claim for a deduction of input VAT in respect of the services. The important point in that regard was that repayment of notional input VAT to Zipvit in respect of the services would constitute an unmerited windfall for Zipvit.

Zipvit appealed to the Upper Tribunal (UT).

UT decision
The appeal was dismissed.

The UT's reasoning on the due or paid issue differed from that of the FTT.

The UT upheld the FTT's decision on the invoice issue and on the question of the exercise of discretion by HMRC under regulation 29(2).

Zipvit appealed to the Court of Appeal.

Court of Appeal judgment
The appeal was dismissed.

After an extensive review of the case law of the CJEU in relation to the due or paid issue, the Court of Appeal decided that the position was not *acte clair*.

The Court reached the same conclusions as the tribunals below on the invoice issue and the question of the exercise of discretion by HMRC under regulation 29(2). The Court considered the position regarding the invoice issue to be *acte clair*, so that no reference was required to the CJEU.

The Court held that it was unnecessary to make a reference to the CJEU on the due or paid issue, given that Zipvit's claims failed on the invoice issue.

Zipvit appealed to the Supreme Court.

Supreme Court judgment

In the Supreme Court, it was common ground that due or paid meant due or paid by the trader to the supplier, not by the supplier to HMRC.

The Court decided that neither the due or paid issue, nor the invoice issue, could be regarded as *acte clair* and that a reference should be made to the CJEU to clarify the position.

Comment

Deduction of the input VAT would represent a windfall for Zipvit, as it paid only the VAT-exclusive price for the services and it would leave HMRC out of pocket, as Royal Mail did not account to HMRC for VAT in respect of the services.

This was a test case in respect of supplies of services by Royal Mail where the same mistake was made and the total value of the claims against HMRC is estimated to be between £500m and £1 billion. With such a large amount at stake, it is not surprising that the Supreme Court decided to make a reference to the CJEU. Although the UK is no longer an EU member state it must still adhere to the jurisdiction of the CJEU under the terms of the Withdrawal Agreement.

A copy of the judgment can be viewed here.

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Booth – Penalty appeal struck out

In *CF Booth Ltd v HMRC* [2020] UKFTT 35 (TC), the FTT struck out the taxpayer's appeal against penalties imposed for deliberate inaccuracies in its VAT returns, on the basis that the appeal amounted to an "abuse of process".

Background

CF Booth Ltd (CFB) challenged HMRC's decision, made on 4 May 2018, to notify it of a penalty assessment in the sum of £1,444,813 under Schedule 24, Finance Act 2007, for VAT periods 10/12-09/13, and 02/14 (the penalty assessment). The penalty assessment was issued on the basis that CFB's VAT returns for those periods contained deliberate inaccuracies.

The penalty assessment was issued against the background of the following:

- in October 2014, HMRC issued an assessment to CFB in the sum of £160,281, under section 73, Value Added Tax Act 1994 (VATA), and
- in March 2015, HMRC denied input tax in the sum of approximately £2.6 million.

The first decision denied a claim by the appellant to zero-rate eight supplies of metal to a Belgian trader, Metaux Groupe Belge. The second decision was on the basis that 655 purchases of various metals, on which the input tax was incurred, were connected to the fraudulent evasion of VAT and that CFB knew, or should have known, of the fraud.

CFB appealed these decisions and in 2017 the FTT decided that CFB's VAT returns, in relation to the relevant transactions, contained inaccuracies (the 2017 decision). HMRC proceeded to issue the penalty assessment, which CFB appealed.

CFB accepted that its VAT returns contained inaccuracies for each of the relevant accounting periods in question, but argued that the inaccuracies were not deliberate.

HMRC applied to the FTT, under Rule 8(3) of the Tribunal Rules, for part of CFB's appeal to be struck-out, on the basis that it had no reasonable prospect of success. This was on the basis that the appeal was either an abuse of process (because the 2017 decision had already established that the returns contained deliberate inaccuracies), or on the basis that the appeal was unarguable.

FTT decision
The application was granted.

The FTT noted that a penalty issued under Schedule 24, VATA, is a "criminal charge" for the purposes of Article 6, European Convention on Human Rights (the Convention), with the effect that the burden of proof in relation to the penalty is on HMRC rather than on CFB.

Rule 8(3)(c) of the Tribunal's Rules provides that:

"The Tribunal may strike out the whole or a part of the proceedings if— [...]

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding".

In relation to the 2017 decision, the FTT stated that that decision established that CFB must have had knowledge of what was happening and cannot have either acted in good faith or taken every reasonable measure not to become a participant in the VAT fraud.

The FTT went on to consider the meaning of 'deliberate' in this context and said:

"I disagree with the Appellant that an allegation of deliberate conduct is tantamount to an allegation of fraud and/or must inevitably involve some element of dishonesty. I disagree with the thrust of the Appellant's submissions that deliberate conduct in Schedule 24 has a higher threshold than actual knowledge of connection to fraud in a Kittel-type appeal. I simply do not see (whether as a matter of law or language) why that should be the case".

The FTT, referring to the decision of the Court of Appeal in *HMRC v Tooth* [2019] EWCA Civ 826 (currently on appeal to the Supreme Court), said that there need not be any degree of dishonesty on the part of the taxpayer in order for their conduct to amount to 'deliberate' behaviour. In the view of the FTT, the concept of deliberate, in Schedule 24, is sufficient to catch the situation where a taxpayer has been found to have actually known that the transactions were connected to fraud.

The FTT also concluded that to strike out CFB's appeal would not violate its rights under the Convention and that Rule 8(3)(c) does extend to striking-out an appeal on the basis that the appeal is an abuse of process. In the view of the FTT, CFB could not be permitted to argue that its conduct, in relation to the inaccuracies, was anything other than deliberate, as to do so would allow CFB:

"impermissibly and as an abuse of process, to revisit ... the final and binding findings of fact already made by the FtT...The Appellant had a full opportunity to put forward its case as to the absence of connection to fraud, and its want of knowledge of such connection ... [and] it would be contrary to the principle of finality of litigation to allow the FtT's determinations in 2017 to be re-visited in this appeal. There are no circumstances which could justify such a course."

The FTT also held that, even if CFB's conduct did not amount to an abuse of process, its arguments were hopeless, as the 2017 decision comprehensively addressed the points in issue in the appeal.

Comment

Whilst the FTT's conclusion in this case is perhaps not surprising, the FTT noted that HMRC's argument conflicted with its arguments in *Microring Ltd v HMRC* [2019] UKFTT 456 (TC). Such an unprincipled approach is of concern. HMRC should not be adopting conflicting positions in different cases in order to advance its case in any given appeal. As we commented in an earlier blog on the decision in *Jafari v HMRC* [2019] UKFTT 692 (TC), where HMRC's failure to draw relevant authorities to the FTT's attention was criticised by the FTT, HMRC is under a general duty of candour and must act consistently in its dealings with both taxpayers and the FTT.

The decision can be viewed here.

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LIFE Services – fiscal neutrality not breached by differences in regulation status

In *LIFE Services v HMRC* and *TLC v HMRC* [2020] EWCA Civ 452, the Court of Appeal held that the principle of fiscal neutrality is not breached by treating state-regulated service providers differently from non-state regulated providers for the purposes of the exemption from VAT of the supply of welfare services, regardless of whether the regulation regime is consistent across the UK.

Background

Leisure, Independence, Friendship and Enablement Services Ltd (LIFE Services) and The Learning Centre (Romford) Ltd (TLC) are both limited for-profit companies providing day-to-day care services at off-site facilities to adults and vulnerable people with a broad spectrum of disabilities, through various direct and indirect arrangements with the Gloucestershire County Council and the London Borough of Havering (together, the Council). LIFE Services provided services to the Council following assessment of needs under the Care Act 2014 (Care Act).

The UT had upheld, reversing the decision of the FTT, HMRC's contention that both LIFE Services and TLC's supplies of day care services to vulnerable adults were subject to VAT at the standard rate; the VAT exemption under Item 9, Group 7, Schedule 9, VATA, did not apply. Both LIFE Services and TLC appealed to the Court of Appeal. LIFE Services on the ground that Item 9 did apply to it and both on the grounds that Item 9 breached the principle of fiscal neutrality.

Item 9 exempts from VAT the supply by (a) a charity, (b) a state-regulated private welfare institution or agency, or (c) a public body of welfare services and of goods supplied in connection with those welfare services.

It was not disputed by the parties that both LIFE Services and TLC provided welfare services. LIFE Services argued that it was state-regulated by virtue of the oversight and direct control of the Council through a direct and indirect services contract.

LIFE Services argued that, in the event it was not exempt under Item 9, Item 9 breached the principle of fiscal neutrality for the following three reasons (of which TLC supported only the third reason):

- Item 9 differentiates in its treatment of charities and private operators providing the same services
- Item 9 entitles charities to the exemption regardless of whether they are devoted to social wellbeing, and
- Item 9 treats the providers of day care services in England and Wales differently to Scotland and Northern Ireland, due to the latter's requirement of state regulation under devolved legislation.

Court of Appeal judgment
The appeals were dismissed.

Whether LIFE Services was state regulated
The UT had accepted HMRC's argument that the review regime under the Care Act for day care facilities was not as exacting as that required under the Health and Social Care Act 2008, under which residential care homes are state-regulated. LIFE Services argued, and the Court accepted, that the comparison of one regime to another was not relevant to whether the relationship between LIFE Services and the Council under the Care Act amounted to "state regulation". LIFE Services argued that it was authorised by the Council to provide welfare services on the Council's behalf and therefore it was, in effect, approved or registered pursuant to those provisions which amounted to state-regulation for the purposes of Item 9. The Court did not accept that argument, as the sections of the Care Act which LIFE Services contended amounted to state-regulation did not apply to the contractual relationship between LIFE Services and the Council and, even should those sections apply, in the view of the Court they did not amount to "state regulation".

Whether Item 9 breached the principle of fiscal neutrality
LIFE Services argued that Item 9 imposed different treatment for charities and private bodies because charities could avail themselves of the exemption whether or not they were 'state-regulated'. The Court accepted LIFE Services' submission that the UT had failed to ask itself the correct question, which was whether regulation made a difference in the mind of the consumer, which would justify the difference in VAT treatment. The Court held that it was open

to the UT to conclude that the welfare services provided by state-regulated private welfare bodies are significantly different to those provided by non-state-regulated private welfare bodies in the eyes of consumers. The Court further held that there was a difference in the services provided by charities, which are for public benefit and subject to the supervision of the Charity Commission.

In relation to whether Item 9 applied to all charities, regardless of their charitable purpose, or to only those who were exclusively concerned with social wellbeing, the Court was divided. In the opinion of Arnold LJ, devoted to social wellbeing, meant 'exclusively concerned with'. Newey and Floyd LJJ were of the view that to require a charity to be exclusively concerned with social wellbeing would exclude charities with more than one charitable purpose, or scope of operation. The Court stated that this question, not having been properly argued before it, did not require determination in the context of these appeals.

The provision of day care services is a devolved matter, which has allowed Scotland and Northern Ireland to introduce legislation regulating these operations. LIFE Services and TLC argued that this meant that Item 9 contravened the principle of fiscal neutrality, as the VAT treatment of the provision of such services would differ based on where in the UK the services were provided. LIFE Services and TLC submitted that the UK was required, by the principle of fiscal neutrality, to ensure that similar services were accorded similar VAT treatment throughout the UK. The Court rejected this submission, as it had already found that there was a difference in the mind of a consumer between state regulated and non-state regulated providers and whether this regulation differed was "because they are located in a nation which does not regulate day care services, or for some other reason, the result is the same, namely that they are perceived by consumers as significantly different to state-regulated providers". Accordingly, no breach of the neutrality principle arose.

Comment

LIFE Services argued that the UT's conclusions in relation to the mind of the consumer were not open to the UT because there was no evidence before it as to the impact of state-regulation, or indeed charitable status, on the mind of the consumer. It is surprising that the Court's findings on the impact of state regulation on the mind of the consumer were made, not on the basis of any actual evidence before the Court, from either side, but by the Court "using its own experience of the world" and it said that it did not require "evidence such as a consumer survey or expert report" to determine whether services are regarded as similar for the purposes of a decision on fiscal neutrality. Reaching such a conclusion without any evidence is likely to lead to uncertainty in future cases when considering whether fiscal neutrality applies.

The judgment can be viewed here.

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About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

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

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

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- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
- Winner – Client Service Innovation Award – The Lawyer Awards 2017
- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
- Winner – Adviser of the Year – Insurance Day (London Market Awards) 2017
- Winner – Best Tax Team in a Law Firm – Taxation Awards 2017
- Winner – Claims Legal Services Provider of the Year – Claims Club Asia Awards 2016

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