VAT update

June 2018

In this month's update we report on HMRC's consultation on draft legislation imposing VAT reverse charge on the construction industry; the European Commission's proposal concerning the taxation of intra-EU supplies; and HMRC's recently published guidance on the VAT treatment of goods supplied on approval. We also comment on three recent VAT cases on the supply of services in relation to the construction of a building designed as a dwelling; whether a bottle of wine included in an M&S promotional scheme is a gift; and a ruling of the CJEU that taxpayers may deduct input tax on payments on account for goods that are not delivered.

News

HMRC consultation on draft legislation imposing VAT reverse charge for construction services

On 7 June 2018, HMRC published a consultation seeking comments on a draft HM Treasury order and related documentation for a VAT reverse charge for construction services. more›

Commission proposes amendments to the Principle VAT Directive for reform of intra-EU B2B supplies of goods

On 25 May 2018, the European Commission released a further proposal concerning the taxation of intra-EU supplies, intended to prevent VAT fraud, which is expected to come into effect on 1 July 2022. more›

Revenue and Customs Brief 5 (2018): VAT liability on goods supplied on approval

On 18 June 2018, HMRC published Revenue and Customs Brief 5 (2018): VAT liability on goods supplied on approval. more›

Cases

Summit Electrical Installations: VAT zero-rating of student accommodation not defeated by "separate use" exclusion

In *Summit Electrical Installations Ltd v HMRC* [2018] UKUT 176 (TCC), the Upper Tribunal (UT), agreeing with the First-tier Tribunal (FTT), has held that VAT zero-rating of supplies in the course of constructing student accommodation was not precluded by the "separate use" requirement in note 2(c) to Group 5, Schedule 8, Value Added Tax Act 1994 (note 2(c)). more›

Any comments or queries?

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

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

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

Marks and Spencer: "Free" wine not free for VAT

In *Marks and Spencer Plc v HMRC* [2018] UKFTT 0238 (TC), the FTT has held that where a retailer's promotional offer invited customers to buy three specified food items for £10 and receive a "free" bottle of wine, output tax was payable on the wine element of the promotion. more›

Finanzamt Dsachau: Input VAT recovery permitted for payments on account of undelivered goods

In *Finanzamt Dsachau v Achim Kollro* and *Finanzampt Goppingen v Erich Wirtl* (joined cases C-660/16, C-661/16) the the Court of Justice of the European Union (CJEU), agreeing with the Opinion of Advocate General Wahl (AG), has ruled that taxpayers may deduct input tax on payments on account (POA) for goods that are not delivered and that national legislation may make any subsequent adjustments to deductions conditional on the POA being refunded. 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.

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

News

HMRC consultation on draft legislation imposing VAT reverse charge for construction services

On 7 June 2018, HMRC published a consultation seeking comments on a draft HM Treasury order and related documentation for a VAT reverse charge for construction services.

The measures are intended to tackle the estimated £100million in fraud emanating from the construction sector each year. The proposed measures will significantly increase compliance costs for an estimated 150,000 businesses across the UK. The measures will make the customer responsible for reporting the relevant transaction to HMRC.

The final version of the draft order and guidance are to be published prior to October 2018, with the legislation taking effect from 1 October 2019.

Responses to the consultation should be made by 20 July 2018.

The consultation document and draft legislation can be viewed here.

Back to contents>

Commission proposes amendments to the Principle VAT Directive for reform of intra-EU B2B supplies of goods

On 25 May 2018, the European Commission released a further proposal concerning the taxation of intra-EU supplies, intended to prevent VAT fraud, which is expected to come into effect on 1 July 2022. The proposed draft Council Directive would amend the Principle VAT Directive in various technical respects enabling the move to a destination-based VAT system for intra-EU business-to-business (B2B) supplies of goods.

Currently, trade in goods between businesses is split into two transactions: a VAT-exempt sale in the Member State of origin and a taxed acquisition in the Member State of destination. The proposed changes will define the cross-border trade of goods as a 'single taxable supply' and are designed to ensure that goods are taxed in the Member State where the transport of the goods ends.

The Commission's Press Release can be viewed here.

Back to contents>

Revenue and Customs Brief 5 (2018): VAT liability on goods supplied on approval

On 18 June 2018, HMRC published Revenue and Customs Brief 5 (2018): VAT liability on goods supplied on approval. The guidance explains HMRC's policy on when goods are supplied on approval and the liability of the delivery charges for those goods.

The Brief will be of particular interest to mail order retailers and anyone supplying goods delivered on approval.

The Brief can be viewed here.

Back to contents>

Cases

Summit Electrical Installations: VAT zero-rating of student accommodation not defeated by "separate use" exclusion

In *Summit Electrical Installations Ltd v HMRC* [2018] UKUT 176 (TCC), the Upper Tribunal (UT), agreeing with the First-tier Tribunal (FTT), has held that VAT zero-rating of supplies in the course of constructing student accommodation was not precluded by the "separate use" requirement in note 2(c) to Group 5, Schedule 8, Value Added Tax Act 1994 (note 2(c)).

Background

The appeal concerned the question of whether supplies made by Summit Electrical Installations Ltd (Summit), were zero-rated for VAT purposes. The supplies were made by Summit, as a subcontractor, to Create Construction Ltd in connection with student accommodation at Primus Place, Jarrom Street, Leicester (Primus Place). The issue was whether the supplies were zero-rated as supplies in the course of construction of buildings designed as a number of dwellings. If they were not, they would be standard rated.

FTT decision

Summit argued that the supplies were zero-rated as they fell within items 2 and 4, Group 5, Schedule 8, Value Added Tax Act 1994 because Primus Place was a "building designed as a ... number of dwellings". That meant it had to comply with the requirements set out in the four sub-paragraphs of note 2. There was no dispute that it satisfied the requirements of subparagraphs (a), (b) and (d). The question was whether it also satisfied the requirements of sub-paragraph (c). Summit argued that note 2(c) disallowed only prohibition on use separate from other land or buildings. HMRC submitted that it did not.

The FTT agreed with Summit and allowed its appeal. HMRC appealed to the UT.

UT decision

The appeal was dismissed.

The UT held that note 2(c) disallowed only prohibition on use separate from other land or buildings. This followed *HMRC v Shields* [2014] UKUT 043 (TCC), distinguishing conditions relating to particular other land or buildings and those relating to a business, only the former being relevant for note 2(c) purposes. The UT said:

"We therefore take the law to be as follows. A prohibition on separate use for the purposes of Note (2)(c) to Group 5 of Schedule 8 of VATA will not be found unless the effect of the relevant term in the particular case is to prohibit use of the premises separately from the use of other specific land."

The UT concluded that the condition required only that the accommodation be used by students of a particular university, which could have moved premises or opened an additional site without breaching the condition. The link was not with specific other land or buildings.

Comment
This decision provides helpful clarification, following arguable discrepancies in previous decisions, on the meaning of note 2(c) and confirms that some buildings can meet the test of being both a relevant residential building and a dwelling with zero-rating being available to both main and sub-contractors.

A copy of the decision can be viewed here.

Back to contents>

Marks and Spencer: "Free" wine not free for VAT

In *Marks and Spencer Plc v HMRC* [2018] UKFTT 0238 (TC), the FTT has held that where a retailer's promotional offer invited customers to buy three specified food items for £10 and receive a "free" bottle of wine, output tax was payable on the wine element of the promotion.

Background
The case concerned a promotional scheme ran by Marks and Spencer Plc (M&S) which entitled customers to three food items with a "free" bottle of wine for £10. M&S decided to change the original offer of a main, side, dessert, and bottle of wine for £10, to include a main, side, and dessert for £10, with the bottle of wine being treated as an optional "free" component of the sale. If sold separately, food items were zero-rated for VAT while wine was standard-rated.

HMRC and M&S had previously entered into a retail scheme agreement which stated that where an item or items were given away "free" on the purchase of a specified product or products, no VAT would be due on the "free" item. Following a disagreement on how the promotion should be treated for VAT purposes, HMRC assessed M&S to nearly £12 million in VAT. M&S appealed the assessment to the FTT.

FTT decision
The principal issue before the FTT was whether the £10 should be apportioned between the food and wine, or whether the wine was supplied free of charge for VAT purposes. The FTT concluded that the wine was not free as M&S contended. Rather, the wine was offered conditionally on the purchase of the food items for payment of £10. Accordingly, in the view of the FTT, the price should be apportioned across all four items for VAT purposes. Even though customers could choose not to take the wine and the price for the food would still be £10, this did not mean that the wine was "free". The wine was supplied for consideration as a customer had to spend £10 on food in order to obtain a bottle of wine. Further, whilst the wine was offered subject to availability and did not need to be accepted by the customer, this was considered to be irrelevant for VAT purposes. In the view of the FTT, on a proper analysis of the "economic and commercial reality" of the transaction, the wine was not being supplied for nil consideration. Similarly, the wine was not being supplied as a gift and so the gift exemption did not apply. The term "free" was simply being used in a marketing sense (*Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16) in the same way that a "buy one get one free" promotion is marketed.

Comment
The FTT highlighted that neither case law nor HMRC's practice provides a coherent and consistent set of principles that can be applied to determine the VAT treatment of transactions involving "free" goods or services. The FTT did not seek to lay down principles of wider application and this decision highlights the uncertainty over the correct VAT treatment

of transactions involving "free" goods, vouchers and rewards. It is therefore important to determine each case on its own particular facts, assessing both the contractual terms and the commercial reality.

A copy of the decision can be viewed here.

Back to contents>

Finanzamt Dsachau: Input VAT recovery permitted for payments on account of undelivered goods

In *Finanzamt Dsachau v Achim Kollro* and *Finanzampt Goppingen v Erich Wirtl* (joined cases C-660/16, C-661/16) the the Court of Justice of the European Union (CJEU), agreeing with the Opinion of Advocate General Wahl (AG), has ruled that taxpayers may deduct input tax on payments on account (POA) for goods that are not delivered and that national legislation may make any subsequent adjustments to deductions conditional on the POA being refunded.

Background

The two joined cases concerned taxpayers who had ordered a combined heat and power unit from a German company (the supplier) and made POA (following receipt of invoices). In both cases, the unit was never delivered. Subsequently, the persons acting for the supplier were convicted of fraudulent trading practices and conspiracy to defraud. The supplier was put into insolvency. Both taxpayers sought to obtain a deduction for the input VAT they incurred on the POA made. The German tax authorities sought to recover the deductions and the cases came before the German courts who referred the following questions to the CJEU:

1. Are the requirements as to the certainty that a supply will take place to be determined purely objectively from the point of view of the person making the POA?
2. Are Member States entitled to make the adjustment of both tax and the deduction of input tax subject to a refund of the POA?
3. Must the relevant tax authority refund the VAT to the taxpayer who has made a POA where the taxpayer cannot recover the POA from the recipient of that payment (in this case, the supplier)?

CJEU judgment

In considering the first question, the CJEU looked at when the "chargeable event" occurs and the concept of "certainty" of supply. It was noted that Council Directive 2006/112/EC (the VAT Directive) provides that in these circumstances, VAT becomes chargeable on the receipt of a POA. In order for the VAT to be chargeable in such circumstances, information such as the future supply of goods and services must already be known and when the POA is made, the goods must be precisely identified. Furthermore, the CJEU decided that even though the invoices did not specify a date of delivery, that did not render the supply of good "uncertain". However, where the buyer of goods knew or should reasonably have known that the supply was uncertain, the buyer may be refused the right to deduct the VAT.

The second and third questions were considered together. The CJEU concluded that the VAT Directive should be interpreted as not precluding, in circumstances such as where a supplier of goods becomes insolvent, a national law or practice which enables the adjustment of VAT relating to a POA for the supply of goods, conditional upon that POA being refunded by the supplier.

Accordingly, the taxpayers were entitled to deduct the input tax.

Comment

The CJEU did not rule on the question of whether the taxpayers could reclaim input tax from the tax authorities when the supplier became insolvent. However, it did confirm that the principle in *Reemtsma Cigarettenfabriken GmbH* (Case C-35/05) could apply such that, if the input tax deductions were adjusted, the taxpayers would have a claim for recovery against the tax authority because it would be impossible, or excessively difficult, for the sums to be recovered from an insolvent supplier.

The judgment is consistent with *HMRC v The Investment Trust Companies (in liquidation)* [2017] UKSC 29, in which the Supreme Court noted that insolvency would be a prime example of when direct recovery from a tax authority may be allowed.

A copy of the judgment 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

18363

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