Edition 8
January 2021

V@

Welcome to the January 2021 edition of RPC's V@, an update which provides analysis and news from the VAT world relevant to your business.

News

- The Cabinet Office has updated its guide The Border Operating Model, to reflect the UK-EU trade and cooperation agreement which was agreed on 24 December 2020. Border Operating Model case studies have also been created to assist businesses when importing and exporting goods from January 2021.

- HMRC has launched a new open consultation on VAT and value shifting, which closes on 30 March 2021. The consultation seeks views on a proposed revision of the rules for apportioning the consideration between supplies with mixed liabilities in a single transaction. HMRC notes that the consultation will be of particular interest to businesses that sell goods or services for a reduced price as part of a package or 'bundle'.

- HMRC has published guidance on the Value Added Tax EU Exit Transitional Provisions, in relation to the VAT treatment of transactions or movements of goods which span the end of the transition period. The guidance is a public notice for the purpose of regulation 11 of the Value Added Tax (Miscellaneous Amendments, Revocation and Transitional Provisions) (EU Exit) Regulations 2019 (SI 2019/513), which allows HMRC to make provisions to deal with specific transitional issues connected to the UK's exit from the EU.

- HMRC has published guidance on how to report supplies of goods from Northern Ireland to VAT-registered customers in an EU country using an EC Sales List, from 1 January 2021.

- The Treasury has made three statutory instruments which implement the VAT aspects of the Northern Ireland Protocol: The Value Added Tax (Miscellaneous Amendments, Northern Ireland Protocol and Savings and Transitional Provisions) (EU Exit) Regulations 2020; The Value Added Tax (Northern Ireland) (EU Exit) Regulations 2020; and The Value Added Tax (Miscellaneous Amendments to the Value Added Tax Act 1994 and Revocation) (EU Exit) Regulations 2020. HMRC has also published VAT: Value Added Tax in Northern Ireland, a tax information and impact note about VAT amendments required to implement the Northern Ireland Protocol and (EU Exit) Regulations 2020, after 1 January 2020.

- HMRC has published a Call for Evidence paper which seeks stakeholders' views on the government's assessment of the VAT challenges created by the Sharing Economy. HMRC notes that the Sharing Economy, which is usually facilitated by digital platforms which can be based anywhere in the world, could potentially create certain challenges to the VAT tax base. Responses to the paper must be submitted by 3 March 2021.

- HMRC has published Revenue and Customs Brief 19 (2020): VAT - repeal of the VAT (Treatment of Transactions) Order 1992. The brief announces the government's intention to repeal, before autumn 2021, the VAT (Treatment of Transactions) Order 1992, in order to prevent government departments and the NHS claiming full VAT refunds on employees' private vehicles.

- HMRC has published Revenue and Customs Brief 20 (2020): repayment of VAT to overseas businesses not established in the EU and not VAT registered in the UK. The brief explains the actions HMRC is taking to enable overseas (not established in the EU) businesses to claim VAT refunds where they have had difficulties in obtaining a certificate of status due to the COVID-19 pandemic. This applies to the prescribed year 1 July 2019 to 30 June 2020.

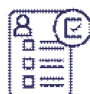
- HMRC has published Revenue and Customs Brief 21 (2020): withdrawal of the VAT

Retail Export Scheme and the tax-free shopping concession. The brief confirms the withdrawal of 'airside' tax-free shopping in the UK and the VAT Retail Export Scheme from Great Britain, following the end of the UK transition period.

- HMRC has made The Value Added Tax (Amendment) Regulations 2020, which came into force on 1 January 2021. The regulations amend Part 24 of the Value Added Tax Regulations 1995, in relation to the agricultural flat-rate scheme, and introduce new financial conditions for certification to use the scheme.

- HMRC has updated VAT Notice 701/14 (Food products) and VAT Notice 709/3 (Hotels and holiday accommodation), to reflect the extension of the VAT reduced rate for tourism and hospitality from 12 January to 31 March 2021.

Case reports



Y-GmbH - CJEU confirms that a sequential number is not always required for a successful VAT refund application

Bundeszentralamt für Steuern v Y-GmbH (Case C-346/19) concerned an Austrian company (**Y**) which made an application to the Federal Central Tax Office (**FCTO**) in Germany for a VAT refund by means of the electronic portal made available to it in its Member State of establishment. In the application form filled in by Y, the numbers referred to as invoice numbers consisted, for each of the goods or services in question, not of a sequential number of the invoice, but of another number, which was in reference to the invoice. The FCTO rejected the refund applications corresponding to those invoices and rejected Y's challenge of that decision on the basis that Y had not submitted a refund application in compliance with the legal requirements within the set deadline. Germany's Bundesfinanzhof (Federal Finance Court) referred the matter to the Court of Justice of the European Union (**CJEU**).

The CJEU, applying the principles of neutrality and proportionality, decided that Article 8(2)(d) and Article 15(1), Council Directive 2008/9/EC (**Directive 2008/9**) must be interpreted as meaning that, where an application for a refund of VAT does not contain a sequential number of the invoice, but does contain another number which allows that invoice, and thus the good or service in question, to be identified, the tax authority of the Member State must consider that application 'submitted' within the meaning of Article 15(1), Directive 2008/9, and proceed with its assessment. In making that assessment, and save where that authority already has available to it the original invoice or a copy thereof, it may request that the applicant produce a sequential number which uniquely identifies the invoice and if that request is not satisfied within the deadline of one month laid down in Article 20(2), Directive 2008/9, it is entitled to reject the application for a refund.

Why it matters: This judgment indicates that HMRC is required to accept that an application for a VAT refund has been 'submitted' within the meaning of Article 15(1), Directive 2008/9, even where it does not contain a sequential number, where it contains another number which allows that invoice, and thus the good or service in question, to be identified.

The judgment can be viewed here.

Colchester Institute - UT confirms that educational courses provided free of charge to students and funded by government grants were a supply of services for consideration

In *Colchester Institute Corporation v HMRC* [2020] UKUT 368 (TCC), the Upper Tribunal (**UT**) held that education and vocational training provided by Colchester Institute Corporation (**CIC**) free of charge to students and funded by grants from two government funding agencies was a "supply of services for consideration" for the purposes of Article 2(1)(c), Principal VAT Directive (**PVD**).

The First-tier Tribunal (**FTT**) had held that the funding did not amount to consideration for any supplies by CIC, finding there was not a sufficient direct link between the provision of education and the funding provided and there was no link between the amount paid by the funding agencies and the actual cost of the provision of any particular course to a particular student. The FTT went on to find that the funded activities were outside the scope of VAT and did not amount to economic activities for the purposes of Article 9, PVD.

CIC appealed the FTT's decision, contending that the FTT had misunderstood the nature of what was provided in relation to the lump sum

grants; the provision was not to specific students in relation to specific courses but a sum paid, on an ongoing basis, according to a formula targeted at certain categories of students.

The UT held that the FTT had erred in looking for a link so direct that the payments could be matched to individual supplies or the costs of individual supplies, or to individual students taking courses. The FTT had decided that CIC was making supplies of education services, which were at all material times exempt from VAT. HMRC had accepted that, if the UT were to conclude the activities were "supplies of services for consideration", no issue would arise in relation to "economic activity", which was established on the facts. However, given that CIC's provision of grant-funded education was found to be an exempt supply of services, the UT concluded that CIC was incorrect to have submitted its claim for repayment of overpaid VAT on the basis of the Lennartz principle. The UT found that section 81(3A), Value Added Tax Act 1994 (**VATA 1994**) (which disapplies the statutory limitation periods in certain circumstances) applied and dismissed CIC's appeal.

Why it matters: The UT's decision that the provision of education and/or vocational training provided free of charge to students and funded by government grants can, for VAT purposes, be a supply of services for consideration is likely to be relevant to the VAT position of numerous other educational institutions. The UT noted that this appeal was a lead case, behind which a number of other colleges' appeals were stayed.

The decision can be viewed here.

The Core (Swindon) Ltd - UT confirms that the supply of juice cleanse programmes was zero rated

In *HMRC v The Core (Swindon) Ltd* [2020] UKUT 0301 (TCC), the UT confirmed that the supply by The Core (Swindon) Ltd (**TCSL**) of fruit and vegetable juices (referred to as juice cleanse programmes (**JCPs**)), which were sold as meal replacements, were zero-rated supplies of food, rather than standard-rated supplies of beverages, within Schedule 8, Part 2, Group 1, VATA 1994.

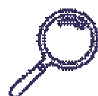
The FTT had allowed TCSL's appeal and HMRC appealed to the UT on the ground that the FTT erred in law in concluding that the JCPs were not "beverages" for the purposes of Schedule 8. HMRC argued that the FTT had erred in law by allowing the way in which the JCPs were marketed to dictate the basis of their classification for VAT purposes. In the view of HMRC, as the JCPs were single-use products they required pure classification and the question of marketing was less relevant.

The UT found that: (1) in all cases involving classifications for VAT purposes, there needs to be a multifactorial assessment conducted; (2) the way a product is marketed and sold is potentially relevant in every case, although it will be more relevant in some cases than others, depending on the facts; and (3) the FTT considered all relevant factors in reaching its conclusions and gave equal prominence to the way in which the JCPs were marketed and the way the products were used by customers.

The UT therefore dismissed HMRC's appeal, concluding that the weight that was to be applied to the relevant factors on a multifactorial assessment was a matter for the FTT, which should not be interfered with on appeal unless the conclusion reached was plainly wrong or irrational, which the FTT's decision was not.

Why it matters: This case confirms that fruit and vegetable juices sold as meal replacements should be treated as zero-rated for VAT purposes. Given that JCPs have been, and continue to be, a growing market in recent years, it will be interesting to see if HMRC seek to appeal this decision to the Court of Appeal.

The decision can be viewed here.



Revive Corp Ltd - UT sets aside decision of the FTT because it had not adequately explained its reasons for concluding that a company should have known that its transactions were connected with VAT fraud

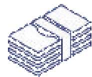
In *Revive Corporation Ltd v HMRC* [2020] UKUT 0320 (TCC), the UT set aside a decision of the FTT, concluding that the FTT had not given adequate reasons for concluding that Revive Corporation Ltd (**RCL**) should have known that certain of its transactions were connected with VAT fraud

(applying the principles that the CJEU set out in *Kittel v Belgium* [2008] STC 1537).

The UT concluded that the FTT had failed to sufficiently address RCL's argument that there was an explanation for the transactions other than that they were connected with VAT fraud, and to give reasons why it found that explanation unreasonable. In particular: (1) whilst the FTT clearly regarded the presence of the red flags in some of RCL's emails as being important, RCL had advanced innocent explanations for them, and the FTT had not explained why it rejected these explanations; (2) the FTT's findings of RCL's awareness of missing trader fraud generally did not support a conclusion that RCL should have known that the specific transactions were connected with VAT fraud; and (3) the FTT's criticisms of the inadequacy of RCL's due diligence processes did not address RCL's alternative explanation of the transactions. HMRC sought to argue that any failure by the FTT to give reasons for its decision made no difference to the outcome, as the only possible conclusion was that RCL's alternative explanation was unreasonable. However, the UT concluded that assessing the reasonableness of RCL's explanation required a multifactorial assessment, which the UT was unable to perform as there was a lack of factual findings in the FTT's decision, which also contained insufficient reasoning. The UT therefore set aside the FTT's decision and the matter was remitted back to the FTT to be considered by a differently constituted Tribunal.

Why it matters: This case provides a useful reminder of the relevant factors and case law that the FTT should consider when determining whether a business should have known that some of its transactions were connected with VAT fraud. It provides confirmation that a multifactorial assessment should be conducted on the basis of the individual facts of the case under consideration and the FTT must provide sufficient reasons for the decision it reaches.

The decision can be viewed here.



Eurochoice - company and its director held jointly and severally liable for HMRC's costs

In *Eurochoice Ltd v HMRC* [2020] UKFTT 0449 (TC), the FTT held Eurochoice Ltd (**Eurochoice**) and Mr Salman Ahmed, its sole director, jointly and severally liable for HMRC's costs in circumstances where only the company was party to the appeal proceedings.

Eurochoice had appealed various VAT assessments to the FTT. Subsequently, Mr Ahmed pleaded guilty in criminal proceedings to one count of cheating the public revenue and one count of conspiracy to commit money laundering, both in relation to the transactions to which the assessments related. In light of this, HMRC applied successfully to the FTT for Eurochoice's appeal to be struck out and sought a direction from the FTT that Eurochoice and Mr Ahmed pay HMRC's costs.

In the view of the FTT, there was no reason for it to depart from the general rule that Eurochoice, as the unsuccessful party in an appeal allocated to the complex category (Eurochoice had not opted out of the costs regime), should pay HMRC's costs. Although Mr Ahmed was not a party to the litigation, section 29, Tribunals Courts and Enforcement Act 2007, gave the FTT a discretion to make a costs award subject to its own rules; it could determine by whom and to what extent costs were to be paid. Accordingly, in the view of the FTT, it could make a costs award against those who were not parties to the litigation which was before it.

The FTT noted that it was "exceptional" for costs orders to be made against non-parties, but where, as in this case, the non-party not merely funded the proceedings but also substantially controlled or benefited from the proceedings, a costs award could be made against that non-party in favour of the successful party and therefore the FTT made the costs order sought by HMRC.

Why it matters: This decision illustrates that the corporate veil will not always protect those directing the mind of a company from adverse costs consequences, particularly in cases involving VAT fraud.

The decision can be viewed here.

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If you would like more information (or have any questions) on any of these topics, please get in touch with us, or your usual RPC contact.

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