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V@

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

News

- HMRC has published **Revenue and Customs Brief 9 (2021): VAT liability of daycare services supplied by private bodies in England and Wales.** The Brief explains HMRC's position following the judgment of the Court of Appeal in the joint appeals of *LIFE Services Ltd* and *The Learning Centre (Romford) Ltd* which became final when the Supreme Court refused permission to appeal earlier this year.

- HMRC has updated its guidance **Changes to notifying an option to tax land and buildings during coronavirus (COVID-19).** The guidance temporarily extends the time limit to notify HMRC of a decision to opt to tax land and buildings from 30 to 90 days, from the date the decision to opt was made. The updated guidance extends the effect of this change so that it applies to decisions made between 15 February 2020 and 31 July 2021.

- HMRC has published **Revenue and Customs Brief 10 (2021): 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 been having difficulties in obtaining a certificate of status. This applies to the prescribed year 1 July 2019 to 30 June 2020.

- The European Commission has published **guidance** on changes to the VAT rules on cross-border business-to-consumer e-commerce activities, which have applied since 1 July 2021. The rationale for these changes is to overcome the barriers to cross-border online sales and address challenges arising from the VAT regimes for distance sales of goods and for the importation of low value consignments. HMRC has published guidance in relation to the changes in its **weekly bulletin**, including information about the UK VAT e-commerce systems that have linked to the EU's VAT e-commerce package since 1 July 2021.

- Under new **guidance** published by HMRC, if businesses sell low value goods in consignments not exceeding £135 in value into Northern Ireland and are registered for the VAT Import One Stop Shop (**IOSS**) in the EU, they must inform HMRC of their IOSS registration number. The guidance provides a link to a service which enables businesses to comply with this obligation.

Case reports

Milton Keynes Hospitals NHS Foundation Trust – Court of Appeal confirms HMRC's entitlement to raise assessment in relation to VAT overclaimed by a public body

In *Milton Keynes Hospitals NHS Foundation Trust v HMRC* [2021] EWCA Civ 942, the Court of Appeal decided that HMRC was entitled to issue an assessment under section 73(2), Value Added Tax Act 1994 (**VATA**), to Milton Keynes Hospitals NHS Foundation Trust (the **Trust**), claiming repayment of amounts wrongly refunded to the Trust under section 41, VATA.

The amount in issue related to VAT paid by the Trust in relation to a new computer system, which it reclaimed from HMRC. HMRC took the view that it was wrongly reclaimed and sought to recover the amount in question. The issue before the Court of Appeal was whether HMRC was entitled to rely upon section 73(2). Both the First-tier Tribunal (**FTT**) and the Upper

Tribunal (**UT**) had decided that HMRC was so entitled.

The Trust argued that HMRC's power to make an assessment under section 73(2) does not apply where the person to whom the refund was made under section 41(3), VATA, is not a taxable person as regards the supplies which were the subject of the refund. The Trust argued that the effect of Council Directive 2006/112/EC (the **Principal VAT Directive**) and the domestic legislation implementing it, is to put a public body performing statutory (non-business) functions outside the VAT scheme. Section 73(2) refers to a VAT assessment in respect of "any prescribed accounting period"; the Trust argued that someone who is not a taxable person does not have any prescribed accounting periods and therefore section 73 can only apply to VAT incurred by a person when acting as a taxable person.

The Court of Appeal dismissed the Trust's appeal, for the following reasons:

1. The Trust was a taxable person, as it did in fact make supplies which fell within the scope of VAT and it was required to be registered in order to take advantage of the public sector refund scheme.
2. A claim for a refund of the relevant VAT must be made on the same form as the ordinary VAT return, which must be made by reference to prescribed accounting periods. The power to claim a refund is therefore inextricably linked to the obligation to make returns by reference to prescribed accounting periods, which the Trust did.
3. The obvious purpose of the reference to prescribed accounting periods is to lay down the administrative machinery for claiming refunds and to trigger the running of time under section 73(6), which limits HMRC's power to make retrospective assessments.
4. It is not correct that public sector bodies are "scoped out" of VAT. They are outside the European framework for VAT, but they are firmly within the domestic framework. For the purpose of participating in the refund scheme, they are taxable persons.
5. The Trust's interpretation would undermine the policy underlying the scheme for refunding the relevant VAT and the policy of ensuring that a public sector body does not retain more than its fair share of public funds.
6. The Trust's argument would mean that the procedural mechanics of reclaiming a refund of VAT wrongly paid would triumph over the substance of the right to recover public money which should not have left the consolidated fund.

Why it matters: The validity of HMRC's decision to issue the relevant assessment was not in issue in this case and will be dealt with separately. However, the Court's affirmation of the decisions of both the FTT and UT will be of wider significance in other cases where HMRC has sought to issue assessments in respect of VAT overclaimed by public bodies under the public sector refund scheme.

The judgment can be viewed **here**.

K and DBKAG – CJEU confirms that VAT exemption for management of special investment funds covers managing their tax-related responsibilities and the use of specialised risk-management software

In the joined cases of *K* and *DBKAG* (C-58/20 and C-59/20), the Court of Justice of the European Union (**CJEU**) has confirmed that the VAT exemption for special investment funds (**SIFs**) extends to the management of their tax-related responsibilities and the grant of a right to use specialised software used to carry out risk-management and performance-measurement functions, if intrinsically connected to, and provided exclusively for, the management of the funds.

K provided outsourced services to investment management companies. These services related to the provision to the tax authorities of tax statements in relation to unit-holders' affairs. The investment management companies remained ultimately responsible for the accuracy of the amounts declared. K invoiced its clients without VAT, relying on the investment management exemption provided for in Article 135(1)(g) of the Principal VAT Directive. The tax authorities considered that the service provided by K was not specific to and essential for the management of the funds, but rather an audit, or tax, related service that did not fall within the exemption.

DBKAG was granted a right to use software essential to risk management and performance measurement of investment funds in return for the payment of a fee. The provider sought to charge VAT on the licence fee for

the software (by means of a reverse charge and seeking recovery of the tax debt from DBKAG).

Both cases were referred from the domestic courts (in Austria and Germany, respectively), to the CJEU, which proceeded to provide its judgment without an opinion from the Advocate-General.

The CJEU noted that the principle of fiscal neutrality required that the fund management exemption was to be interpreted so as not to exclude services that were not outsourced in their entirety. The CJEU referred to its decision in *GfBk* (C-275/11), where it had confirmed that it was necessary to examine whether the service provided by a third party was intrinsically connected to the activity characteristic of a management company, so as to have the effect of performing the specific and essential functions of management of a SIF. 'Management' covered not just investment management, but also administrative and accounting services where these were specific to the activity of a SIF (rather than inherent in any type of investment).

It was not necessarily the case that any type of IT service provided by a third party to a management company would be excluded from the scope of the exemption, and the mere fact that a service was performed entirely electronically would not prevent the exemption from applying. Where the grant of a right to use software was provided exclusively for SIF management purposes (and not provided to other funds) it would be considered 'specific' for the purposes of the exemption.

Why it matters: This judgment provides important guidance in relation to the scope of the VAT exemption for fund management, which has been construed broadly by the CJEU. Notwithstanding the UK's departure from the European Union, this judgment has important domestic ramifications for the UK's fund management industry.

The judgment can be viewed **here.**

BE and DT – CJEU confirms that insolvency proceedings cannot automatically result in a requirement to adjust VAT deductions made in relation to the period preceding the insolvency

In *BE, DT v Administraţia Judeţeană a Finanţelor Publice Suceava, Direcţia Generală Regională a Finanţelor Publice Iaşi* (Case C-182/20), the CJEU has confirmed that Articles 184 to 186 of the Principal VAT Directive must be interpreted so as to preclude national legislation or practice whereby the initiation of insolvency proceedings in respect of an economic operator, entailing the liquidation of its assets for the benefit of its creditors, automatically places an obligation on that operator to adjust the VAT deductions which it has made in respect of goods and services acquired before it was declared insolvent, where the initiation of those proceedings is not such as to prevent that operator's economic activity, within the meaning of Article 9 of the Principal VAT Directive, from being continued, in particular, for the purposes of the liquidation of the undertaking concerned.

DT was a partner and administrator of BE, a company which was subject to insolvency proceedings in 2015. Following the declaration of insolvency, the Romanian tax authorities issued a tax assessment notice to BE, in accordance with national legislation, in respect of adjustments to VAT deductions that the company had made for the period 2013 to 2014, during which time it carried out an economic activity and was registered as a taxable person for VAT purposes.

BE and DT appealed the notice to the Romanian tax authorities, who rejected the appeal on the basis that BE had ceased to carry out an economic activity when it was declared insolvent. The tax authorities noted, in that regard, that such a declaration of insolvency entails a procedure for the liquidation and sale of assets with a view to the repayment of debts, and that the transactions carried out in the context of that procedure do not, in themselves, have any economic purpose. BE and DT appealed the tax assessment and the tax authorities' decision to the Regional Court in Suceava, which upheld the appeal. The tax authorities then appealed to the Suceava regional court of appeal who referred to the CJEU the question of whether EU law precludes, in circumstances such as those in the main proceedings, national legislation which requires, once insolvency proceedings in respect of an economic operator have been initiated, automatically and without further checks, adjustment of VAT, by refusing to allow the economic operator to deduct VAT on taxable transactions that occurred prior to the declaration of insolvency and ordering the operator to pay the deductible VAT.

The CJEU noted that:

1. 'economic activity' must be considered without regard to its purpose or results, therefore the mere fact that the initiation of insolvency proceedings in respect of a taxable person changes, in accordance with the rules laid down in national law, the purposes of that taxable person's transactions, cannot, in itself, affect the economic nature of the transactions carried out in the course of that business;
2. as long as an undertaking continues its activities during insolvency proceedings, it is in competition with other taxable persons carrying out services similar to its own, so the services concerned must, in principle, be treated in the same way for VAT purposes, in accordance with the principle of fiscal neutrality;
3. BE continued, during the insolvency proceedings, to be registered as a taxable person and the Romanian tax authorities made subject to VAT the transactions carried out in the course of those proceedings, which suggested that BE did in fact continue its economic activity and carried out taxed transactions despite being declared insolvent;
4. the possibility for the taxable person concerned, in a situation in which it was required, initially, to adjust the input VAT deductions made on account of it being declared insolvent, despite the continuation of its economic activity, of requesting, subsequently, that the sums concerned be repaid to it precisely because it continued, during the insolvency proceedings, its economic activity, is not such as to compensate for the limitation of its right to deduct resulting from that obligation to adjust imposed by national law; and
5. requiring the undertaking concerned, following an adjustment decision, to actually pay the VAT allegedly due constitutes, for that undertaking, an obstacle to the deduction of input VAT, since it requires that undertaking to commit funds until the tax authorities refund it overpaid VAT, whereas other operators who have not been declared insolvent may use those funds for their economic activities without being required to make such a payment.

Why it matters: This judgment confirms, amongst other things, that a business entering into insolvency does not affect the economic nature of the transactions carried out in the course of that business, even if the purpose of its liquidation is only to extinguish its debts.

The judgment can be viewed **here**.

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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