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

News

- HMRC has updated its **guidance** on paying VAT payments which were deferred between 20 March and 30 June 2020, due to coronavirus. The guidance has been updated to add information about how to join the VAT deferral new payment scheme and a link to join the scheme has been added.

- HMRC has published **transitional guidance** on the VAT treatment of transactions of specified supplies of finance and insurance services. The guidance follows the changes made to the Value Added Tax (Input Tax) (Specified Supplies) Order (SSO) 1999, which came into effect at 11pm on 31 December 2020. Affected businesses are those, including banks, investment managers, insurers and brokers, which supply (i) certain financial services from the UK to persons belonging in the EU; and (ii) services in connection with an export of goods to persons belonging the EU.

- HMRC has published **guidance** on applying for a grant to help small and medium-sized businesses new to importing or exporting. The SME Brexit Support Fund, provides grants for training on (i) how to complete customs declarations; (ii) how to manage customs processes and use customs software and systems; and (iii) specific import and export related aspects including VAT, excise and rules of origin. The grants can also be used for professional advice so that businesses can meet their customs, excise, import VAT or safety and security declaration requirements.

Case reports

Eynsham Cricket Club – Court of Appeal confirms that Community Amateur Sports Clubs are not charities

In *Eynsham Cricket Club v HMRC* [2021] EWCA Civ 225, Eynsham Cricket Club **(ECC)**, a village cricket club registered as a community amateur sports club **(CASC)**, had a new pavilion built to replace a former structure which was destroyed by fire. Initially, invoices were issued on the basis that the supplies were zero-rated. However, following discussions with HMRC, the builder sought to charge VAT. ECC paid the invoices in full (including the VAT) but challenged HMRC's treatment of the VAT element on the basis that the supplies should have been zero-rated.

Section 30 and Schedule 8, Group 5, item 2, Value Added Tax Act 1994 **(VATA)** provide that supplies in the course of construction of 'a building … intended for use solely for … a relevant charitable purpose' are subject to zero-rating. Note 6 to Group 5 requires the relevant use to be 'by a charity'.

The First-tier Tribunal **(FTT)** had held that a CASC could, in theory, benefit from the zero-rating in Schedule 8, Group 5 if its objects were charitable, but that, on the facts, ECC's objects were not charitable, so its appeal was dismissed.

On appeal to the Upper Tribunal **(UT)**, HMRC conceded that the club's objects were charitable, so it fell to be determined whether it was possible for a CASC to benefit from both the limited regulatory regime attaching to CASCs and the VAT benefits of being a charity. The UT held that it was not. The club appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. It held that section 6, Charities Act 2011, was clear that a CASC 'cannot be a charity', and since this legislation was not disapplied anywhere in the relevant VAT legislation, it was clear that the charitable condition for zero-rating was not met. In light

of this, it was also necessary for the Court to rule on whether the denial of zero-rating breached the EU principles of equal treatment and/or fiscal neutrality. The Court held that this case was not dealing with a harmonised VAT exemption for EU law purposes, but rather a domestic exemption, reflecting a domestic social policy choice to treat CASCs and registered charities as separate.

Why it matters: This judgment provides much-needed clarity on the status of CASCs and, by extension, to the status of charities. The judgment is in line with HMRC's published policy in this area (see VCHAR9300).

The judgement can be viewed **here**.

St John Sellers – FTT holds that insufficiency of funds was only a reasonable excuse in relation to invoice-based tax liabilities

In *Robin St John Sellers v HMRC* [2021] UKFTT 27 (TC), the FTT upheld penalties imposed by HMRC in respect of late VAT and income tax payments except when the taxpayer, a criminal barrister, was taxed on an invoice basis and encountered exceptional financial issues.

The key issue for the FTT to determine was whether insufficient funds was a reasonable excuse for late payment of VAT and income tax. The FTT considered that the tests for both were, essentially, identical but distinguished between VAT and income tax. As VAT was payable on a cash or flat-rate (rather than invoice) basis, it enabled taxpayers to more easily set VAT aside than income tax. The FTT concluded that, as the taxpayer was a criminal barrister who had practised for a number of years before default, he should have been familiar with the need to set aside regular, foreseeable and relatively small amounts of VAT from receipts. The FTT concluded that the late payments were not just the result of exceptional cash flow issues and in any event, the taxpayer's cash flow was not so severely restricted as to cause default. Further, VAT payable from receipts was, effectively, a cash-free loan to the taxpayer until paid to HMRC and therefore, the taxpayer had no reasonable excuse for the late payment of VAT.

The FTT was also unsympathetic to the taxpayer's default when he accounted for income tax on a cash basis as opposed to when he applied an invoice basis. The FTT concluded that the taxpayer had a reasonable excuse for late payment on an invoice basis for a particular period when his cash flow difficulties were particularly striking. However, for the other periods in dispute, the FTT concluded that any exceptional difficulties were resolved before the relevant payment deadlines and any other difficulties were foreseeable, so he had no reasonable excuse for default. The fact that the taxpayer was a criminal barrister who was allegedly unable to pay one branch of the government (HMRC) because another branch of government, the executive agencies of the Crown Prosecution Service, Legal Services Commission and the Legal Aid Agency, delayed or were unreasonably slow to make payments (some going back several years) due to the taxpayer, which allegedly severely restricted his cash flow and ability to meet his tax liabilities, was not enough to show a reasonable excuse for default.

Why it matters: This case demonstrates that insufficient funds is unlikely to be an acceptable reasonable excuse to negate late payment penalties, in particular when VAT is payable on a cash or flat rate (rather than invoice) basis. The case also demonstrates the considerable lengths to which taxpayers are expected to go to avoid late or non-payment of tax liabilities.

The decision can be viewed **here**.

Borough Council Of King's Lynn – FTT confirms that off-street car parking overpayments by local authority are subject to VAT

In *King's Lynn and West Norfolk BC (No 2) v HMRC* [2021] UKFTT 10 (TC), the FTT concluded that 'overpayments' at a public authority pay and display off-street car park represented further consideration for a supply of parking and were therefore subject to VAT.

The Council operated pay and display off-street car parks with coin-operated ticket machines which did not provide any change. So, for example, a person wishing to park for an hour may be required to pay a tariff of £1·30 but might in fact pay £1·50 because they only had a one pound coin and a 50 pence piece. They would therefore have overpaid by 20 pence. It was the VAT status of this overpayment which was in dispute in

this appeal.

In 2012 the Council had successfully argued before the FTT (in relation to essentially the same underlying facts) that there was no supply made for the overpayment and it was therefore outside the scope of VAT. However, in the intervening period, litigation in the case of *National Car Parks Ltd v HMRC* [2019] EWCA CIV 854, had cast doubt over that decision (the UT had expressly stated that it had been wrongly decided).

The Council relied on a similar argument in this appeal that the overpayment was not consideration for any supply and was outside the scope of VAT. HMRC argued, once again, that the overpayment was further consideration for the standard-rated supply of off-street parking.

The appeal was dismissed. The FTT accepted that due to a statutory parking Order the Council was prevented from making an offer to provide off-street parking other than as set out in a scale contained in that Order. However, neither the Order nor any other statutory provision prevented a driver from making a counter-offer for the parking that was in excess of the statutory parking charge. Similarly, nothing prevented the Council from accepting the higher counter-offer. Consequently, there was a direct link between the entire payment and the parking services with the result that VAT was due on the full amount including the overpayment.

Why it matters: the decision is consistent with HMRC's published policy in this area (see VATGPB8640) that all payments for off-street car parking are consideration for a supply and are therefore taxable, including overpayments to local authorities. The case may also be of wider interest to those seeking to establish when there is a link between a supply and consideration provided in return.

The decision can be viewed **here**.

Westow Cricket Club – UT discharges penalty based on reasonable excuse

In *Westow Cricket Club v HMRC* [2021] UKUT 23, the UT allowed the appeal of Westow Cricket Club **(WCC)** against a decision of the FTT to dismiss its appeal against HMRC's decision to impose on it a penalty under section 62(1) and (2), VATA (penalty for issuing an incorrect certificate as to zero rating).

The penalty arose from the decision of WCC to issue a zero-rating certificate to Atkinson Builders Ltd on 9 March 2013, in relation to supplies made to it during the course of the construction of a new cricket pavilion. HMRC imposed the penalty on the basis that the certificate was issued incorrectly because WCC was not a registered charity.

WCC appealed to the FTT on the basis that it had a reasonable excuse for issuing the zero-rating certificate, it having conceded that it should not have done so (the reasonable excuse issue). WCC contended that it relied on written advice from HMRC to the effect that the supply of the building works would be zero-rated. The FTT concluded that WCC did not have a reasonable excuse for issuing the zero-rating certificate because it was not, in the circumstances, entitled to rely on what HMRC said and, in any event, even if it had a reasonable excuse on that basis, that excuse no longer applied once it completed the zero-rating certificate in which it gave confirmation to the effect that the building would be used solely for a relevant charitable purpose by a charity.

The FTT also raised, of its own volition, the question of whether the penalty was proportionate on human rights grounds (the **proportionality issue**) and asked for submissions on that issue at a later separate hearing. The FTT considered and dismissed arguments from WCC that the penalty was disproportionate because the regime (i) pursued an illegitimate aim; (ii) was in general disproportionate; and (iii) the result in the present case was disproportionate. WCC appealed to the UT.

The UT allowed the appeal on the reasonable excuse issue and there was therefore no need for it to consider the proportionality issue. The UT found that in the circumstances there was a reasonable excuse for WCC having given the certificate in the form that it did and accordingly the penalty was discharged.

Why it matters: The UT adopted the same approach to reasonable excuse it did in *Perrin v HMRC* [2018] UKUT 156 (TCC). The decision highlights the importance of considering the point at which the reasonable excuse should be assessed, namely, at the time of the action or omission in question.

The decision may assist taxpayers in similar circumstances who have relied on written advice from HMRC.

The judgment can be viewed **here**.

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Adam Craggs
Partner
+44 20 3060 6421

Rebekka Sandwell
Associate
+44 20 3060 6660

ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

Tower Bridge House St Katharine's Way London E1W 1AA
T +44 20 3060 6000 F +44 20 3060 7000 DX 600 London/City **rpc.co.uk**

London Bristol Hong Kong Singapore

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