



Edition 5
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Welcome to the September 2020 edition of RPC's V@, an update on developments in the VAT world that may impact your business.

News

- The Treasury has published a consultation paper **VAT and the Public Sector: Reform to VAT refund rules**. Government departments, devolved administrations, the NHS and Highways England are currently eligible for VAT refunds under section 4, Value Added Tax Act 1994 (**VATA 1994**). The Treasury is proposing to extend the scope of section 41 to permit full refunds of the VAT incurred on all goods and services during the course of non-business activities for those organisations currently falling within the scope of section 41. Interested stakeholders are invited to provide views by 19 November 2020.
- HMRC has updated **VAT Notice 700/11: cancelling your VAT registration**. The notice explains when and how to cancel a VAT registration, and the supplement to the notice gives details of the previous and current registration and cancelled VAT registration thresholds.
- The Treasury has published **VAT Grouping – Establishment, Eligibility and Registration Call for Evidence**. It wishes to receive the views of businesses that utilise VAT grouping provisions, and other interested parties, on how these affect them and the wider business environment so as to inform future policy direction. The call for evidence will examine three distinct areas of VAT grouping: the establishment provisions; compulsory VAT grouping; and grouping eligibility criteria for businesses currently not in legislation, including limited partnerships.
- HMRC has published **Revenue and Customs Brief 12 (2020): VAT early termination fees and compensation payments** and updated its VAT and Supply Consideration Manual. This follows the CJEU judgments in Meo (C-295/17) and Vodafone Portugal (C-43/19), which confirmed that charges to customers for withdrawal from agreements to receive goods or services are normally for the supply of goods or services to which those agreements relate, and most early termination and cancellation fees are therefore liable for VAT (even if they are described as compensation or damages). Previous HMRC guidance stated that these charges were not generally for a supply and were outside the scope of VAT.
- HMRC has published guidance **Pay less import duty and VAT when re-importing goods to the UK and EU**. The guidance provides information in relation to Returned Goods Relief, which may be claimed by persons re-importing goods into the UK, or EU, that have previously been exported.
- HMRC has published **Revenue and Customs Brief 13 (2020): VAT charity digital advertising relief**. The brief sets out HMRC's policy regarding the VAT treatment of a range of digital advertising situations, where advertising services are supplied by a third party to a charity. The brief applies to persons providing advertising services to charities, the charities receiving such services, and representatives of the charities.

Case reports



Ingenious Construction Ltd - application for interim relief and permission to apply for judicial review refused to construction company whose VAT registration had been revoked by HMRC

In R (*on application of Ingenious Construction Ltd*) v HMRC [2020] EWHC 2255 (Admin), the Administrative Court refused an application by Ingenious Construction Ltd (**ICL**), a construction company, for (i) permission to apply for judicial review of HMRC's decision to refuse to reinstate its VAT registration, pending an appeal to the First-tier Tribunal (**FTT**) in relation to

the substantive issue of HMRC's decision to cancel ICL's VAT registration, and (ii) interim relief in the form of restoration to the VAT register.

HMRC accepted that ICL was not itself fraudulent. However, HMRC argued that ICL was facilitating fraud, as it was part of a chain which included other suppliers who were acting fraudulently. The Court found that ICL was supplied with labour over a period of almost two years by a number of fraudulent companies, and it conducted no real due diligence upon them.

The Court decided that there was a good case that HMRC acted proportionately, appropriately and on the basis of objective factors, in deregistering ICL, and refusing to restore it to the register, given the risk which the company posed to the VAT system. ICL's application for permission to apply for judicial review also failed on the basis that ICL had an adequate alternative remedy, because the FTT judge had ordered that the appeal to the FTT be expedited.

Why it matters: This case demonstrates the difficulty of successfully seeking interim relief and permission to bring judicial review proceedings when an alternative remedy is available. The case also illustrates the potential serious consequences for businesses that inadvertently become embroiled in fraudulent activity carried out by others. This decision is a timely reminder of the importance of businesses conducting appropriate due diligence in relation to their suppliers.

The judgment can be viewed [here](#).



All Answers Ltd - student essay writing company was principal and not agent for VAT purposes

In *All Answers Ltd v HMRC* [2020] UKUT 0236 (TCC), the Upper Tribunal (UT) dismissed the taxpayers appeal and held that All Answers Ltd (AAL), a company which operated online and provided essays and coursework to students, was making supplies for VAT purposes as principal and not as agent for the writers of the relevant material.

The central question in the appeal was whether AAL was acting as principal, and was therefore required to account for VAT on the full value of the payment made by its customers, or whether it was acting as agent for the writers who wrote the essays, and was therefore required only to account for VAT on the its share of the customer's payment. The UT agreed with the FTT that the material was supplied by AAL and not by the writers but was of the view that the FTT had not fully investigated the terms of the contracts between the parties. In particular, the UT considered the concept of 'reciprocal performance'. It concluded that there was a legal relationship between AAL and its customers under which it assumed liability for the obligation to provide its customers with a limited right to use academic work of suitable quality within a stipulated timescale, in return for a payment. The terms of that legal relationship were consistent with commercial and economic reality. The fact that a writer, and not AAL, could be directly liable to a customer under the 'no plagiarism guarantee' did not alter this conclusion. The effect of that guarantee was only to provide an assurance to its customers that the work provided was original.

Why it matters: This decision highlights the importance of the terms of commercial contracts and the need to consider the overall effect of all contractual provisions in determining the VAT position.

The decision can be viewed [here](#).



Dhalomal Kishore - Upper Tribunal considers misdeclaration penalties imposed by HMRC for inaccuracies in VAT returns

In *Dhalomal Kishore v HMRC* [2020] UKUT 233 (TCC), Mr Dhalomal Kishore appealed against the decision of the FTT which upheld misdeclaration penalties imposed by HMRC under section 63, VATA 1994, in relation to inaccuracies in Mr Kishore's VAT returns. Mr Kishore had also appealed HMRC's decisions to refuse his claims for input tax, but the litigation was protracted and the appeals were ultimately struck out by the FTT.

Mr Kishore advanced the following six grounds of appeal before the UT: (i) the accrual of liability to a penalty under section 63 requires the taxpayer to be given the chance to satisfy HMRC that there was a reasonable excuse for the misdeclaration; (ii) assuming the first ground succeeds, no liability to a penalty accrued prior to the repeal of section 63 (section 63 was repealed on 31 March 2008); (iii) HMRC's assessment of the misdeclaration penalties was out of time; (iv) HMRC had no right to set-off a

repayment made to Mr Kishore in respect of input tax against one of the penalty assessments; (v) the penalties violated Article 6 of the European Convention on Human Rights; and (vi) the FTT was wrong to strike out the penalty appeals.

The UT allowed the appeal on grounds (v) and (vi), but dismissed grounds (i) to (iv). The UT concluded that the FTT had erred in its approach to the principle in *Henderson v Henderson* (1843) 3 Hare 100, applying too narrow an approach to whether re-litigation of the same issues necessarily constituted an abuse of process. The UT also concluded that the FTT had erred in finding a second abuse of process by reason of Mr Kishore's failure to argue, in the reinstatement application, that the input tax appeals were struck out through lack of funds with which to obtain legal representation. The UT found that the FTT was wrong to strike out the penalty appeals.

Why it matters: This case confirms that section 63(10), VATA 1994, did not impose any procedural pre-condition that a taxpayer must be given the opportunity to put forward a reasonable excuse before liability to misdeclaration penalties could accrue. Although such liability could be established only in the absence of a reasonable excuse, liability accrued from the date of the misdeclaration.

The decision can be viewed [here](#).

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