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V@

Welcome to the May 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 draft **Value Added Tax (Amendment) Regulations 2021**, which will extend Making Tax Digital requirements to smaller VAT businesses from April 2022. The regulations amend Regulation 32B of the Value Added Tax Regulations 1995, to remove the exemption from the requirement to keep electronic records for taxpayers whose turnover is below the threshold for compulsory VAT registration.

- HMRC has published a **Call for Evidence on Simplifying the VAT Land Exemption**. HMRC seeks views on the current VAT rules relating to land and property, and explores potential options for simplifying the rules. The suggested reforms are very broad and would significantly change the VAT treatment in the UK. The consultation sets out several possible fundamental reforms, including:

  - making all minor and short-term interests in property taxable;
  - removing the ability to opt and making all transactions exempt, or taxable at a reduced rate; or
  - using registration with the Land Registry as the basis of VAT liability.

  The consultation closes at 11:45pm on 3 August 2021.

- HMRC has published updated **guidance** on the potential dangers posed to businesses and individuals by mini umbrella companies (**MUC**) in supply chains. HMRC is warning every business which either places or uses temporary labour to be aware of the potential dangers posed to their business by MUC fraud in their supply chain. The guidance includes a number of tips on how individuals can protect themselves from getting involved in MUC fraud. HMRC also list a number of warning signs such as the use of unusual company names, unrelated business activity, foreign national directors, movement of workers and short-lived businesses. The fraud is primarily based around the abuse of two government incentives aimed at small businesses, the VAT Flat Rate Scheme and the Employment Allowance, but this type of fraud can also result in the non-payment of other taxes such as PAYE, National Insurance and VAT.

Case reports

Balhousie Holdings – Supreme Court decides that sale and leaseback arrangement did not trigger VAT self-supply charge

In *Balhousie Holdings Ltd v HMRC* [2021] UKSC 11, the taxpayer, Balhousie Holdings Ltd (**Balhousie**), had built a new care home and sold it to a subsidiary, Balhousie Care Ltd (**Care**). The sale was zero-rated for the purposes of Item 1, Group 5, Schedule 8, Value Added Tax Act 1994 (**VATA**), as the building was 'intended for use solely for a relevant residential or a relevant charitable purpose'. Subsequently, Care entered into a sale and leaseback transaction in respect of the care home to a Real Estate Investment Trust.

Paragraphs 36 and 37, Schedule 10, VATA, provide for a clawback of the benefit of zero-rating if, amongst other things, the original recipient of the zero-rated supply disposes of its entire interest in the building. The dispute in this case was whether, by entering into the sale and leaseback, Care had disposed of its entire interest in the care home. Balhousie was unsuccessful in the Inner House of the Court of Session and appealed to

the Supreme Court.

The appeal was allowed.

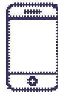
Lord Briggs gave the lead judgment. He said that paragraph 36(2) was concerned with avoiding the tax benefit of zero-rating being conferred upon a person who is not prepared to commit to creating and operating a socially desirable residential care home for a substantial period of time after its completion. In order for the original recipient of the supply to have disposed of its 'entire' interest in the premises it was necessary for it to no longer have any interest in the premises at all (which was not the case here, as Care retained a lease). The idea behind the clawback was to remove the benefit of the relief by reference to the point in time at which it was no longer able to flow through to end consumers because of a change of use.

Lady Arden gave a separate judgment, agreeing that the appeal should be allowed but for different reasons. She concluded that the conditions for zero-rating engaged the principles of EU law. In light of this, she decided that following the decision of the Court of Justice of the European Union (**CJEU**) in *Mydibel v État belge* (C-201/18), which was released shortly after the Court of Session decision in the present case, a sale and leaseback transaction was to be treated for VAT purposes as a single supply and that accordingly Care had not disposed of its entire interest in the care home.

Why it matters: The question of whether a sale and leaseback constitutes a disposal for VAT purposes is relevant in other contexts besides zero-rating, such as for the capital goods scheme. HMRC has previously indicated that it does not regard the decision in *Mydibel* as applying in the UK. It will be interesting to see whether it maintains this position in light of Lady Arden's reliance on that decision.

The different reasoning employed by Lord Briggs and Lady Arden is striking. Time will tell whether, and if so to what extent, EU-based reasoning continues to be applied explicitly by the courts when determining VAT issues where an alternative route, based purely on domestic jurisprudence, is also available.

The judgment can be viewed **here**.



SK Telecom – CJEU decides that roaming services provided to customers staying temporarily in an EU member state are the subject of 'effective use and enjoyment' in that member state

In *SK Telecom Co Ltd v Finanzamt Graz-Stadt* (Case C-593/19), SK Telecom Co Ltd (**SKT**) was a company established in South Korea which supplied mobile phone services to its customers, who were also established, had their permanent address or usually resided in South Korea, by way of roaming services allowing the use of the Austrian mobile communications network. An Austrian mobile communications network operator made its network available to SK Telecom in exchange for the payment of a user fee plus Austrian VAT (the **relevant VAT**). SKT invoiced its customers roaming charges for using the Austrian mobile communications network during their temporary stays in Austrian territory.

The Finanzamt Graz-Stadt (Tax Office of the City of Graz, Austria) rejected an application by SKT for a refund of the relevant VAT. The Bundesfinanzgericht (Federal Finance Court) decided to stay proceedings which arose from this decision and to refer certain questions to the CJEU for a preliminary ruling.

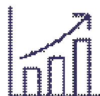
The CJEU decided that point (b) of the first paragraph of Article 59a of Council Directive 2008/8/EC (the **VAT Directive**) must be interpreted as meaning that roaming services supplied by a mobile phone operator established in a third country to its customers who are also established, have their permanent address or usually reside in that third country, allowing them to use the national mobile communications network of the Member State in which they are temporarily staying, must be considered to be ‘effectively used and enjoyed’ within the territory of that Member State, for the purposes of that provision. That Member State may therefore consider the place of supply of those roaming services to be situated within its territory where, regardless of the tax treatment to which those services are subject under the domestic tax law of that third country, the exercise of such an option has the effect of preventing the non-taxation of those services within the EU.

Although the reasoning is slightly different, this judgment follows the opinion of the Advocate General, which we reported in the **November**

2020 edition of V@.

Why it matters: Although the UK no longer applies the 'use and enjoyment' rule to telecommunications, this judgment will have a significant impact on non-EU providers of cross border roaming services to customers temporarily in EU Member States which have chosen to implement the provision in point (b) of Article 59a of the VAT Directive.

The judgment can be viewed **here**.



Jupiter Asset Management – Tribunal decides that the full cost of supplies subject to an open market value direction included overhead costs in respect of which input tax had been recovered

In *Jupiter Asset Management Group Ltd v HMRC* [2021] UKFTT 96 (TC), Jupiter Asset Management Group Ltd (**JAMG**), was the representative member of a VAT group (the **JAMG group**) and a member of a corporate group (the **Jupiter Group**). Within the Jupiter Group, there was another VAT group (the **JIMG group**), the representative member of which was Jupiter Investment Management Group Ltd. The appeals which were the subject of the decision related to the VAT input tax and output tax consequences for the JAMG group of certain strategic and operational management services (the **Management Services**) which were provided by members of the JAMG group to members of the JIMG group over a number of years.

HMRC concluded that JAMG had over-recovered input tax paid by the JAMG group. HMRC's initial focus on the input tax recovery position of the JAMG group expanded to include the JAMG group's output tax liabilities. In that regard, HMRC issued a Notice of Direction of Open Market Value under paragraph 1, Schedule 6, VATA, in relation to any supplies which had been or would be made by the JAMG group for a consideration in money which was less than its open market value to all persons with whom the JAMG group was connected within the meaning of paragraph 1(4), Schedule 6, VATA, and who were not entitled to full VAT input tax recovery.

The First-tier Tribunal (**FTT**) dismissed JAMG's appeal against the output tax assessments issued by HMRC. The FTT decided that, in the absence of comparable supplies provided between third parties (which was the case here), the open market value of the Management Services was to be determined by reference to the full cost of making the supplies, which included the costs incurred on goods and services used in making the supplies and also general overhead costs, the input tax in respect of which had been recovered. The FTT agreed with HMRC that the concept of 'arm's length price' for transfer pricing purposes is relevant only to direct tax and does not apply in the determination of open market value for VAT purposes.

Why it matters: The facts of this case are complex and the decision is fact-specific. However, the decision provides a useful explanation of VAT issues relating to management services. It also provides a reminder of the risk of HMRC issuing a Notice of Direction of Open Market Value where partially exempt businesses seek to reduce their irrecoverable VAT.

The decision can be viewed **here**.

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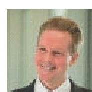

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