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V@

Welcome to the November 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 an impact assessment entitled **Overseas UK VAT registered traders – non-established taxpayers.** Overseas VAT traders, known as non-established taxpayers (**NETPs**), are registered for UK VAT but do not have a business address in the UK. If they are due a repayment, HMRC's VAT systems automatically issue a payable order. HMRC has received notification and complaints from taxpayers advising that they can no longer cash their payable orders in their country or their bank. With the impact of EU Exit and COVID-19, HMRC has seen an increase in banks/countries no longer accepting payable orders which means they cannot be cashed.

  To address this issue HMRC is creating a Gform that will enable NETPs to send HMRC their bank account information so that it can prevent the issue of a payable order and send an electronic Clearing House Automated Payment System repayment instead. The assessment discusses the impact of HMRC's plan to create a Gform.

- HMRC has published a policy paper entitled **Implementation of VAT rules in free zones.** The paper discusses the measure, introduced in Finance Bill 2021-22, to enable the operation of free zones in Great Britain by introducing to the VAT free zone model a VAT exit charge for goods that have benefited from a zero-rated supply and where, after the goods leave the free zone procedure, there is no onward taxable supply of the goods within a specified time limit. The measure will affect VAT registered businesses authorised to operate in the customs site (free zone) of a Freeport.

- HMRC has published a policy paper relating to two statutory instruments:

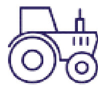
  - **VAT (Distance Selling and Miscellaneous Amendments) Regulations 2021 (SI 2021/1164);** and
  - **VAT (Distance Selling and Miscellaneous Amendments No.2) Regulations 2021 (SI 2021/1165).**

  The statutory instruments address issues identified in legislation introduced in the Finance Act 2021 to implement the One Stop Shop and the Import One Stop Shop simplified VAT accounting schemes. The measures will come into effect on 1 December 2021.

  Additionally, the statutory instruments make a number of minor amendments identified in a review of EU Exit VAT legislation. The changes make sure the UK VAT system operates as required and intended. Together, these statutory instruments make a number of consequential and otherwise necessary amendments to ensure that VAT changes already made as part of the e-commerce package and in relation to EU Exit, work as originally intended.

- HMRC has published a policy paper on the **VAT exemption for dental prostheses imports.** The measure introduces a VAT exemption for the importation into the UK of dental prostheses to ensure supplies of dental prostheses by registered dentists and other dental care professionals continue to be exempt between Great Britain and Northern Ireland. The changes will apply retrospectively from 1 January 2021 (the end of the Brexit transition period).

Case reports



Hampton George Hewitt – UT dismisses appeal against refusal by FTT of application for permission to appeal out of time

In *Hampton George Hewitt v HMRC* [2021] UKUT 231 (TCC), the Upper Tribunal (**UT**) dismissed the appeal of Mr Hewitt against the decision of the First-tier Tribunal (**FTT**) refusing Mr Hewitt's application for permission to make a late appeal against HMRC's decision to cancel his certificate as a flat-rate farmer for VAT purposes, under the agricultural flat-rate scheme (**AFRS**).

HMRC wrote to Mr Hewitt in October 2012, to advise him that it was cancelling his certification under the AFRS, on the ground that it considered it necessary for the protection of the revenue, under regulation 206(1)(i), Value Added Tax Regulations 1995 (SI 1995/2518) (**VAT Regulations**). HMRC took this view because the compensation Mr Hewitt derived from the receipt of the 4% flat-rate addition, which he was allowed to charge and retain under the AFRS, substantially exceeded the input tax which Mr Hewitt would have been able to recover if he had been registered for VAT. This approach was consistent with the provisions of HMRC's VAT Notice 744/46 (paragraph 7.2) in the form in which it was published at the time.

In December 2017, following a referral to the Court of Justice of the European Union (**CJEU**), the UT, in the case of *Shields & Sons Partnership v HMRC* [2017] UKUT 504 (TCC), allowed the appeal of a different taxpayer against the revocation of their certification under the AFRS where HMRC had relied on the same ground as that relied upon in the case of Mr Hewitt. In March 2018, on the basis of the CJEU's decision in *Shields*, Mr Hewitt asked HMRC to reinstate him in the AFRS and to pay him a refund. HMRC refused on the basis that Mr Hewitt had not put forward a reasonable excuse for failing to ask for a review within 30 days of its original decision and there was no reason for the statutory time limit to be extended in his case. Mr Hewitt appealed to the FTT.

The FTT refused Mr Hewitt's application, applying the principles set out by the UT in *Martland v HMRC* [2018] UKUT 178 (TCC), referring to the approach of the Court of Appeal in *Denton and others v TH White Ltd and others* [2014] EWCA Civ 906. On appeal to the UT, Mr Hewitt did not challenge the adoption of those principles by the FTT. The only issue raised on appeal was whether the FTT erred in law by failing to give full effect to the EU law principle of effectiveness, which required that Mr Hewitt be given an effective remedy to enforce his EU law rights.

The UT proceeded on the basis (which the UT said HMRC "*did not seem seriously to challenge"*) that, at the time, the cancellation of Mr Hewitt's certificate was a breach of a directly effective right under EU law, namely, his right to participate in the AFRS. The UT explained that the relevant question was whether the relevant time limit made the enforcement of Mr Hewitt's rights impossible or excessively difficult. The UT decided that the regime that applies to appeals against the cancellation of an AFRS certificate is a reasonable one, which provided Mr Hewitt with an effective remedy which he chose not to exercise. In reaching this conclusion, the UT applied the principles identified in *Claimants listed in Class 8 of the Group Register of the CFC and Dividend GLO v HMRC* [2019] EWHC 338 (Ch), *Leeds City Council v HMRC* [2015] EWCA Civ 1293, *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19 and *Caterpillar Financial Services sp.z.o.o. v Dyrektor Izby Skarbowej w Warszawie* (Case C-500/16). The UT therefore dismissed Mr Hewitt's appeal.

Why it matters: This decision will be of wider significance, as it provides a helpful elucidation of the EU law principle of effectiveness in the context of tax appeals.

The decision can be viewed **here**.

Babylon Farm – UT dismisses appeal as taxpayer not in business

In *Babylon Farm Ltd v HMRC* [2021] UKUT 0224 (TCC), the taxpayer carried on a farming business and had been registered for VAT since 1991. By the time to which the appeal related, the only remaining activity was the sale of hay grown on land belonging to the taxpayer's directors to one sole customer (one of the directors), generating £440 per year.

The taxpayer claimed to recover input VAT, principally on the cost of a new barn to store machinery to make the hay. HMRC disallowed the claim on the ground that the taxpayer was no longer carrying on a business, but did not cancel the taxpayer's VAT registration pending determination of the appeal.

The taxpayer appealed to the FTT on the grounds that (i) it was carrying on a business; and (ii) it was not open to HMRC to deny it credit for input tax

(on the basis that the taxpayer was not carrying on a business) without first cancelling its VAT registration.

The FTT, applying the test in *C&E Comrs v Lord Fisher* [1981] STC 238, held that the taxpayer had not been operating a business during the years in question, as the activities carried on had not followed sound and recognised business principles and nor was it predominantly concerned with the making of taxable supplies for consideration. The FTT also rejected the contention that HMRC had to cancel the taxpayer's registration before denying credit for input tax. The FTT therefore dismissed the taxpayer's appeal.

The taxpayer appealed to the UT, on the grounds that the FTT had made errors of law in concluding that it had not been carrying on a business or economic activity. The taxpayer argued that the FTT had failed to take into account the EU legislation underlying the UK's implementation in Value Added Tax Act 1994 (**VATA 1994**) and applied the wrong tests when determining whether a business was being carried on. In addition, the taxpayer repeated its arguments relating to deregistration.

The UT dismissed the taxpayer's appeal.

On the issue of whether the taxpayer was in business, the UT held that the FTT should have applied the test enunciated in *Wakefield College v HMRC* [2018] EWCA Civ 952, rather than relying on the *Lord Fisher* decision as an 'exhaustive checklist'. The UT decided to re-make the FTT's decision on the point rather than remit the case back to the FTT. The UT held that the taxpayer was not carrying on an economic activity as there was no direct link between the services supplied by the taxpayer and the payment received for them, the haymaking was not being carried on in a regular manner and on sound business principles (the taxpayer raised no invoices, had only one customer worth £440 per year and maintained no insurance), and the taxpayer did not participate in the market.

With regard to the deregistration issue, the UT had little difficulty in rejecting the taxpayer's arguments. In the UT's view, paragraph 13(2), Schedule 1, VATA 1994, gives HMRC a discretion to cancel a registration and not an obligation to do so. Status as a taxable person did not carry an automatic right to deduct income tax regardless of whether a business was being carried on. If a business was not being carried on, or to be carried on, the VAT was not input tax at all (due to the definition in section 24(1), VATA 1994, which defines input tax by reference to goods or services used or to be used for the purposes of a business to be carried on by the taxpayer).

Why it matters: This decision provides useful guidance from the UT on the appropriate test to be applied in assessing whether a taxpayer is in business and therefore can reclaim input VAT.

The decision can be viewed **here**.

Andrew Ellis and Jane Bromley – FTT confirms DIY housebuilders can make interim VAT claims during redevelopment

In *Andrew Ellis and Jane Bromley v HMRC* [2021] UKFTT 0343 (TC), the FTT allowed the taxpayers' appeal against a refusal by HMRC to allow a second claim for repayment of VAT under the DIY Housebuilders' Scheme (the **Scheme**), in respect of supplies of goods used to construct a dwelling house.

Mr Ellis was a builder and applied for planning permission to demolish and replace the taxpayers' three-bedroom bungalow with a four-bedroom dwelling. Permission was granted, and the taxpayers spent five years constructing the property. In 2015, during the construction, the Council assessed the property for council tax purposes, but there was no suggestion that the works were completed. To improve cash flow, the taxpayers made an interim claim for repayment of VAT under the Scheme in 2017 (the **2017 Claim**), and a subsequent claim in 2019 (the **2019 Claim**).

VAT Return 431NB, which Mr Ellis used to make the 2017 Claim, did not request confirmation that the construction was completed and indicated that a valuation was satisfactory evidence to allow a repayment claim to be made. The guidance notes (which were not legally binding) indicated that only one claim may be made in respect of one building and the claim must be made within three months of completion. A VAT repayment was made in June 2017 in respect of the 2017 Claim. The 2019 Claim was rejected by HMRC on the ground that only one claim can be made under the Scheme within the three-month time limit.

Under section 35, VATA 1994, HMRC is required to refund VAT charged on the construction of a residential building. Section 35 does not expressly

prevent more than one claim for repayment being made. Section 6, Interpretation Act 1978, confirms that a reference to "a claim" must be read as including "claims". The FTT noted that none of the provisions of VATA 1994 restrict a self-builder to making one claim only on completion of the development. The FTT decided that Regulation 201, VAT Regulations is *ultra vires* in requiring evidence of completion of a dwelling prior to a claim being accepted, as this would limit the scope of section 35. In the view of the FTT, the Council's re-banding of the property in 2015 was not evidence of completion of the works, but merely evidence that some building works had been undertaken and the dwelling could be inhabited.

The FTT therefore allowed the taxpayers' appeal.

Why it matters: Given that HMRC's guidance is inconsistent with the FTT's decision, it is likely that HMRC will seek to appeal this decision. Subject to any successful appeal by HMRC, this decision will assist other DIY builders of residential buildings seeking to secure a cash flow advantage by make multiple VAT repayment claims during the course of a project.

A copy of the decision can be viewed **here**.

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