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V@

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

News

- The Treasury has made the **Value Added Tax (Treatment of Transactions) (Revocation) Order 2021 (SI 2021/1023)**, which came into force on 21 October 2021 (subject to certain transitional provisions). The order revokes the Value Added Tax (Treatment of Transactions) Order 1992, to ensure that government departments and NHS bodies cannot exploit the legislation to give themselves a VAT recovery advantage over other taxpayers in relation to cars supplied to employees under salary sacrifice arrangements, following the decision of the Court of Appeal in *HMRC v Northumbria Healthcare NHS Foundation Trust* [2020] EWCA Civ 874.

- HMRC has published **Revenue and Customs Brief 13 (2021): Change in the VAT treatment of the construction self-supply charge**. The Brief confirms that, following the Supreme Court decision in *Balhousie Holdings Ltd* [2021] UKSC 11 (which we reported on in the **May 2021 edition of V@**), HMRC has revised its policy in relation to the meaning of 'entire interest', for the purposes of the self-supply charge. The Brief is of relevance to organisations within the care home, NHS or charities sector and businesses engaged in property transactions which are carried out for a relevant residential or relevant charitable purpose.

- HMRC has published a new guidance note in relation to the One Stop Shop (**OSS**) regime, entitled **Submit your OSS VAT Return**. The note explains when and how businesses should submit a OSS VAT Return, and what happens after the return is submitted. HMRC has also updated its guidance note entitled **Check how to report and pay VAT on distance sales of goods from Northern Ireland to the EU**, which explains how to report and pay VAT due on the distance sales of goods from Northern Ireland to consumers in the EU using the OSS Union scheme.

Case reports

Silver Sea Properties – no input tax recovery on furniture and fixtures in care home

In *Silver Sea Properties (Leamington Spa) Sarl v HMRC* [2021] UKFTT 0350 (TC), Care UK Community Partnerships Ltd (**Opco**) operated a care home which it leased on a 'turnkey' basis (i.e. substantially all the equipment necessary to operate the building as a care home had been supplied with the care home) from the appellant (**Propco**), an associated company. As well as the building, Propco supplied various furniture, fittings and other equipment (**FFE**) required to operate the care home. Some of these were capable of being moved around the care home.

Item 1(a)(ii), Group 5, Schedule 8, Value Added Tax Act 1994 (**VATA**), provides that the first grant by the person constructing a building of a major interest in that building which is intended solely for a 'relevant residential purpose' (which includes use as a care home) is zero-rated for VAT purposes. Article 6, Value Added Tax (Input Tax) Order 1992, provides that items incorporated into a building that are not building materials are excluded from credit for VAT purposes (known as the **'Builder's Block'**). Notes 22 and 23, Schedule 8, Group 5, set out details of items that are not 'building materials' for the purposes of the Builder's Block.

The First-tier Tribunal (**FTT**) applied the decision of the Upper Tribunal (**UT**) in *Taylor Wimpey v HMRC* [2018] UKUT 55, where it had been held that an item would be incorporated into a building (and therefore subject to the Builder's Block) if it was a fixture, and also if installed as a fitting. For

this to take place there must be 'a material degree of attachment to the building, albeit less than the degree of annexation required for something to be a fixture'. An electrical appliance that was merely plugged in would not be 'installed as a fitting' for these purposes, but an appliance that was integrated or plumbed-in in a non-temporary manner would be 'installed as a fitting'.

The FTT held that an item of furniture screwed to a wall, even if easily detachable, would be 'installed as a fitting'. It was irrelevant that these items could be uninstalled without causing significant damage. The FTT further held (again applying *Taylor Wimpey*) that whether items constituted 'building materials' depended on whether they were of a kind 'ordinarily incorporated' into a building. In this context, it was necessary to look at whether the items were ordinarily incorporated into a building which 'most closely accords with the use of the building in question'. In the present case, that meant care homes in general, and not 'turnkey' care homes.

There was not a single composite supply of FFE to Opco by Propco (such as to render the entire supply capable of being zero-rated). The FTT thought that the best characterisation of the FFE was as a 'welcome pack'. There was never any intention that it should be returned to Propco at the end of the lease and the inclusion of single-use items in the FFE suggested that it was intended that title to the FFE should pass to Opco.

Why it matters: This decision contains a useful discussion of the Builder's Block and will be of interest to anyone involved in VAT on construction, particularly in the context of residential homes.

The decision can be viewed **here**.

GB Fleet Hire – UT allows appeal against FTT's strike out decision

In *GB Fleet Hire Ltd v HMRC* [2021] UKUT 225 (TCC), GB Fleet Hire Ltd (**GBFH**) appealed to the UT against a decision of the FTT, following a case management hearing, to allow HMRC's application for GBFH's appeal to be struck out under Rule 8(3)(c) of the Tribunal Rules.

The underlying dispute was concerned with whether supplies by GBFH of vehicles which were exported to the Far East and Ireland were properly zero-rated, allowing for input tax recovery. The FTT struck out GBFH's appeal based on its finding that, in a letter dated 5 August 2020 (the **Letter**), GBFH had abandoned its claim to be entitled to zero-rating and therefore GBFH's appeal had no reasonable prospect of the appeal succeeding.

GBFH appealed to the UT on the ground that the FTT erred in its construction of the Letter. The UT allowed the appeal. In the view of the UT, the FTT had erred in law. When construing assertions in the Letter regarding zero-rating, it failed to consider the Letter as a whole, failed to consider relevant aspects of GBFH's proposed amended grounds of appeal and failed to take a highly relevant factor into account, namely, GBFH's continuing claim to be entitled to recover input tax.

The UT accepted that it should be slow to interfere with elements of the FTT's evaluation but concluded that, in this case, there was no discernible evidence that the FTT evaluated the relevant aspects of the evidence or, if it did so, it had not provided an explanation in its written decision. The UT held that the FTT's construction of the Letter as GBFH abandoning its case that its supplies were zero-rated was inconsistent with the evidence and therefore the FTT's finding that GBFH could not succeed was irrational. The UT decided that no reasonable tribunal could, when considering the relevant material before it, have come to that conclusion.

GBFH also appealed on the grounds that the FTT acted in a procedurally unfair manner and had deprived it of access to the court and/or effective protection of its EU law rights. However, because the UT had allowed the appeal on the basis of the first ground of appeal relied upon by GBFH, it did not consider the other grounds of appeal.

Why it matters: Although the UT will be slow to interfere with evaluations carried out by the FTT, this decision is an example of the UT effectively carrying out its appellate function in circumstances when it was of the view that 'no reasonable tribunal' could have come to the conclusion reached by the FTT in this case.

The decision can be viewed **here**.

Richmond Hill Developments – redevelopment was not a "substantial reconstruction"

In *Richmond Hill Developments (Jersey) Ltd v HMRC* [2021] UKFTT 0290 (TC), the FTT dismissed the appeal of Richmond Hill Developments (Jersey) Ltd (**RHD**) against HMRC's decision that a redevelopment of a listed building was not a "substantial reconstruction", where internal features were retained.

RHD converted a nursing home into residential flats. The development retained the external walls and roof, and internal features such as concrete flooring, the building's steel frame and a marble entrance and staircase. These were retained to comply with planning permission requirements.

Item 1, Group 6, Schedule 8, VATA, zero rates the supply of dwellings which are the result of a "substantial conversion" of a listed building. However, under Note 4, Group 6: "a [listed] building is not to be regarded as substantially reconstructed unless when the reconstruction is completed, the reconstructed building incorporates no more of the original building (that is to say, the building as it was before the reconstruction began) than the external walls together with other external features of architectural or historical interest".

RHD argued that the retained internal features were of a structural nature and were *de minimis* so should be ignored for current purposes. Following *HMRC v Zielinski Baker & Partners* [2004] UKHL 7, the FTT considered that the requirement for only external walls and features to be retained had to be applied stringently. Accordingly, the FTT found that the retained features, including the marble walls and staircase (which made up 7% of the floor space), floor slabs (which were connected to the external walls) and steel trusses supporting the eternal walls and floor slabs, could not be viewed as *de minimis*; these were internal features and were retained to maintain the characteristics of the listed building.

In the view of the FTT, the supplies of the flats in the development were exempt rather than zero-rated and therefore RHD could not recover the relevant input VAT in relation to the conversion works carried out.

Why it matters: This decision will be relevant to developers who wish to maximise their input VAT recovery in relation to the conversion of listed buildings.

The decision can be viewed **here**.

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