VAT update

February 2018

In this month's update we report on the EU Commission's proposals to reduce VAT compliance costs for small businesses; guidance published by HMRC following the Supreme Court's decision in Investment Trust Companies; and the latest consultation to implement "making tax digital" for VAT. We also comment on three recent cases involving the impact of discounts on consideration for VAT purposes; when a lack of funds is a reasonable excuse for VAT default; and when different elements of a supply can be taxed at different rates.

News

EU Commission proposes flexibility over VAT rates for small businesses

On 18 January 2018, the European Commission proposed new rules which would allow Member States greater flexibility in setting VAT rates and reduce red tape for small businesses. more›

Business Brief 4 (2017) – HMRC confirms its position following the Supreme Court judgment in *Investment Trust Companies*

In our April 2017 VAT Update (which can be viewed here) we reported on the Supreme Court's judgment in *Investment Trust Companies (in liquidation) v HMRC* [2017] UKSC 29. The case concerned claims made by final consumers against HMRC for VAT that had been wrongly charged to them by their suppliers. more›

Making tax digital

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Cases

Finanzamt Bingen-Alzey – Discounts and consideration for VAT

In *Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG* C-462/16, the Court of Justice of the European Union (CJEU) has confirmed that consideration for VAT purposes should be reduced by any discount applied, regardless of who benefited from the discount. more›

Any comments or queries?

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Design Rationale – Lack of funds a reasonable excuse for VAT default

In *Design Rationale Ltd v HMRC* [2017] UKFTT 878 (TC), the First-tier Tribunal (FTT) has held that a lack of funds caused by HMRC owing significant amounts to the taxpayer was a reasonable excuse for the taxpayer failing to account for VAT on time. **more›**

Stadion Amsterdam CV – when can different elements of a supply be taxed at different rates?

In *Stadion Amsterdam CV v Staatssecretaris van Financiën* C-463/16, the CJEU has confirmed that, in the absence of specific statutory language to the contrary, a single supply, which includes two individually priced elements, is taxable at the rate of the principle supply. **more›**

About this update

The VAT update is published on the final Thursday of every month, and is written by members of RPC's Tax team.

We also publish a Tax update on the first Thursday of every month, and a weekly blog, RPC's Tax Take.

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News

EU Commission proposes flexibility over VAT rates for small businesses

On 18 January 2018, the European Commission proposed new rules which would allow Member States greater flexibility in setting VAT rates and reduce red tape for small businesses.

The aim of the proposals is to reduce overall compliance costs that small businesses face in complying with their VAT obligations.

The entire package is to have effect from 1 July 2022. Should the UK leaves the EU before then, the proposals may have little relevance to the UK but the remaining member states will welcome the proposed greater autonomy on rates which should encourage cross-border trade.

A copy of the Commission's press release is available to view here.

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Business Brief 4 (2017) – HMRC confirms its position following the Supreme Court judgment in *Investment Trust Companies*

In our April 2017 VAT Update (which can be viewed here) we reported on the Supreme Court's judgment in *Investment Trust Companies (in liquidation) v HMRC* [2017] UKSC 29. The case concerned claims made by final consumers against HMRC for VAT that had been wrongly charged to them by their suppliers.

On 19 December 2017, HMRC published Revenue & Customs Brief 4 (2017) in which it confirmed its position following the Supreme Court's judgment in *ITC*.

In HMRC's view there are limited circumstances in which a consumer can claim directly against HMRC. Unfortunately, no further guidance, or examples of circumstances in which HMRC accepts that recourse against the supplier is impossible or excessively difficult, are given.

Anyone who considers that they have a claim that is not precluded by the *ITC* judgment should seek expert advice.

A copy of Business Brief 4 (2017) is available to view here.

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Making tax digital

On 18 December 2017, HMRC published for consultation draft secondary and tertiary legislation to implement "making tax digital" for VAT.

The proposed legislation makes changes to the VAT regime which would require businesses with taxable turnover above the VAT registration threshold to keep and preserve digital records and submit VAT returns to HMRC using functional compatible software.

The consultation period closed on 9 February 2018 and HMRC is analysing the feedback received. The outcome of the review will be published in due course.

A copy of the draft legislation is available to view here.

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Cases

Finanzamt Bingen-Alzey – Discounts and consideration for VAT

In *Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG* C-462/16, the Court of Justice of the European Union (CJEU) has confirmed that consideration for VAT purposes should be reduced by any discount applied, regardless of who benefited from the discount.

Background

Boehringer is a pharmaceutical company which manufactures and supplies medicinal products to various wholesalers and pharmacies. Consumers who purchased the medicines from the pharmacies obtain reimbursement of the full cost from their private health insurer.

Under German law, Boehringer was required to offer a cash discount to the private health insurers on the medicines supplied by it. As a result, Boehringer sought to reduce the consideration received for VAT purposes by the amount of the discount. The German tax authorities challenged this approach. They argued that as the discount provided was not received by the consumer of the products, Boehringer's consideration should not be reduced.

The matter was referred to the CJEU to consider the impact of discounts on consideration for VAT purposes.

CJEU decision

The Court concluded that the discount resulted in a reduction in the taxable amount.

In reaching its decision, the CJEU considered the principles defined by it in *Elida Gibbs Ltd v Customs and Excise Commissioners* C-317/94 regarding the determination of the taxable amount for VAT.

The CJEU commented that Article 90(1) of the VAT Directive embodies one of the fundamental principles of VAT law that the taxable amount is the consideration actually received. It is an expression of the principle of neutrality of VAT requiring the taxable amount to be reduced when, after a transaction is concluded, part or all of the consideration has not been received by the taxable person. There is no rule that the person who receives the discount must be the final consumer in the supply chain and there was no indication in the judgment in *Elida Gibbs* that the Court wished to restrict the scope of Article 11C(1) of the Sixth Directive (which corresponds to Article 90 of the VAT Directive) in such a way.

The CJEU agreed with the Advocate General's earlier opinion (released on 11 July 2017) that the private health insurance companies must be regarded as being the final consumer of the supply, such that the amount payable to the tax authority may not exceed that paid by the final consumer. Accordingly, as part of the consideration is not received by Boehringer because of the discount granted to the private insurer, the CJEU held that there had been a reduction in price in accordance with Article 90 of the VAT Directive.

Applying *International Bingo Technology* C-377/11, the CJEU concluded that as the discount was fixed by statute (the pharmaceutical company was not able to freely dispose of the full amount of the price received on sales to pharmacies and wholesalers) the discount was not part of the consideration received.

Comment

In this case the CJEU refused to restrict the ambit of the principles set out *Elida Gibbs* in which the CJEU confirmed that the amount of VAT collected in a single supply chain did not need to exceed the amount of VAT paid by the final consumer and that a broad interpretation must be given to Article 90(1).

This decision provides helpful guidance on how rebates should be treated for VAT purposes when provided to parties who do not operate in the same distribution chain and it will be of particular interest to pharmaceutical companies and health insurers.

A copy of the judgment is available to view here.

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Design Rationale – Lack of funds a reasonable excuse for VAT default

In *Design Rationale Ltd v HMRC* [2017] UKFTT 878 (TC), the First-tier Tribunal (FTT) has held that a lack of funds caused by HMRC owing significant amounts to the taxpayer was a reasonable excuse for the taxpayer failing to account for VAT on time.

Background

The taxpayer designs and manufacturers interior fittings. It is also a sub-contractor and falls within the Construction Industry Scheme (CIS). During the tax year 2016/17 it did not have "gross payment" status, and so payments to it for labour were made by main contractors who deducted amounts from the payments in accordance with the rules of the CIS.

The taxpayer entered the default surcharge regime for its 11/16 period. It was informed that no liability to a surcharge had been incurred but was warned that a further default within 12 months may lead to a surcharge liability.

Due to overpaying tax through the CIS for 2016/17, which could not be repaid until the end of the year, the taxpayer had insufficient funds to account for VAT from 11/16 onwards. It subsequently defaulted in the 02/17 period. HMRC issued a Notice of Assessment in respect of this default imposing a surcharge of 2% of the VAT paid late.

The taxpayer requested that HMRC review its decision. The conclusion of HMRC's review was to uphold the default surcharge despite knowing that the VAT debt had not been paid as the taxpayer was awaiting a refund under the CIS. In HMRC's view, this did not amount to a reasonable excuse for non-payment of VAT by the due date. The taxpayer appealed to the FTT.

FTT decision
The appeal was allowed and the assessment was reduced to nil.

In reaching its conclusion, the FTT noted that in HMRC's conclusion letter, the officer did not say why the taxpayer did not have a reasonable excuse, but instead informed it what, in her view, a reasonable excuse was, namely, something that prevented the taxpayer from meeting a tax obligation on time that it had taken reasonable care to meet. HMRC did not address the taxpayer's repeated statements that it could not pay the VAT and the reason why.

The FTT followed *Commissioners of Customs and Excise v Salevon Ltd* [1989] STC 907 and *Commissioners of Customs and Excise v Steptoe* [1992] STC 757, which rejected the notion that the cause of an inability to pay was irrelevant.

In the circumstances, the FTT considered the taxpayer had taken reasonable care to meet its obligations (including utilising overdraft facilities) and its inability to pay was clearly due to the fact that HMRC was in possession of an amount well in excess of any possible estimate of the taxpayer's relevant liabilities which it could not offset against the VAT liability. In the view of the FTT, this was a reasonable excuse for the purposes of section 59(7), VATA 1994.

Comment
Whilst penalty cases tend to be fact specific, this decision serves as a useful reminder that HMRC should not automatically reject lack of funds as a reasonable excuse for the purposes of section 59(7) VATA 1994. The broader circumstances surrounding a taxpayer's default must be taken into consideration.

A copy of the decision is available to view here.

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Stadion Amsterdam CV – when can different elements of a supply be taxed at different rates?

In *Stadion Amsterdam CV v Staatssecretaris van Financiën* C-463/16, the CJEU has confirmed that, in the absence of specific statutory language to the contrary, a single supply, which includes two individually priced elements, is taxable at the rate of the principle supply.

Background
Stadion operates a multi-purpose building complex known as the Amsterdam Arena, which includes the museum of Ajax AFC. In addition to operating the venue as a football stadium, it hires the stadium out to third parties for sports competitions and, occasionally, for performances by performing artists. It also offers guided tours of the stadium for an admission charge, which includes a visit, without a guide, to the AFC Ajax museum for the combined price of €10.

It was accepted by the parties that the tour was a single supply of services (the stadium tour and the museum entry). The issue was whether this single service should be taxed at the reduced or standard VAT rate.

If the supplies had been provided as separate services, different VAT rates would have applied – in the Netherlands, entrance to museums is taxed at a reduced rate of VAT (6%), while stadium tours are taxed at the standard VAT rate (21%).

Stadion relied on the CJEU judgments in *Talacre Beach Caravan Sales Ltd* C-251/05 and *Commission v France* C-94/09 (*French Undertakers*) and argued that, as it was possible to identify a "concrete and specific element" (the museum visit) of a single supply, which, if supplied separately, would be subject to a different rate of VAT, then provided the price for each element was identifiable, each element should attract the applicable rate or VAT.

CJEU decision

The CJEU rejected Stadion's argument and confirmed that, in the absence of specific statutory language to the contrary, where there is a single composite supply a single rate of VAT applies.

In reaching its decision the CJEU accepted that there was clearly a single supply in this case. To treat the supply otherwise would be to disregard recent CJEU case law and artificially split the supply (*Bog and others C-479/09* and *Baštová* C-432/15). The fact that the price of each element could be easily identified did not alter the analysis. To conclude otherwise would jeopardise the principle of fiscal neutrality as the VAT treatment would depend on whether a price apportionment was possible.

The Court noted that the *Talacre Beach* and *French Undertakers* cases involved specific and limited exceptions to the general principle. The relevant legislation in those cases had provided for a VAT treatment to "concrete and specific aspects" of a supply which overrode the application of the single rate of VAT to the particular supplies in question. There was no such exception in the present case.

The Court concluded that there was a single supply, comprised of two distinct elements, one principal (the stadium tour) and one ancillary (the museum visit). Accordingly, it must be taxed solely at the rate of VAT based on the rate applicable to the principal element.

Comment

The CJEU's decision in this case is not surprising and helps clarify the confusion caused by the earlier decisions in relation to the scope of any exception to the requirement to apply a single rate of VAT to a single supply.

The general rule remains that a single supply made up of several elements is taxable at the rate of the principal supply. The circumstances in which different elements of a supply can be taxed at different rates (as in *Talacre Beach* and *French Undertakers*) will be limited.

A copy of the judgment can be viewed here.

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About RPC

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