VAT update

June 2016

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EU adopts VAT action plan

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Card handling fees not exempt from VAT

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Corrigan v HMRC – Tribunal allows taxpayer's appeal in VAT repayment supplement case

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In *Grand Entertainments Co v HMRC*[4], the Upper Tribunal (UT) has upheld the decision of the FTT which refused the taxpayer's claim for repayment of VAT. more›

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In *University of Huddersfield Higher Education Corporation v HMRC*[7], the Court of Appeal has dismissed the taxpayer's appeal against the UT's decision that a lease and leaseback scheme offended the *Halifax* abuse of rights principle. more›

Any comments or queries?

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About this update

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

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

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News

Brexit

The result of last week's referendum on the UK's membership of the European Union is likely to lead to a prolonged period of uncertainty in many areas of taxation, particularly those relating to "harmonised" or "partially harmonised" taxes, such as Value Added Tax.

It is unlikely that VAT, in one form or another, will cease to exist after the formal process to extricate the UK from the European Union has been completed, however, the details, and the level of connectivity to the European Union are not likely to be known for some time.

For now, nothing has changed as a consequence of the referendum result and businesses, HMRC and the courts/tribunals will carry on as before.

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Minimum standard VAT rate of 15% to be maintained

The Council of the European Union amended the Principal VAT Directive on 25 May 2016 to ensure the 15% minimum standard rate of VAT is maintained until 30 December 2017. The purpose of the minimum standard rate is to attempt to limit the prospect of distortions and imbalances in the operation of the VAT system across the EU. Fixing the rate for an extended period is designed to ensure a greater degree of legal certainty in this area.

The amending instrument is available to view here.

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EU adopts VAT action plan

The Council of the European Union has delivered its conclusions on the EU Commission's VAT Action Plan.

The Council has asked the Commission to set out proposals for member states to be able to use reverse charging as a mechanism for combating fraud. The Council has also requested draft legislation on the alignments of VAT rates for electronic publications and the introduction of zero-rating for sanitary products for women.

The press release is available to view here.

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Card handling fees not exempt from VAT

The judgments of the Court of Justice of the European Union (ECJ) in Case C-607/14 *Bookit Ltd* and Case C-130/15 *National Exhibition Centre Limited*, have confirmed that in order for debit and credit card handling charges to fall within the VAT exemption found in Article 135(1)(d) VAT Directive 2006/112/EC, the services must effect the change in the legal and financial ownership of the funds in question.

On the facts, the services provided by the taxpayers, including the transmission of authorisation codes that automatically triggered payment, did not cause the change in the legal and financial ownership of the funds but rather consisted of obtaining and exchanging the information necessary to enable the taxpayers to receive payment by debit or credit card.

In the light of the ECJ's decision, it appears the Court of Appeal's application of *Sparekassernes Datacenter Case* C-2/95 in *Bookit Ltd v HMRC*[1] was too wide. The cases will now return to the UK tribunals for determination, but given the ECJ's clear ruling, the ECJ's judgment appears determinative. The ECJ's judgment confirms that the exemption is narrow, and vindicates HMRC's long running attempts to challenge the correctness of the Court of Appeal's decision.

The ECJ also made comments (even though the issue was not referred to it) about the composite supply doctrine, which could provide HMRC with ammunition to re-open the debate about whether the single-composite supply test can be applied even if the relevant services are made by two distinct (non-VAT grouped) entities.

The *Bookit* judgment is available to view here.

The *National Exhibit Centre* judgment is available to view here.

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1. [2006] EWCA Civ 550.

Cases

Corrigan v HMRC – Tribunal allows taxpayer's appeal in VAT repayment supplement case

In *Shaun David Corrigan v HMRC*[2], in allowing the taxpayer's appeal, the First-tier Tribunal (FTT) found that HMRC's enquiry into a repayment claim had lasted only a day and therefore only a day could be left out of account of the 30 day period HMRC was entitled to in order to authorise the claim.

Background

The taxpayer appealed against HMRC's decision to refuse to pay a VAT repayment supplement which is a form of compensation payable in certain circumstances when HMRC does not authorise payment of a legitimate claim to repayment within 30 days of the receipt of a VAT return. Section 79(3) and (4), Value Added Tax Act 1994 (VATA 1994), provides that time taken for HMRC's enquiries can be left out of account for this purpose.

The taxpayer submitted his quarterly VAT returns and submitted a VAT return for the period 1 March 2013 to 31 May 2013 (03/13) and claimed a credit of £26,016.96 (the 05/13 Return). This was received by HMRC on 30 June 2013.

Within HMRC there exists a Repayment Supplement Team and a system of automated credibility checks is applied by computer to all repayment returns and those "failed" by the computer are investigated further to ascertain whether or not all the conditions contained in section 79 VATA 1994 have been met and to decide whether a repayment supplement is appropriate.

The matter was passed to HMRC's office in Glasgow, where an officer decided to instigate a check of the taxpayer's VAT records for the purpose of checking the 05/13 Return. HMRC had telephoned and written to the taxpayer on 16 July 2013, informing him that it intended to visit his premises on 30 July 2013.

HMRC was subsequently satisfied that the bulk of the VAT repayment claim could be made, however detailed reasons were given in a letter dated 5 August 2013 relating to kitchen appliances and a carpet supplied to some of the taxpayer's customers for the adjustment to the claim from £26,016.96 to £24,522.74. The letter indicated that the taxpayer was entitled to a VAT credit of £24,522.74 for the 05/13 period and that the amount would be credited to his account. The VAT repayment was released on 8 August 2013. Following further correspondence from the taxpayer, HMRC agreed that the balance of the claim originally disallowed (£1,494.22), could be reinstated.

Subsequently, the taxpayer made a claim to repayment supplement on 16 April 2014 in relation to the 05/13 Return. This claim was denied by HMRC on 27 June 2014. HMRC indicated that the total time to authorise the first part payment of £24,522.74 from the date of receipt of the VAT return on 30 June 2013 to the date of authorisation of the repayment on 8 August 2013, was 40 days but that the time between when the taxpayer was contacted about the inquiry on 16 July 2013 "to the date that we were satisfied that the claim could be authorised" on 2 August 2013 (18 days) should be omitted, so that the net delay on HMRC's calculation was only 22 days. In relation to the amount of £1,494.22 which was reinstated, HMRC accepted that repayment supplement was due and paid this.

The taxpayer appealed HMRC's decision to refuse to pay the repayment supplement.

2. [2016] UKFTT 0180 (TC) TC04966.

FTT's decision

The substantive issue before the FTT was whether the period from 16 July 2013 to 30 July 2013 (reduced by a "4 day allowance" which HMRC argued was sanctioned by "internal guidance", but the validity of which did not need to be determined in this instance), should be left out of account in calculating the 30 day period for the purposes of section 79(2) VATA 1994. It was agreed that the 30 day period began on 30 June 2013 and that the relevant period ended either on 5 or 8 August 2013.

The FTT considered whether HMRC's telephone call and letter dated 16 July 2013 amounted to an inquiry into the 05/13 Return. If they did, the "stop clock" period would start on this date.

The FTT referred to the decision of the FTT in *Marlico Limited v HMRC*[3], where the judge had indicated that the 30 day exclusion period for HMRC to make reasonable enquiries "begins on the date when the Commissioners first consider it necessary to make an inquiry". The FTT said that it agreed with the judge's analysis that the legislation refers to a specific inquiry, being the "reasonable inquiry relating to the requisite return" and requires HMRC to have identified more than a general need for information. The FTT said that HMRC needs to have formulated a specific question which needed to be answered by the taxpayer concerned.

In the view of the FTT, HMRC's letter of 16 July 2013, identified only a general need for information and simply indicated that HMRC was to visit the taxpayer's premises on 30 July 2013. If there had been a list of records attached to that letter then the FTT considered the terms of such a list might be capable of being construed as formulating a specific question but there was no such list. The FTT therefore concluded that the inquiry had begun and ended on 30 July 2013, the day of the visit to the taxpayer's premises, and that no specific questions had been raised by that date. Accordingly, only one day should be left out of account in calculating the 30 day period and therefore the delay in the VAT repayment exceeded 30 days and HMRC was liable to pay the VAT repayment supplement.

Comment

The approach of the FTT in this case is consistent with the FTT's decision in *Marlico* and provides further guidance on how the FTT will approach any similar issue where HMRC assert that an inquiry sufficient to stop the 30 day clock has been commenced. Taxpayers should consider the nature of the inquiry carefully if HMRC resist repayment claims on this basis. A general indication that HMRC wishes to check records relating to the relevant return and visit the taxpayer's premises will not necessarily suffice to stop the 30 day period running for the purposes of a VAT repayment supplement claim under section 79 VATA 1994.

A copy of the FTT's decision is available to view here.

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Grand Entertainments Co v HMRC – Tribunal refuses repayment claim

In *Grand Entertainments Co v HMRC*[4], the Upper Tribunal (UT) has upheld the decision of the FTT which refused the taxpayer's claim for repayment of VAT.

Background

The taxpayer was the operator of a bingo and social club. Following a successful claim for repayment of VAT by a bingo operator in *Rank Group Plc v HMRC*[5], the taxpayer lodged a claim for repayment on 19 March 2009. The claim related to services supplied in respect of

3. [2015] UKFTT 528.
4. [2016] UKUT 209 (TCC).
5. [2008] BVC 2482.

mechanised cash bingo and gaming machines in the period between 1980 and 1996. HMRC accepted the part of the claim concerning mechanised cash bingo, but rejected the part concerning gaming machines.

In November 2009, the taxpayer wrote to HMRC attempting to amend the original claim to include main stage bingo (bingo played in the traditional way) for the same accounting period. It lodged a further amendment in January 2010, extending its claim to cover the period from 1973 to 1980. HMRC rejected the November 2009 and January 2010 letters on the basis that they amounted to fresh claims and were accordingly out of time.

The taxpayer appealed to the FTT where it was unsuccessful. The taxpayer then appealed to the UT.

UT's decision

In the view of the UT, by reason of the taxpayer's outstanding appeal against HMRC's rejection of part of the original claim, the original claim was still outstanding and was therefore capable of amendment in November 2009 and January 2010. However, in *Reed Employment Ltd v HMRC*[6], the UT concluded that the test for whether a subsequent claim should be regarded as an amendment will be satisfied only if the later claim arises from the same subject matter as the original claim, without extension to the facts and circumstances contemplated by the earlier claim. In the current case, it was clear that the March 2009 claim had not included main stage bingo, or the period prior to 1980. These were fresh demands and therefore could not be construed as amendments to the original claim.

Under section 80(4), VATA 1994, claims for repayment must be made within three years of the accounting period to which they relate. Under section 121, Finance Act 2008, that time limit does not apply to claims made prior to 1 April 2009. The UT concluded that, unlike the claim made in March 2009, the November 2009 and January 2010 letters did not fall within section 121 and were accordingly time-barred by section 80(4). In the view of the UT, a conclusion that a later claim could always be regarded as an amendment to an earlier claim in respect of the same or similar supplies would significantly undermine the effectiveness and purpose of section 80 and would not encourage accuracy and finality in the submission of claims.

Comment

The UT noted that HMRC was taking the view that VAT was chargeable on main stage bingo games at the time the original claim was made. If, however, the taxpayer was dissatisfied with this approach, the prudent course (in light of the 1 April 2009 cut-off) would have been to lodge a claim for main stage bingo and appeal its rejection. Similarly, the taxpayer ought to have claimed in respect of the earlier period on the basis of a best estimate, and later amended the claim to provide a more accurate figure.

A copy of the UT's decision is available to view here.

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6. [2013] UKUT 109 (TCC).

University of Huddersfield – Court of Appeal confirms that VAT lease and leaseback scheme was abusive

In *University of Huddersfield Higher Education Corporation v HMRC*[7], the Court of Appeal has dismissed the taxpayer's appeal against the UT's decision that a lease and leaseback scheme offended the *Halifax* abuse of rights principle. Accordingly, the transaction had to be re-characterised for VAT purposes so that the taxpayer's input tax on construction services was recoverable in accordance with its partial exemption method (and not fully recoverable as attributable to taxable supplies made under the lease).

Background

In 1996, the taxpayer entered into a lease and leaseback arrangement with the trustees of a discretionary trust for a site known as "East Mill". The taxpayer elected to waive the VAT exemption over East Mill with the effect that the rent payable under the lease to the trustees was subject to VAT at the standard rate. The trustees also elected to waive the VAT exemption over East Mill so that VAT at the standard rate was chargeable on the rent payable under the leaseback to the taxpayer. The lease and leaseback contained a break clause that allowed the tenant to terminate the lease before the expiry of the term.

The taxpayer redeveloped East Mill and sought to reclaim the input VAT incurred on the redevelopment costs on the basis that the input VAT was attributable to the taxpayer's taxable supplies of East Mill.

On 26 January 2000, HMRC issued an assessment denying the recovery of input VAT. The taxpayer appealed. On 16 October 2002, the FTT referred the case to the ECJ and made the following findings of fact:

- the lease and leaseback were genuine transactions resulting in genuine supplies
- the sole reason for using the trust, and the sole purpose of the lease to the trustees, was that of facilitating VAT planning
- the transactions into which the taxpayer entered provided for VAT deferral with an absolute VAT saving if the break was exercised and it was the taxpayer's intention to exercise a break or surrender the lease before the expiry of the term
- the transactions were entered into with the sole intention of obtaining a fiscal advantage and it was the subjective intention of the taxpayer and the trust to achieve that fiscal advantage.

On 18 August 2004, the leases were surrendered.

The ECJ said that the lease and leaseback were supplies of goods and services, and constituted an economic activity. However, the ECJ did not comment on whether the transactions amounted to an abuse of rights. Instead, it stated that a deduction for input VAT arising as a result of transactions that constitute an abusive practice should be denied. The case was referred back to the FTT for a decision on whether there was an abuse of rights.

The FTT found in favour of the taxpayer. HMRC appealed that decision to the UT who found in favour of HMRC. The taxpayer appealed to the Court of Appeal.

Court of Appeal judgment

In the view of the UT, the essential aim of the transactions was, undoubtedly, the obtaining of a tax advantage. The taxpayer had, as a result of the transactions taken as a whole, treated the input tax on the building works as being linked to the taxable supply of the lease, rather than

7. [2016] EWCA Civ 440.

to its general (mainly exempt) supplies and therefore recovered 100%, rather than only a small proportion of it. This constituted a tax advantage. Given that the ECJ in *Halifax* had stated that, to permit a taxable person that made only exempt supplies to recover all of its input tax would be contrary to the principle of fiscal neutrality, the tax advantage obtained by the taxpayer was contrary to the purposes of the Sixth Directive and the national implementing legislation.

The Court of Appeal distinguished *HMRC v Weald Leasing Ltd*[8], which concerned the deferral of irrecoverable VAT over the term of a lease from the instant case, where the scheme could be collapsed in order to obtain an absolute saving. The FTT had found that this was the taxpayer's intention from the outset. In the view of the Court, in considering whether the first limb of the *Halifax* principle (that the transactions resulting in the tax advantage were contrary to VAT law) was satisfied, the UT had been correct to focus on the object, purpose and effect of interposing the trust and granting the lease and leaseback, which had no commercial effect other than to secure a tax advantage.

In re-characterising the transactions, the Court said that its task was to disregard the abusive (artificial) elements of the scheme (in this case, the trust and lease and leaseback) and not, as the taxpayer had argued, to substitute it for an alternative scheme that the taxpayer could have implemented (a similar lease arrangement but at arm's length).

Comment

Given the FTT's finding of fact that there was an intention from the start to collapse the leases (and obtain an absolute VAT saving), and the UT distinguishing *Weald Leasing*, the Court of Appeal's judgment is not surprising.

Leasing is not in itself abusive. Partially exempt taxpayers may choose to spread irrecoverable VAT over the lease period, but a lease designed to achieve an absolute VAT saving will be open to challenge by HMRC.

A copy of the Court of Appeal's judgment is available to view here.

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8. (Case C-103/09).

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