VAT update

May 2019

In this month's update we report on (1) HMRC guidance on the correct treatment for the deduction of import VAT by non-owners of goods; (2) Regulations which introduce a VAT reverse charge on specified construction services; and (3) refunds of VAT in the UK for non-EU businesses.

We also comment on three recent cases relating to (1) whether VAT late payment interest constitutes default or commercial interest; (2) whether cashpoint operation services are exempt from VAT; and (3) the consequences of withdrawing a claim.

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HMRC guidance on the correct treatment for the deduction of import VAT by non-owners of goods

On 11 April 2019, HMRC published Revenue and Customs Brief 2 (2019), in which it explains the correct treatment for the deduction of import VAT paid by a taxable person who is not the owner of the relevant goods. more›

Regulations introduce VAT reverse charge for construction services

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Refunds of VAT in the UK for non-EU businesses

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G4S Corporate Services – interest assessed is default interest not commercial interest

In *G4S Corporate Services Ltd v HMRC*, the First-tier Tribunal (FTT) has held that interest assessed under sections 74 and 75, VATA 1994, on late-paid VAT, is default interest intended to reflect the time value of money withheld from HMRC and is not commercial interest. more›

Any comments or queries?

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Cardpoint – cashpoint services not exempt from VAT (AG opinion)

On 2 May 2019, Advocate General (AG) Bot delivered his opinion in *Finanzamt Trier v Cardpoint GmbH*, in relation to the scope of the VAT exemption for financial services. The case concerns whether technical and administrative services provided to a bank operating cash point withdrawals falls within the VAT exemption. **more›**

Buckingham Bingo – failed attempt to resurrect a claim

In *Buckingham Bingo Ltd v HMRC*, the Upper Tribunal (UT) has upheld the decision of the FTT that once a taxpayer has foregone its appeal against an HMRC 'appealable' decision, it cannot resurrect its right of appeal. **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 items

HMRC guidance on the correct treatment for the deduction of import VAT by non-owners of goods

On 11 April 2019, HMRC published Revenue and Customs Brief 2 (2019), in which it explains the correct treatment for the deduction of import VAT paid by a taxable person who is not the owner of the relevant goods.

The correct procedure is for the new owner of the goods to be the importer of record and reclaim the import VAT on the C79, in accordance with section 24, VATA 1994.

From 15 July 2019, HMRC will only allow claims for input tax deduction made using the correct procedure. This allows a transitional period for businesses to make any necessary changes to ensure the correct procedure is followed going forward.

A copy of Brief 2 (2019) can be viewed here.

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Regulations introduce VAT reverse charge for construction services

On 29 April 2019, HM Treasury made regulations introducing a VAT reverse charge on specified construction services. The regulations are effective from 1 October 2019.

The effect of the reverse charge is to impose on the recipient of goods or services (rather than the supplier) the requirement to account for VAT and is intended to combat VAT fraud and evasion in the construction industry.

HMRC has published a guidance note on the reverse charge but has confirmed that this guidance is an overview and that more detailed guidance will follow in the run up to 1 October 2019.

A copy of HMRC's guidance can be viewed here.
A copy of the Treasury Order can be viewed here.

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Refunds of VAT in the UK for non-EU businesses

On 4 April 2019, HMRC updated Revenue and Customs Brief 12 (2018), in which it sets out action that non-EU businesses may need to take if HMRC has rejected their claims for refunds of UK VAT.

When the Brief was first published on 12 December 2018, it provided non-EU businesses with a deadline of 31 March 2019 to submit a valid certificate of status (CS) for overseas VAT refund claims made for 2017/18. However, HMRC is aware that the US government shut-down resulted in delays to the issue of CSs to US businesses and it has therefore extended the deadline for the submission of CSs by US businesses in respect of 2017/18 overseas VAT refund claims, to 30 May 2019.

All other non EU businesses should have submitted their valid CSs by 31 March 2019.

A copy of Brief 12 (2018) can be viewed here.

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Cases

G4S Corporate Services – interest assessed is default interest not commercial interest

In *G4S Corporate Services Ltd v HMRC*[1], the First-tier Tribunal (FTT) has held that interest assessed under sections 74 and 75, VATA 1994, on late-paid VAT, is default interest intended to reflect the time value of money withheld from HMRC and is not commercial interest.

Background

This case comprised of two separate appeals. In each appeal, the appellant was the representative member of a separate VAT group which was assessed to VAT under section 73, VATA 1994, on supplies by group members to the Home Office. The appellants had both mistakenly treated the supplies as exempt from VAT. The appellants did not appeal against these assessments and that VAT due was paid, albeit late.

HMRC subsequently raised interest assessments in respect of the late-paid VAT under sections 74 and 76, VATA 1994, rejecting the appellants' request for a statutory review. This was rejected on the basis that the decision was not an appealable matter and there was no legal basis to perform a review. A review is only available where a right of appeal exists under section 83, VATA 1994.

The appellants appealed to the FTT, arguing that they should not have to pay any interest. The appellants' case was that where there is a late payment of VAT to one part of the Crown (HMRC), but for the entire period of the delay the same amount of money is retained by another part of the Crown (the Home Office, being the appellants' client), the deprivation to the Crown is nil. The appellants submitted that section 74, VATA 1994, should be interpreted purposively so that interest is calculated by reference to the amount of loss caused to the Crown due to the default of the taxpayer.

FTT decision

The appeals were dismissed.

The FTT noted that the appellants' appeals were made under section 83(1)(q), VATA 1994, which gives the taxpayer a right of appeal to the FTT in respect of the amount of interest specified in an assessment that HMRC has made under section 76, VATA 1994, but there is no right of appeal to the FTT in relation to a decision by HMRC to raise an assessment under section 76. The appellants' appeal rights and the FTT's jurisdiction in this case was therefore limited to consideration of the amount of interest specified in the assessments. The exercise of HMRC's discretion to assess the interest could only be challenged by way of judicial review proceedings.

Whilst the FTT accepted that HMRC collected tax on behalf of the Crown, it rejected the appellants' argument that the purpose of sections 74 and 76 was to compensate for deprivation of funds and that, interpreted purposively, the sections allowed interest to be charged only where the Crown had been deprived of its money.

The FTT held that section 74 provided for default interest, intended to facilitate the collection of the right amount of tax where tax was paid late, reflecting the time value of the money, rather than commercial interest. It noted that this was consistent with the EU principle of fiscal neutrality, as it ensured that all taxpayers were treated in the same way, regardless of their status.

1. [2019] UKFTT 0234 (TC).

The FTT also noted, without needing to decide the point, that section 74, provides that VATA 1994 applies to taxable supplies by the Crown in the same way as it applies to taxable persons and this suggests that the Exchequer should not be treated as the same entity as other government departments for VAT purposes.

Comment
Whilst the appellants raised some interesting arguments in this case, the FTT concluded that there was no justification for an interpretive limitation to section 74, VATA 1994, and that the status of the appellants' client (the Home Office) was irrelevant to the calculation of interest.

A copy of the decision can be viewed here.

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Cardpoint – cashpoint services not exempt from VAT (AG opinion)

On 2 May 2019, Advocate General (AG) Bot delivered his opinion in *Finanzamt Trier v Cardpoint GmbH*[2], in relation to the scope of the VAT exemption for financial services. The case concerns whether technical and administrative services provided to a bank operating cash point withdrawals falls within the VAT exemption.

Background
Cardpoint GmbH (Cardpoint) supplied services in connection with the operation of automated teller machines (ATMs). In particular, Cardpoint installed in prescribed locations operational ATMs, equipped with computer software and hardware bearing the logo of the bank operating those ATMs. Cardpoint was responsible for ensuring the smooth running of the ATMs, which involved, amongst other things, transporting bank notes and replenishing the ATMs, installing software and providing day-to-day advice on the running of the ATMs.

When the ATMs were used for cash withdrawals, special software would read particular data from the bank card as soon as this was inserted into the machine. Cardpoint would first verify the data and send an electronic request to Bank-Verlag GmbH (Bank-Verlag) to authorise the transaction requested by the cardholder. Bank-Verlag would then forward the request to the interbank network, which would in turn pass it on to the bank that issued the bank card concerned. That bank would verify whether the account holder had sufficient funds in his account and send back, via the same route, an approval or refusal of the withdrawal requested. Upon receipt of the reply, Cardpoint would generate a data file on the cash withdrawal and, if authorised, implement the requested transaction and generate a data file on the withdrawal. The data file would then be sent as a payment order to Cardpoint's contractual partner, being the bank operating the ATM in question. The contractual partner would transmit the unedited data files to the records system of Deutsche Bundesbank (the German Federal Bank). Cardpoint would also generate a daily, non-editable list of all the day's transactions, which would also be sent to the BBK.

As only banks are entitled to hold settlement accounts with the BBK, they transmitted the data files to the BBK's records system. That data transfer rendered legally binding the right of the bank operating the ATM in question to obtain reimbursement from the bank owning the account affected by the transaction and payment of any charges thereby incurred. Transfer of

2. Case C-42/18.

the data also had the immediate effect of recording in the accounts the clearing, as between the bank operating the ATM and the bank that issued the customer's card, of the amount paid out together with any charges incurred for using the ATM.

Taking the view that the services supplied should be exempt from VAT, in accordance with Article 13B(d)(3) of the Sixth Directive 77/388/EEC, Cardpoint submitted an amended VAT return and requested that the existing tax assessment be amended, claiming that its activities were exempt from VAT. The German tax authorities rejected that request.

The German court identified the similarities between Cardpoint and the situation at issue in *Bookit* (C-607/14). In both cases, the services consisted of an exchange of information and the provision of assistance of a technical and administrative nature. However, the court required assistance from the Court of Justice of the European Union (CJEU), in particular, in relation to the significance to be attached to the fact that the judgment in *Bookit* concerned a separate agreement for the sale of cinema tickets which was absent in the present case.

AG's opinion

In the view of AG Bot, Cardpoint's activities were not covered by the VAT exemption.

The AG noted a number of preliminary points. First, the services making it possible to withdraw cash from a payment account constitute payment services within the meaning of EU law. A withdrawal from an ATM is a payment. Second, it is clear from the CJEU's case law that the considerations applicable to 'transactions concerning transfers' also hold good for 'transactions concerning payments', with the result that those two classes of transaction are treated in the same way for the purposes of the exemption laid down in Article 13B(d)(3) of the Sixth Directive. Finally, the terms used to specify the exemptions laid down in Article 13 must be interpreted strictly.

In the view of the AG, in light of previous case law, there was no reason why the CJEU should deviate from the approach it adopted in *Bookit*, in relation to the supply of services provided by Cardpoint.

The AG noted that Cardpoint itself had acknowledged in its observations that, in accordance with the judgment in *Bookit*, the capture of an ATM user's bank card data, the transmission and verification of that data and the execution of the transaction requested by the cardholder following receipt of the authorisation message from the bank that issued the card concerned, cannot fall within the scope of the exemption. The AG shared that view. None of these activities had the effect of transferring a sum of money or entailed legal and financial changes which are characteristic of the transfer of a sum of money.

Whilst the AG agreed with Cardpoint that some of its activities were essential to the payment transactions, that was not sufficient to exempt the supplies from VAT.

The AG considered the fact that Cardpoint operated in circumstances in which the operation of ATMs had been outsourced by a bank did not constitute sufficient grounds for the CJEU to reason by analogy with case law relating to Article 148 of the VAT Directive (in which the Court held that the exemption laid down in Article 148 could be applied to services provided by intermediaries acting in their own name or by subcontractors). The features and purpose of each VAT exemption do not support such an analogy based solely on the fact that Cardpoint supplies a service in circumstances in which the operation of ATMs has been outsourced.

The AG noted that the information provided by Cardpoint confirmed it was liable to the bank that operates the ATM for any malfunctioning of that ATM. In the AG's view, this demonstrated that Cardpoint assumed no liability for the legal and financial changes involved in a payment transaction. The AG therefore concluded that the supplies were only technical and administrative services which cannot be exempt from VAT under Article 13B(d)(3) of the Sixth Directive.

Comment

Given the increased outsourcing of cashpoint operations, if the AG's opinion is followed, it will have significant implications for similar arrangements and is likely to make them more expensive. The judgment of the CJEU is expected shortly.

A copy of the AG's opinion can be viewed here.

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Buckingham Bingo – failed attempt to resurrect a claim

In *Buckingham Bingo Ltd v HMRC*[3], the Upper Tribunal (UT) has upheld the decision of the FTT that once a taxpayer has foregone its appeal against an HMRC 'appealable' decision, it cannot resurrect its right of appeal.

Background

Buckingham Bingo Ltd (BBL) ran a bingo business. The underlying VAT dispute had arisen from HMRC's change in policy which required taxpayers to account for VAT on a session basis, instead of game by game. BBL determined that, although this would not alter the total sums received, it did reduce the portion of the sums constituting participation fees subject to VAT. BBL therefore sought to recover output tax it considered to be wrongly overpaid. A claim for repayment was included in its 12/11 VAT return.

Following extensive correspondence, on 3 July 2012, HMRC issued a decision letter rejecting BBL's claim for repayment (the 2012 letter). In September 2012, KPMG (who then represented BBL) wrote to HMRC to say that, while it did not agree with the decision, BBL had decided not to challenge the decision. It was common ground that this was an 'appealable decision' under section 83(1)(b), VATA 1994.

In September 2016, DLA Piper (who then represented BBL) wrote to HMRC seeking payment of the sum originally claimed in BBL's 12/11 VAT return, relying on the decision of the FTT in *K E Entertainments Limited v HMRC*[4]. There was further correspondence between the parties. In a letter sent on 5 January 2017 (the 2017 letter), HMRC confirmed that the 2012 letter contained its decision and it refused to undertake a late statutory review of that decision. BBL appealed the 2017 letter.

Before the FTT, HMRC applied to strike out the appeal. The FTT agreed with HMRC, concluding that the 2017 letter did not contain an 'appealable decision'. That letter was simply a statement that HMRC considered there to be no outstanding issues between HMRC and BBL. The FTT struck out BBL's appeal.

BBL appealed to the UT.

3. [2019] UKUT 0140 (TCC).
4. [2018] CSIH 78.

UT decision
The appeal was dismissed.

The UT rejected BBL's argument that because there was no time limit for making an adjustment under regulation 38 of the VAT Regulations SI 1995/2518, it was entitled to ask HMRC multiple times to repay output VAT following its adjustment, and therefore the 2017 letter was an appealable decision against which BBL could pursue an appeal. The UT accepted that provided BBL reflected the adjustment in the 'right' VAT period, there was no express deadline governing the making of the adjustment, but it did not follow that once BBL had made the adjustment it was able to request indefinitely that HMRC make a repayment and treat each response from HMRC as a new appealable decision.

The UT agreed with the FTT that the 2017 letter was not an appealable decision. It was simply a reaffirmation of the 2012 letter and was not therefore an appealable decision.

Finally, the UT found that the FTT had not made an error of law in refusing to exercise its discretion to allow a late appeal. The UT rejected BBL's argument that the FTT had adopted the wrong approach. The UT referred to the approach adopted in *William Martland v HMRC*[5]. *Martland* confirmed that there is no requirement to follow any checklist in determining a late application to amend grounds of appeal, and instead the FTT's role is to take into account all relevant factors when exercising its judicial discretion.

The UT concluded that as four years had passed since HMRC's appealable decision, the FTT was entitled to exercise its discretion to refuse the late appeal.

Comment
This decision is an important reminder to taxpayers of the importance of carefully evaluating whether or not to appeal a decision.

In this case, even though BBL had good prospects of success, the UT confirmed that the FTT was entitled to exercise its discretion and refuse a late appeal. It would appear that the UT was heavily influenced by the fact that BBL had taken a conscious decision in 2012, on professional advice, not to appeal against the 2012 letter and over four years had passed without BBL seeking to change its mind.

A copy of the decision can be viewed here.

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5. [2018] UKUT 0178 (TCC).

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