VAT update

November 2019

In this month's update we report on (1) the revocation of the Cross-border Trade (Public Notices) (EU Exit) Regulations; (2) the new VAT group provisions; and (3) the digitisation of the tribunal service. We also comment on three recent cases which consider (1) who the recipient of a supply is in circumstances where there is more than one potential recipient; (2) single purpose vouchers and the time of supply; and (3) inaccuracy penalties in the absence of any supply.

News items

HMRC announces revocation of Cross-border Trade (Public Notices) (EU Exit) Regulations 2019

The Cross-Border Trade (Public Notices) (EU Exit) Regulations 2019 (the Regulations) were laid before Parliament on 7 October 2019. The Regulations were intended to ease the flow of trade and provide flexibility. However, following opposition, HMRC has now confirmed the Regulations will be revoked. more›

New VAT group provisions now in force

On 1 November 2019, the VAT grouping provisions contained in Schedule 18, Finance Act 2019, came into force and non-corporate entities can now join a VAT group if they meet certain conditions. more›

Tribunal proceedings to be digitally recorded

In his 2019 annual report, Sir Ernest Ryder, Senior President of Tribunals, has commented that by 2020 the intention is to digitally record the proceedings of all reserved tribunals in the United Kingdom. This is part of a broader digitisation programme which the government is in the process of implementing. more›

Cases

American Express Services Europe – economic reality and identifying the recipient of a supply

In *American Express Services Europe Ltd v HMRC* [2019] UKFTT 548, the First-tier Tribunal (FTT) has held that the taxpayer was making exempt supplies of services to a company located outside the EU and therefore could recover VAT. more›

Any comments or queries?

Adam Craggs
Partner
+44 20 3060 6421
adam.craggs@rpc.co.uk

Nicole Kostic
Senior Associate
+44 20 3060 6340
nicole.kostic@rpc.co.uk

About this update

Our 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.

To subscribe to any of our publications, please click here.

Lunar Missions – single purpose vouchers and time of supply

In *Lunar Missions Ltd v HMRC* [2019] UKUT 298 (TCC), the Upper Tribunal (UT) has held that a company which had offered rewards in the form of "single purpose vouchers", within the meaning of paragraph 7A, Schedule 10A, Value Added Tax Act 1994, to supporters of its crowd-funded project had made a taxable supply for VAT purposes when the vouchers were issued. more›

Donnelly – no inaccuracy penalty if input VAT claimed for non-existent supplies

In *Laurence Donnelly v HMRC* [2019] UKFTT 655 (TC), the FTT has held that no inaccuracy penalties were due for over-claimed input VAT as there had been no supply and therefore the over-declaration of output VAT meant that the potential lost revenue was nil. more›

News items

HMRC announces revocation of Cross-border Trade (Public Notices) (EU Exit) Regulations 2019

The Cross-Border Trade (Public Notices) (EU Exit) Regulations 2019 (the Regulations) were laid before Parliament on 7 October 2019. The Regulations were intended to ease the flow of trade and provide flexibility. However, following opposition, HMRC has now confirmed the Regulations will be revoked.

Public Law Project (PLP) wrote a letter before action to HM Treasury (HMT), HMRC and other interested parties on 9 October 2019, detailing a proposed claim for judicial review of the Regulations. There was unease about the nature of the powers the Regulations conferred on HMT and it was claimed that they were ultra vires.

HMRC did not respond in detail, or accept PLP's claims, but confirmed on 17 October 2019, in a letter to PLP, that it would treat the Regulations as revoked with immediate effect.

It is expected that HMRC and HMT will now consult on alternative rules to bridge any post-Brexit gap in trade, although the form they will take remains to be seen.

HMRC's response to PLP can be viewed here.

Back to contents>

New VAT group provisions now in force

On 1 November 2019, the VAT grouping provisions contained in Schedule 18, Finance Act 2019, came into force and non-corporate entities can now join a VAT group if they meet certain conditions.

Sections 43 and 43AZA, Value Added Tax Act 1994, have been amended so that certain individuals and partnerships controlling "UK bodies corporate" can be part of a VAT group with those bodies corporate. Section 43AZA specifies the test that applies when determining whether an individual or partnership controls a UK body corporate.

These amendments have been made following the judgment of the Court of Justice of the European Union in *Larentia + Minerva and Marenave* (C-108/14 and C-109/14).

HMRC guidance has not yet been issued in relation to the new rules and it is anticipated that VAT Notice 700/2 will be updated shortly.

The Regulations appointing 1 November 2019 as the day on which the changes came into force can be viewed here.

Back to contents>

Tribunal proceedings to be digitally recorded

In his 2019 annual report, Sir Ernest Ryder, Senior President of Tribunals, has commented that by 2020 the intention is to digitally record the proceedings of all reserved tribunals in the United Kingdom. This is part of a broader digitisation programme which the government is in the process of implementing.

The recording of tribunal proceedings is to be welcomed and will bring the tribunal system in line with the court system. Such recordings will avoid the need for the parties to pay for independent transcribers.

The annual report can be viewed here.

Back to contents>

Cases

American Express Services Europe – economic reality and identifying the recipient of a supply

In *American Express Services Europe Ltd v HMRC* [2019] UKFTT 548, the First-tier Tribunal (FTT) has held that the taxpayer was making exempt supplies of services to a company located outside the EU and therefore could recover VAT.

Background

American Express Services Europe Ltd (AESEL) is a card issuer. In that role it made supplies of payment services. There was no dispute that AESEL supplied the payment services to another member of the Amex Group, but the parties disagreed about which one of two other members of the Amex Group received the services supplied by AESEL.

In a typical card transaction the following steps took place:

1. a card member who wishes to pay for goods or services presents a card to the merchant. The data is entered into the merchant's payment system using a point-of-sale (POS) terminal/ software or an e-commerce website
2. the card and transaction data are sent electronically by the POS terminal to the acquirer, American Express Payment Services Ltd (AEPSL), which passes the data through the payments system for processing
3. AEPSL sends the data to the payment card network operator, American Express Travel Related Services Company Inc (TRSCo), which forwards it to the issuer, AESEL, for authorisation
4. TRSCo's systems carry out the authorisation process according to pre-set criteria and then send the relevant data back to the issuer, AESEL, and acquirer, AEPSL
5. AESEL checks that the card is legitimate, has not been reported lost or stolen and that the account has the appropriate amount of credit/funds available to pay for the transaction
6. once the checks have been carried out satisfactorily, AESEL generates an authorisation code and sends it to TRSCo. By sending the authorisation code, AESEL confirms that it will fund the cardmember's purchase provided the merchant and AEPSL follow the card scheme rules
7. TRSCo sends the authorisation code to AEPSL
8. AEPSL sends the authorisation code to the merchant
9. the merchant concludes the transaction with the cardmember
10. the merchant's POS system sends the data for the completed transaction to AEPSL
11. AEPSL forwards the transaction data to TRSCo
12. TRSCo forwards the transaction data to AESEL which updates the cardmember's account with the amount of the purchase
13. AESEL pays an amount equal to the cardmember's expenditure to, or to the order of, TRSCo and, in return, receives a fee (the billing credit)
14. TRSCo pays or credits an amount equal to the cardmember's expenditure to AEPSL and, in return, receives a fee (the billing debit)
15. AEPSL pays an amount equal to the cardmember's expenditure to the merchant and, in return, is paid a fee by the merchant
16. AESEL sends a monthly statement to the cardmember which includes all expenditure plus any fee and/or interest chargeable for the relevant month

17. the cardmember pays the amount shown as payable on the monthly statement to AESEL.

The parties differed in their analysis of the relevant contracts and reached different conclusions about which entity received the supplies of payment services. AESEL considered that it supplied the payment services to TRSCo, which was established outside the EU so that it could claim input tax. HMRC's view was that AESEL made exempt supplies of payment services to AEPSL, which was established in the EU so that no input recovery was possible.

FTT decision
The appeal was allowed.

HMRC's relied primarily on the words "on behalf of the Acquirer" in the Card Issuer Agreement. They argued that this meant AESEL should be regarded as making supplies to AEPSL. The FTT disagreed. In the view of the FTT, when read in context, the meaning of those words was plain and described the fulfilment of a service that TRSCo provided to AEPSL, namely, the service of processing and presenting charges. Accordingly, the FTT concluded that the correct contractual analysis was that AESEL made supplies of payment services to TRSCo.

The FTT then considered whether the contractual position corresponded with the economic and commercial reality of the transactions. In reaching a decision on this point, the FTT referred to *HMRC v Loyalty Management UK Ltd, Baxi Group Ltd v HMRC* Joined cases C-53/09 and C-55/09, and *HMRC v Newey* Case C-653/11, which provide guidance on the meaning of the phrase "economic and commercial reality". In the view of the FTT, the fact there were issuers and acquirers not under the control of TRSCo was a relevant factor and this suggested the contractual arrangements were genuinely commercial. The disparity in the level of consideration obtained by AESEL and TRSCo did not necessarily mean that the commercial reality deviated from the contractual position. Similarly, the FTT did not accept that in order to provide a payment service to TRSCo, AESEL must make payment to TRSCo. The settlement of amounts due, by making accounting entries to change the inter-company balances, were transactions concerning payments and transfers for the purpose of Art 135(1)(d) of the Principal VAT Directive. The FTT therefore concluded that the economic and commercial reality of the transactions was entirely consistent with its analysis of the contracts.

Comment
The FTT observed that there is no guidance in the Principal VAT Directive or the Value Added Tax Act 1994, on how to determine who is the recipient of a supply. Where there is more than one potential recipient (such as in the case of tripartite or multi-party contracts) a two stage process is required: it starts with consideration of the contractual position and then looks at whether that is consistent with the economic reality of the transaction.

The decision can be viewed here.

Back to contents>

Lunar Missions – single purpose vouchers and time of supply

In *Lunar Missions Ltd v HMRC* [2019] UKUT 298 (TCC), the Upper Tribunal (UT) has held that a company which had offered rewards in the form of "single purpose vouchers", within the meaning of paragraph 7A, Schedule 10A, Value Added Tax Act 1994, to supporters of its crowd-funded project, had made a taxable supply for VAT purposes when the vouchers were issued.

Background

Lunar Missions Ltd (Lunar) raised funds for a project through a crowd-funding platform called "Kickstarter". On the platform, the creator of a project, such as Lunar, would seek supporters for its project. The creator might also offer rewards to supporters who pledge funds for its project.

Lunar's project was to send an unmanned robotic landing module to the South Pole of the moon. During the crowd funding phase, Lunar offered supporters a range of "rewards" for pledges made to support the project, which included the right to space in the digital memory box (which would be buried on the moon by the spacecraft), if the project was successfully completed ie if the funding target was reached.

For the purpose of the appeal, the parties agreed that the FTT should proceed on the basis of a supply of a voucher for space in the digital memory box, which required a pledge of £60. A supporter who pledged could download a certificate or voucher which confirmed the amount they had pledged and that they were then entitled to a reward. It was not necessary for a person to hold a printed copy of a voucher to obtain a reward.

Lunar's campaign was successful and it obtained 7,297 supporters who pledged a total of £672,447, on or before 17 December 2014. At that point supporters became contractually obligated to pay the amount pledged, and once paid, Lunar became obliged to provide the rewards, subject to certain conditions set out on its website.

HMRC considered that Lunar had made a supply to its supporters at the time at which the pledges made by supporters became unconditional and Lunar received payment, whereas Lunar contended that the supplies would only take place when the digital or physical space in the capsule would be provided. The issue was therefore the time of the supplies made by Lunar.

The FTT agreed with HMRC that the vouchers were "single purpose vouchers" redeemable for only one type of service and the time of supply was the time at which the voucher was issued. Lunar's appeal was dismissed and it appealed to the UT.

UT decision

The appeal was dismissed.

Lunar challenged the FTT's decision on the basis that the FTT had failed to give adequate reasons for its conclusion and that that failure was an error of law. In the view of the UT, it was implicit in the FTT's decision that it reached its conclusion on the basis that if the vouchers were single purpose vouchers, the supply was made at the time at which the vouchers were issued because the supply of services was performed at that time (within section 6(3), Value Added Tax Act 1994) and no error of law was made. Even if that had not been the case, the UT confirmed it would have remade the decision and reached the same conclusion as the FTT for the following reasons.

The UT considered the interaction between section 6 and Schedule 10A, Value Added Tax Act 1994. From the wording of the legislation it was clear that, if the vouchers fell within paragraph 7A, Schedule 10A, the operative provisions of Schedule 10A do not apply. The timing of the supply must therefore be determined by reference to general VAT principles.

Applying the principles identified in *Lebara* C-520/10, the starting point was to consider whether the crowd-funding exercise involved a supply of services. A legal relationship was found to have been created between Lunar and its supporters in which Lunar agreed to provide rights to digital and/or physical space in the capsule and the supporters agreed to pay the price. The UT also found there was reciprocal performance between Lunar and the supporters who pledged funds.

The UT also considered the subject matter of the supply. It was accepted by Lunar that the issue of the vouchers fell within paragraph 7A. It followed that when Lunar issued the vouchers to the supporters, it provided them with all that was necessary to obtain the supply of services. At that point, it made the supply.

The UT agreed with FTT that a supply took place when the vouchers were "issued" ie the time at which a supporter became contractually obliged to make payment.

Comment

The VAT provisions relating to face-value vouchers were amended by Finance Act 2019, with effect from 1 January 2019 (to implement an EU Directive on the VAT treatment of vouchers). This case was not affected by the changes but it highlights the difficulties of applying the previous provisions and a widening of the definition of 'single purpose voucher'.

The decision can be viewed here.

Back to contents>

Donnelly – no inaccuracy penalty if input VAT claimed for non-existent supplies

In *Laurence Donnelly v HMRC* [2019] UKFTT 655 (TC), the FTT has held that no inaccuracy penalties were due for over-claimed input VAT as there had been no supply and therefore the over-declaration of output VAT meant that the potential lost revenue was nil.

Background

Korum Wholesale Trading Ltd (Korum), of which Mr Donnelly was the only director, purportedly resold goods. HMRC began to investigate Korum's activities and concluded the supply to Korum was connected to a fraudulent evasion of VAT by Korum's supplier, and that Korum, in the person of Mr Donnelly, knew of that connection. As a result, it decided that Korum was not entitled to input tax credit in respect of the input VAT on certain invoices issued by Beehive Wine Stores on the basis of the decision of the Court of Justice of the European Union in *Kittel v Belgian State* C-440/04.

HMRC then concluded that the consequent inaccuracy in the VAT returns (the claim for input tax under the invoices from Beehive Wine Stores) was deliberate and had been concealed. As a result, HMRC imposed a penalty on the company under Schedule 24, Finance Act 2007, of 95% of the amount of the input tax claimed.

HMRC also decided that the deliberate inaccuracy was attributable to Mr Donnelly and notified him under paragraph 19, Schedule 24, Finance Act 2007, that he was liable to pay 100% of the penalty. Mr Donnelly appealed the notice.

FTT decision
The appeal was allowed.

The FTT acknowledged the fraud and accepted that Mr Donnelly had known about it, but concluded that HMRC had not proved that the alleged transactions had occurred. As a result, if there was no supply, there was no potential lost revenue and the maximum amount of the penalty was therefore nil.

The FTT considered the proper construction of "deliberate" in paragraph 4(2), Schedule 24, Finance Act 2007. It echoed the view expressed by the Court of Appeal in *Tooth v HMRC* [2019] EWCA Civ 826, that where a person has submitted a tax return which he knows contains an inaccuracy, the return can be said to contain a deliberate inaccuracy even though the taxpayer did not intend to bring about an insufficiency of tax.

In reaching its conclusion, the FTT also considered the proper construction of "attributable" in paragraph 19(1) Schedule 24, Finance Act 2007. In the FTT's view, in the absence of a statutory definition, "attributable" should bear its ordinary meaning. Attributable means having responsibility for something else and, in the context of the attribution of a deliberate inaccuracy, carries with it a sense that the person to whom the action is attributed is in some way blameworthy. Where a person does something which causes an inaccuracy and causes it to be deliberate there is no doubt that the deliberate inaccuracy is attributable to him. Where he fails to do something, which permits the deliberate inaccuracy, or does or fails to do something which permits it, the position is more nuanced and in the FTT's view it is generally only where he knew or had a duty to know whether his action or inaction permitted the inaccuracy that, as a matter of ordinary understanding, one would say that the inaccuracy was attributable to him.

Comment
The FTT in this case adopted the Court of Appeal's analysis of "deliberate" in *Tooth*, in contrast to the position adopted by the FTT in *Leach v HMRC* [2019] UKFTT 352 (TC), where the FTT felt the *Tooth* analysis of "deliberate" was too wide when considering the imposition of penalties. In *Leach*, the FTT preferred the traditional approach to behaviour-based penalties which requires that the taxpayer must have knowingly provided to HMRC a document that contains an error with the intention that HMRC should rely upon that inaccurate document.

The decision can be viewed here.

Back to contents>

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

"... the client-centred modern City legal services business."

We have won and been shortlisted for a number of industry awards, including:

- Best Legal Adviser every year since 2009 – Legal Week
- Best Legal Employer every year since 2009 – Legal Week
- Shortlisted – Banking Litigation Team of the Year – Legal Week Awards 2019
- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
- Winner – Client Service Innovation Award – The Lawyer Awards 2017
- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
- Winner – Adviser of the Year – Insurance Day (London Market Awards) 2017
- Winner – Best Tax Team in a Law Firm – Taxation Awards 2017
- Winner – Claims Legal Services Provider of the Year – Claims Club Asia Awards 2016

Areas of experience

- Advertising & Marketing
- Alternative Dispute Resolution
- Commercial Contracts
- Commercial Litigation
- Competition
- Corporate Crime & Investigations
- Corporate
- Data & Technology
- Employment & Pensions
- Financial Markets Litigation
- Health, Safety & Environmental
- Insurance & Reinsurance
- Intellectual Property
- International Arbitration
- Private Equity & Finance
- Product Liability & Regulation
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Trusts, Wealth & Private Client

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

38/F One Taikoo Place
979 King's Road
Quarry Bay, Hong Kong
T +852 2216 7000

12 Marina Boulevard
38/F MBFC Tower 3
Singapore 018982
T +65 6422 3000

RPC