VAT update

October 2016

In this month's update we report on new HMRC guidance in relation to retrospective VAT group treatment, use and enjoyment rules in relation to insurance repaid services and a new consultation on the introduction of a new penalty for those involved in VAT fraud. We also report on three recent cases involving the collection of commercial waste and whether this constitutes a "special purpose regime", whether a stall at a craft fair amounted to the grant of a licence to occupy land and was not therefore exempt from VAT and whether a taxpayer can withdraw its request that the proceedings be excluded from the costs regime.

News

Retrospective VAT group treatment – HMRC publishes revised guidance

On 21 and 22 September 2016, HMRC published updated guidance on its approach to applications for retrospective VAT group treatment. more›

Use and enjoyment in relation to insurance repair services – new Brief published

HMRC has issued a new Brief explaining the background to the introduction of new rules regarding the application of "use and enjoyment" rules to insurance repair services. more›

Penalties for participating in VAT fraud – new consultation document published

HMRC has launched a consultation on the introduction of a new penalty for those participating in VAT fraud. more›

Cases

Durham Company Limited – Upper Tribunal finds that collection of commercial waste by local authorities falls within VAT exemption

In *Durham Company Limited v HMRC and HM Treasury and Local Government Association*[1], the Upper Tribunal (UT) has confirmed that local authorities arranging commercial waste collection generally do so using powers derived from section 45, Environmental Protection Act 1990 (EPA 1990). more›

Any comments or queries?

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About this update

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

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

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Kati Zombory-Moldovan – grant of a right to use a stall or pitch at a craft fair held not VAT exempt

In *HMRC v Kati Zombory-Moldovan (trading as Craft Carnival)*[3], the UT has held that the grant of a right to use a stall or pitch at a craft fair did not amount to the grant of a "licence to occupy land" and was not therefore exempt from VAT under Schedule 9, Group 1, VATA. more›

N Brown Group Plc – Tribunal confirms there is no going back once a taxpayer has opted out of the costs regime

In *N Brown Group Plc and Another v HMRC*[6], the FTT has confirmed that it does not have the power to permit a taxpayer to withdraw its written request that the proceedings be excluded from the costs regime. more›

News

Retrospective VAT group treatment – HMRC publishes revised guidance

On 21 and 22 September 2016, HMRC published updated guidance on its approach to applications for retrospective VAT group treatment.

HMRC's guidance about the extent to which VAT applications can be given retrospective effect in "ordinary" circumstances has not changed. The revised guidance does however provide some further examples of "exceptional" cases. Two examples given, refer to circumstances where HMRC has made an error and a general direction that HMRC do not automatically reject applications where there may be exceptional circumstances. In such circumstances, the HMRC officer should seek technical advice.

The revised guidance can be found here

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Use and enjoyment in relation to insurance repair services – new Brief published

HMRC has issued a new Brief explaining the background to the introduction of new rules regarding the application of "use and enjoyment" rules to insurance repair services. The new rules mean that VAT will relate to the place where the fruits of any insurance repair services are enjoyed, rather than the location of the paying party. HMRC was concerned that insurance companies were establishing entities in areas outside the scope of VAT in order to avoid VAT.

Revenue and Customs Brief 15 (2016) can be found here.

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Penalties for participating in VAT fraud – new consultation document published

HMRC has launched a consultation on the introduction of a new penalty for those participating in VAT fraud. The consultation proposes the introduction of a fixed penalty of 30% of any VAT which ought to have been paid but for the fraud, applying to anyone who "knows or ought to have known" that the transactions they were party to were part of a fraud on the VAT system.

Comments on the proposals are requested by 11 November 2016.

The consultation document can be found here.

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Cases

Durham Company Limited – Upper Tribunal finds that collection of commercial waste by local authorities falls within VAT exemption

In *Durham Company Limited v HMRC and HM Treasury and Local Government Association*[1], the Upper Tribunal (UT) has confirmed that local authorities arranging commercial waste collection generally do so using powers derived from section 45, Environmental Protection Act 1990 (EPA 1990). The UT was satisfied that this constitutes a "special purpose regime" for the purposes of section 41(1), Value Added Tax Act 1994 (VATA) and Article 13(1) of the VAT Directive, making those activities exempt from VAT.

Background

The Durham Company Limited (TDC), is a business providing commercial waste collection services and is required to charge VAT at the standard rate.

Many local authorities (LAs) collect household and, if requested by the occupier of premises in its area, commercial waste in their capacity as Waste Collection Authorities (WCAs), for the purposes of EPA 1990. When collecting commercial waste, WCAs must recover (and generally do recover) a reasonable charge unless they consider it would be inappropriate to do so.

Under section 41A(1), VATA, and Article 13 of the VAT Directive, charges imposed by a public authority (while acting as a public authority) engaged in providing services it is obliged to provide under statute, are exempt from VAT unless this could lead to a significant distortion of competition.

Believing it had been suffering from unfair competition from a growing number of LAs providing the same or similar services as TDC, the company applied to the High Court for judicial review of HMRC, HM Treasury and the Local Government Association's decision not to collect VAT on waste collection services provided by LAs. The High Court referred the matter to the UT to determine whether a WCA providing such services was carrying out "activities in which it is engaged as a public authority" within the meaning of section 41A(1), VATA and Article 13 of the VAT Directive.

UT's decision

The UT noted that a court is required to analyse all the conditions laid down by national law for the pursuit of an activity (in this case, commercial waste collection) in order to determine whether that activity is engaged in under a special regime applicable only to public bodies (eg pursuant to public powers), or under the same legal conditions applicable to private economic operators (*Fazenda Publica v Camara Municipal do Porto* (*Fazenda*)[2]).

TDC argued that the WCAs effectively choose to go into business providing the services, doing so in competition with private sector companies under the same (or essentially the same) legal conditions. Some LAs operate under commercial terms and conditions, individually negotiated, and employ business development managers to "promote" their services, including the VAT-free nature of their services.

1. [2016] UKUT 417 (TC).
2. C-446/98.

The Respondents drew the UT's attention to the fact that LAs are subject to a number of duties and restrictions not applicable to private sector companies, including:

- to arrange for the collection of commercial waste, if requested, by the occupier of commercial premises in its area (section 45, EPA 1990)
- to set their charges for the collection of waste on a costs recovery basis only (ie non-profit)
- in setting those charges, to do anything which in their opinion is necessary or expedient to minimise the quantities of controlled waste generated in their area
- to ensure that land and highways, streets and public areas, are kept clean of litter and refuse
- to inform residents about their waste collecting responsibilities and encourage business to dispose of waste lawfully.

The UT agreed that LAs derive their authority to collect commercial waste from section 45 EPA 1990 and that the above duties under EPA 1990 restrict LAs' ability to carry out this activity in a way different from the freedom afforded to private companies. This was sufficient to constitute a "special regime".

Accordingly, the UT concluded that where an LA supplies trade waste collection services to business customers in its area, in performance of its statutory duty under section 45, EPA 1990, those services are "activities in which it is engaged as a public authority", within the meaning of section 41A(1), VATA, and Article 13 of the VAT Directive.

As to the competition proviso, the UT explained it would be a matter for the First-tier Tribunal (FTT) to consider whether LA activity in this sphere was anti-competitive, taking into account the nature and scale of each LA's operations and the market conditions it operated in.

Comment

The UT has confirmed, applying *Fazenda*, that the VAT treatment of a LA supply does not depend on the nature of the activity itself but whether it is carried out under a "special regime" applicable to bodies governed either by public law, or law applicable to all operators.

The UT has also provided some helpful analysis on what can constitute a "special regime". In particular, while a LA acting in its own area will be able to rely on the VAT exemption, there was agreement between the parties and the UT that a LA carrying out the same activities via a company outside its area (which LAs are also entitled to do) would not benefit from the same VAT exemption in respect of those activities.

A copy of the decision can be found here.

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Kati Zombory-Moldovan – grant of a right to use a stall or pitch at a craft fair held not VAT exempt

In *HMRC v Kati Zombory-Moldovan (trading as Craft Carnival)*[3], the UT has held that the grant of a right to use a stall or pitch at a craft fair did not amount to the grant of a "licence to occupy land" and was not therefore exempt from VAT under Schedule 9, Group 1, VATA.

Background

Craft Carnival (CC) organised craft fairs in and around Dorset. In a typical year, five or six such fairs would be held. Each of them would take place over a weekend and last two to three days.

3. [2016] UKUT 433 (TCC).

A brochure listing the fairs for the coming year was sent out on an annual basis to some 4,000 craft workers and gardening goods suppliers, which specified the fee for a licence to use a stall or pitch at a particular event to be £180.

In addition to providing the licence itself, CC arranged for the erection of marquees, which were hired for the duration of a fair, and also arranged for the provision of other necessary temporary facilities including portable toilets, electrical generators and security fencing. CC also employed between five and seven members of staff to act as ticket sellers and car park marshals.

Before the FTT, CC argued that it had only supplied the right to use an allocated space, which fell within the EU law criteria of "leasing or letting of immoveable property" and was therefore an exempt supply under VATA as a "licence to occupy land".

Conversely, HMRC argued that CC supplied a standard-rated package of "services" to enable the stallholders to trade, which should be subject to VAT.

The FTT considered that, following *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners*[4], it was necessary to consider the economic reality of any arrangement in order to determine the nature of a supply. Under domestic law, the fundamental characteristic of a supply in respect of leasing or letting of immoveable property was the ability to exclude others from occupying as owner. In the instant case, stallholders occupied the pitch supplied by CC as owner to the exclusion of any other person. The FTT therefore concluded that the supply was an exempt supply of a licence to occupy land and allowed CC's appeal.

HMRC appealed to the UT.

UT's decision
The UT allowed HMRC's appeal.

The UT considered the facts of the present case to be similar to those in *International Antiques and Collectors Fairs Ltd v HMRC*[5], in which the contracts with which the case was concerned were for "the provision of a service of participation as a seller at an expertly organised and expertly run antiques and collectors fair". The contracts did not, therefore, have as their essential object the making available of property.

The UT concluded that that was the situation in the present case. CC had "very real and significant responsibilities beyond the bare provision of an appropriately-sized plot with, potentially, a table and chairs", including the provision of a variety of facilities and the employment of staff. Accordingly, CC's supplies to stallholders did not fall within the land exemption and the fees paid for stalls and pitches were subject to VAT.

Comment
This case serves as a useful reminder of the strictness with which courts and tribunals are obliged to interpret exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. In this case, the intended effect of the exemption did not extend to the provision of the various services provided in addition to the licence to occupy land, and the UT decided that the supply should not be VAT exempt on that basis.

A copy of the decision can be found here.

4. [2014] UKSC 16.
5. [2015] UKFTT 354 (TC).

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N Brown Group Plc – Tribunal confirms there is no going back once a taxpayer has opted out of the costs regime

In *N Brown Group Plc and Another v HMRC*[6], the FTT has confirmed that it does not have the power to permit a taxpayer to withdraw its written request that the proceedings be excluded from the costs regime.

Background

The appeals arose from a long-running and complex dispute. The appellants are partially exempt and their appeals concern the extent to which they should be allowed to recover input tax incurred on marketing and other promotional costs.

The appeals came before the FTT for a case management hearing. The relevant issue was whether the appellants could withdraw their written requests to the FTT that the proceedings be excluded from potential liability for costs under Rule 10(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the Tribunal Rules).

The appellants' appeals had been allocated as Complex by the FTT. Under Rule 10(1)(c), the FTT may make an order in respect of costs in cases where:

"the taxpayer ... has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs ...".

Notwithstanding that they had opted out of costs some considerable time previously, the appellants wrote to the FTT seeking to withdraw their requests that the proceedings should be excluded from liability for costs, noting that HMRC had filed its Statement of Case on the (mistaken) understanding that the costs regime applied.

FTT's decision

The FTT refused the appellants' application.

At the hearing, both parties referred to the comments of the UT in *Atlantic Electronics Ltd v HMRC*[7], where the underlying purpose of the rule had been set out as follows:

"The right to opt out under Rule 10 has to be exercised, as I have mentioned, within 28 days of the allocation of the case as a Complex case. There are I think, two related reasons for that requirement. The first is to achieve certainty for both parties so that they know, at an early stage, which costs regime is to apply and can run their cases accordingly. The second is to prevent the taxpayer from waiting to see how his case progresses...".

The appellants argued that they should be allowed to withdraw their written requests to opt-out of the costs regime for three reasons. Firstly, the costs regime is the default position in a Complex case. Secondly, the taxpayer alone has a right to opt out of the costs regime and this is not dependent on the agreement of HMRC and thirdly, there is nothing in the Tribunal Rules which explicitly prevents a taxpayer from withdrawing a written request to opt out of the costs regime.

The appellants submitted that the FTT had power to allow a taxpayer to withdraw a written request to opt out under Rule 5(3)(c) of the Tribunal Rules, which provides that the FTT may "permit or require a party to amend a document".

6. [2016] UKFTT 445 (TC).
7. [2012] UKUT 45 (TC).

The FTT referred to the policy reasons which underlie the costs rules and that the ability to opt out of the costs regime under Rule 10(1)(c)(ii) is a one off event available for a limited period only (28 days from receiving notification of Complex allocation from the FTT). The FTT commented:

"there are good reasons for that as Warren J pointed out in Atlantic Electronics. It achieves certainty for the parties and prevents a taxpayer from obtaining an unfair advantage in relation to costs by waiting to see how the case progresses before deciding whether or not to opt out ..."

The FTT said that it had to decide two questions. First, did it have the power to permit an appellant to withdraw a request to opt-out of the costs regime and second, if it did have such a power, should it permit the appellants to do so in this case.

The FTT concluded that Rule 5(3)(c) did not give it the power to permit the appellants to withdraw their written requests to opt out of the costs regime. In the FTT's view, reference to "document" meant a document which is used in the proceedings such as a pleading, application, or submission. However, even if the written request was a "document" for the purpose of Rule 5(3)(c), the FTT agreed with HMRC's submission that the appellants were not asking to amend their requests to opt out of the costs regime but rather to revoke the requests entirely. The FTT derived support for its approach from the fact that Rule 17 of the Tribunal Rules specifically provides that a party who has given written notice of withdrawal of their case may apply to the FTT for the case to be re-instated ie to revoke the notice, which strongly suggests that the absence of such a provision in Rule 10 is a deliberate choice. The appellants did not seek to rely on any other provision of the Tribunal Rules and the FTT could not identify a Rule that would allow the FTT to permit the appellants to withdraw their request to opt out of the costs regime.

Comment

The FTT's conclusion that it does not have the power to allow a withdrawal of a previously notified opt out from the cost regime in a Complex appeal is not surprising given the reasoning behind the operation of the costs rules, as explained in the *Atlantic Electronics* case. This decision does, however, provide a reminder to taxpayers that when a case is notified as being Complex by the FTT, careful consideration is required in deciding whether to remain within the costs regime or not. A decision to opt out cannot be revisited at a later date.

A copy of the decision can be found here.

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