VAT Update

October 2018

In this month's update we report on (1) changes to the VAT treatment of supplies of digital services; (2) the European Parliament's adoption of changes which are intended to simplify VAT for small businesses; and (3) the European Commission's proposals for VAT rates and intra-EU supplies. We also comment on three recent decisions relating to the VAT option to tax a property; (2) third party access to documents filed at the First-tier Tribunal; and (3) the validity of Alternative Dispute Resolution agreements that are wrong in law.

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Changes to the VAT treatment of supplies of digital services

Following HMRC's Policy Paper: VAT Changes to the supply of digital services 2019, draft legislation has been published in relation to the rules for businesses making sales of digital services to consumers across the EU. more›

VAT simplification for small businesses

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In *Hastings Insurance Ltd and HMRC v KPMG*[3] the FTT granted KPMG, who was neither a party nor a representative of a party, access to certain documents which had been filed with the FTT. 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 team.

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The Serpentine Trust Ltd – HMRC entitled to raise VAT assessments despite binding contractual agreement on VAT treatment

In *The Serpentine Trust v HMRC*[4], the FTT has held that although HMRC had agreed with the taxpayer one basis for calculating VAT, under alternative dispute resolution (ADR), it was not precluded from raising VAT assessments on a different basis, because the agreement reached was ultra vires and therefore void. **more›**

News items

Changes to the VAT treatment of supplies of digital services

Following HMRC's Policy Paper: VAT Changes to the supply of digital services 2019, draft legislation has been published in relation to the rules for businesses making sales of digital services to consumers across the EU.

The changes are relevant to users, or prospective users, of the UK VAT Mini One Stop Shop (MOSS) and non-UK businesses who sell digital services to the UK and EU customers. The draft legislation seeks to:

- introduce a €10,000 threshold for total supplies to the EU in a year of sales of digital services, which will mean that where relevant sales across the EU in a year fall below the threshold, businesses will only be subject to the VAT rules of their home country; where the total taxable turnover is below the UK VAT registration threshold, the business will be able to de-register from VAT, and
- allow non-EU businesses, which are registered for VAT for other purposes, to use the MOSS scheme to account for VAT on sales of digital services to consumers in EU Member States.

A technical consultation was carried out between 11 September 2018 and 8 October 2018, on the terms of the draft legislation. Responses to the consultation are currently being considered and the government plans to introduce the legislation with effect from 1 January 2019.

A copy of the draft legislation and can be viewed here.

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VAT simplification for small businesses

On 11 September 2018, the European Parliament adopted a Council Directive amending Directive 2006/112/EC on the common system of VAT, to introduce measures to lower VAT compliance costs for small businesses.

The Council Directive seeks to make the following changes to promote closer harmonisation and reduce the compliance burden for small businesses:

- the European Commission is to produce guidelines on simplified registration and accounting, with the simplification measures to be evaluated after three years to ensure they are achieving the desired outcomes
- the European Commission is to set up an online portal for businesses to notify their intention to use the small enterprises exemption and a "one-stop shop" for filing VAT returns in different Member States will be established
- exemptions can only be achieved where annual turnover is below the threshold applied by the Member State in which the VAT is due (member states can set appropriate lower thresholds proportionate to the size and needs of their economy, but maximum thresholds will be set at EU level)

- there will be transitional provisions for small businesses to allow them to prepare to meet their "full" VAT obligations once their annual turnover exceeds the thresholds; provided its annual turnover does not exceed the threshold by more than 33%, a business will be able to continue to benefit from the exemption for a further two years
- qualifying small businesses will either be exempt from the obligation to file a VAT return or they will only be required to submit a simplified VAT return.

The effective date is 1 January 2020. Member states are required to adopt and publish necessary legislation by 31 December 2019.

A copy of the Council Directive can be viewed here.

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European Commission's proposals on VAT rates and intra-EU supplies

On 6 and 7 September 2018, the European Parliament published two reports approving the European Commission's VAT proposals in relation to VAT rates and intra-EU supplies. The reports were further debated by Parliament at the beginning of October 2018.

VAT rates

The first report considers proposals to set a new maximum standard VAT rate. The Commission originally proposed that member states continue to be able to set their standard VAT rates of at least 15%, with the possibility of further reduced and zero rates. The European Parliament has approved the proposals but has made certain amendments, including setting a new maximum standard rate of 25% and introducing a requirement to prioritise reduced rates for goods and services which have a positive impact on the general interest, such as cultural, social or environmental benefits.

A copy of the first report can be viewed here.

Intra-EU supplies

The second report considers the Commission's proposals for taxing intra-EU supplies. The Commission proposed to remove VAT zero-rating for intra-EU business to business goods supplies. Supplies would be taxed where they were received and an administrative 'one-stop shop' would be introduced. Certain "reliable" VAT taxpayers ("certifiable taxable persons" (CTP)) would not be subject to any changes and would benefit from simplification in areas such as chain transactions and proof of transport.

The proposals have been largely approved by the European Parliament, subject to further clarification on CTPs and its alignment with the EU Customs Code. It has also requested the introduction of dispute resolution mechanisms.

A copy of the second report can be viewed here.

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Cases

Rowhildon Ltd – HMRC's decision to refuse a taxpayer's belated notification of an option to tax a property was unreasonable

In *Rowhildon Ltd v HMRC*[1], the First-tier Tribunal (FTT) has held that HMRC's decision to refuse a taxpayer's belated notification of an option to tax a property was unreasonable.

Background

Rowhildon Ltd (the taxpayer) is a real estate company. At a company board meeting held in late June 2016, it was agreed that a site in Norwich would be acquired. The taxpayer completed Form VAT 1614A (Form 1614A) on 1 July 2016, notifying HMRC of its option to tax in order to be able to recover the VAT. A copy of the Form 1614A was kept by the taxpayer.

Following a VAT enquiry by HMRC into the company in October 2016, it became clear that HMRC did not appear to have received the Form 1614A. The taxpayer asked HMRC to accept the copy of the Form 1614A which it had retained as belated notification. HMRC requested proof of postage of the Form 1614A and evidence as to the making of the decision to opt to tax the property by the taxpayer. The taxpayer confirmed that there was no proof of postage available as the Form 1614A was sent by standard post and no log of outgoing post was maintained by the taxpayer due to the volume of correspondence it dealt with. The taxpayer did provide HMRC with a copy of its board minutes, a copy of its computer records which showed that the Form 1614A had been created on 1 July 2016 and confirmed that it was not possible to insert an earlier date into the Form 1614A.

Following further correspondence between the parties, in July 2017, HMRC concluded that, as there was no proof of postage and the taxpayer's board minutes did not expressly refer to the decision to opt to tax, it was not satisfied that the decision to opt to tax had been made by the taxpayer in June 2016 and it was unable to agree a belated notification of an option to tax with effect from 1 July 2016. HMRC offered to agree an effective date for the option to tax of 16 September 2016, being the date on which the property was sold. This would mean the notification would be outside the 30 day period permitted by paragraph 20, Schedule 10, Value Added Tax Act 1994 (VATA) and the taxpayer would be unable to recover the VAT paid on the purchase of the property.

The taxpayer appealed HMRC's decision to refuse its belated notification.

FTT's decision

The appeal was allowed.

It was agreed by the parties that an option to tax cannot be made retrospectively but that HMRC, as a matter of discretion, would accept a belated notification of an option to tax where there is evidence of a positive option to tax on the relevant date and no good reason otherwise to refuse belated notification.

In considering whether a decision made in the exercise of HMRC's discretion was made reasonably, the FTT was required to consider whether, in reaching its decision, HMRC had acted in a way which no reasonable person would have acted, or had taken into account matters that it ought not to have, or disregarded matters that it ought not to have[2].

1. [2018] UKFTT 491.
2. See, for example, *John Dee Ltd v Commissioners for Customs and Excise* [1995] STC 941, at 952 per Neill LJ.

The FTT found as a fact that the Form 1614A was completed on 1 July 2016, on the instructions of Ms Allen, a director of the company, and the FTT accepted the taxpayer's evidence that the copy Form 1614A could not have been printed later than that date. The FTT further found as a fact that a positive decision to opt to tax the relevant site was made by the taxpayer on 1 July 2016.

In light of the above, the FTT concluded that HMRC's decision that the taxpayer had provided "no evidence" of a positive decision to opt to tax the property on 1 July 2016, failed to properly take into account the evidence of the taxpayer that the copy Form 1614A which had been provided could not have been printed later than 1 July 2016. This evidence should have been taken into account by HMRC.

The FTT therefore concluded that HMRC could not have been reasonably satisfied that there were grounds for refusal of the belated notification with effect from 1 July 2016 and its decision to refuse the belated notification was unreasonable.

Comment

This case may be helpful to taxpayers in a similar situation where the only evidence available to the taxpayer that it made a positive decision to opt to tax a property is a copy of the completed online HMRC form. The case also highlights how import it is that taxpayers keep a copy of all correspondence and documents sent to HMRC.

A copy of the decision can be viewed here.

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Hastings Insurance Ltd – a non-party may access certain documents filed with the First-tier Tribunal

In *Hastings Insurance Ltd and HMRC v KPMG*[3] the FTT granted KPMG, who was neither a party in the underlying proceedings nor a representative of a party, access to certain documents which had been filed with the FTT.

Background

KPMG applied to the FTT for copies of HMRC's statement of case and both parties' skeleton arguments in an appeal which had been heard in public. The appeal related to whether, for VAT purposes, Hastings Insurance Ltd (the taxpayer) could recover or obtain credit for input tax it had incurred in the period from 1 February 2009 to 31 December 2013, which was attributable to supplies of broking, underwriting support and claims handling services made to Advantage Insurance Company Ltd.

KPMG sought a copy of the requested documents as it wished to better understand the arguments in the underlying appeal as they were relevant to another case in which KPMG had been instructed.

Both the taxpayer and HMRC objected to KPMG gaining access to the documents it had requested.

HMRC objected on the grounds of taxpayer confidentiality. Its position was that if it supplied a copy of the requested documents it would be in breach of its duty to maintain taxpayer confidentiality, under section 18 Commissioners and Revenue and Customs Act 2005 (the Act).

3. [2018] FTT 478 (TC).

It also argued that there is no rule in the Tribunal Rules which permits the FTT to grant a non-party access to documents which have been filed with the FTT.

The taxpayer contended, amongst other things, that KMPG did not have a "legitimate interest" in the documents it sought.

FTT decision
The application was granted.

The FTT concluded that it has an inherent jurisdiction to allow non-parties access to certain categories of documents filed in proceedings before it, namely, those equivalent to the documents specified in CPR r.5.4C(1). Such documents included statements of case and skeleton arguments which had been deployed at a public hearing and read by the FTT.

The FTT said that section 18 of the Act does not restrict disclosure by the FTT and there is no Tribunal rule stating that documents relating to proceedings cannot be disclosed to non-parties.

The FTT also said that the relevant test is whether KPMG has a legitimate interest in requesting access to the documents and in its view an interest in other related litigation was sufficient to satisfy this test. The FTT agreed with the taxpayer that KPMG should not have access to any part of HMRC's statement of case, which referred to an appeal which had been settled prior to the appeal hearing.

As KMPG had a legitimate interest, the FTT directed that KPMG be allowed to inspect the documents which it had requested.

Comment
This decision provides welcome clarification of the circumstances in which a non-party to litigation before the FTT may obtain a copy of certain documents filed with the FTT. Until this decision, the position was unclear as the Tribunal Rules do not deal with this issue.

Following this decision, information filed with the FTT may end up being disclosed to a non-party. It is therefore important that care is taken when drafting documents such as skeleton arguments to ensure that sensitive or confidential information is not referred to unless absolutely necessary and consideration should be given to including such information in a schedule.

A copy of the decision can be viewed here.

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The Serpentine Trust Ltd – HMRC entitled to raise VAT assessments despite binding contractual agreement on VAT treatment

In *The Serpentine Trust v HMRC*[4], the FTT has held that although HMRC had agreed with the taxpayer one basis for calculating VAT, under alternative dispute resolution (ADR), it was not precluded from raising VAT assessments on a different basis, because the agreement reached was ultra vires and therefore void.

4. [2018] UKFTT 535.

Background

The Serpentine Trust Ltd (the taxpayer) is a registered charity which operates various "supporter schemes" (the schemes) whereby supporters make payments to it and in return receive a range of benefits.

In July 2013, HMRC and the taxpayer held an ADR meeting in relation to the VAT treatment of the schemes. An agreement was reached in relation to some of the schemes only. In relation to those schemes where agreement had not been reached, HMRC considered the schemes during the relevant periods to be standard rated VAT supplies and it subsequently issued two decisions and an assessment to that effect.

The taxpayer appealed to the FTT and additionally sought judicial review of HMRC's decision.

FTT decision

The appeal was dismissed.

The issues before the FTT were whether HMRC and the taxpayer had reached an agreement and if so, whether HMRC had made a unilateral mistake, or whether the agreement was void because it was ultra vires as it did not reflect the correct legal position.

The FTT concluded that the parties had reached an agreement at the ADR meeting and that there was no unilateral mistake by HMRC as an HMRC officer had made extensive changes to the ADR document, including clarificatory amendments, yet no changes had been made to the disputed paragraph.

The income received by the taxpayer from the schemes was standard rated for VAT purposes as the taxpayer had made a "single supply of the opportunity... to partake of exclusive events at, and offers by, the trust". The VAT treatment agreed under ADR was wrong in law and inconsistent with HMRC's published position. Following *Preston v IRC*[5], agreements between taxpayers and HMRC which prevent HMRC from applying a taxing provision in accordance with the law are ultra vires and void.

Comment

It was accepted by the taxpayer that what HMRC had agreed as part of the ADR process was wrong as a matter of law and the FTT concluded that this meant the agreement was ultra vires and void. The judicial review proceedings were stayed until the outcome of this appeal and the taxpayer can now seek to challenge in those proceedings HMRC's decision to change its position on the grounds of legitimate expectation.

This decision could have implications for HMRC's ADR process in general, if agreements reached during the ADR process can be disregarded by HMRC on the ground that the agreed basis for calculating tax is wrong in law.

A copy of the decision can be viewed here.

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5. [1985] AC 835.

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