VAT update

September 2018

In this month's update we report on (1) the ECON committee's amendments to the European Commission's proposal for simplification of VAT for SMEs; (2) the government's technical note on the impact on VAT in the event of a no-deal Brexit; and (3) Revenue and Customs Brief 6 (2018) on VAT exemption for all domestic service charges. We also comment on three recent decisions relating to (1) the VAT treatment of fixed odds betting terminals; (2) VAT on the supply of temporary school accommodation; and (3) the set-off of credit for overpaid VAT against VAT default surcharges issued for later VAT periods.

News items

ECON committee amends Commission's proposal for simplification of VAT for SMEs

The EU Parliament's economic and monetary affairs (ECON) committee has provided amendments to the Commission's proposal for simplification of VAT for SMEs in the EU, which forms part of the wider set of reforms moving towards the creation of a single EU VAT area. more›

Government publishes technical note on the impact on VAT of a no-deal Brexit

On 23 August 2018, the government published a note for businesses and individuals addressing the impact on VAT in the event of a no-deal Brexit. Although the government aims to retain existing VAT rules and procedures as much as possible, there will be some inevitable changes. more›

Revenue and Customs Brief 6 (2018): VAT exemption for all domestic service charges

On 7 September 2018, HMRC published Revenue and Customs Brief 6 (2018), which explains when Extra Statutory Concession 3.18 VAT exemption for all domestic service charges will be applied. more›

Cases

Done Brothers – supplies through fixed odds betting terminals exempt from VAT

In *Done Brothers (Cash Betting) Ltd v HMRC* [2018] UKFTT 406 (TC), the First-tier Tribunal (FTT) has held that supplies made through fixed odds betting terminals (FOBT) are exempt from VAT. The FTT considered that treating similar supplies of gambling through FOBT differently for VAT purposes to supplies of comparator games such as casino roulette, electronic roulette, online gaming and over the counter bets on virtual games, breached the principle of fiscal neutrality. 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.

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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SiBCAS – supply of temporary school accommodation not VAT exempt

In *SiBCAS Ltd v HMRC* [2018] CSIH 9 XA81/17, the Court of Session has held that the provision of temporary school accommodation is subject to VAT. In considering the contract of supply, the Court of Session concluded that the transaction of erecting, letting and dismantling temporary classrooms at a school was an entrepreneurial activity and did not constitute the passive letting of immovable property within the VAT exemption. more›

K D Media Publishing – No set-off of credit for overpaid VAT against VAT already paid in periods before discovery of overpayment

In *K D Media Publishing Ltd v HMRC* [2018] UKFTT 0494 (TC), the First-tier Tribunal (FTT) has held that a taxpayer who was entitled, under section 80, VATA, to a credit for overpaid VAT, was unable to offset that credit against payments of VAT following the overpayment but before the discovery of the overpayment. more›

News items

ECON committee amends Commission's proposal for simplification of VAT for SMEs

The EU Parliament's economic and monetary affairs (ECON) committee has provided amendments to the Commission's proposal for simplification of VAT for SMEs in the EU, which forms part of the wider set of reforms moving towards the creation of a single EU VAT area.

The European Commission published its proposal in January 2018 for SMEs, with turnover below €2m, to be eligible for simplified VAT registration and record keeping, together with a new exemption for companies with an overall EU-wide turnover below €100,000.

On 16 July 2018, the ECON committee report, setting out amendments to the Commission's original proposals, was published.

ECON's amendments include:

- setting both an upper limit (at EU level) and a lower limit (at member state level) for the VAT exemption threshold
- removing the proposed requirement that SMEs submit annual VAT returns
- preventing member states from requiring exempt SMEs to submit VAT returns
- creating an EU-wide online portal allowing SMEs to register for the exemption across all member states, and
- bringing forward the proposed date of implementation to 1 January 2020 (from 1 July 2022).

A copy of the ECON's committee's report can be viewed here.

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Government publishes technical note on the impact on VAT of a no-deal Brexit

On 23 August 2018, the government published a note for businesses and individuals addressing the impact on VAT in the event of a no-deal Brexit. Although the government aims to retain existing VAT rules and procedures as much as possible, there will be some inevitable changes.

Importing goods from the EU

Generally, the current rules governing imports from non-EU countries will apply to imports from the EU, but there will be some changes.

Postponed accounting for import VAT on goods brought into the UK from any country will be introduced. As such, VAT will be accounted for in importers' VAT returns, rather than being paid at the time of import.

Low value consignment relief will not be extended to parcels from the EU. Any parcels sent to the UK valued at £135 or less will attract a VAT charge at the time of purchase and will be required to be paid to HMRC. A digital service will enable overseas businesses to register with HMRC. VAT will continue to be collected from UK recipients for all other excise goods, higher value parcels and potential non-compliance overseas suppliers.

Unless relief is available, vehicles from the EU will be subject to import VAT. The existing Notification of Vehicle Arrival Procedures system should continue to be used to notify transactions to HMRC.

Exporting goods to the EU

The position is not yet confirmed, however, UK businesses are being warned that they will need to check with the relevant member state which rules and process will apply to the goods they export to the EU.

Distance selling arrangements will not apply to UK businesses. Sales of goods to EU consumers will be zero-rated and import VAT will be due at the point of import.

Businesses which are VAT registered will continue to sell goods to EU businesses at zero-rate, but businesses will be required to retain evidence to show goods have left the UK, rather than submit EC sales lists.

When selling goods stored within a member state to EU customers, UK businesses will be required to register and account for VAT in the member states where the sales are made.

Supplying services to the EU

For services supplied to EU member states, the place of supply rules will broadly remain the same. VAT will be due in the member state where the customer resides. However, it is likely that there will be changes to the input VAT deduction rules for financial services and further guidance is awaited.

The online mini one stop shop scheme (MOSS), which allows businesses selling digital services to EU consumers to report and pay VAT through a single return, will no longer be available. However, businesses will be able to register for the MOSS non-union scheme in an EU member state after the UK has left the EU.

A copy of the technical note can be viewed here.

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Revenue and Customs Brief 6 (2018): VAT exemption for all domestic service charges

On 7 September 2018, HMRC published Revenue and Customs Brief 6 (2018), which explains when Extra Statutory Concession 3.18 VAT exemption for all domestic service charges will be applied.

The purpose of the concession is to allow the same VAT treatment of service charges paid by residential leaseholders and freeholders for the same common services on the same common estate. As the charge is directly linked to an exempt supply of an interest in land, leaseholders and tenants are not required to pay VAT on these charges. As there is no such link for freeholders, to allow the same VAT treatment, landlords may elect to use the concession to treat these supplies as exempt from VAT if the landlord is contractually obliged to provide the services.

From 1 November 2018, all property management companies, often used by landlords to obtain goods and services on the landlords' behalf and charge a taxable management fee for providing the service, will need to correctly account for VAT.

A copy of the Brief can be viewed here.

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Cases

Done Brothers – supplies through fixed odds betting terminals exempt from VAT

In *Done Brothers (Cash Betting) Ltd v HMRC* [2018] UKFTT 406 (TC), the First-tier Tribunal (FTT) has held that supplies made through fixed odds betting terminals (FOBT) are exempt from VAT. The FTT considered that treating similar supplies of gambling through FOBT differently for VAT purposes to supplies of comparator games such as casino roulette, electronic roulette, online gaming and over the counter bets on virtual games, breached the principle of fiscal neutrality.

Background

Done Brothers (Cash Betting) Ltd, Tote (Successor) Company Ltd and Tote Bookmakers Ltd (the Appellants) are all members of the Betfred corporate group.

During the period 6 December 2005 to 31 January 2013, gambling services were provided through FOBTs within licensed betting offices and VAT was accounted for on the supplies of these services.

During this period, the provision of facilities for placing bets or playing games of chance was an exempt supply under Group 4, Schedule 9, VATA. However, supplies made through FOBTs were subject to VAT at the standard rate because FOBTs were considered to be "gaming machines" under section 23, VATA, and therefore excluded from the exemption by note (1)(d) of Group 4. Casino roulette, electronic roulette, online gaming and over the counter bets on virtual games ('the comparator games') were exempt from VAT.

The Appellants also supplied the comparator games and were not required to pay VAT on these due to the exemption.

The Appellants claimed, under section 80, VATA, repayment of the VAT they had accounted for as the games supplied through FOBTs were similar to the comparator games and therefore the different VAT treatment breached the principle of fiscal neutrality.

HMRC rejected the repayment claims and the Appellants appealed.

FTT decision

The appeal was allowed in part.

The issue for the FTT to determine was whether the Appellants' supplies of the FOBT games were similar to one or more of the comparator games for the purposes of the principle of fiscal neutrality.

In considering this question, the FTT followed *HMRC v The Rank Group* [2011] C-259/10, in which the CJEU confirmed that two or more games may fall within a single category even where they differ in detail in relation to structure, arrangements and rules. Categories are therefore broader than a specific type of game. The CJEU did not rule out treating games that fell into the same category as different for VAT purposes where it is possible to distinguish the games by differences other than structural details, arrangements or rules.

Rank provides a two stage test when determining similarity. First, it is necessary to establish whether both games fall within the same category due to having similar characteristics. Second,

it is necessary to consider whether the games meet the same needs from a typical consumer's point of view. Two games will meet the same needs if their use is comparable and their differences do not have a significant influence on the average consumer's decision to choose one over the other. Only once both of these elements have been satisfied, may the games be classed as similar.

The FTT considered each game in turn when deciding whether the games were similar from the average consumer's point of view. Applying the principles in *Rank* to the various games available on FOBTs, the FTT concluded that the average consumer viewed the games on the various platforms as similar and interchangeable. Accordingly, the principle of fiscal neutrality was breached by treating the games differently for VAT purposes.

Comment
This decision has implications for other taxpayers who operate FOBT and have made claims for overpaid VAT. It is estimated that the rebate for the bookmaking sector from this case could reach £1billion. Given the large sums involved it is anticipated that HMRC will seek to appeal this decision.

A copy of the decision can be viewed here.

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SiBCAS – supply of temporary school accommodation not VAT exempt

In *SiBCAS Ltd v HMRC* [2018] CSIH 9 XA81/17, the Court of Session has held that the provision of temporary school accommodation is subject to VAT. In considering the contract of supply, the Court of Session concluded that the transaction of erecting, letting and dismantling temporary classrooms at a school was an entrepreneurial activity and did not constitute the passive letting of immovable property within the VAT exemption.

Background
SiBCAS Ltd (the taxpayer) supplied a temporary building to a school to act as a stop-gap until permanent arrangements could be made to replace part of the school which had been condemned. The supply was initially for 24 months, but lasted for 32 months.

The structure was two storeys high, with three interlinked blocks comprising 66 units which were clipped or clamped together to create the 19 classrooms required by the school. The taxpayer carried out the foundation work, including cutting tarmac, digging trenches, laying fresh stone and levelling beams. The structure took 29 days to assemble and 98 days to dismantle.

The taxpayer charged the school VAT on its supplies of the temporary accommodation. The school believed that no VAT should have been charged and referred the issue to HMRC. HMRC agreed that the supply was exempt from VAT as it involved "the leasing or letting of immovable property" pursuant to Article 135(1)(l) of the Principal VAT Directive (2006/112/EC) (the Directive). The Directive was implemented into UK law by VATA. Schedule 9, VATA, provides that "the grant of any interest in or right over land or of any licence to occupy land" is exempt from VAT. The taxpayer appealed to the First-tier Tribunal (FTT).

The issue to be determined was whether the taxpayer's supply of temporary accommodation was exempt as a letting of immovable property. If it was not immovable property, VAT at the standard rate would be chargeable.

The FTT agreed with the taxpayer. In the view of the FTT, immovable meant fixed to, or in the ground, so each unit had to be considered in isolation. The units could be easily disconnected, dismantled and moved quickly, and could not therefore be treated as a letting of immovable property. HMRC appealed to the Upper Tribunal (UT).

The UT allowed HMRC's appeal. The FTT had taken an unduly restrictive view of fixed to, or in the ground, by considering individual components, rather than the building as a whole. The only reasonable conclusion was that the building was fixed to, or in the ground as there were substantial foundations used to secure the buildings, there was connection to services which ran through the ground, and the building could not be moved without difficult dismantling.

The taxpayer appealed to the Court of Session.

Court of Session judgment
The appeal was allowed.

The Court of Session held that the taxpayer's supply of accommodation was not an exempt supply of land pursuant to Group 1, Schedule 9, VATA.

In the view of the Court of Session, the UT had been correct in determining that the structure had to be considered as a whole, rather than interlinked units. However, the Court considered the primary focus should have been on the purpose of the exemption and a consideration of the entire circumstances of the supply, and not just the physical properties of the structure in order to understand the substance of the commercial supply undertaken.

Relevant factors included the terms of the contract between the taxpayer and the school, the duration of the supply, and whether any interest in the land was conveyed or leased.

The contract involved the design, transportation and construction of "temporary classroom accommodation" on the school's own land, payment of rental for the accommodation for a minimum, but ultimately limited, 24 month period and the removal of the temporary classroom facilities at the end of the period. The contract provided for a supply which was economic in nature, for the purposes of the application of VAT, which negated the consideration that the structure itself was immoveable. In light of the contractual terms, the units were undoubtedly movable property and the FTT decision was reinstated. VAT was correctly charged on the supply.

Comment
The VAT treatment on supplies relating to land and buildings is often an area of dispute with HMRC. In taking the legal relationship between the parties and the contractual terms into consideration, this decision provides greater certainty for taxpayers as to the VAT status of a letting transaction. The physical connection of structures to land is no longer the only factor to be considered.

A copy of the judgment can be viewed here.

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K D Media Publishing – No set-off of credit for overpaid VAT against VAT already paid in periods before discovery of overpayment

In *K D Media Publishing Ltd v HMRC* [2018] UKFTT 0494 (TC), the First-tier Tribunal (FTT) has held that a taxpayer who was entitled, under section 80, VATA, to a credit for overpaid VAT, was unable to offset that credit against payments of VAT following the overpayment but before the discovery of the overpayment.

Background

K D Media Publishing Ltd (the taxpayer) is a magazine publishing company. The taxpayer has been consistently late in paying its VAT and has regularly incurred VAT default surcharges as a result.

In February 2017, the taxpayer discovered it had paid too much VAT for the 11/15 VAT period and notified this error to HMRC in a letter dated 10 February 2017. HMRC accepted the position and subsequently adjusted the VAT due for that VAT period and also reduced the default surcharge for that VAT period as a result of the reduced VAT liability. This led to HMRC owing the taxpayer £16,071.25 for the 11/15 VAT period (the overpaid sum).

HMRC issued VAT surcharges to the taxpayer in respect of late payment of VAT for the VAT periods after the 11/15 VAT period.

The taxpayer argued that the overpaid sum that HMRC held for the 11/15 VAT period should be set against VAT periods after the 11/15 VAT period on the basis that HMRC effectively had an extra amount of VAT which had been paid and the amounts paid for each of the intervening VAT periods should be treated as reduced. This would reduce the default surcharges due as they would be calculated on the lower amount of unpaid VAT.

HMRC's position was that it was not required to give credit until it was notified of the mistake by the taxpayer in February 2017. From notification of the error, HMRC applied the credit against the outstanding VAT and default surcharge at the relevant time which was the VAT surcharge which remained in respect of the 11/16 VAT period. HMRC contended that the credit could not be applied against the VAT which had been due for any earlier VAT periods as HMRC was not aware at the time this VAT became due that there was a credit available.

The taxpayer appealed.

FTT decision

The appeal was dismissed.

The FTT noted that section 80(2), VATA, only provided for a credit or repayment to be given on a claim being made. Accordingly, the FTT held that the VAT default surcharges had been properly imposed in accordance with section 59, VATA, as the credit resulting from the overpayment of VAT cannot be allocated against VAT which has already been paid prior to the date on which the credit arose.

In the view of the FTT, there is no suggestion under section 80, VATA, that a corrected overpayment is to be regarded as a liability upon HMRC which would compel it to back date the error.

The FTT distinguished *Swanfield Limited v HMRC* [2017] UKUT 88, in which the FTT held that a taxpayer was entitled to appropriate a payment to VAT that was not yet due, on the basis that no allocation had been made in this matter as the taxpayer had been unaware of the credit until it was discovered.

The FTT also concluded that the taxpayer had no reasonable excuse for its failure to pay its VAT on time for the relevant VAT periods and the default surcharges were not disproportionate given the purpose of the default surcharge regime.

Comment
This decision is consistent with the principle that VAT due in respect of each VAT period is a separate debt and there is no running VAT account between HMRC and taxpayers that spans VAT periods. Each VAT period must be looked at separately. In order to avoid default surcharges, taxpayers must ensure their returns and payment of VAT is made on time.

A copy of the decision can be viewed here.

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