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V@

Welcome to the June 2021 edition of RPC's V@, an update which provides analysis and news from the VAT world relevant to your business.

News

- In **Revenue and Customs Brief 6 (2021): VAT liability of juice cleanse programmes**, HMRC sets out its policy concerning the VAT treatment of supplies of juice cleanse programmes following the Upper Tribunal (**UT**) decision in *HMRC v The Core (Swindon) Ltd* [2020] UKUT 0301 (TCC), which decided that juice cleanse programmes supplied by the appellant were zero-rated meal replacements rather than standard-rated beverages. We reported on this decision in the **January 2021 edition of V@**.

- In **Revenue and Customs Brief 7 (2021): VAT liability of charging of electric vehicles**, HMRC sets out its policy concerning the VAT treatment of charging of electric vehicles when using charging points situated in various public places. The brief confirms that supplies of electric vehicle charging through charging points in public places are charged at the standard rate of VAT. It also explains when input tax can be recovered for charging electric vehicles for business purposes.

- In **Revenue and Customs Brief 8 (2021): VAT treatment of public funds received by further education institutions**, HMRC explains its response to the primary decision of the UT in *Colchester Institute Corporation v HMRC* [2020] UKUT 368 (TCC). We reported on this decision in the **January 2021 edition of V@**. The brief confirms that HMRC is taking steps to test, via a new appeal, the primary decision in that case, which was that public monies received by Colchester Institute Corporation to fund the provision of education represented third party consideration paid from the public purse to educate a particular group of students and therefore the relevant supplies were not outside the scope of VAT (as HMRC had argued).

- HMRC has published a new policy paper on the **EU's e-commerce package**, which will introduce changes from 1 July 2021 in respect of the movement of goods from Northern Ireland to the EU and imports of low value goods into the EU or Northern Ireland. The package also introduces new rules for supplies made through online marketplaces, similar to those already applying in Great Britain and partly in Northern Ireland.

Case reports

David Moulsdale – Court of Session decides that option to tax not disapplied on sale of land

In *David Moulsdale, trading as Moulsdale Properties v HMRC* [2021] CSIH 29, the Court of Session decided (by a majority) that an option to tax was not disapplied on a sale of land, under paragraph 12 (Developers of exempt land), Schedule 10 of the Value Added Tax Act 1994 (**VATA 1994**).

The Appellant bought land, on which a block of offices had been built, from a developer and granted a lease to a connected exempt tenant. The Appellant then sold the offices in an arm's length transaction to a third party company (the **Transferee**), subject to the continuing lease (the **Sale**). The Appellant had opted to tax the land, but did not charge VAT in respect of the Sale, relying on the statutory exemption in paragraph 12, Schedule 10, VATA 1994, to exempt the Sale from VAT.

The dispute concerned whether the Appellant intended or expected that the land would become a capital item (an item on which the owner incurred VAT bearing capital expenditure, under Regulation 113 of the Value Added Tax Regulations 1995) in relation to the Transferee (the land was not a

capital item in relation to the Appellant because the adjustment period in the Capital Goods Scheme (**CGS**) had expired). If this condition was met, as the Appellant contended, the option to tax would be disapplied.

In the First-tier Tribunal (**FTT**), both parties agreed that the relevant provisions should be construed to avoid circularity. The Appellant argued that the answer was for the Appellant's intention or expectation to be assessed ignoring any disapplication which paragraphs 12 to 17 of Schedule 10 might effect. HMRC argued that the CGS item created by the Sale should be ignored for the purposes of deciding whether the Appellant's option was disapplied. The FTT dismissed the Appellant's appeal, holding that the option to tax was not disapplied in relation to the Sale because the Appellant could not have intended the property to become a capital item in the hands of the Transferee. The UT dismissed the Appellant's appeal. In the view of the UT, the FTT's decision contained no error of law and it observed that there was no evidence that the Appellant had any intention or expectation that the property would become a capital item in the hands of the Transferee.

In the Court of Session, Lord Carloway (with whom Lord Menzies agreed) refused the Appellant's appeals on the basis that the Court would not be justified in reversing the decisions of the two specialist tribunals on what was ultimately a matter of fact. In a dissenting judgment, Lord Doherty decided that the FTT and the UT had erred, and that the Appellant's construction of the relevant provisions was correct.

Why it matters: The judgment of the Court of Session is broadly in line with HMRC's approach to the circularity issue set out in HMRC's VAT Land and Property manual at **VATLP23500**. However, given the complexity of the relevant provisions, and in light of Lord Doherty's dissenting judgment, it will be interesting to see whether the taxpayer appeals the decision to the Supreme Court.

The judgment can be viewed **here**.

Tower Resources – UT confirms management charges by a holding company to its subsidiaries represented an economic activity

In *HMRC v Tower Resources Plc* [2021] UKUT 0123 (TCC), the UT dismissed HMRC's appeal against a decision of the FTT that management charges by an oil and mining holding company, to its overseas subsidiaries, for management, logistical and technical services in relation to acquiring licences to explore for and produce oil and gas in sub-Saharan Africa, represented an economic activity for VAT purposes.

Tower Resources Plc (**Tower**) was a UK holding company whose business was to acquire licences to explore for and produce oil and gas in sub-Saharan Africa. Tower's exploration and production activities were conducted through local subsidiaries. Tower funded the local costs of those subsidiaries and provided management services to its subsidiaries, as well as the bulk of the geological and geophysical services. Tower recharged its overseas subsidiaries for these services. The supplies charged to the subsidiaries were outside the scope of VAT under the general business-to-business rule for services, but with a right of input tax recovery because the services would have been subject to VAT if they had been supplied to a UK-based entity. HMRC disagreed that Tower made taxable supplies for consideration to its subsidiaries and therefore denied Tower credit for input tax and issued an assessment for input tax previously claimed by Tower.

Tower appealed HMRC's decisions to the FTT. The FTT allowed Tower's appeals, concluding that Tower made supplies for consideration (for the purposes of Article 2 of Directive 2006/112/EC (the **VAT Directive**)) and that those supplies were an economic activity (within the meaning of Article 9 of the VAT Directive). HMRC appealed the FTT's decision.

The central issue in the appeal before the UT was whether a parent company which charged its subsidiaries for management, logistical and technical services was making a taxable supply for consideration, in the course of an economic activity, where the cost of the services was added to intercompany loan accounts and where, although the loans were repayable on demand, the parent company had in practice not demanded repayment. The UT agreed with both Tower and the FTT that there was a genuine activity in place and there was therefore no problem with the loans not being repaid. The UT commented that *"the provision of funding by a parent company to its subsidiaries through debt and/or equity is standard commercial practice"*. Tower was entitled to the recovery of input VAT on the management services charged to its subsidiaries and HMRC's appeal

was therefore dismissed.

Why it matters: The topic of VAT recovery by holding companies is one of the most revisited areas of case law in VAT, but there remains some uncertainty. In HMRC's VAT Input Tax Manual at **VIT40600**, HMRC states that where *"a holding company incurs input tax on costs in providing or intending to provide management services to subsidiaries on terms whereby any payment will be contingent upon the profitability of those subsidiaries, then the holding company is not engaged in economic activity"*. This case, and others like it, call HMRC's guidance into question.

The decision can be viewed **here**.

Titanium – CJEU decides that a let property did not constitute a fixed establishment

In *Titanium Ltd v Finanzamt Österreich* (Case C-931/19), the Court of Justice of the European Union (**CJEU**) confirmed that where a property was let in Austria, but the landlord did not have staff in Austria to manage the letting, this did not create a fixed establishment for VAT purposes.

Titanium Ltd (**Titanium**) was a property and asset management company that had its registered and management offices in Jersey. During the 2009-10 tax years, the company let a property it owned in Vienna, which was subject to tax, to two Austrian individuals. This was Titanium's only property in Austria and it appointed an Austrian agent to manage the property. The agent, a real estate management company, was responsible for invoicing rental payments and operation costs, and for the preparation of VAT declaration data. Titanium retained the power to enter into and terminate leases, and to decide on the terms of tenancy agreements, and how repairs were financed.

Despite the property being subject to tax, Titanium did not pay VAT in respect of the letting in Austria on the basis that it was not permanently established in the country. The Austrian tax authority considered that a let property could constitute a fixed establishment and determined that Titanium was liable to account for VAT in respect of the 2009-10 tax years.

Titanium appealed against the Austrian authority's decision to the Austrian Federal Finance court, claiming that it should not be treated as permanently established in the country simply because it owned and let an immovable property there. The Court stayed proceedings in order to refer to the CJEU the question of whether the passive letting of a property without human resources in Austria could constitute a "fixed establishment".

The CJEU was of the view that merely owning and leasing a property in a country was not sufficient to create a fixed establishment within the meaning of Articles 43 to 45 of the VAT Directive. In its view, "fixed establishment" required a degree of permanence and structure, both in terms of staff and technical resources to supply services independently. Titanium, having no staff in Austria, had to rely on an agent to carry out some essential letting activities. The CJEU did not consider Titanium had a significant enough local presence to be able to carry out letting activities without the agent's assistance.

Why it matters: Current **HMRC guidance** on fixed establishment states that where an overseas company owns a property in the UK which it leases to tenants and the company *"appoints a UK agent… to carry on its business, this creates a fixed establishment in the UK"*. Although judgments of the CJEU no longer automatically form part of UK law, it will be interesting to see whether this judgment causes HMRC to change its guidance.

The judgment can be viewed **here**.

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