VAT update

April 2016

News

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Bratt Auto Contracts Limited – Upper Tribunal confirms that section 80 claims must be allocated to VAT periods

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Any comments or queries?

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

Robert Waterson
Senior Associate
+44 20 3060 6245
robert.waterson@rpc.co.uk

Nicole Kostic
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 Disputes team.

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

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News

Commission adopts an Action Plan to modernise VAT in the EU

On 7 April 2016, the European Commission adopted a Communication on an Action Plan on VAT, which sets out the first steps the Commission intends to take with the aim of creating a single EU VAT area. This follows the "Roadmap" that the Commission published in January 2016 (details of which were reported in our February 2016 newsletter).

The Action Plan sets out a timeline of the different actions the Commission intends to take. The intention is to create a simple, efficient and fraud-proof definitive system of VAT tailored to the single market. This includes plans to simplify VAT rules for e-commerce, short term measures to tackle VAT fraud and updates to the framework for VAT rates.

The Commission will now ask the European Parliament and the Council, supported by the European and Economic and Social Committee, to provide clear political guidance on the options put forward in its Action Plan and to confirm their support for the proposed reforms.

Details of the Action Plan are available to view here.

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Brief 8/16 – release by HMRC of exporter information

HMRC has announced that, from 8 April 2016, it will start to publish information relating to exporters of goods from the UK to non-EU countries. The purpose of this is to facilitate trade, boost UK growth and help exporters to identify new markets.

The information to be released will be limited to the exporter's name and address, the commodity code, description of the commodity code covering the goods and the month and year of export. It will be available on HMRC's stand-alone trade statistics website. HMRC will not publish commercially sensitive information or details of markets, customers or market share.

HMRC considers the release of this information will provide greater visibility of UK exporters to new customers in the global market place and assist developers to create exporter registers and online shop fronts to advertise and showcase UK exporters and their products.

Businesses do have the option to "opt-out" from having their details published if they wish. To opt-out, businesses should contact HMRC at uktradeinfo@hmrc.gsi.gov.uk and request that information is excluded. It should be noted that you cannot opt out retrospectively and HMRC will not remove information already published.

Brief 8/16 is available to view here.

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Notes to VAT1 on voluntary registration misleading

In *Lepton Service Station Ltd v HMRC* [2016] UKFTT 144 (TC), the taxpayer appealed against HMRC's refusal to allow pre-registration input tax. The First-tier Tribunal (FTT) allowed the taxpayer's appeal and concluded that the VAT1 notes relating to voluntary registration are misleading.

In considering the correct date of registration, the FTT noted that the VAT1 notes relating to voluntary registration state that the applicant should enter the date from which he would like to register and that, if that date is earlier than the application date, it is no more than four years earlier. Paragraph 9 of Schedule 1 to the Value Added Tax Act 1994 provides that, "if he so requests", HMRC shall register him from the date of application or such earlier date as may be agreed.

It is to be hoped that in the light of the FTT's decision in this case HMRC will revise its forms and accompanying notes so that they accurately reflect the law relating to registration for VAT.

A copy of the decision is available to view here.

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Background

Bratt Auto Contracts Ltd (BAC) and Bratt Auto Services Limited (BAS), are associated companies. They both own fleets of vehicles which are rented or leased to their customers; BAS deals in short-term rentals and BAC in long-term contract hire.

In March 2009, by a single letter the companies submitted section 80 claims for overpaid output VAT for (1) output tax declared upon the margin where the input tax on the vehicle was not deductible (*European Commission v Italian Republic* C-45/95); and (2) bonuses paid on demonstration cars where the VAT on the vehicles was blocked (*Elida Gibbs Ltd v Customs and Excise Commissioners* C-317/94) (the Claims).

HMRC rejected the claims on the basis that they did not satisfy the statutory requirements of regulation 37 of the Value Added Tax Regulations 1995 (SI 1995/2518). The rejection was upheld on review.

Despite the rejection of the Claims further information was volunteered to HMRC by BAC and BAS. HMRC remained of the view that the Claims did not satisfy the statutory requirements and the companies therefore appealed to the FTT.

The FTT decided that, in part, there was a valid claim in so far as it stated the sum claimed and how it had been calculated. It also concluded that the provision of the further information did not constitute a new claim and was simply an amendment of the original claim and therefore the claim was not time barred.

The companies and HMRC were dissatisfied with the FTT's decision and they appealed to the UT.

The UT's decision

The companies argued that the relevant statutory provisions had to be construed in a purposive manner and that the claims complied with the legislation.

The UT considered section 80(6) VATA, which requires the claim to be "made in such form and manner" as may be prescribed (the prescription appears in regulation 37). Compliance with regulation 37 is mandatory. A claim cannot be made without specifying the amount or the method of calculation.

The Claims referred to several accounting periods but had not stated how the amount was to be apportioned over those periods. In the UT's view, in order to comply with section 80(6) and regulation 37, a separate claim must be made for each period, identifying that period, the amount for which repayment is sought and the method. Accordingly, as the total sum claimed in the Claims were not allocated to the relevant VAT accounting periods, the UT concluded that the Claims were invalid.

Comment
The UT's decision confirms that a valid section 80 claim must be allocated to the relevant VAT accounting periods.

In circumstances where it is not possible to make a precise calculation allocating an exact amount of tax to each prescribed accounting period, the UT commented it had no objection to a calculation which arrived at a figure for a whole year and then apportioned it equally to the accounting periods within that year. Such an approach would be compliant with regulation 37, as equal apportionment represents an element of calculation.

As there had been no attempt to apportion the amount claimed in this case, the UT concluded that the Claims failed to satisfy the statutory requirements. The UT was not willing to imply that equal apportionment over the prescribed accounting periods had been intended.

A copy of the UT's decision is available to view here.

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Minister Finansów – insurance claim settlement services are not VAT exempt

In *Minister Finansów v Aspiro SA, formerly BRE Ubezpieczenia sp. z.o.o.* (C-40/15), the European Court of Justice (CJEU) considered the VAT liability of claims handling services.

Background
Aspiro SA (Aspiro), a Polish company, provided claims handling services to an insurance company. It performed these services in the name of the insurance company, on the basis of a contract with the insurance company. The services included the preparation and processing of damage reports, damage investigation and contacting the insured where necessary. After carrying out these tasks, Aspiro would decide whether claims should be settled.

Aspiro argued that the services it performed were exempt from VAT. It submitted that the services constituted an element of a single supply of insurance services and formed a distinct whole, entirely related and necessary to the business of the insurance company.

The Polish tax authority accepted that settling of the claims was an insurance activity. However, it concluded that all the other services performed by Aspiro, although linked to the settlement of the claims, did not constitute insurance services. Accordingly, Aspiro did not benefit from the exemption.

Aspiro appealed. The domestic court annulled the Polish tax authority's interpretation. In reaching this decision the court concluded that the Polish domestic law extended beyond what was provided for in the VAT Directive.

The Polish tax authority appealed the decision and the matter was referred to the CJEU for consideration of the scope of the insurance exemption.

The CJEU's decision

The CJEU concluded that for the services to fall within the VAT exemption for insurance intermediary services, the supplier must satisfy the following two conditions:

- there must be a relationship with the insurer and the insured party, either directly or indirectly and
- its activities must cover the essential aspects of the work of an insurance agent, such as the finding or introduction of prospective clients.

Aspiro satisfied the first of these conditions. It was in a direct contractual relationship with the insurance company as a result of which it also had an indirect relationship with the insurance party.

As regards the second condition, the CJEU concluded that the test was not met. The settling of claims by and on behalf of an insurer is not linked in any way to the finding or introducing of potential clients. Accordingly, Aspiro was not considered an insurance intermediary within the meaning of Article 135(1)(a) of the VAT Directive and could not benefit from the insurance exemption.

Comment

Similar questions were raised in 2005 in *Arthur Andersen* C-472/03 and the CJEU has reached a similar conclusion. The services were not exempt as they were not provided by a business as part of finding prospective clients or introducing them to an insurer.

The decision confirms that the scope of the exemption for insurance activities is narrower than that for other financial services.

It will be interesting to see how the decision will be applied, particularly in the UK, where the exemption under UK law is wider than the strict EU position.

A copy of the CJEU's decision is available to view here.

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Hospital Telecommunications Services Limited – HMRC's repeated errors constituted a reasonable excuse for late payment of VAT

In *Hospital Telecommunications Services Limited v HMRC* [2016] UKFTT 161 (TC), the FTT considered whether the company had a reasonable excuse for late payments of VAT.

Background

Hospital Telecommunications Services Limited (HTS) supplied services to hospital trusts. Prior to 2010, many of its customers had taken several months to pay its bills. Substantial sums were owed to HTS by a number of its customers and some had remained outstanding for over six months. As a result, HTS's finances were under considerable pressure.

In the light of its financial issues, HTS asked if it could switch to a cash accounting basis for the purposes of dealing with its VAT liability. HMRC refused this request and no explanation was offered as to why the request had been refused. The refusal was made despite the fact that HTS was not in debt to it and its turnover was within the permitted range.

Some years later, after numerous defaults and default surcharge penalties, HTS was informed by HMRC that most of the problems were of its own making and that it should have changed over to cash accounting.

HTS appealed against the imposition of further default surcharges. The issue before the FTT for consideration was whether it had a reasonable excuse for the late payments.

The FTT's decision

The FTT considered the *Steptoe* principle (*CCE v Steptoe* [1992] STC 757) which confirms that the factor which leads to a shortage of funds can in certain circumstances constitute a reasonable excuse for late payment and is therefore a defence against a default surcharge.

The fact that HTS was facing late payment by numerous customers, rather than by a single customer, made reliance on the *Steptoe* principle difficult.

However, the FTT noted a number of significant errors made by HMRC in dealing with this case. HMRC's initial failure to allow HTS to account for its VAT on a cash accounting basis was relevant. The FTT commented that whilst the continuing cash flow problems might have made it impossible for HTS to transfer over to cash accounting at a later date, that was not the case when the initial request was made. In its view, this failure was the dominant reason for the problems HTS faced thereafter.

The FTT noted HMRC's apparent lack of concern to help HTS and in particular, its failure to advise the taxpayer to consider making bad debt claims. In addition, HMRC made repeated errors with regard to time-to-pay arrangements. On one occasion HMRC wrongly took, by direct debit, both the instalment payment under the time-to-pay arrangements and the total debt at the same time. On another occasion, HMRC failed to take a direct debit payment it could and should have taken.

The refusal by HMRC to agree to allow HTS to account for VAT on a cash accounting basis and HMRC's repeated errors lead the FTT to conclude that HTS had a reasonable excuse for its late payments.

Comment

In determining whether the taxpayer had a reasonable excuse in this case, the FTT considered events which had occurred at the beginning of the payment difficulties in 2010.

In reaching its conclusion, the FTT was assisted by a detailed witness statement prepared by the taxpayer, which set out in considerable detail the history of the dispute since 2010. As this case demonstrates, the importance of well-prepared witness evidence cannot be underestimated when appealing to the FTT.

A copy of the FTT's decision is available to view here.

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16065

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

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

8 Marina View #34-02A
Asia Square Tower 1
Singapore 018960
T +65 6818 5695