VAT update

December 2015

This is our last VAT update of 2015. RPC's next VAT update will be published on 28 January 2016. We wish all our readers a Merry Christmas and a Happy New Year!

News

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HMRC has published Brief 23/15, providing further information on its position following the ECJ judgment in *Skandia* [2015] EUECJ C-126/14. This is in addition to information provided in Brief 18/12 (details of which were reported in our November VAT update). more›

HMRC announces restructuring

Following the Autumn Statement, HMRC has announced that it will close all 170 of its offices and merge them into 13 regional 'hubs' as part of a major restructuring project. The proposal is part of the ongoing modernisation of HMRC's services and the so-called 'Building Our Future' project designed to create a digital tax system over the next 10 years. It is not clear when the planned closures will take effect, but the changes are expected to lead to large cost savings for the government. more›

Changes to the reduced rate of VAT for energy saving materials

Following the judgment of the European Court (CJEU) in *Commission v United Kingdom* (C-161/14), in which it was held that the UK's existing legislation was not consistent with EU law, the government intends to amend the relevant legislation in Finance Bill 2016. more›

Cases

Fairway Lakes Ltd – Tribunal considers issue of single and multiple supplies

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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 Disputes team.

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

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Associated Newspapers Ltd – VAT treatment of promotional retail vouchers

In *HMRC v Associated Newspapers Ltd* [2015] UKUT 641 (TCC), the Upper Tribunal (UT) has confirmed that supplies of vouchers for no consideration are not subject to VAT if supplied for a business purpose. **more›**

Adeco UK Ltd – VAT treatment of temporary workers

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HMRC has received additional information about VAT grouping in the Netherlands and Spain and updated its position. The Netherlands is not expected to apply 'establishment only' VAT grouping. Spain is expected to adopt a two-tier approach, the basic method and the advanced method. The basic method treats each member as a separate taxable person and amalgamates their VAT figures on a single return. This will not trigger the UK VAT changes. The position in relation to the advanced method, however, remains unclear.

As noted previously, HMRC's Briefs concerning this issue are only a guide. Businesses are strongly advised to check with the relevant Member State tax authority to confirm the position in that Member State.

Brief 23/15 is available to view here.

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Whilst a move to a digital tax administration is to be welcomed, it remains to be seen whether this project will address fundamental issues regarding HMRC's poor level of customer service, as recently raised by the Public Accounts Committee.

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Changes to the reduced rate of VAT for energy saving materials

Following the judgment of the European Court (CJEU) in *Commission v United Kingdom* (C-161/14), in which it was held that the UK's existing legislation was not consistent with EU law, the government intends to amend the relevant legislation in Finance Bill 2016.

On 9 December 2015, HMRC published a discussion paper seeking views on the proposed changes to reduced rate of VAT for the installation of energy saving materials. The government intends to retain as much of the relief as possible whilst ensuring that UK law is fully compliant with EU law.

Taxpayers who supply and/or install energy saving materials are invited to comment on the proposed legislative changes and whether the implementation date will cause any difficulties.

Written responses should be submitted and received no later than 3 February 2016.

A copy of the consultation is available to view here.

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Cases

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Background

Fairway Lakes Village is a development site comprised of a number of designated plots of land. The freeholder of the land (a third party) successfully applied for planning permission to construct holiday lodges on the site. The taxpayer was responsible for the construction of the lodges and the infrastructure.

From 2007, the sale arrangements required the landowner to grant a lease to the customer, who also entered into an agreement with the taxpayer (the Agreement). It was this Agreement that was central to the case. The Agreement not only provided for construction of the lodges, but also required the taxpayer to ensure that the third party landowner granted a lease of the built-on land to the customer.

In the majority of cases the lease was granted, and the Agreement signed, on the same day. However, in several instances the lease was granted after the Agreement had been signed.

The dispute between the parties was in relation to the nature of the services provided by the taxpayer. The taxpayer argued that it had made a zero rate supply of construction services. HMRC disagreed and contended that there was a composite supply of construction services and procurement of a lease.

The FTT's decision

The FTT dismissed the taxpayer's appeal and held that there was a single composite supply of construction services and procurement of a lease, which was subject to VAT at the standard rate.

The case concerned a single contract and the parties accepted that the Agreement should be construed in accordance with the principles laid down in *Investment Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, under which it was necessary to ascertain the meaning of the Agreement as understood by a reasonable man.

There was no argument that the terms of the Agreement were consistent with it being a construction agreement. However, the FTT agreed with HMRC's contention that the terms were not inconsistent with it being a contract to complete the building and ensure the landowner granted a lease.

The FTT analysed key clauses in the Agreement and the accompanying Standard Conditions of Sale and concluded that the supply extended beyond the provision of construction services. In particular, it noted that Clause 4.1.1 of the Agreement required the taxpayer to provide a customer with proof of title to the property and its ability to "procure its transfer" and clause 6.8 of the Agreement entitled a customer to issue a "notice to complete" within 10 days which would require the taxpayer to ensure the grant of the lease.

The FTT found further support for its conclusion from the fact that the Agreement referred to the parties as "Buyer" and "Seller", provided for the payment of rent and service charges to the taxpayer and required the taxpayer to give the Buyer vacant possession on completion.

Comment

The FTT did not need to consider the case law on the correct analysis to be applied when considering a multiple or composite supply, as the parties had accepted that if the contract concerned more than mere construction services, then the supply would be subject to VAT at the standard rate. The main issue before the FTT was the interpretation and construction of the Agreement.

The FTT's decision is available to read here.

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Associated Newspapers Ltd - VAT treatment of promotional retail vouchers

In *HMRC v Associated Newspapers Ltd* [2015] UKUT 641 (TCC), the Upper Tribunal (UT) has confirmed that supplies of vouchers for no consideration are not subject to VAT if supplied for a business purpose.

Background

To enhance the sale of its newspapers, from 2007 to 2010, the taxpayer ran a promotion under which its publications could be purchased for half their normal retail price. Potential customers were supplied with half price coupons which were redeemable at newsagents for a promotional period of 3 months. At the end of the promotional period, if the customer had continued to purchase the newspapers throughout the period, they were entitled to a voucher from a high street retailer (the "First Scheme").

In 2011, the taxpayer ran a further promotion. Under this promotion, the customer was supplied with unique reference numbers. These numbers were printed on certain publications. If the customer registered the numbers with an online or telephone account they would be supplied with "points" which could be redeemed for either rewards or a voucher from a high street retailer (the "Second Scheme"). Vouchers were purchased by the taxpayer either directly from retailers or from an intermediate taxable supplier.

The dispute concerned the following two issues, which were the subject of two separate appeals before the FTT:

- whether there was a liability to account for output VAT on the face value of the vouchers given away for no consideration in the First Scheme; and
- whether the taxpayer was entitled to deduct input VAT on the vouchers purchased in the First and Second Scheme.

By two decisions dated 24 January 2014 and 13 August 2015, the FTT found in favour of the taxpayer on both issues. HMRC appealed each decision to the UT. The appeals were combined and heard together.

The UT's decision

The UT considered each issue in turn:

The output tax issue
The UT agreed with the FTT that it was the "strictly business-related purposes" test that applied in the context of the provision of vouchers to customers. The supplies of vouchers for no consideration to customers purchasing the taxpayer's newspapers were therefore not subject to VAT as they were supplied for the taxpayer's business purpose. HMRC's appeal on this point was dismissed.

The input tax issue
In the view of the UT, the taxpayer could in principle deduct the input tax which arose on the supply of the vouchers as they had a direct and immediate link with the business. HMRC's appeal in relation to this issue was also dismissed.

However, the UT disagreed with the FTT's analysis that input tax arose on the issue by the retailers of the vouchers. Paragraph 4(2) of Schedule 10A to the Value Added Tax Act 1994, deems the consideration on issue of the vouchers by retailers to be zero. The issue of the voucher does not therefore bear VAT and the consequence is that no VAT was due from the supplies and none was paid. The taxpayer was therefore not entitled to recover VAT in respect of the retailers' vouchers.

The UT considered its view on the construction of Schedule 10A to be compatible with the principle of fiscal neutrality, as the position for purchases from retailers directly and from intermediaries would be the same. As a matter of law, no input tax would be capable of being claimed by any recipient of such a supply, whether a company in the position of Associated Newspapers, or a company (intermediary) making onward supplies. Distortion is only introduced if you take into account HMRC's concession for intermediaries to deduct input tax on voucher acquisitions, which is not part of the legislative code.

In light of this conclusion, the UT set aside this part of the FTT's decision and re-made it to determine that no input tax arises on the supplies and the taxpayer was not entitled to a deduction in that respect.

Comment
This is an important decision and may have implications for a range of business promotion and incentive schemes, for example, tickets to concerts or sporting events. Businesses for whom this decision is likely to be relevant, should seek appropriate professional advice.

The UT's decision is available to read here.

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Adecco UK Ltd - VAT treatment of temporary workers
In *Adecco UK Ltd and Others v HMRC* [2015] UKFTT 0600 (TC), the FTT has considered the VAT liability of an employment business in respect of work carried out by temporary workers.

Background
The taxpayer provided recruitment services. It provided its clients with three types of temporary workers: employed temps, non-employed temps and contract workers. The appeal was only concerned with non-employed temps.

The taxpayer accounted for VAT on the full charge paid by its clients for the services of

temps. In other words, it accounted for VAT on both the charge paid by the client (which represented the wages paid to the temp) and it accounted for VAT on the charge it retained (the commission element).

Following the decision in *Reed Employment Ltd* [2011] UKFTT 200 (TC), in which the FTT held that an employment bureau was not liable to account for VAT on the element of the charge representing wages, the taxpayer submitted repayment claims to HMRC.

HMRC rejected the taxpayer's claims on the basis that it supplied the services of non-employed temps and was not merely supplying the service of introducing temps to its clients. There were other grounds for rejection of the claim, such as whether the claim was in time and whether HMRC had a defence of unjust enrichment, but the preliminary issued before the FTT for determination was the question of liability.

The taxpayer argued that the economic reality of the contracts was for it to provide a service of introducing candidates for temp roles to its clients. The consideration for doing this was the commission element of the payment paid by the client. The element which represented wages was not consideration for any supply made by it.

The FTT's decision

The taxpayer's appeal was dismissed. The FTT held that the taxpayer was liable for VAT on the whole amount received by clients ie the wages and the commission elements.

In reaching its conclusion, the FTT analysed the contractual position.

Both parties accepted that there was no contractual relationship, actual or implied, between the temp and the client. There was a tripartite arrangement between the temp, the taxpayer and the client. The temp contracted with the taxpayer, and the taxpayer with the client. There was no need for a contract between the temp and the client. The FTT also concluded that there was no legal relationship between the temp and the client.

In considering the contractual position, the FTT considered the legal position between the taxpayer and the temp on the one hand and the temp and the client on the other. A key factor was the obligation of the taxpayer to pay the temp even if the client did not pay the taxpayer. This meant that the client received workers who would carry out the assignments but to whom it had no responsibilities such as the payment of wages. In the FTT's view, the temp owed a legal obligation to the taxpayer to carry out the assignment and the taxpayer owed the temp a legal obligation to pay the temp for the work he carried out. At the same time the taxpayer owed the client a legal obligation to have the work carried out by the temp and the client owed the taxpayer a legal obligation to pay for that work.

The FTT emphasised that the contractual position was not determinative of by and to whom supplies were made for VAT purposes. To determine the correct VAT treatment, the FTT considered relevant case law on the VAT treatment of tripartite arrangements and the impact of "economic realities" of the arrangements. The key question was whether the "economic realities" of the arrangements meant the contracts did not reflect the VAT supply.

The FTT considered the *Reed Employment* case but rejected the reasoning of the FTT in that case. The FTT also considered *Redrow* [1999] UKHL 4, *Loyalty Management* C-53/09, *LMUK/ Amia* [2013] UKSC 15, *Baxi Group Ltd* C-55/09, *WHA* [2013] UKSC 24 and *Airtours Holidays Transport Ltd* [2014] EWCA Civ 1033.

From the case law, the FTT identified the following two principles:

- if B agrees to pay A to provide goods or services to C, and C agrees with B to pay for those goods or services, then the *Redrow* approach applies and the recipient is determined according to who provides the consideration
- however, where a *Redrow* analysis does not lead to tax on final consumption (where A makes a supply to B, but B does not on-supply to C) then applying *Baxi/WHA*, economic reality requires the supply to be seen as made to the final consumer.

The FTT held that the taxpayer's case fell within 1 above and so applying the *Redrow* approach, the taxpayer was the recipient and had to account to HMRC for VAT on the full fees received from clients.

Comment

The FTT chose not to follow the decision of a differently constituted FTT in *Reed Employment*. Given the disparity between the two decisions, further appeals seem likely in order to clarify the VAT treatment of such taxpayers.

The FTT's decision is available to read here:

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About RPC

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