VAT update

March 2018

In this month's update we report on HMRC's informal VAT grouping consultation; HMRC's update on its project to digitise the VAT Retail Export Scheme; and HMRC's new guidance for Fast Parcel Operators. We also comment on three recent cases involving the validity of penalty notices; the recovery of input tax on intra-community transactions; and the validity of the builder's block concerning VAT recovery on goods incorporated into new buildings.

News

HMRC launches informal VAT grouping consultation

HMRC is currently undertaking an informal consultation with a number of industry bodies and trade associations in relation to three specific options for extending VAT grouping to certain non-corporate entities. This follows a previous consultation on the UK's VAT grouping rules launched in December 2016, from which the Government concluded that further work was required. more›

Update note on the digitisation of the VAT Retail Export Scheme

HMRC recently published an update on its project to digitise the VAT Retail Export Scheme (RES), which is intended to improve efficiency for both retailers and travellers, and also help reduce fraud. more›

New guidance for Fast Parcel Operators reclaiming import VAT on returned goods

On 20 February 2018, HMRC issued updated guidance for Fast Parcel Operators (FPOs). more›

Cases

NT ADA Ltd – failure to offer a review did not invalidate VAT penalty

In *HMRC v NT ADA Ltd* [2018] UKUT 59, the Upper Tribunal (UT) has found that a penalty notice issued under section 67, Value Added Tax Act 1994 (VATA) could be valid even though it failed to refer to the taxpayer's entitlement to request a review under section 83A, VATA. more›

Any comments or queries?

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Kreuzmayr – recovery of input tax on intra-community transactions

In *Kreuzmayr GmbH v Finanzamt Linz* (Case C-628/16), the Court of Justice of the European Union (CJEU) has found that the Austrian tax authority was entitled to deny input tax recovery when it emerged that VAT should not have been charged in the first place. **more›**

Taylor Wimpey – Upper Tribunal clarifies the application of the "builder's block" scheme

In *Taylor Wimpey Plc v HMRC* [2018] UKUT 55, the UT has allowed, in part, the taxpayer's appeal in relation to its claim to recover input VAT incurred on the provision of certain white goods, kitchen appliances and carpets installed in newly built houses. **more›**

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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News

HMRC launches informal VAT grouping consultation

HMRC is currently undertaking an informal consultation with a number of industry bodies and trade associations in relation to three specific options for extending VAT grouping to certain non-corporate entities. This follows a previous consultation on the UK's VAT grouping rules launched in December 2016, from which the Government concluded that further work was required.

HMRC is now seeking views on extending the VAT grouping rules to certain partnership and sole trader arrangements. Those invited to participate had to submit their written responses to the consultation by 16 March 2018.

If the proposals are taken forward, HMRC is expected to publish draft legislation for further consultation later this year.

A copy of the letter inviting the Chartered Institution of Taxation to participate in the consultation is available to view here.

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Update note on the digitisation of the VAT Retail Export Scheme

HMRC recently published an update on its project to digitise the VAT Retail Export Scheme (RES), which is intended to improve efficiency for both retailers and travellers, and also help reduce fraud.

Subject to certain conditions, the RES allows travellers who are not established in the EU to receive a refund of VAT paid on goods exported to destinations outside the EU and retailers to zero-rate goods sold to entitled customers when they have the necessary evidence of export and have refunded the VAT to the customer (details are set out in VAT Notice 704).

The update sets out the actions HMRC have taken to date and proposed changes to the process. HMRC is now seeking suggestions from businesses that operate the RES as to how procedures can be improved to best fit with digitisation. Suggestions should be sent to resconsultation.idt@hmrc.gsi.gov.uk.

A copy of the update note is available to view here.

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New guidance for Fast Parcel Operators reclaiming import VAT on returned goods

On 20 February 2018, HMRC issued updated guidance for Fast Parcel Operators (FPOs).

Currently FPOs are not able to claim back import VAT as input tax on their VAT return when an FPO pays duty and import VAT in certain circumstances eg the items are being returned under the rules of distant selling contracts.

To address this issue, HMRC has announced that it will introduce a Trade Facilitation measure. This will only apply to approved FPOs with a Memorandum of Understanding with HMRC and is not available to other agents or operators.

In order to facilitate FPOs, with immediate effect, HMRC requires an application for repayment to be made under Article 174 of the Union Customs Code using form C285.

A copy of the guidance is available to view here.

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Cases

NT ADA Ltd – failure to offer a review did not invalidate VAT penalty

In *HMRC v NT ADA Ltd* [2018] UKUT 59, the Upper Tribunal (UT) has found that a penalty notice issued under section 67, Value Added Tax Act 1994 (VATA) could be valid even though it failed to refer to the taxpayer's entitlement to request a review under section 83A, VATA.

Background

The underlying dispute concerned whether NT ADA Ltd, a Jersey company, was within the scope of UK VAT in respect of supplies made to UK-based customers. HMRC made three decisions against the taxpayer, one of which was a penalty of over £200,000 imposed under section 67, VATA, for failure to register.

HMRC's letter notifying the penalty contained the following statement: "If you disagree with this decision you can ask for a review by an independent HMRC officer within 30 days of this letter. Or you can appeal to the Tribunal Service within 30 days of this letter. If you opt for a review, you can still appeal to the tribunal after the review has finished."

When the matter came before the First-tier Tribunal (FTT), the taxpayer argued that HMRC had failed to comply with the requirement in section 83A, VATA, to offer a review and the FTT therefore had no jurisdiction to consider the penalty notice. The FTT agreed with the taxpayer and struck out the penalty appeal. In the view of the FTT, HMRC had failed to offer a review and it was not sufficient to simply inform the taxpayer that it could ask for a review. This invalidated HMRC's decision to impose a penalty.

HMRC appealed to the UT.

UT decision

The appeal was allowed.

The UT found that whilst it was clear that Parliament intended that a person receiving an appealable decision should be offered a review, the legislation was silent on the consequences of HMRC failing to do so. There was nothing in section 83A which supported the proposition that a failure to offer a review rendered an assessment invalid, invalidly notified, or not capable of appeal. Indeed, in the view of the UT, the offer of a review was simply something that must be made alongside the assessment but was separate to it. Failure to offer a review did not invalidate the related decision and therefore did not preclude an appeal against the decision.

The UT considered that any failure on the part of HMRC to comply with its obligations to offer a review would be relevant and likely to influence the FTT when deciding whether to exercise its discretion to admit a late appeal. The taxpayer would also have the option of making a challenge by way of judicial review.

In any event, the UT considered that the notification by HMRC of the option for a review was sufficient to satisfy the conditions in section 83A.

Comment
This decision highlights an interesting difference between VATA and the Taxes Management Act 1970 (TMA) when it comes to the required contents of a penalty notice. Whilst the failure to offer a review may invalidate a penalty issued under TMA, it would appear that this is not be the case in relation to a penalty issued under VATA.

A copy of the decision is available to view here.

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Kreuzmayr – recovery of input tax on intra-community transactions

In *Kreuzmayr GmbH v Finanzamt Linz* (Case C-628/16), the Court of Justice of the European Union (CJEU) has found that the Austrian tax authority was entitled to deny input tax recovery when it emerged that VAT should not have been charged in the first place.

Background
BP Marketing GmbH (BP), a German company, sold petroleum products to BIDI Ltd (BIDI), an Austrian company. BIDI agreed to transport the goods to Austria. BP zero-rated its sales regarding them as exempt intra-community supplies in accordance with Article 138, Council Directive 2006/112/EC (Principal VAT Directive). BIDI charged Austrian VAT when it resold the goods to Kreuzmayr GmbH (Kreuzmayr), an Austrian company.

Without informing BP, BIDI also agreed that Kreuzmayr would arrange the transport of the goods from Germany to Austria. This meant that a different VAT treatment should have applied. BP should have charged German VAT, and BIDI should have zero-rated its supply.

The Austrian tax authority initially allowed Kreuzmayr's deduction of input tax. However, in the course of a tax audit, it emerged that BIDI had neither declared nor paid the invoiced amounts of VAT. Following the audit, BIDI amended the invoices, showing that no VAT was due on the supplies to Kreuzmayr. However, BIDI became insolvent and Kreuzmayr did not recover the VAT paid to BIDI. On the basis of the amended invoices, the Austrian tax authority formed the view that Kreuzmayr had no right to deduct the input VAT.

The Austrian tax authority concluded that the acquisitions by Kreuzmayr were not local purchases of goods, but rather an intra-community acquisition of goods and they should not have been subject to Austrian VAT. Kreuzmayr disagreed and the matter was referred to the CJEU.

The issue before the CJEU was the correct interpretation of Article 32, Principal VAT Directive, which provides that where goods are dispatched the place of supply is deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins.

CJEU judgment

The CJEU confirmed that the second supply of goods (between BIDI and Kreuzmayr) qualified as a VAT exempt intra-community supply of goods. Kreuzmayr was therefore not entitled to input tax recovery.

The CJEU observed that where two successive supplies of the same goods, effected for consideration between taxable persons, give rise to a single intra-community transport of those goods, that transport can be ascribed to only one of the two supplies.

The CJEU was of the view that paragraph 1, Article 32, Principle VAT Directive, had to be interpreted as applying to the second of two successive supplies of goods which gives rise to only one intra-community transport. As Kreuzmayr was the owner of the goods before the intra-community transport took place, Article 32 applied to the supply to Kreuzmayr.

Where the second supply in a chain of two successive supplies involving a single intra-community transport is an intra-community supply, the principle of legitimate expectation must be interpreted as meaning that the person ultimately acquiring the goods (in this case Kreuzmayr) who wrongly claimed a right to deduct input VAT, may not deduct, as input VAT, the VAT paid to the supplier solely on the basis of the invoices provided by the intermediary operator which incorrectly classified its supply.

The CJEU considered that the fact BP had characterized the supply chain incorrectly (and therefore faced having to account for VAT in Germany without being able to recover it from BIDI) was not relevant to the Austrian VAT treatment.

Comment

The judgment demonstrates the practical difficulties surrounding the application of the 0% VAT rate in chain transactions.

The judgment also highlights the importance of correctly establishing which chain in a chain transaction is VAT exempt and the importance of parties involved in supply chains meeting the relevant requirements that may "protect" them against the effects of possible non-compliance of other businesses in the chain.

A copy of the judgment is available to view here.

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Taylor Wimpey – Upper Tribunal clarifies the application of the "builder's block" scheme

In *Taylor Wimpey Plc v HMRC* [2018] UKUT 55, the UT has allowed, in part, the taxpayer's appeal in relation to its claim to recover input VAT incurred on the provision of certain white goods, kitchen appliances and carpets installed in newly built houses.

Background

Taylor Wimpey Plc was the representative member of a large construction group. It submitted claims to HMRC for recovery of historic input tax amounting to over £51m incurred between April 1973 and April 1997, in relation to the installation of various items in newly built houses, including ovens, surface hobs, extractor hoods, washing machines, microwaves, dishwashers, refrigerators, freezers and carpets. The claims were Fleming claims, made within the extended transitional limitation period for historic claims provided for by section 121, Finance Act 2008, following the decision of the House of Lords in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners*; *Condé Nast Publications Ltd v Revenue and Customs Commissioners* [2008] STC 324.

HMRC denied the taxpayer's claims on the basis the items fell within the scope of the builder's block, which was introduced by Input Tax (Exceptions) No 1 Order (SI 1972/1165, article 3), so that any input incurred on these items was not recoverable. The builder's block excludes the recovery of input tax on appliances installed by property developers.

The taxpayer contended that the builder's block was unlawful under EU law and that as the relevant items were not "incorporated" into the building, the builder's block did not apply. Alternatively, it argued that the goods were "ordinarily installed as fixtures".

The taxpayer's appeal to the FTT was unsuccessful and it appealed to the UT.

The UT held that the builder's block was not unlawful under EU law and adjourned the hearing to allow the parties to agree the extent of the claim that related to goods that were not fixtures in light of the guidance it had provided. As the parties could not agree, the case was referred back to the UT to determine the outstanding issues.

UT decision

The taxpayer's appeal was allowed in part.

The parties had adopted different views of the UT's formulation of the test and the UT had to apply its test to various kitchen appliances. In particular, it had to decide whether certain items, which were not fixtures, were nonetheless fittings and incorporated.

The UT found that all items under consideration were either fixtures or installed fittings, and were therefore incorporated into the buildings for the purpose of the builder's block. Only extractor hoods installed between 1 January 1982 and 1 June 1984, were "ordinarily installed" as fixtures and, therefore, fell within an exclusion from the application of the builder's block.

The UT clarified guidance provided in its earlier decision and confirmed that incorporation does not require an item to be integrated. Items may be free standing but nonetheless be installed fittings because they can reasonably be expected not to be moved on a regular basis.

The UT also considered the issue of offset, which was of academic interest only given its decision on the incorporation issue. The UT concluded that if the items were not incorporated into the buildings and were the subject of a separate standard-rated supply, sections 81(3) and (3A), VATA, would apply to set the amount of output tax on the standard-rated supply, for which the taxpayer was liable, against the amount of input tax due from HRMC, notwithstanding that HMRC was time-barred from pursuing the amount due.

Comment

Although this case was decided on its facts, the UT has provided some helpful guidance on the test to be applied when deciding whether goods have been incorporated into a building and are therefore within the scope of the builder's block. Although this decision does appear to have widened the scope of the builder's block, given the sum in dispute, it would not be surprising if the taxpayer sought to appeal the decision to the Court of Appeal.

A copy of the decision is available to view here.

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