VAT update

November 2018

In this month's update we report on (1) new regulations adopted by ECOFIN which are intended to combat VAT fraud; (2) infringement proceedings brought against Italy and the UK following publication of the so-called "Paradise Papers"; and (3) publication of the response to HMRC's consultation on the "split payment" method of VAT collection. We also comment on three recent decisions relating to (1) the scope of the FTT's jurisdiction in relation to public law issues; (2) input tax recovery by a student union shop; and, (3) application of the reverse charge rules to investment management services received from outside the EU.

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New regulations to help combat VAT fraud

The EU Commission has issued a press release announcing the adoption by the Economic and Financial Affairs Council of the European Union (ECOFIN) of regulations intended to increase administrative cooperation between member states in order to combat VAT fraud. more›

Commission follows up on "illegal" tax breaks for yachts and aircraft

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Response to consultation on the "split payment" method of VAT collection

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Hofmanns Henley Limited – no jurisdiction for FTT to consider legitimate expectation

In *Hofmanns Henley Limited v HMRC*, the First-tier Tribunal (FTT) has held that it does not have jurisdiction to consider public law arguments in the context of a VAT appeal. more›

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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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Loughborough Students' Union – HMRC's decision to deny claim for repayment of output tax on sales of stationery and other items sold on university campus upheld

In *Loughborough Students' Union v HMRC*, the Upper Tribunal (UT) has upheld the FTT's decision to dismiss Loughborough Students' Union's (LSU) appeal against HMRC's decision to deny its claim for repayment of output tax in respect of sales of stationery, art materials and other items from the shops which LSU operates on campus. more›

The Wellcome Trust Limited – supplies received from overseas for non-economic purposes not within the UK VAT reverse charge rules

In *The Wellcome Trust Limited v HMRC*, the FTT has held that the UK VAT reverse charge rules are not applicable to supplies received from overseas for non-economic purposes. more›

News items

New regulations to help combat VAT fraud

The EU Commission has issued a press release announcing the adoption by the Economic and Financial Affairs Council of the European Union (ECOFIN) of regulations intended to increase administrative cooperation between member states in order to combat VAT fraud.

The press release notes that an estimated €150 billion in VAT is lost each year across the EU due to fraud and collection problems. The new measures include: rules to improve the functioning of the VAT system; the alignment of VAT rates for e-publications and the systematic sharing of information with EU enforcement bodies.

A copy of the press release can be viewed here.

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Commission follows up on "illegal" tax breaks for yachts and aircraft

The EU Commission has issued infringement proceedings against the UK (specifically in relation to the Isle of Man) and Italy in relation to the granting of what it terms illegal VAT relief on the purchase of private jets and yachts.

VAT rules permit member states to exempt services when the effective use and enjoyment of a product is outside the EU. In Italy, however, VAT guidelines relating to the leasing of yachts indicate that the larger a boat is the less the lease is deemed to take place in EU waters. Accordingly, the larger the boat the less VAT is payable.

Following publication of the so-called "Paradise Papers", it would appear that the Isle of Man is permitting the deduction of VAT on supplies of aircraft (including leasing services) where the intended use is private, whereas VAT is only deductible where the intended use is business use.

The European Parliament has recently indicated that its TAX3 committee will visit the Isle of Man in order to discuss this and other issues arising from publication of the Paradise Papers.

Italy and the UK have two months in which to respond to the Commission.

A copy of the Commission's press release can be viewed here.

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Response to consultation on the "split payment" method of VAT collection

HMRC has proposed the introduction of a split payment method for collecting VAT. Instead of a supplier accounting for VAT in the normal way, another party in the transaction chain would account for VAT directly to HMRC and accordingly it would pay only the net sum to the supplier.

The purpose of the proposed system is to improve receipts of VAT relating to cross-border sales. The responses were broadly supportive of the government's objective, however, concerns were raised as to the complexity of the system that would be required; the possible effects on cash-flow for small and medium sized businesses; and whether changes would be required at all as it is expected that the EU's 2021 e-commerce package will resolve many of the issues with cross-border sales.

A copy of the consultation outcome paper can be viewed here.

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Cases

Hofmanns Henley Limited – no jurisdiction for FTT to consider legitimate expectation

In *Hofmanns Henley Limited v HMRC*[1], the First-tier Tribunal (FTT) has held that it does not have jurisdiction to consider public law arguments in the context of a VAT appeal.

Background

Hofmanns Henley Limited (the taxpayer) is a car dealership which agreed a sale with a customer resident in Jersey (the customer). The taxpayer intended to use the Personal Export Scheme (PES) to enable the supply of the car to be zero-rated for VAT purposes.

Pursuant to section 30, Value Added Tax Act 1994 (VATA) and Regulations 132 and 133, VAT Regulations 1995, the supply of goods to certain customers may be zero-rated where HMRC is satisfied that the goods have been, or are to be, exported to a place outside the EU. HMRC's Public Notice 707 (PN 707) operates to explain the position and sets out the additional conditions which must be met for a vehicle to be supplied at zero-rate VAT.

The taxpayer considered that PN 707 contained inconsistencies and that it was unclear whether pre-approval was necessary. As such, the taxpayer contacted HMRC's VAT advice helpline on three separate occasions to establish the procedures required to ensure the car could be supplied at zero-rate VAT under PES. HMRC informed the taxpayer that: (i) there was no need to request a code from HMRC; (ii) form VAT 410 was to be filled out at the time of purchase; and, (iii) the only thing the taxpayer needed to do was send form VAT 410 to HMRC.

Following advice from numerous VAT advice helpline call handlers, the taxpayer received form VAT 410 on 27 October 2016, which was signed on 10 November 2016. At some point between 31 October 2016 and 10 November 2016, the car was supplied to the customer. However, the signed form VAT 410 was not received by HMRC until 28 November 2016. On 30 November 2016, HMRC refused the PES application because the use of PES required prior-approval from HMRC which the taxpayer had not obtained before supplying the car. The decision was upheld on review and the taxpayer appealed to the FTT.

FTT decision

The appeal was dismissed.

Although it admitted that errors had been made, the taxpayer contended that it did all it reasonably could to comply with PES. It had sought clarification on procedure from HMRC's VAT advice helpline and the "supplier's checklist", in paragraph 13 of PN 707, contains no reference to the need for the supplier to await approval from HMRC before making the supply.

HMRC accepted that incorrect advice had been provided by the VAT helpline call handlers, but argued that the taxpayer was referred to PN 707 and it was not unreasonable to expect the taxpayer to read PN 707, which was not confusing, and form VAT 410 was not received until two weeks after the supply had been made.

The FTT considered (i) the conditions of PES and whether those conditions had been satisfied; and (ii) whether the FTT had any power to review HMRC's mistakes.

1. [2018] UKFTT 537 (TC).

PES requirements

The FTT considered that the relevant requirements of PES were (i) the taxpayer must ensure the customer is entitled to use the scheme and give the customer copies of PN 707; (ii) upon completion of form VAT 410, the taxpayer must send a copy of the form to HMRC at least two weeks before the vehicle is to be delivered; and (iii) the supplier must not zero-rate the sale until form VAT 412 has been received from HMRC. If the supply is urgent, the supplier can obtain an approval number from HMRC following submission of form VAT 410 and a certificate for urgent delivery at least three working days before delivery of the vehicle.

In the view of the FTT, PN 707 was not particularly clear and it was unhelpful that pre-approval was absent from the checklist. Nevertheless, the FTT determined that the export to the customer did not satisfy PN 707 requirements for PES because form VAT 410 was not sent to HMRC until after the car had been delivered, HMRC did not approve the use of PES, and no certificate for urgent delivery was received from the taxpayer. Therefore, zero-rate VAT should not have been applied to the supply.

Consideration of HMRC's mistakes

The taxpayer argued that the mistaken advice it had received from the VAT helpline call handlers had created a legitimate expectation that there were no pre-conditions to be satisfied before the delivery of the car and that the completion of the necessary forms could take place at the point of sale.

Section 81(1)(b), VATA, enables an appeal to the FTT with respect to "the VAT chargeable on the supply of any goods or services". As such, the right of appeal has no discretion and the FTT has no supervisory jurisdiction. The case of *BT Pension Scheme Trustees*[2] confirmed that the FTT's jurisdiction is entirely statutory with no judicial review jurisdiction. As such, the only relevant question for a VAT appeal before the FTT is whether VAT was chargeable on a supply.

The FTT held, that it had no jurisdiction to consider matters of fairness or legitimate expectation in the application of whether VAT was chargeable on a supply. The only avenue for pursuing such a claim would be for the taxpayer to make an application for judicial review. As such, the FTT did not consider whether the comments of the call handlers on the VAT helpline amounted to a legitimate expectation.

Comment

This decision is an important reminder that the FTT does not have jurisdiction to consider public law arguments such as legitimate expectation in relation to VAT decisions. The FTT's jurisdiction in relation to VAT is confined, by statute, to determining whether VAT is chargeable on a supply. The decision highlights the necessity for taxpayers to consider whether they should also commence judicial review proceedings in the High Court when appealing a VAT decision.

A copy of the decision can be viewed here.

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2. [2015] EWCA 713.

Loughborough Students' Union – HMRC's decision to deny claim for repayment of output tax on sales of stationery and other items sold on university campus upheld

In *Loughborough Students' Union v HMRC*[3], the Upper Tribunal (UT) has upheld the FTT's decision to dismiss Loughborough Students' Union's (LSU) appeal against HMRC's decision to deny its claim for repayment of output tax in respect of sales of stationery, art materials and other items from the shops which LSU operates on campus. Even if it qualified as an eligible body within the meaning of Note (1)(e), Group 6, Schedule 9, VATA, the LSU was not an eligible body making a, or the, principal supply, as required by Item 4, and the supplies for which exemption was sought were not "closely related" to any principal supply.

Background

LSU appealed to the UT against a decision of the FTT dismissing its appeal against HMRC's decision to deny its claim for repayment of output tax in respect of sales of stationery, art materials and other items from the shops which LSU operates on campus.

The LSU maintained that the sales of stationery, art materials and other items from the university's shops were exempt supplies for VAT purposes and that those supplies had incorrectly been treated as standard rated for tax purposes. It argued that it was entitled to exemption on the basis of the domestic VAT legislation and did not rely on the direct effect of the underlying articles in the Principal VAT Directive (PVD).

HMRC sought to uphold the dismissal of the appeal by the FTT although they disagreed with some of the reasons given by the FTT, for example, the criticisms of the drafting of the domestic provisions and the FTT's conclusion that VATA failed properly to implement the PVD.

UT decision

The appeal was dismissed.

In dismissing the appeal, the UT considered the following two questions:

1. did the LSU's supplies of goods and services fall within any of the exempted items listed at Item 4, Group 6, Schedule 9 VATA?, and
2. if so, was the LSU an "eligible body" within the meaning of Note (1)(e), Group 6, Schedule 9, VATA?

In relation to question (1), the UT concluded that the supplies of goods and services made by the LSU did not fit within Item 4, Group 6, Schedule 9, VATA. This was for two reasons.

First, the UT agreed with the FTT's assessment that the supplies were not "closely related" to the provision by an eligible body of education or vocational training. For example, the UT commented that the food, newspapers, household goods were "ends in themselves" and not ancillary to education. The education provided by the university would be just as effective if the students did not buy these items. The UT therefore concluded that the FTT was right to find that the LSU had not demonstrated that any of the goods sold in the shops fell within the narrow definition of "closely related" supplies.

Secondly, the UT concluded that Item 4 was not satisfied because the goods and services supplied by the LSU were not supplied "by or to the eligible body making the principal supply". The UT therefore concluded that even if the LSU could bring itself within Note (1)(e), Group 6, Schedule 9,

3. [2018] UKUT343.

VATA, and establish that it was an "eligible body", it was not "the eligible body making the principal supply" to which the goods and services were said to be closely related.

As the UT concluded that the supplies of goods and services made by the LSU did not fit within Item 4, Group 6, Schedule 9, VATA, it did not need to consider question (2).

Comment

In dismissing the appeal, the UT applied the principles discussed in *Stichting Regional Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financien*[4] and *Revenue and Customs Commissioners v Brockenhurst College*[5]. This decision will be useful to other universities and education providers who sell stationery, art materials and other items to their students on campus.

A copy of the decision can be viewed here.

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The Wellcome Trust Limited – supplies received from overseas for non-economic purposes not within the UK VAT reverse charge rules

In *The Wellcome Trust Limited v HMRC*[6], the FTT has held that the UK VAT reverse charge rules are not applicable to supplies received from overseas for non-economic purposes.

Background

The Wellcome Trust Limited (TWTL) is the sole trustee of the Wellcome Trust (the Trust), which is a charitable trust. The Trust receives income from investments and also carries out comparatively minor activities such as sales, catering and rental of properties for which it is registered for VAT.

The investment income received by the Trust is principally from overseas investments which are managed by investment managers both within and outside the EU.

TWTL claimed repayment of £13,113,882 VAT, which it believed it had over declared in relation to its non-EU investment portfolio, pursuant to section 80, VATA. HMRC rejected the claim and TWTL appealed.

FTT decision

The appeal was allowed.

The issue for the FTT to determine was the correct tax treatment of the management fees paid by TWTL to investment managers outside the EU for the supply of investment management services.

In reaching its decision, the FTT noted the CJEU's judgment in *The Wellcome Trust Limited v Commissioners of Customs and Excise*[7] where the CJEU confirmed that economic activities for the purpose of VAT do not include the sale and purchase of shares and other securities by a trustee in the course of the management of the assets of a charitable trust. The investment management supplies received from non-EU investment managers were non-economic activities and therefore not subject to the reverse charge rules.

4. (C-434/05) EU:C:2007:343.
5. [2014] UKUT 46 (TCC).
6. [2018] UKFTT 0599 (TC).
7. (C155/94) [1996].

The FTT considered the EU and UK place of supply of services rules and noted that the EU Directive 2006/112 (the Directive) prevails over section 7A, VATA. Article 44 of the Directive states that 'the place of supply of services to a taxable person acting as such shall be the place where that person has established his business' and the key point for it to consider was the meaning of "acting as such".

The FTT concluded that the words "acting as such" excluded the supply of services to TWTL, for non-economic business activities, from falling under Article 44 of the Directive. TWTL was therefore not required to account for VAT on the investment management services received from outside the EU under the reverse charge rules.

Comment
This decision provides helpful guidance on the scope and application of the reverse charge rules. Given that more than £13m of VAT is in dispute in this case, TWTL may seek to appeal the decision.

A copy of the decision can be viewed here.

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