VAT focus

The VAT review for February

Speed read

This month's review looks at three recent tribunal decisions. In *News Corp UK & Ireland*, the Upper Tribunal has determined that the definition of newspaper in the domestic UK zero-rating rules can encompass a digital version of a newspaper. Meanwhile, in *Westow Cricket Club*, the FTT has considered the impact of an incorrect, non-definitive view provided by HMRC to a taxpayer and, in *Romima Ltd*, the FTT provided a robust approach to the recognition of single purpose vouchers, where in practice those vouchers might be used for certain purposes other than the main intended purpose. Finally, HMRC has released legislation and guidance on a number of changes affecting cross-border supplies of goods pursuant to certain EU level 'quick fixes' that came into effect on 1 January 2020.

Gary Barnett
Simmons & Simmons
Gary Barnett is a senior professional support lawyer in the corporate tax group at Simmons & Simmons LLP. Before becoming a professional support lawyer, he qualified at another major international law firm as a transactional lawyer, advising on a wide range of corporate tax and VAT matters, with a particular emphasis on M&A transactions. Email: gary.barnett@simmons-simmons.com; tel: 020 7825 3313.

Bryn Reynolds
Simmons & Simmons
Bryn Reynolds is a tax principal at Simmons & Simmons LLP specialising in indirect taxes (principally VAT). Bryn primarily works with telecommunications, media and technology companies. More recently he has focused on financial services. His practice covers both contentious and advisory issues. Email: bryn.reynolds@simmons-simmons.com; tel: 020 7825 3142.

Zero-rating digital newspapers

In *News Corp UK & Ireland v HMRC* [2019] UKUT 404, the Upper Tribunal (UT) held that digital newspapers are entitled to benefit from the same zero-rating provisions as physical newspapers. In overturning the earlier decision of the First-tier Tribunal (FTT), the UT found that the UK zero-rating provisions, correctly interpreted, covered the delivery of a newspaper in digital form.

The FTT had considered that the description of the items zero-rated by VATA 1994 Sch 8 Group 3, including 'newspapers', taken as a whole, was clearly aimed at only supplies of goods. The UT concluded that the FTT had been wrong on this point. Although some provisions of Group 3 specifically mentioned physical items, that did not carry the import that all the items covered by the Group were to be supplies of goods.

The UT also held that the FTT had been wrong to hold that the need to apply a strict construction to the zero-rated items and the operation of the 'standstill rule' in relation to pre-existing zero-rating provisions precluded the application of the principle of statutory construction referred to as the 'always speaking' doctrine.

In fact, the UT considered that the digital newspapers under consideration (*The Times* and *Sunday Times*) were essentially the same periodic publications as the physical versions with any variations in content a relatively minor aspect. Applying the 'always speaking' doctrine, the essential question was whether the digital versions fulfilled the legislative purpose of the statutory provision (despite the fact that a digital edition could not have existed in 1973) to promote literacy, the dissemination of knowledge etc. The UT concluded that the digital editions not only served the same purpose but also shared the same essential characteristics. As such, the digital versions of the newspaper fell within the zero-rating provisions. Whilst it was true that this would result in a digital edition of the newspaper (which did not exist in 1990 at the time the standstill provisions were enacted) being zero-rated, this was not an extension of Group 3, but merely recognition that Group 3 (through permitted tools of construction) includes within its scope digital versions of newspapers.

The UT also concluded that any EU provisions and decisions relating to the scope of the reduced rate of VAT to books and publications were not relevant to the construction of the UK's domestic zero-rating provisions as the zero-rate constitutes an exemption with credit rather than a reduced or super-reduced rate.

Why it matters

Council Directive (EU) 2018/1713 of 6 November 2018 amended the Principal VAT Directive to give member states a discretion to apply reduced VAT rates to e-publications. The government has not indicated whether it will apply this to electronically supplied publications.

Nevertheless, this decision shows that zero-rating should be applied to digital newspapers at least under the original UK legislation. The mere fact that digital newspapers did not exist in 1973 was no barrier to their inclusion in the zero-rated items, when properly construed. There may also be opportunities to apply the UT's approach to construction to other zero-rated supplies.

Non-definitive HMRC guidance

In *Westow Cricket Club v HMRC* [2019] UKFTT 7484, the FTT held that a letter from HMRC giving an incorrect (but non-definitive) view on the VAT treatment undertaken by the taxpayer did not provide a reasonable excuse for incorrectly issuing a certificate of zero-rating. However, the FTT also expressed concern at HMRC's practice of providing an opinion on the correct tax treatment of a transaction in a form that was expressed as non-definitive.

The case concerned a local community sports club run by volunteers which raised funds to build a sports pavilion. It sought guidance from HMRC on whether the supplies of building work to it could be zero-rated. HMRC replied saying that its policy prevented the issue of a 'definitive response' where the point is covered by a public notice as here.

However, the officer went on to refer to para 14.7.4 of *Notice 708* and say that provided the 'pavilion meets the conditions set out, *and it appears to do so*, the construction work will be zero-rated'. That was incorrect as the club was not a charity and, as such, the pavilion was not to be used for a 'relevant charitable purpose' as required by the zero-rating provisions.

The cricket club relied on the response from HMRC to provide a certificate of zero-rating for the building works it received. Following a check, HMRC concluded that the certificate had been issued incorrectly and imposed a penalty on the club. In turn, the club relied on the letter from HMRC to argue that it had a reasonable excuse for the mistake.

The FTT first noted that it was clear that the letter from HMRC would not have been sufficient to create a legitimate expectation. Could it nevertheless provide a reasonable excuse? The FTT considered this argument a 'conceptually difficult one to maintain', but nevertheless accepted that there could be a situation where the excuse relied upon consists of advice from HMRC upon which legitimate expectation could not be founded.

However, the FTT nevertheless held that, in this case, there was no reasonable excuse. It was clear the letter was not intended to provide a definitive answer, but merely refer to the guidance. Although the inspector had gone on to say that 'it appears to [meet the conditions]', that equally was not definitive. Clearly, however, the tribunal considered that this approach was misguided. It suggested that if HMRC is going to rely on its policy of not providing a definitive response, it should simply point to the relevant notice.

In any event, even if the FTT was wrong on the first point, it considered that once the completion of the certificate itself was taken into account – which specifically required the club to state that the building was to be used 'solely for a relevant charitable purpose, namely by a charity' – this removed any objectively reasonable excuse that might otherwise have existed.

Why it matters

The somewhat confusing nature of a non-definitive response from HMRC which nevertheless offered an (incorrect) opinion on the individual taxpayer's situation was rightly criticised in this case. In the context of a non-definitive response, it would certainly have been less misleading had HMRC simply referred to the relevant notice and left matters at that, even though it may seem counter-intuitive to suggest that HMRC should provide less guidance rather than more.

Face value vouchers

In *Romima Ltd v HMRC* [2019] UKFTT 736, the FTT held that the supply of 'chips' issued by a club to customers and used by those customers to pay for private dances or to tip club employees was not an exempt supply of a security for money.

When the clubs concerned issued face value chips to customers, they charged a 20% handling fee. The chips could be used to pay for private dances with self-employed dancers at the clubs. They were also often given to both dancers and staff working at the clubs as tips. When redeemed by dancers, the clubs charged a 20% fee. When redeemed by staff, the club charged a 40% fee.

The FTT stressed that a security for money must secure the payment of money. It will not be a security for money if it secures the performance of some other obligation such as the provision of services. In the hands of the customer, a chip evidenced a right to be supplied with services during a visit to a club, whereas in the hands of the dancers a chip evidenced a right to be paid cash. Moreover, there was no reason an instrument could not objectively satisfy the definition of the term 'security for money' in the hands of one person but not in the hands of another.

It was agreed that if chips were not security for money, they were face value credit vouchers. The issue was whether they were correctly viewed as 'single purpose vouchers' such that all of the consideration for the voucher was subject to VAT when paid. The appellants argued that chips were not single purpose vouchers because, at the time of issue, it could not be known what goods and services would be supplied, by whom and at what rate of VAT.

On that issue, the FTT agreed, however, with HMRC that that the key question was whether what was supplied was subject to tax at a single rate and that depended on the nature of the supply, not the identity of the supplier. Accordingly, it was irrelevant that one dancer might be VAT registered and another dancer may not be VAT registered.

The relevant supplies in this case were supplies of entertainment. That was a type of supply which was charged to VAT at a single rate. In addition, it made no difference that chips might be used to tip dancers or employees; just because those transactions were outside the scope of VAT, it did not mean that the voucher represented a right to receive goods or services of more than one type.

This appears to be the first time that it has been accepted that a single purpose voucher can include a *de minimis* level of goods or services of not just a different type but also a different VAT liability

Why it matters

Whilst the chips sold by the clubs were predominantly spent with third party dancers at the clubs, they could also be officially used (and promoted as such inside certain clubs) on a magazine subscription (zero-rated), charity donations (outside the scope) as well as to tip dancers and staff (outside the scope). There was also some evidence that they could (unofficially) be spent with third party businesses (taxi cabs, takeaways etc.) who would then redeem the chips at the club at face value.

However, the FTT was content, in the absence of specific evidence as to the extent of such usage, to treat this as nothing more than *de minimis* and thus to be ignored. Whilst the case is very fact specific, this appears to be the first time that it has been accepted that a single purpose voucher can include a *de minimis* level of goods or services of not just a different type but also a different VAT liability.

2020 quick fixes on cross-border supplies of goods

On 1 January 2020, provisions in relation to four 'quick fixes' to the VAT regime relating to cross-border supplies of goods came into force. In particular, changes have been introduced with regard to the identification of the intra-community supply in a chain transaction, the requirements to use VAT identification numbers, the documentary requirements for claiming zero-rating and the treatment of 'call-off stock arrangements'.

Changes have been introduced in the UK through the laying of the Value Added Tax (Place of Supply of Goods) (Amendment) Order, SI 2019/1507, and the Value Added Tax (Amendment) (No. 2) Regulations, SI 2019/1509. The changes to the call-off stock arrangements will be included in Finance Bill 2020 and apply retrospectively to removals of goods taking place on or after 1 January 2020. HMRC has also released guidance on the new rules (see bit.ly/37OhK9a).

In relation to cross-border chain transactions, where goods are sold via multiple sellers and buyers but then delivered directly from the original seller to the final buyer, the new rules provide a simplified and standardised approach to determining which is the intra-Community supply (and hence zero-rated in the state of dispatch and taxed as an acquisition in the destination state). The default position will be that the intra-Community supply is the supply to the person in the chain who arranges for the goods to be moved to the destination state.

However, the rules also introduce new formal requirements, including the need for the customer to be VAT registered in a state other than the member state of origin and supply the supplier with that number and that the supply is reported on an EC sales list. In addition, article 45a of Council Implementing Regulation 282/2011 sets out a list of documentary evidence and conditions whereby it can be presumed that the goods have been transported across an EU border.

Call-off stock arrangements relate to goods that are transported by a supplier from one member state to a customer in another where the supplier knows the identity of the person to whom the goods will be supplied. The change here is designed to ensure that the supplier is not required to register in the destination member state.

HMRC guidance sets out how the new rules will be applied in the UK. The European Commission has also released extensive guidance on the quick fixes (see the explanatory notes at bit.ly/3aRMCHW).

Why it matters

The new conditions around identification of the intra-Community supply and zero-rating are now in force. Affected businesses should ensure that their processes and systems are set up to obtain the necessary information.

What to look out for

- On 30 January 2020, the CJEU is due to hear *Vodafone Portugal* (Case C-43/19) concerning charges made by a telecoms provider to a customer who fails to comply with the terms of a minimum tie-in period. On its face, the case appears to raise very similar questions to those answered in the earlier decision in *MEO* (Case C-295/17).
- The Upper Tribunal is scheduled to hear the appeal in *Virgin Media Ltd v HMRC* on 11 February 2020 concerning the correct application of the prompt payment discount rules pre-May 2014. ■

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- ▶ *News Corp*: VAT treatment of digital newspapers (Karen Killington, 22.1.20)
- ▶ Cases: *News Corp UK & Ireland v HMRC* (8.1.20)
- ▶ Cases: *Romima Ltd and others v HMRC* (15.1.20)
- ▶ The 2020 EU VAT 'quick fixes' (John Stewart, 30.1.20)

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