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Welcome to the September 2021 edition of RPC's V@, an update which provides analysis and news from the VAT world relevant to your business.

News

- HMRC has published the **outcome** of its consultation on the draft Value Added Tax (Treatment of Transactions) (Revocation) Order 2021. Following the conclusion of the consultation, the proposed legislation will be taken forward with no changes. The measure will repeal the VAT (Treatment of Transactions) Order 1992 (SI 1992/630), ensuring government departments and NHS bodies cannot exploit the legislation to give themselves a VAT recovery advantage over other taxpayers in relation to cars supplied to employees under salary sacrifice arrangements, following the decision of the Court of Appeal in *HMRC v Northumbria Healthcare NHS Foundation Trust* [2020] EWCA Civ 874. The measure will have effect from 21 October 2021.

- HMRC has published **Revenue and Customs Brief 11 (2021): VAT liability of coronavirus (COVID-19) testing services**, which explains the rules for the VAT treatment of coronavirus (COVID-19) testing services. The brief is relevant to organisations that make supplies of COVID-19 testing services, their advisers and recipients of these services.

- HMRC has published **Revenue and Customs Brief 12 (2021): VAT treatment of gaming machines from 6 December 2005 to 31 January 2013,** which explains what taxpayers with appeals relating to the VAT treatment of gaming machines from 6 December 2005 to 31 January 2013, must do in order to claim VAT refunds. The brief explains HMRC's position following the decision of the First-tier Tribunal (FTT) in *The Rank Group Plc* (TC/2013/04417) and *2016 G1 Ltd* (TC/2010/08268), which were heard together and relate to the third strand of the gaming machine fiscal neutrality litigation.

- HMRC has published two policy papers entitled **Penalties for late payment and interest harmonisation** and **Interest harmonisation and penalties for late payment and late submission**. The papers explain the new points-based penalty regime for regular tax return submission obligations, which replaces existing penalties in relation to VAT Returns and Income Tax Self-Assessment Returns. As part of the reform, interest charges and repayment interest will be harmonised to bring VAT in line with other tax regimes.

- The **Value Added Tax (Amendment) Regulations 2021** have been made. The Regulations amend paragraph 32B of the Value Added Tax Regulations 1995 (the **VAT Regulations**) to remove an existing exemption, for taxpayers whose turnover is below the compulsory VAT registration threshold, from the obligation to keep electronic records. The amendment applies to prescribed accounting periods beginning on or after 1 April 2022.

Case reports

Scanwell Logistics – Onward supply relief not available for import agent

In *Scanwell Logistics (UK) Ltd v HMRC* [2021] UKFTT 261 (TC), the FTT decided that an "import agent" was not able to claim VAT relief under the onward supply relief (**OSR**) provisions as the goods were not supplied through an agent acting in its own name for VAT purposes.

Scanwell Logistics (UK) Ltd (**Scanwell**) was a UK-based company that imported consignments of goods from China into the UK and shipped them on to EU Member States. Between 2014 and 2017, a Czech-based

company appointed Scanwell to act as its agent, preparing import declarations for the relevant goods. As agent, Scanwell did not at any point acquire title to the goods. In the relevant import declarations, Scanwell claimed relief from import VAT under the OSR provisions in Regulation 138 of the VAT Regulations.

In November 2017, HMRC decided that OSR would not be available for the relevant imports and issued Scanwell with a VAT assessment for £5.7m. Scanwell appealed this assessment to the FTT.

Scanwell argued that, while it did not at any point acquire title to the goods, it would be brought into the supply chain for the purposes of OSR because it met the conditions to qualify as an agent under section 47, Value Added Tax Act 1994 (**VATA**). In dismissing the appeal, the FTT considered that Scanwell would only be eligible for OSR if it had been supplied with the goods by the Chinese company, and then supplied the goods onwards to the Czech company.

Under section 47(2A), VATA, a person is an agent if *"he has authority to give rise to a transfer of title to goods to his principal or to cause title to his principal's goods to be transferred to another"*. The FTT was not satisfied that Scanwell met this condition, as the task that Scanwell had been contracted to do did not involve it using its authority to affect a transfer of title. Further, an agent must also be acting in its "own name" in relation to the supply. In the FTT's view, Scanwell could meet this condition if it acted in such a way as to create a legal relationship between itself and a third party, and that relationship related to the goods at issue. Scanwell's actions were limited to matters such as customs clearance and haulage, and this was insufficient to meet this condition. The FTT therefore concluded that Scanwell did not act as agent, and therefore could not claim OSR.

Why it matters: Although this decision relates to OSR, which following Brexit is limited to goods imported into Northern Ireland for onward supply to the EU, the FTT's analysis of agency is a reminder of the importance of considering, in a VAT context, commercial reality as well as contractual terminology.

The decision can be viewed **here**.

Claims Advisory Group – PPI compensation is standard-rated

In *Claims Advisory Group Ltd v HMRC* [2021] UKUT 199 (TCC), the Upper Tribunal (**UT**) decided that the service of claiming compensation for mis-sold payment protection insurance (**PPI**) was not exempt from VAT.

Claims Advisory Group Ltd (**CAG**) made claims on behalf of individual customers who had been mis-sold PPI by certain financial institutions. Compensation for successful claims (equivalent to the amount of the PPI plus interest) was paid to CAG's customers. CAG charged a percentage of the compensation as a fee.

HMRC assessed CAG for VAT on the fees, and it appealed to the FTT. The FTT held that the services provided were outside the scope of the insurance exemption from VAT (under Article 135(1)(a), Principal VAT Directive (**PVD**) and items 1 and/or 4 of Group 2, Schedule 9, VATA), because the supplies were neither insurance transactions nor services performed by an insurance broker or agent that were related to insurance transactions.

CAG appealed to the UT, arguing that the FTT had erred in law in concluding from the facts that it had found that the services were neither exempt on (1) the basis that they were insurance transactions, nor exempt on (2) the basis that they were supplied by a broker, agent or intermediary and were related to insurance transactions.

The UT noted that item 1, Group 2, Schedule 9, VATA, exempts *"[i]nsurance transactions and reinsurance transactions"*, and that Item 4 exempts *"[t]he provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction; and (b) are provided by that broker or agent in the course of his acting in an intermediary capacity"*. The parties agreed that the exemption as implemented in Group 2, Schedule 9, VATA, was no wider than that set out in Article 135(1)(a), PVD.

The UT dismissed the taxpayer's appeal on both grounds.

With regard to the first ground, the UT concluded that due to the economic

purpose and commercial reality of the transactions in question, they were not insurance transactions, but rather their purpose was to claim compensation from financial institutions. The transactions did not result in any customer obtaining the benefit of insurance cover, nor was CAG indemnifying its customers against the risk of any loss. There was no support in case law, as CAG had contended, for the contention that cancelling an insurance policy constituted an 'insurance transaction'.

As to the second ground relied upon by CAG, the UT was of the view that the essential activity of an insurance agent was to *"introduce or put in touch persons seeking insurance and insurance companies"*, which was not what CAG did. It had no relationship of any kind with a potential insured party and it did not have any relationship with an insurer. It was not involved with the *"business of the distribution of insurance products"*. Sending letters before claim was not sufficient to establish a *de facto* or indirect relationship with a financial institution, let alone with the underlying insurer. In addition, CAG's services were not related to insurance transactions within the meaning of the exemption.

Why it matters: This decision provides useful guidance on the nature of the insurance exemption and, in particular, regarding what constitutes an insurance agent and an insurance transaction, for VAT purposes.

The decision can be viewed **here**.

KSM Henryk Zeman - Tribunal can consider 'legitimate expectation' arguments in VAT appeal

In *KSM Henryk Zeman SP Z.o.o. v HMRC* [2021] UKUT 182 (TCC), the UT has confirmed that the FTT does have jurisdiction to consider the question of legitimate expectation in an appeal against an assessment to VAT.

KSM Henryk Zeman SP Zoo (**KSM**), which belonged in Poland for VAT purposes, entered into a contract with another company, Energoinstal SA (**E**), which was based in Poland (and not registered for VAT in the UK) to install a boiler in the UK. KSM sought to register for VAT in the UK, thinking that E would be registered for VAT in the UK, and that KSM would provide services to business customers belonging in the UK for VAT purposes.

HMRC refused KSM's application to register for VAT on the basis that it would be making land-related construction supplies solely to business customers who belong in the UK and who are all registered for VAT in the UK. Accordingly, it is the customer who is deemed to be making the supply in the UK and who accounts for any VAT due under the 'reverse charge' procedure. KSM applied again for registration, this time declaring that E did not belong in the UK, and HMRC assessed KSM to VAT in relation to the supplies it made to E. KSM appealed against the assessment to the FTT on the ground that it had a legitimate expectation that it was not assessable to VAT.

The FTT dismissed the appeal, holding that the questions asked by HMRC in determining whether to register KSM for VAT were insufficient to address the question of whether KSM could, or should, be registered for VAT. However, on the basis of the information provided to it, the FTT could understand why HMRC reached the conclusions it did. HMRC had explained its reasons and had invited KSM to provide further information if it did not agree with HMRC's decision, which KSM had failed to do. In its view, KSM's failure to contest HMRC's decision was not reasonable and as a result KSM could not rely on the principle of legitimate expectation.

KSM's appeal to the UT was dismissed. The UT decided that HMRC's letter refusing the first application for registration did not give rise to a legitimate expectation that KSM would not be assessable to VAT. It made supplies that were not covered in HMRC's letter refusing registration.

The UT also considered whether the FTT had jurisdiction to consider legitimate expectation arguments. HMRC argued that since the FTT was a creature of statute, whether it had jurisdiction to consider a challenge to an assessment on public law grounds was a matter of statutory construction. The UT agreed, but noted that this was the beginning, rather than the end, of the enquiry. The taxpayer was in substance defending part of an enforcement action by HMRC and the promotion of the rule of law and fairness required that it be able to defend itself by challenging the validity of HMRC's decision on public law grounds, unless that entitlement was excluded by the relevant statutory language.

The UT said that it was clear from the wording of section 83, VATA (which was in issue in this case), that the FTT did not have a general supervisory jurisdiction. But the starting point was still that the taxpayer should have the

ability to defend itself by challenging the validity of a decision by relying on public law grounds, unless the statutory scheme excluded this ability. In the view of the UT, such a defence would fall squarely within the scope of the subject matter that was within the FTT's jurisdiction. In addition, there were good policy reasons not to limit the FTT's jurisdiction in the manner sought by HMRC. Accordingly, the UT concluded that, even though KSM had not made out a legitimate expectation on the facts, it was within the FTT's jurisdiction to determine the point.

Why it matters: Although KSM was unsuccessful in establishing a legitimate expectation on the facts of its case, this is an important decision from the UT and one that will be welcomed by many taxpayers. The requirement to consider whether to commence (and then stay) protective judicial review proceedings (within tight time limits) in order to preserve public law arguments increases professional fees and can be a procedural trap for the unwary. This decision goes some way to alleviating that need. However, even though an UT decision is binding on the FTT and must be followed by the FTT, this decision does not put the FTT's jurisdiction to consider public law points beyond doubt. Taxpayers and their advisers wishing to raise legitimate expectation arguments will still have to consider carefully whether they should bring protective judicial review proceedings, not least in circumstances where the legislation granting the FTT jurisdiction is less expansive than in the present case.

The decision can be viewed **here**.

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