



Edition 7
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V@

Welcome to the November 2020 edition of RPC's V@, an update on developments in the VAT world that may impact your business.

News

- The Cabinet Office has updated its policy paper **The Border Operating Model**, which explains how the border with the EU will work after the Brexit transition period. The policy paper contains guidance on VAT on imported goods and import VAT.
- HMRC has published policy paper **Revenue and Customs Brief 16 (2020): VAT liability of payroll services**, which explains HMRC's position following the decision by the Cheshire Centre for Independent Living to concede its appeal in the Upper Tribunal (UT). We report on this case below.
- HMRC has published policy paper **Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021**, which provides information concerning when UK VAT-registered businesses can, or need to, account for VAT on their tax return.
- HMRC has published policy paper **Revenue and Customs Brief 17 (2020): VAT liability of private sonography services - First-tier Tribunal Decision**, which clarifies HMRC's policy concerning the VAT treatment of ultrasound scanning services following the decision of the First-tier Tribunal (FTT) in *Window to the Womb (Franchise Ltd) and others v HMRC*.
- HMRC has updated its guidance **Changes to notifying an option to tax land and buildings during coronavirus (COVID-19)**. The guidance extends the time limit to notify HMRC of a decision to opt to tax land and buildings, from 30 days to 90 days, from the date the decision to opt was made. The updated guidance extends the application of the extension, so that it now applies to decisions made until 31 March 2021.
- HMRC has written a **letter to VAT-registered businesses about new trade arrangements with the EU from 1 January 2021**. The letter explains the steps such businesses need to take to continue trading with Europe from 1 January 2021.

Case reports



SK Telecom - Advocate General opines that roaming services provided to customers staying temporarily in a member state are the subject of 'effective use' in that member state

In *SK Telecom Co Ltd v Finanzamt Graz-Stadt* (Case C-593/19), the Court of Justice of the European Union (CJEU) was asked to provide a preliminary ruling on the interpretation of point (b) of the first paragraph of Article 59a of Council Directive 2006/112/EC (the **Directive**).

The request was made in proceedings between SK Telecom Co Ltd (**SK Telecom**), a company established in South Korea, and the Austrian tax authority, regarding the tax treatment of roaming services provided by SK Telecom to users residing in South Korea but staying temporarily in Austria, consisting of providing them with access to a mobile telephone network in Austria. The questions referred sought, in essence, to determine whether the relevant provision enabled Austria to transfer the place of such supply of roaming services to its territory, with the result that the services would be subject to Austrian VAT.

The Advocate General opined that point (b) of the first paragraph of Article 59a of the Directive must be interpreted as meaning that:

1. roaming services allowing the use of a mobile telephone network

located in a Member State, which are provided by a mobile telephone operator established in a third country to users having their permanent address, or usually residing in that third country but temporarily staying in the territory of that Member State, must be considered as being the subject of 'effective use' in the territory of that Member State; and

2. the requirement of avoiding 'double taxation, non-taxation or distortion of competition' is satisfied where relevant roaming services are not subject to VAT within the EU, which constitutes a case of 'non-taxation' within the meaning of that provision. The tax treatment in a third country is irrelevant for the purposes of the application of that provision.

Why it matters: If the CJEU follows the Advocate General's opinion, the judgment will have a significant impact on non-EU providers of cross-border roaming services to customers temporarily in EU member states which have chosen to implement the provision in point (b) of Article 59a of the Directive. This may be of relevance to such providers in the UK after the end of the Brexit transition period, although the UK itself no longer applies the provision to cross-border supplies of telecommunications services to non-taxable persons.

The opinion can be viewed [here](#).



Crow Metals - HMRC fails to establish that a taxpayer should have known that its transactions were connected with the fraudulent evasion of VAT

In *Crow Metals Ltd v HMRC* [2020] UKFTT 423 (TC), the FTT allowed an appeal by Crow Metals Ltd (**Crow**), a scrap metal trader in Essex, against HMRC's decisions to deny input tax in respect of supplies of scrap metal. HMRC failed to satisfy the burden of proof to establish that Crow should have known that its transactions were connected with the fraudulent evasion of VAT.

Crow's grounds of appeal, in essence, were that HMRC had not discharged the burden of proof in establishing the requirements for a denial of input tax upon the basis of the principles set out in *Kittel*, namely: (1) Was there a VAT loss? (2) If so, did this loss result from a fraudulent evasion? (3) If there was a fraudulent evasion, were the Crow transactions connected with that evasion? (4) If such a connection was established, should Crow have known that its purchases were connected with a fraudulent evasion of VAT?

The FTT allowed the appeals, concluding that HMRC was unable to satisfy the burden of proof in establishing that Crow should have known that its transactions in respect of each of the relevant suppliers were connected with the fraudulent evasion of VAT. The central focus of HMRC's submissions was that Crow's due diligence was poor or late. The FTT concluded that, whilst Crow could be criticised for this, in the context and circumstances of the case, this was not enough to establish that the only reasonable explanation for the transactions was that they were connected to the fraudulent evasion of VAT.

Why it matters: This case is a useful reminder of the key principles that a tribunal or court will follow when determining whether a taxpayer should have known that its transactions were connected with the fraudulent evasion of VAT.

The decision can be viewed [here](#).



Cheshire Centre - HMRC ordered to pay taxpayer's costs due to its unreasonable behaviour

In *HMRC v Cheshire Centre for Independent Living* [2020] UKUT 275 (TCC), the UT ordered HMRC to pay the taxpayer's costs even though HMRC had been successful, as it had acted unreasonably in introducing a new ground of appeal.

The Cheshire Centre for Independent Living (**CCIL**) was a charity which promoted the independent living of disabled persons. A VAT dispute arose between CCIL and HMRC, and CCIL appealed to the FTT. CCIL argued that the provision of payroll services was an exempt supply, on the basis that the payroll services assisted disabled persons in employing personal assistants using funding supplied by CCIL. The FTT allowed CCIL's appeal,

finding that the supply of payroll services was ancillary to care provided by the personal assistants, which itself was an exempt supply as it was a 'supply of services closely linked to welfare work' under Article 132(1)(g) of the Directive.

HMRC appealed to the UT, relying on a new ground of appeal. HMRC argued that the payroll services could not be ancillary to a principal supply of exempt care provided by the personal assistant because the principal supply was not itself exempt. This was because the personal assistant was an employee of the disabled person and as such, pursuant to Article 10 of the Directive, was not a taxable person capable of making a supply within the scope of VAT to their employer. The personal assistant was neither a body governed by public law nor another body recognised by the UK as being devoted to social welfare within Article 132(1)(g) of the Directive. CCIL conceded the point but applied to the UT for a costs order against HMRC on the basis that HMRC had acted unreasonably in failing to run this argument sooner, resulting in CCIL incurring avoidable costs.

The UT granted CCIL's application for a costs order against HMRC. The UT decided that HMRC could, and should, have raised Ground 2 earlier and included it in its statement of case. It had been unreasonable in not doing so, as the relevant facts and legal foundations were known about from the outset of the proceedings. However, the UT decided that, although HMRC had acted unreasonably, CCIL should have considered the position of the principal supply and the surrounding factors (such as the status of the supplier) with 'greater clarity', as this would have affected its view on the strength of its case. Accordingly, the UT awarded CCIL 70% of its costs on the standard basis.

Why it matters: This decision confirms that an unsuccessful appellant may obtain, under Rule 10 of the FTT rules, a costs order against a successful party if that party (or its representative) has '*acted unreasonably in bringing, defending or conducting the proceedings*'. The decision suggests that the tax tribunals will look closely at the conduct of both parties when determining whether the conduct of one party is sufficiently unreasonable to warrant a costs order being made against that party and, if it is appropriate to do so, will reflect the conduct of the other party by discounting the costs awarded.

The decision can be viewed [here](#).

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