



VAT update

January 2019

In this month's update we report on (1) refunds of VAT in the UK for non-EU businesses; (2) changes to the VAT treatment of retained payments; and (3) revised HMRC guidance on when and how to account for VAT when you transfer a business as a going concern. We also comment on three recent cases involving (1) irrecoverable output tax; (2) the deductibility of a repayment supplement from an interest award; and (3) whether a taxpayer had a legitimate expectation that HMRC guidance could be relied upon.

News items

Revenue and Customs Brief 12 (2018): refunds of VAT in the UK for non-EU businesses

On 12 December 2018, HMRC published Revenue and Customs Brief 12 (2018), which sets out action that non-EU businesses may need to take if HMRC has rejected their claims for refunds of UK VAT (overseas VAT refund claims) for the prescribed years 2016-2017 and 2017-2018. [more>](#)

Revenue and Customs Brief 13 (2018): change to the VAT treatment of retained payments

On 14 December 2018, HMRC published Revenue and Customs Brief 13 (2018), which sets out changes to HMRC's policy on VAT payments for unfulfilled supplies. [more>](#)

VAT Notice 700/9: revised HMRC guidance on TOGC

On 6 December 2018, HMRC published a revised version of VAT Notice 700/9, providing guidance on when and how to account for VAT when you transfer a business as a going concern (TOGC). [more>](#)

Case reports

J&B Hopkins: irrecoverable output tax

In *J&B Hopkins Ltd v HMRC*, the Upper Tribunal (UT) has upheld a VAT assessment, even though the taxpayer had not charged VAT and was unable to recover it as the recipient of the supply had gone into liquidation. [more>](#)

Any comments or queries?

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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](#).

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Emblaze Mobility Solutions: no deduction of repayment supplement from interest award

In *Emblaze Mobility Solutions Ltd v HMRC*, the UT has held that a repayment supplement in respect of an input tax repayment should not be deducted from an interest award pursuant to section 84(8), VATA. [more>](#)

Vacation Rentals: taxpayer had legitimate expectation that HMRC guidance could be relied upon

In *R (on the application of Vacation Rentals (UK) Ltd) (formerly The Hoseasons Group Ltd) v HMRC* [2018] UKUT 383 (TCC), the UT has held that HMRC was bound by its published guidance in Business Brief 18/06 (BB18/06), which concerned the treatment of payments for card handling services. [more>](#)

News items

Revenue and Customs Brief 12 (2018): refunds of VAT in the UK for non-EU businesses

On 12 December 2018, HMRC published Revenue and Customs Brief 12 (2018), which sets out action that non-EU businesses may need to take if HMRC has rejected their claims for refunds of UK VAT (overseas VAT refund claims) for the prescribed years 2016-2017 and 2017-2018.

On 23 May 2018, HMRC made certain unannounced operational changes to the checks it carries out to overseas refund claims. One of the changes concerned the certificate of status verification process. It appears that as a result of the changes, HMRC may have rejected claims because a certificate of status did not contain certain information. For example, some claims were rejected because the certificate of status contained a PO Box number rather than a full address.

Accordingly the Brief sets out the following guidance:

2016 – 2017 claims

- those processed and rejected before 23 May 2018, will remain rejected
- HMRC will review claims that were submitted by 31 December 2017 (the deadline for making such claims) and processed under the new procedure i.e. on or after 23 May 2018, if rejected as having an invalid certificate of status, and
- where claims were rejected and an internal review has already been requested or an appeal to the tribunal has been filed, HMRC will reconsider these claims and should have written to all such claimants by 31 December 2018, explaining what happens next.

2017 – 2018 claims

- the new operational procedures will be applied to all claims for 2017 to 2018 that have either already been submitted or were received by 31 December 2018 (the deadline for making such claims)
- HMRC accepts claimants may have insufficient time to obtain a valid certificate of status before claiming and have granted a 90 day extension to 31 March 2019 for claimants to submit a valid certificate of status, and
- if a claim has been rejected and an internal review or appeal to the tribunal has not been made, HMRC has confirmed that it will review such claims and where appropriate will ask claimants to submit a valid certificate of status and supporting documents.

A copy of the Brief can be viewed [here](#).

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Revenue and Customs Brief 13 (2018): change to the VAT treatment of retained payments

On 14 December 2018, HMRC published Revenue and Customs Brief 13 (2018), which sets out changes to HMRC's policy on VAT payments for unfulfilled supplies.

HMRC's current policy is that businesses may treat payments for services, and part payments for goods, as outside the scope of VAT where a customer does not use a service or collect goods they have paid for. However, following the Court of Justice of the European Union's (CJEU) judgments in *Air France-KLM C-250/14* and *FIRIN OOD C-107/13*, this treatment needs to be amended.

From 1 March 2019, HMRC's new position will be that VAT is due on all retained payments for unused services and uncollected goods. Where suppliers become aware that a customer has decided not to take up goods or services after paying, the transaction will remain subject to VAT. No adjustments or refunds of VAT will be allowed for those retained payments.

If suppliers learn that the relevant goods or services will not be used or received before 1 March 2019, they may treat the prepayments as outside the scope of VAT under the current policy.

A copy of the Brief can be viewed [here](#).

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VAT Notice 700/9: revised HMRC guidance on TOGC

On 6 December 2018, HMRC published a revised version of VAT Notice 700/9, providing guidance on when and how to account for VAT when you transfer a business as a going concern (TOGC).

The Notice contains substantive changes in relation to:

- VAT grouping, to reflect HMRC's acceptance of the decision in *Intelligent Managed Services Ltd* [2015] UKUT 0341 (TC)
- property businesses, to reflect HMRC's revised view on lease grants and surrenders
- sales to buyers not established in the UK, to confirm such a transaction can constitute a TOGC.

Many of the changes had previously been announced and reflect developments in case law.

A copy of the Notice can be viewed [here](#).

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Case reports

J&B Hopkins: irrecoverable output tax

In *J&B Hopkins Ltd v HMRC*¹, the Upper Tribunal (UT) has upheld a VAT assessment, even though the taxpayer had not charged VAT and was unable to recover it as the recipient of the supply had gone into liquidation.

Background

J&B Hopkins Ltd (the taxpayer) entered into a construction contract with Rok Building Ltd (Rok), under which it agreed to construct a new place of worship for a charity. The contract provided that the contract sum was exclusive of VAT.

The charity issued a zero-rating certificate to Rok who correctly zero-rated its onward supplies. Rok provided the certificate to the taxpayer and both proceeded in the mistaken belief that the certificate meant the taxpayer's supplies to Rok were also zero-rated. Accordingly, the taxpayer did not charge VAT on its invoices nor did it account to HMRC for VAT on the supply of construction services to Rok.

HMRC assessed the taxpayer for VAT at the standard rate on supplies made by it to Rok. HMRC took the view that, as a sub-contractor, the taxpayer was not entitled to zero-rate its supplies pursuant to Note (12), Schedule 8, Group 5, Value Added Tax Act 1994 (VATA) and assessed the taxpayer on the basis that the payments were deemed to be inclusive of VAT.

After the mistake was discovered, the taxpayer was unable to correct the error and issue a VAT only invoice to Rok to collect the unpaid VAT, to the First-Tier Tribunal (FTT) as Rok had gone into liquidation.

The taxpayer appealed HMRC's assessments to the FTT. The taxpayer accepted that its supplies to Rok were not zero-rated, but argued that the assessments were contrary to EU law as HMRC would be unjustly enriched given that Rok had not recovered the input VAT on the amounts it had paid to the taxpayer. The FTT dismissed the appeal and upheld the assessments.

The taxpayer appealed to the UT.

UT decision

The appeal was dismissed.

The UT agreed with the FTT that the correct analysis of the position is that, to the extent HMRC would be enriched, such enrichment is not at the expense of the taxpayer, but rather at the expense of Rok, which had not made a claim to recover the VAT.

The UT considered that, on a proper analysis, the taxpayer had received a partial payment of £83.33 for the services it had provided, as opposed to the £100 it had bargained for. The balance of £16.67 was VAT, which it was required to account for. The only sense in which the taxpayer was "out of pocket" was because Rok had not paid it the full contract price and that situation had occurred as a result of the taxpayer's own mistake.

In the view of the UT, the position was different from the situation in *Elida Gibbs (C-317/94)*, where it was the VAT system which had been implemented incorrectly. In the present case,

1. [2018] UKUT 0382 (TCC).

the problem had arisen because the taxpayer had failed to operate the machinery of the VAT system correctly. Similarly, the position was different from the situation in both *Reemstma* (C-35/05) and *Banca Antoniana* (C-427/10), where the person claiming the repayment was not at fault. In the current case, the taxpayer made an error in its invoicing and there had been no overpayment of VAT by anyone. Accordingly, the taxpayer must be treated as having received £16.67 VAT.

The UT also concluded that there was nothing in the principles of fiscal neutrality or effectiveness that required the tax authorities of a member state to insulate a taxpayer from the consequences of the insolvency of its counterpart where it had made a mistake in applying the relevant VAT rules.

Comment

The taxpayer's difficulty in this case was that it failed to charge VAT and then waited until it was too late to remedy its mistake. The UT commented that: "J&B was in effect trying to use the principles of fiscal neutrality (Elida Gibbs) and effectiveness (Reemstma) to fill the void that exists because it made an error which it did not discover until it was too late to pursue a contractual remedy against Rok for the balance of the price."

This decision serves as an important reminder that subcontractors must take care to determine the correct VAT liability of the works they undertake and not rely on assurances given by the main contractor.

A copy of the decision can be viewed [here](#).

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Emblaze Mobility Solutions: no deduction of repayment supplement from interest award

In *Emblaze Mobility Solutions Ltd v HMRC*², the UT has held that a repayment supplement in respect of an input tax repayment should not be deducted from an interest award made under section 84(8), VATA.

Background

In 2010, Emblaze Mobility Solutions Ltd (the taxpayer) was successful in respect of an appeal to the FTT against HMRC's denial of input tax. HMRC refused to pay interest under section 84(8), VATA, and in 2012, the taxpayer applied to the FTT for an award of interest under section 84(8). The FTT awarded the taxpayer simple interest at base rate plus 1% (being 1.75%) from the date on which the VAT would have been paid in the normal course of events. The FTT refused the taxpayer's claim for compound interest, on the basis that, following the CJEU's decision in *Littlewoods*³, an "adequate remedy" under EU law did not require the interest to be on a compound basis. In addition, the FTT deducted from the interest award a "repayment supplement" of £422,282.52 that was paid to the taxpayer under section 79, VATA, to compensate it for HMRC's delay in originally paying the repayment claim.

The taxpayer appealed to the UT.

2. [2018] UKUT 373 (TCC).

3. Case C-591/10.

UT decision

The appeal was allowed in part.

The taxpayer appealed on two grounds: (1) the FTT had erred in concluding that the rate of interest payable under section 84(8) should be base rate plus 1%, rather than base rate plus 2.55%; and (2) the FTT had erred in deducting the repayment supplement.

Ground 1: rate of interest

Following *Littlewoods*, the UT agreed with the FTT that simple interest was an adequate indemnity. Additionally, the High Court had confirmed in *RSPCA*⁴, that section 84(8) does not permit a tribunal to award compound interest. The correct construction of the legislation was that it referred to simple interest only.

In the view of the UT, the FTT's decision on the applicable interest rate was within the broad discretion conferred on the FTT by section 84(8). The FTT had properly considered the leading case of *RSPCA*. Accordingly, the appeal on ground one was dismissed.

Ground 2: deduction of the repayment supplement from the interest awarded

With regard to Ground 2, the UT held that the FTT had materially misdirected itself in relation to the deduction of the repayment supplement. There was no requirement in *RSPCA* that, in every case where the conventional rate was exceeded, the repayment supplement paid by HMRC was to be deducted. Such a deduction should only occur where there is a good, identifiable reason.

The deduction gave an effective interest rate of less than base rate plus 1%, that being lower than the conventional rate. Further, and in any event, the repayment supplement served a different function to the interest award, it was an incentive to encourage efficiency within HMRC. The repayment supplement was not a substitute for an interest award. Accordingly, the appeal on Ground 2 succeeded and HMRC was ordered to pay the repayment supplement.

Comment

This decision is of historical interest only as The Transfer of Tribunal Functions and Revenue and Customs Appellants Order 2009 (SI 2009/56) (TTFO) repealed the right to interest under section 84(8), VATA, with effect from 1 April 2009. TTFO replaced section 84(8) with section 85A, VATA. Section 85A(5)(a) provides that HMRC is not required to pay interest on any amount in respect of which a repayment supplement is payable. However, for older cases still being litigated where section 84(8) is applicable, the decision provides helpful guidance on the principles to be applied when awarding interest under section 84(8).

A copy of the decision can be viewed [here](#).

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Vacation Rentals: taxpayer had legitimate expectation that HMRC guidance could be relied upon

In *R (on the application of Vacation Rentals (UK) Ltd) (formerly The Hoseasons Group Ltd) v HMRC* [2018] UKUT 383 (TCC), the UT has held that HMRC was bound by its published guidance in Business Brief 18/06 (BB18/06), which concerned the treatment of payments for card handling services.

4. [2007] EWHC 422 (Ch).

Background

Vacation Rentals (UK) Ltd (the claimant), acted as a booking agent between holidaymakers and property owners. This role included collecting payment from holidaymakers on behalf of its property-owning clients. When collecting payments made by either credit or debit card, the claimant charged an additional fee and treated it as being exempt from VAT.

Under item 1, Group 5, Schedule 9, VATA, certain financial services are exempt from VAT. This includes the “issue, transfer or receipt of, or any dealing with money, security for money, or any note or order for the payment of money”.

In *Bookit v HMRC* [2006] STC 1367, the Court of Appeal held that a supply by the taxpayer of card handling services was exempt from VAT where it contained the following four specific components:

1. obtaining card information and security information from the customer
2. transmitting this information to the card issuer
3. receiving authorisation codes from the card issuer, and
4. transmitting all of the above information to the intermediary bank which liaises between the card issuer and the taxpayer (the fourth stage).

Following *Bookit* and the decision of the Court of Session in *Scottish Exhibition Centre v HMRC* [2008] STC 967, HMRC issued BB18/06, which confirmed that if an agent, acting for the supplier of goods or services, makes a charge to a customer over and above the price of the goods or services, for a separately identifiable service of handling payment by a credit or debit card, and that service includes the fourth stage, then the additional charge will be exempt under item 1, Group 5, Schedule 9, VATA.

In the present case, HMRC refused to apply BB18/06 to the claimant’s treatment of card handling services and issued VAT assessments to it.

HMRC’s view was that the claimant’s card handling services did not satisfy the requirements of *Bookit* and BB18/06 because it received the authorisation code from its merchant acquirer and not the card issuer, as was the case in *Bookit*.

The claimant applied to the UT for judicial review of HMRC’s decision not to apply its guidance in BB18/06, arguing that it had a legitimate expectation that HMRC would comply with its own published policy.

UT decision

The UT agreed with the claimant and quashed HMRC’s decision not to apply the terms of BB18/06 to the claimant’s card handling services.

The UT was satisfied that the claimant had a legitimate expectation that HMRC would not resile from its own published guidance. In the view of the UT, HMRC’s interpretation of BB18/06 was overly literal and technical. HMRC’s published policies should not be construed in the same way as a statute, rather, they should be construed on a “fair reading by an ordinarily sophisticated taxpayer”.

The UT noted that the guidance contained within BB18/06 was “clear, unambiguous and unqualified” and focused on the fourth stage as being the core factor of whether the exemption was applicable. It is noteworthy that the UT also commented that the change in HMRC’s view was as a result of a change in personnel rather than any change in the law.

Comment

This decision confirms that published HMRC guidance can create a legitimate expectation which the taxpayer can rely on to challenge a decision of HMRC which is inconsistent with that guidance. HMRC is of course entitled to abandon its guidance, but only where it is able to demonstrate sufficient public interest in doing so. In this case the UT was of the view that “HMRC had not even begun to discharge that heavy burden”.

A copy of the decision can be viewed [here](#).

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