



VAT update

July 2016

Summary

In this month's edition of our VAT update we will report on (1) the EU Council's variation to the Principal VAT Directive relating to vouchers, (2) HMRC's update on VAT Notice 708, and (3) a variation in the law on the applicability of VAT to offshore property held by insurers. We also comment on three recent cases concerning the supply of services by a bank, the applicability of VAT to an incomplete transfer of title, and whether VAT is payable on charitable donations.

News

Council adopts Directive on treatment of vouchers

On 27 June 2016, the Council adopted a Directive amending the Principal VAT Directive to harmonise national VAT rules in relation to transactions involving vouchers. [more>](#)

HMRC updates VAT Notice 708 on buildings and construction

HMRC has published an updated version of VAT Notice 708, which explains when building work/materials can be zero/reduced rated, when developers are blocked from deducting input tax, the issuing of certificates and time of supply rules. [more>](#)

Order changing VAT place of supply rules for repair services made

Following this year's Budget, an Order was made on 11 July 2016 changing the VAT place of supply rules for repair services of tangible moveable property, such as cars. The Order ensures that such repair services are treated as made where they are used and enjoyed. The Order applies to repair services received on or after 1 October 2016. [more>](#)

Cases

ING Intermediate Holdings Ltd – VAT on attracting and retaining deposit account customers irrecoverable

In *ING Intermediate Holdings Ltd v HMRC*, the Upper Tribunal (UT) has dismissed the taxpayer's appeal and held that VAT attributable to providing deposit accounts by a bank is irrecoverable.

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Any comments or queries?

Adam Craggs Partner

+44 20 3060 6421
adam.craggs@rpc.co.uk

Robert Waterson Senior Associate

+44 20 3060 6245
robert.waterson@rpc.co.uk

About this update

The Tax update is published on the first Thursday of every month, and is written by members of [RPC's Tax Dispute team](#).

We also publish a VAT update on the final Thursday of every month, and a weekly blog, [RPC Tax Take](#).

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***D & J Grant* – input tax recovery on partial payments denied**

In *D & J Grant v HMRC*, the FTT dismissed the taxpayer's appeal and held that a buyer of goods was not entitled to recover input tax in relation to amounts paid under a sale contract constituting only 70% of the purchase price, as title was only to pass on payment of the final instalment and the goods were not delivered. In the view of the FTT, the absence of title passing meant that there was no supply for VAT purposes. [more>](#)

***Friends of the Earth* – payments made by supporters of a charity were donations and not consideration for the supply of a magazine and other benefits**

In *Friends of the Earth Trusts Limited v HMRC*, the FTT has held that payments made by supporters of a charity were donations and not consideration for the supply of a magazine and other benefits for VAT purposes. The charity was therefore not entitled to claim input tax on the cost of training its street fundraisers and its appeal was dismissed. [more>](#)

News

Council adopts Directive on treatment of vouchers

On 27 June 2016, the Council adopted a Directive amending the Principal VAT Directive to harmonise national VAT rules in relation to transactions involving vouchers.

Vouchers are used increasingly and come in many forms. They include, for example, pre-paid telecom cards, gift cards and price discount coupons for the purchase of goods or services.

There has been considerable disparity across the EU in relation to the VAT treatment of vouchers which has led to the risk of double taxation or non-taxation, in particular, in circumstances where a voucher is issued in one member state and used in another.

Member states will have until 31 December 2018 to transpose the directive into national laws and regulations. Provisions will only apply to vouchers issued after that date.

The press release can be found [here](#).

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HMRC updates VAT Notice 708 on buildings and construction

HMRC has published an updated version of VAT Notice 708, which explains when building work/materials can be zero/reduced rated, when developers are blocked from deducting input tax, the issuing of certificates and time of supply rules.

VAT Notice 708: buildings and construction, can be found [here](#).

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Order changing VAT place of supply rules for repair services made

Following this year's Budget, an Order was made on 11 July 2016 changing the VAT place of supply rules for repair services of tangible moveable property, such as cars. The Order ensures that such repair services are treated as made where they are used and enjoyed. The Order applies to repair services received on or after 1 October 2016.

The Order will prevent UK insurance companies avoiding VAT by having property repaired outside of the EU.

The Statutory Instrument 2016 No 726 can be found [here](#).

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Cases

ING Intermediate Holdings Ltd – VAT on attracting and retaining deposit account customers irrecoverable

In *ING Intermediate Holdings Ltd v HMRC*¹, the Upper Tribunal (UT) has dismissed the taxpayer's appeal and held that VAT attributable to providing deposit accounts by a bank is irrecoverable.

Background

Ing Intermediate Holdings Ltd (the taxpayer), is a retail bank offering only deposit accounts. It invested the funds raised from customer deposits to generate a profit. The taxpayer made investments, mainly in bonds, with a view to holding them to maturity.

Deposits made into accounts with the taxpayer could be withdrawn without notice but had to be to another bank account held by its customer. The taxpayer had no branches, and all services were provided electronically via telephone and the internet. No cheque books, debit cards or overdraft facilities were provided and there were no fees or charges. However, the terms of the accounts reserved the right to introduce or vary charges. The terms of the accounts referred to "customers" and to the "services" provided by the taxpayer.

HMRC refused the taxpayer's part recovery of input tax on the substantial costs it incurred on expenditure on advertising campaigns, the construction of its head office and call centres and staff.

The taxpayer appealed to the First-tier Tribunal (FTT), arguing that the deposit-taking side of its operations supported its investment business and that, therefore, those costs were partially recoverable as overheads attributable to specified supplies relating to investments. HMRC argued that the input tax was attributable to exempt supplies of banking services and was therefore irrecoverable.

The main issue was whether the deposit taking activity involved a supply of services for consideration by the taxpayer or whether it was merely the lending of money.

The FTT dismissed the taxpayer's appeal. In its view the input tax was irrecoverable because it was attributable to exempt banking supplies made to deposit account customers. It found that the VAT in question had a direct and immediate link to those banking supplies, rather than to the taxpayer's investment business, which was funded by the sums held on deposit.

UT's decision

The UT dismissed the taxpayer's appeal. It agreed with the FTT that the taxpayer's supply of a deposit account was a supply of services of the provision of deposit accounts to customers in return for consideration. With regard to consideration, the UT considered that quantification was possible but did not reach a conclusion on quantification as all that was required was for quantification to be possible. As a result, input VAT incurred in attracting deposit account business was not recoverable to the extent that the deposited funds were used for investment activity to generate an investment return from non-EU investments.

Although it had decided the case in favour of HMRC, the UT nonetheless went on to consider whether the activity of investing the deposit funds in bonds represented an economic activity for VAT. If there was no economic activity, there would be no entitlement to input VAT recovery. The UT thought it unlikely that there was an economic activity, but was of the view that in order

1. [2016] UKUT 298 (TCC).

to resolve this issue it would have been necessary to refer the matter to the ECJ. However, as this was not necessary in order to dispose of the appeal, no reference was made.

Comment

Although much of a bank's activities is likely to constitute a supply of services, given the VAT-exempt nature of most banking business the input tax on such supplies is likely to be rendered irrecoverable, creating a real cost for banks. As a consequence, a taxpayer in the financial sector is likely to be in a worse position than taxpayers in other sectors in raising funds.

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D & J Grant – input tax recovery on partial payments denied

In *D & J Grant v HMRC*², the FTT dismissed the taxpayer's appeal and held that a buyer of goods was not entitled to recover input tax in relation to amounts paid under a sale contract constituting only 70% of the purchase price, as title was only to pass on payment of the final instalment and the goods were not delivered. In the view of the FTT, the absence of title passing meant that there was no supply for VAT purposes.

Background

D & J Grant (the taxpayer), entered into a purchase and sale agreement on December 2012 with Free Breeze Energy Systems UK Ltd (FBE), for the supply of two wind turbines. 70% of the purchase price plus VAT had been settled by February 2013 and the remaining 30% of the purchase price was scheduled to be paid on inspection after delivery. The purchase order had not been placed by FBE until March 2013, when it entered into a creditors voluntary liquidation.

In October 2014, in response to an enquiry raised with respect to input tax recovery in relation to payments made to FBE, HMRC stated that in the absence of title passing, there was no "supply" for VAT purposes. In HMRC's view, title would not pass until the full amount of the purchase price had been paid. This view was upheld on review and the right to deduct input tax was denied.

The taxpayer appealed HMRC's decision.

FTT's decision

The FTT concluded that the legal title did not pass with payment of only 70% of the price. Therefore, the taxpayer could not reclaim the input tax and the appeal was dismissed.

Comment

The FTT held that the absence of title passing meant that there was no taxable supply for the purposes of section 4, VATA.

This decision may be contrasted with that in *David Peters Ltd v HMRC*³, in which there was a supply because payment was made in full and title passed despite a lack of delivery. In evaluating the commercial risk of goods not materialising and title not passing, for example, due to the seller's insolvency, potential buyers should factor in the cost of the denial of input tax.

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

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2. [2016] UKFTT 0442(TC).

3. [2012] UKFTT 124 (TC).

Friends of the Earth – payments made by supporters of a charity were donations and not consideration for the supply of a magazine and other benefits

In *Friends of the Earth Trusts Limited v HMRC*⁴, the FTT has held that payments made by supporters of a charity were donations and not consideration for the supply of a magazine and other benefits for VAT purposes. The charity was therefore not entitled to claim input tax on the cost of training its street fundraisers and its appeal was dismissed.

Background

Friends of the Earth Trust Limited (FOTE), is a registered charity that aims to protect and improve the environment through campaigning, undertaking research, educating and publishing. Between May 2009 and May 2014, FOTE used a dedicated team of street fundraisers provided by a separate company to recruit members and seek donations. The street fundraisers were trained by FOTE but were encouraged to come up with their own pitches and develop their own individual approach to obtaining donations.

FOTE provided members with, in return for a minimum payment of £3 a month, a selection of benefits including regular copies of its magazine “Earthmatters”. FOTE viewed the payments from its supporters, obtained by the street fundraisers, as consideration for the supply of the magazine and other benefits. As a result, the charity sought to claim input tax on the cost of training the street fundraisers. HMRC decided that FOTE was not entitled to claim input tax and FOTE appealed to the FTT.

FOTE contended that:

- payments made by its members were consideration for the supply of the magazine and other benefits, not a donation
- the supply was wholly or overwhelmingly a zero-rated supply of a magazine and that there was a direct and immediate link between the various fundraiser costs and the benefits.

FTT’s decision

The FTT considered section 5, VATA, which provides that a supply does not include anything done otherwise than for consideration and also relevant case law.

In *Kuwait Petroleum*⁵, the ECJ expressed the view that in order for a supply to be made “for” consideration, there has to be a legal relationship and reciprocity and for the parties to have agreed objectively that the price was paid for the supply. In *The Serpentine Trust Limited v HMRC*⁶, the FTT held that benefits offered to supporters of a charity for fixed payments were subject to VAT, contrary to the taxpayer’s argument that the cost of the benefits was minimal and the majority of each payment comprised VAT free donations.

The FTT said that, when viewed objectively, the £3 minimum monthly payments were donations and not consideration “for” the supply of the magazine and benefits. The payment was a gift to FOTE to be used in its charitable work and, as a consequence, the charity would send the supporter free copies of the magazine.

In reaching this view, the FTT was influenced by the following:

- there was a low likelihood that the magazine and benefits were mentioned by the street fundraisers at the time the supporters signed up to the charity

4. [2016] UKFTT 411 (TC).

5. (Case C-48/97).

6. [2014] UKFTT 876 (TC).

- the magazine and benefits received a low level of prominence in communications to the supporters
- there were multiple references to the magazine as “complimentary” on the direct debit form
- any perceived value that the magazine had would only become apparent to the member once they had received it.

The FTT therefore concluded that FOTE was not entitled to claim input tax on the cost of training street fundraisers and dismissed its appeal.

Comment

It is common practice for large charities to use street fundraisers provided by a separate company to obtain donations. If FOTE had been successful in its appeal, a number of charities may have sought to reduce the cost of training fundraisers through the VAT system.

Although the decision turned on its own particular facts, it does provide a clear summary of the principles to be applied when considering whether a payment is consideration for a supply for VAT purposes and emphasises that this requires an objective analysis of the circumstances of such payments and the benefits provided in return.

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

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- Winner – Law Firm of the Year – The Lawyer Awards 2014
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