VAT update

September 2016

In this update we report on changes to the VAT treatment of single dwellings with more than one building, an extension to the simplified mechanism for employer input tax deductions in relation to investment management services and new guidance on HMRC's powers to seek to recover underpaid VAT from online marketplaces. We also report on three recent cases involving MTIC fraud, reasonable excuse for late payment of VAT and whether supplies relating to fractional ownership interests in a property are exempt from VAT.

News

Revenue & Customs Brief 13 (2016) – VAT treatment of multiple-building dwellings

In Revenue & Customs Brief 13 (2016) and a modified version of VAT Notice 708, HMRC has set out its change of policy in relation to the VAT treatment of dwellings comprised of more than one building. more›

Revenue & Customs Brief 14 (2016) – deduction of VAT on pension fund management costs following the Court of Justice of the European Union's decision in *PPG Holdings*

Following the decision of the Court of Justice of the European Union in *PPG Holdings BV*[1], HMRC issued Revenue and Customs Brief 43 (2014). more›

VAT Notice 700/1 – should I be registered for VAT?

HMRC has issues a revised VAT Notice 700/1. more›

Cases

Pacific Computers – errors of law in MTIC case leads to case being remitted to the First-tier Tribunal

In *HMRC V Pacific Computers Ltd*[2], the Upper Tribunal (UT) has concluded that the First-tier Tribunal (FTT) made errors of law that had been material to the outcome of a taxpayer's appeal in a case involving missing trader intra-community (MTIC) fraud. more›

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 VAT update is published on the final Thursday of every month, and is written by members of RPC's Tax Dispute team.

We also publish a Tax update on the first Thursday of every month, and a weekly blog, RPC Tax Take.

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1. Case C-26/12.
2. [2016] UKUT 350 (TCC).

McNamara Joinery – reasonable excuse for late payment of VAT due on return

In *McNamara Joinery Limited v HMRC*[3], the FTT allowed an appeal against a default surcharge of £490.62 levied by HMRC for the late payment by the due date of 7 February 2016 of the appellant's VAT return for the period ended 31 December 2015. more›

Fortyseven Park Street – taxpayer's appeal against HMRC's VAT assessment on sales of fractional shares in luxury Mayfair apartments dismissed

In *Fortyseven Park Street Limited v HMRC*[4], the FTT has dismissed a claim by the seller of fractional shares in luxury Mayfair apartments, that the sales were exempt lettings under Schedule 9, VATA 1994. more›

3. [2016] UKFTT 529 (TC).
4. [2016] UKFTT 0569 (TC).

News

Revenue & Customs Brief 13 (2016) – VAT treatment of multiple-building dwellings

In Revenue & Customs Brief 13 (2016) and a modified version of VAT Notice 708, HMRC has set out its change of policy in relation to the VAT treatment of dwellings comprised of more than one building.

In the wake of the First-tier Tribunal's (FTT) decisions in *Catchpole v HMRC*[5] and *Fox v HMRC*[6], HMRC now accepts that more than one building can form a single dwelling in circumstances where the buildings are designed to function together.

This change of policy will have implications for construction projects where multiple buildings are constructed or converted as part of a single project.

Where construction takes place in stages, HMRC will treat the later buildings as annexes to the original building which will not benefit from zero-rating unless:

- they are on the same site
- the stages are completed without unreasonable delay
- none of the buildings are occupied until after all the building work is completed.

For projects which have taken place during the last four years, taxpayers should consider if they have a claim for the repayment of overpaid VAT.

Revenue & Customs Brief 13 (2016) can be found here.

VAT Notice 708 can be found here.

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Revenue & Customs Brief 14 (2016) – deduction of VAT on pension fund management costs following the Court of Justice of the European Union's decision in PPG Holdings

Following the decision of the Court of Justice of the European Union in *PPG Holdings BV*[7], HMRC issued Revenue and Customs Brief 43 (2014) which created a transitional period for employers to use a simplified mechanism whereby employers could obtain a 30% input tax deduction on the VAT element of single invoices concerning investment management and administration services relating to their pension funds.

However, owing to difficulties in reconciling the new rules with pensions and financial services regulations and case law in this area, HMRC has issued Revenue and Customs Brief 14 (2016), which extends the transitional period and use of the simplified mechanism to December 2017.

Revenue and Customs Brief 14 (2016) can be found here.

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5. [2012] UKFTT 309 (TC).
6. [2012] UKFTT 264 (TC).
7. Case C-26/12.

VAT Notice 700/1 – should I be registered for VAT?

HMRC has issues a revised VAT Notice 700/1. Changes to the notice include information on the introduction of new powers enabling HMRC to hold an online marketplace jointly and severally liable for the unpaid VAT of an overseas seller trading goods in the UK through that marketplace.

The Notice includes new information on HMRC's powers to direct certain non-established taxable persons to appoint a UK-based VAT representative.

VAT Notice 700/1 can be found here.

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Cases

Pacific Computers – errors of law in MTIC case leads to case being remitted to the First-tier Tribunal

In *HMRC V Pacific Computers Ltd*[8], the Upper Tribunal (UT) has concluded that the First-tier Tribunal (FTT) made errors of law that had been material to the outcome of a taxpayer's appeal in a case involving missing trader intra-community (MTIC) fraud.

Background

The appellant appealed to the FTT against HMRC's rejection of its claim to recover input VAT in the VAT accounting period 09/06.

By the time of the hearing before the FTT, the appellant had accepted that in respect of each relevant transaction there had been a fraudulent evasion of VAT but denied any knowledge of such fraud. Accordingly, the only issue before the FTT was whether HMRC had proved, on the balance of probabilities, that the appellant either knew, or should have known, of the fraud.

HMRC relied on, amongst other things, a schedule of money movements compiled in relation to a criminal investigation from which an HMRC officer had extracted entries relevant to transactions carried out by the appellant, from which it submitted that knowledge could be inferred. The appellant did not challenge this evidence.

In allowing the appeal, the FTT said that it had not attached much weight to the evidence which had not been tested in cross-examination, including the schedule of money movements, that it preferred the evidence of the appellant's witnesses, and that the most likely explanation for the appellant's transactions was that it had been an innocent party who knew nothing of the fraud.

HMRC appealed to the UT.

UT's decision

Before the UT, HMRC argued that the FTT had:

- given insufficient weight to the evidence of some of its witnesses, whose evidence had been agreed
- erred by disregarding the case officer's evidence and schedule
- erred by purporting to find "such facts as are necessary" to justify the rejection of HMRC's assertions.

The UT allowed HMRC's appeal and remitted the case to the FTT with a direction that it be re-heard by a fresh panel.

In the view of the UT, where evidence was not in dispute it had to be accorded full weight and not partial weight. To do otherwise, on the basis that the evidence had not been tested by cross-examination, was an error of law on the part of the FTT.

The FTT had also erred in refusing to accept HMRC's schedule and in failing to give it significant weight. The case officer's evidence as to the provenance of the materials on which the schedule had been based had been before the FTT in the form of an unchallenged witness statement.

8. [2016] UKUT 350 (TCC).

The UT was critical of the FTT's failure to comply with its duty to provide adequate reasons for its decision. A statement by the FTT that it found "such facts as are necessary" to support other findings or determinations was not itself a finding of fact and was contrary to the duty to give reasons.

Although in making a multi-factorial assessment it was not necessary for the FTT to specify what weight it gave to each item, it was necessary for the decision to contain a summary of the FTT's basic factual conclusion and a statement of the reasons that had led it to reach that conclusion. The FTT had not satisfied this basic test.

The UT concluded that the FTT had failed properly to examine the evidence pertinent to the claim to recover input VAT. It had effectively closed its mind to a material part of HMRC's evidence that had not been challenged by the appellant. It had misunderstood HMRC's case and accordingly had asked itself the wrong question in relation to the evidence of orchestration and contrivance. The FTT's failure to properly address, by reference to the available evidence, HMRC's submissions regarding the link between the evidence of fraudulent behaviour by the other companies in the chain and the appellant's knowledge, was an error of law.

Comment

Although litigation before the FTT is less formal than litigation before the High Court and above, this decision is a timely reminder that basic rules of evidence cannot be entirely disregarded. Where evidence is unchallenged and accepted by one party, as was the case in this instance, the FTT must give proper weight to such evidence in reaching its decision.

This decision also confirms that the FTT must give adequate reasons for the decision it reaches, whether in the context of a substantive appeal or a case management hearing. Parties to litigation are entitled to know the reasoning of the tribunal or court concerned so that they can take appropriate legal advice and decide whether there are grounds for appealing the decision in question.

A copy of the decision can be found here.

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McNamara Joinery – reasonable excuse for late payment of VAT due on return

In *McNamara Joinery Limited v HMRC*[9], the FTT allowed an appeal against a default surcharge of £490.62 levied by HMRC for the late payment by the due date of 7 February 2016 of the appellant's VAT return for the period ended 31 December 2015.

Background

The VAT Regulations 1995, specifically regulation 25(1), provide that returns should be made not later than the last day of the month following the end of the period to which it relates. It also permits HMRC to vary this period.

The appellant appealed the surcharge on 14 April 2016 and submitted in his Notice of Appeal that its agent had, on 12 February 2016, contacted HMRC and secured a two week extension in which to pay the outstanding VAT which the appellant was unable to pay due to unexpected cash-flow problems caused by the temporary default of a debtor. These debts were paid during the two week extension.

9. [2016] UKFTT 529 (TC).

HMRC argued that the VAT return and payment in respect of the period to 31 December 2015 were due by 7 February 2016 and the return was received in time on 2 February 2016, however, the payment was received 19 days late on 26 February 2016. A surcharge of 10% of the outstanding amount was therefore levied in accordance with section 59(5)(c) VATA 1994. Documents submitted to the FTT showed that the appellant had submitted the return in time but paid the amount late on the previous three occasions. The first failure attracted a notice warning that future failures may result in a default surcharge being levied. The second attracted a surcharge at 2%, however, HMRC waived this as it was under £400 and they waived the surcharge of 5% for the third failure as again the surcharge was under £400.

HMRC acknowledged that the appellant's agent attempted to make contact prior to the due date, however, it maintained that the appellant or its agent should reasonably have expected delays in the run up to the due date. HMRC therefore argued that there was no reasonable excuse for the late payment and that agreeing a time to pay request did not offset the issue of the surcharge as it was made after the due date.

FTT's decision

The FTT said that the only power it had in these circumstances was to discharge the penalty if it was wholly disproportionate to the gravity of the offence or plainly unfair. In the present case, it did not consider that the surcharge of £490.62 was wholly disproportionate or plainly unfair. It was clear that the appellant had defaulted in paying the VAT but the question was whether the appellant had a reasonable excuse for that default.

Even though the FTT did not consider insufficiency of funds due to non-payment by debtors to be a reasonable excuse for late payment, it did consider that the repeated unsuccessful attempts made by the appellant's representative to contact HMRC were unexpected and unforeseeable. The submissions from HMRC that the appellant or its agent should have expected delays were dismissed. The FTT was of the view that HMRC was in a much better position than any taxpayer to know when busy times were likely to occur in its call centres. This was information which taxpayers could not reasonably be expected to know.

The FTT therefore concluded that the appellant had established a reasonable excuse for the late VAT payment for the period ending 31 December 2015 and the appeal was allowed.

Comment

HMRC tends to take a very strict line when dealing with default surcharge cases. The problems of VAT compliance often fall to be borne by smaller enterprises which are more susceptible to problems of cash flow. In this case the taxpayer took the correct course in attempting to agree a short extension with HMRC but found the mechanics of doing so (ie speaking to HMRC on the telephone) impossible in the time available. In this case the FTT is to be commended for taking a sensible and pragmatic view of the practical difficulties faced by many taxpayers when attempting to contact HMRC.

A copy of the decision can be found here.

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Fortyseven Park Street – taxpayer's appeal against HMRC's VAT assessment on sales of fractional shares in luxury Mayfair apartments dismissed

In *Fortyseven Park Street Limited v HMRC*[10], the FTT has dismissed a claim by the seller of fractional shares in luxury Mayfair apartments, that the sales were exempt lettings under Schedule 9, VATA 1994.

Background

The appellant, a subsidiary of Marriott Vacations Worldwide Corporation, sold "fractional interests" in 49 self-contained luxury residences at 47 Park Street, Mayfair, London (the Property). In return for a substantial upfront price (ranging from £92,000 to £243,000, depending on the apartment's size and "category"), a purchaser was entitled to exclusive occupation of the residence for up to 21 days each year until 2050. The purchaser also gained access to a range of related benefits during that period, such as the option to:

- exchange stays at the Property for stays in other properties within the Marriott hotel group
- realise rental income in respect of the apartment
- pay for up to 14 additional nights at a 35% discount on the "commercial" rate.

The terms of this arrangement were governed by a membership agreement, to which those who purchased a fractional interest were the "members". Essentially, the arrangements formed a type of flexible timeshare plan.

Schedule 9, VATA 1994 comprises 16 groups of goods and services that are exempt from output VAT. "Group 1" is land, but item 1 lists a number of exceptions to that exemption, the exception in dispute in this case being item 1(d) of Group 1 (item 1(d)), which standard rates "the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of rooms which are provided in conjunction with sleeping accommodation or for the purposes of catering".

The appellant argued that the only supply it made to a member in return for the purchase price was the grant of a licence to occupy land, which falls within the land exemption, such that no VAT was due. The supply was not, in its view, excluded from that exemption as the provision of "accommodation" in a "hotel, inn, boarding house or similar establishment" (under item 1(d)) or as the provision of "holiday accommodation" (under item 1(e)).

HMRC's view was that VAT should be charged on the sale of fractional interests as the sale of the opportunity to obtain a right to occupy accommodation or, alternatively, that the sales were standard-rated supplies of "accommodation" in a "hotel ... or similar establishment" under item 1(d).

FTT's decision

The FTT rejected HMRC's argument that the purchase price was for the opportunity to obtain a right to occupy accommodation, and concluded instead that the prices paid for the fractional interests were in return for licences to occupy land and were standard-rated supplies of "accommodation" in a "hotel ... or similar establishment" within item 1(d).

Issue 1 – Whether the supply was an exempt supply of leasing and letting

The FTT considered that the fact that occupation of the property was conditional on reservation (and not automatic) did not detract from the economic reality of the arrangements that, having regard to the substantial price paid for an interest, the price was for the right to occupy. It was unrealistic to conclude, as HMRC sought to, that the price would be paid simply for the right

10. [2016] UKFTT 0569 (TC).

to access the rights of membership. Consequently, the service was found to be a supply of the leasing or letting of immoveable property, notwithstanding the fact that members also became entitled to other specified benefits.

Issue 2 – Whether there was a supply of "accommodation" in "hotel ... or similar establishment"
Although it acknowledged that this was a difficult issue, the FTT ultimately concluded that the provision of the apartments to members under their fractional ownership interests did fall within the exclusion in item 1(d). It considered that the annual period of occupation (rather than the long-term length of the licence) and the nature of the services provided to members and non-members alike made the accommodation similar in nature to that of a hotel and therefore it was standard-rated.

Comment
The recent rise of businesses such as Airbnb reflect a wider general interest in the variety of methods through which short-term to medium-term accommodation can be supplied. Given that the FTT acknowledged that it found certain aspects of the appeal difficult and the large sums involved, the appellant may seek to appeal the decision to the UT. If the decision is appealed, the UT will have an opportunity to provide helpful guidance on how to determine when supplies of leasing and letting are exempt and in respect of the distinction between supplies of accommodation in "hotels" and "similar establishments" and supplies of residences as "dwellings".

A copy of the decision can be found here.

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16523

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000