Edition 15
August 2021

V@

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

News

- HMRC has updated its **guidance on VAT deferred due to coronavirus (COVID-19)**, to include details of the penalty that may be charged if a business did not take any action to pay its deferred VAT in full, or make an arrangement to pay (either by joining the VAT deferral new payment scheme or contacting HMRC to agree extra help to pay) by the deadline of 30 June 2021. The penalty is charged at 5% of the deferred VAT that is unpaid when the penalty is assessed and must be paid within 30 days of the date of the penalty assessment. A business may appeal against a penalty if it has a reasonable excuse.

- HMRC has opened a **consultation on reporting rules for digital platforms**. Following the announcement at Spring Budget 2021, the government is consulting on the implementation of the Organisation for Economic Co-operation and Development's Model Reporting Rules for Digital Platforms. From January 2023, these rules will require platforms to report information regarding the income of sellers providing goods and services to assist sellers to get their tax right and to enable HMRC to detect and tackle non-compliance. The consultation sets out the details of the rules and seeks views on the government's implementation. The consultation will close at 11:45pm on 22 October 2021.

- The Financial Secretary to the Treasury has made a **written statement to Parliament** confirming that legislation will be introduced at the earliest opportunity to allow a VAT zero rate to apply to trades in UK emissions trading scheme allowances within the VAT Terminal Markets Order (SI 1973/173). The zero-rating relief provided by the statutory instrument, which permits VAT zero rating for transactions on terminal commodity markets, avoids the administrative and cash flow burdens of accounting for VAT and should have no effect on the VAT amount collected at the final stage of consumption. The statement confirms that the treatment will be provided from the time the trades in the UK Emissions Trading Scheme commenced in May 2021.

- The government has published summaries of responses to various VAT consultations and a research report on Making Tax Digital for VAT. The consultations for which the summaries of responses have been published are **VAT Grouping – Establishment, Eligibility and Registration**, **VAT and the Public Sector: Reform to VAT Refund Rules**, **VAT and the Sharing Economy** and **VAT and value shifting**. The research report, called **Impact of Making Tax Digital for VAT**, considers the impact of Making Tax Digital for those taxpayers who have been required to operate it since April 2019.

Case reports

Zipvit – Advocate General opines that a right of deduction requires an invoice separately stating the VAT

In *Zipvit Ltd v HMRC* (Case C-156/20), Advocate General Kokott has opined, following the Supreme Court's reference to the Court of Justice of the European Union (**CJEU**), that recovery of VAT on postal charges wrongly treated as exempt from VAT would only be practically possible where the customer was in possession of a VAT invoice.

The case concerns the correct interpretation of Article 168 of Council Directive 2006/112/EC (the **Principal VAT Directive**), in connection with the question of whether a recipient of postal services may deduct input VAT in relation to those supplies, where both parties and HMRC had mistakenly treated the supplies as exempt from VAT. We reported on the

judgment of the Supreme Court in the **April 2020 edition of RPC's VAT update.**

The Advocate General proposed that the CJEU answer the questions referred to it by the Supreme Court as follows:

1. The 'VAT due or paid', referred to in Article 168(a) of the Principal VAT Directive covers the VAT actually due from or paid by the supplier to the Member State.
2. It follows from Articles 73 and 78, taking into account Article 90 of the Principal VAT Directive, that the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person, which already includes VAT.
3. However, the right of deduction under Article 168(a) of the Principal VAT Directive presupposes the supply of the goods or services and the possession of an invoice (Article 178(a) of the Principal VAT Directive) documenting the passing on of VAT. By contrast, a deduction of input tax is not possible without possession of an invoice stating the VAT separately.
4. The recipient of a supply who has not endeavoured to obtain a corresponding invoice stating the VAT separately within the limitation period under civil law cannot claim to deduct input tax against the tax authorities without such an invoice.
5. Since the right of deduction of the recipient of a supply is independent of the actual taxation of the service provider, it is irrelevant whether the supplier had a successful defence to its own taxation.

Why it matters: If the Advocate General's opinion is followed by the CJEU, it will mean that the taxpayer (and many other taxpayers in similar circumstances) will be unable to deduct input VAT in respect of services they received from the Royal Mail which were incorrectly treated as exempt, due to the absence of an invoice which separately stated the VAT in question. The total value of these claims is estimated to be between £500 million and £1 billion. The referral to the CJEU was made during the Brexit transition period, whereas the CJEU's decision will be made after the end of the transition period. It will therefore be interesting to see the extent to which the Supreme Court will follow the reasoning of the CJEU.

The opinion can be viewed **here**.

The Claimants in the Royal Mail Group Litigation – Court of Appeal confirms there is no actionable private law right to compel the issue of VAT invoices

In *The Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd* [2021] EWCA Civ 1173, the Court of Appeal has confirmed that the claimants have no actionable private law right to compel Royal Mail Group Ltd (**Royal Mail**) to issue invoices which show the amount of VAT which should have been charged in respect of services that were incorrectly treated as VAT exempt.

Before 2009, there was a general assumption that all postal services were VAT exempt. In 2009, the CJEU held in R (*on the application of TNT Post UK Ltd*) *v HMRC* (Case C-357/07) (***TNT***) that, while the universal postal service is VAT exempt, arrangements that are individually negotiated, such as franking and tracked delivery arrangements, are not. A group of approximately 340 companies (the **Traders**) were of the view that the amounts they paid for services before the UK VAT legislation was revised to comply with *TNT* had not been VAT exempt and claimed to be entitled to VAT invoices from Royal Mail. In the High Court, the claimants sought (a) declarations that they were entitled to VAT invoices, (b) orders that the VAT invoices be provided, and (c) damages for not having been provided with VAT invoices in respect of services which *TNT* confirmed were, and always had been, taxable.

The High Court found in favour of Royal Mail, concluding that there was neither a statutory duty nor a contractual obligation, enforceable by the Traders, to require a VAT invoice. We reported on the judgment of the High Court in the **February 2020 edition of RPC's VAT update**. The Traders appealed to the Court of Appeal.

The Court of Appeal upheld the decision of the High Court, dismissing the Traders' arguments that they had an actionable private law right to compel Royal Mail to issue invoices which show the amount of VAT which should have been charged. The Court found that, although the principle in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-

106/89) requires the court to interpret domestic legislation in conformity with EU law, it does not go any further. In particular, it does not require the court to interpret domestic legislation in such a way as to give rise to a private law cause of action where no such right exists as a matter of EU law. The Court did not consider that the *Marleasing* principle requires a court to hold that there is a private law claim of the kind that the Traders asserted, unless Parliament had independently made it clear that such a right exists, which was not the case here.

Why it matters: If the CJEU follows the opinion of Advocate General Kokott in *Zipvit Ltd* (see our case commentary above), in deciding that a right of deduction requires an invoice separately stating the VAT, the Court of Appeal's judgment in this case will prevent the Traders from recovering their input VAT in respect of the relevant supplies. Given that the total potential recovery if the Traders ultimately succeed is in the region of £500 million, the Traders are likely to seek to appeal this judgment to the Supreme Court.

The judgment can be viewed **here**.

Target – Court of Appeal clarifies rules for financial services VAT exemption

In *Target Group Ltd v HMRC* [2021] EWCA Civ 1043, the Court of Appeal has confirmed that certain loan administration services supplied to a bank did not qualify for exemption from VAT under Schedule 9 to the Value Added Tax Act 1994 (**VATA 1994**), as they did not fulfil the required functions of a financial transaction concerning payments or current accounts.

Target Group Ltd (**Target**), was a provider of loan administrative services to a lender bank. For each of the lender's borrowers, Target received loan information and created a "loan account". It would then identify the loan balance, the repayment dates and the amounts (including interest) that should be applied to the next payment. Target then liaised with borrowers to facilitate repayments and made binding instructions for funds to be transferred from the borrower to the lender (the **Repayment Services**).

In 2015, Target applied to HMRC to exempt the Repayment Services from VAT under Article 135(1)(d) of the Principal VAT Directive, on the basis that they were either (i) *"transactions … concerning deposit and current accounts"* or (ii) *"concerning … payments, transfers, debts …"*. HMRC decided that the supplies were not exempt, on the basis that the Repayment Services were composite supplies of the management of loan accounts. Target appealed this decision to the First-tier Tribunal (**FTT**).

The FTT held that the Repayment Services could have been exempt from VAT if they had been transactions concerning payments and transfers. However, in the FTT's view, the Repayment Services, when taken as a whole, constituted debt collection and were therefore standard rated for VAT purposes. The Upper Tribunal (**UT**) dismissed Target's appeal, concluding that the Repayment Services would in no circumstances attract a VAT exemption, as Target's role in the transactions was limited to passing information to BACS (which is an automated clearing house system). The BACS system would then communicate instructions to the borrower's and lender's banks to transfer funds. The UT relied on the CJEU's judgment in *HMRC v DPAS Ltd* (C-5/17) (**DPAS**) (which post-dated the decision of the FTT), in which the CJEU had said that even where the service in question is a necessary step for a payment to be made, it could not in itself constitute an exempt supply as *"actual execution is necessary to qualify as a transaction concerning transfer or payment"*.

The Court of Appeal dismissed Target's appeal. Target argued that the Court should distinguish between a "communications interface" and a company that delivers binding instructions to move funds and that the latter should be VAT exempt. The Court disagreed, following *DPAS*. The Court decided that the Repayment Services could not form a distinct whole that fulfilled the criteria to qualify as a *"financial transaction"* under Article 135 (1)(d), because Target merely provides an *"outsourced business process service"* and does not actually execute transfers of funds between parties. It only communicates instructions to do so, and neither the borrower's nor the lender's bank has delegated its functions to Target. Target acts merely as the *"trigger"* of the transaction but does not execute the necessary legal steps for a financial transaction to take place. Accordingly, the Repayment Services were not exempt from VAT.

Target also relied on an alternative argument that the Repayment Services were exempt transactions *"concerning current accounts"* within article 135

(1)(d). The Court rejected this argument on the basis that the loan accounts that Target administered were not current accounts as the borrowers could not deposit and withdraw funds from them.

Why it matters: This judgment confirms that supplies by a financial institution which effect a relevant payment or transfer will qualify for VAT exemption, but supplies by a party giving instructions for funds to be transferred between financial institutions will not. The clarification of the rules will be helpful to the financial services industry. The judgment is also another example of the UK courts continuing to follow EU case law following the end of the Brexit transition period.

The judgment can be viewed **here**.

If this email has been forwarded to you, you can sign up to RPC V@ here: **Subscribe**

If you would like more information (or have any questions) on any of these topics, please get in touch with us, or your usual RPC contact.

Adam Craggs
Partner
+44 20 3060 6421

Rebekka Sandwell
Senior Associate
+44 20 3060 6660

ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

Tower Bridge House St Katharine's Way London E1W 1AA
T +44 20 3060 6000 F +44 20 3060 7000 DX 600 London/City **rpc.co.uk**

London Bristol Hong Kong Singapore