



VAT update

March 2016

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HMRC and government agencies focus on VAT evasion by internet retailers

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BPP Holdings v Revenue & Customs Commissioners – Court of Appeal confirms that HMRC must comply with rules and directions issued by the tax tribunals

In the recent case of *BPP Holdings v Revenue & Customs Commissioners* [2016] EWCA Civ 121, the Court of Appeal has confirmed that the First-tier Tribunal (FTT) was correct to debar HMRC from further participation in the appeal proceedings and confirmed that the strict approach to compliance with rules and directions adopted in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795, is equally appropriate to litigation before the tax tribunals. [more>](#)

HMRC v Vodafone Group Services – claim for overpaid VAT invalid if new reason substituted out of time

In *HMRC v Vodafone Group Services* [2106] UKUT 89, the UT has held that a claim for repayment of VAT cannot be amended so as to include later claims relating to different transactions. [more>](#)

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In *Half Penny Accountants Ltd v HMRC* [2016] UKFTT 45 (TC), the FTT allowed the taxpayer's appeal and quashed HMRC's decision to require security from the taxpayer. [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 Disputes](#) team.

We also publish a general Tax Update on the first Thursday of every month, and a weekly blog, [RPC Tax Take](#).

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News

Next steps following the change to the reduced rate of VAT for energy saving materials

Following the judgment of the Court of Justice of the European Union (CJEU) in *Commission v United Kingdom* (C-161/14), in which the CJEU concluded that the UK's existing legislation (Schedule 7A VATA 1994) was not consistent with EU law, the government announced its intention to amend the relevant legislation in Finance Bill 2016.

In December 2015, the government published a discussion paper seeking views on the proposed changes (details of which were reported in our December VAT update). The date for responding to the government's consultation has closed and HMRC are considering the responses it has received.

In the meantime, the Minister for State for the Department of Energy and Climate Change has confirmed that if the rate of VAT changes as a result of this EU ruling, the government will consider various options to maintain a suitable rate of return for investors under the feed-in-tariff.

The parliamentary discussion on solar energy and VAT is available to view [here](#).

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HMRC and government agencies focus on VAT evasion by internet retailers

HMRC has confirmed it is working with other government agencies, including carrying out joint visits with trading standards and sharing intelligence with the UK Border Force, to address risks across supply chains to ensure that sellers who sell online pay all taxes that are due.

In December 2015, more than £500,000 worth of goods were seized by tax officials from warehouses because it was suspected they had been illegally offered to UK online shoppers at VAT-free prices. The recovery followed the establishment of a taskforce to examine the best ways to crackdown on VAT evasion by sellers who operate through online platforms.

Online retailer Amazon was recently accused by MPs, during a parliamentary debate, of being "morally complicit" in VAT evasion perpetrated through its platform.

The parliamentary discussion on VAT evasion and internet retailers is available to view [here](#).

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Measures announced in the Budget to tackle online VAT evasion

In his recent Budget, the Chancellor announced plans to take action to stop overseas suppliers undercutting UK businesses (on the internet and on the high street). HMRC is to be given new powers to tackle VAT fraud by overseas businesses.

Under the new rules, HMRC will be able to require non-compliant overseas traders to appoint a tax representative in the UK and will notify online marketplaces, such as eBay, of traders who fail to pay VAT. Online platforms can be held liable for missing VAT if traders continue to evade VAT and they fail to act to prevent future fraud. The measures are expected to raise £875m for the Exchequer by April 2021.

The government will also introduce a due diligence scheme for the fulfilment houses where overseas traders store their goods in the UK. This will make it more difficult for firms evading VAT to trade. While the government continues to take action domestically, the global nature of the fraud means international action is also required. The UK has therefore raised this issue with the EU and its international partners and further action to combat such fraud can be expected.

Details of the measures aimed at tackling online VAT evasion are available to view [here](#).

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In the recent case of *BPP Holdings v Revenue & Customs Commissioners* [2016] EWCA Civ 121, the Court of Appeal has confirmed that the First-tier Tribunal (FTT) was correct to debar HMRC from further participation in the appeal proceedings and confirmed that the strict approach to compliance with rules and directions adopted in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795, is equally appropriate to litigation before the tax tribunals.

Background

The substance of this appeal is the zero rating of printed materials provided to students for educational courses. However, a preliminary issue arose concerning HMRC's conduct during the course of the litigation before the FTT.

Briefly, during the conduct of the proceedings before the FTT, HMRC failed to meet a number of deadlines set out in directions issued by the FTT. In particular, HMRC delayed service of their Statement of Case and failed to plead the facts on which they relied. Other failures included late compliance with a direction to carry out a further disclosure exercise and late applications for extensions of time. As a result, BPP Holdings (BPP) applied for a direction preventing HMRC from taking further part in the appeal.

The key question was the proper approach of the tax tribunals in cases where there has been breach of a direction. Before the FTT, BPP was successful and HMRC were prevented from further participation in the proceedings. HMRC successfully appealed to the Upper Tribunal (UT) and BPP appealed to the Court of Appeal.

The critical difference between the decisions in the FTT and UT was the release of the conflicting decisions of the UT in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 196 (TCC) (which the FTT had the benefit of); and *Leeds City Council v HMRC* [2014] UKUT 350 (TCC), which had been released when the UT was sitting in *BPP*.

Both of these cases considered whether the stricter approach to compliance with rules and directions made under the Civil Procedure Rules (CPR), as set out in *Mitchell* and *Denton v TH White Ltd* [2014] 1 WLR 3296, applied to cases before the tax tribunals. In *McCarthy*, the UT concluded that the stricter approach applied to cases before the tax tribunals. In *Leeds City Council*, however, the UT concluded that as the tribunal rules were less strict than the CPR, *Mitchell* and *Denton* did not apply to litigation before the tax tribunals.

The Court of Appeal's decision

The Court of Appeal allowed BPP's appeal.

The Court of Appeal held that the FTT's approach had been correct. The FTT had made clear that its consideration was limited to whether the guidance in the authorities was relevant by analogy to the application of the overriding objective in the tribunal rules.

HMRC argued that the approach adopted by the UT in *Leeds City Council* should be preferred. They appeared to argue that, as a state agency during a time of austerity, the Court should subject it to a lower standard of compliance. This suggestion was roundly rejected by the Court of Appeal who commented that it found HMRC's approach towards compliance to be "disturbing" and that even a litigant in person is expected to comply with the rules of court and court orders. The Court said that: "A State party should neither expect to nor work on the basis that it has some preferred status." The Court of Appeal had little difficulty in allowing BPP's appeal.

In reaching its decision, the Court considered that nothing in the wording of the relevant tribunal rules justified a different approach in the tax tribunals to compliance or the efficient conduct of litigation at a proportionate cost. Nothing in the wording of the tax tribunal rules' overriding objective was inconsistent with the general legal policy described in *Mitchell* and *Denton*. There was no justification for a more relaxed approach to compliance with rules and practice directions in the tax tribunals.

Comment

This decision endorses the stricter approach to compliance with rules and directions that was adopted by the UT in *McCarthy*. Although the tax tribunals are less formal than the higher courts, this does not mean that the tribunal rules and directions can be ignored. Compliance with such rules and directions must be taken seriously.

A copy of the Court of Appeal's decision is available to view [here](#).

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HMRC v Vodafone Group Services – claim for overpaid VAT invalid if new reason substituted out of time

In *HMRC v Vodafone Group Services* [2106] UKUT 89, the UT has held that a claim for repayment of VAT cannot be amended so as to include later claims relating to different transactions.

Background

In 2007, Vodafone wrote to HMRC requesting a repayment of over £4m, representing the amount by which it claimed to have over-declared its liability for output tax under the Nectar card scheme in its VAT returns for the periods 01/04 to 01/06 (the Nectar claim). The Nectar claim remained outstanding and was the subject of a separate appeal to the FTT.

Between 2009 and 2011, Vodafone made additional claims for the repayment of further output tax which it had over-declared in accounting periods including those covered by the Nectar claim (the later claims). The later claims were separate from the Nectar claim and related to other accounting errors. HMRC refused to repay some of the later claims on the ground that they had been made out of time.

Vodafone accepted that had the later claims been freestanding they would fail as they were out of time. However, they argued that it was possible to amend the Nectar claim so that it encompassed the later claims. HMRC disagreed. HMRC accepted it was possible to amend a claim, but argued that it was not permissible to do so in the way Vodafone claimed as its approach amounted to replacing one claim with another.

The matter came before the FTT which considered, as preliminary issue, whether a taxpayer could vary the methodology by which a claim was calculated (eg by substituting a different

reason for claiming an identical or lower amount) after the expiry of the time limits set out in section 80, VATA 1994. The FTT found in Vodafone's favour and HMRC appealed to the UT.

The UT's decision

The UT confirmed that a claim is a demand for repayment of overpaid tax. It rejected Vodafone's argument that a claim is defined by its amount alone. The UT was of the view that such an approach was inconsistent with the statutory language. In its view, a claim is not simply a sum of money in abstract, but for an amount which relates to a particular transaction in respect of which output tax has been accounted. It was therefore not possible for a taxpayer to extend a claim to include entirely different transactions.

The UT therefore concluded that the later claims were not subsumed within the Nectar claim and allowed HMRC's appeal.

In reaching its conclusion the UT acknowledged that *Reed Employment v HMRC* [2013] UKUT 109, was authority for the proposition that "a claim could be amended, even if the amendment consisted of a change in the amount claimed or the method of calculation, as long as the fundamental character of the claim was unchanged; in other words, the amended claim had to arise out of essentially the same facts or circumstances as original claim". It commented that this was consistent with its own conclusion that it is the amount and method of calculation which define the claim.

Comment

This decision provides some clarity on the scope of permitted amendments to existing section 80 claims. It is clear that the UT will not tolerate attempts by taxpayers to enlarge existing claims with elements that were not in contemplation when the claim was originally made.

A copy of the UT's decision is available to view [here](#).

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Half Penny Accountants Limited v HMRC – Tribunal quashes HMRC's decision to require security from the taxpayer

In *Half Penny Accountants Ltd v HMRC* [2016] UKFTT 45 (TC), the FTT allowed the taxpayer's appeal and quashed HMRC's decision to require security from the taxpayer.

Background

On 6 February 2015, HMRC served a notice of requirement for security on Half Penny Accountants Limited (Half Penny). Whilst up to date with its returns, Half Penny had not paid any VAT to HMRC since 6 December 2013. It owed £68,717 in unpaid VAT, and default surcharges in the sum of £8,963.79 had also been imposed.

Half Penny attributed its cash flow difficulties to poor hiring decisions.

HMRC issued a notice to Half Penny requiring security from it pursuant to paragraph 4(2)(a), Schedule 11, VATA 1994.

On 4 March 2015, Half Penny wrote to HMRC, requesting a review of its decision to demand security. It said in its letter that it was talking to another firm of accountants about being acquired and that should those talks prove to be successful it would be able to meet its liabilities. However if security was required, it would not be able to continue in business, which

would affect the planned takeover. It requested an extension of time to pay until May 2015, which would allow it time to sell at least part of the business the proceeds from which could then be used to pay the outstanding VAT.

HMRC carried out a review and upheld its decision to demand security. In its letter of response to Half Penny, dated 9 April 2015, HMRC referred to its poor compliance record and that if it was to grant it further time, this would give it an unfair advantage over other taxpayers.

Half Penny appealed to the FTT.

The FTT's decision

The FTT allowed Half Penny's appeal and quashed HMRC's decision requiring security.

In the FTT's view, it was necessary for it to consider the situation at the time the review was carried out by HMRC (as opposed to when the decision to demand security was originally taken). Accordingly, the FTT was able to take into account that HMRC knew, at the later time, that Half Penny was seeking a buyer for its business.

The FTT examined HMRC's decision to not take into account the potential takeover and whether HMRC was right to ignore this information and, if not, whether HMRC would inevitably still have maintained its demand for security had that information been taken into account.

The FTT concluded that by excluding the potential business sale from its considerations, HMRC was ignoring something that was potentially relevant "to the protection of the revenue". If the sale went ahead as planned, it would improve the ability of Half Penny to meet its VAT obligations.

On this basis, the FTT allowed the appeal as it did not appear to it inevitable that HMRC's decision would have been the same, had it taken the sale of the business into account. It reiterated that its jurisdiction was supervisory, and that accordingly it was not for the FTT to decide, or even speculate, how consideration of the potential sale of the business would have affected HMRC's decision.

Comment

The FTT has confirmed that HMRC must consider the position at the time of any review rather than when the decision to demand security was taken and must take into account all relevant information. HMRC must take into account circumstances which would improve the taxpayer's ability to meet its VAT obligations. Failure to do so is likely to lead on appeal to the FTT quashing HMRC's decision to require security from the taxpayer.

A copy of the FTT's decision is available to view [here](#).

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About RPC

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