VAT UPDATE
JANUARY 2023

Covering material from October – December 2022

Disclaimer

Tolley CPD takes every care when preparing this material. However, no responsibility can be accepted for any losses arising to any person acting or refraining from acting as a result of the material contained in these notes.

VAT Update January 2023
Contents

1. INTRODUCTION

These notes contain a brief summary of some of the main VAT developments in the last three months – Tribunal and Court decisions, changes in legislation, Customs announcements. They are divided as follows:

- outputs generally;
- land and property;
- international matters;
- inputs generally;
- administration.

The same main headings will be used each quarter. If nothing has happened under a particular heading in a particular quarter, that heading will be omitted – but all headings will still carry the same number. That is why some headings are included with "nothing to report".

1.1 Appeals pending

The list of VAT appeals that HMRC has lost and that may have implications for other businesses was updated on 28 November 2022.

- Chelmsford City Council: The Upper Tribunal dismissed HMRC's appeal on the Special Legal Regime issue. HMRC is not seeking permission to appeal.
- Conservatory Roofing UK Ltd: The Upper Tribunal found the First-tier Tribunal had not considered all the relevant information when dismissing Conservatory Roofing UK Ltd's appeal. The Upper Tribunal remitted the decision to the First-tier Tribunal to be remade.
- *DCM (Optical Holdings) Ltd*: The Supreme Court unanimously rejected DCM's appeal (see 5.8.3).
- E-Zec Medical Transport Services Ltd: Appeal allowed. HMRC is not seeking permission to appeal.
- Emerchantpay Ltd: Appeal allowed. HMRC is not seeking permission to appeal.
- *Gray & Farrar International Ltd*: Upper Tribunal allowed the company's appeal. HMRC granted permission to appeal to the Court of Appeal. Listed for hearing on 17 or 18 January 2023.
- *Hippodrome Casino Ltd*: HMRC granted permission to appeal to the Upper Tribunal.
- *Hodge and Deery Ltd*: First tier Tribunal allowed the company's appeal. No further appeal so the decision is final.

- *Hotel La Tour Ltd*: HMRC have been granted permission to appeal to the Upper Tribunal. Listed for hearing on 12, 13 or 14 June 2023.

- Lynton Exports (Alsager) Ltd: Appeal allowed. HMRC is not seeking permission to appeal.

- Mid Ulster District Council: The Upper Tribunal allowed HMRC's appeal on the distortion of competition issue. Matter remitted to the First-tier Tribunal.

- Netbusters (UK) Ltd: The Upper Tribunal dismissed HMRC's appeal. HMRC is not seeking permission to appeal.

- *News Corp UK & Ireland Ltd*: the company has been granted leave to appeal to the Supreme Court against the CA's decision (listed for hearing on 22 to 23 November 2022).

- *NHS Lothian Health Board*: The Supreme Court unanimously allowed HMRC's appeal. (See 5.8.4).

- Staysure.co.uk.Ltd: Appeal allowed. HMRC is not seeking permission to appeal.

- *The Prudential Assurance Company Ltd*: FTT allowed the appeal. HMRC granted permission to appeal to the UT (hearing listed for November 2022).

http://www.hmrc.gov.uk/vat/vat-appeal-update.pdf

2. OUTPUTS

2.1 Scope of VAT

2.1.1 NHS Trust car parks

In *Northumbria Healthcare NHS Foundation Trust v HMRC [2022] UKUT 267* (7 October 2022), the Upper Tribunal (UT) decided that the Trust was acting as a taxable person in providing car parking facilities and that not charging VAT would lead to a significant distortion of competition. The reasons for the decision were that the provision of the car parking facilities was not subject to a special legal regime and there would be a disadvantage to private operators if VAT was not charged.

There was no dispute that the Trust is a public authority for the purposes of VATA 1994, s 41A. The issue was whether, in relation to its provision of car parking facilities, it met the two conditions of s 41A for treatment as a non-taxable person. For the Trust to achieve the VAT treatment it was pursuing both conditions had to be met. The first condition was that the car parking facilities must be supplied in the course of the activities in which the Trust is engaged as a public authority. The second condition was that the supply must not lead to a significant distortion of competition. As explained below, the UT decided that neither condition was met.

The concept of a special legal regime is relevant to the first condition and is derived from CJEU case law relating to the application of Article 13 of the Principal VAT Directive. The CJEU has stated that an activity will be regarded as having been carried on under a special legal regime 'where the pursuit of the activity involves the use of public powers' (*Fazenda Pública v Câmera Municipal do Porto* (Case C-446/98)) or where the activity is 'closely linked to the exercise of rights and powers of public authority' (*HMRC v Isle of Wight Council* (Case C-288/07)).

The UT noted that for the provision of car parking facilities to be subject to a special legal regime it is necessary to show that the pursuit of the activity involves or is closely linked to the exercise of rights and powers of the public authority. The UT decided that the Trust was not subject to such a special legal regime in relation to its provision of car parking facilities. The Trust did not therefore meet the first condition of VATA 1994, 41A.

In relation to the second condition, some of the car parks are in locations which are practical for general use. It is understood that the pricing decisions taken by the Trust are intended to discourage general use of such car parks and that the prices would not necessarily reduce if VAT was not charged. The UT rejected an argument that a higher profit, if VAT was not charged, does not in itself amount to a distortion of competition. The UT noted that 'the disadvantage to private operators does not depend on the decision taken by the public body as to the way in which it will reflect the fiscal advantage in its pricing.'

Northumbria Healthcare NHS Foundation Trust v HMRC [2022] UKUT 267

Lecture 1

2.1.2 VAT treatment of government energy support payments

The 11 November 2022 edition of HMRC VAT Notice 701/19 provides guidance regarding the VAT treatment of payments relating to the:

- Energy Bill Relief Scheme
- Energy Price Guarantee
- Energy Bills Support Scheme

Payments made to suppliers under the Energy Bill Relief Scheme and the Energy Price Guarantee are grant payments and outside the scope of VAT. Any VAT incurred by suppliers in relation to the operation of the Energy Bill Relief Scheme or the Energy Price Guarantee relates to the taxable supply of energy and is therefore recoverable, subject to the normal rules for VAT recovery.

The Energy Bills Support Scheme provides contributions to help domestic customers meet the cost of their energy bills and does not affect the price charged by the supplier. Energy suppliers are required to account for VAT under the normal rules as the payments are made for a taxable supply of energy. Any VAT incurred by suppliers in relation to the operation of the Energy Bills Support Scheme relates to the taxable supply of energy and is therefore recoverable, subject to the normal rules for VAT recovery.

VAT Notice 701/19

2.1.3 Works performed by public authority

Summary - The advocate general's opinions were that certain activities were not carried out in the course of an economic activity, meaning that the supplies would not be within the scope of VAT.

A municipality in Poland (Gmina O) undertook a project to install renewable energy source systems in properties located in its jurisdiction. The works were part funded by an EU grant and part funded by the owners of the properties. The installations formed part of a national strategy in Poland to improve public health. The terms of the installation were that the energy source systems would be owned by the municipality for five years, after which, ownership would transfer to the property owners. The municipality sought an advance tax ruling that its services to the residents were not subject to VAT because they were performed as part of its statutory obligations as a local authority, and not as part of an economic activity. However, the Polish tax authorities disagreed.

In a second case, Gmina L, the municipality in Poland undertook a project, in this case for the removal of asbestos from residential properties. The cost of the works was covered by Gmina L, who in turn had some of the costs subsidised from a central fund. The property owners did not pay for the works. Once again, the Polish authorities argued this was an economic activity within the scope of VAT.

Decision

In the first case, the AG opinion had doubts that the services were being performed in the course of an economic activity. The opinion acknowledged that there were supplies being made to the residents. The fact that they were part grant funded did not change this. However, as the supplies were not being performed under commercial terms with a view to making a profit, they did not have the indicators of economic activity. In addition, the aim of the project being to improve public health also pointed to the conclusion that the supplies were not being performed in the course of economic activity; effectively, Gmina O was only performing the services because of its statutory duty to do so.

In the second case, the AG first identified the nature of the supplies and concluded that there were supplies from the municipality to the residents. The argument that the supplies were in fact between the contractors performing the removals and the residents (as put forward by the Polish tax authorities) was rejected due to a lack of contractual agreements between the contractors and the residents. Again, the AG opinion doubted that the supplies by the municipality were performed in the course of economic activity. The municipality did not receive any compensation for its services of arranging for the contractors to perform the removals and the services were only available to residents of the municipality. In addition, the purpose of the works was not to generate revenue, but to improve local public health.

In both cases, the final decision on the matter has been left to the referring court.

Gmina O (Case C-612/21) and Gmina L (Case C-616/21)

Lecture 2

2.1.4 Off-street parking overpayment subject to VAT

This case concerns the VAT treatment of off-street parking provided by the Borough Council of King's Lynn and West Norfolk, where the pay and display parking machines used to collect payments from customers did not provide change. The issue was whether when, for example, a customer inserted a £1 coin and 50p piece to pay for an hour’s parking costing £1,40 whether the 10p overpayment represented consideration paid for the supply of car parking making it liable to VAT.

In 2012, the Council had previously appealed a similar case (Borough Council of King’s Lynn and West Norfolk v HMRC [2012] UKFTT 671 (TC) with the First Tier Tribunal finding that an overpayment was not part of the consideration for a supply made by a local authority. This decision was not challenged by HMRC.

Subsequently, the Court of Appeal reached a decision in National Car Parks Limited v HMRC [2019] EWCA Civ 854, finding that an overpayment was part of the consideration for a supply of off-streetcar parking by a private sector provider. The Court of Appeal did not hear any argument regarding the provision of such supplies by a local authority and

declined to take a view on the correctness of the earlier First Tier Tribunal case.

As a result, the issue in this case was essentially whether the Court of Appeal's case applied equally to the provision of car parking services by local authorities. If so, the earlier First Tier Tribunal case involving the Borough Council of King's Lynn and West Norfolk was wrong.

The Borough Council of King's Lynn and West Norfolk argued it could only charge for parking by exercising its powers within the statutory framework by charging a set fee. With no direct link with the supply, any overpayment was a voluntary non-taxable contribution to the Council.

The Upper Tribunal adopted the Court of Appeal's approach in National Car Parks Limited v HMRC [2019] EWCA Civ 854. The tariff board showing the hourly rates charged to park included a statement that overpayments were accepted and that no change was given. The Tribunal concluded that this was effectively an offer to provide parking in exchange for coins of not less £1.40. The statutory provisions governing the council's car parking did not prohibit overpayments. Where a customer chose to insert £1.50, this was the total consideration given by the customer for the supply and so the taxable amount for VAT purposes.

The Borough Council of King's Lynn and West Norfolk v HMRC [2022] UKUT 00326 (TCC)

Lecture 3

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Loan sub-participations

In *O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A* (Case C250/21) (6 October 2022) the CJEU rejected the Advocate General's opinion and held that the sub-participation agreements were VAT exempt credit transactions.

A sub-participation agreement exists when a lender that has provided a loan sub-contract all or part of its risk to another financial institution – the sub-participant. In the case here, a number of Polish banks securitised loans with *O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A* (O. Fundusz) acting as the sub-participant.

The arrangement was that O.Fundusz advanced an upfront payment to the lenders, and following this, any payments made against the loan by the original borrower were passed to O. Fundusz. O Fundusz was effectively taking on the risk and reward of the loans made by the banks. The point being considered by the CJEU was the VAT treatment of the payments from O. Fundusz to the banks.

The Polish tax authorities considered that the sub-participation agreements did not constitute the exempt supply of credit. Notably, the loans were not assigned or transferred to O. Fundusz and O Fundusz was

only entitled to receive payments from specified loans and could not pursue the banks for further payment if the debtors defaulted.

These arguments put forward by the Polish tax authorities led the Advocate General to find that O. Fundusz was providing a risk management service which did not have the typical indicators of a loan, and therefore, the AG considered that the service of O. Fudusz should be subject to VAT.

The CJEU reached a different conclusion and applied a 'substance over form' analysis. It found that the banks were clearly making an exempt supply of credit in the making of the loans to customers, and in taking on the risk and reward of the loans, O. Fudusz was also making an exempt supply of credit. Effectively, O. Fudusz was making capital available in return for renumeration (the hallmark of the provision of a loan) and the sub-participation did not change this.

O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O S.A (CJEU Case C250/21)

Lecture 4

2.3.2 Medical services connected with insurance policy

The CJEU held that medical services provided in connection with an insurance policy did not qualify for exemption, as the actual services supplied did not qualify as medical care.

CIG Pannónia Életbiztosító Nyrt is an insurance company governed by Hungarian law. Since 2012 the company marketed and sold a health insurance product, subject to certain conditions, to provide the insured person medical care abroad in relation to five serious illnesses.

The insurance company entered into a contract with Best Doctors España SAU, a Spanish company to provide two services:

1. Based on documentation provided to the Spanish company, Best Doctors España SAU would review the insured person's medical information to confirm their diagnosis and so also their entitlement to the insurance services (the InterConsultation Service);

2. Where it was concluded that the insured person was covered by the insurance product, Best Doctors España SAU would make the appropriate plans abroad. This included making medical appointments, organising treatment, and arranging accommodation and travel (FindBestCare Service).

While Best Doctors España SAU was not responsible for covering transport and accommodation costs or health care costs.

Between October and December 2012, Best Doctors España SAU issued three invoices to the Hungarian insurance company but did not account for VAT. The company believed that the consultation service, as well as the arranging of medical care were exempt medical services (Article 132(1)(c) of the VAT Directive).

The Hungarian tax authority believed that the company was liable to account for VAT under the reverse charge mechanism and raised assessments for underdeclared VAT. It argued that both the review service and arranging of medical care were "indirectly linked to the therapeutic aim, with the result that they cannot be exempt from VAT under Article 132(1)(c) of the VAT Directive".

The Supreme Court in Hungary decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

> 'Must Article 132(1)(c) of [the VAT Directive] be interpreted as meaning that a service used by an insurance company is exempt from VAT where the purpose of the service is:
>
> - to verify the accuracy of a diagnosis of a serious illness with which the insured has been diagnosed; and
>
> - to seek the best medical care available to treat the insured; and
>
> - where included in the cover offered by the insurance policy and at the request of the insured, to arrange provision of the medical care abroad?'

The CJEU confirmed that in order to be exempt, the services must:

- constitute "provision of medical care"; and
- be carried out "in the exercise of the medical and paramedical professions as defined by the Member State concerned".

The CJEU found that the:

- InterConsultation Service did not relate directly to the restoration of health, but instead simply enabled CIG Pannónia Életbiztosító Nyrt to establish whether the person was covered under the insurance product;
- FindBestCare Service was the provision of a logistical or administrative service, and not the "provision of medical care".

CIG Pannonia Eletbistosito Nyrt (CJEU Case C-458/21)

Lecture 5

2.3.3 Umbrella company did not supply exempt medical care

In *Mainpay Ltd v HMRC [2022] EWCA Civ 1620 (09 December 2022)* the Court of Appeal held that supplies made by an umbrella company which employed consultants and GPs did not fall within the VAT exemption for medical care and were instead taxable supplies of staff.

Mainpay employed consultants and GPs which it supplied to an intermediary agency and which in turn supplied the doctors to various

clients (usually NHS trusts). Both the FTT and UT had decided in HMRC's favour that Mainpay's services did not fall within the scope of the exemption for medical care. The taxpayer appealed to the Court of Appeal.

The Court of Appeal was satisfied that there was nothing conceptually wrong with the approach of the FTT in asking whether there was a supply of staff or a supply of medical services. Case law made clear that there was a valid distinction between supplies of staff on the one hand, and supplies of services comprising of what the staff actually do, on the other.

Similarly, when looking at whether there was a supply of staff or medical care there was no issue with the approach of the FTT in considering whether consultants worked within a framework of control set by NHS trusts. This framework of control was one factor relevant to the commercial and economic reality of the supplies Mainpay made to the intermediary agency.

The Court of Appeal went on to consider the meaning of medical care as established in the relevant case law on exemption. This case law suggested that for exemption to apply the services had to have a therapeutic aim and to consist of diagnosis, treatment or cure of disease or ill-health.

Applying these principles to the facts of the case, the Court concluded that the commercial and economic reality of the arrangements was that Mainpay provided supplies of staff and not medical care to the intermediate agency.

The Court of Appeal also rejected arguments from Mainpay concerning the purpose of exemption which included the contention that VAT charged on Mainpay's services would have the effect of increasing VAT in the supply chain. Consequently, Mainpay's appeal was dismissed.

Mainpay Ltd v HMRC [2022] EWCA Civ 1620

Lecture 6

2.3.4 Consultation on VAT treatment of fund management

On 9 December 2022, HMRC and HMT launched a consultation on proposed reform of the VAT rules on fund management to improve legal clarity and certainty. This consultation closes on 3 February 2023.

> "At Budget 2020, the Government announced a wide review of the options for reforming the VAT treatment of fund management services. This technical consultation sets out proposals for reform of the VAT rules on fund management. These reforms are not intended to result in policy change but are intended to improve the legislative basis of the VAT treatment of fund management. The consultation seeks input on whether the proposed changes achieve the objective of codifying the existing policy to give legal clarity and certainty."

Chapter 2 sets out the proposal:

> "to codify current UK policy for the VAT treatment of fund management (based on UK law, retained EU law, general principles, guidance and a body of case law) into UK law. This legislation would establish the VAT liability of a supply of fund management without requiring reference to other sources of case law and guidance, providing certainty and clarity, simplifying the process considerably.
>
> Under this approach, the VAT treatment of fund management in the UK will not change significantly for those fund managers who either currently:
>
> (i) rely on UK legislation, or
>
> (ii) the direct effect of EU law. This is because the government intends to:
>
> a) retain the list of exempt fund types currently comprising Items 9 and 10 (of Group 5, Schedule 9 of VATA). This aims to support the UK fund management industry that currently utilise these provisions and do not meet the SIF criteria. However, it is not intended that this list of exempt fund types will be expanded in future. Items 9 and 10 are retained purely to ensure continuity of treatment for existing funds.
>
> b) make legislative changes to bring relevant case law and guidance into UK law. In doing so, the government will provide certainty in VAT treatment of fund management by establishing defined criteria to determine which funds are entitled to the SIF exemption, alongside the existing list of funds in VATA.
>
> Under this approach, the following criteria for a fund to be considered a SIF would be legislated for:
>
> a) the fund must be a collective investment;
>
> b) the fund must operate on the principle of risk-spreading;
>
> c) the return on the investment must depend on the performance of the investments, and the holders must bear the risk connected with the fund; and
>
> d) the fund must be subject to the same conditions of competition and appeal to the same circle of investors as a UCITS (Undertakings for Collective Investment in Transferable Securities), that is funds intended for retail investors.
>
> *https://www.gov.uk/government/consultations/vat-treatment-of-fund-management-consultation*

2.4 Zero-rating

2.4.1 Children's face masks

HMRC has published a business brief and updated its VAT notice to clarify that facemasks are regarded as clothing for VAT purposes.

Therefore, children's facemasks can in principle qualify for the zero-rate of VAT.

To qualify, masks must be specifically designed and held out for sale for young children.

VAT Notice 714
Revenue & Customs Brief 11/2022

2.4.2 VAT Energy Saving Materials and Grant Funded Heating

New chapter added on the Government Spring Statement 2022 announcement with effect from 1 April 2022 concerning the zero rate of VAT and a reversal of the 2019 restrictions.

VENSAV2080

Update to the guidance on energy saving materials concerning legislative changes applying to Great Britain with effect from 1 October 2019 until 31 March 2022 and continuing to apply in Northern Ireland.

VENSAV3020/ 3270

2.5 Lower rate

Nothing to report.

2.6 Computational matters

2.6.1 Best judgement not applied

Georgiou & Co Limited ran cash only fish and chip shops. Shares in the company were initially owned equally between Mr Georgiou, his wife and his parents but later, following the death of his father in 2014, Mr Georgiou's shareholding increased to 50%.

The business ceased trading on 18 November 2017 and went into a Creditors' Voluntary Liquidation on 23 March 2018.

HMRC commenced a VAT enquiry, later concluding through cash reconciliations that cash sales and purchases exceeded the corresponding figures on the `VAT return and till Z readings did not show dates nor times.

Following an enquiry, HMRC issued 'best judgement' VAT assessments for periods 03/14 to 03/16. These totalled some £141,000 for under-declared output tax and were based on average transaction values as well as the numbers of transactions. HMRC also issued a deliberate behaviour penalty close to £85,000 and a personal liability notice to Mr Georgiou

Following on from this, corporation tax assessments were issued covering underdeclared profits for the accounting periods ending 31 March 2014, 2015 and 2016 for £230,000 and a determination notice for the period

ending 31 March 2017 for £69,000. The Corporation Tax assessments and penalties included amounts attributable to a charge under the "loans to participators" provisions of s.455 CTA 2010.

Mr Georgiou argued that "he inherited a failing and loss-making business, tried very hard to turn it round, but was ultimately unable to do so".

HMRC argued that Mr Georgiou "systematically and deliberately" supressed sales in order to evade VAT and Corporation Tax and appropriate the undeclared profits for his own use.

Decision

The First Tier Tribunal found that HMRC failed to fulfil their burden of proof to show that their VAT assessments had been made using 'best judgement'.

The Tribunal concluded that it was not reasonable to use HMRC's sampling undertaken on just two nights. These two nights failed to reflect changes that took place in the business over the four-year period, or the seasonal fluctuations that affected the business through each year.

HMRC's calculations included arithmetic errors and overlooked the reduction in the number of shops owned by the company over the period of the assessment. Further, some bank deposits were not queried with the taxpayer and indeed it was known that some of these deposits represented rent rather than sales.

The VAT assessments had not been raised with best judgement and so the corporation tax assessments, penalties and personal liability notice were not valid. Further, as HMRC had not provided evidence that the taxpayer took any money for his own use, the s.455 charge did not apply.

The appeal was allowed.

Chrisovalandis Georgiou, Ninos Koumettou (Liquidator) of Georgiou & Co Ltd v HMRC (TC08660)

Lecture 7

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

Nothing to report.

2.9 Agency

2.9.1 Uber settles all outstanding VAT claims

In *Uber BV and others v Aslam and others 2021 UKSC 5* the Supreme Court found that Uber taxi drivers are workers for employment law purposes rather than independent contractors.

This decision called into question the VAT implications of the agency structure used by Uber. The structure of Uber's arrangements was that the taxi drivers would be responsible for accounting for VAT on the actual services of transportation (in practice however, many taxi drivers operate under the VAT registration threshold.

Following the Supreme Court decision, it has been confirmed that Uber has settled all outstanding VAT claims such that the VAT position now matches the employment tax position with Uber acting as principal.

Uber BV and others v Aslam and others 2021 UKSC 5

https://www.sec.gov/ix?doc=/Archives/edgar/data/1543151/000154315122000029/uber-20221101.htm

It is understood that UBER are now using the Tour Operator Margin Scheme (TOMS) to account for VAT on their margin of bought in and resold transport services. So whilst acting as principal they have the same VAT liability as private operators who continue to account for VAT on their agency fee.

Following the UBER decision, it is understood that Transport For London contacted all London operators and encouraged them to follow the terms of their London licence and act as principal. This would put them on the same footing as UBER – presumably they are also adopting TOMS.

Operators outside of London are not governed by the same licence law as London firms. UBER are however taking action against Sefton Council to establish whether licences outside of London should be operated on the same basis i.e. operators as principal.

Lecture 8

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

Nothing to report.

2.12 Other supply problems

2.12.1 Vouchers purchased from a concession in Harrods

In *Lucky Technology v HMRC [2022] UFTT 00366 (TC)* (22 September 2022) the First-tier Tribunal held that VAT could be recovered on the purchase of vouchers from a concession in Harrods.

The case brings together two areas of VAT law which are notoriously complex and often the subject of Tribunal decisions – the VAT treatment of vouchers and VAT recovery when a VAT invoice is not held. In addition to the difficult VAT technical analysis, the facts of the case are similarly complicated, which led the Tribunal to open with the statement '*this decision comes with a caveat: The decision is based on inadequate evidence and may well not reflect the reality.'*

The appellant Lucky Technology Limited (Lucky) bought and sold vouchers. During 2016 it bought vouchers for use on the online gaming platform Steam from a concession in Harrods (DSG Retail aka Dixons / Currys). The vouchers were purchased over the counter and the till receipts were silent on VAT. Lucky recovered the VAT on the vouchers it purchased. To support the VAT claim by Lucky, the accountant of Lucky produced a spreadsheet setting out the VAT incurred, sent this to Harrods and Harrods produced a summary invoice showing VAT at 20%. These transactions ran from December 2015 to April 2016 and HMRC allowed the recovery of this VAT by Lucky.

However, for transactions from May 2016 onwards Harrods stopped responding to the request for VAT invoices and (when eventually received) the bulk invoices showed VAT at 0%, but Lucky continued to reclaim input tax in the same way. HMRC refused to accept the claim and it is this input tax claim that formed the basis of the Tribunal decision.

The first point was whether VAT was properly charged on the sale of the vouchers by Harrods. The rules in respect of accounting for VAT on vouchers has since changed, but at the time, the treatment depended on whether the vouchers were 'single' or 'multipurpose' vouchers, and, if the vouchers were multipurpose vouchers, the VAT treatment depended on whether Harrods was acting as principal or agent in the supply chain.

The Tribunal found that the vouchers did not fall to be single purpose vouchers, as they could be used to purchase games online or computer hardware (although these are both standard rated for VAT, the fact that different products could be purchased was enough to mean the vouchers did not fall to be 'single purpose').

It was therefore concluded the vouchers were multipurpose retailer vouchers. This led to the question of the role of Harrods in the supply chain and whether it was acting as an agent of Steam in supplying the vouchers to Lucky or principal. This was relevant because VAT is not chargeable on the *first issue* of retailer vouchers. If Harrods was supplying the vouchers only as Steam's agent, then the supply of the vouchers by Harrods was not a subsequent supply but rather still be the first issue of them by Steam and thus VAT would not be chargeable. However, if Harrods was acting as principal and not as Steam's agent, then the supply of the vouchers by Harrods would be subject to VAT. The Tribunal assessed the terms of the concession arrangement and concluded that Harrods was acting as principal, and thus, the VAT charged to Lucky was properly charged.

Having decided that there was a taxable supply the question then was whether the company could recover the VAT although no VAT invoice had been issued.

The Tribunal was clear that HMRC should have used its discretion to allow the company to recover the input tax even though Harrods had not accounted for the output tax, saying *'we do not accept that Harrods' actions in its dealings with HMRC should properly dictate whether or not the appellant, who has no control over Harrods, is entitled to reclaim input VAT'.* The fact that Lucky did not hold a VAT invoice did not mean it had not incurred and paid VAT on the supplies.

Lucky Technology v HMRC [2022] UFTT 00366 (TC)

Lecture 9

2.12.2 Reverse charge must be operated

Added a note to remind businesses they are still required to operate the reverse charge where it applies even though it is no longer a requirement (since 1 July 2022) to submit a reverse charge sales list. It also notes that the legislation (in VATA 1994, ss 65–66) enabling penalties for inaccuracies in and failure to submit such a sales list remains in place despite the requirement to submit such a list having been removed.

VATREVCHG13000

2.12.3 Cash accounting not available

HMRC has updated VAT notice 731 to explain the interaction of the cash accounting scheme and the domestic reverse charge.

VAT Notice 731 confirms that businesses cannot use the cash accounting scheme for supplies of goods and services that are subject to one of the domestic reverse charges. Businesses are directed to VAT Notice 735 and, for supplies of building and construction services, to the relevant HMRC guidance, to find out if they need to apply the relevant VAT reverse charge.

VAT Notice 731

2.12.4 Retail vouchers given away free to employees

In GE Aircraft Engine Services Ltd v HMRC (Case C-607/20) (17 November 2022) the CJEU held that no deemed supply of services arose for VAT purposes on vouchers given away free of charge by a company as part of its employee recognition scheme.

The taxpayer was a UK business operating in the UK in the aircraft manufacturing sector and was part of the international General Electric group. The group set up a programme called "Above and beyond" under which employees could nominate colleagues they deemed deserving of a reward for performance. One category of reward offered was retail vouchers.

During the period in question transfers of retail vouchers subsequent to their issue were typically treated as supplies of services subject to VAT (the voucher rules were subsequently amended on an EU-wide basis from 1 January 2019). In addition, the legislation required (in simple terms) a deemed supply to be accounted for when bought-in services were made available for use privately or otherwise outside the business without charge.

The central question was therefore whether – when the vouchers were given away free of charge – the taxpayer was obliged to account for VAT on a deemed supply of services.

Since the vouchers were given away in the context of a programme designed to recognise and reward the most deserving and high-performing employees, the Court decided they were not supplied for purposes other

than those of the business. Consequently, a deemed supply did not arise, and the taxpayer was not required to account for VAT.

The Court was satisfied that this conclusion did not violate the principle of fiscal neutrality. The consumption of the employees was not untaxed because when the retail vouchers were used to purchase goods or services from a retailer, the retailer would then declare output tax.

The CJEU was able to provide a ruling in this UK dispute since under the Withdrawal Agreement it continued to have jurisdiction to give preliminary rulings on requests from courts and tribunals made before the end of the transition period (31 December 2020).

GE Aircraft Engine Services Ltd v HMRC (Case C-607/20)

Lecture 10

2.12.5 Online marketplaces or sales direct to UK customers

HMRC has recently issued new guidance to be used to check when a business needs to pay VAT if it sells goods using an online marketplace or direct to customers in the UK.

https://www.gov.uk/government/collections/selling-goods-using-an-online-marketplace-or-direct-to-customers-in-the-uk

3. LAND AND PROPERTY

3.1 Exemption

Nothing to report.

3.2 Option to tax

3.2.1 Option to tax notifications

We understand that following a consultation with members of the Land & Property Liaison Group, HMRC has decided to proceed with changes to the administrative process for option to tax notifications.

The administrative changes consulted on were as follows:

- HMRC to stop issuing receipt letters in response to notifications (with HMRC confirming that the automatically generated e-mail response (where a notification is submitted via e-mail) will constitute evidence of the notification date)

- HMRC to cease processing requests for confirmation of existing options to tax, save for where the effective date of the option is likely over six years ago or the request is made by an appointed LPA receiver or insolvency practitioner.

We understand that HMRC will implement the above changes with effect from 1 February 2023.

STOP PRESS: This has now been confirmed in R&C Brief 1/2023 published on 11 January 2023.

https://www.gov.uk/government/publications/revenue-and-customs-brief-1-2023-changes-in-processing-option-to-tax-forms-by-the-option-to-tax-national-unit

Lecture 11

3.3 Developers and builders

3.3.1 Buildings and construction domestic reverse charge

The overview and section 2 have been updated to include information about the VAT domestic reverse charge.

VAT Notice 708

3.3.2 Domestic reverse charge technical guide updated

HMRC updated its reverse charge technical guide on construction with various additions and amendments, including (but not limited to):

- New content on scaffolding;

- Updated content on end-user exemption;

- Updated content on labour only construction services vs supplies of staff;

- Updated content on construction services supplied with other goods and services;

- Updated the section 'Scaffolding on zero-rated new build housing' to confirm that there will be transitional period up to 1 February 2023 where businesses can use either reverse charge accounting or normal VAT rules.

https://www.gov.uk/guidance/vat-reverse-charge-technical-guide

Lecture 12

3.3.3 Update guidance on village halls and similar buildings

Updates were made by HMRC to Notice 708 on when a building is a village hall or similar for the purposes of the relevant charitable purpose (RCP) rules (see paragraph 14.7.4 of the notice). The notice no longer refers to a requirement for a charity to have trustees drawn from representatives of local groups who intend to use the hall. This condition appeared questionable following cases such as *Caithness Rugby Football Club and Greenisland Football Club.* The guidance now says that to be a village hall or similar the following conditions must apply:

- It must be constructed and managed by a charity

- It must be operated on a non-commercial basis for the benefit of the local community as a village hall or similar

- It must be used solely to provide social or recreational facilities for a local community (solely meaning 95%)

Further guidance is provided on each of these points in the VAT Notice.

VAT Notice 708

Lecture 13

3.4 Input tax claims on land

Nothing to report.

3.5 Other land problems

3.5.1 Change of use charge

Update to the guidance to clarify that a 'change of use' charge is triggered where the 'entire interest' in a building is disposed of, irrespective of whether the purchaser uses it for a qualifying purpose.

VCONST21400

3.5.2 Disposal of 'entire interest'

Update to the guidance on what constitutes the disposal of the 'entire interest' in a building in the context of sale and leaseback transactions following the Supreme Court decision in Balhousie Holdings Ltd [2021] UKSC 11.

A sale and leaseback transaction will not constitute the disposal of the 'entire interest' in a building for these purposes where all of the following apply:

- the property is sold, with an immediate leaseback in place, which is a seamless transaction with no time lapse;
- the lease must be for the remaining ten-year term from the original acquisition date or longer;
- the property must be continually used / operated for a qualifying purpose, meaning the business suffers no break in trade during the sale and leaseback.

VCONST21500

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 Altering place of supply of services

In *Climate Corporation Emissions Trading GmbH v Finanzamt Österreich* (Case C-641/21) the CJEU held that the place of supply of services cannot be altered in disregard of the wording of Article 44 of Directive 2006/112/EC on the grounds that the supplier knew, or should have known, that the supply involved participating in a chain of transactions that involved VAT evasion.

In 2010, the Austrian company sold greenhouse gas emission allowances to a German company, with the place of supply of the services being Germany, where the recipient belonged.

However, the Austrian tax authorities argued that Climate Corporation Emissions Trading GmbH was supplying goods and that the German company was a 'missing trader'. The Austrian tax authorities argued that Climate Corporation Emissions Trading GmbH knew, or ought to have known, that the allowances would be used for tax evasion. As a result, the Austrian tax authorities sought to tax the supply in Austria where the supplier belonged.

The Austrian courts found that the supply was actually one of services, not goods, and asked the CJEU to whether the place of supply of those services by a taxable person established in an EU member state to a taxable person established in another member state could be deemed to be the supplier's member state where that transaction involves VAT evasion

The CJEU found that "the place of supply of services cannot be altered in disregard of the clear wording of Article 44 of the VAT Directive on the ground that the transaction at issue is vitiated by VAT evasion." Member States can take steps to ensure that the correct VAT is collected and prevent evasion, but those steps must not go beyond what it needed to attain such objectives.

Climate Corporation Emissions Trading GmbH v Finanzamt Österreich (CJEU: Case C-641/21)

Lecture 14

4.2 Where is the supply of services?

4.2.1 Cross-border supply of social care

Momtrade Ruse OOD, a Bulgarian company, provided outpatient social services in the form of personal carers, social assistants and home help for elderly people in Austria and Germany. The place of supply for this B2C service was Bulgaria.

Article 132(1)(g) of the EU Principal VAT Directive provides a a VAT exemption for services closely linked to welfare and social security work

that are supplied by a body that is "recognised by the Member State concerned".

The issue in this case was when applying this condition which was the "Member State concerned".

In the Advocate-General's opinion:

- The Member State that is the place of supply must determine whether the supply is "closely linked to welfare and social security work";

- The mere fact that a commercial company is registered as a provider of social services with a state agency would not mean that the company is "devoted to social wellbeing";

- "the Member State concerned" was the State where the services were carried out and whose social welfare systems generally paid for those services. Ion this case that was Austria and German,

Momtrade Ruse OOD (CJEU A-G: Case C-620/21)

4.3 International supplies of goods

4.3.1 Trader support service extended

Following Brexit, the UK government established the trader support service to help businesses with declaration requirements when moving goods between Great Britain and Northern Ireland.

The service is available free of charge provided businesses have signed up. It offers education, training and advice about the changes to the way that goods move under the Northern Ireland Protocol and the service can complete customs and safety and security declarations on a business' behalf where these are required for movements between Great Britain and Northern Ireland.

The Government has now announced a commitment to this service is being extended until December 2023.

https://www.gov.uk/government/news/support-service-for-northern-ireland-traders-extended-for-a-year

Lecture 15

4.3.2 Calculating the VAT value of imported goods

On 3 November 2022 HMRC published guidance on working out the VAT value using the customs value of imported goods.

https://www.gov.uk/government/collections/working-out-the-customs-value-of-your-imported-goods

4.3.3 Update to National Export System guidance

Update to the guidance on the procedures available under the National Export System (NES) to include details of the Customs Supervised Exports scheme and Entry into Declarants Records process.

VEXP40200

4.3.4 Strict compliance obligations of inward processing relief

In *Thyssenkrupp Materials (UK) Limited v HMRC* [2022] UKFTT 443 (TC) (30 November 2022) the FTT decided that a failure to provide accurate and complete information to HMRC in relation to a quantity of goods on which inward processing relief (IPR) had been claimed gives rise to a customs debt, not just in relation to that quantity of goods, but on all the goods covered by the relevant bill of discharge report. The decision was made on the basis that it was consistent with the CJEU judgment in *Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg* (Case C-262/10) (‘*Döhler’*).

The appeal by Thyssenkrupp was against a decision by HMRC to issue a C18 Post Clearance Demand Note in the amount of £8,889,275.43. The HMRC letter accompanying the C18 included the following words: “failure to comply with an obligation arising in respect of goods liable to import duties, from the use of the customs procedure under which they were placed”, which are very similar to the words used in Community Customs Code, Article 204.

Inward processing relief (IPR) was the customs procedure which Thyssenkrupp had been authorised by HMRC to use. The C18 Demand was issued because HMRC considered Thyssenkrupp had breached the IPR conditions by failing to submit accurate bills of discharge which satisfactorily demonstrated the disposal of the goods.

Thyssenkrupp had complied with the requirement to submit bills of discharge to HMRC quarterly in an Excel spreadsheet format. There was a mismatch, however, between the data that had been submitted on the CHIEF system and the data that was submitted in Excel spreadsheet format. The relatively large amount of the C18 Demand relates to a claim by HMRC that a single error on a single row of a bill of discharge spreadsheet schedule incurs a customs debt, not just in respect of the import duties relating to that row, but in respect of the import duties relating to all the rows in the relevant bill of discharge.

HMRC made the point that if an entry on the CHIEF system is incorrect, and the entry in the bill of discharge is correct, Thyssenkrupp should have made a post clearance amendment to correct the incorrect entry on the CHIEF system and should have referred to the post clearance amendment in the relevant bill of discharge. The FTT noted that, although a failure to make a post clearance amendment in relation to an entry on the CHIEF system is not an omission on a bill of discharge, the absence of the post clearance amendment meant that it was impossible for HMRC to reconcile the data and therefore it was correct for HMRC to regard the data as inaccurate or incomplete.

One of the arguments presented in support of Thyssenkrupp was an argument that measures to be adopted by Member States to ensure respect for the Community Customs Code must comply with the principle of proportionality. The CJEU judgment in *Döhler Neuenkirchen GmbH v Hauptzollamt Oldenburg* (Case C-262/10) was referred to in support of the argument.

The FTT did not, however, accept the argument and noted that in the same judgment the CJEU had confirmed that in circumstances where the IPR conditions are not met the obligation to pay customs duties is not a penalty. The FTT considered that the CJEU judgment supported the approach taken by HMRC and dismissed the appeal.

Thyssenkrupp Materials (UK) Limited v HMRC [2022] UKFTT 443 (TC)

Lecture 16

4.3.5 Cross-border sales of luxury vehicles

Luxury Trust Automobil GmbH, an Austrian company whose business includes cross-border brokering and cross-border sales of luxury vehicles.

In 2014, the company purchased vehicles from a UK supplier and sold them to a company in the Czech Republic. In each case, the vehicles arrived directly from the supplier in the United Kingdom to the recipient in the Czech Republic.

Adopting the triangulation rules, Luxury Trust Automobil GmbH could avoid registering for VAT in the Czech Republic, with the customer in the Czech Republic being responsible for accounting for the VAT provided that the following appeared on the invoices:

- 'Exempt Intra-Community triangular transaction' (Article 226(11) of the VAT Directive); and
- "Reverse charge" (Article 226(11a) of the PVD.)

The invoices issued by Luxury Trust Automobil GmbH included the former but not the latter.

The Czech company was classified by the Czech tax authorities as a 'missing trader' and could not be contacted by the Czech tax authorities. Further, the company had not declared or paid VAT in the Czech Republic on the triangular transactions.

The CJEU ruled that:

> "the wording of Article 197 of the VAT Directive, in conjunction with Article 226(11a) thereof, requires an express reference to a reverse charge, but there was no such reference in the present case."

Omission of these words meant that the triangulation rules were not satisfied and further, the invoices could not be subsequently corrected by issuing replacement invoices.

With Luxury Trust's Austrian VAT registration number on the invoice, the company was liable to acquisition VAT in Austria.

Luxury Trust Automobil GmbH (CJEU: Case C- 247/21)

Lecture 17

4.4 European rules

4.4.1 EU Commission ViDA reforms published

The EU Commission has published its long-awaited legislative proposals on VAT in the Digital Age (ViDA).

The package has three main pillars:

1. Single VAT registration – for movements of own stock prior to B2C e-commerce sales

2. Digital reporting requirements – including mandatory B2B intra-EU digital reporting requirements and mandatory intra-EU e-invoicing

3. Extension of deemed supplier obligations to short-term accommodation and transport platforms

These changes are expected to be phased in between 2023 and 2028.

A feedback period was opened for a minimum of 8 weeks.

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13186-VAT-in-the-digital-age_en

4.5 Foreign refund reclaims

4.5.1 Authorised persons list expanded

Wording added to expand the list of who can constitute an 'authorised person' for the purpose of authorising the issue of a VAT66 (Certificate of status of overseas taxable person) by email. The authorised person list is expanded from a director or secretary of the business to include a sole trader, partner or trustee.

VROBP6010

4.5.2 Refunds of VAT for non-UK businesses sections updated

The sections "Electronic submission of claims" and "Postal claims" have been added. Removed the section "How UK and Isle of Man businesses can claim EU VAT".

VAT Notice 723A

4.5.3 Claiming refunds in Northern Ireland or the EU.

Updated section 5.9 to clarify that where the taxable amount exceeds £200 for fuel and £750 for all other goods and services, scanned copies of all invoices and import documents must be attached to your application.

https://www.gov.uk/guidance/claim-vat-refunds-in-northern-ireland-or-the-eu-if-youre-established-in-northern-ireland-or-in-the-eu#full-publication-update-history

5. INPUTS

5.1 Economic activity

Nothing to report.

5.2 Who receives the supply?

5.2.1 Holistic approach over the recipient of a supply

In Ashtons Legal v HMRC [2022] UKFTT 422 (TC) (15 November 2022), the FTT decided that a partnership, rather than the company named on the lease documentation and invoices, was the recipient of a supply of premises by a landlord. The FTT considered the economic and commercial reality of the arrangements and concluded that the supply was made to the partnership, which was entitled to treat the VAT charged by the landlord as input tax.

The case concerned a tripartite arrangement involving a landlord, a partnership (Ashtons Legal) and a company (Ashtons Legal Limited). The only issue was whether the supply was from the landlord to the partnership, or, as HMRC argued, from the landlord to the company.

The FTT did not agree with HMRC that the lease documentation determined the VAT treatment. The FTT decided that it was bound by the Supreme Court decision in Airtours Holiday Transport Ltd v HMRC [2016] UKSC 21 to look objectively at the economic and commercial reality.

The company was dormant. It did not have any assets or a bank account or employees, and it had never traded. The partnership was a firm of solicitors and the leases had been negotiated so that it could occupy the premises for the purposes of its business, which in fact it did.

Under the Law of Property Act 1925, a partnership can enter a lease in the name of no more than four partners. It was only to address this point that the company was named on the lease documentation.

The lease documentation prohibited the creation of a landlord and tenant relationship between the company and the partnership, and the partnership paid the rent to the landlord.

HMRC argued that the supply was made by the landlord to the company and suggested that the company could have opted to tax the premises and made an onward supply of the leased premises to the partnership. The FTT noted, however, that this suggestion would have been impossible to implement because:

- it ignored the Law of Property Act 1925 point referred to above – the partnership consisted of more than four partners;

- the contractual lease documentation specifically prohibited the creation of a landlord and tenant relationship between the company and the partnership.

The FTT found that the facts in Ashtons Legal were very similar to those in Lester Aldridge v Customs & Excise Commissioners [2004] 18864. Both cases concerned firms of solicitors taking leased office premises in the names of companies because of the Law of Property Act 1925 point referred to above. The FTT followed the decision in Lester Aldridge, deciding that the supply was made from the landlord to the partnership, and that the partnership was entitled to treat the VAT charged by the landlord as input tax.

Ashtons Legal v HMRC [2022] UKFTT 422 (TC)

Lecture 18

5.2.2 Reclaim of input tax by purchaser

Summary – Stock was transferred as part of a transfer as a going concern and so the input tax claim in relation to the stock was disallowed.

On 6 October 2015, Apollinaire Ltd was incorporated as a men's outfitters, and registered for VAT from that date. The company's sole director and shareholder was Benny Hashmi.

Benny Hashmi had a history of setting up companies, where he acted as director. The companies failed to submit returns and/or had unpaid tax debts and were then dissolved.

One such company was Snow Whyte Limited. The company traded under the name Benny Hamish but referred to as Snow. This was incorporated in November 2010 and was supposedly owned by a Mr Singh. A VAT deregistration form was submitted to HMRC stating that Snow ceased to trade on 30 September 2015 and the company was dissolved on 2 August 2016.

HMRC's Real Time Information for PAYE showed that until 30 September 2015, Snow had 6 full-time employees including Benny Hashmi and they all commenced employment with Apollinaire Ltd on 1 October 2015, with Apollinaire Ltd also trading under the name of Benny Hamish and operating from the same premises as Snow had done. Apollinaire Ltd submitted its first VAT return covering the period 6 October 2015 to 31 January 2016, seeking a repayment of £98,191.21, due mainly to input tax claimed on stock allegedly bought from Snow.

HMRC believed there had been a transfer of a going concern from Snow to Apollinaire Ltd. The input tax claim was denied. The return was adjusted for input tax claimed on stock purchases as well as output tax errors connected with retail scheme calculations.

Initially, the company's accountants confirmed there had been a transfer of a going concern but later, with new accountants appointed, the company argued that only stock had been bought and not the business as a whole meaning that the input tax was recoverable.

Further, with Benny Hashmi's history, HMRC issued a personal liability notice as they believed the errors on the return were deliberate and there was a risk that the company would become insolvent.

The First Tier Tribunal found Benny Hashmi's evidence lacked credibility and questioned whether Mr Singh ever existed.

The First Tier Tribunal found that there was a transfer of a business as a going concern between Snow and Apollinaire Ltd, with Benny Hashmi as director, or shadow director, controlling both companies. The trade before and after Snow ceased trading was unchanged, with the same trading name, employees and premises.

No input tax was recoverable on the stock transferred and the appeal was dismissed.

Apollinaire Ltd and another v HMRC [2022] UKFTT 432 (TC)

Lecture 19

5.3 Partial exemption

5.3.1 Brexit guidance updated

Guidance updated for Brexit to explain that recovery of input tax attributable to foreign and specified supplies requires (among other things) the supplies to be made outside the UK (and not, as in pre-Brexit times, requiring the supply to have been made outside the EU too).

PE34000

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

Nothing to report.

5.8 Other input tax problems

5.8.1 Sale and leaseback agreement was a VAT invoice

In *Raiffeisen Leasing Case C-235/21 (29 September 2022)* the CJEU held that a written contract relating to a finance lease could, in principle, be regarded as a VAT invoice despite not containing all the elements formally required in VAT law. This conclusion was subject to the qualification that the contract must contain all the information necessary for a tax authority to establish whether the substantive conditions for VAT recovery had been satisfied.

A company (RED) owned land and a residential building in Slovenia on the site of which it wanted to construct a new building. RED entered into

a sale and leaseback transaction with the taxpayer (RL). This transaction was effected in two parts.

1. Under one agreement (concluded on 19 November 2007) RED was required to pay monthly lease instalments to RL. RL did not issue and invoice nor did it declare or pay VAT even though a VAT amount was included in the contract. RED recovered the VAT contending that the sale and leaseback contract represented a VAT invoice.

2. Under the second agreement (concluded on 22 November 2007) the property was sold from RED to RL. The sale contract included VAT and RED issued a VAT invoice. VAT was duly recovered by RL. Several years later the lease agreement was terminated because RED has not fulfilled its obligations under the contract and RL sold the land to a third party at a VAT inclusive price.

After several more years the Slovenian tax authority issued a decision to deny RED the right to recover VAT in respect of the sale and leaseback agreement. As this decision eliminated the risk of tax loss RL was allowed to reduce the amount of output VAT due. However, as it was established that VAT had not been paid by RL it was ordered to pay significant interest on the tax debt.

RL's contention was that the leasing contract with RED could not be classified as a VAT invoice because it did not include all the elements formally required in VAT law. Consequently, RED had never been entitled to recover input VAT and there was no risk of tax loss.

The CJEU was therefore asked to consider whether the VAT Directive (Directive 2006/112/EC, art 203) had to be interpreted as meaning that a sale and lease contract which was not followed by the issue of a VAT invoice could itself be regarded as such an invoice. If so, it also needed to consider what the contract would need to contain to be so regarded.

The Court concluded that the contract could in principle be regarded as a VAT invoice. To be so regarded, the contract would need to contain all the information necessary to be able to establish whether the substantive conditions for VAT recovery has been met. In the circumstances of the case, it was for the referring court to determine whether all the necessary information was included within the contract in question.

Raiffeisen Leasing (CJEU: *Case C-235/21)*

Lecture 20

5.8.2 Obligation to adjust VAT recovered if intended supplies not made

In *UAB 'Vittamed technologijos' (in liquidation) v State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania* (Case C-293/21) the CJEU held that there is an obligation to adjust the VAT recovered by a business in relation to capital goods if, because of a decision by the owner or sole shareholder to place the business in liquidation, there is no prospect of the capital goods being used by the business to make taxable supplies.

In 2012 and 2013, the company acquired goods and services in connection with the realisation of an international project funded by the European Union, the objective of which was to develop a prototype of a medical diagnostic and monitoring device and subsequently to place that device on the market. The company deducted EUR 87 987 of input VAT paid in respect of the supply of those goods and services which were used to make the capital goods to be used in the future.

By the time the project was completed, the company was making losses and with an absence of orders and possible future income, the sole shareholder discontinued the business, and in 2015 the company went into liquidation. As a result of this, in 2017 the Lithuanian tax authorities assessed the company for the input tax previously recovered as the capital goods produced had not been used and would never be used in the course of taxable economic activities.

Vittamed technologijos arguing that that where costs are incurred while preparing to undertake an economic activity, input tax recovery is allowed, even if that activity and subsequent taxable supplies never takes place.

The CJEU were asked by the Lithuanian courts whether, under such circumstances, the company was under an obligation to adjust deductions of input VAT.

Article 184-187 of the VAT directive refers to the adjustment mechanism required to establish a direct link between the right to deduct input VAT and the use of the goods or services. The CJEU confirmed that as the company had no intention to use the capital goods produced, the close and direct relationship was broken, meaning the adjustment mechanism must be applied.

UAB 'Vittamed technologijos' (in liquidation) v State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania (CJEU: Case C-293/21)

Lecture 21

5.8.3 Entitlement to refuse input tax claim whilst claim verified

In *DCM (Optical Holdings) Ltd v HMRC [2022] UKSC 26* (12 October 2022) the Supreme Court held that an assessment of output tax under-declared on mixed supplies made by the appellant was not time barred. The Court also upheld HMRC's power to refuse a person's claim for input tax credit whilst it is verified and to decide later to pay a lower amount than what had been claimed.

DCM was a VAT-registered business which specialised in the sale of dispensed spectacles and laser eye surgery under the name 'Optical Express'. It was partly exempt for VAT purposes and made mixed supplies for which the income had to be apportioned between taxable and exempt.

The taxpayer and HMRC had been in dispute for many years but the relevant disputes for the purposes of this appeal to the Supreme Court related to:

- An assessment for under-declared output tax made by HMRC in October 2005 and whether this was invalid on the basis it was time-barred (the time-bar challenge)

- Decisions made by HMRC in relation to various appeals to reduce VAT credit amounts below what DCM had submitted in its VAT returns which the taxpayer contented HMRC did not have the power to do (the vires challenge)

The time-bar challenge hinged on the argument that HMRC was out of time because its assessment was raised more than a year after evidence of facts sufficient to justify the raising of the assessment had come to light. DCM argued that HMRC had known 'something was wrong' with its output tax apportionment method on mixed supplies by January 2004 and had only one year from then to raise an assessment.

This argument was comprehensively rejected by the Supreme Court. It held that knowledge in this context meant actual, rather than constructive, knowledge. Moreover, the time-barring rules applied to *the assessment that HMRC had actually raised* and not another assessment that it might hypothetically have raised. HMRC had obtained the last pieces of evidence relevant to its actual assessment in a 2005 visit. Therefore, the assessment was not time-barred.

With regard to the vires challenge, DCM maintained that VATA 1994, s 25(3) mandated HMRC to pay the VAT credits claimed in DCM's self-assessed VAT returns. HMRC therefore did not have the power to refuse these credits whilst it verified the claim and to decide at a later date to reduce them.

The Supreme Court again rejected the taxpayer's arguments. It was implicit in VATA 1994, s 25(3) that HMRC's obligation to pay a VAT credit arose only once it was established that the VAT credit was due. This obligation on HMRC 'did not depend solely on the say-so of the trader'. Furthermore, the power and duty to verify claims for a VAT credit and to refuse to pay sums which were not due was implicit in the statutory statement of HMRC's duty to 'be responsible for the collection and management of VAT' (VATA 1994, Sch 11, para 1).

DCM (Optical Holdings) Ltd v HMRC [2022] UKSC 26

Lecture 22

5.8.4 Evidence required to support a claim to recover VAT

In *HMRC v NHS Lothian Health Board* [2022] UKSC 28 (19 October 2022), the Supreme Court allowed the appeal by HMRC in a relation to a claim for input tax for the period 1 April 1974 to 30 April 1997. The Supreme Court agreed with HMRC that NHS Lothian had not provided sufficient evidence to support the amount of VAT claimed.

The appeal by HMRC was against the 2020 decision by the Court of Session in favour of NHS Lothian, following decisions by the First-tier Tribunal and the Upper Tribunal in favour of HMRC. There was no dispute that NHS Lothian was entitled to submit a claim for the period. Taxpayers had until 31 March 2009 to make claims for late deduction of input tax incurred before 1 May 1997 and NHS Lothian had submitted its claim on time.

HMRC successfully argued that the Court of Session had adopted the wrong approach by regarding the establishment of a right to deduct some input tax as separate from the obligation on the taxpayer to quantify the amount it is entitled to recover.

The Supreme Court noted that it is clear from the CJEU decision in *Vădan v Agenția Națională de Administrare Fiscală—Direcția Generală de Soluționare a Contestațiilor* (Case C-664/16) that the exercise required of NHS Lothian was more than one of mere quantification.

The Supreme Court stated that: 'The FTT was therefore entitled to conclude that it is not enough for a taxpayer to show that it has engaged in business activity and has bought supplies for which it was charged VAT. The taxpayer must present either the specified documents showing the amount of input tax incurred or devise a credible alternative method by which that amount can be estimated by HMRC with reasonable certainty that the amount now being claimed was at least close to the amount that had in fact been incurred.'

The Supreme Court also considered the EU principle of effectiveness and concluded that 'there was nothing in the approach of HMRC or the reasoning of the FTT that made NHS Lothian's claim for historic input tax virtually impossible or excessively difficult, and so nothing that infringed the principle of effectiveness.'

Why it matters: NHS Lothian is one of several NHS Boards which have submitted late claims seeking to recover VAT, all of which will be affected by the decision. Although the 31 March 2009 deadline for submitting such claims has passed, the decision is of relevance to the evidence that is required to support input tax claims generally and illustrates the importance of a robust document retention policy.

HMRC v NHS Lothian Health Board [2022] UKSC 28

Lecture 23

5.8.5 VAT refund where supplier in liquidation

The company in respect of which HUMDA was the legal successor, engaged Bíró Hűtéstechnikai és Acélszerkezetgyártó Ipari Kft. ('BHA') to provide services in connection with the construction of Hungary's pavilion at the World Expo held in 2015 in Milan (Italy).

In return for those services, BHA issued nine invoices including VAT, for a total amount of approximately EUR 1,230,500. Those invoices were paid by HUMDA's predecessor, with BHA paying the VAT invoiced to the Hungarian tax authority.

During a tax inspection, the Hungarian tax authority found that, given that the provision of services related to property located in Italy, under

Hungarian legislation the VAT was not payable in Hungary and had been invoiced in error. However, BHA had gone into liquidation. Unable to obtain a refund of the VAT from the supplier, HUMDA tried to recover the VAT from the Hungarian tax authorities, which was denied.

On appeal, the referring court asked the CJEU where it was not possible to claim the amount from the supplier because it had gone into liquidation, whether it could be refunded directly by the Hungarian tax authorities.

The CJEU found that in these circumstances, the principles of VAT neutrality and effectiveness allow a taxpayer to seek a refund of VAT incorrectly charged by a supplier from the tax authorities, if obtaining the refund from the supplier would be impossible or extremely difficult.

HUMDA Magyar Autó-Motorsport (CJEU: Case C 397/21)

It should be noted that HMRC will not settle any claims for VAT improperly charged. Following the EU Withdrawal Agreement 2018 HMRC have stated that general principles of EU law will not be enforceable in the UK. Their policy is confirmed in R&C Brief 4 (2022).

Lecture 24

5.8.6 Carousel fraud - second purchaser in supply chain

In 2011, A, a trader bought a used car for his business from C, who claimed to be W, who in turn knew that C was pretending to be him.

Invoices were issued as follows:

- C issued W with an invoice for EUR 52,100.84 plus VAT of EUR 9,899.16 for the supply of the car and entered this in both his accounts and tax return;

- W issued an invoice totalling EUR 77,000, showing EUR 64,705.88 plus VAT of EUR 12,294.12. This was issued to C, who in turn forwarded it to A, who paid the full amount to C and reclaimed this input tax. C kept the full EUR 77,000 and W never entered the transaction in his accounts or tax returns.

The German tax authorities argued that A could not reclaim any input tax because he could not have been unaware of the tax evasion committed by C. A ought to have checked the identity of the other contracting party, which would have revealed that C had deliberately concealed his identity, which could have had no purpose other than to evade VAT.

However, the amount of VAT lost as a result of the fraud was less than the amount of VAT that A had tried to reclaim. Consequently, three questions were referred to the CJEU:

1. Can the second purchaser of goods be refused the right of deduction in respect of the purchase because he or she should have known that the original seller had evaded value added tax

(VAT) in the first sale, even though the first purchaser had known that the original seller had evaded VAT in the first sale?

2. If Question 1 was answered 'yes', was the refusal of the right of deduction in the case of the second purchaser limited in terms of amount to the shortfall in tax revenue caused by the evasion?

3. If Question 2 was answered 'yes', was the shortfall in tax revenue calculated

   a) by comparing the tax lawfully payable in the supply chain with the tax actually assessed,

   b) by comparing the tax lawfully payable in the supply chain with the tax actually paid, or

   c) in another way, and, if so, what way?

The CJEU concluded that:

- a second purchaser may be refused VAT recovery if they knew or ought to have known of the existence of fraud at the time of the first sale, even if the first purchaser was aware of the fraud;

- where a taxpayer does not undertake the checks reasonably required to satisfy themselves a transaction is not within a supply chain involving VAT fraud then its input VAT claim may be refused in full.

A v Finanzamt M (CJEU Case C-596/21)

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 VAT Soft drinks Levy

Wording inserted to state the VAT Soft Drinks Industry Levy policy team is responsible for VAT deregistration and registration policy. If a taxpayer is seeking policy advice on a particular case that is not covered by the relevant Manual or contained in VAT Notice 700/1 or 700/11, they should submit either a General Advice Request or a Technical Advice Request.

VATDREG01150, VATREG01300, VATDSGA01150

6.2.2 Registration and deregistration thresholds

The government announced that the VAT registration and deregistration thresholds will not change for a further period of 2 years from 1 April 2024.

This measure maintains the VAT registration threshold at £85,000 and the deregistration threshold at £83,000 (thresholds which have been in place since 1 April 2017).

https://www.gov.uk/government/publications/autumn-statement-2022-documents

6.3 Payments and returns

6.3.1 Reverse charge sales list and amendments

Update to the guidance on the reverse charge sales list (RCSL) to confirm that from 17 October 2022, businesses are no longer able to submit a sales list or make any amendments via the online portal.

VATREVCHG31000

6.3.2 MTD – using compatible software

A number of VAT notices have been updated to notify that taxpayers must keep digital records and submit returns using software that works with Making Tax Digital for VAT.

VAT Notices 700, 700/12, 700/21, 700/56

6.3.3 Default surcharge – no reasonable excuse

Kattrak International Limited paid its VAT for the period 06/20 late. As this was the company's first default, no surcharge was payable, but a surcharge liability notice was issued with a surcharge liability period running until 30.6.21.

For the next three quarters, the VAT was again paid late, but no penalty was charged as the figure calculated was less than £400. Each time the surcharge period was extended.

The VAT due for the 06/21 quarterly VAT period was paid in two parts, both were paid late on 20.8.21 and 25.1.22 respectively. As the fourth default, a surcharge of 10% of the late VAT (£2,850.03) was charged and the surcharge period extended to 30.6.22.

Late again in the period to 09/21, the surcharge rate rose to 15% and the surcharge period extended to 30.9.22.

Both parties agreed that the surcharges were properly imposed, but Kattrak International Limited argued that the company had a reasonable excuse for the failure to make the payments for the 06/21 and 09/21 quarterly VAT periods on time. The company stated that as a result of previous issues with an employee committing fraud, there was only one person in the company authorised to make VAT payments. Further, the company stated that it had tried to set up a direct debit to settle the VAT due but the mandate was cancelled, probably by HMRC.

Decision

The First Tier Tribunal concluded that 'on the balance of probabilities, that it was not HMRC that cancelled the direct debit instruction.' It was likely that it had been cancelled by the company or its bankers.

The company should have checked that the direct debit was in place and would operate as intended. Once it was known that the 06/21 direct debit had not worked, surely the problem should have been resolved by the time the 09/21 payment fell due.

Finally, the Tribunal concluded that 'whatever the effect of Covid on the Appellant's business, there was nothing preventing the payment of VAT on time'.

With no reasonable excuse, the appeal was dismissed.

Kattrak International Limited v HMRC (TC08645)

6.4 Repayment claims

6.4.1 Refunds to Corporate Joint Committees

HMRC published a draft information and impact note on adding Corporate Joint Committees to the list of 'other bodies' that are entitled to refunds of VAT on non-business expenditure under VATA 1994, s 33(k). The changes are expected to come into effect in February 2023.

https://www.gov.uk/government/consultations/draft-legislation-the-value-added-tax-refund-of-tax-order-2023/draft-tax-information-and-impact-note-vat-refunds-to-corporate-joint-committees

6.5 Timing issues

Nothing to report.

6.6 Records

Nothing to report.

6.7 Assessments

6.7.1 Time limits for long first period

Update to clarify the applicable time limits for raising VAT assessments in respect of long first periods including the interaction with the one year 'evidence of fact' rule.

VAEC1160

6.7.2 Assessments for deregistered traders

Note added to the guidance on the circumstances that affect assessments for deregistered traders explaining that subject to time limits, VAT assessments made under VATA 1994, s 73(1) can still be issued after the date of deregistration, provided they cover periods before the date of deregistration and not periods after that date.

VAEC3530

6.8 Penalties and appeals

6.8.1 Regulatory breaches leading to a penalty

Guidance on regulatory breaches leading to a penalty updated to include failure to keep records and maintain information in electronic form.

VCP11117

6.8.2 January late payment / submission penalties and interest

A number of statutory instruments were made to bring into force the January 2023 changes to late payment / submission penalties and interest. The legislation also makes a number of consequential to the legislation to accommodate the changes.

The statutory instruments are as follows:

- The Finance Act 2009, Finance (No. 3) Act 2010 and Finance Act 2021 (Value Added Tax) (Interest) (Appointed Days) Regulations 2022 (SI 2022/1277)

- The Finance Act 2021 (Value Added Tax) (Penalties) (Appointed Day) Regulations 2022 (SI 2022/1278)

- The Finance Act 2009, Sections 101 and 102 (Value Added Tax) (Late Payment Interest and Repayment Interest) (Exceptions and Consequential Amendments) Order 2022 (SI 2022/1298)

6.8.3 Guidance on new penalty and interest regime

HMRC published new guidance on the new penalty and interest regimes for the late payment of VAT and the late submission of VAT returns. This included gov.uk guidance as well as new and updated manual pages.

CH141000, CH192000, CH193000

6.9 Other administration issues

6.9.1 Journalist can access skeleton arguments

In *Bouncylagoon Limited and Others [2022] UKFTT 361 (TC)* the First-tier Tribunal held that a BBC journalist was entitled to be provided with electronic copies of the parties' skeleton arguments in respect of appeals referred to collectively as the 'VAT Umbrella litigation'.

There are over 18,000 appellants in the VAT Umbrella Litigation. Each appellant has been compulsorily de-registered for VAT by HMRC and some are subject to other decisions such as removal from the VAT Flat-rate scheme, assessments for undeclared VAT and denial of entitlement to make an Employment Allowance deduction. HMRC's belief is that the appellants are all 'participants in an organised and contrived structure with the purpose of defrauding the Revenue by claiming tax benefits which they were not entitled to.' This is disputed by the appellants.

In advance of the hearing there was a case management hearing. The purpose of this case management hearing was to select lead cases and give directions enabling the lead cases to proceed to a hearing. It was carried out in public and had been attended remotely by a BBC journalist (Anna Meisel). Following the case management hearing, the Tribunal emailed the representatives of the parties to ask them if they had any objection to it passing on the parties' skeleton arguments and the tribunal bundle to the journalist. HMRC did not object, but the appellant's representative did.

The appellants' objection was on two grounds:

- the skeleton arguments and the documents contained within the bundle went beyond the detail that was discussed during the case management hearing

- no reasons were provided for the application beyond the fact that Ms Meisel was a journalist

The Tribunal noted that it would be difficult for an observer of the case management hearing to understand the parties' submissions and the Judge's comments on them during the hearing without the skeletons. In such circumstances, therefore, the Tribunal was satisfied that providing the skeletons to a journalist would further the principle of open justice by allowing the journalist to understand the proceedings more fully and, if they so chose, report them more accurately. Therefore, the Tribunal concluded that it would provide the journalist with copies of the skeleton arguments.

The open justice principle did not apply to the hearing bundle. This bundle (of almost 1,500 pages) contained details and correspondence referring to appellants and matters that were not chosen as lead cases and may never be the subject of a public hearing or judicial decision. The Tribunal therefore concluded that it would not provide the journalist with a copy.

Bouncylagoon Limited and Others [2022] UKFTT 361 (TC)

Lecture 25

6.9.2 New VAT Notice 733

HMRC has published VAT Notice 733 that explains the operation of the Flat Rate Scheme in detail, who can use it and how to apply to join.

VAT Notice 733

6.9.3 VAT Fulfilment House Due Diligence Scheme Manual

New manual added.

FHDDS05000 to FHDDS35240