VAT UPDATE
OCTOBER 2022

Covering material from 1st July – 30th September 2022

VAT Update October 2022

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 7 September 2022.

Where they have already been reported in this update service, they are not reproduced below.

- *Conservatory Roofing UK Ltd* (see 2.5.1): The Upper Tribunal allowed the company's appeal and has remitted the case to the First Tier Tribunal.
- *DCM (Optical Holdings) Ltd*: the taxpayer has been granted leave to appeal against the Court of Session's decisions in favour of HMRC (hearing 8 February 2022, decision awaited).
- *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.
- *Mid-Ulster District Council* (See section 2.2.1): HMRC's appeal to the Upper Tribunal allowed. Case remitted to the First Tier Tribunal.

- *Netbusters (UK) Ltd (see section 3.1.1):* Upper Tribunal dismissed HMRC's appeal. No further appeal so the decision is final.

- *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 v HMRC*: Court of Session allowed taxpayer's appeal on grounds that "no repayment" had to be the wrong answer; remitted to FTT for reconsideration of the amount; HMRC have been granted leave to appeal to the Supreme Court (hearing from 8 to 9 June 2022).

- *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

1.1.1 Financial services exemption case in the Supreme Court

The *Target Group* case concerns outsourced loan services provided to a bank. These services are described as the 'operation of individual loan accounts, processing payments received from Borrowers and the administration of Loans'. The Court of Appeal previously held that Target's services, when viewed as a whole, did not fulfil the essential functions of a financial transaction and therefore failed to qualify for the financial services exemption. On 9 August permission was granted for an appeal to the Supreme Court.

https://www.gov.uk/government/publications/vat-appeal-updates

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Local authority sports and leisure remitted to FTT

Under *Article 13* of *Directive 2006/112/EC* local government authorities are not to be regarded as taxable persons where activities or transactions in which they engage as public authorities unless their treatment as non-taxable persons would lead to significant distortions of competition.

It was not disputed that M (a District Council) was acting as a public authority when providing sports and leisure services. The issue was whether or not treating the Council as a taxable person when providing the facilities would lead to a significant distortion of competition.

The Upper Tribunal decided that in considering the matter of distortion of competition the First-tier Tribunal had wrongly interpreted *Article 13* of *Directive 2006/112/EC* and remitted the case to the First-tier.

HMRC v Mid-Ulster District Council, [2022] UKUT 197 (TCC).

2.1.2 VAT Supply and Consideration

Detail added to the table setting out the VAT treatment of types of agreements specific to the oil industry.

VATSC06530

2.1.3 Establishing identity of electronic service supplier

Regulation (EU) No 282/2011, art 9a provides a statutory framework within the EU for establishing the identity of the supplier of electronically supplied services.

In *Fenix International Limited v HMRC* the Advocate General (AG) of the CJEU looked at a UK operator of a pay-to-view social media website (known as 'Onlyfans'). Users of the website consisted of creators and fans. The fans made payments to view content uploaded by the creators. The website operator collected the payments from the fans and distributed the payments to the creators, retaining an element of the payments as its fee.

HMRC assessed the website operator on the basis that it made the supply to the fans and therefore the entire amount of the payments it collected from the fans represented consideration for that supply. HMRC referred to VATA 1994, s 47(4) and Regulation (EU) No 282/2011, art 9a in support of its position.

An argument was presented on behalf of the website operator that Regulation (EU) No 282/2011, art 9a is invalid and the First-tier Tribunal referred the question of whether Article 9a was valid or not to the CJEU.

The AG proposed that the CJEU provide an answer confirming that Regulation (EU) No 282/2011, art 9a is valid. The Advocate General indicated that nothing had been revealed by the question referred to it by the First-tier Tribunal that affected the validity of Article 9a.

Fenix International Limited v HMRC (CJEU A-G: Case C-695/20),
Lecture 1

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 'Card handling fee' additional consideration

A company (S) arranged short-term accommodation for business travel. If a business used a credit card to make a booking, S would be charged a 2.5% card handling fee, which it passed through to the business customer. It treated these payments as a 'pass through' disbursement and did not charge VAT.

The Tribunal found that the:

- credit card fees did not meet the disbursement conditions or fulfil the conditions for the finance exemption to apply;

- payment should be treated as additional compensation for the provision of reservation services and VAT accounted for.

SilverDoor Ltd v HMRC, [2022] UKFTT 233 (TC),
Lecture 2

2.3.2 Payment services between members of corporate group

In *Emerchantpay Limited v HMRC [2022] UKFTT 334 (TC)* the First-tier Tribunal held that payment services provided within a corporate group represented financial intermediation and qualified for the financial services exemption.

EMPL (the appellant) was a UK-based contracting and trading company acting as a 'payment services provider' or 'PSP'. In the marketplace, consumers would pay for goods and services by credit card, a card acquirer would collect the payment from the credit card institution and transmit it to the merchant. As a PSP, EMPL was interposed between the merchant and the card acquirer. Its role was to introduce merchants to card acquirers and a number of alternative payment methods. There were various elements to its services, including the provision of due diligence on the merchants, payment processing, support, and customer service. EMPL was remunerated by way of commission.

EMPL had three directors and no other employees. Consequently, it lacked the resources to perform the services independently. Instead, it sub-contracted the work to another member of its corporate group; EMPO. EMPO was a Bulgarian company with approximately 50 employees. There was no agreement setting out the precise scope of services that

EMPO would provide to EMPL. It was the nature and liability of these services that had become subject to a dispute with HMRC.

HMRC argued that EMPO's services were taxable and as a result were subject to the reverse charge. In contrast, EMPL claimed that they were exempt as financial intermediation under VATA 1994, Sch 9, Group 5, Item 5.

The First-tier Tribunal ultimately sided with EMPL; the services represented a single composite supply and, when viewed as a whole, the core elements were those which were essential in bringing merchant acquirers together with merchants with a view to the former providing financial services to the latter. As a result, they were exempt.

Having found for the taxpayer on the exemption point, it was unnecessary for the FTT to consider a further point raised during the appeal which was whether the assessments were out of time. EMPL had claimed that the assessments were out of time on the basis that they were not issued within one year of evidence of facts (in accordance with the requirements of VATA 1994, s 73(6)(b)).

Emerchantpay Limited v HMRC [2022] UKFTT 334 (TC)
Lecture 3

2.4 Zero-rating

2.4.1 Private ambulance service qualifies for zero-rating

In *E-Zec Medical Transport Services Ltd v HMRC* [2022] UKFTT TC 0857, the First-tier Tribunal (FTT) decided that non-emergency ambulances could qualify for zero-rating, rather than being treated as exempt from VAT.

E-Zec Medical Transport Services Ltd (E-Zec) is one of the largest providers of Non-Emergency Patient Transport Services (NETPS) in the UK. It provided these services on behalf of various NHS trusts around England to transport sick and injured individuals to and from hospital and doctor's appointments through its fleet of over 500 vehicles.

Generally, the vehicles were configured with eight seats, to allow the vehicles to have the ability to carry wheelchairs. The provision for wheelchair users also includes an aluminium tracking system installed on the floor, which allowed the vehicle to be easily reconfigured depending on how it will be used during a particular day.

The point at the heart of the case was whether the NETPS provided should be treated as exempt from VAT or zero-rated. This distinction is important, as although in both instances there is no VAT charge levied on the services, the ability to zero-rate the services would allow E-Zec to recover VAT incurred on costs as input tax, whereas if the services were exempt, input tax recovery would be restricted.

It was common ground between E-Zec and HMRC that if the services qualified for zero-rating, this would take precedence over the exemption.

Therefore, it was up to the Tribunal to assess if the NETPS qualified to be zero-rated.

In assessing whether zero-rating would be possible, the configuration of the vehicles was key, as the normal rules for zero-rating passenger transport services is that the vehicle must be designed or adapted to carry ten or more passengers.

However, there is an exception for a vehicle designed or adapted for the safe carriage of two or more persons in a wheelchair in a vehicle which *if it were not so designed or adapted*, would be capable of carrying 10 or more persons. Therefore, as the vehicles were not actually designed or adapted to carry 10 or more people, E-Zec could only zero-rate its services if the vehicles *could* carry 10 or more people, but for the wheelchair adaptations.

The tribunal undertook an extensive review of the evidence before coming to a conclusion, and it was found that if the wheelchair modifications were removed, the vehicles would have been able to carry 10 passengers, and thus should qualify for zero-rating. In reaching this conclusion, the Tribunal noted:

'HMRC's argument seems to me to be completely uncommercial and frankly unrealistic. The flexibility and adaptability required for non-emergency vehicles as part of the actual and intended use of the vehicles. To deny zero rating on the basis that this flexibility was one of the Appellant's purposes seems to me to run contrary to the very purpose of the provision.'

E-Zec Medical Transport Services Ltd v HMRC [2022] UKFTT (TC)

Lecture 4

2.4.2 Mega marshmallows were not confectionery

There is a US/Canadian tradition of a s'more, which is a large, toasted marshmallow which, together with chocolate, is sandwiched between two digestive biscuits. Marshmallows are normally treated as confectionery for VAT purposes and are thus standard rated. The taxpayer here argued that much larger marshmallows designed specifically for s'more are not confectionery. They are intended to be cooked before consumption and would be eaten off a skewer rather than with the fingers. Therefore they should be treated as zero-rated food.

Agreeing with the taxpayer, the First-tier Tribunal focused on the way that the product was marketed and sold rather than the qualities of the product itself.

The tribunal's conclusions summed up the basis of the decision as follows:

'On balance we accept that the Product does not fall to be described as confectionery. The fact that it is sold and purchased as a product specifically for roasting, the marketing on the packaging of the Product which confirms that purpose, the size of the Product which makes it particularly suitable for roasting and the fact that it is

positioned in supermarket aisles in the barbecue section during the summer months when most sales are made and otherwise in the world foods section, leads us to that conclusion.'

Innovative Bites Ltd v HMRC [2022] UKFTT 00353 (TC)
Lecture 5

2.5 Lower rate

2.5.1 Conservatory roofing case remitted to FTT

C is a company that provides conservatory roofing services. C took the view that approximately 90% of its sales qualified for the reduced-rate for energy-saving materials in *VATA 1994, Sch 7A, Group 2*.

HMRC argued that the service C was supplying was a 'replacement roof' and was subject to VAT at the standard rate.

The First-tier Tribunal held that there was a single supply which was essentially a composite insulated roofing system that did not qualify for the reduced rate of VAT.

C appealed the First-tier Tribunal decision.

The Upper Tribunal remitted the case to the First-tier Tribunal to be fully re-determined. The Upper Tribunal set aside the First-tier Tribunal decision, noting that it lacked reasons and a clear set of findings of fact.

Conservatory Roofing UK Ltd v HMRC, [2022] UKUT 182 (TCC)
Lecture 6

2.5.2 Amendment of reduced rates

The temporary reduced rate of 5% that was applied to tourism and hospitality has been corrected to July 2020. The end of the temporary reduced rates has been corrected to 31 March 2022 for following VAT notices—

- VAT Notice 709/3: Hotels and holiday accommodation
- VAT Notice 709/1: Catering, takeaway food
- VAT Notice 701/14: Food products
- VAT Notice 701/20: Caravans and houseboats

2.6 Computational matters

2.6.1 Subway franchises – best judgement

Peppermint Foods Limited ran two Essex-based Subway franchises. At both locations the company sold hot toasted sandwiches and cold food and drink. Hot takeaway food as well as everything eaten on the premises was standard rated. Cold takeaway food, other than confectionery, should have been zero rated.

During an investigation, an experienced HMRC officer found that the average standard rated sales for the preceding four years was 58% which, in his experience, seemed low compared to other Subway franchises

As a result, in June 2018, he carried out a series of test purchases on two days at both venues. He discovered that items were being incorrectly recorded. In August 2018, HMRC shared the results of these test purchases with the company and was told that there had been some issues with the till which had been rectified.

To check this, HMRC followed up their work by analysing Z-readings provided by the director for that month. This indicated that 78% of sales were standard rated. However, a further two days of invigilation checks were carried out in October 2018 and January 2019, which indicated that 94% of sales were standard rated.

HMRC concluded that Peppermint Foods Limited's staff had incorrectly rung hot takeaway food into the till as cold takeaway food resulting in an underpayment of output VAT. Consequently, for the VAT periods 05/15 to 02/19, HMRC raised assessments to collect output VAT due, initially calculated using the 94% rate that they had arrived at. This was later reduced to 86%, an average of the 78% and 94% rates. A final reduction was made to the amount assessed to recognise that the assessment for the June 2015 period was out of time.

By the time of the hearing, Peppermint Foods Limited were disputing assessments totaling £144,383 of VAT due. Peppermint Foods Limited argued that the invigilation exercises carried out by HMRC were 'wholly unrepresentative of the overall period assessed'. The company argued that HMRC should have undertaken a year of daily invigilation. Further, HMRC did not allow for staff errors, for the times during which the ovens were unavailable and gave no consideration to IT errors.

Decision

The First tier Tribunal concluded that HMRC's approach was evidence-based and took into account the impact of what might have been higher sales of cold food during the hotter month of August. In their view, the assessment was made to best judgment and was a valid assessment.

Having confirmed that the assessments raised were valid, the First Tier Tribunal then looked to the company to provide evidence to establish the correct amount of tax due. The tribunal stated that it was not for HMRC to 'conduct a year-long invigilation exercise', but rather was up to Peppermint Foods Limited to demonstrate that HMRC assessments were excessive. Indeed, the First Tier Tribunal was critical of the company for failing to provide 'contrary number evidence' to HMRC's figures.

The appeal was dismissed.

Peppermint Foods Limited v HMRC ([2022] UKFTT 232 (TC)
Lecture 7

2.7 Discounts, rebates and gifts

Nothing to report.

2.8 Compound and multiple

2.8.1 Primary healthcare a single exempt supply

NHS England (NHSE) engaged Spectrum Community Health CIC (S) to deliver primary healthcare at various prisons. S agreed to provide a range of services including nurses, GPs, pharmacies, mental and sexual health services, optometry, dentistry, and physiotherapy.

S was of the view that each of these services was a separate supply, and hence each service should be taxed in its own right. This meant that although the bulk of the services provided by S were exempt healthcare, some of the services were treated as taxable (e.g. supplies of drugs were treated as zero-rated and supplies of sexual health services were treated as reduced-rated). As a result of these taxable services, S sought to recover some input tax.

HMRC disagreed and contended that the company made a single composite supply of exempt care and medical treatment. The tribunal agreed with HMRC, saying that the prison service was buying a complete package of medical care rather than a collection of distinct services, and there was no need to look beyond the contract between S and NHSE. Notably, the tribunal found that NHSE wanted to engage with S to deliver an integrated primary healthcare service equivalent to that provided by the NHS in the general community. This was, in the Tribunal's view, a single supply that it would be artificial to split.

There was then a separate discussion about whether the company was a *duly recognised establishment of a similar nature to hospitals*. That was important, because if it did fall within this test, it would still be able to obtain some input tax recovery. The tribunal found that it didn't. The test was whether or not the company operated from a physical building like a hospital and that was not the case here. The consequence was that all of the company's supplies were exempt, and no input tax recovery was possible.

Spectrum Community Health CIC v HMRC [2022] UKFTT 237 (TC)
Lecture 8

2.8.2 Postage, delivery and direct marketing

Section 2.2 of VAT Notice 700/24 entitled "How to work out the VAT treatment for delivered goods" has been updated to clarify where there is no extra charge for delivery, the full sales price accounts for VAT.

It now reads:

> If you deliver goods to your customers but make no additional charge

> If delivery is free, or the delivery cost is built into the normal sales price, VAT is accounted for on the full sales price based on the liability of the goods being sold.
>
> This applies whether or not delivery is required under the contract.
>
> *VAT Notice 700/24*

2.9 Agency

Nothing to report.

2.10 Second hand goods

2.10.1 Second-hand vehicle export refund scheme delay

The ICAEW reported that the introduction of the second-hand motor vehicle export refund scheme (the refund scheme) is to be delayed. The scheme was due to be introduced from 1 October 2022 but the government has postponed the start date while discussions continue with the EU on the future of the Northern Ireland Protocol

The scheme is for car dealers who buy second-hand vehicles in Great Britain, sell those vehicles in Northern Ireland and currently use the VAT margin scheme for those sales. Once introduced, the refund scheme will allow businesses to claim a refund of VAT instead of using the VAT margin scheme to account for VAT on those sales.

https://www.icaew.com/insights/tax-news/2022/jul-2022/second-hand-motor-vehicle-export-refund-scheme-delayed

2.11 Charities and clubs

2.11.1 VAT Education Manual

Update to reflect a change to HMRC's policy in relation to the VAT treatment of charities supplying nursery and crèche facilities. The change was announced in Revenue & Customs Brief 10 (2022), published in June 2022. Previously, following the decisions in Yarburgh Children's Trust [2002] STC 207 and St Paul's Community Project [2005] STC 95, HMRC took the view that where a charity supplied nursery and crèche facilities for a consideration that was fixed at a level designed to only cover its costs, this was not a business activity for VAT purposes. The amended guidance states that HMRC will now instead apply the tests set out in Longridge on the Thames and Wakefield College when determining whether activities are business activities for VAT purposes.

VATEDU36900

2.11.2 How VAT affects charities

Section 4.1 "business test" has been updated to include new information about the two-stage test. This section now reads:

4.1 BUSINESS TEST

An organisation that is run on a not-for-profit basis may still be regarded as carrying out a business activity for VAT purposes.

To decide if an activity is a business activity for VAT purposes, you need to consider whether there is a direct link between the services received and the payment made.

You should apply a 2-stage test.

Stage 1: The activity results in a supply of goods or services for consideration

This requires the existence of a legal relationship between the supplier and the recipient.

The first step is to consider whether the supply is made for a consideration. An activity that does not involve the making of supplies for consideration cannot be a business activity for VAT purposes.

Stage 2: The supply is made for the purpose of obtaining income (remuneration)

An activity is not economic just because a payment is received. It must also be carried out for the purpose of obtaining income (remuneration), even if the charge is below cost.

VAT Notice 701/1

HMRC have provided further guidance in their internal manual VBNB30300.

www.gov.uk/hmrc-internal-manuals/vat-business-non-business/vbnb30300

Lecture 9

2.11.3 Zero rating advertising to charities

VAT Notice 701/58 explains which advertising services and closely related goods are zero-rated when supplied to a charity. It also explains which goods for the collection of donations can be zero-rated by concession.

A number of sections have been updated:

Section 3.1 - Media where charities can advertise VAT free;

Section 3.2 - What the term 'the public' covers;

Section 3.7 - Information on the internet

Section 4.1- Relief on the design or production of an advertisement

VAT Notice 701/58

2.12 Reverse charge

2.12.1 Filing and submitting a return

Section 4.6 of VAT Notice 700/12 has been updated to include more goods and services where the reverse charge applies and the VAT return boxes that need to be completed. It now reads:

> 4.6 Reverse charge accounting
>
> Under the reverse charge procedure, the buyer of the goods or services, rather than the seller, is liable to account for the VAT on the sale. You need to use the following information to complete your VAT return.
>
> If you use the reverse charge for gold or international services, and you're the:
>
> - supplier — fill in box 6 (value of the supply)
> - customer — fill in box 1 (output VAT), box 4 (input VAT), box 6 (value of the deemed supply) and box 7 (purchase value)
>
> If you use the reverse charge for mobile phones and computer chips, wholesale gas and electricity, emission allowances, wholesale telecommunications, renewable energy certificates, building and construction services and you're the:
>
> - supplier — fill in box 6 (value of the supply)
> - customer — fill in box 1 (output VAT), box 4 (input VAT) and box 7 (purchase value)

VAT Notice 700/12

2.12.2 Place of supply – Construction

Section 7.7 of VAT Notice 741A has been updated to include information about VAT reverse charge for construction services and now reads:

> If you make supplies of building and construction services in the UK and those services are liable to VAT at the standard or reduced rate you may have to apply the VAT reverse charge for construction services.

VAT Notice 741A

2.12.3 VAT Groups Manual

Update to guidance on calculating an intra-group reverse charge under VATA 1994 s.43(2A). The reverse charge is based on the value of supply bought in by the supplier to the extent used to make the intra-group

supply, and not on the full value of the intra-group supply i.e. ignore any intra group mark up. The guidance now includes reference to VATA 1994, Schedule 6, Paragraph 8A (replacing reference to a concession).

VGROUPS01350

2.12.4 Insurance claims handling services – place of supply

Uniga Asigurări SA was a Romanian insurance company offering international motor insurance and medical insurance policies. The company offered international insurance policies covering the risks relating to accidents that occurred outside Romania. Working with claims handler companies across the EU, the company was able to deal with claims that originated abroad.

Having helped to settled claims for accidents abroad, these overseas companies would invoice Uniga Asigurări SA for the services provided. Believing that the place of supply for those services was the place of establishment of the supplier of the services, the Romanian company did not declare VAT under the reverse charge regime in Romania

Between 2007 and 2009, the Romanian tax authorities argued that these claims handling services were 'services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the provision of information'. Consequently, the place of supply was Romania and the reverse charge mechanism should have been applied.

The CJEU considered each in turn:

- Claims handling does not normally form part of an engineer's main or regular work;
- Lawyers are mainly concerned with litigation, through representation or defence of their clients' interests and not administering claims;
- Consultants do not usually make decisions for their clients, while claims handlers do have the authority to settle claims up to agreed limits;
- Claims handling services were not similar to data processing services and could not be treated as the provision of information.

In reaching its conclusion, the CJEU found that claims handling was distinct from these professions and could not be classified as "similar services".

As a result, the Romanian company was correct not to apply the reverse charge mechanism

(CJEU: Case C-267/21)

2.13 Other supply problems

2.13.1 Invoicing a non-resident landlord

Where accountants provide accountancy services to a non-UK resident landlord letting out UK residential or commercial property, this is not a land related service. Rather, it is a B2B supply of accountancy services, taxed where the landlord belongs.

In order to determine the correct VAT treatment for the accountancy services, the question to ask is whether the non-UK resident landlord has a UK fixed establishment. It is unlikely that the landlord will have a UK business establishment as they will be running the business from wherever they are located.

Where the non-UK resident landlord engages independent third-party agents to manage their properties, European case law has established that this does not create a fixed establishment. This means that the landlord belongs outside the UK and the supply of accountancy services is outside the scope of UK VAT. The invoices raised are recorded in Box 6 of the VAT return but no VAT charged.

Where the non-UK resident landlord has opted to tax UK commercial property, they will be UK VAT registered. Remember, a UK VAT registration does not mean that the landlord belongs in the UK. So being UK VAT registered does not change the VAT position for accountancy services that are invoiced to the landlord. The services are still outside the scope. Any output VAT incorrectly charged by the UK accountants is not recoverable by the landlord.

The position may change where a non-UK resident landlord has a large number of UK properties. In this situation, the agency commission payable would be expensive and so it may be beneficial for the landlord to employ people in the UK to look after their property portfolio. By employing people in the UK, the landlord would then have sufficient permanent human technical resources in the UK to have created a UK fixed establishment. This would mean that UK VAT was chargeable by the accountant for their services as the landlord now belongs in the UK.

Lecture 10

2.13.2 Influencers and barter transactions

Barter transactions are not gifts as they involve the exchange of goods or services in return for something else. This is a VAT supply for both parties.

The barter rules come into play when considering goods that are given to an influencer in return for the influencer promoting those goods. In this case:

- the supplier has sold goods and has an output tax liability on the sale of goods;
- the influencer has provided advertising services and has an output tax liability on these services.

The value of a barter transaction consideration needs looking at very carefully.

Example

A VAT registered clothing company gives clothes to a VAT registered influencer who is active on social media and has a lot of followers. The clothes are given to the influencer on the proviso that the influencer creates a short video on their clothes.

In this situation, the clothing company is supplying clothes that should be valued for output tax purposes based on the value of the advertising services received. The value of the advertising services will vary depending on how many followers the influencer has. By contrast, the influencer is supplying advertising services that should be valued for output tax purposes based on the value of the clothes received. The value of the advertising and the clothing are not necessarily the same, meaning that each party could be accounting for different amounts of output tax.

Where invoices are not issued in respect of these transactions we may have an issue. If HMRC visited the clothing retailer they may notice that they use influencers to advertise their products. Output VAT would be due from the clothing retailer but they are unlikely to have received an invoice for advertising services from the influencer to reduce their VAT exposure via an input tax claim.

In order to avoid any VAT issues, it would be useful to have contracts that stipulated the values of the goods being given and the value of the advertising received in return. With no general market value rule for VAT, the consideration may well be accepted as the value in the contract. With contracts in place, invoices can be issued to reflect the output tax that is also payable. Where an influencer has a large number of followers, they may receive goods as well as cash in return for them advertising the products. Detailing this within the contracts would support the total consideration value to use for VAT purposes.

With barter transactions we should always remember that output tax for one party, is input tax for the other as:

- the output tax for the clothing company is input tax for the influencer; and

- the output tax for the influencer is input tax for the clothing company.

Where VAT invoices are raised for the output VAT, the input tax should be recoverable.

And finally, what if the influencer has not considered the need to be VAT registered? A non- VAT registered influencer, who undertakes a large number of these barter-type transactions, could inadvertently breach the VAT registration threshold. Both cash and the value of goods received count as supplies to be valued when comparing total supplies to the registration thresholds.

Lecture 11

2.13.3 Fuel and power

VAT Notice 701/19 has been updated.

Section 2 has been updated to include information about VAT reverse charge measures for wholesale gas and electricity and construction services.

Sections 4.1 and 4.3 include more detail about hydrogen gas and when it should be standard rated or taxed at the reduced rate.

VAT Notice 701/19

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Hiring of sports pitches a single supply of land

In *HMRC v Netbusters (UK) Limited* [2022] UKUT 175 (TCC) (5 July 2022), the Upper Tribunal (UT) decided that the First-tier Tribunal (FTT) was correct to conclude that the taxpayer made a single composite supply with an objective character of the grant of a licence to occupy land.

Netbusters organises competitive five a side football and netball leagues, hiring pitches as regular series of block bookings from third parties, and making the pitches available to the teams who participate in the leagues it manages.

HMRC did not have permission to argue that the teams were not clubs or other organisations falling within VATA 1994, Sch 9 Group 1 Note 16(b)(v). In its appeal HMRC presented five key arguments, all of which were rejected by the UT. HMRC argued that the FTT had failed to:

1. properly apply relevant case law
2. properly consider the matter of passivity
3. properly consider what was supplied by Netbusters
4. correctly find in relation to the facts
5. correctly analyse the true nature of what Netbusters receives when it hires pitches from third parties

In relation to the first argument the UT held that the FTT was under no obligation to cite every authority available to it, so long as it properly interpreted and applied the relevant principles, which the UT was satisfied it had done.

In relation to the second argument, the UT noted that the FTT had considered the matter of passivity and had concluded that the additional league management services did not represent significant added value to the supply of the pitches. The decision in *Belgian State v Temco Europe SA* (Case C-284/03) confirms that leasing or letting immovable property is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value. The UT noted that passivity 'is not to be seen as a necessary requirement, but as one factor or characteristic in a multi-factorial assessment' regarding whether a supply is to be identified as the leasing or letting of immovable property.

In relation to the third argument, the UT pointed out that the FTT had recognised that there were two elements, pitch hire and league management, and had concluded that the league management was of modest value and did not change the fundamental nature of the supply. The fact that HMRC disagreed with that conclusion did not mean that the FTT had failed to properly consider the matter or that its conclusion was wrong.

The UT rejected the fourth argument, concluding that the findings of the FTT in relation to the facts were consistent with the information available to it.

The fifth argument presented by HMRC related to whether the terms on which Netbusters hired facilities from third parties provided it with rights sufficient to make an onward grant of a licence to occupy. The UT noted that when Netbusters hired a sports hall from a school, the fact that Netbusters did not have exclusive access to the entire school did not mean that it did not have exclusive access to the sports hall for the period of hire. Referring to the CJEU decision in *Belgian State v Temco Europe SA* (Case C-284/03) the UT noted that 'what is required is not full exclusivity but, rather, that the occupation is exclusive as regards all other persons not permitted by law or the contract to exercise a right over the property'.

HMRC v Netbusters (UK) Limited [2022] UKUT 175 (TCC)
Lecture 12

3.2 Option to tax

3.2.1 Revoke an option to tax within the first 6 months

The address for sending completed VAT1614C form and any supporting documents has been updated.

https://www.gov.uk/government/publications/vat-revoking-an-option-to-tax-within-6-month-cooling-off-period-vat1614c

3.2.2 Exclude a new building from an option to tax

The address for sending the completed VAT1614F form and any supporting documents has been updated. This form is used to exclude a new building from an option to tax on the land on which it is being constructed.

https://www.gov.uk/government/publications/vat-new-buildings-exclusion-from-an-option-to-tax-vat1614f

3.3 Developers and builders

3.3.1 Substantial redevelopment works to a dwelling

The appellant, N, was appointed to implement a substantial programme of redevelopment works to a dwelling. N engaged a sub-contractor to carry out the work. HMRC decided that the standard rate of VAT, rather than the zero rate, applied to the work. That decision was upheld following a review.

It was accepted by all parties, including HMRC, that N, as the recipient of the supply, was entitled to appeal against the HMRC decision that was addressed to the sub-contractor. There were two alternative elements to the appeal.

Firstly, did the work qualify for the zero rate under VATA 1994, Sch 8, Group 5, Items 2 and 4?

Alternatively, if the work did not qualify for the zero rate of VAT, did it qualify for the reduced rate under VATA 1994, Sch 7A, Group 7?

The redevelopment works involved a significant amount of demolition of the existing dwelling. The Tribunal decided the extent of the demolition was not sufficient for the conditions of VATA 1994, Sch 8, Group 5, Note 18 to be met and therefore the zero rate of VAT did not apply. To that extent the appeal was dismissed.

Against the alternative argument, that the reduced rate of VAT applied under VATA 1994, Sch 7A, Group 7, HMRC argued that it was not an appealable matter as it had not decided that the reduced rate of VAT did not apply. HMRC referred to VATA 1994, s 83(1)(b) and argued that the appeal should be struck out in relation to whether the reduced rate of VAT applied.

In relation to the above argument by HMRC, the tribunal considered the Upper Tribunal decision in *HMRC v SDI (Brook EU) Ltd and another, [2017] UKUT 327 (TCC)*. The following is an extract from that decision:

> *"It is clear that appeals are not confined to cases where HMRC have decided the precise amount of VAT to be charged. Cases may proceed on questions of principle which are related to the chargeability of VAT, such as questions as to the nature of a particular class of supply and whether those supplies are standard-rated, exempt or zero-rate. Section 83(1)(b) therefore cannot be construed narrowly; it must be construed broadly so as to encompass any issue between a taxpayer and HMRC, in respect of which HMRC has made a decision, which is material to the chargeability of the taxpayer to VAT."*

Applying the above extract to the matter before it the tribunal noted that the HMRC decision that the redevelopment works did not qualify for the zero rate of VAT is a decision 'which is material to the chargeability of the taxpayer to VAT'.

HMRC presented no other argument regarding reduced rating and the tribunal was satisfied that the dwelling was unoccupied for at least two years before the redevelopment works commenced and that the other conditions for reduced rating under VATA 1994, Sch 7A, Group 7 were met. The Tribunal rejected the argument by HMRC in relation to the scope of VATA 1994, s 83(1)(b) and decided that the work qualified for the reduced rate of VAT.

NorthChurch Homes Ltd v HMRC, [2022] UKFTT 201 (TC)
Lecture 13

3.4 Input tax claims on land

3.4.1 Input tax recovery on village hall

Church House was built in 1907 and used continuously by the local community as a village hall.

In 2015/16, Bletchingley Church House Charity (BCHC) contracted for work to be done on Church House aimed at restoring the property. No new building was constructed although the work did include installing a lift and various disabled facilities.

The charity confirmed that their intention was that:

> "The property will be leased to a separate legal entity, Bletchingley Church House Charity Administration Limited (BCHA)L for over 21 years and that company will be responsible for the letting and use of the property as a village hall on behalf of the charity..."

BCHC accepted BCHAL was not a charity but that following the grant of the lease, it was acting as BCHC's agent. Consequently, BCHC argued that BCHC used church house for a relevant charitable purpose. However, there was no management agreement between BCHC and BCHAL and there was no record of BCHC using Church House after the grant of the lease. BCHC claimed input tax of £87,002.75 that related to the costs of the work done.

HMRC disallowed the claim on the grounds that BCHC had not made a grant of a qualifying first lease under Item 1 (a) (ii) of Group. 5, Sch. 8 VATA 1994, and goods and services on which the VAT has been charged could not be used for the purpose of any taxable business activity. After the grant of the lease, Church House was not run by a charity nor used exclusively by a charity.

The First Tier Tribunal stated that Item 1 (a) (ii) Group. 5, Sch. 8 VATA 1994 zero rates the first grant of a major interest by a person constructing a building intended solely for use for a relevant charitable purpose in, or in any part of, the building.

The Tribunal stated that the phrase *"intended for use solely for … a relevant charitable purpose*" is defined in Note 6, which states that *"Use for a relevant charitable purpose means use by a charity..."* The Tribunal concluded that the property must be used by a charity for it to be use for a relevant charitable purpose. The Tribunal confirmed that BCHC was a charity while BCHAL and its BCHAL's hirers were not. The Tribunal found that less than 95% of the Hirers were charities, meaning that the 5% *de minimis* limit from *Wakefield was breached.*

The Tribunal went on to consider whether or not BCHC's use of Church House satisfied the other requirements. As well as being used by a charity, the use must be used:

1. *"otherwise than in the course or furtherance of a business"* and/or

2. *"as a village hall or similarly in providing social or recreational facilities for a local community..."*

As there was a legal relationship between BCHC and BCHAL under the Lease, BCHC made a supply for consideration to BCHA whereby BCHC provided BCHAL with exclusive possession of Church House, meaning there was a direct link between the supply and the consideration provided by BCHAL. Further, the supply was made to obtain income on a continuing basis.

On the second point, the First Tier Tribunal found that there was no evidence that BCHC used Church House after the Lease had been granted *"as a village hall or similarly in providing social or recreational facilities for a local community...."*. For the avoidance of doubt, the Tribunal stated that if BCHC did use Church House after the Lease had been granted *"as a village hall or similarly in providing social or recreational facilities for a local community..."* it did not do so solely. BCHAL, which is not a charity, and the Hirers, less than 95% of which were charities, also used Church House and their use was not for relevant a charitable purpose.

Item 1 (a) (ii) in Grp 5, Sch. 8 VATA was not satisfied and the appeal was dismissed.

Bletchingley Church House Charity v HMRC [2022] UKFTT 211 (TC)
Lecture 14

3.4.2 Compulsory purchase of land

In 2015 HA.EN purchased a secured loan that had been granted by a bank to a Lithuanian property developer. The loan had been secured with a mortgage over a plot of land on which a building was being constructed

The following year, with the developer was facing financial problems, HA.EN bought the property for €4.5m plus VAT through a compulsory purchase procedure. The proceeds reduced the outstanding loan but no cash changed hands.

The property developer accounted for the output tax on the sale but was unable to pay this amount to the tax authorities.

Having suffered the input VAT on the purchase, HA.EN reclaimed the input VAT through its VAT return.

The tax authorities denied the input tax claim on the grounds that HA.EN knew or should have known that the property developer would not pay the output VAT due. The tax authority argued that HA.EN had acted in bad faith and committed an abuse of rights.

The CJEU stated that in order to find that there had been an abuse of rights the:

1. transactions must result in a tax advantage being obtained, contrary to the intentions of the law;

2. main aim of the transactions must be solely to obtain that tax advantage.

The CJEU found that the main aim of the compulsory purchase was for HA.EN to recover its debt, rather than to secure a VAT advantage. Even if HA.EN's claim for input tax recovery could be described as a tax advantage, it was not contrary to the purposes of the Principal VAT Directive. HA.EN should be entitled to recover the input tax.

CJEU: Case C-227/21

3.4.3 Incorrectly addressed invoices

A property letting business could not recover input VAT on the majority of incorrectly addressed purchase invoices.

The partnership, Majid and Miah Properties, was registered for VAT from 20 January 2010 on the basis that it intended to make taxable supplies by letting out a property. On 8 March 2010, the partnership bought a property and exercised an option to tax.

With supplies made in connection with the property now subject to VAT, the partnership later claimed input tax in connection with expenditure incurred on the purchase and refit of their property for use as an Indian restaurant. This refit took some time and no supplies were made in connection with it for some considerable period during which input tax was claimed.

Finally, on 6 August 2016, the partnership entered into a 15-year lease backdated to 3 August 2015:

- The lessee, Mehfil (Preston) Ltd, was a company in which both partners were directors;

- The lease stated that rent of £2,166.67 per month was payable from 1 September 2016.

In July 2016, HMRC visited the business and subsequently identified that input VAT had over-claimed. HMRC also concluded that the rent commencement date in the lease was an error and should have read 1 September 2015. HMRC concluded that output tax had been under declared by the Appellant on rental received.

HMRC issued assessments for the overclaimed input VAT of £30,446 and undeclared output VAT of £8,664.

The partnership accepted that some of the assessed input VAT related to another business and was not recoverable by the partnership but appealed the balance.

Decision

The First Tier Tribunal concluded that there was a continuous supply of services under the lease agreement but for the first 12 months there was a rent-free period in respect of which no VAT would have been due. As a

result, rent was due from 1 September 2016 to 1 February 2017 when the restaurant closed, and the lease terminated. This non-payment meant that no VAT tax point arose under Regulation 90 of the 1995 VAT Regulations.

However, this has not been paid not paid and as such there was no tax point arising under regulation 90. However, on the basis of the finding that the lease was terminated in February 2017, the Appellant would have become liable under the basic tax rules to VAT on the rent which was due on the 6 rental payments which had fallen due after 1 September 2016.

However, on the finding that the lease was terminated in February 2017, Majid and Miah Properties would have become liable under the basic tax rules to VAT on the rent which was due on the 6 rental payments which had fallen due after 1 September 2016. In summary:

- the assessments in periods 11/15 – 08/16 were not due because of the rent-free period;

- No VAT was due in period 11/16 because no tax point arose in that period;

- For 02/17 VAT on the 6-months rent which had become due should have been taxed. HMRC only taxed for 3-months rent. The Tribunal directed that the assessment for 02/17 should be increased to £2166.

- No VAT was due for periods 05/17 – 08/17 as the lease had come to an end in February 2017.

Moving on to the input tax recovery:

- Where Majid and Miah Properties recovered VAT on redevelopment and fit-out invoices that were addressed to a non-VAT registered builder who could not reclaim the VAT, it was accepted that the VAT had been incurred as agent for the Partnership and was recoverable.

- There was no evidence as to the VAT status of the other builders, John Oldfield and RN Builders, to whom invoices were raised, and so it was assumed that these builders may have recovered the VAT. The VAT on these invoices was found to have been properly assessed.

- Input VAT could not be recovered on pro forma invoices, other invoices addressed to Mehfil, or invoices addressed to other third parties.

Majid and Miah Properties v HMRC [2022] UKFTT 327 (TC)

3.5 Other land problems

3.5.1 VAT payable on break fee

In Ventgrove Ltd v Kuehne+Nagel Ltd [2022] CSIH 40 (6 September 2022), the Inner House of the Court of Session (CSIH) held that a break payment made by a tenant to terminate a lease early was subject to VAT and that the landlord did not have a legitimate expectation that HMRC would not seek to impose the VAT charge.

Under the terms of a lease agreement entered into between Ventgrove Ltd, the landlord, and Kuehne+Nagel Ltd (KN), the tenant, KN had the right to terminate the lease early following a minimum tie-in period, provided it gave sufficient notice and paid Ventgrove £112,500 "together with any VAT properly due thereon".

Ventgrove had opted to tax the land. KN exercised its break right on 23 February 2021 and paid Ventgrove £112,500. Ventgrove contended that the break right had not been validly exercised because KN failed to pay the additional VAT of £22,500. The Outer House of the Court of Session (CSOH) found in favour of KN that the lease had been validly terminated because, in accordance with both the relevant case law and HMRC policy, termination payments were outside the scope of VAT.

On appeal, the CSIH held that VAT was properly due in relation to the break fee and that Ventgrove did not have any legitimate expectation that HMRC would treat it otherwise. In reaching this conclusion, Lord Tyre delivering the opinion of the court, relied on the CJEU decisions in *MEO v Autoridade Tributaria* (C-295/17) and *Vodafone Portugal v Autoridade Tributaria* (C-43/19). Both these cases concerned the exercise of a termination right contained within the original contract. The CSOH distinguished these cases as not relevant because they involved compensation for costs incurred by a supplier due to a customer's failure to complete a minimum tie-in period, rather than (as in this case) a payment for terminating a lease following the end of a tie-in period in accordance with a contractual right. However, the CSIH found the distinction was immaterial. The CJEU cases were in point as they were also, at root, about one party terminating a contract early by making a payment which would not have been payable if the contract had continued to run to the intended termination date.

Following the CJEU decisions, HMRC updated its guidance in Revenue and Customs Brief 12 (2020) (RCB 12) to make clear that VAT was chargeable on early termination payments. The CSIH, therefore, also held that Ventgrove did not have a legitimate expectation that HMRC would treat such payments as falling outside the scope of VAT by applying "a wrong view of the law". At the time KN made the payment, RCB 12 had been amended to postpone its effect. However, the CSIH concluded that this postponement likewise did not create a legitimate expectation because the postponement was only relevant to businesses that had an established practice of treating termination payments as outside the scope of VAT and Ventgrove did not fall into that category.

Ventgrove Ltd v Kuehne+Nagel Ltd [2022] CSIH 40
Lecture 15

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

Nothing to report.

4.3 International supplies of goods

4.3.1 Insufficient evidence that export could be zero-rated

Maron Plant Limited is a reminder that zero rating for exports is not automatic. A company has to demonstrate that that the requirements were met – including retaining evidence that the goods involved were actually transported abroad.

Here the company failed to do this: the tribunal said 'Bluntly, we have problems with the director's evidence'. Not surprisingly it concluded that zero rating was not available.

Maron Plant Limited v HMRC [2022] UKFTT 198 (TC)

4.3.2 Transitioning to the CDS

The Customs Handling of Import and Export Freight (CHIEF) system is being withdrawn in two stages:

1. The last day for making import declarations using the CHIEF system was 30 September 2022;

2. After 31 March 2023, the system will be closed for export declarations.

The old system is being replaced by the (CDS). Imports into the UK must be declared through the CDS system from 1 October 2022, with export declarations following six months later.

CHIEF was an IT system based on a paper form while CDS is a fully electronic system through which all data is exchanged digitally. It uses the Union Customs Code (UCC) and Data Integration and Harmonisation rules.

Access to the CDS is via HMRC's Digital Tax Platform on GOV.UK with traders identified by their Economic Operators Registration and Identification (EORI) number.

All business importing and exporting into the UK with a GB EORI number must subscribe to CDS.

In order to subscribe businesses will need the following information:

- Government gateway user ID and password;
- EORI number (which all importers should already have);
- UTR number (for UK taxpayers);
- Business address;
- National Insurance number (for individuals or sole traders);
- The date the business started trading.

Businesses, that have applied Postponed Import VAT Accounting since 1 January 2021 and are paying the import VAT through their VAT returns, should already be subscribed to CDS as it is through this system that the Postponed Import VAT Accounting statements required for VAT accounting purposes are accessed.

Once subscribed, businesses will sign in to CDS using their Government Gateway login details and use any of the following CDS services:

- Use their own purchased software for CDS import and export declarations;
- Use a cash account for CDS declarations;
- Gain access to their postponed import VAT statement;
- Obtain their import VAT and duty adjustment statements;
- Check how to pay duties and VAT on imports;
- Set up a Direct Debit for a duty deferment account;
- Upload documents and get messages about customs declarations;
- Manage their email address for CDS purposes.

For many existing businesses, subscribing to the CDS will be all that is required as many will already be relying on their third-party freight forwarders or broker's duty deferment account. Where this is not the case, businesses will need to:

- Replace the existing direct debt linked to their duty deferred account as CDS uses a different HMRC bank account to CHIEF;
- Select their customs duty and import VAT payment method whether that be using:
    - Immediate payment at the time of importation.
    - Their CDS cash account where they deposit funds to cover future import taxes payable
    - Individual or general guarantee accounts applicable to certain customs regimes and reliefs.

- Update existing authorities to third party forwarders and agents to enable them to utilise a cash account or duty deferment account for payment purposes.

https://www.gov.uk/guidance/get-access-to-the-customs-declaration-service

Lecture 16

4.3.3 Import VAT accounting

HMRC has updated its guidance on accounting for import VAT in the VAT return to address ongoing challenges with postponed VAT statements. HMRC notes that some statements produced in June 2022 contained errors and that statements published between 4 and 8 July should not be relied on. Corrected statements will be issued "shortly", according to HMRC, and will show a date later than 13 July. Further guidance is also expected, following publication of the revised statements

https://www.gov.uk/guidance/complete-your-vat-return-to-account-for-import-vat

4.3.4 Repayment of import duty

HMRC's guide has been updated to confirm that VAT-registered importers cannot use form C285 to reclaim overpayments of import VAT but must instead make any adjustment through their VAT return. Adjustments to a VAT return are subject to normal VAT rules.

Non-VAT registered importers must continue to use form C285 to claim for a repayment.

The section on overpaid Customs Duty on imports from Cambodia and Myanmar has been removed.

https://www.gov.uk/guidance/how-to-apply-for-a-repayment-of-import-duty-and-vat-if-youve-overpaid-c285

4.3.5 Liability for import VAT

In *BMW Shipping Agents Limited v HMRC* [2022] UKFTT 335 (TC), the First-tier Tribunal (FTT) held that a freight forwarder that had made customs declarations in its own name, rather than as agent, was liable for the import VAT. The reason for the decision was the entries made on the customs declarations.

The appeal, by a UK VAT registered freight forwarder, was against a post clearance demand note for import VAT of over £3 million issued by HMRC in 2016. The goods originated in China and entered the UK before being immediately forwarded to other EU countries.

The sole involvement of the freight forwarder was to arrange for the goods to clear customs in the UK and be forwarded on to VAT registered businesses in other EU countries. The importer was not established in the UK or registered for VAT in the UK.

OSR could have been claimed, and would have removed the liability for import VAT, had the freight forwarder taken title to the goods as owner and made a zero-rated supply of the goods to the VAT registered businesses in other EU countries.

Alternatively, OSR could have been claimed if the importer had been registered for VAT in the UK, had been correctly identified as the importer on the customs declarations, and had made a zero-rated supply of the goods to the VAT registered customers in other EU countries.

There was no dispute that, as the freight forwarder never owned the goods, it was not entitled to claim OSR. The dispute related to whether it was the freight forwarder or the importer that was liable for the import VAT. The FTT decided that it must make its decision based on the details entered on the customs declarations and dismissed the appeal.

In dismissing the appeal the FTT noted that HMRC will receive a windfall amount and commented that: 'If there is anything to be learnt from this sorry tale, it is that agents need to ensure that they take a great deal of care in understanding the circumstances in which they may be liable for import VAT and the requirements which need to be satisfied in order for a claim to OSR to be available.'

BMW Shipping Agents Limited v HMRC [2022] UKFTT 335 (TC)

4.4 European rules

Nothing to report.

4.5 Foreign refund reclaims

Nothing to report.

5. INPUTS

5.1 Economic activity

5.1.1 Contribution in kind

W GmbH had 90% interests in two limited partnerships that developed residential properties in Germany for sale. As an exempt supply, any input tax suffered on construction services would have been irrecoverable.

Consequently, W GmbH:

- procured €40m of construction services for the partnerships as a contribution in kind and treated these contributions as outside the scope of VAT;

- reclaimed the input tax on the construction services on the basis that it was a taxable business, having charged management fees to the partnership.

To be able to reclaim the VAT incurred on the procured constructions services, the CJEU stated that two conditions needed be met:

1. W GmbH needed to be a taxable person

2. The goods or services must be used by a taxable person for the purposes of their taxable activities.

The CJEU accepted that W GmbH was a taxable person as it was not merely a holding company). W GmbH supplied accounting and management services in return for a paid fee and this constituted an economic activity.

Unfortunately, the CJEU concluded that the construction costs were not general costs forming part of W GmbH's management and accounting services. The construction services were intended to be used by its subsidiaries, with no direct and immediate link with WG's own economic activity. and so input tax recovery was denied.

Finanzamt R v W GmbH, CJEU Case 98/21 (CJEU: Case C-98/21)
Lecture 17

5.2 Who receives the supply?

5.2.1 No valid invoice, no claim

Mr Latifi ran a bed and breakfast business but was not registered for VAT. In August 2013, he entered into a lease agreement with Oxford City Council, for quarterly rental amounts of £8,750.00, plus standard-rated VAT. On 27 November 2013, his business was incorporated and the company registered for VAT. Star Services Oxford Limited accounted for and claimed input VAT on the rent paid to Oxford City Council.

In June 2018 following a compliance visit, HMRC raised an assessment on Star Services Oxford Limited for £26,250. This covered the three-year period from 2014 to 2017 and related to the input tax incorrectly reclaimed on the rent paid to the council.

HMRC stated that the VAT could not be reclaimed as the lease and invoices raised were to Mr Latifi and not the company.

Prior to HMRC raising this assessment, Mr Latifi had registered for VAT in his own name and applied for an option to tax (OTT).

The First Tier Tribunal agreed with HMRC. Mr Latifi and the company were separate legal entities, needing separate VAT registrations. It was Mr Latifi who had the lease with Oxford City Council and not his company. He was not registered for VAT at this time and so could not consider recovering the VAT. Mr Latifi had effectively subleased the property to Star Services Oxford Limited which was an exempt supply. Input VAT on the invoice from Oxford City Council to Mr Latifi could not be recovered by a third party.

Note: At the time the assessment was raised, the HMRC officer commented:

> "…a belated OTT has been applied for on the sole proprietor registration, & if that is granted in the future following provision of information requested, then any appropriate claim to input tax on the rent that may then be charged by the sole proprietor registration, can be made on a future return as appropriate."

The issue in this appeal could have been avoided if Mr Latifi had been VAT as a sole trader, he had opted to tax the property and then charged VAT on the rent to Star Services Oxford Limited and the other tenants.

Star Services Oxford Limited v HMRC [2022] UKFTT 291 (TC)
Lecture 18

5.3 Partial exemption

5.3.1 VAT partial exemption framework for NHS

HMRC has published an updated edition of its VAT partial exemption framework for NHS bodies which is intended to facilitate the agreement of partial exemption special methods.

Although there does not appear to be any significant change to the substance of the content, there have been improvements to how it is presented and users may find it easier to navigate than the previous edition. HMRC has indicated that the framework for NHS bodies will continue to be updated regularly.

A point not covered in the framework, but which is covered in the 20 May 2022 edition of the main HMRC guidance on partial exemption, VAT Notice 706, is that from 1 August 2022 all requests for approval of partial exemption special methods should be submitted to HMRC using the online service (rather than by email). Only if it is not possible to use the online service should a request for a partial exemption special method be submitted to the HMRC Written Enquiries Team.

https://www.gov.uk/guidance/nhs-bodies-partial-exemption-framework

5.4 Cars

Nothing to report.

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

5.6.1 Free safety testing integral part of a business activity

In *The Towards Zero Foundation v HMRC* [2022] UKFTT 226 (TC), the First-tier Tribunal (FTT) decided that free safety testing performed by The Towards Zero Foundation (TZF) was not a separate non-business activity, and that input VAT incurred relating to this 'free testing' could be recovered.

TZF is a UK registered charity, and its aim is to reduce road fatalities by promoting safe and sustainable mobility.

One aspect of its work is performing NCAP level car safety testing programmes. TZF identifies cars it suspects perform below the expected safety standards and subject these vehicles to crash tests. Once the tests have been performed, if the car does not meet the required safety standards TZF will publish the results, including on social media. Typically, the car manufacturer will want to avoid this negative publicity and thus take measures to improve the safety of the cars. Once this has been done, the manufacturers will pay TZF to re-test the cars, and publish the results (with the aim that the revised cars will now pass the safety tests).

A dispute arose as HMRC accepted that the 're-testing' element was a business activity for TZF and allowed VAT recovery on costs related to this re-testing. However, HMRC issued an assessment for £152,000 to deny input VAT recovery on the initial tests for which TZF did not make a charge, on the basis that this was a non-business activity carried out by TZF to meet its charitable objectives.

The FTT however allowed TZF's appeal as it agreed with TZF that the 'free testing' was not a separate non-business activity, but the initial free tests were '*an inherent and integral part of TZF's business activity'* and therefore full input tax recovery should be allowed. The principles followed are similar to that of an earlier CJEU decision in *Sveda* (C-126/14) which also analysed the link between input tax and business / non-business activities.

The Towards Zero Foundation v HMRC [2022] UKFTT 226 (TC)
Lecture 19

5.7 Bad debt relief

Nothing to report.

5.8 Other input tax problems

5.8.1 Input tax could not be reclaimed without valid invoices

In *Tower Bridge GP Limited v HMRC* [2022] EWCA Civ 998 the Court of Appeal dismissed Tower Bridges' (TB) appeal and agreed with HMRC that input tax cannot be reclaimed where the taxpayer only holds invalid invoices.

The case related to the purchase of carbon credits by a member of TB's VAT group and the TB VAT group sought to recover the VAT on these purchases, despite the supporting VAT invoices being invalid as they did not contain the supplier's VAT number, amongst other issues.

It transpired that the supplier was never actually VAT registered and fraudulently defaulted on its obligation to account to HMRC for the VAT which it had received, although there was no suggestion that the buyer knew, or should have known, that the transactions were connected with fraud (it is worth noting that the trading of carbon credits is a 'high risk' sector, and a domestic VAT reverse charge has subsequently been implemented).

The appeal related to two issues:

1. Whether HMRC was entitled to deny TB input tax claimed in respect of 17 separate purchases of carbon credits on the basis that the invoices were invalid, principally because they did not contain a VAT registration number or name the customer as required by Regulation 14 of the VAT regulations 1995 ("VATR"). The question was whether that decision was in conformity with the Principal VAT Directive. (The 'EU law issue').
2. Whether HMRC's decision to refuse to exercise its the discretion in favour of TB to allow the input VAT recovery was unreasonable (the 'Discretion issue').

TB's appeal was dismissed in respect of both issues and the earlier Court decisions were upheld.

In respect of the EU law issue, the Court undertook a detailed analysis of case law, and found that VAT recovery based on invalid invoices is generally only permissible when a valid VAT invoice is subsequently produced. In this case, as the supplier was never actually VAT registered, TB had no right to recover VAT based on the invalid invoices. (An interesting point is that a recent CJEU case, *Kemwater Prochemie* reached a different conclusion, however, as this decision happened post-Brexit, the Court declined to apply this decision).

Turning to the discretion issue, HMRC refused to exercise its discretion on the basis that the supplier was not actually registered for VAT, the transactions were connected to fraud and TB failed to conduct reasonable due diligence. The Court found that these were perfectly legitimate reasons for HMRC choosing not to exercise its discretion.

Tower Bridge GP Limited v HMRC [2022] EWCA Civ 998

Lecture 20

5.8.2 HMRC did not prove customer was 'fraudster'

In *Lynton Exports (Alsager) Ltd v HMRC* [2022] UKFTT 224 (TC) the taxpayer was a long-established export trader that successfully exported 'classic' British food overseas. It started a new revenue stream where it supplied confectionary to the Republic of Ireland, which was much less profitable than the core business.

HMRC contended that the new revenue stream was suspicious, particularly given the volume of sales in the first year of trading (c.£15m). It denied input tax claims citing the Kittel principle. The court held that whilst HMRC had uncovered certain aspects of the trade which were suspicious, HMRC had not acted sufficiently to prove that the buyer of the goods was a 'fraudster'. As such, the taxpayer won the appeal.

Lynton Exports (Alsager) Ltd v HMRC [2022] UKFTT 224 (TC)

5.8.3 Delayed input tax recovery

Company B sold 10 plots of land to X, invoicing with VAT. X settled the invoices but did not reclaim the input VAT.

The plan was that Company B would develop the site, building mobile homes and then X would sell the homes with the land. In return for the development work, B would receive 50% of the final sale proceeds.

For economic reasons the development did not go ahead and X resold two plots of land back to Company B. VAT was charged on the invoice but X neither declared nor paid the VAT.

The Dutch tax authorities sent X an adjustment notice relating to the VAT on the two plots of land and collected the VAT. X appealed claiming that he should be able to net off the amount of VAT originally paid back on the purchase which had not been reclaimed at the time. The case was originally dismissed but later upheld at the Regional Court of Appeal in the Netherlands.

The State Secretary for Finance case appealed to the Supreme Court of the Netherlands arguing that X should have deducted the VAT relating to the supply of the plots in 2006 at the time that tax became chargeable.

The CJEU were asked whether Article 184 and 185 of the VAT Directive prevented a taxable person from deducting VAT at a later stage by way of an adjustment, at the time when those goods or services are first used for the purposes of taxed transactions, even where no abuse of rights, fraud or loss of tax revenue has been established.

The CJEU concluded that X had lost his right to deduct VAT as a result of the expiry of a time limit. He could not rely on Article 184 or 185 to reduce the VAT payable at a later stage.

(CJEU: Case C-194/21)

5.8.4 'No other reasonable explanation standard' in Kittel case

The taxpayer (N) deducted input VAT on certain vehicle purchases. HMRC refused N's claim to recover input tax on the basis that N knew or should have known that its purchases were connected with fraud.

The FTT concluded that N did not have actual knowledge of the fraud. Applying the 'no other reasonable explanation standard' the FTT concluded that the only reasonable explanation for each purchase was that it was connected with fraud.

On appeal to the Upper Tribunal, N argued that the FTT had misapplied the 'only reasonable explanation test'. However, the UT was satisfied that the test had been applied correctly by looking at whether N would have had constructive knowledge of the fraud and not merely whether there was a risk of fraud.

Northside Fleet v HMRC [2022] UKUT 00256 (TCC)

5.8.5 VAT-free shopping scheme

The previous VAT refund scheme (the VAT Retail Export Scheme) was withdrawn in Great Britain on 31 December 2020.

In the 'mini-budget' it was announced that VAT-free shopping scheme will be introduced with the aim of providing a boost to the high street and creating jobs in the retail and tourism sectors.

Following the appointment of Jeremy Hunt as Chancellor of the Exchequer, the reintroduction of the VAT -free shopping scheme will not go ahead.

5.8.6 Funded pension schemes

Section 6 "Insolvent companies" has been added and reads:

> 6. Insolvent companies
>
> Where a company is being wound up but still exists as a legal entity, and is still receiving supplies for which it's liable for VAT, then VAT on those supplies is deductible under the provisions of Section 94 of the VAT Act 1994. This includes VAT on costs incurred in winding up the company's occupational pension scheme.
>
> Where the VAT deductible on such supplies exceeds the output tax owed by the company to HMRC for the relevant period, the company may reclaim the balance of the VAT deductible for that period through the office of its insolvency practitioner.

VAT Notice 700/17

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 MTD for VAT - registration

HMRC has developed a new VAT registration service to speed up the registration process. A key change is that every new taxpayer registering for VAT will automatically be signed up to Making Tax Digital as part of the general VAT registration application, and the requirement to complete a separate Making Tax Digital registration will cease.

Making Tax Digital for VAT became mandatory for all VAT-registered businesses from 1 April 2022, so existing taxpayers should be unaffected by this change. However, for any new taxpayers, this change should streamline the VAT registration process.

HMRC recommends that any VAT registration applications currently in progress are submitted by 5pm on 31 July 2022 as any partially completed saved applications on the old service will be lost after this time.

https://www.tax.org.uk/vat-registration-changes-from-1-august

6.2.2 MTD for VAT – Filing

From 1 November 2022, businesses will no longer be able to use their existing VAT online account to file their quarterly or monthly VAT returns and will instead need to keep VAT records and file returns using MTD software. Businesses which file annual returns will still be able to use the VAT online account until 15 May 2023.

HMRC has updated its guidance documents to reflect this change.

https://www.tax.org.uk/hmrc-stakeholder-digest-17-august-2022

6.2.3 MTD for VAT –Default option for reporting errors

The default option for reporting errors in a VAT return will be via the new online "G-form".

This form should be used to submit a VAT Error Correction Notice (ECN). Once submitted, a copy of the digital form will be captured into the Digital Mail Service (DMS) and processed as normal.

The new G-Form will streamline the current process for customers, making it easier to tell HMRC about errors on their VAT returns. It will enable customers to:

- upload supporting documentation
- provide explanatory notes
- save the form allowing them to complete it later

- receive a confirmation of submission with a reference number

It also will help to reduce mistakes through built in validation and auto-calculations and capture more complete information.

https://www.gov.uk/government/publications/agent-update-issue-100/issue-100-of-agent-update#g-form

6.2.4 VAT Registration Manual

Update to the guidance on failure to notify liability for registration, introducing wording that confirms that where a trader has not notified their liability to be registered under the VATA 1994, the trader could be liable for a failure to notify under FA 2008, Schedule 41. A belated notification penalty under VATA 1994, s 67continues to apply to obligations to notify a liability to be registered for VAT before 1 April 2010.

VATREG26050

6.2.5 Who should register for VAT?

There have been two changes to VAT Notice 700/1.

1. Women's sanitary products have been removed from the examples list in section 2.5 'Reduced-rate supplies'.

2. Section 4.5 about 'Your VAT registration number – when to expect it', has been updated to tell you that we will aim to send a certificate showing your full registration within 30 days.

VAT Notice 700/1

6.3 Payments and returns

6.3.1 No reasonable excuse for late payment

The First-tier Tribunal dismissed the appeal by the taxpayer company, Hawksmoor Construction Ltd (Hawksmoor), against a VAT default surcharge of £2,252.12 imposed by the Revenue and Customs Commissioners pursuant to s 59 of the Value Added Tax Act 1994 in relation to the period at issue.

Hawksmoor's case was that it did have a reasonable excuse, pursuant to s 59(7) of the Act, for its late payments, namely that its sole director and his partner had both contracted covid at the time that their child was born. The FTT held that having heard and considered the evidence and arguments of both parties, Hawksmoor did not have a reasonable excuse for not paying the VAT shown on the return for the period at issue by the last day on which it had been required to be paid.

Hawksmoor Construction Ltd v HMRC [2022] UKFTT 209 (TC)

6.4 Repayment claims

6.4.1 Credit notes issued but funds never repaid

In *London School of Accountancy and Management Limited v HMRC* [2022] UKFTT 239 (TC), the appeal concerned a claim to reduce the taxable amount in relation to services said to have been invoiced to students but never supplied. The appellant (LSAM) was in liquidation at the time of the hearing of the appeal. Credit notes had been issued, but the appellant did not have the funds to repay to students the course fees and VAT it had charged and received from them.

The First-tier Tribunal dismissed the appeal. The decision confirms that the mere fact of a service not being performed does not in itself entitle a supplier to a refund from HMRC of the VAT charged and received from the intended recipients of a supply. The following is an extract from the decision:

"What is required is a change in the consideration actually received by LSAM as the supplier for there to be a reduction in the taxable amount. In the present case, any refund of fees supposed to be due to the students remains a proposition, a vague indication, a remote possibility that is never going to materialise since LSAM does not have the funds in excess of £3.72 million to repay the course fees in tandem with the VAT attached thereto. The credit notes are purely theoretical, and do not represent a decrease in consideration in the real world."

London School of Accountancy and Management Limited v HMRC [2022] UKFTT 239 (TC)
Lecture 21

6.4.2 Museums and galleries refund scheme

HMRC is encouraging museums and galleries to apply for the VAT refund scheme for museums and galleries that offer free admission.

The scheme is governed by VATA 1994, s 33A and the museums and galleries eligible for the scheme are listed in the VAT (Refund of Tax to Museums and Galleries) Order 2001 (SI 2001/2879). Museums and galleries can apply to be added to this Order.

The scheme encourages museums and galleries to provide free entry and open up access to works in collections. Any museum and gallery open to the public free of charge for 30 hours a week can apply for the scheme. The scheme was last open to new applicants in 2018/19 but will be open again for new applicants in the autumn.

https://www.gov.uk/government/news/museums-and-galleries-urged-to-sign-up-for-vat-refund-to-support-free-entry-for-the-public

https://www.gov.uk/guidance/vat-refund-scheme-for-museums-and-galleries-notice-998

6.4.3 Admission fees – Advocate General opinion

P GmbH ran an indoor playground area in Austria. The company issued over 22,000 invoices to end customers with no right to recover input VAT. The company incorrectly charged VAT at 20% rather than the reduced rate of 13% that should have applied. The company corrected its VAT position in its annual VAT return by seeking to reclaim the overdeclared output VAT.

The Austrian tax authorities denied the claim arguing that P GmbH:

- Owed the VAT as it had accounted for it on its invoices and its customers had paid the VAT;
- Would be unjustly enriched if the VAT were refunded.

Normally, businesses must account for the higher amount of VAT collected to the relevant tax authority. This is to prevent tax loss where invoices are issued to businesses who might recover overstated VAT as input tax,

In this case, the AG opined that the rule should not apply to supplies to consumers.

If P GmbH had overcharged VAT because the legislation was unclear, it should be entitled to reclaim the VAT without being required to reissue invoices.

However, if P GmbH had not considered the VAT position correctly, the company would only be able to reclaim the VAT if it could demonstrate that there was no risk of tax loss.

In practice, this could mean that P GmbH would have to reissue over 20,000 less detailed invoices, which would have been impossible in practice.

Finally, the Advocate General stated that it was unlikely that the company's claim could be denied on the basis of unjust enrichment. Provided the company had acted in good faith, it should be entitled to recover the overcharged VAT.

(CJEU: A-G C-378/21)

6.5 Timing issues

Nothing to report.

6.6 Records

Nothing to report.

6.7 Assessments

6.7.1 Assessment contested as time-barred

The taxpayer (N) contested a VAT assessment on the grounds that it was time-barred under VATA 1994, s 73(6)(b). The provision required the assessment to be made no more than one year after evidence of facts, sufficient in the opinion of HMRC to justify the making of the assessment, came to its knowledge. It was common ground that the burden of proof for showing the assessment was made outside of the time limits rested with N as the appellant.

The dispute turned on when relevant accounts data had been handed over to HMRC. The Tribunal noted that it was conspicuous that N provided no witness evidence to clarify when the relevant data was in the possession of HMRC. The documentary evidence that was provided was not sufficient for the Tribunal to conclude, on the balance of probabilities, that the evidence of the facts came into HMRC's knowledge more than a year before the assessment was raised.

Nottingham Forest v HMRC UKFTT 305 (TC)
Lecture 22

6.7.2 VAT assessments—overseas online marketplace traders

From September 2022, HMRC will change the way VAT assessments are carried out for overseas online marketplace traders. HMRC will start sending VAT assessments instead of asking for information from traders, in cases where information held by HMRC indicates that the VAT returns are inaccurate.

The reason for this change is that HMRC believes it holds the right information to enable it to raise an accurate assessment, so it does not require traders to send in the same details. The assessments will be sent to the trader's registered UK address, which may be their agent's address.

This change is the latest in a string of updates for online marketplaces and traders which operate on these platforms and follows the trend of HMRC seeking to ensure proper and accurate taxation of such traders.

These assessments will:

- VAT returns for periods up until December 2020
- be subject to statutory review and appeals rights.

The assessment letters will tell traders what to do if they—

- think that the information held is wrong
- want to provide more information.

If a trader struggles to pay an assessment, HMRC say that they will work with them to arrange more time to pay. If they do not pay their assessment

or arrange a time-to-pay agreement, HMRC will issue a Joint and Several liability notice to the hosts of the online platform they trade from.

The marketplace will then decide what it thinks is necessary to protect itself from being pursued by HMRC for the trader's VAT debts. This may include withdrawing permission for them to sell on its website. If this happens, the trader will not be able to trade on the marketplace until HMRC withdraw the notice and it can then take up to 6 weeks for hosts to allow a trader to use their platform again.

HMRC want to encourage traders and their agents to correct returns before they receive an assessment, to avoid any penalties. For more information on how to do this, go to How to correct VAT errors and make adjustments.

The VAT rules for overseas sellers who operate on online marketplaces, changed on 1 January 2021. For more information about this change, go to VAT and overseas goods sold to traders in the UK using online marketplaces.

https://ciotmktgprodeun.azureedge.net/hmrc-are-changing-the-way-they-carry-out-vat-assessments-for-overseas-online-marketplace-traders-who-submit-inaccurate-returns

Lecture 23

6.8 Penalties and appeals

6.8.1 Strike out of taxpayer's assessment where no returns filed

HMRC issued an assessment to O under VATA 1994, s 73(1). The provision allowed HMRC to issue a best judgement assessment of VAT due where a person had failed to make a return. O appealed arguing that HMRC was out of time to raise the assessment. HMRC applied for a partial strike out on the basis that there was no right to appeal under VATA 1994, s 83(1)(p) because O had still made no returns for the period in question (April 2011 to March 2018).

The First-tier Tribunal agreed with HMRC that the relevant provisions must be read as requiring returns to have been submitted before an appeal can be brought. In other words, (and in line with other tribunal decisions in *Yun He* and *Withington KFC Services*) 'where an assessment is issued because no return has been filed, there is no right of appeal unless or until a return is filed'.

Mr P Oag v HMRC [2022] UKFTT 287 (TC)

6.8.2 Change to penalties and interest charges

A reminder that new penalties will start from next year for businesses who submit VAT returns late or pay late.

For VAT periods starting on or after 1 January 2023, the default surcharge will be replaced by these new penalties.

HMRC are also making changes to how VAT interest is calculated.

If businesses submit a nil or repayment VAT return, they will need to make sure it is submitted on time. Unlike the current default surcharge, under the new late submission penalties, if a nil or repayment return is submitted late, penalty points and a £200 fine may apply.

https://www.tax.org.uk/hmrc-stakeholder-digest-1-september-2022

Lecture 24

6.8.3 Appeal and hardship claim

In May 2017, HMRC refused input tax claims made by SNM Pipelines Ltd for VAT on the grounds that that the company knew or ought to have known that the input tax had been incurred in transactions connected with the fraudulent evasion of VAT. HMRC issued assessments for £312,377 to recover the disputed input tax.

The company submitted a notice of appeal in August 2017 which was lodged in time. However, HMRC claimed that the company did not make a valid appeal as it had not:

- paid or deposited the disputed input tax with HMRC as required by s. 84(3);

- applied under section 84(3B) for the appeal to be entertained without payment of the VAT on the ground that it would cause SNMP to suffer hardship.

The company eventually re-submitted the notice of appeal in December 2020 and made a hardship application which was accepted by HMRC in February 2021. However, in July 2021, HMRC served a notice of objection to the company's late appeal.

At the hearing, the company's argued that its appeal had been made in time and was valid even if the disputed tax had not been paid and a hardship application had not been made. The company argued that under s.84 VATA 1994 where no tax is paid or hardship application made, the appeal cannot be 'entertained' by the FTT until this occurs. Neither section 84 nor rule 20 of the FTT Rules invalidated the making or notification of the appeal in those circumstances.

The FTT decided that the company had made a valid appeal when it filed its 2017 notice of appeal without paying the disputed tax or applying for hardship. To be valid, s. 84(3) refers to an appeal being entertained and rule 22(1) uses the term "an appeal proceeding". Both parties agreed that "entertaining" and "appeal proceeding" must mean the same. The FTT confirmed that starting proceedings was not the same thing as entertaining or proceeding with an appeal. The FTT went on to find that as HMRC had subsequently accepted that the company would suffer hardship if it were required to pay the disputed tax, there was no longer any reason why the appeal should not now proceed towards a hearing.

Consequently, the FTT stated that there was no need to consider whether to grant the company permission to make a late appeal. However, had it been necessary, the FTT would have applied the three-stage test in *Martland* and would have refused the permission on the grounds that:

1. the delay was serious and significant;

2. there was no good reason for the delays from 31 August 2017 until 24 September 2020 when nothing happened or between 14 October 2020 and 3 December 2020 when new solicitors had been instructed but did not file any notice of appeal and no application for hardship was made;

3. the prejudice to HMRC caused by the delay outweighs that caused to the company by its own inaction

SNM Pipelines Ltd v HMRC [2022] UKFTT 231 (TC)

6.9 Other administration issues

6.9.1 Insolvency

Section 1.4 “More information and advice” section has been updated to remove duplication.

Section 13.2 has been added to give information on set-off and preferential debts. It reads:

> 13.2 SET-OFF AND PREFERENTIAL DEBTS
>
> When HMRC owes a pre-insolvency credit to a debtor and seeks to set this off against pre-insolvency debts owed by the debtor, which are both preferential and non-preferential (sometimes called 'unsecured debts'), this is undertaken differently depending on the UK jurisdiction of the insolvency.
>
> For insolvencies under the law of England, Wales and Northern Ireland, the amount due from HMRC to the debtor must be set-off rateably against the non-preferential debt and the preferential debt, in proportion to the respective amounts of those debts.
>
> In insolvencies under the law of Scotland, set-off operates differently. HMRC will set-off any sums due to the debtor against HMRC non-preferential debt first, then any remainder against HMRC's preferential debt.

Credit note information has been updated in sections 12.2 and 12.3 to read:

> 12.2 TIME LIMIT
>
> When a credit note evidencing a decrease in consideration is received or issued by an office holder after the relevant date, adjustments of VAT resulting from such credit notes will relate to the VAT accounting period in which the decrease in consideration took place.
>
> 12.3 PRE-INSOLVENCY SUPPLIES

If you issue a credit note evidencing a decrease in consideration for supplies made in a pre-insolvency VAT period, the effect is to reduce the output tax due in that period and thus to reduce our claim in the insolvency.

If you receive such a credit note which relates to supplies made in a pre-insolvency VAT period, the effect is to reduce the input tax which can be claimed in that period and so to increase our claim in the insolvency.

Since the adjustment of VAT arising from the credit note applies in the VAT accounting period in which the supply increase or decrease in consideration took place, the VAT Return for the period in question will often already have been submitted once the credit note comes to light. In that event, the credit note adjustment should be declared either by letter or by means of a voluntary disclosure to the relevant office. Provide details of the VAT element and the date of the original supply. If you have not yet rendered a VAT Return for the period concerned and you're intending to do so, the return must include the credit note adjustment.

12.3.1 Voluntary arrangement

In the case of a company voluntary arrangement the adjustment should be made on the normal basis, that is, in the period the adjustment takes effect in the business accounts of either the taxable person issuing the credit note or the customer receiving one.

12.3.2 Scottish trust deeds

For Scottish trust deeds credit notes should be treated on the normal basis outlined in paragraph 12.3.1.

12.3.3 Other insolvencies

Credit notes for all other types of insolvency should be accounted for on the normal basis outlined in paragraph 12.3.1.

Email addresses in sections 1.4 and 3.6 have been updated.

VAT Notice 700/56

6.9.2 Appeal against disclosure declaration allowed in part

In *Paul Ellis (1) North Yorkshire Properties Limited (2) v HMRC* [2022] UKUT 254 (TCC) the Upper Tribunal allowed in part an appeal against a disclosure direction that the appellants considered was disproportionately wide. The Upper Tribunal decided that HMRC were entitled to obtain information consisting only of material falling within specific time periods that were subject to appeal.

Paul Ellis (1) North Yorkshire Properties Limited (2) v HMRC [2022] UKUT 254 (TCC)

6.9.3 The Retained EU Law (Revocation and Reform) Bill 2022

On 22 September the Retained EU Law (Revocation and Reform) Bill was introduced to Parliament. The Bill will sunset the majority of retained EU law so that it expires on 31st December 2023.

All retained EU law contained in domestic secondary legislation and retained direct EU legislation will expire on this date, unless otherwise preserved. However, it appears that tax (and VAT) will be dealt with separately. The press release accompanying the introduction of the bill states as follows:

> *'More generally, all required legislation relating to tax and retained EU law will be made via the Finance Bill (or subordinate tax legislation) which is usual and appropriate for tax provisions. The government will also introduce a bespoke legislative approach for retained EU law concerning VAT, excise, and customs duty in a future Finance Bill. This approach will revoke any remaining retained direct EU law that the government did not repeal in the Taxation (Cross-border) Trade Act 2018, and make clear that UK Acts of Parliament and subordinate legislation are supreme.'*

https://www.gov.uk/government/news/the-retained-eu-law-revocation-and-reform-bill-2022