



Indirect tax update

Edition 26/2020 – 16 July 2020

Summary

Welcome to this week's Indirect Tax Update.

Following on from last week's edition of Indirect Tax Update, the Treasury has now published a statutory instrument (The Value Added Tax (Reduced Rate) (Hospitality and Tourism) (Coronavirus) Order 2020, SI 2020/728) – and HMRC has published more details and guidance in connection with the introduction of the reduced VAT rate of 5% to various supplies in the hospitality, entertainment and catering sectors.

We take a look at the new legislation and the guidance notes relating to the application of the 5% rate and to the 'Eat out to Help Out' scheme.

We also take a look at the Judgment of the Court of Appeal in the case involving HMRC v Northumbria Healthcare NHS Foundation Trust concerning the question of whether VAT was recoverable on costs relating to cars supplied to employees under a salary sacrifice scheme.

Under UK domestic VAT law, the provision of a motor car to an employee by an employer in exchange for a salary sacrifice is not regarded as a supply for VAT purposes. If there is no supply for VAT purposes then, according to the Trust, there is no business or economic activity and, as a consequence, the Trust is entitled to reclaim the VAT it incurred on the purchase of the motor cars under the special provisions of section 41 of the UK VAT Act.

The general activities of an NHS foundation trust are not regarded as business activities and, in the circumstances, the Court has ruled that the Trust is entitled to reclaim the input VAT under these special rules.

In preparation for Brexit, HMRC has also issued a number of guidance documents relating to the future import and export requirements after the end of the transitional period (which is now less than six months away).

Businesses that continue to trade in goods with former EU based customers and suppliers need to familiarise themselves with the new import and export rules and procedures and make preparations for what will be significant changes.

'Eat out to Help Out' and introduction of the reduced VAT rate of 5%

HM Treasury publishes legislation and HMRC publishes guidance

Following the Chancellor of the Exchequer's announcements last week, the Treasury has issued a statutory instrument setting out the temporary measures aimed at stimulating the UK's flagging post-pandemic economy. HMRC has also issued guidance documents relating to the Eat out to Help Out scheme and the introduction of the reduced VAT rate of 5% for the hospitality, holiday accommodation and attractions sectors.

The statutory instrument amends Schedule 7A of the UK VAT act and introduces the reduced rate to supplies in the course of catering of any food or drink for consumption on the premises on which it is supplied and to supplies in the course of catering of any hot food or hot drink for consumption off those premises. The supply of any alcoholic drinks is not covered by the reduced rate and so remains liable to VAT at the standard rate of 20%. (alcoholic drinks are defined as those that are subject to a duty of excise). The reduced rate will apply to supplies of catering in all pubs, restaurants or cafes or by take-away outlets with effect from 15 July 2020 until 12 January 2021. Businesses are not required to reduce their prices charged but, merely to account for VAT at 5% between these dates. The VAT fraction to work out the VAT included in a gross price is 1/21).

The reduced rate will also apply to supplies of holiday accommodation (ie accommodation in a building, hut, (including a beach hut or chalet), caravan, houseboat or tent which is advertised or held out as holiday accommodation or as suitable for holiday or leisure use). This will include such things as yurts and similar glamping pods held out as holiday accommodation and will also apply for the period from 15 July 2020 to 12 January 2021.

As far as admission to attractions is concerned, supplies of a right of admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas and exhibitions and similar cultural events and facilities will be liable to VAT at 5% unless the supply is already covered by an exemption from VAT under the 'cultural services' exemption. HMRC's guidance stipulates that the reduced rate does not apply to admission to sporting events. Where admission to events includes other incidental or 'ancillary' supplies of goods or services, the supplier can apply the reduced rate to the whole of the admission charge.

HMRC has also published guidance on how restaurants and other establishments serving food for on-premises consumption can sign up for the 'Eat out to Help Out' scheme. The registration service went live on 13 July. Participating businesses will be entitled to deduct the 50% discount (capped at £10 per diner) for all meals from customers' bills and to then reclaim that amount through an online service. Claims for refunds can be made on a weekly basis and should be paid by HMRC (directly by BACS) within 5 working days. The scheme will operate on Mondays, Tuesdays and Wednesdays during August 2020.

Food businesses can register for the scheme if the particular establishment sells food for immediate consumption on the premises, provides its own dining area or shares a dining area with another establishment for eat-in meals and was registered as a food business with the relevant local authority on or before 7 July. Businesses that only sell take-away food and drink will not be eligible to register for the scheme. Participating businesses will also need to keep records including, for each day of using the scheme and for each establishment, the total number of customers who have used the scheme in the establishment, the total value of transactions under the scheme and the total amount of discounts given. HMRC has said that it will publish more guidance on how to actually make a claim in due course. The claim service will be open from 7 August 2020 and will run until 30 September 2020.

Customers will not need a voucher or similar to claim the discount. Participating establishments will simply remove the discount from a customer's bill. However, businesses should still account for VAT (at the reduced rate on food but at the standard rate on alcohol) on the full amount of the bill – in other words, VAT will be due as if there had been no discount applied to the customer's bill. The Government's contribution is regarded as third party consideration (or part consideration) for the supply.

Comment – as set out in the Chancellor's statement on 8 July, these measures are being introduced to help to protect jobs in the hospitality sector by reducing the tax burden and to encourage customers to return to their pre-lockdown eating out habits. HMRC's guidance is reasonably comprehensive but does not provide any guidance on, for example, whether a tonic water supplied with a gin can be treated as a separate supply and reduced rated or whether the whole of the gin and tonic (as an example) is to be regarded as a single supply that is liable to VAT at the standard rate. Hopefully, HMRC will provide further guidance in due course.

Court of Appeal – HMRC v Northumbria NHS Foundation Trust

Whether Trust entitled to reclaim input VAT on the purchase of motor cars supplied to employees under a salary sacrifice arrangement

In 1992, when salary sacrifice arrangements began to surface, the Treasury issued a statutory instrument (The Value Added Tax – Treatment of transactions Order 1992 SI 1992/630) to make it clear that, in circumstances where an employee gave up part of their salary and received the right to use a motor car in return, the provision of the right to use the car was not to be treated as a supply of goods or a supply of services. The effect of that regulation was to ensure that no VAT was due in relation to the provision of the car.

In Northumbria NHS Foundation Trust, the Trust used such a scheme for its employees. However, as a branch of 'government', the Trust falls within a special VAT regime. Essentially, it is not regarded as undertaking an economic activity when it delivers its core NHS services and, under normal VAT rules, that would prevent it from being able to reclaim input VAT incurred on goods and services supplied to it. However, under section 41 of the VAT Act, special rules apply to government departments and similar public bodies whereby, in order to minimise the impact of VAT – which is ultimately borne by the taxpayer, such bodies are allowed to reclaim the VAT incurred on non-business (or non-economic) activities. The Trust considered that, as the provision of cars under its salary sacrifice arrangements were to be treated as neither a supply of goods nor a supply of services (under the order above), then it was entitled to reclaim the input VAT it had paid on the purchase of the cars.

HMRC disagreed. It considered that the two concepts of supply and economic activity were separate and that the order deeming that the provision of a motor car under a salary sacrifice arrangement was not to be regarded as a supply did not mean that the Trust's activity of leasing the cars was not an economic activity.

The Court of Appeal considers that HMRC's arguments were wrong. The fact that the order specifically precludes there being a supply (of the motor car) means that there is no economic activity and, as a consequence, the Trust was entitled, under the provisions of s41 to reclaim the input VAT that it had incurred on the acquisition of the vehicles. HMRC's appeal was dismissed.

Preparing for Brexit

HMRC issues guidance in relation to imports and exports etc

The Brexit transitional period expires on 31 December 2020 – this is now less than six months away and all businesses that continue to trade with other businesses in the European Union must familiarise themselves with the new VAT regime that will come into force on 1 January 2021. The system of trading with EU countries will change dramatically from the current regime. Put simply, from 1 January 2021, the UK will be regarded as a third country as regards the EU. This means that any goods arriving from the EU will need to be imported into the UK (with a customs declaration required and customs formalities to observe). Similarly, where goods are despatched from the UK to the EU each movement will be treated as an export and will require an export declaration.

To this end, HMRC has issued a number of guidance documents to help businesses decide how they are to import and export goods and how they will meet their customs obligations and reporting requirements. The guidance provides a helpful checklist and provides guidance on the different import options that a business faces.

Any business wishing to import or export goods in 2021 will need an EORI number. The process to obtain one is fairly simple and any business without one should take time now to apply. To help businesses new to importing, HMRC has agreed that, for non-controlled (standard) goods, businesses will be allowed to take up to six months to lodge a customs declaration (normally, these declarations are required when the goods arrive at the border). The business will need to also apply for and be authorised for both 'simplified declarations' and duty deferment. Alternatively, a business can operate under the normal regime of declaring goods at the point of entry. In either case, a business intending to import goods may, in certain circumstances need specialist software and will need to train its employees (for which the Government has provided more funding) unless it decides to appoint a customs intermediary such as a customs agent or freight forwarder. These decisions need to be taken now to give a business time to prepare for the changes.

When goods are imported into the UK, there may be both customs duty and import VAT to pay. The amount of VAT payable is determined by reference to the value of the goods being imported plus the customs duty (if any) that is payable. The rate of VAT payable will depend on the goods in question. The amount of customs duty payable will depend on the classification of the goods (under the UK Tariff), the value of the goods (there are a number of ways of determining the value for customs purposes) and the origin of the goods (determination of origin can be tricky). A business will also need to consider whether to import the goods into 'free circulation' or whether to import them to various special procedures such as 'inward processing', 'temporary admission' or for storage in a Customs Warehouse.

All of these issues (and many others) need to be addressed before the end of December 2020. Importing and exporting goods is a complex exercise which, with less than six months to go, requires immediate attention.

Comment

In this case, the Trust not only provided motor vehicles to employees under the salary sacrifice arrangements, but also supplied vehicles to other Trusts and other third party organisations. It accounted for VAT in the normal way in respect of these transactions. This activity was accepted as being an economic activity.

As far as its own employees were concerned, the Trust's acquisition of the vehicles incurred a VAT cost. However, UK VAT law (through the 1992 order) deems that there is neither a supply of goods nor a supply of services in relation to the provision of the vehicle to an employee who gives up part of their salary.

As a consequence, the leasing of the cars to employees is not a business activity of the Trust and due to the status of the Trust – recognised as a 'body of persons exercising functions on behalf of a Minister of the Crown' – it was covered by the special provisions of section 41 of the VAT Act. Accordingly, the Court of Appeal agreed with the Upper Tribunal that the Trust was entitled to reclaim the VAT that it had incurred on the purchase of the cars. HMRC's appeal was dismissed. It is possible that HMRC may seek further leave to appeal this judgment to the Supreme Court.

Comment

Many businesses (both in the UK and in the European Union) have left preparation for Brexit until there was some certainty in relation to the transitional period. There have been calls for the transitional period to be extended to give businesses more time to prepare. However, the Government has stated that the transitional period will not be extended and it will, thus, come to an end on 31 December 2020.

For many businesses, the new import / export regime for the movement of goods between the EU and the UK (and vice versa) will be the first time they have ever encountered import / export formalities. There is much to do and very little time in which to do it.

Most businesses will, likely, appoint third party agents to deal with their customs and import/export obligations. In such cases, the business still needs to understand the processes and to begin having conversations with such agents to ensure that there is no hold ups when goods either arrive or depart the UK.

Grant Thornton UK LLP is holding a 'What Happens after Brexit?' webinar on Thursday 23rd July from 3pm to 4pm. This will cover a number of tax issues – not least, the new customs regime and changes to the VAT system after the end of the transitional period.

Any business wishing to participate in the webinar should contact graham.c.brearley@uk.gt.com

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