Indirect Tax Update
2024 Edition 01 – 30 January

Summary

This month, we examine one case from the Upper Tribunal which looked at the difficulties for a taxpayer in successfully claiming repayment supplement from HMRC.

The First Tier Tribunal looks at two "disruptive industry" appeals. Firstly with Bolt which provides smartphone arranged private hire journeys, and secondly Vision Dispensing which provides contact lenses from the Netherlands. It also settled a dispute involving serviced residential accommodation.

Also, in the FTT we consider the VAT impact of the difference between a mini-poppadom made with traditional gram flour and one that includes potato. For all the thousands of pages of tax legislation in the UK, it's remarkable that the tax rate of a product can be either 20% or 0% can turn on the definition and interpretation of phrases such as "similar to" or "not sufficiently different from". The hunt for clarity in the VAT treatment of food products continues.

Finally, we look at the government announcements on Fund Management Services and the extension of zero rating for energy saving materials.

News from the UK Courts and Tribunals

Upper Tribunal (UT)

[2023] UKUT 00295 (TCC) Bollinway Properties Limited

The UT has confirmed the FTT decision that 5% repayment supplement was not payable by HMRC on the £71 million input tax claim by Bollinway following its purchase in September 2018 of the properties formerly used by the Toys R Us Group for £356 million plus VAT.

Bollinway had submitted its return on time, actually just 2 days after the end of its VAT period, but HMRC did not authorise the repayment until 49 days later.

Repayment supplement applied to VAT returns before the end of 2022 if HMRC failed to authorise a repayment claimed on a VAT return (submitted on time) within 30 days of receiving the return. Days when any enquiries sit with the taxpayer do not count towards the 30 days. Bollinway accepted the clock was stopped from 23-26 November (3 days) and on 14 December 1 day), but disputed the clock was stopped between 27 November to 18 December 2018.

HMRC had requested a full set of backing documents to support the input tax claim on 27 November, and Bollinway had supplied the contractual documents and the tax invoice but not the property transfers (Land Registry Forms TR1).

The FTT, with which the Upper Tribunal agreed, said it was reasonable given the large input tax claim, Bollinway's lack of history, and Toys R Us' very public insolvency, for HMRC to require a full set of backing documents. The TR1 forms were the formal evidence of the legal transfers of property sufficient to convey land and the delay in Bollinway providing the TR1s until 18 December was fatal to their claim for repayment supplement.

Comment: Getting HMRC to pay repayment supplement (discontinued after the beginning of 2023) was always difficult, because it operated as a penalty against HMRC.

First-tier Tax Tribunal (FTT)

TC09002 Vision Dispensing Limited (VDL)

The FTT has decided the services provided by VDL did not amount to exempt dispensing services.

VDL is a UK member of the international Vision Direct Group claimed to provide exempt dispensing services to customers who buy contact lenses online from its Dutch sister company, so that 18% of the price was paid to VDL for dispensing services (exempt) and 82% to the Dutch company.

The supply of contact lenses is not so strictly regulated in the Netherlands as in the UK. In the UK, the supplier must be provided with the specification of the lenses as prescribed by the appropriate professional, and must undertake verification before supplying contact lenses. In NL a customer can order direct using any information available (eg looking at a pack of lenses) and does not need to provide a copy of the prescription or specification provided by the optometrist.

VDL does provide online, phone and webchat guidance to customers on request, but the Tribunal was not convinced that it was within the "continuum of care" needed for a UK regulated supply. Supervision of the staff providing advice to customers by registered optometrists did not change the Tribunal's view that the services were not medical care.

Comment: The judgement provides a detailed summary of the regulatory environment for supply of contact lenses in the UK and the NL and some of the pressures faced by high street opticians with disruptive competition from online suppliers

TC09014 Bolt Services UK Limited

The FTT has confirmed that web based "Ride Hailing Services" with journeys provided by self-employed drivers are subject to the Tour Operators Margin Scheme (TOMS) so VAT is levied on the margin rather than the full fare.

Bolt is part of a group of companies with headquarters in Estonia that provides a global mobility platform (the 'Platform') offering a range of services, including transport by private hire vehicles ('PHV'), in over 400 cities worldwide. The Bolt group of companies also provides car rental services, mobility scooter rental services and grocery delivery services. This appeal was only concerned with its Ride Hailing Service whereby the passenger uses Bolt's customers to request a Private Hire Vehicle to take them from point A to point B by using an app on their smart phones, and Bolt then allocates the journey to a self-employed driver who is willing to transport the customer.

Bolt contracts separately with both drivers and passengers and is responsible for all invoicing and remittance of payments and there is no contractual relationship between the drivers and the customers.

The Tribunal undertook a detailed analysis of the UK legislation's conformity with the PVD and CJEU case law. Ultimately finding the TOMS is compulsory when travel services are bought in and supplied without material alteration. It found the Ride Hailing Service fell within the TOMS and so VAT would be due on the margin only.

Comment: The factual finding that the PHV drivers were self-employed (and therefore taxable persons within the meaning of the PVD), means the similar claim by UBER appears to be differentiated (their drivers were deemed by the employment Tribunal / Court to have employment rights).

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TC09013 Realreed Limited

The Tribunal has ruled serviced apartments held out for short stays are standard rated, but the reduced value rules can apply after 28 days continuous occupation.

Realreed owns a large property called Chelsea Cloisters comprising 656 self-contained apartments and some commercial units. 421 of these apartments are let on long leases where no issues arise. The appeal concerned the VAT treatment of the remaining 235 apartments, comprising studios, and one-bedroom or two-bedroom self-contained Apartments let on Assured Shorthold Tenancies or with much less formal Guest Registration Forms.

Realreed argued the letting of the Apartments is a supply of exempt accommodation, furthermore related standard rated services (cleaning etc) were separately provided by an associated company Chelsea Cloisters Services Limited ('CCSL').

HMRC countered that the use of the Apartments is carved out of the exemption as "the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation". However, where the Apartment is let on an Assured Shorthold Tenancy (AST) for a minimum of 6 months, HMRC accepted the rent is exempt.

Realread used web based booking sites to make the accommodation available (eg Booking.com, Hotels.com, Expedia.co.uk) which HMRC pointed out were commonly used by the hotel sector. Many customers used the apartments for short term visits of a few days or weeks, but some lived there longer (there was one who had resided there for 20 years)

In a lengthy judgement the FTT concluded Chelsea Cloisters is an establishment similar to a hotel both on the ordinary meaning of the term and as premises where furnished sleeping accommodation is provided which is used by or held out as being suitable for use by visitors or travellers

It continued to say the difference between a formal AST and the one page Guest Registration Form was not material for deciding the liability and therefore both were standard rated (even though HMRC allowed ASTs to be exempt).

Realread could use the special "long stay" valuation rules to reduce the value on which VAT is calculated by 80% after continuous stays of 28 days, but the services separately provided by CCSL must be valued at the full amount and VAT accounted for at the standard rate.

Comment: It seems surprising the FTT did not distinguish between AST's (which by their nature under the Housing Act 1988 require the premises to be the tenant's only or principal home) and the short-term stays governed by a Guest Registration Form, and this could be subject of a further appeal (or HMRC not taking the point). However, applying the reduced value rules to long term lets could be beneficial if major landlord repairs were required as the result would be higher input tax recovery.

It seems the taxpayer's structuring of services being provided by a separate, but related, company CCSL, has backfired as more output tax is due than would be the case if the accommodation and services were provided as a package by Realreed.

TC09024 Walkers Snack Foods Limited

Walkers argued that its Sensations Poppadoms should be zero rated, but HMRC asserted that the potato content was sufficient to make them standard rated.

The Tribunal found the total percentage of 39 - 40% potato in the ingredients was sufficient for the poppadoms to be potato snacks and excluded from zero rating.

Comment: the Tribunal Judgement includes references to Walkers decision to reduce the percentage of gram flour by replacement with potato, at least partly on the basis of cost. It remains to be seen how much the potato content would need to be reduced and replaced by gram flour to stop being a potato snack. Would the increase in cost be outweighed by the reduction in output tax liability?

Court of Justice of the European Union

Case C-288/22 TP - Luxembourg

In a confusing Judgement the Court considered the case of TP who acts as a Director of a number of Luxembourg public companies. He is typically paid on the basis of fees approved by the shareholders, and sometimes calculated as a percentage of the company's profits.

In Luxembourg a Director, acting as a natural person and not through a personal service company, is not treated as an employee, and the tax authority assessed TP for output tax, which led to a cost to the Companies that were not able to recover all or some of the VAT he was obliged to charge.

Comment: the Judgement is really quite confusing as the two paragraphs appear to give contrary views. In the first paragraph the Court is clear that a director (in Luxembourg) carries out an economic activity, but in the second paragraph the Court says the Director does not act independently where he does not bear the economic risk associated with the recommendations or decisions he makes.

It seems unlikely the Judgement will impinge on the UK since appointment as a Director in a personal capacity is normally treated as employment and any remuneration, including fees, will be outside the scope of VAT (see Notice 700/34 last part of paragraph 3.4)

Case C–433/22 HPA – Construções SA

The Court has ruled the PVD allows a reduced rate of VAT for services relating to the renovation and repair of private dwellings on condition that the dwellings concerned are actually used for residential purposes at the time when those works are carried out.

Comment: The Court has taken a restrictive approach to the reduced rate relief by saying that it applies only to supplies to the final consumer who uses the residential property. The Court makes the point (paragraph 35) that used in this context "actual use" does not necessitate that it be occupied while the works are carried out by those persons who stay there, be it permanently or otherwise. Actual use for residential purposes is not affected by the fact that the property is used only at certain points in the year and the fact that a private dwelling is unoccupied for a certain period of time does not alter its nature as a private dwelling.

Other News from HMRC and HM Treasury

On 9 December 2023 HM Treasury published VAT Treatment of Fund Management Services Review Summary of Responses.

In December 2022 HM Treasury published a technical consultation on the VAT treatment of fund management services. The consultation set out how the government intended to achieve the twin aims of:

- improving policy clarity and certainty for all stakeholders on the application of the VAT exemption for fund management services and
- removing reliance on retained EU law.

It proposed:

- to codify in legislation what was meant by the term Special Investment Fund in respect of the VAT treatment of fund management, and
- retain the current list of exempt fund types, comprising Items 9 and 10 of Group 5, Schedule 9 of VAT Act 1994 (VATA), to which the fund management exemption applies.

The key takeaways from the summary of responses and HMT's reaction are that the government considers:

- a list-based approach (i.e the legislation sets out which funds qualify for exemption) is appropriate and provides sufficient legal certainty (thus meaning that the proposed principles-based approach will not be implemented);
- existing legislation covers the vast majority of fund types which should benefit for exemption *NB
- the current settled case law provides businesses with sufficient clarity in respect of what constitutes 'management' for the purposes of the fund management exemption.

The request by several respondents to introduce a zero rating for fund management services provided to UK domiciled funds, and the extension of the application for exemption, has been ruled out at this stage.

Comment: We aware HMRC considers existing legislation may not cover certain Investment Trust Companies where there may have been a reliance on the principles of 'direct effect', afforded by EU law, and EU litigation, for VAT exemption. This is particularly important given Retained EU Law Act 2023 has removed some European VAT legislation with effect from 1 January 2024.

Grant Thornton is hoping to engage HMRC on this matter and will keep all relevant businesses updated on progress as and when there is any.

Energy Saving Materials

HMRC has published a number of items on the outcome of its consultation on VAT energy saving materials (ESM) relief, this culminated in a legal change effective from 1 February 2024 the expand the temporary zero rate relief (until 31 March 2027) to

- electrical battery storage when retrofitted to a qualifying ESM or as a standalone when connected to the National Grid
- water-source heat pumps
- diverters retrofitted to ESMs such as solar panels and wind turbines

The relief will also be extended to the installation of all qualifying ESMs in buildings used solely for a relevant charitable purpose and will continue to apply when these ESMs are installed in residential buildings.

VAT payments on account

HMRC has updated its guidance to confirm that payments on account (POA) that are not paid on time will be subject to late payment interest while outstanding quarterly balancing payments will be subject to late payment interest and may be charged a late payment penalty.

Ongoing VAT Appeals

On 20 December 2023, HMRC updated its updates on VAT appeals. The Hotel La Tour case (VAT on seller's deal fees) is progressing to the Court of Appeal, with the hearing scheduled for April 2024. The Prudential Assurance Company Ltd (VAT on performance fees due after leaving a VAT group) was listed in the Appeal Court in late January 2024.

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