Briefing

The VAT review for June

Speed read

There are two Court of Appeal decisions this month and, whilst both contain important applications of the law, both are, in practice, heavily fact dependent. In *Fortyseven Park Street Ltd*, the court overturned the decision of the Upper Tribunal, considering that the wider rights and services provided to the members obtaining rights of occupation took the supplies outside the scope of the land exemption. In *National Car Parks v HMRC*, the court confirmed that overpayments made by a customer at parking machines remained consideration for VAT purposes. Meanwhile, the AG has applied the functional approach to the payments and transfers exemption endorsed by the CJEU to supplies involving operating ATMs and the legislation for implementing the reverse charge to certain supplies of construction services has been enacted.

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VAT reverse charge for construction services

The legislation to introduce a reverse charge on certain supplies of construction services with effect from 1 October 2019 has been enacted. The Value Added Tax (Section 55A) (Specified Services and Excepted Supplies) Order, SI 2019/892, will, in general terms, introduce a VAT reverse charge on supplies of construction services through intermediaries to which the provisions of the Construction Industry Scheme (CIS) also apply. However, since the purpose of the legislation is to prevent missing trader fraud opportunities within the construction industry, the legislation includes a number of exceptions for low risk situations, such as where the supply is made to the final consumer.

Under the reverse charge measure, VAT on certain supplies of construction services ('specified services') will need to be accounted for to HMRC by the customer rather than the supplier.

The definition of 'construction services' is based on the definition of 'construction operations' in the CIS. As such, it covers a wide range of services, including the construction, alteration, repair, extension and demolition of buildings, structures or works forming part of land; the installation of systems of heating, lighting, air conditioning, power and drainage, etc.; internal cleaning when carried out in the course of other construction works; and painting or decorating and other services integral or preparatory to such services. Conversely, it excludes services such as the professional work of architects, manufacturing building components and installation of security systems (unless they form a single supply with other construction services).

A supply which falls within the definition of construction services is nevertheless outside of the scope of the reverse charge if it constitutes one of the categories of 'excepted supplies', being:

- supplies where a payment is not required to be included in a return made under the CIS;
- supplies of specified services to an end user; and
- supplies to an intermediary supplier where either the intermediary supplier is connected with the expected end user of those services or the supplies are made in relation to land, buildings or civil engineering works in which both the intermediary supplier and the expected end user of those services have a relevant interest (such as landlords and tenants).

Where a supply is an excepted supply, the normal VAT accounting rules will apply.

Why it matters

The new rules will affect a large number of businesses when they come into effect in October 2019. It is estimated that up to 150,000 businesses could be required to operate these rules on supplies they make or receive. Whilst the added complexity will give rise to further administrative burdens for businesses, at least the final form of the rules has been closely tied to the operation of the CIS rules. However, further guidance on the evidence that suppliers need to obtain concerning certain of the exceptions (for example, if the recipient is an end user) would certainly be welcome.

Fractional interests in land

In *HMRC v Fortyseven Park Street Ltd* [2019] EWCA Civ 849, the Court of Appeal has held that grants of fractional interests giving rights to annual short term stays in a property providing luxury serviced accommodation were excluded from the VAT exemption for supplies of land. In overturning the decision of the Upper Tribunal, the Court of Appeal considered that the overall nature of the supply of the interests to buyers under a membership agreement and the accompanying rights and obligations were sufficient to distinguish the situation from the usually passive activity of leasing or letting immovable property.

Fortyseven Park Street (FPS) owned the lease on a property on Park Street in Mayfair, containing 49 self-contained apartments. It sold 'fractional interests' in these apartments to individuals (called members) which were governed by a membership agreement.

The membership agreement provided members with the right to stay in an apartment for 21 nights per year, subject to making an advance reservation, though their right did not attach to any particular apartment. Members paid an 'annual residence fee' to a manager (a company related to the taxpayer) in return for the management and administration of the property and the rights and obligations under the membership agreement. Members were also entitled to various benefits, including receiving

rent from the apartments as an alternative to staying in the property, the option (subject to availability) to purchase extra nights, access to a resale and exchange programmes.

Supply of land?

HMRC argued that the fact that the rights of occupation were subject to the making of an advance reservation removed the supply to members from the land exemption. The Court of Appeal rejected this argument. Even though a member was required to make a reservation, members were still buying a right to occupy conditional on reservation. Whilst members did not receive in advance the right to occupy any particular apartment, it was clear from the jurisprudence of the CJEU that such an exclusive right was not necessary.

However, HMRC also contended that a supply of land is normally characterised by a relatively passive activity linked to the passage of time and with little significant added value. In this case, HMRC argued that the various elements of the membership agreement which promised the supply of hotel-type services turned the supply from a simple land supply into a more complicated service, in a manner similar to the sporting rights in the case of *Luc Varenne* (Case C-55/14).

The court agreed. This was a case in which the supply was more than simply land. Members did not pay such large sums to 'obtain bare physical space'. They were promised the 'amenities and service of a five-star hotel' and the membership agreement reflected this. The court considered that these hotel-type additional services could not simply be regarded as ancillary or 'plainly accessory' to a supply of land. Accordingly, the supplies of fractional interests by FPS did not fall within the land exemption, which (the court noted) should be restrictively construed.

The hotel issue

The court also went on to consider whether the exception for 'the provision in a hotel or similar establishment of sleeping accommodation' (VATA 1994 Sch 9 Group 1 item 1(d)) would have applied had the supply been a supply of land. There was clearly a supply that included 'sleeping accommodation' in a 'similar establishment' to a hotel. Therefore, the court overturned the decision of the Upper Tribunal on this point, holding that the fact that members obtained a 'long term right' did not exclude the application of the exception. It was also relevant that the exception to the exemption (unlike the exemption itself) should not be construed narrowly.

Why it matters

Whilst this decision suggests that supplies of an interest in a building run in a similar way to a hotel may fall outside the exemption from VAT, the correct classification of such a supply will, in practice, be fact specific and must be considered on a case by case basis. There may well be a fine balance between those cases where the additional elements point towards a more complex supply and those which do not take the supply outside the land exemption. There may also be differences depending on the identity of the person supplying the additional services.

More generally, it is also worth noting that the court confirmed that the fact that a right to occupy may be subject to conditions (such as the need to make a reservation) does not prevent the grant of that right from falling within the exemption for a supply of land.

Overpayments and consideration

In *National Car Parks Ltd v HMRC* [2019] EWCA Civ 854, the Court of Appeal has held that overpayments made by car park users formed part of the consideration for VAT purposes. The court concluded that the overpayments clearly constituted contractual consideration for parking.

The decision of the court was based on a hypothetical example of a user of a pay and display car park wishing to pay for one hour's parking. The ticket machine indicates that the cost of parking for up to one hour is £1.40, but the customer only has £1.50 in change. The machine states that change is not given but overpayments are accepted. The customer therefore pays £1.50 in coins and obtains parking for up to one hour.

In those circumstances, NCP contended that the additional 10p paid by the customer was not consideration for the supply of parking. Since the supply would have been made regardless of whether the customer paid the extra 10p, that additional payment was voluntary and there was no direct link to the supply of parking.

The court disagreed. It was clear that on the hypothetical facts the contractual price for parking was £1.50. A contract was made at the latest when the customer pushed the green button for a ticket. The fact that the tariff board and ticket machine stated that 'overpayments' could be made and no change was given, taken together, indicated that NCP was willing to provide parking for an hour on payment of at least £1.40. Therefore, when the customer 'offered' £1.50 by inserting coins of that value into the machine and pressed the green button, a contract was made for parking for one hour for the payment of £1.50.

Accordingly, the court held that the full payment qualified as 'consideration' for VAT purposes as a payment under a legal relationship and having a direct link to the service provided.

Why it matters

The question of whether an overpayment forms part of the consideration for a supply may well be fact-specific. In this case, the court was able to conclude that the full payment was contractual consideration. Other cases may well be more nuanced, depending on whether the customer is contractually able to recover the overpayment. However, it is also clear from CJEU jurisprudence that a payment need not be contractual consideration to be 'consideration' for VAT purposes and, accordingly, the mere fact that an overpayment is voluntary would not necessarily prevent it from being consideration for VAT purposes.

VAT exemption for transfers and payments

In *Finanzamt Trier v Cardpoint GmbH* (Case C-42/18), the advocate general has opined that the services of a company operating ATMs on behalf of a bank do not fall within the scope of the VAT exemption for transfers and payments. The functional approach to the VAT exemption endorsed by the CJEU in cases such as *Bookit* (Case C-607/14) meant that the outsourced services provided by Cardpoint, no matter how extensive, did not fall within the exemption.

Cardpoint provided services to banks in connection with the operation of ATMs. Indeed, the full functions of operating an ATM had essentially been outsourced to Cardpoint. When ATMs were used for cash withdrawal transactions, special software would read particular data from the bank card. First of all, Cardpoint would verify

that data and send an electronic request to the bank to authorise the transaction requested by the cardholder. Next, the bank would forward the request to the interbank network, which would in turn pass it on to the bank that issued the bank card concerned. That bank would verify whether the account holder had sufficient funds in his account and send back, via the same channels, an approval or refusal of the withdrawal requested. Upon receipt of the reply, Cardpoint would generate a data file on the cash withdrawal and, if authorised, implement the requested transaction.

The AG emphasised that legal ownership of money was transferred from the bank, and not Cardpoint, to ATM users. So, whilst Cardpoint's service had the effect of physically transferring bank notes, transfer of the legal ownership of the money was contingent upon authorisation from the banks concerned. The services provided by Cardpoint were confined to forwarding the customer's request for payment and giving technical effect to that payment.

As such, the AG concluded that the service supplied by Cardpoint did not directly entail the act of debiting or crediting an account or accounting by means of accounting entries. Cardpoint transmitted and received data, but it was the banks concerned that provided and acted on the data files to effect changes to the underlying bank accounts. Cardpoint's services were to be classified as 'physical, technical or administrative services'.

It made no difference that banks had outsourced a large proportion of their ATM activity to Cardpoint, such that it provided a very extensive service. It was clear from *Bookit* that a functional and qualitative approach to the exemption based on the nature of the services was required, not a quantitative approach. Therefore, whilst some of the services of Cardpoint may have been 'essential' to the payment transactions, that was not sufficient to bring it within the exemption.

Why it matters

The decision is further confirmation of the need for a functional approach to the application of the exemptions for payments and transfers and the fact that it is difficult for services provided otherwise than by a bank to fall within the exemption. The mere fact that almost all the necessary activities relating to the operation of an ATM were outsourced to Cardpoint was not enough to engage the exemption as it was, ultimately, the banks concerned that effected the transfers legally. In this sense, the decision follows that made in *Bookit*, where the transfer of authorisation codes by the booking agent was insufficient to engage the exemption.

What to look out for

- The revised VAT treatment of personal contract purchases (PCPs) and similar contracts (as single supplies of taxable leasing services) must be applied to all new contracts from 1 June 2019.
- The FTT is due to commence hearing the long-running *HMRC v Newey (t/a Ocean Finance)* case (remitted back from the Upper Tribunal) on 28 June 2019. ■

For related reading visit www.taxjournal.com

- VAT reverse charge for construction services proposals (Sean McGinness, 28.6.18)
- Cases: *HMRC v Fortyseven Park Street* (29.5.19)
- Cases: *National Car Parks v HMRC* (22.5.19)

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