

Buzzacott

VAT update – issues affecting the charity sector

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Areas to be covered

Case Law

- Colchester Institute Corporation
- Balhousie
- Royal Opera House
- United Grand Lodge
- Step by Step (Northern Ireland) Ltd
- Cambridge University Boathouse Ltd
- Buzzacott client

Exemptions - planning

Updates

- VAT Recovery – annual adjustments & CGS
- Construction industry reverse charge
- Temporary reduced rate – extended to 31 March 2022
- Online Conferences
- HMRC delays

Looking ahead

- New Penalty regime from 1 April 2022
- Simplifying the Land exemption

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Case Law

Case Law

Colchester Institute Corporation ('CIC')

- CIC is a college providing education to 16-19yr old students
- Students pay fees themselves or courses wholly /partly funded by EFA/SFA
- HMRC policy – grant funding not consideration for any supply by the school/college, hence funding outside the scope & education is a non-business activity
- Provision of education in return for a fee is exempt where provided by an eligible body

Case Law

Colchester Institute Corporation ('CIC')

- CIC undertook major campus development in 2008 at a cost of around £100m
- Applied 'Lennartz mechanism' & recovered VAT on costs attributable to non-business activity
- Lennartz requires that output tax is accounted for in subsequent periods – gives cash flow benefit
- In 2014 CIC submitted retrospective claim for output tax paid – 4-year cap
- Argued funding from EFA/SFA was payment for the supply of education to students - exempt

Case Law

Colchester Institute Corporation ('CIC')

- Submitted no adjustment to input tax claimed in 2008 as HMRC out of time to adjust
- HMRC rejected claim, CIC appealed
- FTT agreed with HMRC that grant funded education was non-business activity
- CIC appealed and UTT found in favour of CIC – funding was third party payment for the provision of education – exempt, hence no Lennartz payments

Case Law

Colchester Institute Corporation ('CIC')

However:

- HMRC argued if no output tax , no entitlement to input tax recovery
- Was CIC right that HMRC out of time?
- Specific legislation requires that all consequences of a mistake are adjusted
- No output tax under Lennartz and hence no entitlement to input tax regardless of 4-year cap

Case Law

Colchester Institute Corporation ('CIC')

Potential implications:

- Entitlement to zero rate reliefs for new buildings
- Zero rating for fuel and power
- Impact on School Academies?

- HMRC issued Business Brief 8/21
- Further litigation to test the decision but in the meantime, taxpayers can continue to treat grant funded education as non-business

Case Law

Royal Opera House

Background:

- HMRC historically took view production/exhibitions costs directly attributable to grant of admission
- This policy changed following challenges by Mayflower Theatre and Garsington Opera - HMRC issued a Business Brief 62/09
- Many organisations use the 'standard' income-based partial exemption method
- HMRCs view is that production/exhibition costs have no direct link with bar/catering income
- Where difference is 'substantial' SMO is triggered - apply a method based on 'use'
- Broadly a sectorised calculation that omits income streams that are 'unrelated' to show/exhibition activity

Case Law

Royal Opera House

- ROH submitted a retrospective claim, arguing no SMO, which was rejected
- Appealed to FTT, - Bar and catering income attracted customers, which in turn funded part of the cost of productions
- ROH's argument was there was a direct and immediate link between production costs and bar and catering income, hence income should be used in turnover calculations
- Accepted by First Tier Tribunal (FTT), HMRC appealed to the Upper Tribunal (UT)

Case Law

Royal Opera House

- UT undertook a detailed review of the case law
- Concluded there are two alternative bases for establishing a link to taxable supplies:
 - Where the costs concerned are general costs, i.e. overheads, there is a right to VAT recovery on the basis of a ‘direct and immediate’ link with a taxpayer’s economic activity as a whole
 - Where the costs concerned are attributable to a particular supply or supplies, i.e. residual costs, the expenses must form part of the cost components of specific taxable transactions

Case Law

Royal Opera House

- ROH and HMRC agreed that the production costs were 'residual' and not overheads
- UT concluded the production costs only had a direct and immediate link with the exempt supply of tickets (and other production-related taxable supplies), not the catering and bar income
- Production costs had an indirect link to bar & catering income and hence could not be included in apportionment calculations
- CoA agreed with UT
- HMRC targeting reviews

Case Law

Balhousie Holdings

- BH issued a Z/R certificate for construction of new building to be used for RRP – hence subject to 10-year change of use provisions
- BH entered into a sale and leaseback arrangement to raise funds
- HMRC ruled COU provisions triggered as BH had disposed of its entire interest
- Supreme Court disagreed – under a sale and leaseback arrangement BH always had an interest in the property
- HMRC issued R&C Brief 13/21

Case Law

Balhousie Holdings

- ‘The disposal of your entire interest in a property will not occur when all the following conditions are in place:
 - A qualifying property must have been purchased
 - When the property is sold, there must be an immediate lease in place, which is a seamless transaction with no time lapse
 - The lease must be for the remaining term of the 10 years from the original purchase date or longer
 - The property must be continually used or operated for a qualifying purpose meaning the business suffers no break in trade during the sale and leaseback
- If these conditions are not met then the sale of the property or the giving up of a long lease within the 10 year period will be subject to the self supply charge for the remaining term, as you will have disposed of your entire interest in the property within the 10 year period.’

Case Law

United Grand Lodge of England

- Concerned subscriptions paid by its members and whether exempt under VATA 1994, Schedule 9, Group 9
- Bodies qualify for exemption if they are non-profit making organisations, and if they operate in the public interest in that they are:
 - Trade unions
 - Professional associations
 - Learned societies
 - Representational trade associations
 - Other public interest bodies, that is, bodies with main object/aims that are in the public domain and are of a political, religious, patriotic, philosophical, philanthropic or civic nature

Case Law

United Grand Lodge of England

- UGLE claimed that its sole main aim was philosophical in nature; or, in the alternative, the main aims, taken together, were of a philosophical, philanthropic, or civic nature and it did not have any other main aims
- Judge not satisfied that the charitable works of individual freemasons, such as volunteering to give time to a local charity, were undertaken by them as freemasons
- Found that UGLE did have aims of a philosophical, philanthropic and civic nature (the promotion of all aspects of the practice of freemasonry and charity was central to UGLE's activities)
- However, not accepted that these were UGLE's main or primary aims

Case Law

United Grand Lodge of England

- At least 48% of payments made by UGLE were to freemasons and their dependants
- In the FTT's judgment such support remained one of the main aims of freemasonry and thus of UGLE
- Evidence showed that the provision of relief to freemasons and their dependants was the more important than donations to good causes unconnected with freemasonry
- There was nothing in the evidence which indicates any civic aim - UGLE cannot be said to be an organisation that has aims pertaining to the citizen and the state
- Therefore subscriptions liable to VAT

Case Law

Step by Step (Northern Ireland) Ltd

- SBS is a registered charity which provides vocational training in hospitality to students with learning difficulties
- Ran a restaurant (staffed by students/teachers) which is open to the public so that students get practical experience – run on a non profit making basis
- SBS had contract with a College to provide training to its students and was also responsible for recruitment of students to the training programme
- SBS registered for VAT in 2011 but applied to deregister in 2018 on basis it believed its supplies were exempt

Case Law

Step by Step (Northern Ireland) Ltd

- Relied on VAT 1994 Sch 9 Grp 6:

“1. The provision by an eligible body of –

(a) education; ... or

(c) vocational training. ...

4. The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided –

(a) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and

(b) where the supply is to the eligible body making the principal supply, it is made by another eligible body.”

Case Law

Step by Step (Northern Ireland) Ltd

- SBS argued its services were a business activity and that its supplies from the restaurant were essential to the education or vocational training – referred to CJEU case of Brockenhurst College
- HMRC had concluded activities were non-business on the basis its activities were fully grant-funded – in which case restaurant services can't fall within the 'closely related' exemption
- FTT referred to the Colchester case and found there was a supply for consideration. i.e. the College was paying SBS for its services and hence SBS undertaking an economic activity
- FTT found basic purpose of the restaurant was to enable students to get work experience and hence services closely related to the provision of education - exempt

Case Law

Cambridge University Boathouse Ltd

- CUB owns a Boathouse which it licences to three CU boat clubs, which field crews for the annual boat race with Oxford
- CUB sought to recover VAT in respect of its Boathouse
- Claim for I/T rejected by HMRC on the basis that HMRC believed its services fell within the sporting exemption.

VATA 1994 Sch 9 Grp 10 item 3:

- “The supply by an eligible body to an individual of services closely linked with and essential to sport or physical education in which the individual is taking part.”

Case Law

Cambridge University Boathouse Ltd

- It was accepted by HMRC that CUB was an 'eligible body' and that the supplies were closely related to the provision of sport
- Although the supplies from the boathouse were made to the clubs, following the CJEU decision in Canterbury Hockey, the exemption still applies if the 'true beneficiaries' of the service are individuals
- The FTT therefore had to determine whether the 'true beneficiaries' were the rowers or the clubs
- FTT found it was the clubs who had the right to use the boathouse, paid for it and stored its equipment there. Rowers had no right of access or right to use the boathouse unless allowed to do so by the clubs – hence exemption didn't apply

Case Law

Buzzacott client

- Client provides hostel accommodation for homeless under licence agreement
- HMRC initially argued services exempt as accommodation ancillary to provision of welfare
- Then ruled standard rated as hotel/similar accommodation
- HMRC subsequently confirmed supply is subject to VAT, but not because of the exclusion to land exemption

- VATA 1994 Grp1 Sch9 item 1:
 - The grant of any interest in or right over land....., other than.....
 - (d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation.....

- Argued licencing agreement did not convey a grant of an interest in land or licence to occupy and supply was use of facilities

Case Law

Buzzacott client

- Why is this important - supply taxable in either case?
- Special rule allows for hotel/hostel accommodation excluded from the exemption to be liable to a reduced VAT charge where a stay is longer than 28 Days– referred to as '28-day rule'.
- If the supply is one of the use of facilities, not a grant of an interest in land as argued by HMRC, cannot use this special rule and VAT will be due on long stays

Case Law

Buzzacott client

- Case heard in March
- HMRC relying on the fact that licence agreement states no landlord/tenancy relationship and agreement not intended to confer exclusive occupation to tenant
- Client argued it was clear that residents had exclusive occupation of their rooms for period of licence agreement
- Both parties arguing supply is standard rated but for different reasons
- If HMRC are right, could have wider application, particularly with interpretation of what constitutes a 'licence to occupy'

- Still waiting for the decision!

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Exemptions - planning

Exemptions - Planning

- Exemptions in Schedule 9 all have specific conditions
- Definition of 'eligible body' or non profit making organisation falling within the exemption different in each case:
 - Provision of education
 - Provision of welfare services
 - Cultural exemption
 - Sporting services
 - Membership subscription

Exemptions - Planning

If services are exempt

- Good news – no VAT to account for on the supply of goods and services
- Bad news – no VAT recovery on associated costs, unless PE DML applies - therefore, important that budgets set accordingly

However, is there an alternative?

- Are you better 'breaking' the exemption making supplies liable to VAT?
- Consider impact of standard rating vs exemption
- If S/R better, take steps to structure accordingly
- Careful planning needed, but possible

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Updates

VAT recovery – annual adjustments

Basis for annual adjustment

- Many organisations had skewed annual adjustments
- COVID-19 caused distortion of normal trade
- Charities with charity shops - reduced levels of taxable income/activity
- Museums, galleries, theatres - reduced ticket/bar/retail sales
- Universities - reduced trading income, subsidiaries not be operating
- Mixed bag of implications

VAT recovery – annual adjustment

HMRC issued R&C Brief 4/21

- Fast Track approval for temporary method
- Can use average of 2-3 years recovery rate pre COVID-19
- Can use estimated turnover
- If using Standard method, the SMO should be applied if applicable
- Also applies to CGS adjustments
- HMRC had been slow with approvals
- Approval letters have end date

Construction industry reverse charge

Introduced on 1 March 2021

- Intention is to stop missing trader fraud
- Supplier issues invoice to customer advising that the customer will account for VAT
- Applies to 'specified services' between VAT registered entities
- Generally services that are defined as construction operations for purposes of the Construction Industry Scheme (CIS)

Construction industry reverse charge

The reverse charge will apply to specified services unless:

- The services are supplied to an end user, such as the property owner, or directly to a main contractor that sells or lets a newly completed building
- The recipient makes onward supplies of those construction services to a connected company
- The recipient is not VAT registered, or required to be VAT registered
- The recipient is not registered for the CIS
- The supplier and recipient are landlord and tenant or vice versa, or
- The supplies are zero-rated

Construction industry reverse charge

- An end user is a person who receives the specified services for any purpose other than making an onward supply of those services
- Where the customer has not confirmed it is an end user either in writing, an email, or in the contract, HMRC's guidance is reverse charge applies and no VAT is charged
- If your customer doesn't provide confirmation that it is an end user it cannot be treated as one
- Supplier invoices must make it clear reverse charge applies and customer will account for VAT
- Suppliers should be asking you to confirm

End of temporary reduced rate

Temporary reduced rate of 5%, now 12.5%

- Reduced rate introduced for admission to attractions, holiday accommodation and sales of food and non-alcoholic drinks - boost the tourism and hospitality sector
- 5% applied from 15 July 2020 to 30 September 2021
- Now 12.5% until 31 March 2022
- If payments received before 31 March 2022 for events/accommodation/catering to be provided after this date, 12.5% still applies
- However, if supplies exempt under cultural exemption, still applies

End of temporary reduced rate

Practical issues to consider

- May need to adapt pricing structure to reflect higher VAT rate
- Tills and accounting systems will need to be reconfigured
- Changes to EPOS till systems, online booking engines and back-office functions
- Invoice templates may need to be changed
- Ensure correct rates applied and recorded if VAT return straddles 31 March 2022
- If special retail or accounting scheme used, does this need to be amended

Online conferences

Many organisations moved to online conferences/events

- Admission to a conference – where event takes place
- What about virtual events – need to determine:
 - The nature of the service provided
 - The place of supply for VAT purposes
 - The status of the customer
- If Electronically Supplied Service, with minimal human intervention e.g. recorded event, place of supply:
 - B2B, in customers country – UK VAT or OTS with reverse charge
 - B2C, in consumers country – UK VAT or overseas VAT Reg

Online conferences

- What about live event with active participation between speakers and delegates, what is POS – educational services?
- Not treated as ESS, therefore ‘general rule’ applies but there is an exception for education supplied to consumers, POS where performed. Therefore:
 - B2B UK customers – UK VAT
 - B2B Overseas customer – OTS – reverse charge/overseas VAT reg
 - B2C UK Consumer – UK VAT, unless supplier eligible body
 - B2C overseas consumer – UK VAT, unless the supplier is an eligible body
- Not all countries use same definition of ESS and some countries require local VAT registration regardless

HMRC delays

A number of areas where HMRC very slow to respond:

- VAT Groups
- Deregistrations
- Application to Register
- Option to Tax
- Revoking the OTT
- Voluntary Disclosures
- Applications for non statutory clearance

Option to tax

- Priority route in place to enable HMRC to deal with most urgent cases
- Sale Agreed - The organisation/agent should provide the following on company letter headed paper from the solicitors of the other side (i.e. if the query is from the seller then the letter should be drafted by buyer's solicitor or vice versa) and the letter should include the following details:
 - i. The names of the parties to the sale
 - ii. The solicitors name and their wet signature
 - iii. Date for completion of sale of the property
 - iv. Highlight the implications to the business if the case is not processed
 - v. Seller's VRN
- Hardship/Financial Loss/Prosecution cases – The customer/agent should provide the following on company letter headed paper and signed by an authorised signatory:
 - i. Highlight the implications to the business if the case is not processed, e.g. evidence of financial hardship or financial loss to trader with supporting documentation
 - ii. Court order document/ any other official court documents if request is based on prosecution cases

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Looking ahead

Looking ahead

- New Penalty and Interest Regime from 1 April 2022
- Simplifying the Land Exemption
- Changes to PE and CGS thresholds – initial call for evidence 2019
- Value Shifting Consultation – currently suspended
- Full import procedures from 1 Jan 2022
- MTD – from 1 April 2022 all VAT registered entities must use compatible software to submit returns
- Buzzacott case Tribunal decision?

New Penalty and Interest Regime – VAT & ITSA

New regime will apply to VAT periods starting after 1 April 2022

Late payment penalty

- Late payment penalties are built around the idea that the sooner you pay, the lower the penalty rate will be.
- The first penalty will be based on a set percentage of the balance outstanding up to day 30. This will be at 2% of sum outstanding
- The second penalty will be calculated on amounts outstanding from day 31 until this is paid in full. This will be at 4%
- Agreeing a payment plan with HMRC may result in the penalty charges being suspended
- HMRC will notify the taxpayer of both penalties separately
- Taxpayers will be able to appeal the penalty charges

New Penalty and Interest Regime – VAT & ITSA

New late submission penalty

- When a taxpayer misses a submission deadline they will incur a penalty point
 - Points will be received for each late filing, with a fixed financial penalty of £200 when the threshold is reached.
 - The points threshold depends on the taxpayer's submission frequency:
 - annually = two points
 - quarterly = four points
 - monthly = five points
- Total points can be reset to zero at any time if taxpayer meets conditions:
 - Submission of returns on or before the due date for a period of time based on their submission frequency
 - All returns that were due within the preceding 24 months have been received

New Penalty and Interest Regime – VAT & ITSA

Interest Harmonisation

- The VAT interest rules will change to align to those that currently exist in ITSA. The following changes will be made for VAT periods starting from 1 April 2022
- When sum not paid by the due date, late payment interest ('LPI') will be charged from the date that tax becomes overdue until the date the payment is received
- VAT Repayment Supplement will be replaced with VAT Repayment Interest ('RPI')
- Repayment Interest will be paid from the later of:
 - The due date of the return
 - The date the return is submitted

LPI – 2.5% + BoE base rate

RPI – BoE base rate less 1% (minimum 0.5%)

New Penalty and Interest Regime – VAT & ITSA

General

Overall impact should be lower penalties but complex set of rules:

- With LPP there will be a 'Period of Familiarisation' – no LLP in first year (to 31 March 2023) if payment made in full within 30 days of due date. Interest will still be charged
- HMRC has discretion not to apply a point or penalty
- Taxpayers can challenge point or penalty through HMRC review system or FTT

Simplifying Land Exemption

HMRC 'call for evidence' in May 2021 includes reconsideration of 3 options rejected by the Office for Tax Simplification in 2017:

- Removing the ability to opt and making all relevant transactions exempt
- Removing the option to tax and making all land and property taxable at a reduced rate
- Making all commercial land and property taxable at the standard rate with an option to exempt

Latest proposals include consideration of:

- Simplifying VAT on land by making most supplies subject to VAT, and exempting specific supplies – hopefully exceptions are residential and charity buildings
- Simplifying VAT on land by defining short-term or minor interests as subject to VAT – attempt to provide some clarity land/facilities
- VAT Liability linked to Land Registry - if registered with land registry exempt – if not taxable

One to keep an eye but progress likely to be slow

Questions over a glass of wine?

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