Analysis

Looking back on 2024: a VAT retrospective

Speed read

2024 saw the 'sunsetting' of general principles of EU law – including the principle of supremacy – across the UK legal landscape, but – curiously, or perhaps not surprisingly? – not for VAT. It also saw the first concrete Brexit dividend in the introduction of VAT on education provided by private schools (a measure that completely cuts across the EU Principal VAT Directive). There were also cases of note, both on the EU and domestic fronts – *Hotel La Tour*, for example. And does the disproportionately high number of cases on the VAT treatment of food mean it is time finally to rewrite the legislation?

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Happy New Year (2024)

The year started with a sunset. 1 January 2024 was when the Retained EU Law (Revocation and Reform) Act 2023 (or REULA 2023 to the cool kids) came into force. REULA was at heart an executioner (of *lege europa*), and its main purpose (in a nutshell) was to end the principle of the supremacy of EU law in the UK, abolish other general principles of EU law and 'sunset' the EU-derived legislation specified in the Act.

But VAT is the fiscal embodiment of exceptionalism.

So while it is as affected by parts of REULA 2023 – ss 5 and 6, for example – as any other area of law, it is mostly saved from the legislative slaughter by FA 2024 s 28.

As HMRC put it:

> 'Section 28, Finance Act 2024 means that UK VAT and excise legislation will continue to be interpreted in the same way as it was before 1 January 2024. Drawing on rights and principles that have always applied for interpreting UK law, including the principle of abuse. This means, principle of consistent interpretation (sometimes known as the "Marleasing" principle) continues to apply in interpreting VAT and excise legislation.
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> 'However, businesses will no longer be able to rely on the "direct effect" of EU law. It will no longer be possible for any part of UK legislation to be quashed or disapplied on the basis that it's incompatible with EU law, as UK law is now supreme.'

(As I referred to them earlier, I should mention that REULA 2023 s 6 ('Role of courts') has yet to come into force, and s 5, which basically replaces the qualifier 'retained' or 'retained EU' with the word 'assimilated' (rebranding 'retained EU law' as 'assimilated law', for example), is a bullet the tax can take.)

Where VAT stands post-REULA 2003, therefore, is pretty much where it stood before.

Midsummer (or thereabouts): private school education (the teaser)

REULA 2023 caught some media attention, but really, there was only one VAT news story in 2024: the taxing of private school education.

That there would be political controversy was expected; what was *not* expected was that there would be technical controversy as well. The architecture of the new legislation is novel, and the detail is less precise than it could be, but neither is quite what one would call 'controversial'. What *was* controversial is what HMRC said in Revenue & Customs Brief 8/2024:

> 'School fees paid before 29 July 2024 [i.e. the date from which VAT on education provided by private schools on or after 1 January 2025 became payable] will follow the VAT treatment in force at the time of the normal tax point for these supplies, *where the fee rate for the relevant term has been set and was known at the time of payment*' (emphasis added).

It is trite law that where payment for a supply is received before the basic tax point for that supply (which, for a supply of education, is normally the end of the relevant school term), the tax point for that supply would be accelerated to the time of receipt of the payment (to the extent of the amount received).

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This is subject to the relevant goods or services being 'precisely identified' at the time of the payment. This was the condition laid down by the CJEU in *BUPA* (Case C-419/02). It is unclear what the authority is for HMRC's assertion that, in order for a tax point to be accelerated, the consideration for the supply (i.e. the 'fee rate') must be set (meaning, presumably, in stone) and known at the time of the payment.

There is no suggestion in Brief 8/2024 that HMRC's comment is restricted to supplies of education (and there is no rational reason why such supplies should be subject to different time of supply rules). So is this how HMRC views prepayments in general? Where a professional firm charges for a job on an hourly basis (so the final consideration for its supply is not 'set' until the job is finished), would HMRC not treat any prepayments received before the job is finished as having any accelerative effect?

Surely, that cannot be right. But HMRC has, so far, declined to elucidate or elaborate.

Winter comes: private school education (the thing itself)

I mentioned above that the architecture of the new legislation was novel. This was primarily a reference to the addition of a new Part 3 to VATA 1994 Sch 9. The idea is that whatever is being supplied, whatever exemption it would ordinarily fall under, if it constitutes the 'provision of education by a private school', it would be excluded from exemption by operation of the new Part 3.

This approach avoids having to tinker too much with the drafting of the education exemption (in Sch 9 Group 6). Also, because Part 3 applies across the whole of Sch 9, it should – at least in theory – also avoid having to identify what other exemptions (contained in the other Groups of

Sch 9) may apply to a private school's activities (and thus may also need to be revised to actualise the new regime).

However, this only works if what is being supplied constitutes the 'provision of education by a private school'. Although, in everyday language, 'education' has a broad meaning, for VAT purposes, it is construed narrowly to refer only to instruction or study in a subject. An activity commonly regarded as part and parcel of 'education' in the everyday sense may not, therefore, be 'education' in the VAT sense – the care or protection of children, for example. In such a case, Part 3 would not operate, and private schools may still be able to bring such care or protection within the welfare exemption (in Sch 9 Group 7).

There are also practical complications with the new rules stemming from odd political choices. While the provision of education by a private school will indeed become taxable, as the Labour Party promised before the election, the supply of certain goods and services that are closely related to the provision of such education will remain exempt. While this was no doubt conceived as political generosity, the Government may have underestimated the effort required in some cases to work out what is now taxable (as private school education) and what remains exempt (as an item closely related to such education).

Some notable cases along the way

Hotel La Tour

A business sells shares in a subsidiary to raise funds to pay off its debts. The VAT analysis should be straightforward; however, because VAT is the twilight zone, it is not. Depending on the precise facts, that share sale may be an exempt supply, or it may be a 'VAT nothing' – i.e. a transaction that falls outside the scope of VAT.

If the share sale is an exempt supply, the business would not be able to recover the VAT it incurs in relation to the sale, but if it is a 'VAT nothing', and the business is registered for VAT, then it would in all likelihood be able to recover such VAT. This means that business A and business B could be in diametrically opposed VAT recovery positions if one made a supply and the other did not even though both are carrying out the same transaction – a share sale.

The taxpayer in *Hotel La Tour*, which had made an exempt supply, argued that the same VAT recovery position as follows a 'VAT nothing' ought to apply to it. That would only be consistent with the EU law principle of fiscal neutrality. The First-tier and Upper Tribunals agreed; the Court of Appeal ([2024] EWCA Civ 564) did not.

That is where we are in 2024. Now we wait to see what the Supreme Court says in due course.

SC Adient

The fixed establishment is a core concept in the VAT place of supply rules.

A particular issue is whether business A in country X that has outsourced certain of its activities to business B in country Y can be said to have a fixed establishment in country Y simply by virtue of it being in the same corporate group as business B and having entered into the outsourcing arrangement with business B.

The short answer is 'no'.

SC Adient (Case C-533/22) is not the first case to consider this issue (nor, I suspect, the last), but it does contain a useful summary and discussion of the applicable principles.

Lomoco Development

Broadly, under VATA 1004 Sch 8 Group 5 item 1, the first grant by a person constructing a dwelling of a major interest in, or in any part of, that dwelling or its site is zero-rated. HMRC accepts that zero-rating applies provided 'construction of the [*dwelling*] has commenced and progressed beyond what is commonly known as the "golden brick", that is, beyond foundation level' (see HMRC's *VAT Construction Manual* at VCONST03540).

There is no legislative basis for HMRC's position, and the reasons why HMRC takes the view it does has always been a little elusive.

Lomoco Development (Case C-594/23) is a Danish referral and does not, of course, discuss the UK concept of the 'golden brick'. However, the CJEU does consider the notion of 'building land' ('even improved land falls within the concept') and the notion of 'building' ('foundations of residential housing structures cannot be classified as a "building"'). It also confirms that the casting of foundations is part of the construction process (which in turn suggests that there may be no need to go *beyond* foundation level in order to have a dwelling under construction).

Lomoco Development is, of course, decided after IP Completion Day (or, in layman's terms, actual Brexit), so whether it will influence discussions of the 'golden brick' concept remains to be seem.

Food

VATA 1994 Sch 8 Group 1 zero-rates the supply of food of any kind used for human consumption. But there are exceptions – notably, ice cream and frozen yogurt and similar frozen products, confectionary (but not including cakes or biscuits, unless the biscuits are covered wholly or partly in chocolate), certain beverages (e.g. fruit juices) and sports drinks. And then there are items that override the exceptions. To call the VAT regime on food confusing and convoluted is an understatement.

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2024 saw decisions in *Duelfuel Nutrition* [2024] UKFTT 104 (on cakes and confectionary), *WM Morrison Supermarkets* [2024] UKFTT 181 (on confectionary), *Innovative Bites* [2024] UKUT 95 (on confectionary), *Walkers Snack Foods* [2024] UKFTT 31 (on whether certain products were made from the potato or potato starch and whether they were similar to potato crisps) and *Bottled Science* [2024] UKFTT 592 (on whether a collagen drink product was food of a kind used for human consumption).

That so many cases were decided on such a narrow topic in a single year is no doubt a fluke. Or it may be an indication that there are simply too many disputes in an area that should be clearer with more certainty.

We saw at the beginning of this article (and the beginning of 2024) how EU law abolished in other areas of law was preserved for VAT in order to ensure stability. Later on in the year, we saw how UK VAT law deviated fundamentally from EU VAT law through the introduction of VAT on private school education. Perhaps, going into 2025, it is not too much to hope that the Government will bring in even more stability by demolishing the existing VAT regime on food and rebuilding it from the ground up. ■

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