



# Indirect tax update

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## Summary

Welcome to this week's Indirect Tax Update.

In the second week of the Coronavirus lockdown, there have been few cases to report from the courts. That said, the UK's Supreme Court has issued an interim judgment in the case of Zipvit Ltd concerning the recovery of input VAT on postal services supplied by Royal Mail.

The Supreme Court has decided to refer the issue to the Court of Justice and so, it is likely to be a further 18 months or so before the matter is resolved.

The issue – whether amounts charged by Royal Mail which, at the time, were treated by both Royal Mail and its customers as VAT exempt should now be treated as VAT inclusive giving the customer a right to a VAT reclaim – has now gone through all of the tiers of the UK's domestic courts. However, the Supreme Court is not sure of the correct interpretation of the VAT Directive and has decided to stay the proceedings and refer the matter to the Court of Justice for guidance on the correct interpretation of EU law.

It is likely to take up to a further 18 months for the Court of Justice to deliver its judgment by which time it will be over eight years since the First-tier Tax Tribunal's initial decision.

HMRC has now issued further guidance to businesses in the UK in relation to the deferral of VAT payments as a result of the Coronavirus pandemic.

Businesses may, at their discretion, defer the payment of any VAT falling due between 20 March 2020 and 30 June 2020 until 31 March 2021. The deferral only relates to payments that are due in relation to the normal VAT returns of a business and any payments on account. Payments arising from voluntary disclosures cannot be deferred but businesses can seek time to pay if the Coronavirus outbreak is the cause of financial difficulties.

Finally, and again as a result of the Coronavirus outbreak, HMRC has announced that it is to delay the requirement for businesses to have digital links in place under the Making Tax Digital regime. These links were required to be in place by 1 April or 1 October 2020 depending on the taxpayer's status. However, in light of the 'difficulties', HMRC has announced a deferral until 01 April 2021.

## United Kingdom Supreme Court – Zipvit Ltd v HMRC

*Whether payments made to Royal Mail that were treated at the time as VAT exempt were actually VAT inclusive*

When VAT was introduced in the UK in 1973, the UK exempted from VAT all postal services that were provided by Royal Mail. It was only following the judgment of the Court of Justice in 2009 (in the case of TNT Post UK Ltd) that the correct VAT position became clear. In its judgment, the Court of Justice determined that only the 'universal service' provided by the public postal service should be exempted from VAT and that, as a result, the provision of postal services, where the terms of the contract are individually negotiated between the postal service provider and the customer were not covered by the exemption but were, in fact, liable to VAT.

Zipvit is a typical commercial customer of Royal Mail. It, like many hundreds of businesses in the UK negotiated with Royal Mail for it to deliver parcels and, as a consequence of the Court of Justice Judgment in TNT, the service was not exempt from VAT but was liable to VAT at the standard rate. As a result, Zipvit lodged a claim with HMRC for a refund of the VAT that it said was inherent in the price that it had paid to Royal Mail. Zipvit considered that, under UK and EU VAT law, the price paid for a taxable supply (which the supplies in question turned out to be), included an element of VAT which it was entitled to reclaim as input tax. The only problem was that, as Royal Mail had hitherto always treated the supplies as VAT exempt, Zipvit did not have a tax invoice and HMRC refused its claim for a refund.

The case has had a protracted history. Initially, at the First-tier Tax Tribunal in 2014, Zipvit's appeal was dismissed on the basis that the VAT claimed was neither due nor had been paid and Zipvit did not possess a tax invoice in support of its claim. At the subsequent appeal (in 2016), the Upper Tribunal also dismissed Zipvit's appeal and the matter then reached the Court of Appeal. In its judgment in 2018, the Court of Appeal saw as 'fatal' Zipvit's inability to produce a valid VAT invoice to support its claim for input VAT deduction. Zipvit has now appealed to the Supreme Court.

In a preliminary judgment issued on 1 April 2020, the Supreme Court has decided that the issues raised in this appeal are not clear and require an interpretation of the EU VAT Directive and that it requires assistance with such interpretation from the Court of Justice.

In essence, the Supreme Court requires guidance on the two main issues. Firstly, whether, for the purposes of Article 168 of the VAT Directive, there is an amount of VAT 'due or paid' by Zipvit in circumstances where Zipvit, Royal Mail and HMRC had all erroneously treated the supplies as VAT exempt. Secondly, does the fact that the customer is unable to produce a valid VAT invoice to support its claim for input VAT which complies with the VAT Directive mean that the trader is not entitled to claim the input tax if this is deemed to be included in the amount actually paid to the supplier.

In normal circumstances it can take up to 18 months for a case to be heard at, and judgment to be delivered by, the Court of Justice. Accordingly, we will not know the answers to these questions for quite a while.

**Comment – Zipvit's claim for input VAT was originally made in September 2009. By the time the Court of Justice delivers its judgment and, in turn, the UK's Supreme Court considers that judgment and delivers its own, it may well be 2022. It is understood that there are many hundreds of cases stood behind Zipvit with anywhere up to £1 billion of tax claimed. The arguments are understandable and it will be interesting to see how the Court of Justice responds to the questions raised. One can see the logic of Zipvit's case – if a supply was treated (by all parties) as exempt from VAT, but it later turns out to be taxable, then it is arguable that the VAT was both 'due' and has been 'paid' as part of the commercial price. However, one can also see from HMRC's perspective that without a valid VAT invoice to support its claim, Zipvit's position is 'difficult' to reconcile. Hopefully, in due course, the Court of Justice will resolve that conundrum!**

## HMRC clarifies its guidance on VAT payment deferrals

### Government announces help for UK businesses as a result of Covid-19 Pandemic

On 26 March 2020, HMRC issued further guidance in relation to the earlier announcement concerning the deferral of VAT payments as a result of the Covid 19 pandemic. The later announcement clarified the following:

- The deferral scheme covers VAT payments due between 20 March 2020 and 30 June 2020 - i.e. the payment due date, rather than the return period;
- Deferral is optional;
- Payments relating to monthly and quarterly returns, and payments on account are included;
- payments related to disclosures, assessments, import VAT, duties and other indirect taxes are not included. If businesses cannot pay these other tax liabilities businesses will need to contact HMRC to negotiate time to pay;
- Non-established taxable persons (NETPs) are included; (earlier guidance suggested that this was not the case)
- VAT Mini One Stop Shop (MOSS) payments are not deferred;
- No interest or penalties will be charged as a result of deferral;

HMRC has also confirmed that VAT returns must still be submitted on time, any deferred VAT will be due to HMRC on or before 31 March 2021, there is no need to tell HMRC that payments are being deferred, direct debits must be cancelled, and can be cancelled online by those with online banking facilities and all VAT payments falling due after the end of the deferral period will have to be paid as normal.

### Comment

*The original announcement made by HMRC required some clarification. HMRC's latest announcement on 26 March resolves a number of the questions that were raised.*

*In particular, HMRC has clarified that the date for repayment of any deferred payments will be 31 March 2021 (and not 5 April 2021 as first envisaged).*

*HMRC has also confirmed that the deferral arrangements are open to non-established businesses (ie non-UK businesses with a UK VAT registration.*

*Where VAT becomes payable during the deferment period as the result of a voluntary disclosure or by way of an assessment issued by HMRC these cannot be deferred. Any business that is struggling to settle such liabilities as a result of the Covid -19 outbreak is asked to contact HMRC to negotiate time-to-pay.*

*Importantly, HMRC has also confirmed that where a business elects to defer payments falling due in the deferment period, no interest or penalties will be charged. Businesses should continue to submit VAT returns in the normal way by the due dates.*

## Making Tax Digital

### Digital links requirement to be delayed by 12 months

HMRC has announced – again, as a result of the Covid-19 pandemic – that the requirement for businesses to have digital links in place (as part of the making tax digital VAT regime) is to be deferred for a further 12 months.

On Monday 30 March 2020, HMRC made the following announcement to stakeholders:

***“We understand that the impact of COVID-19 is creating extremely difficult times for all, and we are committed to helping in every way possible all those businesses facing unprecedented challenges. Therefore, we are providing all MTD businesses with more time to put in place digital links between all parts of their functional compatible software. This means that all businesses now have until their first VAT return period starting on or after 1 April 2021 to put digital links in place.”***

The digital links requirement of Making Tax Digital (MTD) has been operating within what HMRC describe as a “soft landing period”, allowing businesses to continue to use ‘cut and paste’ or ‘copy and paste’ within their VAT return preparation process. It was expected that from 1 April 2020 all VAT registered businesses would have been required to implement and maintain a clear digital ‘journey’ or ‘digital links’ to support VAT accounting transactions. However, this requirement is to be postponed for a further 12 months.

In the current ‘lockdown’ period, MTD digital links are unlikely to be at the forefront of business priorities. Hopefully, the pandemic will be long gone by the time April 2021 comes around. Businesses will need to turn their attention to these requirements in due course.

### Comment

***With the exception of a few complex and large businesses, the requirement to have digital links was supposed to come into effect from 1 April 2019.***

***In light of the problems associated with the global pandemic and the economic impact on businesses, HMRC has recognised that priorities will have changed.***

***Accordingly, the requirement to have digital links between the various pieces of accounting software has been postponed for a further 12 months. As the requirement for having digital links has now been deferred until 1 April 2021, taxpayers will no longer have to implement or maintain these digital links and may continue to use ‘cut and paste’ or ‘copy and paste’ to prepare VAT returns.***

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