



# Case alert

## HMRC v Pertemps Ltd

August 2019

### Summary

This was HMRC's appeal from a decision of the First-tier Tax Tribunal.

The issue in the case was whether the taxpayer company – Pertemps Ltd - was liable to account for VAT in relation to the operation of a salary sacrifice scheme for temporary workers. The workers agreed to forego a proportion of salary in return for the payment of expenses by Pertemps. Pertemps made a small 'administration' charge of between £0.50p and £1.00 to each staff member for each shift worked and HMRC considered that this constituted a supply of services for consideration (ie a business or 'economic' activity for VAT purposes).

The First-tier Tax Tribunal allowed Pertemps' appeal against HMRC's ruling and HMRC appealed that decision to the Upper Tribunal.

The Upper Tribunal has found against HMRC ruling that Pertemps' operation of the salary sacrifice scheme was not a business activity and that it supplied no services to the workers in return for the administration fee.

### Upper Tribunal

Pertemps Ltd is a supplier of workers. In common with many other businesses it operates a salary sacrifice scheme for some of its workers (known as the Mobile Advantage Plan (MAP)), whereby the worker sacrifices part of his salary in return for the employer paying the worker's expenses. For each shift worked, the company charged an administration fee of between £0.50p and £1.00 and HMRC considered that the fee constituted consideration for a supply of services by Pertemps to its workers. Pertemps appealed to the First-tier Tax Tribunal which ruled that whilst there was a supply for consideration, the operation of the MAP scheme was not an economic activity for VAT purposes. Accordingly, the FTT allowed Pertemps appeal and HMRC appealed on a point of law to the Upper Tribunal.

The Upper Tribunal has dismissed HMRC's appeal. Whilst it considers that there were errors of law made by the FTT in relation to the supply issue, in dismissing the appeal, the Upper Tribunal agreed with the FTT that the operation of the salary sacrifice scheme was not, for VAT purposes, an economic activity.

The Court of Appeal held, in the earlier case of Wakefield College, that there are two questions to be resolved before a person's supplies become liable to VAT. Firstly, there is the question of whether or not the person is making supplies for consideration and, secondly whether the person making those supplies does so as part of an economic activity. Wakefield establishes that whilst there may well be supplies for consideration, that is not sufficient on its own. Article 9 of the VAT Directive requires that the making of the supplies for consideration is part of the persons 'economic' activity as defined by the Directive. In particular, are the supplies made by the person for the purposes of deriving income on a continuing basis?

On the evidence, the Upper Tribunal concluded that the FTT was wrong to conclude that there was a supply of services for consideration. In reality, all that was happening was that the workers were simply changing the method of their remuneration. There was no supply of services between Pertemps and the worker so the FTT's conclusion that there was a supply for consideration was incorrect. On the second point, the Upper Tribunal agreed with the FTT's analysis based on 'Wakefield'. The operation of the MAP was not an economic activity and, as such, HMRC's appeal was dismissed.

**Comment – Salary sacrifice arrangements are fairly common and, in general, they are not regarded as falling within the scope of VAT. In this case, HMRC focused on the fact that there was an admin charge made by the employer to the employee and concluded (incorrectly) that there was a supply for consideration by a taxable person acting as such. Both Tribunals were, however, persuaded that the operation of the salary sacrifice scheme was not an economic activity for VAT purposes. Businesses operating such schemes will need to consider whether their particular arrangements are similar.**

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