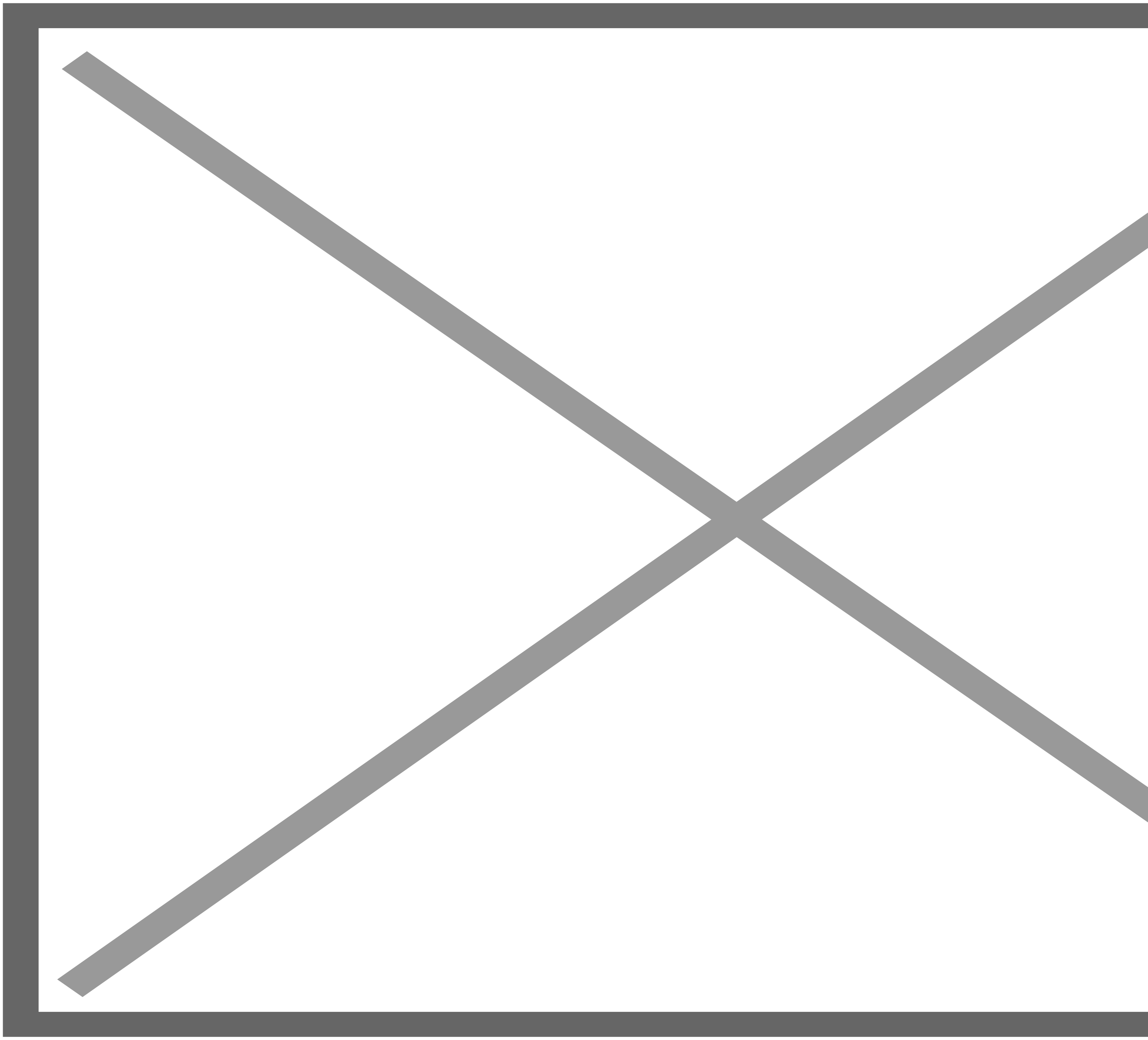
Turning a new leaf

Indirect Tax



01 July 2020

Linda Skilbeck and *Jayne Simpson* examine the digital publications which are to be zero?rated from 1 May 2020, and the complications highlighted in *News Corp UK*

Key Points

What is the issue?

Certain supplies of 'e-publications' (those listed in HMRC's Revenue and Customs Brief 3/2020) were to be zero-rated from 1 December 2020, but due to increased demand for digital reading material due to Covid-19, the effective date for implementation was brought forward to 1 May 2020.

What does it mean for me?

The VAT liability of digital versions of printed reading matter has been under the spotlight since the *News Corp UK & Ireland Ltd*. In 2019, the Upper Tribunal found that the digital supplies of newspapers should be zero-rated.

What can I take away?

Taxpayers impacted by the new zero rate should consider whether they could make protective claims for overpaid VAT on standard rated supplies of digital content meeting the description of supplies in the Revenue and Customs Brief, including those received from overseas suppliers by partly exempt businesses.

In the March 2020 budget, Chancellor Rishi Sunak announced that from 1 December 2020, certain supplies of digital reading content ('e-publications') would be zero-rated 'just in time for Christmas'. Within two weeks, lockdown rules came into effect in the UK in response to the global coronavirus pandemic. This saw a marked increase in digital reading at home, particularly for schoolchildren, so the implementation date for zero-rating was revised by statutory instrument on 30 April 2020, and The Value Added Tax (Extension of Zero-Rating to Electronically Supplied Books etc.) (Coronavirus) Order 2020 brought forward the effective date to 1 May 2020.

Revised VAT guidance

HMRC published its Revenue and Customs Brief 3/2020 that lists which e-publications can benefit from zero-rating (whether supplying or lending), and these correspond to VAT Act (VATA) 1994 Schedule 8 Group 3 Items 1-3:

- books, booklets, brochures, pamphlets and leaflets;
- newspapers, journals and periodicals, including magazines; and
- children's picture books and painting books.

Items 4-6 of Group 3 are not included, so digital music manuscripts and electronically supplied maps/charts remain standard rated. Where a supplier sells products within Items 1-6, care will be needed to change the VAT rate only on qualifying products.

The qualifying product list excludes e-publications which are 'wholly or predominantly devoted to advertising', or those which wholly or predominantly consist of audio or video content; this includes audio books. For further products excluded from the zero-rating, the Brief refers the reader to gov.uk guidance, 'Zero rate of VAT for electronic publications'. Here, exclusions are listed for:

- intellectual property that is supplied electronically, including plans or drawings for industrial, architectural, engineering, commercial or similar purposes;

- e-publications that are predominantly intended for completing, unless it is an electronic version of a printed book which is already zero-rated; and
- e-reader hardware and software, unless otherwise zero-rated under the relief to assist older people and the disabled in VATA 1994 Group 12 Schedule 8.

The guidance also comments on single and multiple supply issues and sets out examples of where supplies are subject to single or different VAT rates. There appear to be as many areas of potential difficulty with interpretations and definitions here as there have been in the past for printed matter.

It should be noted that HMRC will only be updating VAT Notice 701/10 and the VAT manual VBOOKS by 31 July 2020, so care should be taken if using guidance that is superseded by Revenue and Customs Brief 3/2020.

Membership subscriptions for non-profit making bodies

Under HMRC's extra-statutory concession 3.35 certain non-profit making membership organisations, including clubs, charities and societies, may apportion their subscriptions into the individual components of the membership package, applying a separate VAT treatment to each. Many memberships include zero-rated printed matter and standard rated digital content, so membership apportionments should be revised to ensure that output VAT is not overdeclared from 1 May 2020. This change will be welcome news as it will allow membership bodies to employ more environmentally friendly e-publications to reduce waste and distribution costs, and to meet members' requests for digital versions of periodicals, reflecting the move away from printed versions, which has seen an increase in VAT declarable on membership subscriptions. There may be further cost savings with reduced printing and postage requirements.

Tax points for digital subscriptions

When buying an annual subscription for a monthly or quarterly e-publication, such as a digitally supplied magazine, you usually pay either a single upfront price for the year or opt for monthly payments. Customers paying by monthly instalments may expect to see a reduction in the monthly price for supplies of e-publications received from 1 May onwards. For customers paying annually, the picture is less clear. A lot depends on the tax point rules that apply to the supply (i.e. the date the tax is due), and whether the supplier chooses to adopt the rules applying on a change in the VAT rate. It also, of course, depends on whether a supplier decides to pass on the VAT saving to consumers at all.

HMRC's guidance on the rate change for e-publications is silent on tax points, so suppliers will have to consult the usual tax point rules, the 'change of rate' legislation in VATA 1994 s 88 and associated HMRC guidance. Unlike physical printed publications which are goods, supplies of e-publications are services. The basic tax point for a supply of services under UK law is the date when the services are 'performed' (usually meaning 'completed'). An 'actual' tax point overrides this basic tax point and is created when a payment is received or a VAT invoice is issued before the basic tax point, or when a VAT invoice is issued up to 14 days after the basic tax point.

For certain supplies of services, where all or part of the price is determined or payable periodically, from time to time, or at the end of any period, there is a tax point each time a payment is received or a VAT invoice is issued. This typically applies to leasing and rental payments. Such supplies are often referred to as 'continuous', although of course leasing and rental agreements are for a defined period, and not open ended.

Where a single 'one-off' supply of services spans the change of rate, and an actual tax point arising from receiving a payment or issuing an invoice falls on one side of the change and the basic tax point falls on the other, the change of rate rules in VATA 1994 s 88 allow a business to determine when its supplies are made by reference to the 'basic tax point' only; i.e. disregarding any 'actual tax point'. This means that the business can elect to treat the supply as having occurred on the 'basic tax point' date, and apply the 0% rate, if:

- for a single supply of an e-publication, an 'actual tax point' occurred before 1 May 2020 due to the issuing of a VAT invoice or receipt of payment in advance of the supply; and
- the 'basic tax point' falls on or after 1 May 2020.

Businesses can choose to apply the special provisions to all or some of their supplies and HMRC does not need to be informed. In that case, credit notes (and VAT refunds) are normally required to be issued to customers within 45 days of the rate change; however, with the impact of the coronavirus pandemic, if this deadline is missed it is worth contacting HMRC to see if this can be extended.

For continuous supplies, invoices issued or payments received on or after 1 May will be subject to 0% VAT, and where advance invoices have been issued for 20% these need to be corrected.

The tax point rules are straightforward for single supplies of e-publications. The position is more complex where subscriptions are concerned. If a subscriber chose to pay for an annual e-journal subscription by monthly instalments, there would be a tax point at each payment and the 0% rate could only apply to payments after 1 May. However, where an upfront payment for a 12 month subscription for monthly e-journals was made in full before 1 May but delivery or access to the 12th e-publication is not complete until some months later, the question arises as to whether the subscription is a single supply made over a 12 month period, or a 'continuous supply'.

Where there is a single payment (i.e. no periodic payments), a subscription would appear to be a single supply which is only 'performed' (i.e. complete) when the 12th edition is delivered; in which case, the supplier ought to be able to choose to zero rate the entire supply under the change of rate provisions. In VATTOS4320, HMRC states that where services are performed over a period of time and there is one consideration for the services as a whole, the basic tax point is when all obligations are fulfilled, which appears to confirm that analysis.

But in VAT Notice 700 para 8 s 30, HMRC guidance on single supplies apparently contradicts this. It uses an example of a decorator doing a single job that spans the rate change (which would seem to be a single supply), and who receives payment (creating an actual tax point) before the rate change. The basic tax point would appear to be the time when the job is finished, so the decorator could apply the lower rate to the entire job under s 88. HMRC, however, says that he is entitled to use the lower rate only for work 'performed' after the rate change, even though the service to the customer is not completed until after the rate change.

Some subscriptions may be longer than a year but have a break clause, which might suggest they are 'continuous'; and some may give other rights such as access to archives, or use of limited copyright where the zero rate may not apply. Whether one or the other argument is stronger is likely to depend on the exact nature of the obligations of the supplier under the contracts and the nature of the supply, and careful analysis of subscription contracts.

Mini One Stop Shop (MOSS) for international suppliers

Overseas businesses which sell e-publications to UK consumers and are registered for the VAT MOSS scheme (both union and non-union schemes) will need to ensure that the VAT rate is updated in the MOSS VAT return.

The European Commission's website publishes EU VAT rates in its MOSS section and a 'by country' EU VAT rate checker tool for electronically supplied services, broadcasting and telecommunications. At the time of writing, the UK's zero rate for e-publications had not been updated, so for all of May and at least part of June, some international suppliers may still be charging the standard rate of VAT for sales of e-publications to UK consumers. It is worth checking that overseas businesses using MOSS to sell e-publications to UK consumers are up to date. The CIOT has contacted HMRC to highlight this issue.

VAT liability dispute in *News Corp UK & Ireland Ltd*: what do I need to know?

The VAT liability of digital versions of printed reading matter has been under the spotlight since the First-tier Tribunal decision in March 2018 in *News Corp UK & Ireland Ltd* [2018] UKFTT 129 ('News UK'). News UK is the representative member of a VAT group whose publications include *The Times*, *The Sun* and their Sunday equivalents. Whilst News UK's printed newspapers were zero-rated under VATA 1994 Schedule 8 Group 3 Item 2, subscriptions for the equivalent online content were standard rated. The FTT concluded that digital versions of newspapers were not newspapers within the meaning of Item 2, HMRC won the case and the online content remained standard rated.

News UK subsequently appealed to the Upper Tribunal [2019] UKUT 404 and the court agreed that the digital supplies should be zero-rated, based on the following points:

- VATA 1994 Schedule 8 Group 3 is not limited to goods, and so can include services.
- The digital newspapers were the same/very similar to the corresponding printed newspapers.
- The doctrine of 'always speaking' engaged to keep up with new technological developments.
- The supply of the digital newspapers was zero-rated within Item 2, even though they did not exist when zero-rating was introduced.

Following the loss at the Upper Tribunal, HMRC was granted permission to appeal to the Court of Appeal and it published Revenue and Customs Brief 1/2020, which stated that as it was appealing the *News UK* decision, taxpayers should continue to apply the standard rate to e-publications.

The new UK zero-rating for e-publications, effective from 1 May 2020, does not address the historical period of News UK's appeal, which ran from September 2010 to June 2014, and 28 January 2013 to 4 December 2016, so this must be considered in the ongoing litigation.

Taxpayers impacted by the new zero rate should consider whether they could make protective claims for overpaid VAT on standard rated supplies of digital content meeting the description of supplies in the Revenue and Customs Brief, including those received from overseas suppliers by partly exempt businesses which were subject to reverse charge. The claims, which are subject to the four year cap, would be held by HMRC until the litigation in *News UK* is finalised and the parties accept the outcome. Revenue and Customs Brief 1/2020 sets out the details of what should be provided to HMRC when making a protective claim.