

AAT VAT Update 14 October 2014

In this month's edition of the VAT update we look at:

- 1 Local authority building control repayment claims and the burden of proof
- 2 How big is the tax gap?
- 3 Spot the ball is not a game and entrance fees are subject to VAT
- 4 HMRC issue new guidance on VAT registration
- 5 HMRC issue brief 32/14 on VAT – policy on holding companies
- 6 HMRC publishes updated guidance for barristers and advocates

1. Local authority building control repayment claims and the burden of proof

I believe in natural justice and when HMRC misdirects someone so that they pay over sums as if VAT when in fact it is not due, HMRC should apologise and do its best to make things right. I also dislike seeing disputes between different parts of government because such disputes are really just about moving money from one pocket of government to the other and the body of taxpayers does not win anything.

In *Royal Borough of Kensington & Chelsea [RBKC] v Revenue & Customs* [2014] UKFTT 729, the issue was whether the local authority were entitled to a VAT repayment claim of £584,572 VAT (a) in light of the Method 2 agreement between the parties and (b) in the absence of evidence as to which, if any, repayment claims had been made by persons other than the appellant as envisaged by the agreement.

In November 1985, HM Customs and Exercise (HMCE, now HMRC) issued guidance that building control fees charged by local authorities in England and Wales were subject to VAT from 1 April 1985. This was wrong but it took until 1995 for HMCE to recognise their mistake during which time the local authorities were charging VAT and accounting for this output tax. In fact as a regulatory activity it is obvious that this should have been outside the scope.

This case is about the onus of proof and the requirements of evidence and with the dates involved it is also obvious that producing evidence is going to be a problem for both parties. Nearly 29 years have elapsed since HMCE made the mistake and issued incorrect guidance and 19 years have elapsed since the error was corrected. So this is a Fleming type claim. But the local authority had shown it had overpaid VAT of £584,572. HMRC's response was to contend that by entering into a type 2 method of dealing with the error the local authority had relinquished any right it had to recover any of the VAT it had overpaid.

HMRC has a policy of destroying documents after six years. It had no evidence to defend the appeal by the local authority and HMRC tried to argue that the onus of proof lay with the local authority which had no knowledge of any VAT repayment claims that individuals might have made direct to HMRC. The First Tier Tribunal (FTT) found as a fact that the evidential burden was on HMRC to prove what "relevant applications" were made, rather than on RBKC to prove what "relevant applications" were not made. By destroying the documents (which it ought to have kept), HMRC had to lose this appeal.

The local authority was entitled to a repayment of the VAT it had paid in error when acting under the incorrect guidance issued by HMCE. This case does HMRC no credit and demonstrates what appears to be a serious failing within HMRC.

<http://www.bailii.org/uk/cases/UKFTT/TC/2014/TC03850.html>

2. How big is the tax gap?

The tax gap might loosely be described as the difference between what ought to have been collected and reality. Richard Murphy has recently published a paper which makes an interesting read and in which he estimates the tax gap at £122bn whereas HMRC estimate the tax gap at £35bn.

With such a complex tax system, there is always going to be a tax gap. Evasion is intolerable and should never be condoned. But with such a complex system and such poor service performance at points within HMRC, it is inevitable that mistakes and avoidance of tax will result in some tax gap.

VAT is a transaction based tax and it is essential to get it right at the tax point. Taxpayers ought to be able to rely on HMRC giving them good advice and guidance but as the previous tax case shows, HMRC make mistakes.

At 85 pages, the paper is worth a read. It is biased but it argues its position well.
<http://www.taxresearch.org.uk/Documents/PCSTaxGap2014Full.pdf>

3. Spot the ball is not a game and entrance fees are subject to VAT

In *Revenue and Customs v IFX Investment Company Ltd & Ors* [2014] UKUT 398, the issue was whether the VAT – Exemption in Group 4 of Schedule 5 to Finance Act 1972 was available for Spot the ball competitions.

Sitting in the Upper Tribunal Norris J ruled that:

“Playing” involves some sort of engagement with other “players” (individual or institutional) or (if there are no other participants) with a machine or a pack of cards (or whatever other means or used to “play” the “game”) or some prior or subsequent action or “move” or “round” undertaken by the solo player.’

Participating in a spot the ball competition did not have the necessary characteristics of “Playing”. Norris J. ruled that the exemption from VAT was NOT available. “There is no “game”: and completing and posting a coupon is not “playing”.”

<http://www.bailii.org/uk/cases/UKUT/TCC/2014/398.html>

4. HMRC issue new guidance on VAT registration

At 11 pages this may be helpful for clients intent on looking after their own VAT and considering registering for the first time. [VAT1 guidance notes \(PDF 121K\)](#)

5. HMRC issue brief 32/14 on VAT - policy on holding companies

[Revenue & Customs Brief 32/14](#) highlights new and revised guidance on input tax deductibility and holding companies following the Court of Appeal decision in BAA. HMRC has stated that there is no change to their policy. The revised guidance can be found at [VAT Input Tax Manual](#). The new guidance covers the following issues:

- when a shareholding is used as part of an economic activity
- when VAT may be recoverable by a holding company
- the effect of a holding company joining a VAT Group
- how to treat mixed economic and non-economic activities

6. HMRC publishes updated guidance for barristers and advocates

Notice 700/44 explains the rules which apply to VAT-registered barristers or advocates. It provides information about:

- when you should normally account for VAT on your professional fees
- how to account for VAT on outstanding fees if you cease to practise
- how to cancel your registration
- what to do if you cease to practise but continue to make other taxable supplies and

- what to do if you are partly exempt for VAT purposes

On 12 September 2014 [Revised version of VAT Public Notice 700/44 published](#)
Notice 700/44: barristers and advocates, has been revised to reflect the introduction of an online system for deregistering from VAT and some changes to office addresses.

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The views expressed in these podcasts are Derek Allen's personal views and do not necessarily represent AAT policy or strategy.

The next VAT Update will be on the website on 14 November 2014