AAT VAT Update 14 November 2014

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

1 Local authority and off street parking
2 HMRC criticised for lacking judgement when seeking an inappropriate penalty
3 European Commission publish paper on VAT reform in the single market
4 BB39/14 published on supplies made in the course of education
5 Agent Update 44 published by HMRC

1. Local authorities and off street parking

The issue of whether or not local authorities should charge VAT for off street parking has been running for at least a decade and has involved passing the case to the CJEU following which the High Court decided that the case needed to go back to the First Tier tribunal (FTT) for additional findings of fact.

The FTT found in favour of HMRC and the latest appeal was heard by the Upper Tribunal (UT) which upheld the decision of the FTT. Local authorities had been claiming a refund of VAT that the local authority had paid since 1978. The local authority argued that car parking fees which it charged were outside the scope of VAT because it was fulfilling a statutory duty.

The FTT had ruled that if Local authorities did not charge VAT this would have a significant effect distorting any commercial competition and so VAT had been properly charged and the local authorities were not entitled to the refund. The UT decision, delivered on 15 October is an interesting read.

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/IoW-v-HMRC.pdf

2. HMRC lacked judgement to seek an inappropriate penalty

I am saddened to record that HMRC has pursued a case to tribunal which, in my view and reading the facts, must cause concern that there is something dreadfully wrong with the HMRC internal review process. In Tyne Valley Motorhomes v Revenue & Customs [2014] UKFTT 969, the business appealed assessments for VAT of £703,585 but this figure had been reduced from the original sum HMRC had sought. The issue related to zero-rating of motor homes adapted for disabled users. HMRC alleged incorrect zero-rating of sales of mobile homes which the appellant had sold as zero-rated under Group 12 of Schedule 8 to the VAT Act 1994 (the Act) relating to aids for the handicapped. The assessment relates to periods 03/07 to 09/10.

HMRC sought a penalty of £47,632 under Schedule 24, FA2007 for allegedly giving HMRC inaccurate VAT returns which were carelessly inaccurate.

An important fact in this case was that the buyers were accepted to be disabled and the business had kept good records establishing that the buyers were qualifying disabled persons. The assessment for £703,585 is based on the decision of HMRC that the fitting of D Lock handles to approximately 50 vehicles did not entitle their sale to be zero-rated. In a few cases steps were also added to assist with access to the vehicles

The D Lock handles are 32.5 cm long. About half way along the handle there is a cushioned area for the user to take hold of. They are fitted to the outside of the vehicle and in order to fit them two holes have to be made in the outer panel of the vehicle.

At a control visit in 2003, an officer of HMRC reviewed sales invoices for adapted vehicles and customer declarations and raised no concerns about adaptations. In 2005 and 2006 it appears that HMRC conducted 4 other control visits and checked the zero rating treatment and were satisfied that the business did all that could reasonably be expected to get the VAT right. The business followed the HMRC guidance for zero rating. So it came as a distressing shock when in 2010 another officer said that zero rating was not available and raised assessments for VAT.

The tribunal ruled: "On our interpretation of "substantially and permanently" adapted we find that the grab handles are sufficiently substantial and permanent to qualify."

HMRC should be hanging its head in shame that this appeal progressed to tribunal. The judgment observes at Paragraph58:

"…HMRC did not have any logical basis they could advance in support of an argument that somehow spinners would qualify as permanent but grab handles would not."

The tribunal added at paragraph61: "...that the assessments to tax are invalid as no tax was due and the zero rate had been correctly applied."

HMRC's position gets worse. The tribunal discharged the penalty assessment and observed: "...it is plain that the appellants were not careless. They followed the respondents' own statements and although the respondents now wish to resile from those statements (wrongly so as we have held) a member of the public who follows the published guidance given by the respondents cannot be said to have been careless in doing so. It was frankly ridiculous to hear it said on behalf of the respondents that the appellants should have taken their own professional advice and ignored what they were told about, for example, 'spinners'." Adding at paragraphs 65 & 66:

"We will add that we consider it to have been utterly wrong for the Commissioners to increase the amount of the penalty by removing some of the mitigation they had previously allowed when and because the appellants submitted their notice of appeal to the Tribunal. They changed their mind about that later but it should never have happened.

Indeed we regard it as a misuse of the penalty regime for the Commissioners to have attempted, as they appear to have done by offering to suspend the penalty, to induce the appellant to admit liability. It was not made clear to the appellants or, perhaps more to the point it would not have been clear to the appellants if they had not been represented, that by agreeing to the terms on which suspension was offered they were admitting liability."

http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKFTT/TC/2014/TC04081.html&query=Tyne+and+valley&method=boolean

I had a feeling of déjà vu as I read the Tyne Valley Motorhome case that I have summarized above. It reminded me of the tribunal decision *Dennis George Bunning and Christina Denise Bunning t/a Stafford Land Rover v Revenue & Customs [2012] UKFTT 32*.

It may be just a coincidence but that case also reminded me of the decision in *Croall Bryson*. In the *Croall Bryson* case, I remembered that one of the purchasers of a vehicle which had been adapted for use by a handicapped wheelchair user was a Mr. K Myles who, from memory, bought a 4 x 4 Land Rover and sold it within a week.

With VAT at 20%, there is an economic driver for someone to take advantage of the zero rating which is available under group 12, item 2A, schedule 8 VATA 1994 which provide that a qualifying motor vehicle can benefit from zero rating if it is sold to a handicapped person who usually uses a wheelchair. To qualify for zero rating the vehicle must be adapted to enable the disabled wheelchair user to enter, drive or otherwise travel in the vehicle and it must be used for domestic or personal use and the vendor must retain documents to show the eligibility of the vehicle and its purchaser.

The original assessment was in the amount of £48,457 plus interest of £5,423 but after an internal review by an officer of HMRC the amount assessed was reduced to £13,839. This was the quantity for the disputed sale of a Range Rover Sport HSE and a Land Rover Discovery.

An important question here is to ask who the abuser is. The Land Rover dealer has to accept on trust that the purchaser who is demonstrably disabled is not abusing the zero-rated provision by acquiring a zero-rated Land Rover and then on selling it. In fact a person acquiring an asset with a view to selling it at a profit is trading and would be required to report the taxable income from the transaction.

It is good practice for the vendor to hold copies of documents showing that the conditions for zero rating have been supplied but actually this is not a statutory requirement.

The Tribunal ruled that the handicaps of Mr. Myles and Mr. Randall were such that they qualified. They were handicapped persons who usually used their wheelchair for mobility.

The Land Rover and Range Rover were both qualifying motor vehicles.

The worry arising here is that HMRC are tackling those with the deepest pockets and are rightly concerned that zero rating of vehicles could be abused by handicapped people. The issue is surely whose tax is it? Is it just a coincidence that in 2 different published tax decisions the buyer of a vehicle which benefitted from zero-rating was a Mr. K Myles?

A sad consequence of this action is noted at paragraph 45 of the decision when Mr. Bunning added that:

> *"Because of the difficulty he had experienced with the supplies which are the subject of this appeal, the Appellant was now very reluctant to sell cars to disabled persons and that he has in consequence been accused of discriminating against such customers".*

HMRC are concerned that the zero rating for such vehicles is being abused. A newsletter to clients setting out the condition might be good customer care. The fact that I have just mentioned three tribunal decisions which dealt with the same issue shows that HMRC are checking that motor dealers are operating the special zero rating provisions correctly.

3. European Commission publish paper on VAT reform in the single market

The European Commission has published a six page paper on its workings and the options to reform the single market. The paper presents five ideas on how to ensure a simpler, more effective and more fraud-proof VAT system tailored to the Single Market in the EU. By way of background, the Commission has also published a paper on the VAT tax gap which confirms the HMRC estimate of 10.9% and tells the reader that the range is between 5% and 44% (Romania).

Reform has been under discussion for over 20 years and one of the five options is to stick with the status quo. The other options include a reverse charge mechanism where the goods are delivered, a reverse charge mechanism where the customer is based, a charge made by the supplier where the goods are delivered and a charge made by the supplier where the customer is based irrespective of where the goods are delivered.

You can read more about this at:
http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/swd_2014_338.pdf

4. BB39/14 published on supplies made in the course of education

On 10 November 2014 HMRC published its revised guidance in BB39/14 which concerned the VAT liability of restaurant meals provided to the public and charges for concerts and other performances put on by students as part of their further education courses.

HMRC had lost before the FTT and UT but are pursuing an appeal to the Court of Appeal which they hope will be heard in February 2015. Brockenhurst College successfully challenged a decision made by HMRC rejecting voluntary disclosures for:

(1) the supplies made from its restaurant, used for training chefs, restaurant managers and hospitality students. The claim was made on the basis that these were exempt supplies of education and not standard rated supplies of catering
(2) the tickets for concerts and other live performances put on by students as part of their educational courses. These were similarly claimed to be exempt

The FTT concluded (and the Upper Tribunal agreed) that the supplies in question were exempt as being closely linked to education because:

(a) the College was an eligible body and so its principal supplies were exempt supplies of education
(b) the supplies were integral and essential to those principal exempt supplies
(c) the supplies were made at less than their cost
(d) the supplies were not advertised to the general public. Instead, there was a database of local groups and individuals who might wish to attend the restaurant or performances
(e) the supplies were not intended to create an additional source of income for the College

HMRC disagreed with the conclusion on the basis that the supplies were outside the education exemption because the students were not the beneficiaries of the supplies in question, but only benefited from making them. HMRC has appealed to the Court of Appeal.

A decision of the Upper Tribunal should establish legal precedent but HMRC have announced that there is no change to HMRC's policy that such supplies are outside the scope of the educational exemption because they are enjoyed by third parties not in receipt of education. This policy will not be reviewed until the Court of Appeal releases its judgment next year.

There is supposed to be equality of arms in the judicial system but this announcement by HMRC shows how they are prepared to disregard the law if they do not like a decision. If you have clients affected by this decision, I suggest that you make a protective claim for repayment because you can expect HMRC to restrict the VAT to the four year time limit if HMRC loses again at the Court of Appeal.

https://www.gov.uk/government/publications/revenue-and-customs-brief-39-2014-vat-liability-catering-and-other-services-linked-to-education/revenue-and-customs-brief-39-2014-vat-liability-catering-and-other-services-linked-to-education

5. Agent Update 44 (PDF 458K) **published by HMRC**

Published on 21 October, a good read is the bi-monthly round up of the latest developments in tax, HMRC service and consultations for accountants and tax professionals and a section on the latest news and issues from the Working Together network.

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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 December 2014