AAT VAT Update 14 July 2014

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

1. Tribunal jurisdiction and golf club reclaims of VAT
2. Zero rating on take away food and snowballs
3. Further information from HMRC on place of supply changes
4. Updates on DIY housebuilder schemes
5. Floor space is a fair and reasonable method for partial exemption

1. Tribunal jurisdiction and golf club reclaims of VAT

Many golf clubs are struggling in this period of austerity and would welcome a 'windfall' of tax to be repaid. However, HMRC, on 25 June, have issued Revenue & Customs Brief 25/14 which provides an update on HM Revenue & Customs (HMRC) policy following the decision by the Court of Justice of the European Union (CJEU) on Bridport & West Dorset Golf Club in December 2013. HMRC lost at the CJEU which ruled that golf club visitor fees from non members may be exempt from VAT. Brief 25/14 explains HMRC's:

- interpretation of the judgment and the subsequent change to the policy,
- approach to repayment claims by non-profit making golf clubs and other members' sports clubs in respect of VAT incorrectly charged to non-members.

As a result of the CJEU judgment, HMRC accepts that supplies of sporting services to both members and non-members of non-profit making sports clubs qualify to be treated as exempt from VAT. However, many golf clubs will not receive the windfall they hoped because HMRC are proposing to deal with repayment claims in two phases.

Phase One: where a members' golf club or other non-profit making sports club considers it has overpaid VAT on sports related services it may make a claim to HMRC under section 80 of the VAT Act 1994 for repayment of VAT incorrectly accounted for. Such claims are subject to the conditions set out in Notice 700/45. This means that clubs will need to demonstrate that they have made arrangements to reimburse the VAT to non-members who actually paid it, and make a legally binding commitment to do so in a timely manner.

Claimants who intend to reimburse non-members need to ensure that their claim is adjusted to reflect any over claim of input tax by application of their partial exemption and/or capital goods scheme calculations as appropriate. In other words the club could end up worse off as a result of its VAT recovery and the obligation to re-imburse the VAT incorrectly charged on visitors green fees. The administration of this process could be a nightmare.

All Phase 1 claims and new claims should be sent to the following address:
VAT Bridport Claims S0483
PO Box 200
BOOTLE
L69 9AH

Phase Two: clubs that do not adopt reimbursement arrangements
HMRC are examining the scope for restricting repayments to clubs not making arrangements to reimburse the paying non-members to avoid the unjust enrichment of members' clubs. Further advice will be issued on these claims after a conclusion has been reached on this point.

Where a submitted claim has already been rejected by HMRC and the claimant has not appealed, that claim cannot now be resubmitted. Any claims submitted now will be a new claim subject to the four-year time limit.
Rejected claims that were appealed to the First Tier Tribunal, however, are still open.

Amounts of overpaid output tax which are repaid and not re-imbursed to affected customers may have direct tax implications. For example, trading income from non-members is taxable and therefore any surplus of non-member income that remains after the deduction of relevant expenses is liable to Corporation Tax.

Case study

Earlsferry Thistle (ET) is a golf club in Elie, Fife, with 60 members. Its premises adjoin those of the Elie Golf House Club (GC). ET pays an annual fee to GC in order to permit ET's members to play golf on GC's course at certain restricted times. Between 1990 and 2010, GC charged VAT on ET's annual fee and accounted to HMRC for the VAT collected. ET is not registered for VAT.

In Revenue & Customs v Earlsferry Thistle Golf Club [2014] UKUT 250, Lord Tyre gave the judgement in favour of HMRC illustrating that the rules have to be respected and in this case the tribunal had no jurisdiction to hear or deal with the appeals which must therefore be struck out. GC obtained repayment of £20,399.97 from HMRC of the VAT that it had collected from ET and would pass on the sum repaid to ET, subject to indemnification of GC by ET for costs incurred by GC in so doing.

On 11 October 2011, Earlsferry Thistle (ET) made a claim, which it described as a "direct effect claim", to HMRC for VAT said to have been erroneously charged on the supplies by GC to ET. The sums incorrectly charged during the period from 1990 to 2010 were said to amount in total to £41,503.07. ET sought payment from HMRC "under EU law" of the balance of this sum after deduction of the £20,399.97 that it had received from GC.

Henderson J held in the *Investment Trust Companies* that despite the terms of section 80(7), the principle of effectiveness required the admission of a claim by the recipient of a supply directly against HMRC for wrongly-paid tax which could not be recovered without excessive difficulty from the supplier.

At this stage a sensible person might think that natural justice demands that HMRC should pay the VAT wrongly charged to the recipient of the supply and that the golf club's claim must succeed. Never forget that in tax there is no natural justice or indeed fairness. As Lord Tyre stated at Paragraph 23:

> *"The ruling by the ECJ in Bridport may have removed one potential obstacle to such a claim. But that ruling has no bearing upon the preliminary question of whether the FTT has jurisdiction to hear a claim for payment made outwith the statutory appeal regime by the recipient of a supply. In my opinion it does not, and for that reason the application by HMRC to strike out the appeal ought to have been granted."*

http://www.bailii.org/uk/cases/UKUT/TCC/2014/250.html

2. Zero rating on take away food and snowballs

It is over 41 years since VAT was implemented in the UK and yet there are still arguments ongoing about the extent of zero rating. There have been two interesting decisions emerging in June 2014, one won by the taxpayers regarding snowballs and one lost by the taxpayer regarding hot take away food from Subway shops.

For Subway food outlets, there is an enormous commercial advantage if it could zero rate its toasted sandwiches and meatball marinara as falling within Schedule 8 Part II Group 1 Note 3(b) of the Value Added Tax Act 1994. Having lost at the First-tier Tribunal (FTT) and Upper Tribunal, they pursued their appeal to the Court of Appeal where Lord Justice McCombe gave the leading judgement in favour of HMRC's contention that such supplies should be standard rated. The appellant has gone into liquidation and argues that the result of standard rating such supplies has been to cause a breach

of a principle of EU law; that of "fiscal neutrality", designed to prevent the distortion of competition by discriminatory tax treatment of similar products or services.

Normally, an appeal can only proceed to higher courts if the appeal is on a point of law. The FTT had found as a fact that the purpose in heating the toasted sandwiches and the meatballs was for them to be eaten hot and so the proper treatment on supply was to standard rate them for VAT. So it was an interesting development for the taxpayer to argue that imposing standard rating on the supply of toasted sandwiches placed it at a competitive disadvantage to other sandwich outlets.

The argument failed and the court ruled , unanimously, that the supplies were standard rated. http://www.bailii.org/ew/cases/EWCA/Civ/2014/773.html

In Lees of Scotland Ltd & Thomas http://www.bailii.org/uk/cases/UKFTT/TC/2014/TC03754.html Tunnock Ltd v Revenue & Customs [2014] UKFTT 630, two separate appeals were consolidated. The issue was whether the items in dispute were cakes and could be zero rated or whether they were biscuits or confection and fell to be standard rated.

If you have a feeling of déjà vu and remember the Jaffa cake arguments, you would be correct. For both companies the issue was substantive with Lees seeking a repayment of £2,057,497 and Tunnocks seeking £805,956. HMRC had ruled in 1995 that snowballs and snowcakes were standard rated but the companies argued that ruling was wrong and as a result they had overpaid VAT and now claimed a repayment.

HMRC accept that meringues, teacakes and Jaffa cakes are cakes for the purposes of this legislation (Schedule 8, Group 1) and benefit from zero rating. Lees snowballs are usually sold by supermarkets in the cake aisle, cake and biscuit aisle or in the in store bakery. Paragraph 22 sets out the tribunals finding of facts which might be distilled down to the finding that snowballs were more similar to cakes than to confection or biscuits.

The marketing and packaging of these products were neutral and ultimately the decision boils down to a finding of fact by the tribunal which ruled at Paragraph 53:

“A snowball looks like a cake. It is not out of place on a plate full of cakes. A snowball has the mouth feel of a cake. Most people would want to enjoy a beverage of some sort whilst consuming it. It would often be eaten in a similar way and on similar occasions to cakes; for example, to celebrate a birthday in an office. We are wholly agreed that a snowball is a confection to be savored but not whilst walking around or, for example, in the street. Most people would prefer to be sitting when eating a snowball and possibly, or preferably, depending on background, age, sex etc with a plate, a napkin or a piece of paper or even just a bare table so that the pieces of coconut which fly off do not create a great deal of mess. Although by no means everyone considers a snowball to be a cake we find that these facts, in particular, mean that a snowball has sufficient characteristics to be characterized as a cake.”

3. Further information from HMRC on place of supply rules

Published on 24 June VAT and businesses supplying broadcasting, telecommunications and e-services gives further information on the new place of supply of digital services rules which will apply from 1 January 2015.

4. Updates on DIY housebuilder schemes

New notes to VAT431C form for claiming a VAT refund as a DIY housebuilder (PDF 239K) for claiming a VAT refund on converting an existing building into a dwelling as a DIY housebuilder.

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ct;vat
New notes to VAT431NB form for claiming a VAT refund as a DIY housebuilder (PDF 223K) for claiming a VAT refund on a new build as a DIY housebuilder.

5. Floor space is a fair and reasonable method for partial exemption

Henderson J in the Upper Tribunal has dismissed an appeal by HMRC against the First-tier Tribunal's (FTT) decision that a floor space based partial exemption method proposed by Lok'nStore Group Plc, which allowed recovery of 99.98% of the 'residual' VAT compared to 94-96% using the standard method, was 'fairer and more reasonable than the attribution that would result from the standard method.'

The dispute arose because Lok'nStore sold insurance which is an exempt supply for its customers' goods while they were in store. But the company's main activity and use of its premises was selling standard-rated storage, packing materials, etc. The FTT agreed that the goods and services on which the residual VAT is incurred are used almost exclusively for the purpose of making taxable supplies of storage which is the main focus of its business.

An error of law in the First-tier Tribunal's reasoning did not vitiate the analysis which they undertook. Henderson J. upheld the conclusion of the FTT that the proposed partial exemption special method was 'fair and reasonable'.

At 34 pages and over 50 paragraphs this is a lengthy read
http://clients.squareeye.net/uploads/pump/documents/LoknStore%20Group%20Plc%2023%2006%2014.pdf

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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.

This podcast concentrated on VAT. There will be a general tax podcast updating AAT members on recent developments and decisions available on the website on 31 July 2014.