VAT update – April 2016

In this edition of the VAT update we look at:

1. The Frozen Fruit Company's fruit dessert "similar to" ice cream, ice lollies, frozen yoghurt and water ices
2. Retrospective use of the flat rate scheme
3. HMRC announcements, including fuel rates

1. The Frozen Fruit Company's fruit dessert was "similar to" ice cream, ice lollies, frozen yoghurt and water ices

This report of the tribunal decision is similar to an explanation of how NOT to conduct an appeal hearing. The surprise is to learn that the Frozen Fruit Company owners were qualified lawyers who should have known that they needed evidence to displace the HMRC decision that their product should be standard rated.

The Frozen Fruit Company is the brainwave of Victoria and Michael Philippou, who have given up their careers as City lawyers to launch their exciting new desserts. After months of chopping, mixing and tasting in their kitchen, plus a lorry-load of fruit and four ice-cream machines later, they found the perfect blend of taste and healthy ingredients.

The Product is a fruit dessert which is available in three different flavours: "Blackberryblue" (blackberry and blueberry), "Orangeberry" (orange and raspberry) and "Strawgo" (strawberry and Alphonso mango). It is sold in 500ml and 120ml tubs. It was common ground that the Product consists only of frozen fruit with no added water, sugar or other ingredients except an amount of xanthan gum amounting to some 0.2% of total ingredients[1]. It was also common ground that the Product is designed to be eaten frozen, although there are ways in which the Product can be used other than in its frozen state. No samples of the product were made available to the tribunal and that seems, with hindsight, to have been a serious omission because there was no evidence merely assertions and hearsay to support the taxpayers' contention that the product was a foodstuff and should be zero rated.

Clearly the frozen fruit product is a foodstuff and might benefit from zero rating within Schedule 8 unless the fruit product is an excepted item. The "excepted items" are:

> Ice cream, ice lollies, frozen yoghurt, water ices and similar frozen products, and prepared mixes and powders for making such products.

Mr Ruse's (a director of the company) submission was that the Product was no different from frozen fruit and should have the same VAT treatment as frozen fruit. He failed to produce samples of the product and so he lacked evidence to support his submission.

The Tribunal did not agree with that submission.

> The exception referred to above is not concerned only with the ingredients of the Product; it is also concerned with the question of whether (i) the Product is a "frozen product" and (ii) whether it is "similar to" other types of frozen product. Moreover, the FTT did not agree that the Product can fairly be described as being nothing more than frozen fruit for the same reasons that one cannot describe a cake as being nothing more than flour, butter, sugar and eggs. The frozen fruit is subjected to a process in order to make the Product and describing the Product by reference only to its ingredients ignores that process.

The FTT concluded that the Product is a frozen product that is similar to a "water ice". As such it falls within excepted item referred to above and supplies of it are not zero rated.

http://www.bailii.org/uk/cases/UKFTT/TC/2016/TC04819.html

2. Retrospective use of the flat rate scheme is at HMRC's reasonable discretion

In **Goodman v Revenue and Customs (VAT - ADMINISTRATION : Accounting and payment) [2011] UKFTT 654** a solicitor wished his application to join the Flat rate scheme (FRS) to be back dated two years to when he first registered for VAT.

Mr Goodman registered for VAT from 1 July 2012. He applied to HMRC to join the FRS on 6 May 2014. His application included a request to enter into the Scheme retrospectively, with effect from 1 July 2012. This request was supported by a letter which explained as follows:

a) he had been VAT registered since 1 July 2012 but had previously been unaware of the FRS and so had not applied earlier to join it.

b) he calculated that his failure to apply earlier had resulted in his overpaying VAT of approximately £7,500.

c) he wished to defer payment of his VAT liability for the period 02/14 as this would be approximately the same amount as that overpayment.

d) he had been unemployed for two years before July 2012 and had suffered cash flow difficulties before and after that date.

e) he had ceased trading as a self-employed consultant and accepted an offer of partnership with a law firm from 1 March 2014.

f) he had paid all his VAT, including penalties for late payment, and could "ill afford to forgo the benefit of FRS."

It was agreed that Mr Goodman would have fulfilled the relevant eligibility criteria in the Regulations for admission to the FRS from 1 July 2012. The only question was whether HMRC's decision not to allow admission from that date should be reversed by the Tribunal on the basis set out in section 84 (4ZA) VATA – namely that HMRC could not reasonably have been satisfied that there were grounds for that decision.

HMRC had allowed registration to the flat rate scheme to be back dated to February2014. One might at this point remember that tax is governed by rules and has little to do with fairness or equity. If Mr Goodman had applied at the outset to operate the flat rate scheme he would have paid less tax. Mr Goodman argued that he had overpaid tax but this argument is misconceived because Mr Goodman did not "overpay" at all. He paid VAT on the normal basis, in the correct amounts. The fact that he might have paid less VAT if he had been admitted to the FRS at an earlier date did not mean that he had overpaid VAT under the normal rules.

The question that the tribunal had to consider was whether HMRC had acted reasonably in refusing to allow retrospective entry to the flat rate scheme. HMRC had considered Mr Goodman's circumstances, the policy underlying the scheme and the economic effect that the refusal would have and the only conclusion possible was that HMRC had acted reasonably and the appeal must fail.

3. HMRC announcements including new fuel rates

Clause 115 for Finance Bill (number 2) introduces the possibility that zero rating might become available for women's sanitary products. HMRC has published a policy paper on this topic

The **VAT road fuel scale charges** are amended with effect from 1 May 2016. Unless the vehicle(s) have a very high private mileage, I doubt if it is good practice to use the VAT road duel charges although I recognise that it may make administration easier. If the scale charge is used, all the VAT charged on road fuel can be recovered without having to split your mileage between business and private use

Businesses which choose to do so must use the new scales from the start of the next prescribed VAT accounting period beginning on or after 1 May 2016.

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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 30 April 2016