Vat update – 14 November 2016

AAT VAT Update 14 November 2016

1. **Granting a stall or pitch at a craft fair was a standard rated supply**

Composite supplies are always difficult. In Revenue & Customs v Zombory-Moldovan (ZM) (t/a Craft Carnival) [2016] UKUT 433, the dispute concerned whether the trader made an exempt supply of land or whether the major supply was the services in organising the craft fair which would fall to be standard rated. The First Tier tribunal (FTT) had decided in favour of Mrs. ZM that the relevant supplies are exempt supplies of licences to occupy land.

Craft Carnival organises craft fairs in and around Dorset. In a typical year, five or six such fairs will be held. Each of them will take place over a weekend and last either two days or three (in the case of a Bank Holiday weekend). In most cases, the venue will be close to a stately home or historic property.

HMRC relied on the advertising and website used by Mrs ZM. Mrs ZM arranges for the provision and erection of Marques and of other necessary temporary facilities including portable toilets, electrical generators and security fencing. She also employs between five and seven members of staff to act as ticket sellers and car park marshals. Before the fair takes place Mrs ZM would have issued a press release and advertised the event in local newspapers and on Craft Carnival's website and booked a children's entertainer, such as a magician, to encourage families to attend.

Craft Carnival has two sources of income: stallholders and visitors. A fair can attract between 40 and 110 stalls and be attended by between 1,200 and 3,500 paying visitors. The fee for a stall or pitch was then specified as £180. An indoor pitch, which is selected by approximately 60% of stallholders, is generally inside a marquee or occasionally a building and consists of an area ten feet by six feet. It is demarcated by a trestle table which is made available with two folding chairs to each. An outdoor pitch consists of a 20 foot square patch of ground demarcated by posts with a sign stating the name of the stallholder who is free to erect a tent or gazebo and arrange their items for display. Although it is possible on some occasions to provide electric power points to outdoor pitches this is very much the exception and generally these are not offered.

Schedule 9 to the Value Added Tax Act 1994 provides for the "grant of any interest in or right over land or of any licence to occupy land" to be an exempt supply. It enacts Article 135 Principal VAT Directive (2006/112/EC).

The recent persuasive decision of the FTT (Judge Peter Kempster and Mr John Coles) in International Antiques and Collectors Fairs Ltd v Revenue and Customs Commissioners [2015] UKFTT 0354 (TC) was noted. That case concerned fees charged to exhibitors who booked spaces at antiques and collectors fairs organised by the taxpayer. The FTT held that the fees were not exempt.

With two contrasting cases, the Upper Tribunal had to find a decision of precedent. The FTT finding of fact could only be overturned if the true construction of the contract between Craft Carnival and a stallholder, Craft Carnival is obliged to provide a stallholder with a stall or pitch at the relevant fair. The reference to the "Show" in the terms and conditions does not, as the FTT thought, merely set out the context of the agreement. To echo Lord Hoffmann in the Investors Compensation Scheme case (as to which, see paragraph 24 above), the booking form and terms and conditions would "convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which they were at the time of the contract" that Craft Carnival was promising that there would be a fair of the relevant description. That, moreover, was the economic reality.

The UT agreed with HMRC's argument that argued that the fee that a stallholder pays to Craft Carnival is payment for participation as a seller in a high-quality, expertly- organized and run craft and garden fair, one element of which is the provision of a pitch. Craft Carnival's own website says, "Ours are not 'village hall' events with a smattering of stalls". The UT held the contract between Mrs. ZM trading as Craft Carnival and the stallholder, meant Craft Carnival had significant responsibilities for

organising a high-quality, expertly run craft and garden fair, rather than just the provision of a pitch. They concluded that it was a single supply of standard rated services.

http://www.bailii.org/uk/cases/UKUT/TCC/2016/433.html

2. Input tax on cars: the importance of evidence and HMRC failings

It is the role of the First Tier Tribunal (FTT) to find facts. They have discretionary powers to consider information as well as evidence but once the FTT find the facts after considering the evidence and arguments presented to them, provided that decision is reasonable it cannot be overturned.

Many years ago the Inland Revenue formed their appeals unit and I observed a considerable improvement in the professionalism exhibited when a contentious appeal arose. Officers in the appeals unit understood evidence and cross examination. In Zone Contractors Ltd v R&C [2016] UKFTT 0594, HMRC seem to have taken a case to appeal which should never have been allowed to go to appeal in the state it arrived. From HMRC's position, they lacked the evidence to support HMRC's argument that cars had been used privately and they appear not to have cross examined witnesses to establish the evidence that HMRC needed to justify the disallowance of input VAT on the cars. There were 6 vehicles involved and VAT of £27,151. HMRC disallowed the input tax on the basis that, in their view, Zone had failed to provide sufficient evidence to support its assertion that the cars had been purchased with the intention that they were used exclusively for business purposes and were not made available for private use.

In practice, I have seen many such disputes and HMRC have evidence in the form of surveillance reports showing that the vehicle(s) has been used privately. But in this case, HMRC seem to have decided that the vehicles were available to be used privately without establishing the necessary evidence.

Zone is a civil engineering contracting business. Its primary activity is the provision of ground works services. It works to large contractors on substantial infrastructure projects preparing the ground for development, particularly road construction.

All employees signed a contract of employment and which explicitly included an absolute prohibition of any private use of company vehicles. Zone also claimed that the motor cars were kept either on site or at the company offices overnight and therefore not available for private use.

Zone have two offices, one in Birmingham and one in London. Both the directors and Mr Newlands are based in Birmingham together with a person providing office administration. The directors will spend the majority of their working week attending one of the sites on which their workforce are situated. Their evidence was that they would drive from home to the Birmingham office where the company vehicles were parked over night; they would collect such equipment as was necessary and using one of the 4x4 vehicles (both Toyota Land Cruisers) they would drive to site. The Land Cruisers were necessary to get about the site when they got there and to transport the equipment necessary. The directors referred to using the vehicles to tow trailers or larger pieces of equipment as necessary. When on site the vehicles would be used not just by the directors but also frequently by foremen and supervisors to get about the site.

Each of the directors owned their own private car and these were used to commute to and from the office. The wives of the directors also had cars of their own.

The insurance policy allowed business use as well as social domestic and pleasure. When Zone disposed of cars in which it had claimed input tax it had declared VAT on the full selling price. Zone had therefore acted entirely consistently with the assertion that the cars were used for business purposes and subject to input tax recovery.

There have been many disputes about input tax recovery on cars. The principle established in CEC v Elm Milk Ltd [2006] EWCA Civ 164.was: “The important point was not whether it was possible to imagine any exceptional circumstances in which the car might be used for private purposes. The question was whether when the employer purchased the car he intended to make it available for private use”.

HMRC contended that there was no evidence that the employees had signed or were bound by the employment contract with the consequence that there was no legal restriction on the availability of the cars. Absent mileage logs or some other adequate enforcement and monitoring of use the Tribunal were invited to conclude that there was no intention to prevent the making available for private use.

If I read between the lines, HMRC did not believe the evidence being presented by the taxpayer. But HMRC failed to establish evidence to support its arguments and contention.

The Tribunal therefore finds that the staff of Zone were subject to a legal restriction on the private use of any company vehicle. The contractual restriction also required the vehicles to be parked overnight by reference to the instruction of the directors. AND The Tribunal finds that there was no need for either director to use the saloon cars for private purposes (because each director had two cars available for their personal use).

Over the period from 2013 through to the hearing of the tribunal HMRC insisted that mileage logs or some other means of monitoring use were the only means of securing input tax recovery in accordance with Article 7. In light of Elm Milk such insistence is, in the Tribunal’s view incorrect in cases where there is evidence of a legal restriction.

I think that HMRC deserve serious criticism for pursuing this appeal to tribunal. HMRC failed to establish the evidence which it needed to support its contention and it seems to have failed to consider the evidence which the taxpayer presented properly. It should have settled the case by agreement a long time ago. The key issue when considering whether input tax on a car can be recovered is the taxpayer’s intention when the vehicle was purchased. The tribunal were disinterested in the mileage logs because de minimis private usage and monitoring the minutiae were not relevant to establishing the intention when the vehicles were bought.

http://financeandtax.decisions.tribunals.gov.uk//judgmentfiles/j9309/TC05330.pdf

3. Avoidance: AAT and other give guidance

Tax avoidance is an emotive topic. I struggle personally with where the watershed lies between sensible tax planning to achieve the commercial objective and egregious unacceptable avoidance. That watershed is ill defined and poorly understood but what is clear is that an adviser should help a client navigate the complexities of tax legislation. A failure to advise a client of how to achieve the commercial objective and claim all the available reliefs might render the advisor liable to pay compensation to the client.

The seven major professional bodies including AAT have published guidance on Professional conduct in Relation to Taxation. Members should not engage or encourage tax avoidance activity. HMRC has endorsed the code. The new PCRT will come into effect during March 2017 and includes five new standards that will prevent the creation, promotion or encouragement of tax avoidance schemes. This must be required reading for every member.

At 55 pages this is an interesting read; https://www.tax.org.uk/sites/default/files/PCRT%20Effective%201%20March%202017%20FINAL.pdf

Not surprisingly, the government and HMRC are delighted with the development.

https://www.gov.uk/government/news/updated-code-of-conduct-will-discourage-number-of-avoidance-schemes

4. Place of Supply rules: Cross border internet selling

In practice I have always found that the place of supply rules are complex and deserve careful scrutiny. I have always been reluctant to advise because I found it a difficult area. In Sportsdirect.com Retail Ltd & Anor v Revenue and Customs [2016] UKFTT 716, the underlying problem was the place of supply rules but in the first instance HMRC tried to deny the taxpayer a right of appeal by denying that there had been an appealable decision.

HMRC argued that Decision Letter should not be construed as making any decision in relation to the UK VAT which is chargeable on supplies of goods by the Appellants. They argue that the Decision Letter should instead be construed instead as reserving HMRC's position on the treatment of those supplies for UK VAT purposes until the VAT treatment of the supplies in question in other EU member states has been decided.

The dispute relates to the application of Articles 32 to 34 of Directive 2006/112/EC (the "Directive") – provisions which cover internet sales made by a taxable person in one EU member state to consumers belonging in another EU member state who are not registered for VAT in that state – and the enactment of those provisions in the UK tax legislation in Section 7(5) of the VATA. The place of supply will be in the EU member state where the goods are located at the time when the dispatch or transport of the goods to the customer begins unless the goods are "dispatched or transported by or on behalf of the supplier" from an EU member state other than that in which the dispatch or transport of the goods ends, in which case the place of supply will be where the goods are located at the time when the dispatch or transport of the goods to the customer ends.

The Sports Direct group has been accounting for VAT on cross-border intra-EU internet sales for over six years on the basis that, by ensuring that a group member other than the selling group member is engaged by the consumer to effect the transport of the goods to the consumer, the selling group member falls outside Article 33 of the Directive and is required to account for UK VAT on the basis that its supplies are made in the UK.

HMRC should be regarded as having made a decision to the effect that:

(a) the supplies in question should be regarded as being made in the destination EU member state; and

(b) no refund of UK VAT previously paid would be made until evidence of the VAT paid in each destination member state was provided.

Taxpayers should be entitled to certainty and yet HMRC seem unable to help the taxpayer with advice on how the directive might be interpreted in other jurisdictions. This is a difficult and complex area and the tribunal judge recommended that:
"…it seems to me that it would promote a quicker and cheaper resolution of this issue for the appeal to proceed and, if necessary, for a reference to be made to the European Court of Justice on the correct interpretation of Article 33 of the Directive than for the Respondents to await developments in other EU member states. This is a matter which affects all EU member states and I believe that the sooner there is a resolution of the question of whether the "literal interpretation" or the "broader interpretation" of the language in Article 33 is to be preferred, the better it will be for all concerned."

http://www.bailii.org/uk/cases/UKFTT/TC/2016/TC05445.html

5. Transport of trainee sailors: zero rating?

I thought that all the potential disputes on the interpretation of item 4(a) of Group 8, Schedule 8 Value Added Tax Act 1994 had been settled many years ago. I enjoyed reading those historic cases about

rides at the Pleasure beach, cars to airports, cruises and train journeys. It came as a surprise to read Sailing Projects Ltd v R&C [2016] UKFTT 0684

HMRC decided that Sailing Projects Ltd's (SPL) supply of a yacht and skipper to an associated company, Adventures At Sea Limited (AAS) does not relate to the "transport of passengers" within item 4(a) of Group 8, Schedule 8 to the Value Added Tax Act 1994 (VATA) and therefore is not zero rated and should instead be standard rated.

AAS provides a number of activities revolving around sailing ranging from the Duke of Edinburgh Award Gold Residential standard to "milebuilding" – i.e. building up experience and sailing miles. Although, in the past, it offered the possibility of obtaining specific qualifications such as the International Certificate of Competence, this was not its main focus and is not something which it continues to offer today.

SPL hired the yacht to AAS but retained responsibility for operating the yacht, ensuring the safety of all those on board and complying with any other relevant shipping regulations.

The yacht has a carrying capacity of ten or more passengers. It is not a "qualifying ship" within the meaning of item 1, Group 8 of Schedule 8 VATA. SPL provided some sample entries from the yacht's log. These are examples of two five-day trips which show a planned itinerary involving various stops along the Hampshire coast or at the Isle of Wight for lunch or to berth overnight which were accepted as representative of a typical voyage undertaken by SPL for its customer, AAS.

The taxpayer argued that the nature of the activities carried on by AAS (training sailors) is irrelevant to the VAT treatment of the supplies made by SPL. Whilst there may be an element of education/training involved in AAS's activities, SPL's job is simply to transport AAS's customers along the route required by AAS. The supply of the boat and the skipper by SPL is solely for this purpose – i.e. the transport of passengers.

The yacht is being sailed from one place to another. The stops were chosen partly based on the tides but also because they would be convenient places to stop for lunch, to anchor for the night or to go ashore to carry out other activities which form part of the trip. One example given was for the participants to row ashore and buy ice-creams.

The tribunal rejected HMRC's arguments that the people on board were crew or that the principal supply was one of training. SPL provided transport of passengers and the fee it charged AAS was correctly zero rated.

http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j9390/TC05413.pdf

6. Autumn Statement is 23 November

Phillip Hammond will deliver his first autumn statement. Already there has been speculation about tax raising moves as well as pleas for fiscal measures to help business. This has been a year of surprises for me and I'll not be making any predictions but I will listen to that statement with interest. Rapid change has become the constant in recent years.

Derek Allen
14 November 2016

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 November 2016.