Vat update – 14 October 2016

AAT VAT Update 14 October 2016

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

1 Agent of Principal? Taxi owner faced VAT bill on driver's income
2 Self service coin exchange machines were within Exemption
3 Local authority commercial waste collection is exempt from VAT
4 Resolving disputes with HMRC

Agent or Principal? Taxi owner faced VAT bill on driver's income

In Khalid Mahmood v R&C [2016] UKFTT 0622, he appealed a decision of HMRC that he should have registered from 1 April 2009 and faced a VAT charge of £77,000 plus penalties for failing to register.

Mr Mahmood carried on business as a taxi firm base in Halifax, trading as Metro Cars. He had worked as a taxi driver but took over the business of Metro Cars in or around 2008. There were some cars owned by the business and he also engaged the services of self-employed drivers who had their own cars, kept the cash fares and paid the appellant rent for the use of the base.

Mr Mahmood had some contract work but he argued that such work was conducted by the self-employed drivers and he passed on 100% of the money received to the driver. In other words, he argued that he acted as an agent and not the principal in the contract work cases. HMRC notice 700/25 states:

"3.3 Agent or principal?
As a taxi or private hire car business you may perform two different types of work. These are:
cash work, where individual customers pay cash to the driver on completion of the journey and
account work, where regular customers, particularly companies and institutions, are allowed to settle their bills periodically
If all your drivers are employees you are a principal and must follow paragraph 3.2 when accounting for VAT. However, if your drivers are self-employed you may, depending on the agreements you have with them, be acting as their agent for cash work and in some cases for account work as well.

HMRC argued that the three features of the arrangements that they mention, negotiation by the appellant, invoicing by the appellant and receipt of payment in his business account and presence of those features means that appellant is the person making the supply as principal.

All the material features of the account business point to it being agency business, in particular the 100% correlation of fares and payments to the drivers, albeit not simultaneously, and the fact that the same rental is paid irrespective of the nature of a driver's work in the week concerned. Mr Mahmood produced written statements from 6 drivers and this evidence discharged the burden of showing that the decision of HMRC requiring registration from a date in 2009 was wrong as the supplies of services made to the account customers were not made by the appellant but by the drivers. The penalty was reduced to nil.

http://financeandtax.decisions.tribunals.gov.uk//judgmentfiles/j9336/TC05358.pdf

Self-service coin exchange machines were within Exemption

In Coinstar Ltd v R&C [2016] UKFTT 0610, the issue was whether coin exchange Kiosks operated at supermarket sites were within the financial services exemption. A customer could exchange coins for a voucher to be spent. HMRC argued that the fee charged for converting the coins into a voucher should be standard rated. Coinstar argued its supplies are exempt from VAT by virtue of Article 135

of Council Directive 2006/112/EC on the Common System of Value Added Tax ("Principal VAT Directive" or "PVD") given effect to in UK law by Items in Group 5 of Schedule 9 VATA.

Coinstar has over 2000 kiosks at various supermarket locations throughout the UK. Each kiosk is connected to a computer via a phone line. When a customer wishes to use the kiosk there will be a display asking if the customer wants a cash voucher or to donate to charity. Once the choice is made, the screen displays the commission to be charged (9.9% for a cash voucher). Some of that 9.9% commission is shared with the supermarket.

In the case of a donation to charity the customer receives a receipt from the charity showing the tally of coins and the processing fee and this receipt includes a Gift Aid Declaration with the name and other details of the donor to be entered.

Article 135 of the Principal VAT directive is reflected in Group 5 in Part 2 of Schedule 9 to VATA. The tribunal had no less than 31 case law authorities in the bundle, of which 16 were decisions of the Court of Justice of the European Communities or Union ("ECJ"), 8 were binding decisions of superior UK Courts and tribunals and the rest were decisions of this or the VAT Tribunal or VAT & Duties Tribunal and so not binding.

HMRC argued is that the appellant's customer is paying for his coins to be sorted and counted, to save the customer the time he would spend otherwise doing this task himself and taking the coins to the bank. HMRC point out that this position is consistent with Coinstar's advertising as shown in the documents in the bundle

The tribunal found the fact that this was a financial transaction. It allowed the appeal and held that the supplies made by Coinstar fall within the exemption in Item 1 Group 5 Schedule 9 VATA 1994.

http://financeandtax.decisions.tribunals.gov.uk//judgmentfiles/j9324/TC05346.pdf

3. Local Authority commercial waste collection is exempt from VAT

In theory, Judicial Review (JV) is a mechanism that protects the rights of citizens from administrative decisions which are wrong. In practice JV is expensive and time consuming and a citizen is unlikely to succeed even though the citizen is suffering an injustice and experiencing something which is clearly wrong. This is because of the Wednesbury Principle which I might paraphrase as being that success will only occur if it can be shown that the decision is so unreasonable that no reasonable person could have made the same decision. That hurdle is very difficult to pass.

TDC is a company registered in England (Company Number 03757703) and carries on business as a provider of commercial waste services, including in particular "trade waste" collection services consisting of emptying "wheelie bins" used by businesses and other occupiers of non-residential premises for disposing of waste. When TDC supplies trade waste collection services, it is required to charge its customers VAT on those supplies.

A local authority (LA) in the United Kingdom is charged with the collection of municipal waste. Section 45(1)(b) EPA 1990 provides that it is the duty of a Local authority "if requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste". Provision is made in relation to charging for such collection by section 45(4) EPA 1990.

This is an application for judicial review, commenced in the Administrative Court and subsequently transferred to the Upper Tribunal, concerning the lawfulness of the VAT treatment being afforded to local authorities carrying out certain trade waste collection and disposal services. The relevant EU legislation is contained in Article 13(1) which provides relevantly that LAs

“Shall not be regarded as taxable persons in respect of activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities where their treatment as non-taxable persons would lead to significant distortions of competition.”

The UT held that a Local Authority making trade waste collection services supplies to business customers in its area did so in the performance of its duties (its public duties under the Environmental Protection Act (EPA) 1990 s.45 (1) (b)). This could therefore come within the meaning of ‘in the course of activities in which it was engaged as a public authority under VATA 1994 s.41A and the Principal VAT Directive article 13(1) so that no VAT was due on the service.

TDC were arguing that this gave LAs a competitive advantage because the LA did not charge VAT and so it could provide the service cheaper. However, their argument was not supported by specific evidence and this would be necessary on a case by case basis. Without such evidence the judicial review was doomed.

http://www.bailii.org/uk/cases/UKUT/TCC/2016/417.html

Resolving disputes with HMRC

A great deal can be learnt from reading tax cases. I feel so sorry for those taxpayers who become involved in the appeal process. In my view, many of the cases which come before the tribunals should have been resolved at a much earlier stage and by the process of discussion and negotiation.

Mr Mahmood (agent or principal) and the TDC case concerning whether a local authority were exempt from VAT for waste collection services illustrate that the dispute between the parties should have been settled by considering the evidence and the strength of the cases that the evidence supported. In Mr Mahmood’s case he had evidence which showed clearly that he was acting as the agent of the drivers doing the taxi work and if he had presented his case at an early meeting with a reasonable HMRC officer, the dispute would not have arisen and the expense and worry of the litigation process could have been avoided.

Similarly in the TDC case, their lack of evidence to support their argument that the VAT exemption available to Local authorities distorted competition meant that they had no realistic hope of success. The hurdle of the Wednesbury principle is difficult to overcome even if the claimant has a strong case but pursuing a judicial review appeal when the evidence was lacking was a recipe for disaster.

It is inevitable that some disputes are difficult or that unreasonable arguments are promoted but many tribunal appeals could be avoided if both parties to the appeal considered the evidence and the strength not only of their own arguments but also the strengths of the opposition’s arguments

Derek Allen
14 October 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 31 October 2016.