VAT update 14 January 2016

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

1. local authority parking is VATable
2. vouchers
3. college catering and drama referred to CJEU to clarify exemption boundaries
4. HMRC update guidance to confirm snowballs are zero rated
5. HMRC help for agents

1. Local authority parking is VATable

In Isle of Wight Council & Ors v HM Revenue and Customs [2015] EWCA Civ 1303, the local authority was claiming a refund of the VAT it had charged its customers for parking. This dispute has been running for a very long time and significant amounts of money were potentially involved. My problem with a case like this is that at the end of the day the VAT at issue is an argument about which pocket of government is going to pay the bill. We, as taxpayers, are the losers because we pay the legal costs of this dispute which I suspect must be enormous.

The Court of Appeal has delivered a unanimous judgement in favour of HMRC refusing to repay the VAT which the local authority was trying to reclaim. The judgement runs to 80 paragraphs but that pales into insignificance beside the First-tier Tribunal (FTT) decision delivered by Sir Stephen Oliver QC. The hearing before the FTT lasted seven days. Oral evidence was given by nine witnesses, some of whom were witnesses of fact and some of whom gave expert evidence. In its reported version ([2013] SFTD 442, to which all references in this judgment are made), the decision runs to 65 closely printed pages and 268 paragraphs. It contains a meticulous and detailed account of the evidence, including, in particular, evidence relating to the factors relevant to the setting of charges by providers of OSCP.

The issue of principle is whether a local authority which charges members of the public for off-street car parking ("OSCP") is a non-taxable person for Value Added Tax ("VAT") purposes. This turns on whether treating the authority as a non-taxable person "would lead to significant distortions of competition" within the meaning of Article 4.5(2) of the Sixth Council Directive of 17 May 1977 (77/388/EEC). The test case started before the VAT Tribunal in 2004 and the local authority claimed under section 80 of the Value Added Tax Act 1994 ("VATA 1994") for repayment of VAT which had been paid between 1997 and 2001. Other authorities had lodged claims back to 1978.

HMRC refused to repay the VAT and the Court of Appeal has now agreed unanimously with the Upper Tribunal's conclusion that the First-tier Tribunal reached conclusions that were open to it on the facts that it found, and dismissed the appeal. Litigation has been ongoing since 2004 and has involved decisions of the European Court as well as the High Court.

HMRC are correct to pursue their decision but criticism should be levied at the Government generally for allowing this circular dispute the outcome of which does not help the economy or the tax yield.

2. Vouchers

In Revenue & Customs v Associated Newspapers Ltd [2015] UKUT 641, The First-tier Tribunal (FTT) had ruled that when vouchers were issued to readers of the Daily Mail there was no output tax liability triggered at that point but when the vouchers were redeemed the input tax was recoverable on the VAT incurred on the redemption. At first blush, this seems like the alchemists dream. HMRC argued that the effect is that Associated Newspapers Ltd (ANL) is entitled to reclaim input tax paid to voucher retailers, such as Marks & Spencer (described as a paradigmatic example), but is not required to account for any output tax on the onward supply of that voucher free of charge to its customers. This, Mr Beal argued for HMRC, was equivalent to conferring upon ANL zero-rating for its own provision of the vouchers, something for which there was no basis in UK law.

Cases considered included:

- *Argos Distributors Ltd v Customs and Excise Commissioners* (Case C-288/94) [1996] STC 1359 looks at the position of the retailer for vouchers., and
- *Elida Gibbs Ltd v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387. Looks at the position of the wholesaler for vouchers, and
- *Astra Zeneca UK Ltd v Revenue and Customs Commissioners* (Case C-40/09) [2010] STC 2298 looks at vouchers supplied to employees as a reward. The provision of the vouchers to the employees in those circumstances was a supply of services for consideration and that consideration was VATable.

Many other cases were considered but by paragraph 73 the court decided that the input tax incurred was recoverable because it was a cost of making taxable supplies. The vouchers were acquired for the purpose of the business promotion scheme to increase the circulation of ANL's newspapers, and also to facilitate the associated sales of advertising.

This is a very lengthy decision and a summary probably does not do justice to the careful analysis delivered by the Upper Tribunal (UT). As I mentioned above, the UT agreed with the FTT's decision that ANL was entitled to recover input VAT it was charged from intermediary voucher vendors.

The UT also agreed that ANL's supply of vouchers free of charge with their newspaper scheme was for business purposes and was not a supply of services to the value of the voucher, so no output VAT was due on the voucher.

However, the UT disagreed with the FTT in respect of input VAT purported to be charged to ANL by a retailer issuer of the voucher. The UT held that as the retailers did not have to declare VAT on the consideration at that point, but only on the final redemption of the voucher, this could not be ANL's input VAT.

3. College catering and drama courses referred to CJEU to clarify exemption boundaries

In HM Revenue and Customs v Brockenhurst College [2015] EWCA Civ 1196, we have another example of one pocket of Government disputing the VAT treatment. The people who lose from these expensive disputes are you and I because ultimately we pay for the dispute but the outcome produces no discernible difference to the consolidated fund.

This is a dispute which has wide implications for many educational establishments but in my view HMRC deserves criticism for continuing to appeal the decision. HMRC should have accepted the decision of the FTT and if they did not like the result they should have changed the law.

The College, which carries on the business of providing education to its students, teaches courses in (a) catering and hospitality, and (b) performing arts.

For the purpose of enabling the students enrolled in the course related to catering and hospitality to learn skills in a practical context, the College runs a restaurant. The catering functions of the restaurant are all undertaken by students of the College, under the supervision of their tutors. The public attend the restaurant and pay for their meal, the charge being around 80% of the cost of the meal.

Now just pause here and observe that the meals are provided at a loss. That is not in the course or furtherance of a business. The purpose must therefore be the obvious one that the catering students are training and as part of their course they produce edible food. The educational part should be exempt.

A similar set of facts and arguments applied to drama students who stage plays which are made available to the public for a token fee, which offsets some of the costs for staging a production. The College claims the supplies of catering and concerts etc. are exempt for VAT purposes pursuant to Article 132(1)(i) because they are "closely related" to the provision of education or, as the Revenue and Customs Commissioners ("HMRC") maintain, are standard-rated. The exemption has been implemented into UK law by section 31 and group 6 of schedule 9 of the Value Added Tax Act 1994.

It has not been suggested that the domestic legislation is capable of producing a different result from the Principal VAT Directive.

The Court of Appeal has decided to refer to the CJEU for a ruling to clarify the boundaries of the exemption. What a waste of time and money! HMRC should direct its resources towards improving compliance and improving the tax yield. Whatever the outcome, it just moves money from one government pocket to another and it does nothing to help the economy, the tax yield or anything useful except ensure that the legal professionals involved are paid handsomely for their efforts. It wastes HMRC resources and as an organisation, HMRC's service standards are unacceptably poor.

4. HMRC update guidance to confirm snowballs are zero rated

VAT Notice 701/14 has been updated following the FTT decision in Lees and Tunnock to add snowballs as zero rated products. I suspect that every student of VAT has heard of the Jaffa cake decision which confirmed Jaffa cakes were zero rated. Now we have chocolate snowballs also zero rated. It might be time to revisit zero rating and to eliminate some of the anomalies.

5. HMRC help for agents

I believe that I might have been critical of HMRC service standards in this podcast. The service that HMRC provides taxpayers with complaints can be dreadful, with long delays in answering correspondence and extraordinarily long delays in answering the telephone.

Tax is complex and HMRC wastes a considerable amount of its limitless resource doing things that are inefficient and often pointless. But in fairness to HMRC they do produce some helpful material designed to help agents.

In December 2015, they published Agent Update 51 which is always required reading for tax advisers. This is an interesting read and it gives a good overview of the tax environment for agents

They also produce webinars and learning support for tax agents.

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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 January 2016.