VAT update – August 2016

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

1 HMRC Publish updated Toolkits

2 Insured repairs: place of supply rules amended from 1 October 2016

3 HMRC tackling tax avoidance list of 2015 cases

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1. HMRC Publish updated toolkits on VAT

In principle, I support the initiative for HMRC to publish toolkits which identify the common errors discovered by HMRC when it checks returns. In practice, I am concerned that the toolkits are too long and the valuable messages and examples they contain get lost or hidden in the presentation.

HMRC has published updated versions of its input tax (24 pages), output tax (30 pages) and partial exemption (22 pages) toolkits. Each of the guidance toolkits contains valuable hyperlinks to further reading in bold green text.

https://www.gov.uk/government/publications/hmrc-vat-input-tax-toolkit

https://www.gov.uk/government/publications/hmrc-vat-output-tax-toolkit

https://www.gov.uk/government/publications/hmrc-vat-partial-exemption-toolkit--2

2. Insured repairs: place pf supply rules amended from 1 October 2016

On 11 July a Statutory Instrument was laid which amends the place of supply rules for insured repairs. The change obliges the service provider to charge VAT at the standard rate on the repairs they perform where the provider of the insurance cover for the goods is located outside the VAT territory of the EU. The SI is intended to apply the "use and enjoyment" principle to "… UK repairs under UK insurance contracts and must be applied from 1 October 2016.

http://www.legislation.gov.uk/uksi/2016/726/pdfs/uksi_20160726_en.pdf

3. HMRC tackling tax avoidance list of 2015/16 cases

HMRC has published a list of 26 litigation decisions where HM Revenue and Customs (HMRC) considered tax avoidance was involved and a decision was received in the tax year 2015 to 2016.

There are four of these decisions which concerned VATR &C v DPAS Ltd [2015] UKUT 585 – VAT dental scheme with mixed outcome

R& C v Newey (t/a Ocean Finance) [2015] UKUT 300 - VAT scheme which HMRC lost but I understand are appealing further. The scheme was arranged in 1996 so this dispute has been ongoing for nearly 20 years

R& C v Pendragon plc & Ors (Rev 1) [2015] UKSC 37 –VAT scheme to avoid output tax on demonstrator cars which HMRC won

Massey & Anor (t/a Hilden Park Partnership) v v R& C[2015] UKUT 405 –VAT golf club scheme which HMRC won

HMRC claim that the list shows that HMRC are successful in tackling avoidance. Such litigation must act as a deterrent. I feel sorry for Mr Newey because he might be winning his appeal but he is still involved in litigation about something he set up 20 years ago. That must be a huge deterrent to anyone thinking of using an avoidance scheme. The costs of litigation are considerable and even if the successful litigant recovers costs, the award of costs will usually be a small fraction of the commercial costs incurred.

https://www.gov.uk/government/publications/tax-avoidance-litigation-decisions/tax-avoidance-litigation-decisions-2015-to-2016

4. New Treasury Team Appointed

HM Treasury

- Chancellor of the Exchequer – Rt Hon Philip Hammond MP
- Chief Secretary to the Treasury – Rt Hon David Gauke MP
- Financial Secretary – Jane Ellison MP
- Economic Secretary – Simon Kirby MP†
- Commercial Secretary – Lord O'Neill of Gatley

The full list of Ministerial appointments was published on 18 July and can be found at https://www.gov.uk/government/news/full-list-of-new-ministerial-and-government-appointments

5. Composite Supply: Zero rating denied on construction of new holiday lodge

In Fairway Lakes Limited v Revenue And Customs [2016] UKUT 340, Fairway made to the customer a composite supply of construction services of a new holiday lodge and the procurement that the landowners will grant to the customer a lease of the plot of land on which the lodge is to be constructed. If the main element was the holiday lodge it would be zero rated but if the main element was the transfer of the plot then it would be exempt but if the main element was a service to obtain a transfer from the landowner, it would be standard rated..

Sunningdale Investment Limited ("SIL") owns the freehold of 11 plots of land at Fairway Lakes Village in Norfolk, on which holiday lodges are sited (or will be sited). The directors and shareholders of SIL are Mr Laurence Gage, his sister, Mrs Judith Collen, and their mother, Mrs Doris Gage.

A partnership between Mr Gage and Mrs Collen ("the Partnership") owns the freehold of a further 31 plots of land at Fairway Lakes Village on which holiday lodges are (or will be) sited. The appeal concerns lodges built on plots owned either by SIL or the Partnership.

Fairway is responsible for the construction of the lodges and infrastructure at Fairway Lake Village. It owns the freehold of plots 2, 3 and 5 and has granted leases of these plots. It is also (as "the Management Company") a party to leases of plots granted by each of SIL and the Partnership. Mr Gage and Mrs Collen are the directors of Fairway, each of them holding 50% of the shares in Fairway.

The construction of a lodge takes about 4 months from the time when the kit is received from the manufacturer. The kit is erected by a combination of 3 carpenters employed by Fairway, subcontracted building/erection services provided by SIL and outsourced subcontractors as needed. Fairway has access to the land in order to undertake the construction of lodges by virtue of an oral agreement with the landowner.

The landowner grants a lease to a customer, who also enters into the Agreement (in relation to a particular plot) which is made between Fairway and the customer.

The Agreement relative to Lodge 8 shows 'The Basic Cost of the Lodge' as £155,140 and 'The Reservation Deposit' as £5,000. The Completion Statement relative to Lodge 8 shows 'Balance of Basic Cost of Lodge' payable on completion as £150,140. From this it appears that, notwithstanding the terms of clause 1.2 of the Agreement, there was not in practice necessarily an intermediate stage 2 at which a payment was required. The Reservation Deposit of £5,000 was paid on ordering the lodge and the balance of the 'The Basic Cost of the Lodge' was paid at completion.

Both the First tier tribunal and the Upper Tribunal(UT) found as a fact that the lease was granted and the Agreement was signed when a lodge was ready for occupation by the customer, rather than at an earlier time before construction of the lodge. (It is, in particular, clear from the calculation of rent due in the Completion Statement in relation to Lodge 8 (which was not suggested to be unrepresentative), that the lease was granted when the lodge was ready for occupation by the customer.) Fairway's responsibility for the payment of conveyancing and estate agents' fees was indicative that the Agreement included an obligation on Fairway to procure the landowners to grant a lease of the plot to the customer.

The UT decided that what was happening here was that a customer was buying a package of a lease (from the landowner) and a lodge (from Fairway). The UT ruled that the supply by Fairway to the customer was a composite supply which included an undertaking to procure that the landowner would grant a lease of the plot to the customer. That supply does not fall to be zero-rated under Item 2, Group 5, Schedule 8, VATA. It is instead a standard-rated supply. Therefore, the appeal is dismissed.

It seems to me that this is a complex case and the decision turns on the interpretation of the contractual agreement. The construction of the agreement was determinative of the appeal - and that the First-tier Tribunal's conclusion that there was no independent (zero-rated) supply of construction services was right. However, what is not recorded but seems to me possible is that if the agreement had been written differently, a better VAT outcome could have been achieved. It illustrates that principle in taxation which is: "It ain't what you do but the way that you do it."

http://www.bailii.org/uk/cases/UKUT/TCC/2016/340.html

6. Rugby clubhouse gets zero rating when used by local community

In Revenue And Customs v Caithness Rugby Football Club [2016] UKUT 354, the subsequent use as a local community hall allowed the construction of the clubhouse to be zero rated (VATA Sch 8, Group 5, item 2 and note 6(b)).

Caithness Rugby Football club (CRFC) is a members club affiliated to the rules of the Scottish Rugby Union. It is a registered charity. It is the tenant and occupier of land in Thurso let to it by Highland Council at a rent of £1 per year if asked. Most of the land comprises playing fields. The lease permits the Respondent to erect a clubhouse on the land.

In 2012 CRFC built a new clubhouse at £300,000 construction cost, 50% was provided by Sport Scotland. Other contributions came from the Robertson Trust, the Community Landfill Fund and the Caithness and North Sutherland Fund; but £95,000 had to be raised by the CRFC through fund-raising events.

The clubhouse comprises four changing rooms which occupy just under half of the building; a main hall; a kitchen which doubles as a bar area when functions are held; toilets, an officials' room; a store room and a boiler room. The main hall, kitchen and toilets constitute about 40 per cent. of the building.

The FTT found that since its construction there had been very substantial use of the clubhouse for a wide variety of sporting, social and recreational activities in addition to the rugby club's own use; and that the actual use of the clubhouse was consistent with what had been intended at the time of its construction. It was satisfied on the evidence that the building had been intended for use by a charity (the Respondent) in providing social or recreational facilities for the local community. It was also satisfied that the intended use by the Respondent of the building was "use as a village hall or similarly".

HMRC argued that a prerequisite of satisfying note 6(b) was that there be local community direction or control of the use of the building. Direction or control had to be understood in a reasonable way. It could be indirect and representative (e.g. by the local community electing representatives to the managing body) but the end result had to be that the local community had practical and effective direction or control of the use of the building.

The UT ruled "In my opinion there is nothing in art 17, or in the judgment of the Court of Justice in Commission v United Kingdom, which supports the proposition that the degree of closeness between the consumer and the supply will necessarily be insufficient to make the consumer the final consumer unless he has direction over or control of the goods or services or the product (e.g. a building) in which they have been incorporated. "

HMRC's suggested interpretation of note 6(b) is not correct. On a proper construction of the provision it does not require that a local community has direction over, or control of, the use of the building within which the relevant facilities are provided. In any particular case the existence or absence of direction or control will be a relevant factor, but not necessarily a decisive one. In my opinion the use of a building may be intended to be at the disposal of a local community even though the community is not the body directing or controlling its use.

The evidence of subsequent use demonstrated that the rugby clubhouse was used to benefit the local community and its construction should be zero rated.

http://www.bailii.org/uk/cases/UKUT/TCC/2016/354.html

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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 August 2016.