AAT VAT Update 14 December 2014

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1. The Autumn Statement

From a VAT perspective there does not seem to be anything material or significant. It will be a welcome development to rescue services that they will be able to recover the VAT. For practitioners, the exercise creates a great deal of reading material.

The OBR has published a 234 page economic outlook report with a lengthy executive summary (to page 22) that is worth a read.
http://cdn.budgetresponsibility.independent.gov.uk/December_2014_EFO-web513.pdf

At 552 pages, the Draft Clauses and Explanatory Notes for Finance Bill 2015 published on 10 December can be read at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385160/Draft_clauses_and_explanatory_notes_for_Finance_Bill_2015.pdf

2. Pubs and unannounced visits (Schedule 36, FA2008)

A number of practitioners have reported that their clients who operate pubs have received unannounced visits from HMRC. This is unusual because most visits by HMRC officers will have been arranged and the taxpayer will have been given at least 7 days' notice. Paragraph 10 authorises an officer of HMRC to enter a person's business premises to inspect the premises, business assets and business documents on those premises. The word "inspect" means that the officer can look at what is visible but it does not allow the officer to search.

In 2011, HMRC were conducting unexpected visits of fast food outlets like fish and chip shops in Scotland. Provided the visit is reasonable, they have a right to visit and inspect the business records but in practice HMRC were visiting at early evening peak business time. The proprietor of the business was entitled to ask the HMRC officers to leave because the visit was disruptive and inconvenient. These unannounced visits should start with the officer(s) giving the proprietor a notice which is usually under paragraph 12(2)(b) Schedule 36, FA 2008 and has been authorised by an appropriate authorising officer. If the visit is inconvenient, the taxpayer is entitled to ask the officer(s) of HMRC to leave.

Sometimes the notice will have been authorised by a tribunal. The proprietor may still ask the officer(s) to leave but if the view is that the proprietor is being obstructive or difficult, a penalty of £300 may be exigible. In addition, a daily penalty of up to

£60 per day can be imposed for each day after the initial penalty is determined until the information is supplied.

Historically, HMRC conducted some research which showed that the average yield from an arranged visit to pubs was significantly less than the yield from unannounced visits. This may explain why certain officers are conducting unannounced visits.

All unannounced visits should be based on evidence that there is a significant risk of non-compliance. If there is something wrong with the business tax returns, the best practice is to identify any error and volunteer the information, giving access to the relevant documents and helping the case towards an early settlement. That way any potential penalty under Schedule 24 FA2007 may be mitigated.

In a more recent case a publican was interviewing a prospective staff member and taking delivery from a supplier before the pub had opened for business, when HMRC called unannounced. It was not convenient to have HMRC officers on the premises and the proprietor was perfectly entitled to ask the HMRC officers to leave and return at a more convenient arranged time.

3. Charity wins to zero rate VAT on building

In Revenue & Customs v Longridge On The Thames [2014] UKUT 504, Mrs Justice Rose in the Upper tribunal upheld the decision of the First Tier Tribunal (FTT) that a building had been constructed by a charity for the charity's purpose and that the charity was not conducting a business.

The VAT at issue was £135,000. Longridge is a charity. The Longridge site is on the banks of the River Thames near Marlow in Buckinghamshire. It used to operate as a boating centre for The Scout Association. In 2004 the three Scout counties involved at Longridge decided they could no longer provide oversight for the premises. The site was transferred to a new charitable trust in September 2005. On the site there are areas for campsites; a games field; a ropes course, climbing wall and "Jacob's ladder"; an area for go-karting; a "giant swing"; waterfront landing stages; and buildings for storing craft and equipment for the various water-based activities provided. There is a building which provides overnight accommodation for young people's groups visiting the site and taking courses provided by the Longridge. There is also a youth club, a reception area and a cafe.

The VAT at the centre of this dispute was incurred on the construction of a training centre which includes toilets, shower rooms and changing rooms on the ground floor and meeting room facilities on the upper floor. The cost of building the training centre was, the Tribunal found, entirely met by donations and grants rather than out of charges to customers.

The Tribunal found that by far the greater part of Longridge's activities are 'directly by way of carrying out its charitable objectives' and a limited part was 'seemingly for the purpose of raising funds' to subsidise the charitable activities. The activities relied heavily on volunteers acting as instructors so the activities were heavily subsidized by the volunteers' input.

HMRC argued, that where there is consideration paid for services then there is a presumption that there is an economic activity absent some unusual feature that overturns that presumption. HMRC's contention was that the FTT had erred in law by failing to recognize that this was a business.

Section 30 and items 2 and 4 of Group 5 of Schedule 8 to VATA 1994 – Note (6) to Group 5 was considered carefully. The Upper Tribunal concluded that the activities needed to be looked at in their entirety and the overall impression was that the activities were being conducted to meet the charitable objectives. The FTT had reached the right conclusion for the right reasons and the new building could benefit from zero rating.

http://www.bailii.org/uk/cases/UKUT/TCC/2014/504.html

4. Planning restriction of occupancy denied DIY building scheme VAT

HMRC recommend that the spirit as well as the letter of tax law be respected but the evidence is overwhelming that HMRC interpret tax law strictly. I felt really sorry for Mr Patel. Mr Patel had wanted to recover input VAT of £8,444 under s35 VATA 1994 and a condition is that the claim must be lodged within 3 months. He encountered planning difficulties. HMRC, refused to meet his claim because the planning permission he had obtained did not relate to the works undertaken. Mr Patel had intended to extend an existing dwelling, and obtained planning permission for that project, but after the work had begun it was realised that it would be necessary to demolish and replace the dwelling. The planning authority did not object to that change, but Mr Patel did not obtain a new planning permission.

At the appeal heard before the First Tier Tribunal (FTT), Mr Patel was granted a postponement in order that Mr Patel could secure retrospective planning permission, in accordance with s 73A of the Town and Country Planning Act 1990, which Mr Patel duly did. The FTT decided that the retrospective permission was sufficient, and allowed Mr Patel's appeal.

Technically, the time limit of three months had expired. The decision of the FTT was fair and a form a natural justice because if Mr Patel had obtained the right planning permission at the right time he would have been entitled to recover the input tax of £8,444. But we know that fairness and equity has little to do with tax and the HMRC appealed to the Upper tribunal on the grounds that Mr Patel had failed the time limit. The Upper Tribunal had no option but to decide in favour of HMRC because his claim was out of time.

HMRC more aggressive approach was demonstrated when HMRC sought to recover its cost in taking the appeal successfully to the upper tribunal. HMRC had employed a solicitor and counsel to take the appeal although Mr Patel did not attend the hearing and had been unrepresented. You can read more about this at: http://www.bailii.org/uk/cases/UKUT/TCC/2014/484.html

In Revenue and Customs v Shields [2014] UKUT 453, the issue was whether a planning permission condition that occupation of the newly built dwelling be limited

to person solely employed by the equestrian business (and any resident dependants) prohibited the separate use of dwelling and so failed the DIY builders scheme.

http://www.bailii.org/uk/cases/UKUT/TCC/2014/453.html is another example of the spirit of the law being ignored by HMRC. Mr Shields sought repayment of VAT of £6,189.56 incurred on the construction of a dwelling to be occupied by Mr Shields and his family on the site of his equestrian business.

HMRC argued that the planning condition prohibited the separate use of the dwelling then the building was not "designed as a dwelling", as defined by Note 2(c) to Group 5 of Schedule 8 VATA94. If the building was not designed as a dwelling for VAT purposes then it could not qualify for a refund under the DIY Builders Scheme. The FTT held that the relevant condition in the planning permission was an occupancy condition and did not amount to a prohibition of the separate use of the dwelling.

Now if we step aside for a moment, is it sensible to pursue appeals for modest amounts when the risk is, as Mr Patel discovered, costs might be awarded against the loser. Real people are faced with a real dilemma about costs but HMRC do not seem to take a commercial view on such things. The cost of pursuing an appeal would be far greater than the tax at issue. The same commercial reality faced Mr Shields.

Mr Shields has kept horses at 274 Bangor Road, Newtownards, County Down, since 1993. He was already living at the property in 2003. The equestrian business was not registered for VAT. In 2011, the annual turnover of Mr Shields' equestrian business was said to be approximately £50,000 to £60,000. Mr Shields also carried on another business, called "Landscape Supplies", from the property in partnership with his son. That business was registered for VAT.

Mr Shields built his new house throughout 2008 and 2009 and moved into the newly built house in 2010 submitting his claim for repayment of the house in 2011. The Department of the Environment granted planning permission removing the occupancy restriction with effect from 13 February 2012. But at the time of the repayment claim, the occupancy restriction did apply. The spirit of the law would suggest that a fair result would be to recognize that Mr Shields had done everything properly and should get a repayment. But technically, the planning condition, even though removed retrospectively, meant that he could not qualify. Whether or not Mr Shields was entitled to recover VAT incurred in constructing the dwelling under section 35 VATA94 must be considered in the light of the facts when the construction or conversion has been carried out and the claim is made (see section 35(1)(c) and (1B) and Note 2(d) to Group 5 of Schedule 8 VATA94).

The judgment is a worthwhile read because it reviews the recent cases on DIY builder's scheme and planning restrictions on occupancy. HMRC applied for costs but fortunately for MR Shileds the Upper tribunal decided not to award costs to HMRC. Be warned, indeed be afraid, the evidence is that HMRC are playing hardball and no one should start the appeal process without weighing carefully the risk of losing an appeal at a higher tribunal or court and facing paying the winner's costs.

5. **Agent Update 45 (PDF 791K) published on 8 December by HMRC**

HMRC have published the 45th edition of Agent Update, the bi-monthly round up of the latest developments in tax, HMRC service, consultations for accountants and tax professionals, plus the latest news from the Working Together network.

6. **HMRC publish guidance on VAT recovery relating to pension schemes**

Revenue and Customs Brief 44/14
This brief sets out HMRC's position following the decision of the Court of Justice of the European Union in ATP Pension Services (C-464/12).

Revenue and Customs Brief 43/14
This brief sets out HMRC's position following the decision of the Court of Justice of the European Union in Fiscale Eenheid PPG holdings BV cs te Hoogezand (C-26/12).

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14 December 2014

The views expressed in these podcasts are Derek Allen's personal views and do not necessarily represent AAT policy or strategy.
The next VAT Update will be on the website on 14 January 2015