AAT VAT Update 14 September 2014

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1. Cultural exemption applied to give the British Film Institute (BFI) a repayment of VAT wrongly charged

Article 13A(1)(n) of the Sixth Directive exempted supplies of "certain cultural services and goods closely linked thereto by bodies governed by public law or other cultural bodies recognised by the Member State concerned". During the claim period from 1990 to 1996, UK domestic legislation did not provide exemption for cultural services and the British Film Institute (BFI) accounted for VAT at the standard rate on the sale of tickets for admission to screenings of films.

The First Tier Tribunal (FTT) had found in favour of the BFI and HMRC appealed to the Upper Tribunal (UT). HMRC accepted that a provision of a directive has direct effect; that is, can be relied upon by a person against all national legislation which does not conform to it, if it is unconditional and sufficiently precise - see Case 8/81 *Ursula Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53 at [25]. HMRC argued that the opening words of the provision: "certain cultural services" meant that the UK had discretion on the matter and that the directive was unclear or ambiguous so the BFI should not recover the VAT it had wrongly paid to HMRC.

The BFI was formed in 1933 as a private company limited by guarantee. In 1951, it was agreed that the BFI would run the National Film Theatre (now the BFI Southbank) which opened to the public in 1952. From 1 January 1990, UK did not implement Article 13A(1)(n) until 1 June 1996 when the VAT Act 1994 was amended so as to grant exemption for supplies of cultural services described in group 13 to schedule 9 to the Act.

Now if I pause here, the UK has failed to implement the correct law with the result that the BFI has been charging attendees VAT incorrectly and has overpaid £1.2million as a result of the Government's failure to do what was right. HMRC should never have pursued this appeal and seeking to retain money to which it has no right is immoral. Perhaps even worse is that HMRC are arguing for something that they recognized needed correcting when they changed the law in 1996. Yet in August 2014, the UT is still considering this tax appeal which relates to something the Government failed to enact properly some 24 years ago. The people in HMRC responsible for pursuing this appeal should hang their heads in shame at the waste of public money when they pursue an appeal which is wrong and arose from their failure to do the right thing 24 years previously.

Fortunately, HMRC have lost again and the upper tribunal has confirmed a decision which was fair and just. HMRC should repay the money plus interest.
http://www.tribunals.gov.uk/financeandtax/Documents/hmrc-v-bfi.pdf

2. VAT and property sales/purchase – getting it right

The VAT arising on the sale/purchase of a property will usually be material and it is important that it is right. The vendor may need to account for output tax, the buyer may wish to recover the input tax. Neither the vendor nor the buyer will want ambiguity or difficulty because resolving any such dispute may be time consuming and expensive.

The obvious complications are whether the property is exempt, has opted to tax, is part of a transfer of a going concern and the cost of a mistake can be substantial. Good practice will ensure that the

responsibility for VAT is covered clearly in the contract and in cases of doubt a ruling should be sought from HMRC.

In CLP Holding Company Ltd v Singh & Anor [2014] EWCA Civ 1103 (31 July 2014), the company sold a property in August 2006 at 72 Rolfe Street in Smethwick in the West Midlands to Mr. Singh for £130,000. At that time the standard rate of VAT was 17.5%. The vendor (CLP) had opted to tax the property in 1989 and so was obliged to charge VAT on any sale.

In 2007, CLP wrote asking the buyer to pay an extra £22,750 of VAT but the buyer did not accept that this was due. It is worth reading the detail of the case to understand the lack of clarity in the contract terms and the importance of detail.
http://www.bailii.org/ew/cases/EWCA/Civ/2014/1103.html

This is not a tax dispute as such but rather a commercial dispute which was being considered by the Court of Appeal. The resolution of this dispute relied on the interpretation of the contract which had to be done in the context of the whole contract and the background relationship of the parties. The buyer had paid the money to the vendor well ahead of the legal formalities of transferring the title and the buyer believed that the full consideration was £130,000. In this regard it seemed to the judge that the following points are material:.

> "First, it has never been suggested that the claimant ever communicated to the defendants that it had exercised the option to tax.;
>
> Second, the defendants are individuals and while I recognise that the property comprises commercial premises, there has never been any suggestion that the defendants were aware or had any reason to suppose that the transaction might be subject to a VAT charge."

Lord Justice Kitchin concluded: "Taking all these matters into consideration and considering, as I must, the matter from the perspective of the reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, I have little doubt that such a person would conclude that the parties intended that nothing was or could become payable by the defendants over and above the specified purchase price of £130,000"

The vendor has to treat the consideration received as inclusive of VAT and pay to HMRC £19,361.70. Even if the buyer was registered for VAT, the tax point was established in 2006 and the buyer could not now recover input VAT. The vendor made a mistake and paid a heavy price for that mistake but the case illustrates the importance of getting the VAT right in respect of property transactions.

3. Card handling charges referred to CJEU for clarification of exemption

In Bookit Ltd v Revenue & Customs [2014] UKFTT 856, the FTT considered whether card handling charges were exempt under Article 135 (1)(d). HMRC had an additional argument that the arrangement was an abuse of rights. The credit and debit card handling fees were charged by Bookit Ltd to customers making advance bookings for cinema tickets at Odeon cinemas.

In 2006 Bookit successfully argued in the Court of Appeal that the card handling fees then being charged were exempt from VAT - see *Bookit Limited v Revenue & Customs Commissioners [2006] EWCA Civ 550*. This arrangement gives a VAT advantage because the customer does not need to pay VAT for the card handling service. The card handling services comprise obtaining the card information from the customer, transmitting that information to the merchant acquirer, obtaining the authorisation code and then re-transmitting the card data information to the merchant acquirer as part of the settlement process.

The Consumer Rights (Payment Surcharges) Regulations 2012 ("the 2012 Regulations") which came into force on 6 April 2013 meant that the Odeon group had to restructure its arrangements. In relation to certain contracts the 2012 Regulations essentially prevent a trader from charging excessive fees for accepting a particular form of payment, such as credit card or debit card. The fees charged may

not exceed the cost borne by the trader for processing that method of payment. In October 2013 the appellant re-introduced a card handling fee to customers. The present fee is 21p per transaction. This is sufficient to cover the appellant's direct costs of providing a card handling service, but not its overheads or a profit margin. Bookit Ltd derives its profit from the sums it charges Odeon cinemas.

Judge Cannan was asked to rule on the following questions:

(1) *Do the Card Handling Fees fall within the Scope of the Exemption?*- He has referred this to the CJEU for a preliminary ruling.
(2) *Do the Card Handling Services amount to Debt Collection?* –No
(3) *Are the Tax Advantages Contrary to the Purpose of the Directive?* – Judge Cannan ruled at paragraph 148 : " I do not accept that the contractual arrangements in the present appeal are artificial. They do reflect economic reality. They do not in any way disguise or misrepresent commercial reality."

4. HMRC updates guidance on self billing notice 700/62

Revised Notice July 2013
This notice cancels and replaces Notice 700/62 (July 2013). Details of any changes to the previous version can be found in paragraph 1.2 of this notice.

5. HMRC update their guidance on disclosure and penalties

Changes to Code of Practice 8 (COP 8) (PDF 111K) [http://www.hmrc.gov.uk/pdfs/cop8.pdf]
Change of Civil Investigation of Fraud to Contractual Disclosure Facility and updates to HMRC web links. Addition to 'Paying tax during our enquiries' to include Certificates of Tax Deposits.

VAT Notes No 3 of 2014
HMRC publish VAT Notes quarterly. They contain a summary of all recent changes to the VAT rules and announce future changes.

HM Revenue & Customs - withdrawal of 0845 helpline telephone numbers
The 0845 numbers for HMRC helplines will stop being used in December 2014 and they are preparing for their withdrawal.

6. HMRC update guidance to complete VAT returns

https://www.gov.uk/government/publications/vat-notice-70012-filling-in-your-vat-return/vat-notice-70012-filling-in-your-vat-return

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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.

The next VAT Update will be on the website on 14 October 2014