AAT VAT Update 14 March 2015

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

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1. Cold food eaten outside premises but nearby is catering

With the standard rate of VAT at 20%, the difference if zero rating applies would give a business a considerable commercial advantage. VATA 1994, Sch8, group 1 provides that zero rating can apply to food except food of a kind used for human consumption, unless supplied in the course of catering.

Bagel Nash Ltd. was an established business and had previously assumed that all of its supplies were standard rated and the company was seeking to recover overpaid output VAT of £118,067 for the periods 07/08 to 01/12. The company operated a Kiosk and allegedly had overpaid output tax on the sales of cold takeaway food items sold in the food court area in the York Designer Outlet. HMRC refused the claim on the basis that the food was consumed on the premises and therefore output tax had been correctly declared.

There was a Pret a Manger outlet next door to the appellant's premises and in evidence a receipt from the nearby competition showed they were zero rating sandwiches. However, there was a lack of evidence on site location or circumstances of sale so the First Tier Tribunal declined to hear arguments on fiscal neutrality. That seems to me to have been a serious error of judgement on the part of the appellant.

The outlet is a kiosk fronted by a counter which means that no customers can go behind the counter. It is self-evident that there is no possibility of customers eating within the outlet. Indeed, it is evident that the customers are physically standing in the food court, and not in the outlet, when making purchases or enquiries. Customers may use the food court seating are if they wish.

The company had 13 other outlets and at the other outlets the appellant had made zero rated sales where a customer proactively specifically stated that they were taking the appropriate goods away. At outlets other than the one with which we are concerned here, the customers had been asked if relevant goods are "eat in" or "take away". At this outlet, however, until the claim was made, it had been assumed that all sales were standard rated unless the customer specifically informed the till operator that they would be eating out.

On the balance of probability, the vast majority of the customers would have been consuming their purchases very close to the outlet. The appellant has no control over the food court and does not have an exclusive right of occupancy. The FTT decided that the average customer, who would not be familiar with the terms of the lease, would consider that in purchasing the appellant's products there was also a right to eat in the food court. Consequently, whilst the FTT accepted that no food could possibly be eaten in the outlet itself, since no customer could enter it, nevertheless on a common sense view, objectively considered, the FTT find that "the premises" for the purposes of Note 3(a) includes the food court. The supply was one of catering and standard rate VAT applied.

The appellant has lost and the reclaim of VAT was correctly refused by HMRC. However, I think that the appellant's arguments were weakened by a lack of evidence. For example, if the appellant had been able to show a significant percentage of the bagel sales were taken as carried away, the company could have claimed that significant percentage as being zero rated.

I anticipate that HMRC will be enthusiastic in arguing this case favours more standard rated supplies from cold food establishments but I think this decision turns on its particular facts and the lack of evidence produced by the taxpayer appellant,
http://www.bailii.org/uk/cases/UKFTT/TC/2015/TC04279.html

2. France and Luxembourg are not respecting the law on e-books etc

The European Commission took infringement proceedings against France and Luxembourg. Luxembourg applied a 3% reduced rate for electronically supplied e- books. In both cases, the Court agreed with the Commission that the domestic provisions allowing reduced rating for sales of e-books went beyond the scope of EU law. It rejected the contention that the principle of fiscal neutrality meant that, for VAT purposes, e-books should be taxed in the same way as their physical counterparts, since EU law permits lower rating for paper books, etc., but expressly excludes electronically supplied services (which would include downloaded e-books, etc.) from the relief.

Consequently, it must be held that, by applying a reduced VAT rate of 3% to the supply of electronic books, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 96 to 99, 110 and 114 of the VAT Directive, read in conjunction with Annexes II and III to that directive and Implementing Regulation No 282/2011.
http://curia.europa.eu/juris/document/document.jsf?text=&docid=162692&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=369085

France had been charging VAT at a reduced rate of 5.5% and the Commission's infringement proceedings have been upheld.
http://curia.europa.eu/juris/document/document.jsf?text=&docid=162685&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=406100

3. VAT input tax recovery claims on share issue expenditure

Prior to 2005 and the CJEU decision in Kretztechnik (case C-465/03), HMRC had always held that share issues were VAT exempt financial service supplies, with any associated input VAT being irrecoverable. In Perenco Holdings Ltd v HMRC 2015UKFTT0065, the company was making a Fleming type claim to recover VAT input tax in the amount of £331,455 in relation to 5 the services supplied by lawyers and accountants in respect of share issues by Perenco between June 1987 and March 1989.

It is a characteristic of many *Fleming* claims that, because the claims relate to VAT periods many years and sometimes decades ago, documentary evidence tends to be sparse. Often the relevant tax invoices and VAT returns will no longer exist or, as in this case as regards VAT returns are no longer retrievable. The personnel involved in the original transactions may have long since moved on and, in any event, after so many years memories will have faded.

This case is largely about the burden of proof and evidential requirements. Perenco was a fully taxable trader in all VAT periods relevant to this appeal and it would be entitled to a full repayment of the VAT suffered if its claim is successful. Over the appeal period there were 8 share issues made largely to fund the expansion of the business which was making taxable supplies. Perenco no longer holds any VAT invoices (either its own or those issued by its suppliers) for the period under appeal.

Following the Fleming and Conde Nast publications decisions in 2008, on 24 March 2009, Perenco submitted a voluntary disclosure in respect of input tax incurred, but previously not claimed, for a number of share issues which took place between 1984 and 1989. The original records having been destroyed, Perenco had to build its case using circumstantial evidence like the fact that there had only been one VAT inspection visit at the end of the period in 1989 whereas if the company had been claiming fluctuating VAT repayments there would have been expected to be more frequent VAT control visits.

What this appeal boils down to is the burden of proof and whether Perenco has already received the benefit of a deduction for input tax in the VAT periods in which it was incurred and who bears the burden of proof of showing either no deduction was obtained or that a deduction was obtained.

It falls to Perenco to make good its case that it has a valid claim. The absence of records of VAT visits prior to November 1989 supported Perenco's case that there had been no previous significant repayment claims until the 09/89 VAT period (which triggered the visit by an HMRC officer). The officer's notes in respect of the November 1989 visit referred to input tax having been recovered in respect of "acquiring and disposing of companies" and not in respect of share issues.

Perenco failed to establish the burden of proof in several cases where it was probable that overseas investors had acquired the shares in which case the VAT would have been recovered. Each share issue was analysed and in three of the eight share issues Perenco had adduced sufficient evidence to establish a prima facie case that the input tax had not already been recovered, the legal burden of proof passed to HMRC who then had to provide evidence to refute the taxpayer's evidence, and if they could not, the taxpayer must win. This was a decision in principle but the quantum of the repayment claim remained to be considered at another hearing.
http://www.financeandtaxtribunals.gov.uk/judgmentfiles/j8250/TC04272.pdf

4. HMRC free webinars to help with VAT

HMRC now make available an extensive selection of free webinars on VAT. You can read more about this and even direct clients towards these at:
https://www.gov.uk/government/news/webinars-emails-and-videos-on-vat

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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 March 2015.