VAT update 14 September 2015

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

1. whether a barrister had an excuse for not filing electronically by refusing to tick HMRC's T&C box
2. was a lack of evidence in a DIY builders' scheme claim liable to a penalty?
3. input VAT on vouchers to be given away freely is recoverable
4. VAT on single use bags supplied by vendors

1. Whether a barrister had an excuse for not filing electronically by refusing to tick HMRC's T&C box

In **Garrod v Revenue & Customs (VAT) [2015] UKFTT 353**, a barrister was required to file his VAT return electronically but filed a paper return instead. He had been prevented from filing electronically because he refused to tick the box which confirmed that he had read the terms and conditions (T&C) imposed by HMRC.

Mr Garrod is a barrister in practice. He is required to submit VAT returns. He failed to submit an electronic VAT return by the due date for the VAT quarter 06/12, but did submit it by paper. This led to correspondence with HMRC but he continued to refuse to make online returns, making paper returns instead. Ultimately HMRC imposed a penalty of £100 on him on 16 July 2013 for failure to make an online return in the period 03/13. Mr Garrod requested a review of the penalty; one was carried out but upheld the issue of the penalty.

Pausing at this point, I find it quite remarkable that HMRC should have charged the penalty and even more remarkable that they did not vacate the penalty when asked to review it. I am concerned that there is a serious skills shortage and lack of sound judgement within HMRC. This case should have been settled without needing to trouble the tribunal. Looking at the fundamentals, charging a £100 penalty when it costs £6 to process a paper VAT return is morally wrong and quite disproportionate to the issue. More importantly, the man is compliant and his paper return should just have been accepted by HMRC. Mr Garrod was and is prepared to use the internet to submit his returns online; what he would not do was to submit his return online because he was unable to do so without signing up to the 'Government Gateway' which required him (electronically) to tick a box stating that he had read HMRC's terms and conditions for online filing.

The HMRC terms and conditions (T&C) run to twelve and half pages. Frankly, I think that is ridiculous and the person within HMRC who tried to make it mandatory for the taxpayer deserve some serious criticism. The T&C imposed obligations on the taxpayer and as a result were in fact unlawful. HMRC were obliging taxpayers to review their online mailbox regularly to check for HMRC communications. And to keep their ID and passwords secure. If he failed to check his mailbox, he risked overlooking something with time-limits or otherwise important and HMRC would delete messages after 12 months in any event.

Where a government department unlawfully prevents compliance by citizens with the law, then there is no non-compliance by the citizen. To the tribunal judge Barbara Mosedale, this seems comparable to the rule of public law that a member of the public has no liability where liability depends on the prior unlawful act of a public authority, as explained by the House of Lords in **Wandsworth LBC v Winder [1985] AC 461** and also in **Boddington v British Transport Police [1999] 2 AC 143.**

HMRC should hang its head in shame that it so lacked judgement as to try to impose an unlawful condition and then to pursue this case to an appeal tribunal.

2. Was a lack of evidence in a DIY builders' scheme claim liable to a penalty?

Tax is complex and in my view it is almost inevitable that mistakes will arise. Mere mistakes should not be liable to a penalty under the Schedule 24, FA 2007 regime. Penalties should only be considered if the taxpayer failed to take reasonable care or worse acted deliberately to under declare the true liability to tax.

Practitioners should note that HMRC has changed its policy on penalties relating to the DIY builders scheme which is found at s35 VATA 1994. In **Howells & Anor v Revenue & Customs[2015] UKFTT 412** HMRC disclosed that this is only the second penalty appeal to come to tribunal because HMRC's policy in the past was not to seek penalties. In this case they wanted a penalty of £3,810.54 imposed under paragraph 1 Schedule 24 Finance Act 2007

If the work of conversion of a vacant property is to qualify under the DIY builder's scheme, that property must have been unoccupied and unused for 10 years or more. The Howells lived in a static caravan on the land adjacent to the property, and would therefore have been included in the electoral roll. Utility bills would also have been sent to their address, as they were living in the caravan. They sent photographs of the property but this is not evidence which proves that the property has been unoccupied for 10 or more years.

Now let me pause here and comment that the law on evidence is complex. For example, in Scotland it is different from that in England. It is entirely possible that someone believes something but they cannot provide the evidence to support that belief and that seems to be the case for the Howells who had submitted a claim on VAT431 form for a VAT refund of £25,403.64 under VAT ACT Section 35 Ð DIY Builders and Converters Refund Scheme.

So just to summarise, the Howells find themselves denied the input VAT to which they believe they are entitled and HMRC are adding insult to injury because they are seeking a 15% penalty and claiming that HMRC's decision not to accept the evidence without corroboration from the electoral role or utility bills means that the Howells were careless.

In my view, HMRC disgraced themselves with pursuing this penalty in these circumstances. The tribunal held that HMRC have not shown that there is an inaccuracy in any document on which they have based their conduct in this case, and especially in their act of assessing a penalty. The appeal must on that basis succeed. The lesson is that HMRC are demonstrating mission creep and now seeking penalties in cases where it is inappropriate.

3. Input VAT on vouchers to be given away freely is recoverable

In **Associated Newspapers Ltd v Revenue & Customs [2015] UKFTT 409**, the First-tier Tribunal has decided that Associated Newspapers (AN) was entitled to reclaim input VAT on the purchase of vouchers given away in its sales promotion schemes. This decision should be considered in conjunction with the tribunal decision from 2014 which decided that the newspaper did not need to account for output VAT on the vouchers which it gave away as a promotion exercise to improve newspaper circulation.

HMRC sought to disallow input VAT incurred by AN (or notionally incurred in the case of vouchers supplied by retailers direct to AN), as well as appealing against the output tax decision. AN appealed against that ruling and the Tribunal has now decided that '... the appellant does incur input tax … on its acquisition of the vouchers, whether by direct purchase from the retailers or by purchase from an intermediate taxable supplier..' and '... that the appellant should be entitled to recover this input tax.'

4. VAT on single use bags supplied by vendors

I had commented earlier in my summary of the Howells case that the law in Scotland is often subtly different from that in England. For some time now, vendors in Scotland charge 5p for each bag that the customer needs. It has led to a considerable change in behaviour in Scotland (and other countries where a similar tax has been introduced) and it discourages customers from using the polythene and paper bags which used to be dispensed freely by retailers.

R&C Brief 14/2015 is HMRC guidance to retailers that from 5 October 2015 a compulsory charge on carrier bags is to be introduced in England. Any amount that a retailer charges for a bag is VAT inclusive and the receipts should be included in calculating trading profits even though the government hopes that the money so received will be applied towards good causes.

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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 30 September 2015.