VAT update – 14 December 2015

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

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1. The Autumn statement

Politicians crave the oxygen of publicity. However, I do not think that there was much relating to VAT in the Autumn statement. Much as I might have expected, there was an announcement that there will be consultation with a view to bringing forward change in legislation on the reduced rates of VAT for energy saving material. The changes will be prospective and apply from April 2016.

Sixth form colleges in England will be given the opportunity to become academies, a consequence of which will be to allow them to recover their non-business VAT costs under section 33B of the VAT Act 1994.

The budget will be on Wednesday 16 March when we can expect yet more changes.

2. VAT and employment bureaux and the supply of temporary staff

In Adecco UK Ltd, Ajilon (UK) Ltd & Ors v Revenue & Customs (VAT - SUPPLY : Other) [2015] UKFTT 600, the issue was whether the employment bureaux which supplied temporary workers to various businesses should account for VAT on its margin or on the full amount of the charge which included individual wages.

Adecco has three business models:

1. **Employed temps:** it employs persons who it assigns to its clients on a temporary basis. There is an employment contract between Adecco and the employee under which the employee agrees to act exclusively for Adecco and Adecco guarantees to find a minimum number of paid assignments for the employee;
2. **Non-employed temps:** these are the subject of this appeal and I will refer to them as 'temps'. They are persons who are on the books of Adecco but are not considered to be employed by that company. Adecco may introduce them to clients looking for a temporary worker to undertake an assignment. The temps are not obliged to accept any assignment offered and Adecco is not obliged to find them an assignment. Nevertheless, Adecco undertakes with these persons to pay them for the work they do for Adecco's clients and is classed as their 'employer' for various regulatory matters, including the working time regulations and payment of PAYE/NIC. Adecco's payment by its clients will be periodic and normally calculated as an amount representing the payment Adecco must make to and on behalf of the temp plus a commission element.
3. **Contract workers:** these are self-employed workers which Adecco may introduce to a client, and with whom the client will enter into a separate contract direct with the contract worker to provide the work required. They are not Adecco's employees in any sense, and Adecco does not undertake to pay them. Adecco's charge to its clients will typically be a one-off fee (albeit normally calculated by reference to the contract worker's rate of pay and the length of the assignment).

The appeal is concerned only with the middle category, non-employed temps.

On 24 March 2011, this Tribunal (Judge Roger Berner) released a decision in the case of *Reed Employment Ltd* **[2011] UKFTT 200 (TC)** (*'Reed Employment'*). In that decision the Tribunal found that the employment bureau appellant in that case providing non-employed temps to its clients was

making a supply of introductory services to its clients in return for its commission. It was therefore not liable to account for VAT on the element of the charge representing the wages which it received from its clients and paid to the temps.

Adecco sought to apply that decision and wanted a repayment of the VAT which it had charged to clients and paid to HMRC. Various repayment claims relating to charges paid for non-employed temps for the period 1 April 2007 to 31 December 2008 were submitted to HMRC by Adecco totalling some £11,125,661. HMRC refused the repayment claim arguing that Adecco is liable to account for VAT on the full charge paid by the clients because, says HMRC, it supplies the services of the non-employed temps and is not merely supplying the service of introducing temps to its clients.

Representative contracts were considered. The temp's contract with Adecco was for the temp to do the work it was required by Adecco's client to do. But that does not answer the question whether the temp was supplying its services of carrying out the work to the client, or whether its service was supplied to Adecco and was the service of agreeing to do the work it was instructed to do by the client.

It was the client who told the temp what to do on a day to day basis. The contract provided that the temp would be subject to the 'legitimate instructions, monitoring, direction, supervision, management, and control' of the client and indeed, were these not the case, the client would presumably not have been prepared to pay a fee for the temp. The fact is that, in its contract with the temp, the Adecco agreed to pay the temp for his work. And that is very significant in defining what it was Adecco provided to its client.

This 314 paragraph judgement is lengthy and considers in detail arguments about agency contracts, employment status and contractual arrangements when tripartite contracts are involved. I think that paragraphs 93 and 99 are key observations from the tribunal judge Barbara Mosedale who concluded:

"I find that under its contract with the temp, Adecco was liable to pay the temp the agreed payment for its services in undertaking the assignment for the client. I find that the client had no contractual obligation with either the temp or Adecco to pay the temp for its work in undertaking the assignment. The client's only obligation to pay for the work was an obligation to pay Adecco the agreed fee."

"Taking an overview of the tri-partite situation, Adecco owed to its temps the obligation to pay them for all the work undertaken for Adecco's clients, irrespective of whether Adecco's clients had paid Adecco. Contractually, therefore, the temps' obligation to perform the work for Adecco's clients was owed to Adecco, because Adecco provided the consideration."

I find this a fascinating decision for a different reason. It seems, in my view, to have been decided on an analysis of English contract law and the absence of a legally binding contract between the client and the worker was crucial. To be legally binding under English law there has to be reciprocal consideration. Now Scottish law is different because a unilateral contract can be legally binding. Reciprocal consideration is not a requirement and under Scottish law the individual worker would probably be held to be supplying his labour to the client. If this appeal had been heard in say Edinburgh, I think that the decision would have been in favour of the Adecco. But that hypothesis is irrelevant because it was heard in London and English law applied.

Where the client or end user is an exempt business or even partially exempt, the imposition of VAT is going to make a substantial difference and the case considers the contractual terms which Adecco arranged with some anonymous banks. The contracts were analysed and the judge concluded that inclusion of a clause within the contract was:

,"… in the reference to Business Brief 10/04. It seems that someone with an imperfect understanding of BB 10/04 drafted the contract in this way to bring the payments by Bank A to Adecco within the terms of BB 10/04 in order to avoid VAT. The reality is that such a term was quite unnecessary to come within the terms of BB 10/04. Moreover, making the assumption that I am making as explained at 141-142, the clause was not even implemented in that Adecco invoiced Bank A for the full amount plus VAT.."

If you have clients who 'employ' agency workers or you have clients who supply agency workers and recruitment services, this **decision** is an essential read. A decision of the First Tier tribunal does not establish legal precedent and practitioners are now faced with the uncertainty of two conflicting decisions. The judge recognised this conflict and hoped that it would be resolved by a higher court.

3. VAT gap estimated at £13bn

On 25 November the Office of National Statistics **published** its preliminary estimate of the historical tax gap for VAT. The VAT gap is estimated at 10.4 per cent of the estimated net VAT total (£124bn) theoretical liability in 2014-15. This VAT gap equates to £13 billion.

4. Value of self supply of cars and modelling methods for repayment claims

In **Revenue and Customs v General Motors (Uk) Ltd [2015] UKUT 605**, the upper tribunal (UT) rejected HMRC's appeal against the decision of the First tier tribunal (FTT). General Motors UK (GMUK) took into its own use in its business cars which were used as demonstrator cars, press cars, pool cars and cars for GMUK's staff. After they had been so used for a relatively short period (sometimes less than 6 months, and usually for not much longer than a year) they were sold as second-hand cars.

The number of cars that GMUK took into its own use varied between 13,000 and 20,000 in each year. These cars were of a higher than average specification, because many of them were supplied to senior GMUK employees, whose preference was for higher specification vehicles. The FTT found that, for different reasons, cars used as demonstration and pool vehicles may well also have been of a higher specification.

The background to this case is complex involving historical claims but the essence is that GMUK had based its acquisition cost on an accepted industry practice of 2/3 list price. Following the CJEU decision in the *Italian Republic* case, GMUK realised that accounting for VAT on the self-supplied cars on this basis led to a cost. Accordingly, GMUK claimed a refund of the tax overpaid, but since it had destroyed records covering much of the period involved, it relied on macro-economic modelling to arrive at the cost of the vehicles.

The appropriate margins of error to adopt for the years within the Claim Period are:

a) for 1991 to 1996, 6% (but no less than that); and
b) for 1986 to 1990, 7% (but no less than that).

This means that the cost price shown by the adjusted model for those years is more likely than not to have fallen within 6% (or, for the earlier years, 7%) of the actual cost price which the FIN 51 data for those years (were they still available) would have established. In other words the standard of proof was one of the balance of probabilities and the model used by GMUK, subject to some modification was a reasonable way of quantifying the repayment which was due.

HMRC argued that the FTT should not have accepted certain information as evidence and should not have made a best judgement decision on the margins. The UT has ruled that the FTT was entitled to reach its decision and did not make any error of law.

5. Residential caravans may continue to benefit from zero rating (new standard)

Revenue and Customs Brief 21)2015 announces a legislative amendment for caravans which ensures that sales of caravans designed for all year round occupation ('residential caravans') continue to benefit from the VAT zero-rate. This follows the publication of a revised British Standard (BS 3632:2015) upon which the VAT zero-rate relies. A tax information and impact note on **VAT: maintaining the zero-rate for residential caravans and** the new legislation in **The Value Added Tax (Caravans) Order 2015** have also been published.

6. HMRC Update VAT appeals

On 17 November, HMRC published a **list of cases** where HMRC has:

- lost at the first-tier tribunal that could have a wider impact
- lost in the Upper Tribunal or higher courts
- taken a decision about whether to appeal

Cases where HMRC has partly lost are also included where they meet the above criteria.

The list includes details of cases where a decision has been handed down since 1 January 2010. It's updated on a monthly basis and details of finalised cases are retained for 6 months.

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14 December 2015

The views expressed in these podcasts are Derek Allen's personal views and do not necessarily represent AAT policy or strategy. As this is the last VAT podcast for 2015, may I wish all my readers a very Happy Christmas and New Year.

This podcast concentrated on VAT. There will be a general tax podcast updating AAT members on recent developments and decisions available on the website early in the New Year.