Constable VAT Consultancy

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Double Issue

It may be the holiday season but this has not stopped a steady flow of Tribunal decisions and for that reason this VAT Focus will exceptionally take up two sides of A4.

HM Revenue & Customs Briefs

The UK received notification from the European Commission that its exemption for business supplies of research between eligible bodies does not comply with European legislation. The UK has accepted that this is the case and will withdraw the exemption with effect from 1 August 2013.

HMRC has published Revenue & Customs Brief 21/13 which sets out transitional arrangements that will apply. The withdrawal will apply from 1 August 2013 to all written contracts that are entered into on or after that date. However, for supplies of business research where the written contract was entered into before 1 August 2013, whether or not work has already commenced, the exemption will continue to apply to services within the scope of the contract. Affected bodies should also read VAT information sheet 11/13 for further guidance.

Following concerns raised by representatives of various trade sectors HM Revenue & Customs Brief 23/13 announces that HMRC are publishing an updated VAT Information Sheet in order to assist traders in establishing the correct liability of supplies, or intended supplies of storage facilities.

This Information Sheet will be of interest to suppliers of any facility which is used, or intended to be used, by their customers for the storage of goods.

Pension scheme input tax opportunity

A recent CJEU case, *PPG Holdings BV,* may mean that employers are able to reclaim additional VAT on pension fund scheme investment management costs (current UK rules only allow a recovery of VAT on general administration costs) .

This Dutch case asked two questions of the Court. The first was whether a taxable person who has set up a pension fund as a separate legal entity is entitled to deduct the VAT he has paid on services relating to the management and operation of the fund. The second question related to whether or not a particular type of pension fund could be classified as a 'special investment fund' and only needed to be answered if the answer to the first question was negative.

The Court ruled that VAT incurred on costs relating to the management and operation of the fund is recoverable by the employer when the costs are not passed on to the pension fund. This right arises because there is a direct and immediate link between the costs incurred and the taxable business activities of the employer.

As the first question was answered in the positive the second question did not need to be addressed. However, it should be noted that this question was answered on the case of *Wheels Common Investment Fund Trustees Ltd,* reported on in our 13 March 2013 newsletter.

Any businesses operating pension schemes for its own employees should consider making a protective claim. If you would like to discuss the matter further please speak to your usual CVC contact.

Was golf club planning 'abuse'?

Hilden Park Partnership (HPP) was a 'for profit' golf club charging VAT on green fees. Following professional advice the Club was restructured with the intention of creating two not-for-profit businesses (known throughout the case as "Members" and "Visitors") to make exempt supplies of sporting facilities. HPP transferred the business relating to use of the golf club, driving range and health club to the two not-for-profit businesses. Members and Visitors paid rent to HPP as owner of the land and facilities.

HMRC challenged the exemption on the basis that the scheme was abusive and the income received by Members and Visitors was proper to HPP and was taxable. At the hearing it was pointed out that the Members and Visitors did not qualify as not-for-profit businesses (surpluses were paid out to connected businesses in the form of rent and other fees). This was used as a defence that scheme was not abusive as it did not work (although no VAT was ever declared in the belief that it did). Although the scheme failed HMRC needed to succeed on the abuse issue because this allowed tax to be collected (Members and Visitors are now in liquidation).

The Tribunal found that the structure itself was not abusive, but that since the two non-profit making companies "Members" and "Visitors" covertly distributed profits to the appellants, the gaining of exemption could be abusive.

Evidence of the distribution of profits was a lease, from a different period, of the making the golf course available to a third party. A comparison of the rent paid under that lease was compared to that charged to Members and Visitors. Although Members and Visitors leased a smaller amount of land the rent payable was four times higher. The Tribunal also found that the terms of trading were not at arms length and were very much to the disadvantage of Members and Visitors and that the payment of rent to the appellants was a covert payment of profit. Due to the fact that the appellants exercise control over Members and Visitors, and that none of the appellants' arguments for setting up the structure in that way were successful, the Tribunal found that the prime motive for the structure was tax avoidance. The supplies were therefore redefined to re-establish the situation that would have prevailed in the absence of abusive practice i.e. they were – taxable.

Can a nature reserve be a zoo for VAT purposes?

A recent VAT case, *Wildfowl and Wetland Trust (WWT),* considered the question of whether 7 sites operated by WWT qualified as zoos. This is important from a VAT perspective as the legislation allows exemption for certain cultural services including admission to zoos.

The case related to those WWT sites where there are captive collections as well as free wild birds. At these sites birds, mammals and amphibians are kept in enclosures of various types and are viewed by the visiting public. All these sites are licensed to operate as zoos. However, none of the marketing literature uses the word 'zoo'.

HMRC argued that WWT did not operate zoos and that this was not part of its aims and objectives. HMRC also argued that the larger part of the land available at the sites was providing a habitat for visiting species and that by contrast the area given over to captive species was minimal. The Tribunal visited the site and considered the behaviour of visitors, who spent more time in general looking at captive species up close as one would at a zoo and came to the conclusion that the sites were zoos for the purposes of applying VAT exemption.

Not an extension

A company (Astral Construction Limited) constructed a nursing home on the site of a redundant church. Planning requirements meant that the church was retained and incorporated into the care home as the main reception area. HMRC said that the construction works qualified to be charged at the reduced rate (5%) whereas the taxpayer believed that the zero-rate applied as the construction of a relevant residential purpose building (Item 2, Group 5, Schedule 8 of the 1994 VAT Act). HMRC referred to note 16 of Group 5 of Schedule 8 which states that:

"for the purpose of this group the construction of a building does not include
(a) the conversion, reconstruction or alteration of an existing building or
(b) any enlargement of, or extension of an existing building."

HMRC made particular reference to the fact that the note talks of "any enlargement of, or extension" and as such it is not a question of degree, i.e. the size of the extension is not a material factor. However, the Tribunal thought that it was a question of degree. The church was dwarfed by the new build; no objective observer would see it as an extension or enlargement to the church "as the sheer size of the works precludes this". As such note 16 ((a) and (b)) did not apply and the works were zero-rated.

It is difficult to see HMRC allowing the introduction of a "question of degree" in to Note 16 without further appeal.

Legitimate Expectation

In 2007 an NHS Trust and a private company were looking at setting up a joint venture to provide pathology services. The VAT treatment of these services was key to the joint venture's profitability so they sought a ruling from HMRC. In 2008 HMRC ruled that the pathology services supplied by the joint venture would be standard rated. On that basis the venture went ahead.

In 2010 a second NHS Trust looked to join the venture and HMRC was asked to confirm its 2008 ruling which it duly did. In January 2013 HMRC issued a decision that the pathology services were exempt. The parties to the venture have appealed to the First Tier Tribunal but this appeal was to the Administrative Court seeking an injunction to prevent HMRC implementing its decision, if necessary, until three months after the First Tier Tribunal had handed down its decision (on the basis that the FTT agreed with HMRC). The Administrative Court agreed to the injunction saying that this would also give the taxpayer time to reorganise the delivery of pathology services if ruled to be exempt.

Annexe?

Chelmsford College constructed a new Art & Design block which they certified to be subject to the zero-rate as an annexe for relevant charitable purpose. HMRC disagreed and sought to have VAT charged on the construction. Taking guidance from a previous case (Cantrell) the Tribunal agreed that the A&D block did not qualify as an annexe and was standard rated. The principal reasons for this decision were the fact that the building shared a heating system and also a centre of administration situated in the main block meant that the new building was not 'capable of functioning separately' from the main college building.