Constable VAT Consultancy

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TOGC Treatment Opportunity

A recent Tribunal, Robinson Family Ltd, allowed a sale of a property business to be treated as a Transfer of a Going Concern (TOGC) even though the transferor granted a lease. Whilst HMRC policy in the past has been to reject TOGC treatment (because the transferor in granting a lease is not selling its asset entirely), HMRC have announced in Brief 30/12 that they are not to appeal this case.

This means that similar transactions may now qualify for TOGC. Aside from the obvious cash flow benefits, removing VAT from the price may also reduce Stamp Duty Land Tax payable. Also, TOGC treatment will in many cases prevent the building being subject to the Capital Goods Scheme (CGS). Your usual CVC contact will be able to help if you think this could apply to your business.

Can there be a TOGC where no sale of business takes place?

The Tribunal recently considered another interesting TOGC case, Mark Young T/A the St Helens. Mr Young operated a restaurant from leased premises under the auspices of a company. The company owned no assets other than food and wine used in the trade. In February 2009 the company became insolvent and trading ceased. However, after a few weeks Mr Young personally entered into a new lease for the premises and reopened the restaurant under a new name. Mr Young then registered for VAT later in 2009 based on the turnover of the new business.

HMRC argued that there had been a TOGC and, as a result, Mr Young was liable to register immediately on transfer of the business. The Tribunal agreed with this view and found that despite the fact there was a name change and no assets were sold, fundamentally the same business was being carried on and Mr Young was liable to VAT register immediately.

Flat Rate Scheme (FRS) Backdating

A VAT registered business applied for the FRS in February 2009 and this was granted by HMRC. In October 2010 they applied for the FRS to be backdated to 2007. HMRC was pursuing the business for £4,000 of outstanding VAT for periods in 2008 and rejected the backdating. The Tribunal rejected the appeal agreeing with HMRC that the FRS exists to ease an administrative burden, not to reduce the tax due.

Purchase Invoice Validity

HMRC raised an assessment on a taxpayer as the purchase invoices used as evidence to claim input tax were invalid, either because the supplier had deregistered for VAT or had been classified as a missing trader when the invoices were issued. The appellant demonstrated that he obtained a copy of the suppliers' certificates of VAT registration prior to dealing them. Whilst these suppliers had not paid the output tax leading to a loss of tax to HMRC, the Tribunal said that this was not the issue before them, or the concern of the appellant. There had been a supply. Whilst invoices issued after the date of deregistration could not be valid, the Tribunal endorsed them for the purposes of allowing the VAT charged to be reclaimed.

VAT on Costs = Input Tax?

A holding company, Cloud Electronics Holdings Ltd (H) was set up to acquire the shares of a trading company Cloud Electronics Ltd(C). H incurred VAT on professional fees, which HMRC refused to repay saying that the supplies had not been made to H (several engagements were entered into before H was incorporated) and that the services had been consumed in the transfer process so did not relate to subsequent supplies made by H to C. The Tribunal concluded that HMRC's assertions were incorrect. The fact that professional fee tax points occurred after H's incorporation and that substantial charges made by H (£450,000+) to the trading company were the key points in reaching this conclusion. This case highlights the importance of proper VAT planning and attention to detail in relation to merger and acquisition costs.

Registration of Non–Established Taxable Persons (NETPs)

The new 'nil' turnover threshold comes into effect on **1st December 2012** requiring businesses not established in the UK to register and account for VAT on any taxable supplies made in the UK. NETPs making taxable supplies of any value in the UK must register for UK VAT from that date. This brings the UK position into line with that in the rest of the EU.

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Thinking outside the box