Saffery Champness
CHARTERED ACCOUNTANTS

VAT Update

Our June VAT Update covers recent VAT developments, including: a reminder that the UK may not be subject to the European Court's rulings in the future; and the Court of Appeal is not in the holiday spirit when it finds that charges made to holidaymakers had to be standard rated. Our new monthly top tips section also sets out a dos and don'ts guide to dealing with the thorny issue of correcting VAT errors.

Wedding room hire (Blue Chip Hotels): the next stage

We reported last year on HM Revenue & Customs' (HMRC's) win at the First Tier Tribunal on a case involving a room hired for civil wedding ceremonies at a hotel that had not been opted to tax. It had treated its supplies as exempt from VAT. However, HMRC successfully argued that the hire charges were subject to VAT even without an option to tax.

On appeal, the Upper Tribunal has upheld the decision in favour of HMRC but for slightly different reasons. The Upper Tribunal identified the Approved Premises Regulations (APR) required the hotel to fulfil a number of obligations in providing the room for a wedding ceremony. The Upper Tribunal decided that this demonstrated the hotel was supply far more that simple passive hire of a room and the significant value added was indicative of the price charged.

The Upper Tribunal's decision seems to suggest that the supply of land (the hire of the room) was subsumed in a wider supply where the main value and benefit was not the provision of the room but the additional services.

Comment: HMRC continues to successfully pursue the line of argument that the land exemption only applies where the landlord/hirer is being passive and is not adding value to the supply of the land in other ways.

It is difficult following this latest decision to see how the hire of any room could ever be VAT exempt when there are a range of regulations any responsible commercial provider must meet in providing such a facility.

We would suggest that venues review their VAT treatment of hire of rooms and facilities to ensure that the VAT treatment is correct (exempt or standard rated) and they are applying the correct VAT place of supply rules when overseas customers are involved.

Blue Chip Hotels Limited v Revenue & Customs Commissioners (Upper Tribunal)

Please contact Sean McGinness if you would like to discuss this further, E: sean.mcginness@saffery.com

Power charges for holidaymakers

In this case, the taxpayer was an operator of holiday parks which charged customers for holidays taken in static caravans and other holiday accommodation. Minor charges were made for power that were not dependent on the level of use by the customer.

Upholding an earlier Upper Tribunal decision in HMRC's favour, it had already been decided that there was a single supply of serviced holiday accommodation. At the Court of Appeal, the Court rejected the taxpayer's arguments and held that there was no basis to "carve out" from the single service supply an element that related to the power and apply the 5% reduced rate. Instead, it said that the total charge made to the customer should be standard rated.

The argument that this was in some way discriminatory to customers that did not bring their own caravans and self-catered was also rejected. Customers that paid to hire pitches for their own caravans could choose whether to also receive power and were charged the 5% reduced rate of VAT where they opted to do so. The Court found that this involved a completely different type of supply and so there could legitimately be a different VAT treatment for power charges without there being a breach of fiscal neutrality.

Comment: The taxpayer argued that the 5% reduced rate of VAT overrode the fact that there was a single supply of services. A similar argument had been successfully used by

HMRC to deny zero-rating relief on sales of caravans to an element of the single supply of goods that would have been otherwise standard rated. However, in this case there was no specific 'carve out' for power charges in the reduced rate VAT law that could have been applied.

Colaingrove Ltd v Revenue & Customs Commissioners (Court of Appeal)

Please contact David McGeachy if you would like to discuss this case further, E: david.mcgeachy@saffery.com

VAT on temporary workers' fees

In May we reported that the Upper Tribunal had ruled that HMRC was correct to require VAT to be charged on the wages element of charges made by recruitment companies for non-employed temps. Adecco has appealed and the case should be heard by the Court of Appeal no later than 23 April 2018.

Please contact Helen Mellor if you would like to discuss this case further, E: helen.mellor@saffery.com

Education exemption applies to "closely related" services

The Court of Justice of the European Union (CJEU) has confirmed that the education exemption can apply to "closely related" services, even where they were not provided to the students.

HMRC and Brockenhurst College were in dispute for a number of years in respect of the college's catering and performing arts departments. The college invited groups of diners to have meals in its restaurants and staged performances for friends and families of the students. EU VAT legislation allows for exemption of goods or services which are closely related to the supply of education to the student. HMRC had challenged this on the basis that the supplies were for the direct benefit of the diners or audience members.

Both the Lower and Upper Tax Tribunals had found in Brockenhurst's favour, such that the supplies were ancillary services to the education and there was no requirement for the services to be made to the same person. It was agreed between the parties that as the EU exemption was not clear on this point, a reference would be made to the CJEU.

The CJEU observed that the practical training was designed to form an integral part of the student's curriculum and without it students would not fully benefit from their education. It also noted that the college provided meals and performances at below cost, and it was not in direct competition with commercial providers. Thus, the education exemption did cover those services, where they were ancillary to the principal supply of education and their basis purpose is not to obtain additional income for the college by carrying out transactions in direct competition with commercial providers.

Comment: The case will need to return to the Court of Appeal for final determination and HMRC is likely to issue revised guidance. If not done already, education providers that have previously accounted for VAT on such supplies to non-students should consider making claims. However, the potential impact on recovery of associated VAT on purchases and building costs should not be overlooked when making such claims.

Brockenhurst College v Revenue & Customs Commissioners (CJEU)

Please contact Alison Hone if you would like to discuss this further, E: alison.hone@saffery.com

Bulgarian VAT case may have an impact on UK property developers

The Advocate General (AG) of the CJEU has recently released an opinion that could have implications for property developers and housebuilders in the UK who enter into planning gain agreements (often referred to as section 106 or section 75 agreements).

In a recent case (Iberdrola Inmobiliaria Real Estate Investments EOOD), a property developer was denied VAT recovery on costs relating to the repair and improvement of a water pumping station. The developer recovered VAT on the costs of the work on the water pumping station, but the Bulgarian tax authority blocked this recovery on the basis that the VAT was not incurred by the developer for its business purpose.

The AG opined that the only party which could receive the supply from the contractor was the local authority, as the work was carried out on its facility. It was accepted that there was some benefit to the developer in incurring the costs but, ultimately, the VAT incurred on the costs was not recoverable as the supply was to the local authority and not the developer.

The AG also commented that the accounting treatment was irrelevant for the purposes of deciding who received the supply for VAT recovery purposes.

Comment: Assuming the CJEU case law continues to set precedent in the UK following Brexit, and the CJEU follows the opinion of the AG, there could be an issue for developers who carry out work under section 106 (section 75 in Scotland) agreements, particularly if the work is on land owned by a third party. If this work is seen a supply to the third party then there could be a cost, as it may not be in a position to recover the VAT. We expect that the court will hand down its judgement in the autumn. If it does follow the AG's opinion, then it may be wise for any UK developers to review agreements being entered into under section 106 or section 75, to consider whether the case is relevant.

Iberdrola Inmobiliaria Real Estate Investments – Opinion of Advocate General (AG)

Please contact Sean McGinness if you would like to discuss this further, E: sean.mcginness@saffery.com

Husband and wife hairdressers – one business

In a recent case, the First Tier Tribunal considered whether a husband and wife, who were both hairdressers, were operating as one business or carrying on two separate sole trades.

Mr & Mrs Belcher both operated their hairdressing businesses from the same premises and under the same name. They also shared a bank account and utilities. Mr Belcher's business was male hairdressing and Mrs Belcher's was ladies hairdressing. Whilst the two businesses were on the same premises they were in separate areas and had different front doors, their own booking system and tills. They did however share suppliers, although they ordered different products.

The First Tier Tribunal focused the decision on the outcome of a recent CJEU decision (Nigl C-340/15). The Tribunal held that the question was whether Mr & Mrs Belcher acted in their own name, on their own behalf, with their own responsibilities, and ultimately for their own economic gain as individuals. It came to the conclusion that they did and they were therefore not acting as one business for VAT purposes. The Tribunal decided that Mr & Ms Belcher did not divide the profits of one business, but instead used one bank to share the profits of two businesses as husband and wife.

Comment: This case is interesting for any family that operates various businesses, even when in a similar field. The First Tier Tribunal reached this decision even though Mr & Mrs Belcher had been submitting partnership tax returns for a number of years. As indicated, they also shared a bank account, a point HMRC usually focuses on when considering whether there are close organisational and economic links.

The case demonstrates that decisions on this issue will continue to be reached based on the fact of each case. However, the principles from the Nigl case appear to give a more flexible framework than HMRC's traditional tests in this area.

Graham and Christine Belcher v HMRC (First Tier Tribunal)

Please contact Sean McGinness if you would like to discuss this further, E: sean.mcginness@saffery.com

Top tips: correcting a VAT error

If you discover an error on your VAT return, what should you do?

Do:

- Correct the error in your next return if it does not exceed the greater of: £10,000 or 1% of turnover (as defined by VAT Notice 700) in the same VAT return period the error was discovered (subject to an upper limit of £50,000).
- Write to HMRC if the error exceeds the relevant threshold to reduce the risk or avoid any penalties or interest.
- Complete form VAT 652 and include it with your letter.
- Contact HMRC to make sure they have received your written correction if you do not hear from them within 21 days.
- Remember to make any necessary corrections to both your input and output tax when correcting errors.
- Keep details about the inaccuracy – eg the date it was discovered, how it happened, the amount of VAT involved.
- Check with a VAT specialist if you are unsure.

Do not:

- Correct the error in your next return if it exceeds the greater of: £10,000 or 1% of turnover (as defined by VAT Notice 700) in the same VAT return period the error was discovered (subject to an upper limit of £50,000).
- Correct errors that could be viewed or misinterpreted as deliberate on your return, regardless of the error size. We highly recommend you contact a VAT specialist in these circumstances before taking action.
- Make an adjustment to correct an error discovered in VAT accounting periods that ended more than four years ago.

Comment: With the introduction of the penalty regime in 2009, HMRC has the right to apply penalties even if there was no "loss of tax". Careful recording of the reasons for the error and taking professional advice on making the error corrections can reduce the risk of significant penalties being applied.

Please contact Saiqa Islam if you would like to discuss this further, E: saiqa.islam@saffery.com

For advice regarding any of the issues raised here, please speak to your usual Saffery Champness partner or contact David McGeachy, VAT Partner: T: +44 (0)20 7841 4000 or E: david.mcgeachy@saffery.com.

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