Constable VAT Consultancy

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Legitimate Expectation

In an important decision, *Noor,* the Upper Tier Tribunal (UTT) has ruled that the First Tier Tribunal (FTT) does not have jurisdiction in regards to the public law concept of "legitimate expectation" as this is a matter for remedy by judicial review.

HMRC will no doubt refer to this case regularly in the future, when a taxpayer feels that they have been given misleading advice from HMRC, despite all the relevant facts being given. Frustratingly this decision was on a case for a relatively small sum (£4,000) and involved a taxpayer that did not have the resources to have legal representation. The UTT noted in their decision that the lack of counter argument meant their 'decision may not, therefore, be as persuasive as it might be, although as a matter of precedent it will be binding on the FTT'.

Court of Appeal Decision in BAA case

We have reported on the progress of this case in previous newsletters, most recently in our VAT Focus of 8 July 2011. In this case a bid vehicle, ADIL, incurred VAT on fees paid by it in connection with a successful takeover bid of a BAA. After the takeover, ADIL joined the BAA VAT group and the representative member of the VAT group claimed recovery of the VAT on fees as input tax as part of the group's general overheads.

The Upper-tier Tribunal agreed with HMRC that this input tax should not be claimed as ADIL had no intention to make onward taxable supplies at the time it incurred the VAT.

BAA appealed and the Court of Appeal has dismissed its case holding that, at the relevant times, there had not been a continuous and unbroken economic activity nor a 'direct and immediate' link between the supplies on which ADIL had incurred input tax and the supplies on which BAA had declared output tax. This is an important decision and should be noted by those involved in mergers and acquisitions, as it is possible that had ADIL been able to evidence that economic activity (such as provision of services to group members) was intended at the time of the acquisition then the outcome would have been different.

Opportunity for not-for-profit cinemas

A recently published VAT Tribunal has found that admission to a cinema, operated by an eligible body, was VAT exempt prior to 1996 as EU law had direct effect in the UK at that time in the absence of UK law. Previous attempts to get exemption in similar circumstances have failed, but crucially the Tribunal said that those decisions were made either before the ECJ case, *Commission v Spain,* which judged that member states could not decide what services were cultural and which were not, or without reference to the case.

The case was brought by the British Film Institute (BFI) and this particular point only related to period of claim between 1990 and 1996. After this date HMRC implemented the UK legislation, which restricted the cultural services eligible for exemption (and did not include cinemas). The issue of whether HMRC could legitimately restrict the scope of the exemption in this way is also under dispute but this matter has yet to be heard.

This decision may give grounds for other not for profit operators of cinemas to seek refunds of "over declared" output tax. However, due to the status and financing of the BFI, it is unlikely that local or regional organisations would be in the identical situation of the BFI and each case would need to be looked at on a case- by-case basis. In addition, seeking to have previously taxable supplies redefined as exempt could have a financial impact on the organisation (e.g. repayment of input tax recovered in previous periods). As any claims submitted will be subject to the four year capping provisions, any organisation that considers it would benefit from a claim may wish to make one as soon as possible.

Live-work Units

In a recent VAT Tribunal case, *John and Susan Kear,* the judge ruled that the appellants could not recover the VAT on building works under the D-I-Y builder's scheme and commented that "few (if any) live-work units can qualify for zero-rating". The judge also noted that as the "work" elements of the building were effectively being used as living space the works had not been carried out in accordance with planning consent and were thus standard rated. The taxpayer's argument that modern office work space could be furnished informally enabling a bedroom to qualify as "work" space was also rejected. If live-work units are a condition of planning approval being granted then careful consideration of the VAT implications should be made.

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