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Weekly VAT News

Indirect tax news from the past week

06/06/2022

RCB 10(2022): updated guidance on the meaning of "business"

For over forty years, students of UK VAT have learned six indicators of when a business activity is taking place, drawn from the judgments in *Lord Fisher* and *Morrison's Academy*. More recent judgments from the Court of Appeal, in particular *Wakefield College*, which had the benefit of CJEU guidance in other cases, have shown that this approach needs to be refreshed. In RCB 10(2022) HMRC consider that the question of whether a taxpayer's "predominant concern" is making supplies for consideration (one of the traditional indicators) is no longer relevant. They acknowledge that *Wakefield College* requires a two-part test: if (1) an organisation is making supplies for consideration, and (2) the supplies are made for the purpose of obtaining income, then a business activity is taking place. The RCB does not set out how to analyse the purpose behind making supplies (beyond observing that an economic activity can exist when supplies do not lead to profit), but HMRC have overhauled the VBNB manual which provides further detail. The RCB concludes that HMRC will no longer apply the six indicators, although it accepts that they "can be used as a set of tools designed to help identify those factors which should be considered." (Contact: David Walters)

***Telent*: relitigation of input tax claim estopped – FTT**

In 2006 telent Ltd (Marconi) transferred 75% of its business as a going concern to Ericsson. The associated pension scheme obligations remained with telent, and the Pensions Regulator required it to place funds in escrow to help cover any future funding shortfall. Investment managers charged telent VAT of approximately £300k annually, and in 2014 HMRC denied telent input tax recovery. Telent appealed, but in March 2016 withdrew its appeal. Six months later, having changed advisers, it renewed its argument for input tax recovery. HMRC eventually conceded that telent was entitled to input tax recovery in principle, but argued that the new claim could not overlap the period dealt with in the original appeal. The First-tier Tribunal has ruled that telent's decision to withdraw its original appeal indicated an acceptance that it was not entitled to input tax recovery as a matter of principle. Telent was prevented from relitigating the overlap periods by estoppel. Alternatively, the FTT considered that it would be an abuse of process for telent to pursue an appeal for the overlap periods in the absence of any factual or legal new point. The FTT therefore accepted HMRC's application to strike out telent's appeal to the extent that it related to the overlap period. (Contact: Oliver Jarratt)

EU VAT Committee: cross-border VAT groups

The latest guidelines issued by the EU VAT Committee address the treatment of VAT groups by multinational businesses in light of Working Paper 1025 (which set out the Commission's analysis of the CJEU judgment in *Danske Bank*). Almost unanimously (i.e. with the agreement of all but 1, 2 or 3 EU Member States) the committee considered that VAT groups should be 'local establishment' only and not include the whole legal entity of a VAT group member. In its view, *Danske Bank* means that cross-border transactions between EU establishments of the same legal entity will be within the scope of VAT if either establishment is in a VAT group. Similarly, services received by an EU establishment which is part of a VAT group from its non-EU establishment are potentially subject to VAT. The Committee's guidelines are not binding on EU Member States, and there are some countries whose positions do not conform to the committee's guidelines. It will be interesting to see whether countries which currently include legal entities in VAT groups in their entirety (which is also how the UK applies VAT grouping) will consider future changes. (Contact: Daniel Johnson)

***Hodge & Deery*: exemption for flexi vault burial chambers – FTT**

Burial vaults are liners, frequently made of reinforced concrete and used at cemeteries with unstable soil structures, which fit around a coffin and prevent the soil in a cemetery from subsiding when the coffin collapses. Hodge and Deery Ltd installed flexible pre-formed burial vaults at a cemetery in Rainham, and treated its services as exempt from VAT as the "making of arrangements for or in connection with the disposal of the remains of the dead". HMRC assessed H&D for VAT on the basis that the exemption only applied to services connected with the burial of a particular person, not to the construction of a large number of vaults for future use. The First-tier Tribunal has ruled that it did not matter that the services were provided in advance, nor that the services were not provided in connection with a specific funeral. The VAT exemption for making burial arrangements may not have anticipated the mass preparation of vaults for future use, but the "always speaking" rule of statutory interpretation applied, and meant that the construction of pre-formed flexible vaults was exempt in the same way as the construction of a brick retaining wall inside an individually dug grave. H&D's appeal was allowed. (Contact: Donna Huggard)