Business/non-business litigation cases: HMRC policy discussion paper

Indirect Tax

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The ATT and CIOT have commented on a draft discussion paper which sets out HMRC's policy views following a number of recent court decisions concerning whether activities are business or non-business for VAT purposes.

In recent years there has been evolving case law concerning whether activities are business or non-business for VAT purposes (and the related impact on input tax recovery) which HMRC have not commented on publicly.

In response to questions from members of the Joint VAT Consultative Committee (JVCC), HMRC have produced a draft paper setting out their views on some of these cases. This paper presents a basic summary of each case and a short statement on HMRC's view of the implications for VAT policy. It covers nine cases including *Sveda* and *Iberdrola* as well as a number of UK cases. It omits other key cases – see below.

The ATT and CIOT have made written submissions which are not currently available on the ATT/CIOT websites due to the confidential nature of the discussion paper. These will be made available when possible.

In their submissions both the ATT and CIOT query what the purpose and intended final use of the paper is. In particular, it is not clear whether it will be published more widely to taxpayers and their agents, or kept within the JVCC. We would like to see it result in published guidance to assist everyone (including HMRC) in dealing with a complex and evolving area with more consistency.

The CIOT note that there is an absence of overall conclusions or identification of themes in the paper, giving the impression that an overall policy in the area has yet to be formulated. Dealing with issues on a case-by-case basis is not helpful in such an increasingly complex area of the law. This view is supported by the ATT, whilst

also noting that the paper asserts HMRC policy views in a number of cases where the Courts have found in favour of the taxpayer, or where cases are still being appealed. Given that in several instances HMRC's arguments have been rejected by the Courts to date, both the ATT and CIOT have queried what benefit taxpayers and advisers would gain if the paper were to be published more widely in its current form.

The CIOT submission points out some notable omissions from the paper. In particular, it is regrettable that the paper does not refer to the CJEU judgement in *Gemeente Borsele*, which *Wakefield College* was largely based on when it reached the Court of Appeal. Another notable omission is the CJEU's decision in *Finland* which deals with principles relevant for deciding whether there is economic activity.

The CIOT submission observes that terminology is a factor in the lack of uncertainty in this area. In the UK, generic terms such as 'business' or 'non-business' are used when what is often meant is 'economic activity'. Activity can be either economic or non-economic, and either can be undertaken for business or non-business purposes with different VAT consequences. It would be helpful to clarify the terminology and tests in guidance, aligning this with case law and legislation.

Both the ATT and CIOT are concerned that in one case HMRC say that they strongly disagree with a decision of the First-tier Tribunal (FTT) which they call 'irrational', but have chosen not to appeal. If a case is considered to be of sufficient importance as to be included in a policy document, then HMRC should consider appealing that decision to provide certainty for both taxpayers and themselves or accept the decision of the court. HMRC's own Litigation and Settlement Strategy framework guides HMRC staff to apply the law fairly and consistently and, where HMRC decide not to persist with litigation, concede the issues.

The submissions also comment on other cases covered in the paper. The CIOT identifies some contradictory positions taken by HMRC, in particular with respect to whether supplies are being made for a consideration, and the extent to which input tax can be attributed to taxable supplies when there are ostensibly other 'uses' of that input tax.

The ATT and CIOT also request further clarification from HMRC as to their views on the impact on VAT recovery of a business receiving grants or subsidies. It is noted that HMRC's approach is currently inconsistent, with fully taxable businesses

receiving subsidies (such as a train operator or a farmer) often entitled to full VAT recovery, but charities and businesses benefiting from, say, green energy incentives (such as the Renewable Heat Incentive) often having a percentage of the VAT incurred disallowed.

Representatives of the ATT and CIOT will be attending a special JVCC meeting on 18 July to discuss the paper in more detail.