Back to basins!

Indirect Tax | Management of taxes



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Keith Gordon looks at the First-tier Tribunal’s decision on a series of VAT assessments in a fairly typical back-duty investigation into a bathroom fittings company

Key Points

What is the issue?

The company, a bathroom supplier, maintains a list of trusted traders to whom it sometimes delegates excess work. The dispute turned on the nature of the contractual relationships between the parti es in those cases where work was so delegated.

What does it mean for me?

Misunderstandings should, of course, be avoided if at all possible. They can cause HMRC enquiries to become more prolonged than necessary and give rise to credibility issues if a different slant on the facts is put forward at a later stage.

What can I take away?

HMRC hopes that time limits will be overlooked by the taxpayer so it will have the opportunity of recovering more tax than is really collectible. Advisers should check all assessments to ensure that time limits have been complied with.

Subject to the usual caveats about making generalisations, tax disputes can typically be divided facts are. My articles usually focus on the former type of case but, in the interest of balance, this is an example of the latter.

Indeed, the circumstances of this case would make an ideal case study for anyone wishing to look at tax investigations and how they might be finally resolved at a tribunal.

The facts of the case

The case is that of Marshalls Bathroom Studio Ltd v HMRC [2020] UKFTT 269 (TC). The case concerned the company’s appeal against VAT assessments made for the quarters from that ending February 2012 to that ending November 2015.

The company is family-owned and designs, manufactures, supplies and installs bathrooms. It has been carrying on the business since the 1970s and has on its payroll a team of fitters, plumbers and tilers. However, there are occasions when there is too much work for the installation work to be carried out in-house. Accordingly, the company maintains a list of trusted traders to whom it sometimes delegates the excess work. These trusted traders are not themselves VAT-registered. When work is delegated in this way, the customers are instructed to make payment direct to the independent trader.

The dispute turned on the nature of the contractual relationships between the parties in those cases where work was so delegated.

The company took the view that, in those cases, the company acted solely as an agent on behalf of the independent trader. Accordingly, the company did not account for any output tax on the fees duly paid to the trader. On the other hand, HMRC took the view that the company remained the principal and was therefore liable to account for the output tax on the full price paid by the customer, irrespective of to whom payment had been made.

The company's stance was reinforced by the fact that, on the rare occasions where a customer made a complaint, the company would turn to the relevant independent trader to rectify matters.

The tribunal's decision

The case came before Judge Richard Chapman QC and Tribunal Member Noel Barrett .

They noted, in particular, that the customers considered themselves to be contracting with the company and not with the independent traders. Indeed, the company director gave evidence making it clear that although the traders might be involved in giving pricing quotes to the company at the initial stages of any particular job, the decision as to whether the fitting would be carried out in-house or not would not be taken until a later stage, based upon the availability of in-house staff (or the lack of it). Even more importantly, that decision would be taken by the company and not the customer (who by then had already entered into the contract with the company).

Furthermore, one of those traders made it clear that when his services were required he would attend the showroom, and be told what to do and how much he would be paid for doing it. There was no evidence of any discussion between the trader and the ultimate customer.

For these reasons, the tribunal concluded that the customers contracted exclusively with the company and therefore no part of the payments made could be excluded from the company's turnover. Accordingly, output tax was payable on the full sums paid by the customers, including those paid over to third parties.

Commentary

Ultimately, the case turned on its own facts and there is absolutely no reason why a different outcome could not be achieved in a different case.

However, there are still a number of issues worthy of further discussion arising from the tribunal's decision.

The first is that this was a case where the company's advisers had previously communicated to HMRC (and latterly the tribunal) a set of facts which were not consistent with those advocated by the taxpayer (or, in this case, the taxpayer's director). It is assumed that this was a consequence of a misunderstanding by the advisers.

Such misunderstandings should of course be avoided if at all possible. In many cases, they can cause HMRC enquiries to become more prolonged than necessary and give rise to credibility issues if a different slant on the facts is put forward at a later stage. Of course, the tribunal's role is to interpret the facts from the evidence it sees and hears, and it should not be swayed by the fact that a different account had been put forward earlier on in the dispute.

However, this will all depend on how the tribunal assesses the credibility of the witnesses before it. In the present case, the witness (Mr Marshall) was held to have given his evidence 'in a genuine and honest manner' and what he said, whilst inconsistent with what had been argued for by the company's advisers, was entirely consistent with the corroborative documentation. Unfortunately for the company, however, there are no prizes for honesty and Mr Marshall's clear evidence demonstrated that his company had under-declared its VAT liability. (To contrast, however, there was a case some years ago (Rice v HMRC [2014] UKFTT 133 (TC)), where the taxpayer's argument succeeded only because of the contents of the oral evidence given by the taxpayer, whereas the case would have been lost had the tribunal accepted the facts as previously advanced by his accountants in the course of the prior correspondence. (See my article 'Trading Places' in the April 2014 issue of Tax Adviser.)

Furthermore, HMRC's victory was not outright. The assessments under appeal were made on 1 November 2016, although it seems that the officer had previously made an assessment for the February 2012 quarter in February 2016 (i.e. shortly before the expiry of the four-year time limit imposed by the Value Added Tax Act 1994 s 77(1)(a)), in May 2016 for the May 2012 quarter, and in August 2016 for the August

2012 quarter. The evidence in respect of those earlier assessments is not clear but it seems that the officer seems not to have insisted upon those earlier timely assessments and proceeded on the assumption that they had been superseded by assessments made on 1 November 2016.

> HMRC hopes the time limits will be overlooked by the taxpayer so it will have the opportunity of recovering more tax than is really collectible.

As the four-year time limit had been breached and because HMRC offered no evidence to suggest that this was a case for an extended time limit (for example, by suggesting deliberate or knowing default), the tribunal allowed the appeals against the assessments for the first three quarters.

Having considered that the remaining assessments were made within the four-year time limit, the tribunal then proceeded to consider whether the assessments (for the quarters up to August 2014) were made within one year of HMRC having received sufficient information to justify the making of the assessments (as per VATA 1994 s 73(6)(b)). (The remaining assessments were timely in any case because of the two-year rule in s 73(6)(a).)

On the facts, the tribunal concluded that this time limit was just satisfied as the knowledge threshold was crossed in November 2015 (i.e. just under a year earlier) upon receipt of a letter answering a number of HMRC's questions. What concerns me, however, is that HMRC's representative put forward the argument that it would have been impossible for HMRC to assess the taxpayer at any time before March 2016. The reason for that date is not immediately clear. However, the tribunal rejected the argument (although it made no difference in the end), pointing out that HMRC had in fact issued an initial assessment in February 2016.

It worries me that HMRC felt able to put forward an argument that was so clearly contradicted by the facts (or, looking at things the other way around, it felt comfortable issuing an assessment as it was approaching a time limit, even though it felt that it did not have enough information at that stage to justify that course of action).

What to do next

This case typifies something which is all too common (but in my view unforgivable). HMRC will often issue assessments in clear breach of statutory time limits, highlighting the loss of tax which it believes has occurred but failing to point out the additional conditions that it needs to satisfy to justify the late assessment. It appears that, in these cases, HMRC hopes that the time limits will be overlooked by the taxpayer and so it will have the opportunity of recovering more tax than is really collectible. Advisers should therefore check all assessments to ensure that time limits have been complied with. In many cases, HMRC will then offer a reason to justify the late assessment but it is my experience that it will often back down in the face of a continued challenge.

In the meantime, the case is a useful reminder that advisers, when corresponding with HMRC, should ensure that they accurately convey the facts about their clients' circumstances and not make assumptions as to what the facts are (as they might be inaccurate, outdated or at least misleading).