Taxing times

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Lorraine Parkin details a welcome change of VAT policy by HMRC

In November 2012, HM Revenue & Customs (HMRC) accepted that its policy has been incorrect in relation to the transfer of a property business as a going concern. The policy essentially stipulated that if the transferor retained any interest in the property the transfer would not fall to be a transfer of a business as a going concern (TOGC) and outside the scope of VAT.

Test case

HMRC?s position was tested recently at the First-tier Tax Tribunal in the case of Robinson Family Ltd [2012] UKFTT 360 (TC) . For legal reasons, the transferor, who occupied the property in question under a head-lease, was unable to assign its interest to the transferee. Instead, it granted a sub-lease for a term equal to its head-lease save for three days. The company treated the transfer as a TOGC but HMRC stated that, as the transferor had not disposed of its interest in the property and had merely created a new interest (the sub-lease), the transfer could not be treated as a TOGC.

The First-tier Tax Tribunal looked at the economic reality and confirmed that, in the circumstances, taking a substance-over-form approach, there had in fact been a transfer of a property letting business. When viewed on an objective basis, the transferee was to carry on the same property letting business as that previously carried on by the transferor. In essence, the Tribunal held that it was of no relevance that the transferor retained a small reversionary interest in the property and that the interest held by the transferee was different from that of the transferor. All other conditions having been met, the transfer was that of a going concern.

Narrow interpretation

The decision was quickly followed by HMRC?s Revenue & Customs (R&C) Brief 30/12 on 16 November, in which it confirmed that it would not be appealing against the First-tier Tax Tribunal?s decision. Having considered, HMRC now accepts that its previous policy was incorrect and that, going forward, a TOGC can take place even if a transferor retains an interest in the property being transferred.

Nevertheless, there might be a few situations where it could be advantageous to seek a retrospective VAT adjustment

However, HMRC puts a narrow interpretation on the level of interest that can be retained and indicates that possible TOGC treatment will only be available where this is sufficiently small. The brief sets a limit of 1% of the value of the property and states that TOGC will not apply to transfers where this limit is breached.

It is not clear to me where this 1% de minimis figure arises from. It seems to miss the point being made by the Tribunal. As the Tribunal set out in its decision in Robinson Family Ltd, it is the substance of the transaction that matters when determining whether or not a business has been sold as a going concern. I suspect we may see more litigation given HMRC?s narrow interpretation.

Retrospective application

Having acknowledged that its policy was incorrect, HMRC accepts that there may have been situations in the past where, in light of the existing policy, certain property transfers may have been treated incorrectly. In such circumstances, VAT will have been charged by the transferor in relation to the supply of the property in question. In the majority of cases, it is likely that the transferee will have ?opted to tax? and will have, therefore, reclaimed the VAT charged.

Nevertheless, there might be a few situations where it could be advantageous to seek a retrospective VAT adjustment. For example, a cash flow benefit might be gained if VAT has been incorrectly charged but not yet repaid to the claimant. More crucially, the transferee is also likely to have paid stamp duty land tax (SDLT), which is based on the VAT inclusive purchase price of the property. Revenue & Customs Brief 30/12 confirms that, in such cases, HMRC will consider any claims for overpaid VAT and SDLT. However, details on how any overpaid SDLT can be reclaimed are sketchy.

HMRC is to issue further guidance on this in due course. In brief, a claim for overpaid SDLT can normally be made within 12 months of the filing date for the return in question. Where the 12-month period has passed, it is much less clear whether a claim would be accepted by HMRC.

Ordinarily, overpayment relief is not due if the original SDLT liability was calculated in accordance with the practice generally prevailing at the time. We await HMRC?s guidance, but consider that it would be harsh in the extreme if, in the circumstances, HMRC refused to make a refund.

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