VAT insight June 2018

TerryDockley&Co
TAKING THE STING OUT OF VAT

The latest VAT developments that could affect you or your clients' businesses

HMRC must stop its campaign to restrict zero-rating on new housing

In my December 2017 Insight I drew attention to an unwarranted campaign by HMRC to restrict the scope of zero-rating for dwellings by using "the 2(c) test" in a way that was not intended by parliament (when-is-a-house-not-a-dwelling?). In May 2018, in the case of Summit Electrical Installations Limited, the Upper Tribunal confirmed that HMRC's interpretation of this test goes beyond the intentions of the legislation. This test prevents the zero-rating of a dwelling if its "separate use, or disposal" is prohibited "by the term of any covenant, statutory planning consent or similar provision".

Summit Electrical Installations is an electrical subcontractor which was involved in the construction in Leicester of a block of student studio flats known as Primus Place.

The First-tier Tribunal had decided that the requirement that the flats be occupied only by full-time students "attending the University of Leicester or De Montfort University (or such [other] higher/further educational establishment as may be agreed in writing by the local planning authority")" did not fail the 2(c) test. The Tribunal took the view that attendance at one of the universities did not equate "with a link to specific land". HMRC appealed this decision.

Reviewing the decisions in *Lunn*, *Roy Shields* and *Burton* (see my December Insight), the Upper Tribunal concluded that "prohibition on separate use" in 2(c) required a "prohibition on use of the premises separate from the use of some other specific land or premises. It was not enough that there was a link to a business or an activity". *Shields* had failed not because of a link to a particular business alone but a link to a business at a particular address. The Upper Tribunal did not accept HMRC's argument that the Primus Place planning condition failed 2(c) because it was by reference to "the buildings of the University"; it pointed out that the City Council had not referred to the use of Primus Place

"… in connection with particular university campuses or particular sites, but its use in connection with particular universities. A university is not just a building or collection of buildings; it is an educational institution. Like other educational institutions, a university can change its physical location. In the case of schools, for example, it is not at all uncommon for a school to move to a completely new site – in some cases some distance away – but it remains the same institution and the same school. [The planning condition required] use by students attending particular Universities, not use by students attending particular premises".

I made the same observations about schools in my December Insight. Too often HMRC is able to flout the intention of legislation and succeed, as in cases like "Marygreen" (the disguised school in my Insight), because the cost of litigation is prohibitive. In *Lunn*, Owain Thomas, counsel for HMRC, stated that the purpose of 2(c) was "to restrict the availability of zero-rating to separate dwellings which do not exist in … a legally dependent relationship with another dwelling". The Upper Tribunal agreed, taking a slightly wider view. The 2(c) test did not only apply where the dwelling was ancillary to another dwelling, it also applied where the dwelling could not lawfully be used separately from "other premises".

HMRC should acknowledge that the Upper Tribunal has stated the law correctly and stop trying to extend the scope of the 2(c) test.

Picture: Leicester Town Hall, home of Leicester City Council

To discuss how this may affect your clients or your business, or to talk about a VAT issue in general – contact:

Terry Dockley & Co

T: 07787 576783

E: thd@terrydockley.co.uk

www.terrydockley.co.uk