

Penalty for incorrect zero rating certificate

FTT decision raises a number of serious issues and highlights how complex VAT has become, says Les Howard

Westow Cricket Club had a new pavilion constructed. It issued a zero rating certificate to the building contractor on the basis that the building was to be used as a 'village hall,' as defined in Note 6(b) to Sch 8, Group 5.

The certificate was invalid since the club was a Community Amateur Sports Club (CASC). It is now well established that a CASC is NOT a charity. It is therefore unable to benefit from zero-rating under the 'Relevant Charitable Purpose' provision.

HMRC issued a penalty assessment on the grounds that the club had issued an incorrect certificate. The club argued that it had a 'reasonable excuse.' Perhaps surprisingly, the FTT found against the club.

I do disagree with the conclusion of the Tribunal on this occasion! Here are my reasons:

1. The FTT quoted HMRC Notice 708, para 14.7.4, without qualification. The wording of this paragraph is now incorrect, following the Upper Tier decision in Caithness Rugby Football Club.
2. HMRC's ruling commented that their policy was that they would not provide a definitive response where the point is clearly covered by published guidance. Evidently the matter was not clear; why would the club write if it were clear!?
3. The HMRC officer did give an indication that the club would be entitled to issue a zero-rated certificate.
4. Upon receipt of the HMRC letter, the Club Treasurer did read the relevant part of Notice 708. He concluded that the certificate was validly issued and signed it on behalf of the club.
5. it was a further three years later that HMRC checked whether the certificate had been properly issued.
6. Para 4 of the decision refers to "a certificate for zero rated and reduced rated building work." Another deficiency missed! No reduced rate applies for RCP construction work!
7. The club's appeal was that they had followed HMRC's guidance. This created a 'legitimate expectation,' which ought to provide a reasonable excuse.
8. The FTT concluded that, viewed objectively, the facts could not constitute a reasonable excuse. It provides two 'strands of reasoning,' explained in paras 21-25 of the decision.

My view is that the FTT has appeared to have missed the point. It failed to consider how the club responded to its communications with HMRC. The club officer read the

HMRC letter, and then the published guidance referred to, issuing a certificate in the form set down in the Notice. There can be no criticism of the club for not being aware of the deficiencies in HMRC guidance, especially as the FTT missed it too.

The FTT has applied a 'was the club right or wrong?' test here. This is quite different to the reasonable excuse test. It quoted Perrin which is a leading case, but seems not to have applied its reasoning correctly.

Arguably, the club should have read the correspondence and guidance more carefully (that is easy to say as an adviser). Also, the club should have sought technical VAT advice (also easy to say as an adviser).

FTT decisions are persuasive, not binding. Subsequent decisions may choose to depart from this one.

One further comment. HMRC seem to have become more aggressive of late. I would therefore expect more penalties to be issued for incorrect zero-rate certificates.

Check out the decision here: <https://tinyurl.com/r79tn69>

- Les Howard is a partner in vatadvice.org, a specialist VAT practice based in Cambridgeshire. He has over 30 years' experience in VAT, including a short spell with HMCE (as it then was). As well as assisting businesses and charities with VAT issues, he lectures on VAT and sits on the Tax Tribunal