**VAT hardship applications**

In VAT appeals, disputed tax has to be paid before an appeal can proceed, unless the taxpayer can show that to do so would cause hardship.

The hardship test looks at the ability of the taxpayer to pay from resources which are immediately or readily available. The hardship might be to the business of the taxpayer, but it could also be personal financial hardship.

In a recent case, HMRC denied a company credit for input tax of around £771,000 which had been deducted by the company in computing its VAT for previous periods. The company appealed against the decision and made a claim for hardship. As part of the claim the company produced evidence to demonstrate that its bank deposit had reduced from £5 million to £300,000 and that the company had used up its agreed and available loan facilities of £5 million. The company did not want to approach its bank for a further loan as it did not want to raise concern within the bank.

HMRC’s argument was that the First-tier Tribunal (FTT) had erred in law in failing to consider whether the company could borrow to fund the VAT. HMRC also argued that the FTT should have considered whether the company could have paid the VAT if it had sold fixed assets not used in the business. It also argued that the company had not provided full information about its financial circumstances and had 'wilfully delayed' the proceedings.

The Upper Tribunal (UT) confirmed that the FTT had not erred in law in failing to consider whether the taxpayer could borrow under a new facility or sell fixed assets not used in the business.

The Upper Tribunal also confirmed that taxpayers are not generally expected to take out a new loan or sell fixed assets unconnected to the business before it can show hardship.

**What can we learn from this?**

1. This shows that HMRC are now closely scrutinising hardship applications and will be challenging the ability of the taxpayer to pay from resources which are immediately or readily available. This is in line with current government policy to more actively challenge and pursue tax defaulters in order to reduce the loss to the Exchequer.
2. Previous cases have established case law within this area. Cases should not involve a lengthy investigation of assets and liabilities, or focus on the ability of a company to pay in the future. The test is on the position of the company at the date of the hearing, not on what the company may have had available in the past or the future.
3. However, it is important to note that consideration as to whether the taxpayer is or has been responsible for putting himself in a position where he cannot pay the tax due will be given. This is a more strategic evaluation of circumstances that consider if the taxpayer has been responsible for delaying the hearing of the application and if that delay has led to him then not having the resources to pay.
4. The immediacy and availability of realisable resources should also be considered. If the business does have cash or other readily realisable resources available, a hardship application can still be made if it can be shown that using those resources to pay the disputed tax, would have consequences that would cause the taxpayer sufficient financial hardship. Consideration will be given as to if the business has an ease of availability to access borrowing facilities, if the use of those facilities would in themselves, not cause financial hardship.
5. Testing for hardship relates to the whole disputed tax sum owed. It should not be broken down into consideration of if payment of a lesser amount could be made, without hardship resulting.
6. Each case and situation are individual to the matters and facts involved and advice should be sought at the earliest opportunity.

For companies being investigated by HMRC for Tax avoidance or Tax evasion we recommend taking legal advice at the earliest opportunity. For a confidential discussion contact Altion Law on 01908 414990.