VAT UPDATE
APRIL 2011

Covering material from January – March 2011

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VAT Update April 2011

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1. INTRODUCTION

These notes contain a brief summary of some of the main VAT developments in the last three months – Tribunal and Court decisions, changes in legislation, Customs announcements. They are divided as follows:

- outputs generally;
- land and property;
- international matters;
- inputs generally;
- administration.

The same main headings will be used each quarter. If nothing has happened under a particular heading in a particular quarter, that heading will be omitted – but all headings will still carry the same number. That is why some headings are included with "nothing to report".

1.1 Appeals pending

It is not possible to compile a comprehensive list of cases under appeal, and some of those which are thought to be still "live" may be dropped without a hearing. The following is compiled from several sources, and is just an approximate guide to some of the arguments that do not appear yet to have been finally settled:

The HMRC website section which reported the progress of appeals stopped being updated some time ago and for some time it was only possible to pick up clues to unsettled cases from Revenue & Customs Briefs which announced HMRC's intention to appeal a decision or to concede defeat. However, a new "VAT Appeal Update" appeared on 21 January 2011, and it is to be hoped that this will continue. It says that it will be updated monthly, but as at 20 April the 21 January edition is still the most recent on the website.

http://www.hmrc.gov.uk/vat/vat-appeal-update.pdf

Awaiting the CJEU:

- *Littlewoods/Grattan*: the entitlement of traders to interest on VAT overpayments (questions described in this update).
- *Rank Group plc*: the exemption for FOBT gaming machines (the Upper Tribunal and Court of Appeal have referred questions which were described in the last update). The Daily Telegraph reported on 23 March 2011 that Rank had received a rebate of £74.8m in overpaid VAT and expected to be repaid a further £79.5m in interest shortly.

UK appeals awaiting hearing:

- *BAA Ltd*: HMRC will appeal to the Upper Tribunal after the First Tier Tribunal held that a company was entitled to recover input tax on the costs of its holding company bidding to acquire it
- *DCM (Optical Holdings) Ltd*: HMRC have appealed to the Upper Tribunal after the FTT accepted that a floor-area based special method could be appropriate

- *GMAC UK plc*: HMRC appealed to the Upper Tribunal after the First Tier Tribunal held that the company was entitled to go back for many years in a bad debt relief claim because the UK rules were too restrictive – this update includes a preliminary UT decision, which was not to refer questions to the CJEU but to proceed with a substantive hearing
- *Greener Solutions Ltd*: HMRC have appealed to Upper Tribunal after First-Tier decided that a trader did not have the means of knowing about a carousel fraud
- *Isle of Wight Council and others*: remitted to Tribunal to consider evidence again in light of CJEU's ruling on how "risk of distortion of competition" is to be applied
- *John Wilkins and others*: in one of the disputes about compound interest, the Supreme Court refused HMRC permission to appeal one aspect of the case. HMRC have requested a stay on the other substantive issue
- *London Clubs Management Ltd*: HMRC have appealed to the Court of Appeal after the FTT and Upper Tribunal accepted that a floor-area based special method could be appropriate
- *Newey (t/a Ocean Finance)*: HMRC have appealed to the Upper Tribunal after the First Tier Tribunal held that a scheme was effective in reducing irrecoverable VAT on advertising costs by moving a loan broking business to the Channel Islands
- *Pendragon plc*: HMRC will appeal to the Upper Tribunal after the First Tier Tribunal found a scheme "not abusive"

HMRC's list confirms that the following cases will not be appealed further:

- *Enersys Holdings UK Ltd*: HMRC were considering an appeal to the Upper Tribunal after the First Tier Tribunal found a £130,000 default surcharge "disproportionate" for being one day late with a payment – apparently they now say that the case turned on its own facts and does not set any general principle.
- *Everest Ltd*: First-Tier Tribunal held that cashbacks reduced taxable consideration even if they appeared at first sight to be linked to loan transactions.
- *Moorbury Ltd*: Upper Tribunal held that the effect of a finding of "abuse of rights" was that HMRC should assess for the net tax due, not assess to disallow input tax while applying the cap to overpaid output tax.

In this update from previous lists:

- *Brayfal Ltd*: Upper Tribunal dismissed HMRC's appeal against the First-Tier's majority decision that a trader did not have the means of knowing about a carousel fraud

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 VAT status of public bodies

The Budget announcements included a proposal to amend UK law to ensure that there is clear transposition of EU agreements relating to the VAT treatment of public bodies carrying out their statutory duties in competition with the private sector. The Government will issue draft legislation in the autumn with a view to including measures in Finance Bill 2012.

Budget 2011 overview 3.51

Meanwhile, it has been reported that commercial waste disposal companies have protested at a recent HMRC announcement that the Department regards waste services by councils as falling within their non-business activities. This would enable councils to carry out similar functions to the commercial companies without having to charge VAT. HMRC appear to regard this as not posing a significant risk of distortion of competition, in spite of their long-running argument about that principle in the *Isle of Wight Council* case on off-street parking charges.

Financial Times 31 March 2011

2.1.2 Trespass?

A company supplied parking enforcement services for car parks on private land. Up to 2007 it accounted for VAT on some income for parking infringements but regarded other receipts as outside the scope, being penalties for trespass rather than consideration for a supply. HMRC ruled that the receipts were either:

- received by the company as principal as part of a contractual arrangement with the motorist; or
- retained by the company in its capacity as agent for the landowner under a contract with the landowner, and were therefore part of the consideration for services to the landowner.

In either alternative, the receipt would be taxable. HMRC's policy on car parking penalties is set out in R&C Brief 57/08: it appears that the dispute arose following the issue of this Brief, and the appeal was in effect an attempt to show that the policy given in the Brief was wrong.

The Tribunal agreed with HMRC. The company did not have sufficient interest in the land to sue in its own right for trespass. It was not in the same situation as other licensees who had been held to have that right: if it could sue for trespass at all, that would only be as agent for the landowner, and the retention of the fines was then pursuant to the contract with the landowner.

The Tribunal also rejected the contention that the payments were for breach of contract. They were still within the agreement with the motorist and were therefore VATable in principle, even if received by the company as principal.

First Tier Tribunal (TC00999): *Vehicle Control Services Ltd*

2.2 Disbursements

2.2.1 Medical records

A firm of solicitors specialised in medical and clinical negligence claims. It paid health authorities and other parties for the provision of medical reports on its clients and recharged those amounts to the clients. The question arose of whether these were disbursements, outside the scope of VAT (as the solicitors contended), or a cost incurred in providing the solicitors' services and therefore subject to VAT on recharge (as HMRC contended).

The Law Society intervened in the case in support of the firm, which the chairman noted was an unusual event. The argument put forward by the Law Society's QC appears to have been the one that most convinced the chairman: the medical reports were used by the solicitor in providing a service to the client, but this could be distinguished with the payment for obtaining those reports. That was something done as agent for the client. If the client changed solicitor, the medical reports would be handed on to the new firm – they belonged to the client, not to the lawyer. The lawyer spent professional time analysing the reports, but that was the subject of the lawyer's fees. The mere cost of obtaining the reports was not part of the service.

After considering a number of UK precedent cases on lawyers' recharges, and the CJEU case of *De Danske Bilimportorer* (Case C-98/05) on car registration taxes, the chairman accepted this argument and allowed the appeal.

First Tier Tribunal (TC00949): *Barratt Goff and Tomlinson*

2.2.2 Article

Tax Adviser, April 2011, contains an article by Neil Warren about the problems of recharging expenses and disbursements.

Tax Adviser April 2011

2.3 Exemptions

2.3.1 EU consultation

The Commission has launched a consultation on the taxation of the financial services sector. It considers the possible introduction of a Financial Transactions Tax (FTT) or a Financial Activities Tax (FAT) and is therefore more related to the UK bank levy than to VAT, but if there is a substantial reform of financial sector taxation presumably the VAT treatment will be part of it. For example, the questions about the FAT refer to the possibility of compensating the sector for the negative aspects of VAT exemption.

http://ec.europa.eu/taxation_customs/common/consultations/tax/2011_02_financial_sector_taxation_en.htm

2.3.2 Insurance manual

HMRC have updated their online manual on insurance to clarify when claims handling services qualify for exemption.

www.hmrc.gov.uk/manuals/vatinsmanual/VATINS5500.htm

2.3.3 Underwriting guarantees

When a company offers shares for subscription by investors, it is common to pay financial institutions to guarantee the offer. This means that the institutions will take up any spare shares at a set price if the issue is undersubscribed. If the public take up all the shares, the institution buys no shares but keeps the fee.

The Swedish court referred a question to the CJEU to determine whether such fees were covered by the exemptions for financial services. The court ruled that they were exempt. The Swedish law did not provide for such an exemption, but the court noted that other versions (including the UK and Irish VAT law) explicitly provide for such an exemption.

CJEU (Case C-540/09): *Skandinaviska Enskilda Banken AB Momsgrupp v Skatteverket*

2.3.4 Debt collection

HMRC have issued their reaction to the CJEU decision in *Axa UK plc* (Case C-175/09). They propose now to treat all "payment collection" services as taxable, even where they have given a previous ruling that such services were exempt. The Brief explains:

Following the AXA judgment, therefore, 'debt collection' cannot be seen as applying solely to the service of chasing and recovering overdue payments on behalf of the creditor and all services principally concerned with collecting payments from the person owing them for the benefit of the entity to which those payments are owed (regardless of whether those payments are received before, on, or after their due date) fall within the exclusion to the exemption and are consequently liable to VAT at the standard rate.

Supplies which involve the collection of payments as a minor or ancillary function but which are principally concerned with other payment related transactions that fall within the Article 135(1) exemptions, for example the movement and settlement of payments between bank accounts, will not be affected by the AXA judgment and will continue to fall within the VAT exemption.

What this means for businesses

All payment related services falling within the definition of 'debt collection' as outlined by the CJEU in the AXA judgment are now liable to VAT at the standard rate. If this applies to payment related services supplied by your business and your business has previously received a ruling from HMRC that those services fall within the VAT exemption (or it has previously been treating its services as exempt in line with HMRC's published policy in this area) then VAT must be applied to those services from the date of this brief.

Revenue & Customs Brief 54/2010

2.3.5 Pension fund management

It has been reported that a case concerning the potential exemption of the management of occupational defined benefit pension funds will be referred to the CJEU. The case was initiated in 2008 by the National Association of Pension Funds and Wheels Common Investment Fund, following the success of JP Morgan Claverhouse in establishing that exemption should apply to the management of authorised investment trusts. The question will be whether a member state is required to extend exemption to the management of pension funds as a "special investment fund" which competes directly with other such funds that are already recognised and exempted (e.g. OEICs and AITs).

The Tribunal heard the case between 10 and 15 February 2011 and decided to refer questions to the CJEU. It is estimated that the potential VAT saving for the industry could be £100m a year (with, presumably, a number of claims for back tax also riding on the result).

NAPF Press Release 4 March 2011

2.3.6 Lottery machines

HMRC have issued a Brief accepting the decision of the Tribunal's decision (TC00581) in *Oasis Technologies (UK) Ltd*. This was that an electronic lottery machine made exempt supplies because it was a lottery, even if it was supplied by something that might also have appeared to be taxable as a gaming machine.

The Brief explains that HMRC now accept that exemption will apply to a machine having all the following characteristics:

- the machine must provide a game of chance
- the tickets must be randomly distributed
- the player, operator or manufacturer must not be able to influence the order in which a ticket is revealed
- the result of the lottery must not be determined or influenced by means of the machine, and
- where groups of tickets have been pre-loaded into a machine, the machine may randomly select a new group when the current one is completed.

Claims for repayment can be made subject to the rules on capping and unjust enrichment.

The Brief also explains HMRC's views:

- that electronic lottery machines are liable to Amusement Machine Licence Duty, which they will assess on unlicensed machines;
- concerning the development of electronic bingo machines, which may also be exempt from VAT.

Revenue & Customs Brief 01/2011

2.3.7 Postal exemption

HMRC have published their internal manual which gives details of the exemption for the Post Office's postal services.

www.hmrc.gov.uk/manuals/vpostmanual/index.htm

2.3.8 Education anomaly

Taxation 20 January 2011 contains an article by Neil Warren which examines the peculiar application of the education exemption in the UK. It points out that, following the case of Empowerment Enterprises Ltd, certain training services can be exempt when supplied by a sole trader but taxable when provided by a company – even if they are in other respects identical, and in spite of the normal principle that VAT should not create a fiscal distortion based on the identity of the supplier.

Taxation 20 January 2011

2.3.9 Scottish doctors

HMRC have issued an Information Sheet clarifying the VAT treatment of doctors in Scotland. Issues covered include:

- when and how to register;
- taxable and exempt supplies, including payments by the Health Board;
- recovery of input tax, including partial exemption issues;
- record keeping.

Information Sheet 05/2011

2.3.10 Trade association

An unincorporated association was founded in 1989 to be a representative body for tour operators. It accounted for VAT on its members' subscriptions, but submitted a claim for repayment in 2008 on the basis that the subscriptions should have been exempt under Item 1(d) Group 9 Sch.9 VATA 1994.

The Tribunal considered that it was the "primary purpose" of the Association that would bring it within the exemption or would fail to do so. The chairman was satisfied that the primary purpose of the Association was the representation of the views of its members to government, which might naturally include the EU government as matters which affected tour operators would cross country boundaries. The test in Item 1(d) was therefore satisfied.

Note 5 excludes exemption unless an association's membership is restricted wholly or mainly to persons whose business interests are directly connected with its purposes. The chairman noted that this did not use the expression "primary purpose", and therefore it was not essential that the members were all interested in the representational activities.

Accordingly, the Tribunal concluded that exemption was available and was not excluded by Note 5. The appeal was allowed.

First Tier Tribunal (TC00965): *European Tour Operators Association*

2.3.11 Sports leagues

HMRC have issued a Brief to comment on the VAT liability of organisations which run sports leagues on a commercial basis. Apparently some such organisations have suggested that they should be exempt as making supplies of land. HMRC disagree: they believe that the supply comprises a bundle of different elements, but the overall nature of the supply is not related to land. It is therefore standard rated, unless the body is eligible for the sporting services exemption under Group 10 Sch.9 VATA 1994 (i.e. is not for profit).

Some organisations have also complained that they have received misleading advice from HMRC officers in the past. The Brief advises them to contact the HMRC Complaints Team with appropriate evidence.

R & C Brief 04/2011

2.3.12 Investment gold coins

HMRC have issued a revised (February 2011) version of their notice on investment gold coins. It cancels and replaces the previous notice and provides revised lists of coins whose supply is exempt from VAT.

Notice 701/21A

2.3.13 Cost sharing exemption

As has happened several times in recent years, the Budget included a comment that consultation will continue on the possible implementation of a cost-sharing exemption for charities and other similar bodies. The brief note comments that attempting to achieve economies of scale by sharing costs with other bodies can create a VAT cost which is therefore a barrier to efficiency. No timescale is set for the possible implementation of such a measure.

Budget 2011 overview documents

2.3.14 Dismantling for Uncle Sam

A company carried out the service of dismantling ships for the US Navy. HMRC ruled that this was subject to UK VAT, and the company appealed. It argued that Art.151(c) of the 2006 VAT Directive required that such supplies should be exempt. The article states:

1. Member States shall exempt the following transactions:

(c) the supply of goods or services within a Member State which is a party to the North Atlantic Treaty, intended either for the armed forces of other States party to that Treaty for the use of those forces, or of the civilian staff accompanying them, or for supplying their messes or canteens when such forces take part in the common defence effort;

HMRC believed that the exemption should only apply where the visiting forces were stationed in the member state. The company argued that such a restriction would require specific wording in the article, which was more naturally read as conferring a general exemption for supplies to any NATO customer.

HMRC argued that the purpose of the exemption was to prevent a member state from enjoying a fiscal advantage by taxing NATO forces which were stationed within it. The First Tier Tribunal accepted that fiscal neutrality was part of the system of VAT, but did not agree that this was the sole purpose of the exemption, nor that HMRC's construction of the words of the article was correct. It appeared that the dismantling services fell within the article and should be exempt.

HMRC appealed to the Upper Tribunal, which decided that it could not resolve the different interpretations of art.151 with complete confidence. The Upper Tribunal did not agree with some of the FTT judge's reasoning. It would be necessary to refer questions to the CJEU, and questions were drafted for the parties to consider.

Upper Tribunal: *Able UK Ltd v HMRC*

2.4 Zero-rating

2.4.1 Hot or fresh?

A company sold a range of home delivery food. It made a voluntary disclosure to reclaim output tax it alleged it should not have charged on a range of items which were delivered at above the ambient temperature, but which could be eaten hot or cold. It argued that its purpose in heating the food was to demonstrate that it had been freshly prepared and to comply with food safety regulations, and it was indifferent as to whether the customer ate the food hot or cold. The items included crispy duck with pancakes, spring rolls with dip, samosas and various types of bread.

The First-Tier Tribunal examined the Court of Appeal's judgment in *John Pimblett & Sons Ltd* (about fresh pies rather than hot pies), as well as other related cases such as *Malik* (which concerned home-delivery curry). The members of the FTT were divided: the Chairman (who has the casting vote) thought that the purposes of demonstrating freshness and enabling the food to be consumed hot were indistinguishable; the Tribunal member's dissenting opinion was also recorded, holding that there were two purposes of which one could be predominant.

As well as an examination of the case law, there was also a detailed consideration of how the various items were prepared and sold. The Chairman held that the only way the appellant could truly show indifference to whether the food was eaten hot would be to supply it cold. The appeal was dismissed.

The trader appealed to the Upper Tribunal, where the judge emphasised that it was the subjective purpose of the supplier, not the customer, which was in issue. The tests from Pimblett were summarised as follows:

First, that it is not part of the test that the supplier knows that the items will or may be consumed hot. The test is the precise one of the supplier's own purpose in heating the items. Secondly, the Tribunal is entitled to test the evidence and may decline to accept the supplier's assertions as to his purpose. Thus evidence as to the customer's purpose, and evidence

about the way in which the supplier deals with the food after it has been cooked or heated, goes to the weight of the evidence but it is for the Tribunal to determine the purpose of the supplier having considered all the circumstances of the case. Thirdly, in the event that the Tribunal finds more than one purpose, it must have regard to what is the supplier's dominant purpose, disregarding any inevitable results which may flow from that dominant purpose. A necessary consequence is to be distinguished from the supplier's purpose, even though this may result in different results as to rating as between traders conducting similar businesses.

The judge went on to consider a possible distinction between "purpose" (purely subjective) and "intention" (which imports an element of the inevitable consequences of actions, as in the *Upton* case on cars). In this case, the FTT had found without qualification that the subjective purpose of the trader in heating the food had been to demonstrate to the customers that the food had been freshly prepared. Having found that as a fact, the FTT should have allowed the appeal. The Upper Tribunal would not overrule the First-Tier on a finding of fact, but would do so on the logical inferences to be drawn from the findings that it had made.

The trader's appeal was allowed.

Upper Tribunal: *Deliverance Ltd v HMRC*

2.4.2 Ferret food

A company supplied food for ferrets. HMRC ruled that this was standard rated as "petfood". The company argued that some ferrets are "working animals" rather than pets, and zero-rating for "animal feeding stuffs" was therefore appropriate. It made a reclaim of past output tax.

The Tribunal had to consider a "Ferret Census" organised by the Ferret Education and Research Trust. It concluded that a minority of ferrets in the UK are working animals; the majority are pets. The appellant sold food for ferrets in general, and did not hold the product out as particularly suitable for working ferrets. It was therefore properly categorised as petfood, and was standard rated.

First Tier Tribunal (TC00896): *Supreme Petfoods Ltd*

2.4.3 Goods or services?

The CJEU has considered a series of cases from Germany in which the issue was whether the supply of prepared food constituted goods (eligible for a lower rate in Germany) or services. The court's answers were:

- "the supply of food or meals freshly prepared for immediate consumption from snack stalls or mobile snack bars or in cinema foyers is a supply of goods within the meaning of Article 5 if a qualitative examination of the entire transaction shows that the elements of supply of services preceding and accompanying the supply of the food are not predominant" and

- "except in cases in which a party catering service does no more than deliver standard meals without any additional elements of supply of services, or in which other special circumstances show that the supply of the food represents the predominant element of a transaction, the activities of a party catering service are supplies of services".

CJEU (Case C-497/09): *Finanzamt Burgdorf v M Bog*; (Case C-502/09): *Fleischerei Nier GmbH & Co KG v Finanzamt Detmold*

These cases attracted considerable interest. The CJEU itself issued press releases to draw attention to the issue and the decision. UK national papers speculated that UK traders could make claims for repayment of overpaid output tax.

HMRC issued a Brief to quell the enthusiasm. In their view, the decisions have no impact in the UK. The UK's zero-rating legislation is a specific legal framework which is operated by the UK within the derogations permitted by art.110 VAT Directive. The UK has discretion over what to include in the derogation, and exceptions to the standard rating of supplies are to be construed strictly. Therefore, in HMRC's view, the UK's exclusion of hot takeaway food from zero-rating is within the UK's rights and not susceptible to the application of the *Bog* decision.

R & C Brief 19/2011

2.4.4 Transport manual and Notice

HMRC have updated their online manual on transport to take account of changes to the law on qualifying aircraft.

www.hmrc.gov.uk/manuals/vtransmanual/updates/updateindex.htm

HMRC have also issued a new version of Notice 744C *Ships, aircraft and associated services*. The technical content has been updated to take account of developments in policy and changes in the law since the September 2005 edition. This includes court decisions on boats used for living accommodation as well as the changes to the conditions for qualifying aircraft.

Notice 744C

2.4.5 Aids for the handicapped?

A company supplied massage mattresses and wave pads for the elderly and infirm. It claimed that these should be zero-rated within Sch.8 Group 12 item 2. However, they were not within item 2(b) (electrically or mechanically adjustable beds designed for invalids) because they were only mattresses, and they were not within item 2(g) (equipment and appliances not included in paragraph (a) to (f) above designed solely for use by handicapped persons) because they did not satisfy the term "solely". The Tribunal dismissed the appeal.

First Tier Tribunal (TC01028): *Made to Measure*

2.5 Lower rate

Nothing to report.

2.6 Computational matters

2.6.1 New notices

HMRC have published new versions of their notices on retail schemes:

- 727 Retail Schemes
- 727/3 Retail schemes: How to work the Point of Sale scheme
- 727/4 Retail schemes: How to work the Apportionment Schemes
- 727/5 Retail schemes: How to work the Direct Calculation Schemes

Naturally one of the changes relates to the increase in the standard rate of VAT on 4 January 2011. Apart from that, the notices say that they have been restructured to improve readability, but there have been no significant technical changes from the versions that were issued in August 1997 apart from the incorporation of subsequent updates.

Notices 727, 727/3, 727/4, 727/5

The internal HMRC guidance on retail schemes has also been added to the main online manuals.

www.hmrc.gov.uk/manuals/vrsmanual/vrs1000.htm

2.7 Discounts, rebates and gifts

2.7.1 Samples legislation

The Budget confirmed that the Finance Bill 2011 will include measures to remove the restriction which limits the non-taxation of samples to the first such sample given to a recipient in accordance with the *EMI* case decision (Case C-581/08). The new rule will take effect from Royal Assent, but will also be applied retrospectively where traders wish to submit claims.

2.8 Compound and multiple

2.8.1 Children's parties

The decision of the First Tier Tribunal in a case about children's parties (TC00242) has been overturned by the Upper Tribunal.

An individual provided children's parties for a single price. Originally she accounted for output tax on the whole amount received. She then made a voluntary disclosure, claiming that she was making a supply of exempt land (rental of a hall) and incidental taxable refreshments. As part of her turnover should have been treated as exempt, she had overpaid output tax. HMRC refused to make any repayment, and she appealed to the First Tier Tribunal.

The premises resembled a sports hall. It was used during the week as a nursery for very young children, and those supplies were agreed to be standard rated. For weekend parties, customers paid a fee "for 75 minutes' use of the play barn" with a simple buffet meal afterwards. Only one member of staff was present: after greeting the customers and admitting them to the hall, the staff member retired to the kitchen to prepare the food.

The appellant's representative argued that there was a single supply of a licence to occupy, with the catering and use of play equipment being incidental to that within the terms of *Card Protection Plan*. The supply should therefore be wholly exempt. HMRC also believed that there was a single supply, but that it was standard rated as "a children's party" rather than being a licence to occupy land. This was supported by earlier decisions about the provision of a room in conjunction with a wedding reception in *Willerby Manor Hotels Ltd* (16,673) and *Chewton Glen Hotels Ltd* (20,686).

The Tribunal considered the two aspects of Card Protection Plan carefully: first, whether there is a single supply which it would be artificial to divide; and second, whether any of the remaining separate supplies might take on the liability of a principal supply to which they are ancillary. The conclusion was as follows:

44. We identify the elements or components of what is supplied are as follows:

- *The use of the Hall;*
- *The use of (or opportunity to use) tables and chairs in the Hall;*
- *The use of (or opportunity to use) play equipment in the Hall;*
- *The provision of refreshments;*
- *The service of member(s) of staff in receiving customers and their guests and in preparing refreshments and preparing the Hall and the café room before use/cleaning them up after use;*
- *The non-exclusive use of (or opportunity to use) the toilet and changing facilities in the building.*

45. On the evidence we regard the second and third of these components as ancillary to the first and the fifth and sixth of these components as ancillary to the first and fourth. That is, we regard, from an economic

point of view, the use of the Hall and the provision of refreshments as the main or principal components of what was supplied by the Appellant to customers, and that it would be artificial, and distortive to split out for VAT purposes the second, third, fifth and sixth of the listed components.

The Tribunal went on to consider whether the supply of the use of the hall was an exempt licence to occupy, and concluded that it was: it was a relatively passive activity linked to the passage of time rather than to any value added provided. The provision of catering was a separate supply even though a single price was charged, and an apportionment of the consideration was necessary.

The appeal was therefore allowed in part, and the parties were invited to discuss and agree the apportionment. Instead, HMRC appealed to the Upper Tribunal, contending:

- that the decision was wrong, and there was a single supply which was not exempt;
- even if there were two supplies, the supply of the facilities of the barn were not exempt.

The trader changed her position (which had been that there was a single exempt supply) and argued instead that the First Tier Tribunal had reached the correct conclusion.

The judge reiterated the tests of single and multiple supplies as they were formulated by the Court of Appeal in the *Baxendale* case (about LighterLife):

(a) Every supply of a service must normally be regarded as distinct and independent. However, a transaction which forms a single supply from an economic point of view should not artificially be split into separate supplies: Case C-349/96 Card Protection Plan Ltd v Customs and Excise Comrs [1999] ECR I-973, [1999] STC 270, para 29.

(b) For this purpose, regard must be had to all the circumstances in which the transaction takes place: Card Protection Plan, para 28.

(c) There is a single supply where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded by contrast as ancillary to that principal supply: Card Protection Plan, para 30.

(d) However, the fact that one element in a package supplied cannot be described as ancillary to another element does not mean that it is to be regarded as a separate supply for tax purposes. The question is whether those separate elements are to be treated as separate supplies or merely as elements in some over-arching single supply: College of Estates Management v Customs & Excise Comrs [2005] UKHL 62, [2005] STC 1597, [2005] 1 WLR 3351, per Lord Rodger of Earlsferry at [12].

(e) In that regard, the test is whether the various elements supplied to the customer are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split: Case C-41/04 Levob Verzekeringen BV v Staatssecretaris van Financiën [2005] ECR I-9433, [2006] STC 766, para 22

(f) It is important to take an overall view at the level of generality that corresponds with social and economic reality, without over-zealous dissection: Dr Beynon per Lord Hoffmann at [31]; Card Protection Plan [2001] UKHL 4, [2002] 1 AC 202, [2001] STC 174, per Lord Slynn at [22].

(g) The assessment should be made from the perspective of the customer, as a typical consumer, not the supplier: Levob, para 22; Weight Watchers at [17].

(h) The fact that a single price is charged for two or more elements is a relevant factor pointing to single supply but it is not decisive: Card Protection Plan (in CJEU), para 31. Similarly, the fact that separate prices are stipulated for various elements is not decisive where the two elements have an objective close link such that they form part of a single economic transaction: Levob, para 25.

(i) The fact that the same or similar goods or services could be supplied separately from different sources is irrelevant to the question whether in the particular transaction under consideration their combination produces a different economic result: Baxendale at [24], following Case C-425/06 Ministero dell'Economia e delle Finanze v Part Service Srl [2008] ECR I- 897, [2008] STC 3132.

(j) The test is not whether the different elements in the services provided by the taxpayer to its customers have value and utility in their own right: Baxendale at [39].

The judge then criticised the approach of the First Tier Tribunal in applying these principles. The FTT had considered that the two supplies – land and catering – were both of value to the customer, and it would not be distortive to give each their separate identity for VAT. The judge said this was not the correct test: rather, it should have determined whether, from the perspective of a typical customer, objectively viewed, what was in fact being supplied was as a matter of economic reality to be regarded as a single supply for VAT purposes. The connection between the two supplies was so strong that it was unrealistic to separate them.

The judge then considered whether the supply could properly fall within the land exemption, although he commented that it was not strictly necessary to do so (because HMRC had won on the single/multiple supply issue). He commented that the matter was a question of fact and degree on which he would be reluctant to interfere with the FTT's decision; however, he would also have set aside the ruling on this ground if it had been the sole determining issue. He considered that the charging structure (a fee per child, rather than a fee for the room) was inconsistent with the proposition that the customer could occupy "as if the owner". Someone who paid for 20 children could not bring 25. He also considered that the provision of the play equipment was a more significant part of the supply than the FTT had allowed, and that leant towards "facilities" rather than "licence to occupy".

HMRC's appeal was allowed.

Upper Tribunal: *HMRC v Diana Bryce (t/a The Barn)*

2.8.2 Catalogues

In VTD 19,648 *Redcats (Brands) Ltd*, the taxpayer unsuccessfully argued that some of the consideration received from mail order catalogue customers was in fact for the zero-rated supply of the catalogue itself. Another mail order company tried a similar argument, with a similar lack of success.

The catalogue had a notional price of £3.50, but this would be credited against the delivery cost for a subsequent order for goods. Customers who did not place an order did not have to pay for the catalogue. The company accounted for VAT according to its own interpretation, and received assessments for underdeclared output tax. HMRC argued that the scheme was ineffective on technical grounds (the catalogues being supplied for no consideration) and was also an abusive practice.

The Tribunal chairman reviewed evidence which was in places unclear and inconsistent, but he still concluded that the company was correct in asserting that the main purpose of the arrangements was to encourage orders and to reduce the number of catalogues which were sent to people who would not order from them. It was therefore not principally about a tax advantage, which would mean it was not an abusive practice.

However, the effect of the arrangements was that no customer ever actually paid for a brochure. The charge and credit were a book-keeping exercise: in reality, the catalogue was supplied for no consideration, so there was nothing that could be zero-rated. The whole amount actually paid by the customer was for delivered, standard rated goods.

The company was partly successful in that some of the assessments were held to be out of time. Assessments for 05/04 and 08/04 were issued in May 2007, just under 3 years after the end of the first of those return periods; and assessments for 11/04 to 08/07 (totalling some £3.3m) were issued in October 2007, again within 3 years of the first of those periods. The officer who raised the assessments had spent some of the year leading up to May 2007 trying to obtain additional information but discovered nothing new: the evidence on which the assessments were based was therefore all over a year old, and the assessments failed.

For the same reason, the parts of the October 2007 assessments that related to periods ending more than two years earlier (up to 08/05) were also out of time.

As both parties had partly succeeded, the chairman invited them to make further submissions on the question of costs.

First Tier Tribunal (TC00998): *Next Group plc*

2.8.3 Spectacles

An optician submitted VAT returns on the basis that 40% of the consideration received on the supply of spectacles and 60% related to exempt dispensing services. This was applied to two different registrations, one covering a single shop run as a sole trader, and the other covering two shops run in partnership with his wife. HMRC questioned the apportionment following a control visit. This visit had been arranged to review a reclaim for overdeclared output tax on sales wrongly classified as taxable.

HMRC asked for more information about time spent on different activities in the different shops. The optician provided this, and claimed that it supported an even higher proportion of exempt sales. However, the officer raised an assessment based on over 60% of the consideration being taxable in each shop. The trader appealed.

The Tribunal examined the history of the dispute, which included HMRC requesting information for a trial period of one month, then asking for further information, including a trial period of three months. The optician's accountant protested that this would involve excessive time and expense for the trader when the original trial confirmed the figures in use.

The Tribunal also went through the possible bases for the assessment in s.73 VATA 1994, and decided that it was not raised "to best judgement". This was because it was not based on the evidence available: the further information provided by the taxpayer had been adjusted – arbitrarily, in the view of the Tribunal and the taxpayer – to produce a higher figure of taxable turnover. HMRC could show no justification for doing this. The appeal was therefore allowed.

First Tier Tribunal (TC00998): *D Doris (t/a Gardiners of Denny)*

2.8.4 Printed matter

The Budget announcements included confirmation of the anti-avoidance measure to deny zero-rating to printed matter which is ancillary to a differently rated service where, if the service and printed matter had been supplied by a single company, the two supplies would have been treated as a single standard rated, reduced rated or exempt supply. This will apply from Royal Assent to the Finance Act 2011.

HMRC may have considered an attack on such arrangements (held to work by the Court of Appeal in the *Telewest* case in 2005) using the abuse of rights principle – in *Part Service*, the CJEU held that splitting a single supply into differently rated elements supplied by separate companies could be abusive. This very specific statutory solution seems clearer but of more restricted application.

Budget Summary documents

2.9 Agency

Nothing to report.

2.10 Second hand goods

2.10.1 New notices

HMRC have published new versions of their notices on margin schemes. There are three separate notices – one covering margin schemes in general, including global accounting; one for second-hand cars and other vehicles; and one on the auctioneers' scheme. The main change relates to the increase in VAT rate to 20%. Auctioneers' invoices are no longer required to contain references to the relevant EU or UK legislation.

Notices 718, 718/1, 718/2

2.11 Charities and clubs

2.11.1 Reader's Query

A Reader's Query in *Taxation* asked about the VAT treatment of DVDs sold by a charity's trading subsidiary for export. The DVDs were to be manufactured and despatched in France. The answers suggested that there did not seem to be a UK VAT liability, but that the French position should be considered on the basis of local advice.

Taxation 20 January 2011

2.12 Other supply problems

2.12.1 Car fuel scale charges

An updated set of car fuel scale charges (s.57 VATA 1994) will apply for return periods starting on or after 1 May 2011. The lowest scale applies to cars with emissions ratings of 120g/km or less; the charges rise at each 5g/km increment above that until the maximum is reached at 225g/km or more. The rules about the application of the charge have not changed.

SI 2011/898

2.12.2 Output tax toolkit

HMRC have published a "toolkit" to help traders declare the correct amount of output tax. They say that use of the toolkit is likely to indicate that a trader has "taken reasonable care" if penalties are being considered (of course, it will also reduce the likelihood of errors which could be penalised). The toolkit is mainly aimed at tax agents and advisers to assist them in preparing VAT returns for their clients, although there is no reason that a trader should not use it as well.

The toolkit consists of a checklist which is then expanded by notes. For each question there is an explanation of the risk addressed by the question, and the ways in which that risk can be mitigated. The checklist is based on common errors which HMRC find in VAT returns, and is therefore directed towards eliminating the mistakes that people most frequently make.

The checklist is as follows:

	Record keeping	Yes	No	N/A
1	Have output tax records been reviewed for errors and omissions?			
2	If the Flat Rate Scheme has been used, has it been operated correctly?			
	Supplies and liability			
3	Have all occasional and miscellaneous supplies been included in the VAT Return calculation?			
4	Has output tax been accounted for on the disposal of assets when appropriate?			
5	Has output tax been declared correctly on any self-billed invoices received?			
6	If the business undertakes cross-border transactions, have the place of supply rules been correctly applied?			
7	Has the business applied the correct VAT liability to its supplies?			
8	Have supplies relating to land and buildings been treated correctly for VAT purposes?			
9	If the business has opted to tax land and buildings, has any related income been correctly treated?			
10	Is there supporting evidence for non-standard-rated supplies?			
	Time of supply			
11	Has output tax been declared at the correct time?			
12	If deposits have been received, has output tax been declared when appropriate?			
13	If the Cash Accounting Scheme is operated, has output tax been accounted for correctly?			
	Value and calculation			
14	Has output tax been calculated correctly on VAT-inclusive values, discounted amounts and mixed supplies?			

15	Where disbursements have been itemised, have they been included in the value of the supply when appropriate?			
16	Have delivery charges been treated correctly?			
17	If a retail scheme is operated, has output tax been calculated correctly?			
	Exports and dispatches	Yes	No	N/A
18	If goods exported outside the European Union (EU) have been zero- rated, has the specified evidence been obtained within the appropriate time limits?			
19	If goods dispatched to business customers in other EU states have been zero-rated, has the specified evidence been obtained within the appropriate time limits?			
	Credit notes and bad debt relief			
20	Have sales credit notes been correctly issued?			
21	Have any adjustments for bad debt relief and bad debts recovered been made correctly?			
	Business gifts and deemed supplies			
22	Has output tax been accounted for on business gifts when appropriate?			
23	Has output tax been accounted for on assets put to private or non-business use?			

An example of the explanatory notes is given below for the first question:

1. Have output tax records been reviewed for errors and omissions?

Risk

Output tax errors can occur as a result of omission, misposting or misunderstanding when transactions are first entered in the records. In particular, sales invoices dated towards the end of a VAT Return period can sometimes be overlooked – for example if the VAT Return report within a computerised accounting system has been run before all relevant sales invoices have been posted.

Mitigation

Consider whether all relevant supplies made by the business have been identified and whether the level of calculated outputs is consistent with levels of expenditure and your understanding of the business.

A general review of output tax postings prior to submission of the VAT Return will often identify and eliminate many errors and omissions. Comparing the calculated output tax and net outputs totals, or reconciling calculated outputs values to other available turnover information (for example in management accounts), may also highlight significant

omissions, as may comparing calculated output tax to the amount declared on the last return or on the return for the same period last year.

If a computer package is used to calculate VAT Return values, care should be taken to ensure that correct date ranges are set and that all relevant transactions within the VAT period date range are included.

Some computer accounting packages have integral VAT audit functions which can assist in identifying potential errors before a return is submitted.

Explanation

Common output tax errors include:

- *manual, arithmetical and consolidation errors*
- *omitted or duplicated invoices*
- *sales invoices posted gross without extracting output tax on standard or reduced rate supplies*
- *output tax incorrectly calculated on VAT-inclusive amounts or on supplies subject to a settlement discount*
- *incorrect VAT liability codes being set within a computerised accounting system*
- *VAT and net values transposed*
- *sales credit notes incorrectly posted*

VAT Return calculations should include all business activities of the registered person. While a business may keep separate financial records for different aspects of its business for commercial or other administrative purposes (for example a building contractor owning a number of rental properties which maintains separate records for its construction and property activities), all of its supplies should be included.

For further information on what to include in each box of a VAT Return see VAT Returns: how to complete your VAT Return box-by-box (www.businesslink.gov.uk/bdotg/action/layer?r.l1=1073858808&r.l2=1083126673&r.l3=1083127324&r.s=tl&topicId=1081167159).

http://www.hmrc.gov.uk/agents/toolkits/VAT-output-tax.pdf

2.12.3 Reader's Query

A Reader's Query in *Taxation* asked about the VAT implications of a cycle-to-work scheme, in which an employer provides a bicycle for commuting (which enjoys a specific income tax exemption) but there is a salary sacrifice by the employee and an understanding that the employee will buy the bike for its written down value at the end of a set period. The answers consider the possibility that HMRC will seek to apply the *AstraZeneca* decision to such arrangements and charge output tax on the salary forgone – it is not yet clear whether HMRC will change their policy in this area, which up to now has been to favour such schemes in accordance with the previous government's policy objectives.

Taxation 24 February 2011

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 No abuse

A company, L, owned a plot of land with planning permission to build 575 homes with the condition that they were not to be occupied as a principal place of residence. It entered into arrangements with customers and a related company, C, under which:

- L granted a long lease over a plot of land to the customer, standard rated because of note 11 group 1 Sch.9 VATA 1994 (land with a right to build holiday accommodation on it);
- C sold construction services to the customer, purported to be zero-rated as construction of a building designed as a dwelling.

HMRC ruled that there was a pre-planned series of transactions which together comprised the sale of a holiday home, which ought to be standard rated. The true interpretation of the arrangements was either that L sold the completed holiday home (effectively subcontracting the cost of construction to C), or L and C together sold the completed holiday home and were liable for output tax on their proportion of the consideration paid. As an alternative argument, the arrangement was abusive within the *Halifax* principle (being similar also to the case of *Part Service* C-425/06).

In respect of the main argument, the First Tier Tribunal (TC0016) held that it was not possible for supplies by two different companies to be treated as a single composite supply, nor as a joint supply of a holiday home by the two companies together. The decision of the Court of Appeal in *Telewest* was followed.

The company argued that *Halifax* should not apply because there were various commercial advantages to the arrangement from the companies' point of view – the effect was not only favourable for VAT. By selling the land first and the construction services afterwards, L generated cash income much earlier than it would have been received under what HMRC said was the "normal" transaction. Also, people who bought the land were not bound to use C for the construction services, and they were not bound to a particular timetable. The two transactions were spread over a long period in most cases, and could be spread over even longer. They should not be looked at as a single pre-planned arrangement.

Nevertheless, the First Tier Tribunal found for HMRC. Looking at the transactions and the relationship between the parties and the supplies in detail, it appeared that the conditions for *Halifax* to apply were satisfied. The transactions were artificial in that they had (in the Tribunal's view) been arranged specially to create a VAT effect; they were contrary to the purpose of the VAT law because they would benefit from exemption and zero-rating when in reality what was being supplied was something that ought to be standard rated. That had the potential to distort competition, which was contrary to the purpose of the law. The trader's appeal was dismissed.

Both sides appealed to the Upper Tribunal: HMRC argued that the CJEU's decision in *Part Service* postdated and therefore overruled *Telewest*, and the company appealed against the ruling that its transactions were abusive. The Upper Tribunal found for the taxpayer on both points.

In respect of the single supply issue, the judge considered the arguments in detail, but held that the *Part Service* decision would only apply if there was abuse or a sham. The decision in *Telewest* was still considered good law in the case of straightforward transactions, which is what the Upper Tribunal thought these were.

The First Tier Tribunal had found that the contracts were genuine and not a sham, and that finding of fact was not in dispute in the appeal. The Tribunal again considered a range of precedents, in particular the discussion of the requirement to recharacterise artificial transactions that was set out in the Court of Appeal's decision on *WHA Ltd*. Lord Neuberger in that case said that it was necessary to compare the allegedly artificial arrangements with "normal commercial operations" to decide whether they should be treated in a different way for VAT. The Tribunal also referred to the opinion of the Advocate-General in the *Weald Leasing* case, in which he concluded that a business could engage in transactions that are not directly within its normal sphere of operations without necessarily becoming "artificial".

Another comment of Lord Neuberger from WHA Ltd was considered highly relevant: a taxpayer who has alternative courses open to him is entitled to choose that which minimises his liability to VAT.

The taxpayer's counsel was very critical of the original decision, claiming that it:

a. contains a large number of internally contradictory findings of fact;

b. contains a large number of instances where the Tribunal has simply failed to find facts of the utmost significance;

c. frequently and unlawfully rejects the unchallenged evidence of witnesses;

d. is often simply incoherent; and

e. makes findings despite there being absolutely no evidence in support.

He went on to suggest that a different comparison should be made between the company's transactions and so-called "normal commercial operations". There were several different possibilities:

a. LME supplies the land and an unrelated company builds the holiday home.

b. An unrelated company supplies the land and CBL builds the holiday home.

c. LME supplies the land and CBL builds the holiday home ("the self-build model").

d. A company supplies a completed holiday home with its site ("the development model")

HMRC and the First Tier Tribunal thought that (d) was the "proper" way of taxing the transaction; the companies had done (c); the Upper Tribunal, after considering extensive arguments, decided that the appropriate comparison was with (a). If that had been the business model, the same VAT consequences would have followed as the company wanted for (c). It was therefore not possible to conclude that the transactions artificially defeated the purpose of the law.

The Tribunal then considered briefly the "second limb" of the *Halifax* test – the assertion that the objective evidence suggested that the main purpose of the transactions was to obtain the tax advantage. The company had argued in the First Tier Tribunal that its business model was not just designed to avoid VAT – it had other purposes and consequences as well. The Tribunal commented that it would be necessary to re-examine those arguments if it was held to be wrong on the first limb of *Halifax*, but in the circumstances it was not necessary to do so.

The Tribunal also commented on a procedural and technical point that HMRC had raised. The building company (CBL) had been subject to an alternative assessment to output tax on its services if the main assessment on LME had been dismissed, and it had never appealed against it. It appears that HMRC raised the possibility that it was now out of time to do so, and the dismissal of their case against LME would enable them to collect the money from CBL. The judge commented that he regarded both decisions as covering all aspects of the case; if it was necessary as a formality for CBL to appeal, he invited them to do so, making it clear that the Tribunal would give them leave to appeal out of time and would then allow the appeal. He expressed the hope that this would not be necessary, so HMRC will probably drop that assessment.

Upper Tribunal: *The Lower Mill Estate Ltd v HMRC*

3.1.2 Hairdressers

A hairdresser rented out the basement of her salon to two independent hair stylists. The usual dispute followed – she regarded the rent as exempt consideration for a licence to occupy land, while HMRC regarded it as taxable consideration for a supply of facilities. The dispute dated back to 2004 when the hairdresser was compulsorily registered with effect from November 1999 and issued with a central assessment for over £30,000, which has been outstanding while the case was appealed.

The Tribunal examined the contract between the parties, which provided for non-exclusive occupation of the basement, and the way in which it was operated, which involved the owner having free access to the basement. In line with precedents on which HMRC wished to rely, and distinguishing the case of *M J Taylor & Mrs Pauline Taylor ((t/a Anglia Markets & Bantees)* (VTD 20,323), the Tribunal concluded that this was a taxable supply of facilities.

First Tier Tribunal (TC01015): *Annette Glen-Jones (t/a Sophisticuts)*

3.1.3 New rules on change of use

HMRC have issued an Information Sheet to clarify when the new rules on change of use will apply (paras.35 – 37 Sch.10 VATA 1994). The changes take effect from 1 March 2011, but will only operate where both the zero-rated grant or supply and the change of use take place on or after that date. If the zero-rated supply took place before then, the old change of use provisions will continue to apply. It will therefore be necessary to keep an old copy of the legislation until 2021.

Information Sheet 04/2011; Revenue & Customs Brief 05/11; SI 2011/86

A further Brief clarifies that the simplified rules for change of use will only apply to a building completed on or after 1 March 2011.

Revenue & Customs Brief 13/11

3.2 Option to tax

3.2.1 Belated notification or belated option?

A dispute arose about a decision not to accept a late notification of an option to tax. This was added to the appealable matters in s.83 VATA 1994 with effect from 1 June 2008; as the supplies in this case were all before that date, the Tribunal (with the agreement of both parties) decided to hear the appeal as if it concerned a refusal to register the trader, with the refusal to accept the notification being a subsidiary part of that appealable decision.

The company had acquired a building subject to an option to tax. Its bookkeeper mistakenly believed that the company was therefore bound to charge VAT to its own tenants, and when the building opened as a serviced office block in April 2005, this was done. The company also spend a considerable amount of money refurbishing the property. Calculations of the amounts of input and output tax (in respect of this and a second building) from April 2005 up to a request for registration in 2008 were provided to the Tribunal.

HMRC had refused to accept that a "de facto" option to tax had been made because the landlord had not accounted for the tax to them. The company had charged VAT to tenants but had not paid it to HMRC. The directors claimed to have been surprised that no VAT returns arrived, but a combination of confusion and illness had meant that they had not followed this up for a considerable period.

The chairman distinguished the situation from an earlier case in which charging VAT had been accepted as evidence that an option had been exercised. Here, the charging of VAT arose out of a misunderstanding: there was no evidence that a positive decision had ever been taken to charge VAT on the rent. The failure to follow up the VAT obligations, when the director had been registered before in a restaurant business and must have had some familiarity with the requirements, counted against the appeal. It was dismissed, presumably with the result that the "VAT

charged to tenants" should be refunded to them or paid as a debt due to the Crown, and the VAT suffered on costs would be irrecoverable.

First Tier Tribunal (TC00960): *Mill House Management UK Ltd*

3.2.2 Disapplication

HMRC issued a Brief to give further details of the simplification of the disapplication rules that was subject to consultation in December. The new "2% occupancy for grantors" rule, and the complete disregarding of ATMs, will apply from 1 March 2011. However, they will not apply to supplies which are made as a result of a grant before that date: the continuing receipt of rent is deemed to be a succession of "supplies" when received, but if the option was disapplied when the lease was granted before 1 March, it will continue to be disapplied after 1 March.

Revenue & Customs Brief 03/11; SI 2011/86

3.2.3 Article

Taxation, 10 February 2011, contains an article by Neil Warren about the revocation of an option to tax. It includes practical examples of savings in both VAT and SDLT which can be achieved.

Taxation 10 February 2011

3.2.4 Reader's Query

Readers' Queries in *Taxation* contain a problem arising from a restaurant owner who leases the premises personally which are used by his business, which is run through a company. The answers point out that the chain of supply is likely to create a blocking of VAT charged by the main landlord.

Taxation 3 February 2011

3.3 Developers and builders

3.3.1 Not a body governed by public law

A college appealed against HMRC's refusal to issue a zero-rating certificate in relation to the construction costs of a new campus building. The question was whether the buildings would be used for a "relevant charitable purpose", i.e. other than for a business purpose (as it was accepted that the appellant was a charity for the purpose of this rule).

The college argued that the nature of its funding, its mode of operation and its general characteristics were such that it was not in business at all so far as the activities intended to take place at the new campus were concerned. It also argued that it was at the relevant time "a body governed by public law" in the sense required by art.13 VAT Directive, and it was therefore not to be regarded as a taxable person. Although this point was rejected by the High Court in the *Cambridge University* case in 2009, the Tribunal was asked to rule on the issue so that the college could argue in an appeal that the earlier case was wrongly decided.

The Tribunal considered the facts of the case in detail, and then applied a number of legal principles to those facts. First, everyone agreed that the provision of grant-funded education is not a business for VAT purposes. This is backed up by the CJEU decision in *Commission v Finland* (Case C-246/08), where charging contributions for legal aid based on a means test broke the link between consideration and service and was therefore not a business activity.

However, there were a significant number (even if the minority) of students who paid fees for their education. Applying the *Lord Fisher* tests to these activities, the chairman found that the college was engaged in business. He also considered the precedents on "public bodies" and concluded that the college did not fit the description. HMRC were therefore correct to refuse the zero-rating certificate, and the appeal was dismissed.

First Tier Tribunal (TC00948): *Wakefield College*

3.3.2 Planning conditions

Two purchasers of a property appealed against a ruling that the planning conditions for building it meant that it had to be supplied standard rated as holiday accommodation. The company which made the supply was joined in the appeal; it had been placed in liquidation because of the VAT debt arising on this supply.

Group 5 Note 13 Sch.8 VATA 1994 rules out zero-rating if "residence there throughout the year, or the use of the building or part as the grantee's principal private residence, is prevented by the terms of a covenant, statutory planning consent or similar permission". In this case, the planning consent stated "The development hereby permitted shall be used for holiday purposes only and shall not be used for permanent residential accommodation". The Tribunal examined some arguments and precedents, including a range of possible situations in which a person could reside in a house without occupying it continuously, but had little difficulty in concluding that the legislation applied exactly to the situation. The appeal was dismissed.

First Tier Tribunal (TC00898): *David Trathen and another*

3.3.3 Part of the same project

A charity arranged for the construction of a nursing home. This could be zero-rated as the construction of a building for a relevant residential purpose. The following year, it further arranged for the construction of a kitchen and laundry block, and HMRC ruled that this would have to be standard rated because it was not part of the same project – it was in effect an extension of an existing building.

The Tribunal examined the history of the project. The original plans had been drawn up with the possibility of constructing kitchen and laundry facilities expressed only as an intention for the future, and HMRC argued that this was the construction project that had started and been completed. However, at an early stage the planning permission had been revised to include the kitchen and laundry. Although the residential areas were completed and occupied first, with cooking and washing facilities being provided on a temporary basis by other buildings on the site, this was

unsatisfactory and clearly not the long-term intention. There was nothing to require such a construction project to be completed all at once, and it appeared that the kitchen and laundry block were part of the same programme. They should be zero-rated.

First Tier Tribunal (TC00925): *Hoylake Cottage Hospital Charitable Trust*

A similar issue arose in a case concerning the construction of a dwelling house and a detached garage, where there was a lapse of time between the two parts of the project. A triple garage and games room was constructed before work on the main house commenced. The builder and property owner argued that the project had been carried out in this way because of wrangles over planning permission that took years, and because of financial constraints on the owner – to satisfy the planning consent he had to start the project within 5 years of its grant, but in that period he did not have the financial resources to undertake the entire house.

The Tribunal distinguished earlier decisions in which a garage had been constructed under separate planning consents. This was part of a single project under a single consent, even if it had taken four years to complete, and the garage attracted zero-rating.

However, the whole of the building did not. The consent provided for a "triple garage with a first-floor games room", which was what the builder had constructed. The legislation explicitly provides that only a garage can be zero-rated, and the games room was more than incidental to the garage. An apportionment would be required, and the parties were invited to go away and agree one.

First Tier Tribunal (TC00959): *Palmers of Oakham*

3.3.4 Retrospective planning permission

A company was registered in 2006 as a property developer. When a control officer visited to check a return in 2008, he discovered that the company's working on a property owned by the son and daughter-in-law of one of the directors. This was being treated as zero-rated on the basis that an existing property had been demolished to ground level and reconstructed.

The officer checked the county's planning register and could only find a planning consent for an extension and addition of first floor. When this was raised with the company, photographs were produced to show that in fact the building had been demolished. However, HMRC ruled that this was not in accordance with the planning consent, so the works would be standard rated.

Eventually the company obtained retrospective planning consent which made what it had done lawful. However, the Tribunal agreed with HMRC that zero-rating could not be applied retrospectively. At the time the supplies were carried out, they did not satisfy the conditions of Group 5 because the building did not satisfy Note 2(d). The works could be zero-rated from the date that planning consent was granted, but not before that.

The company argued that no tax point had arisen for the works before the planning consent was obtained. Round sum payments had been made, but these were characterised as loans to enable the company to buy materials.

The contract did not provide for stage payments and no invoices had been raised. The Tribunal considered that precedent cases had found similar payments to be "in respect of the supply" and therefore sufficient to trigger a tax point. The appeal was dismissed.

First Tier Tribunal (TC01024): *Abbeytrust Homes Ltd*

3.4 Input tax claims on land

3.4.1 Roller blinds

HMRC issued a Brief to confirm that they will not appeal against the decision of the Tribunal in *John Price* (TC00873) because the amount of VAT at stake is so small. However, they do not agree with it, and will not be changing their policy: the believe that roller blinds and other "window furniture" are not building materials as defined in the law, and will continue to refuse claims for refunds on them.

Revenue & Customs Brief 02/11

3.5 Other land problems

3.5.1 Listed places of worship scheme

Listed places of worship, of any faith or denomination, are entitled to claim a grant equal to the VAT paid on eligible works. However, with effect from 4 January 2011, professional services such as architects' fees and works on clocks, pews, bells, organs have been excluded.

It has been announced that the LPW scheme will continue for a further 4 years from April 2011 with an annual fixed maximum budget of £12m. The above restriction will remain in place.

www.lpwscheme.org.uk

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 Rates

HMRC have published information sheets for those registered under the special scheme for e-traders telling them that the standard rates of VAT have increased from 1 January 2011:

- in Slovakia from 19% to 20%;
- in Latvia from 21% to 22%;
- in Portugal from 21% to 23%; and
- in Poland from 22% to 23%.

Information Sheets 22/2010, 23/2010, 01/2011, 03/2011,

This means that the standard rates of VAT in the EU are now:

	2000	2009	2010	2011
Austria	20.0	20.0	20.0	20.0
Belgium	21.0	21.0	21.0	21.0
Bulgaria	20.0	20.0	20.0	20.0
Cyprus	10.0	15.0	15.0	15.0
Czech Republic	22.0	19.0	20.0	20.0
Denmark	25.0	25.0	25.0	25.0
Estonia	18.0	20.0	20.0	20.0
Finland	22.0	22.0	23.0	23.0
France	19.6	19.6	19.6	19.6
Germany	16.0	19.0	19.0	19.0
Greece	18.0	19.0	23.0	23.0
Hungary	25.0	25.0	25.0	25.0
Ireland	21.0	21.5	21.0	21.0
Italy	20.0	20.0	20.0	20.0
Latvia	18.0	21.0	21.0	22.0
Lithuania	18.0	19.0	21.0	21.0
Luxembourg	15.0	15.0	15.0	15.0
Malta	15.0	18.0	18.0	18.0
Netherlands	17.5	19.0	19.0	19.0
Poland	22.0	22.0	22.0	23.0
Portugal	17.0	20.0	20.0	23.0
Romania	19.0	19.0	19.0	24.0
Slovakia	23.0	19.0	19.0	20.0
Slovenia	19.0	20.0	20.0	20.0
Spain	16.0	16.0	18.0	18.0
Sweden	25.0	25.0	25.0	25.0
UK	17.5	15.0	17.5	20.0

Or, to put it another way:

Higher than the UK (12): Belgium, Denmark, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Sweden

Same as the UK (7): Austria, Bulgaria, Czech Republic, Estonia, Italy, Slovakia, Slovenia

Lower than the UK (7): Cyprus, France, Germany, Luxembourg, Malta, Netherlands, Spain

4.1.2 Exchange rates

HMRC have issued the standard information sheet containing exchange rates to be used by traders registered under the special scheme for internet businesses in the quarter to December 2010.

Information Sheet 02/2011

4.2 Where is a supply of services?

4.2.1 Reference on phonecards

Following the UK Court of Appeal's decision in the *Arachchige* case, another argument about phonecards is to be referred to the CJEU. The questions are as follows:

Where a taxable person ("Trader A") sells phone cards representing the right to receive telecommunications services from that person, is Article 2(1) of the Sixth VAT Directive to be interpreted so as to mean that Trader A makes two supplies for VAT purposes: one at the time of the initial sale of the phone card by Trader A to another taxable person ("Trader B") and one at the time of its redemption (i.e. its use by a person – "the End User" – to make telephone calls)?

If so, how (consistently with EU VAT legislation) is VAT to be applied through the chain of supply where Trader A sells the phone card to Trader B, Trader B resells the phone card in Member State B and it is eventually purchased by the End User in Member State B, and the End User then uses the phone card to make telephone calls?

This is effectively the same problem as in the *Arachchige* case, but looked at from the point of view of the telecommunication company (A) rather than the retailer (B). The Court of Appeal decided that the best way of ensuring that VAT was charged on the consumption of the phone calls was to make the retailer charge output tax on all of them, regardless of the location of the telecommunications company.

In the Tribunal decision which leads to the reference, Sir Stephen Oliver examines the background to the dispute in the way in which the company operates, and summarises the dispute as follows:

29. Lebara did not account to HMRC for VAT on its sales of phonecards to Distributors on the ground that the sale of the phonecards was the supply of a right to receive telecommunications services made to its

Distributors. It is not in dispute that the place of supply of those transactions was in the Member State in which the Distributor was established, pursuant to Article 9(2)(e) of the Sixth Directive, as in force at the relevant time.

30. HMRC contend that the phonecards are face value vouchers. The VAT treatment of face value vouchers is not harmonised by EU legislation and Member States take different views about how they should be treated for VAT purposes. The phonecards represent at least two potential supplies for VAT purposes made by Lebara: the first ("issue") is at the point of sale of the phonecard to the Distributor (which is the supply of a right to receive telecommunications services), and the second ("redemption") is when the phonecard is used by the End User to obtain telephony from Lebara.

31. Accordingly, HMRC contend that Member States have a legitimate policy choice as to how to tax the phonecards.

32. In the UK, the issue of the phonecards is not subject to VAT because paragraph 4(2) of Schedule 10A to the Value Added Tax Act 1994 provides: "The consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher". It is common ground that the phonecards are a "retailer voucher" within the meaning of that provision and that the consideration for the issue of the phonecards by Lebara to the Distributors did not exceed the face value of the voucher.

First Tier Tribunal (TC00945): *Lebara Ltd*

CJEU (Reference) (Case 520/10): *Lebara Ltd v HMRC*

4.2.2 Exhibition services

A company supplied temporary stands for business customers to use at fairs and exhibitions in order to present their goods and services. The Polish tax authority issued assessments based on a ruling that these supplies were ancillary to exhibitions and therefore supplied where the exhibition took place under art.52(a) VAT Directive. The company appealed, claiming that the supplies should be classified as advertising and therefore supplied where the customer belonged.

The Advocate-General has given an opinion supporting the tax authority's view.

CJEU (A-G's opinion) (Case C-530/09): *Inter-Mark Group sp. z o.o., sp. komandytowa w Poznaniu v Minister Finansów*

4.2.3 Articles

Neil Warren reviews the current state of the reverse charge rules in an article in *Taxation*, 24 March 2011, and he reviews the place of supply rules in another in *Tax Adviser*, February 2011.

Taxation 24 March 2011; Tax Adviser February 2011

4.3 International supplies of goods

4.3.1 Budget measures

The Budget included a measure to restrict the use of the VAT exemption for low value postal imports for the avoidance of VAT by certain mail-order retailers. This was hinted at in advance: the initial measure is simply to lower the threshold from £18 to £15 with effect from 1 November 2011, but further measures are threatened if traders continue to exploit the "loophole". It appears that the government will need to obtain agreement at European level to impose more radical anti-avoidance rules, and consultations will be carried out to find out what restrictions on the scope of the relief might be permitted where it is used for purposes for which it was not intended. The relief was estimated in official figures to have cost £130m in lost VAT in the last year, but press reports suggest that the true figure may be higher.

Businesses and tax advisers protested in advance of the change, arguing that it would cost more to enforce than the revenue it would raise.

Daily Telegraph 3 March 2011

The Budget also included an announcement that Finance Bill 2012 will provide powers for regulations to grant indirect tax and duty reliefs for diplomatic missions, international bodies, visiting NATO forces and European research infrastructure consortiums (ERICs). The first three categories currently enjoy reliefs by extra-statutory concession, and these will be put on a statutory footing by the new measures. EU regulations provide a framework for relief for ERICs.

HMRC will launch a joint project with the Driver and Vehicle Licensing Agency (DVLA) to counter VAT fraud on imported road vehicles. There will be a new requirement to notify HMRC of an imported vehicle before it can be registered with DVLA for use on the UK roads. Legislation will be included in FB 2012.

4.3.2 Despatch of car

A company sold a rally car and had it transported from the UK to Spain. There was some uncertainty about who had actually bought and paid for the vehicle: the money had been transferred from a bank in Dubai. HMRC ruled that the customer was not registered in the EU – it was either an unregistered person in Spain, or a company in Dubai. As the goods had been transferred to a destination in the EU, they could not be zero-rated. There were other problems with the paperwork – the EC Sales List had not been completed in respect of this sale. The VAT assessed was £44,000.

The evidence was confusing and incomplete, but the Tribunal accepted the company's version of events: a taxable Spanish company had acquired the rally car, and had also acquired another similar vehicle which enabled it to transfer a desired registration number to the rally car. HMRC had declined an offer of payment for an officer to go to Spain to inspect the chassis numbers on the vehicles to show that they matched up. The Tribunal decided that, on the basis of the evidence and the balance of probabilities, the company's explanation was convincing: the car had been

supplied to a registered person in Spain, and it was therefore a zero-rated despatch.

First Tier Tribunal (TC00882): *Dom Buckley IRS Ltd*

4.3.3 Successive supplies

The CJEU has considered a situation in which there are two successive supplies of goods which involves a single intra-community despatch. The question was how the exemption for despatches should apply to the two transactions. The reply was that in circumstances such as those in the case, in which the recipient of the first supply, having obtained the right to dispose of the goods as owner in the member state of that first supply, expressed his intention to transport those goods to another member state and presented his VAT identification number attributed by that other state, the intra-Community transport should be ascribed to the first supply. This was subject to the condition that the right to dispose of the goods as owner had been transferred to the second person acquiring the goods in the member state of destination of the intra-Community transport. It was for the referring court to establish whether that condition had been fulfilled in this case.

CJEU (Case C-430/09): *Euro Tyre Holding BV v Staatssecretaris van Financien*

Graham Elliott analyses this decision in *Accountancy*, March 2011. He comments that it is rather unclear and also unhelpful. His view of the problem, and the CJEU's answer, is as follows:

"*The CJEU appears to think that, where the original supplier in the first leg of the transaction has been given to believe that he will be making a dispatch – by having received the EU VAT registration number of the intermediary supplier, and having been given no indication within the contractual terms that he would be making a sale within his own country – he can say that he dispatched the goods and is not liable to VAT. But that is conditional on the intermediary supplier then accounting for VAT in the target state (in this case Belgium), and not treating its supply as a zero-rated dispatch.*

"This leaves difficulties in a case where the intermediary supplier gave those indications to the initial supplier, but then treated itself also as a dispatching supplier. In that case, it seems that the intermediary supplier's failure to account for VAT in the state of arrival invalidates the zero-rated dispatch by the initial supplier. Yet that rule would be unenforceable or would create uncertainty for the intial supplier. It would imply that the secondary supplier could play a trump card, treating its own supply as a dispatch, causing the initial supplier to be liable for home VAT. That would be illogical. Why should the initial supplier have a weaker position than the intermediary supplier?"

Accountancy March 2011

4.3.4 New rules on gas, electricity and cooling

HMRC have issued an Information Sheet to provide more detail about the new rules on the place of supply of gas, electricity and cooling through networks which were introduced with effect from 1 January 2011.

Information Sheet 21/2010

4.3.5 Guidance

HMRC have issued a new edition of Notice 60 *Intrastat General Guide*. Some minor changes are listed in para.1.2.

Notice 60

A new version of the Single Market Notice has been issued to take account of changes to EC Sales Lists which took effect on 15 March 2011.

Notice 725

HMRC have also issued a new information pack "Guide to Importing & Exporting: Breaking Down the Barriers", updated from the previous version. New or changed sections are indicated with an asterisk in the contents list.

HMRC Press Release 26 January 2011

HMRC have published a new version of Notice 702/8 *Fiscal warehousing*. It has been updated to reflect the increase to the VAT rate on 4 January 2011.

Notice 702/8

HMRC have published a new version of Notice 232 *Customs warehousing*. It has been re-written, restructured and up-dated, and now includes:

- Discharge procedures – movements to another customs procedure using declarations rather than 3 or 2 copy SADs or commercial documentation
- Single Administrative Document (SAD) Harmonisation changes
- The updated list of high risk goods which require a guarantee when they are moved (Annex 44c)
- The requirement for goods to move to approved premises within 5 days of the declaration to customs warehousing being made
- Updated legislative references
- Changes to the Reviews and Appeals procedure
- List of the appropriate customs warehousing customs procedure codes (CPCs), and
- The C1410 (customs warehousing application form) completion notes.

Notice 232

HMRC have published a paper giving information about how to reclaim overpaid import VAT. From 1 March 2011 fully taxable importers will reclaim such overpayments through the VAT return rather than on a

separate claim to HMRC. Non-registered or partially exempt importers will continue to use the previous system on forms C285 or C&E 1179.

JCCC CIP (11) 14

HMRC have published updated versions of Notice 705 *Buyer's guide to personal exports of motor vehicles to destinations outside EU* and Notice *705A Supplies of vehicles under the personal export scheme for removal from EC*. The only changes relate to the HMRC addresses to use when applying for the schemes – the rest of the technical content remains unchanged.

Notices 705, 705A

4.3.6 Sailaway boats

HMRC have issued a new Notice on the treatment of 'sailaway boats' supplied for export outside the EU. It replaces two previous Notices, the May 2010 version of Notice 703/2 and also Notice 703/3 (Sailaway boat scheme) which has been cancelled. It includes the conditions for zero-rating the supply of such a boat, the paperwork that has to be completed, and information for purchasers.

Notice 703/2

4.3.7 Consultation responses

In July 2010 the Commission published a consultation document on the possibility of simplifying VAT collection procedures in relation to centralised customs clearance. This is a procedure under which customs authorities may authorize importers to both declare and pay customs duties to the local customs administration of their establishment, independent from where the goods are physically imported and where they are transported to within the EU. In such cases, the customs debt shall be deemed to be incurred in the Member State of authorisation.

The consultation sought the views of business on how to resolve the VAT issues which arise from this – where the VAT debt would arise and how it should be declared. The Commission has now published an analysis of responses, and states that it will take these responses into account in its future work on the issue. No timetable is given for the next development.

Commission Press Release 23 February 2011

4.4 European rules

4.4.1 New implementing regulation

The European Council has agreed on a new implementing regulation. The previous implementing regulation was issued in 2005 to clarify certain aspects of the 6th Directive, particularly in relation to place of supply of services. Since then the 6th Directive has been replaced by the 2006 Principal Directive, and the VAT package changes to the place of supply rules have been put into effect. The new regulation has a similar purpose to the previous one, and takes into account the changes since then.

Council Press Release 19 January 2011; Regulation 282/2011; http://eur-lex.europa.eu/JOHtml.do?uri=OJ%3AL%3A2011%3A077%3ASOM%3AEN%3AHTML

4.4.2 VAT strategy review

Following on from the green paper on the future of VAT issued in December, the European Commissioner responsible for taxation (Algirdas Semeta) has promised that a new strategy will be published by the end of this year. It is estimated that the burden of VAT on business amounts to nearly €70bn each year, approximately 8.5% of all VAT receipts. The Commissioner also suggested that some 12% of VAT is not collected because of fraud, evasion and avoidance.

http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/78&format=HTML&aged=0&language=en&guiLanguage=en

4.4.3 EUROFISC up and running

The Commission has announced that the EUROFISC network, which aims to combat organised VAT fraud and was officially launched on 10 November 2010, has now started its operations. The first meeting was scheduled to take place in Paris on 7/8 February, when anti-fraud experts from the administrations of all 27 member states met to discuss how to combat organised VAT fraud.

Commission Press Release 8 February 2011

Meanwhile, on 19 January 2011 the Commission suspended transactions, except for the allocation and surrender of allowances, in all EU Emissions Trading System national registries following cases of cyber theft from a number of registries. Ten registries have since been allowed to resume full operations after providing reasonable assurances that the minimum security requirements are in place. This appears to be a further attack on the emissions trading system unrelated to the VAT frauds that came to light two years ago and which were dealt with by imposing a reverse charge system.

Commission Press Release 24 February 2011

4.4.4 Minimum standard rate confirmed

The Council has issued a Directive confirming that the minimum standard rate of VAT throughout the EU will remain 15% until 2015.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:326:0001:0002:EN:PDf

4.4.5 Austrian cars

The Commission took infringement proceedings against Austria for including a standard fuel consumption tax in the basis for assessing VAT on imports of cars. The CJEU applied the principles of *De Danske Bilimportører* (Case C-98/05) and granted the Commission's application.

CJEU (Case C-433/09): *Commission v Austrian Republic*

4.4.6 Belgian warehousekeepers

A question has been referred by the Belgian courts about the liability of a warehousekeeper for VAT owing from the owner of goods held in the warehouse:

Does the former Article 21(3) of the 6th Directive, now incorporated in Article 205 of Directive 2006/112/EC, in conjunction with Articles 202 and 157(1)(b) of the same Directive, authorise the Member States to provide that a warehouse-keeper other than a customs warehouse-keeper is jointly and severally liable, unconditionally, for the tax which is owing on a supply of goods made for valuable consideration by the owner of the goods who is liable for the tax on those goods, even where the warehouse-keeper acts in good faith or where no fault or negligence can be imputed to him?

CJEU (Reference) (Case C-499/10): *Vlaamse Oliemaatschappij v F.O.D. Financiën*

4.4.7 Bulgarian market value rules

The Bulgarian courts have referred questions to the CJEU on the application of art.80 VAT Directive, which is transposed into UK law as Sch.6 para.1 VATA 1994 – the power of the authorities to direct that output tax is charged on the market value where a transaction takes place between connected parties, one of whom is unable to deduct input tax in full.

The first question asks whether an open market value ruling is possible, where the consideration is higher than market value, only where the supplier cannot deduct input tax in full (presumably because the actual consideration would then increase partial exemption recoveries). Further questions ask for clarification of the scope and extent of the authorities' powers under art.80.

CJEU (Case C-621/10): *'Balkan and Sea Properties' ADSITS v Director of the Varna Office 'Appeals and the Administration of Enforcement'*

4.4.8 Bulgarian spare parts

A Bulgarian business imported second-hand motor parts into the EU from Switzerland. The Bulgarian rules denied a deduction for import VAT because the trader was subject to a margin scheme. Alternatively, the rules would defer an entitlement to deduction until the corresponding sale.

The CJEU ruled that this was not in accordance with the Directive. The right to deduct import VAT was immediate, where the trader had imported goods under the normal scheme of VAT. The provisions in the Directive had direct effect and could be relied on by the trader in the domestic courts.

CJEU (Case C-203/10): *Direktsia Obzhalvane I upravlenie na izpalnenieto Varna v Auto Nikolovi OOD*

4.4.9 French administration

The Commission has applied to the CJEU for a declaration that France is in breach of its obligations under the VAT Directive in allowing a derogation from the reverse charge procedure to businesses which are not established in France, provided that they appoint a tax representative there. Such traders must apply for a VAT identification in France, and the law permits "the offsetting of the deductible VAT of the seller or provider against the VAT collected by one or more of his or her customers". The Commission objects to all these measures as infringing a number of articles of the Directive.

CJEU (Case C-624/10): *Commission v French Republic*

4.4.10 Horses again

The CJEU has granted the Commission's application for a declaration that the Netherlands law which allows a reduced rate for supplies of live horses is in contravention of the VAT Directive. The lower rate is supposed only to be applicable to animals which are used for food or for agricultural production.

The court considered arguments about the precise meaning of the list of potentially lower rated items which is rendered in English as "Foodstuffs (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs". Although it is possible to read that as providing for the inclusion of all live animals, the court considered that the context demanded that a more natural reading in the context restricted it to animals used in the preparation of foodstuffs.

CJEU (Case C-41/09): *Commission v Netherlands*

Following similar actions against the Netherlands, Austria and Germany, the Commission has issued proceedings against France in respect of the application of a lower rate of VAT to live horses regardless of their intended use. The French rules also apply a super-reduced rate of 2.1% to sales of horses to non-registered persons for racing and riding.

CJEU (Case C-596/10): *Commission v French Republic*

4.4.11 Portuguese farmers

As the next step in a long-running dispute with Portugal, the Commission has applied to the CJEU for a declaration that the operation of the agricultural flat rate scheme in that country is excessively disadvantageous to farmers – no flat rate compensation is given to balance the input tax forgone, and transactions of farmers are exempt from VAT. Although member states are not allowed to give compensation which exceeds the input tax forgone, the Commission does not believe that they are allowed to implement a scheme which offers no compensation at all.

CJEU (Application) (Case C-524/10): *Commission v Portuguese Republic*

4.4.12 Polish invoices

A Polish trader reclaimed input tax on purchases from an unregistered supplier. The supplier had nevertheless provided invoices which showed full details for a VAT invoice, including the tax payable. The Polish authorities disallowed the claim, and questions were referred to the CJEU on the rights of the trader under the VAT Directive.

Somewhat surprisingly in the context of cases about carousel fraud, the CJEU ruled that "a taxable person has the right to deduct VAT paid in respect of services supplied by another taxable person who is not registered for that tax, where the relevant invoices contain all the information required by Article 22(3)(b), in particular the information needed to identify the person who drew up those invoices and to ascertain the nature of the services provided". Presumably this passes the responsibility for collecting the VAT back to the authorities, who must find the "clearly identified" supplier.

CJEU (Case C-438/09): *Dankowski v Dyrektor Izby Skarbowej w Łodzi*

4.4.13 Luxembourg boats

Questions were referred by the Luxembourg courts in relation to the application of the exemption for supplies of vessels on the high seas. The CJEU ruled that "Article 15(5) must be interpreted as meaning that the exemption from value added tax provided for by that provision does not apply to services consisting of making a vessel available, for reward, with a crew, to natural persons for purposes of leisure travel on the high seas".

CJEU (Case C-116/10): *Administration de l'enregistrement et des domaines v Feltgen (administrator of Bacino Charter Company SA)*

4.4.14 Belgian tobacco

A Belgian law, dating from 1977, simplifies the application of VAT and excise duty to manufactured tobacco products by levying a single charge when the manufacturer or importer purchases "tax paid" labels. Subsequent supplies are effectively exempt – no further VAT is charged, and none can be deducted. A trader appealed against a refusal of a bad debt relief claim for a refund of VAT included in the price charged to, and not received from, a customer which became insolvent. The trader argued that the rules were not permitted by the VAT Directive.

The CJEU rejected this contention. The simplification procedure was within the scope of discretion allowed to member states. The trader had not charged VAT on the sale to the customer, and therefore could not recover VAT when the customer did not pay.

CJEU (Case C-489/09): *Vandoorne NV v Belgische Staat*

4.4.15 TOMS everywhere

The Commission has decided to refer 8 countries (Czech Republic, Finland, France, Greece, Italy, Poland, Portugal and Spain) to the CJEU for non-compliance with the Directive in their implementation of the Tour Operators Margin Scheme. The complaint is mainly that they allow TOMS to apply to sales between travel agents. The Commission pointed out this problem to 13 states in 2008 following a review of TOMS implementation in 2006, but 5 (Cyprus, Hungary, Latvia, the Netherlands and the UK) have since corrected their rules.

Commission Press Release IP/11/76

4.4.16 Retrospective discounts

The Polish courts have referred a question to the CJEU about conditions which Poland imposes on a trader who wishes to reduce output tax on account of a price reduction for a supply:

In view of the fact that Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [1] provides that where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly under conditions which are to be determined by the Member States, does the concept of these conditions cover a condition such as that provided for in Article 29(4a) of the Ustawa o podatku od towarów i usług (Law on turnover tax) of 11 March 2004 (Dziennik Ustaw No 54, item 535, as amended), which makes the right to reduce the taxable amount in relation to the amount set out in an invoice contingent on holding, before the expiry of the time limit for submitting a tax declaration for the accounting period in which the purchaser of the product or service received a correcting invoice, acknowledgement of receipt of the correcting invoice by the purchaser of the product or service in respect of which the invoice was issued, and does it infringe the principle of VAT neutrality and proportionality?

CJEU (Case C-588/09): *Minister Finansów v Kraft Foods Polska S.A*

4.4.17 Interest on a customs debt

A Bulgarian company imported some copper and declared the value for customs duty and import VAT purposes. Later the supplier amended the invoice, and the importer notified the authorities that the value needed to be corrected. The authorities charged additional duty and VAT and added interest from the time that the original customs debt had been due for payment, rather than the time that the additional debt was due (7 days after the demand).

The CJEU ruled that this was not permitted. Where the original value had been declared and the duty settled in good faith, there was no reason to charge interest on the debt before the debt had become payable. The attempted charge was in effect a penalty for an incorrect return, but there was no provision in Bulgarian law for such a penalty – and without express provisions, no penalty could be levied.

CJEU (Case C-546/09): *Aurubis Balgaria v Nachalnik na Mitnitsa – Sofia*

4.5 Eighth Directive reclaims

4.5.1 New Notice on 8th and 13th Directive

HMRC have issued a completely rewritten version of Notice 723A which explains the procedure for reclaiming VAT incurred by non-established traders. It covers three different types of claim:

- traders from the UK who wish to claim VAT incurred in other member states;
- traders from other EU member states who wish to claim VAT incurred in the UK;
- traders from non-EU countries who wish to claim VAT incurred in the UK.

Notice 723A

5. INPUTS

5.1 Economic activity

5.1.1 Not in the course of business

An individual had been in business for a number of years, but on being diagnosed with a serious illness in 1998 he ran the business down and stopped filing VAT returns. HMRC did not chase him because he was coded as a repayment trader. In 2008 an officer contacted him and established that the business had ceased; after initially asking to be deregistered, the trader (in his 70s) asked for the registration to be maintained, and he submitted a repayment return. HMRC ruled that he was no longer carrying on a business, and even if he was the expenditure on which he was claiming VAT did not have sufficient connection with it.

It appears that the individual took the refusal of his claim as an allegation of dishonesty. The Tribunal chairman took care to point out that this was not the case: rather, he had misunderstood the conditions for claiming input tax, which were not satisfied here. His business activity was restricted to an informal arrangement with an American customer for whom he wrote software: he supplied a note of what he thought his work was worth once a year, and expected to be paid a share of a partnership "pot" some time after 2011 on the basis of these declarations. The Tribunal agreed with HMRC that this did not constitute a business for VAT purposes – there was no supply for consideration. Even if it did constitute a business, the list of items claimed did not appear to relate closely to the activities of that business, being incurred in connection with other activities. The appeal was dismissed.

First Tier Tribunal (TC01008): *Dr John H Smalley*

An agricultural contractor sold a company he owned with his wife in order to support his agricultural contracting business, which had suffered from shortage of funds after the foot-and-mouth outbreak. He claimed a deduction for costs associated with the sales. He also claimed for a number of other items, including the cost of preparing wills for himself and his wife, and in relation to works carried out on the company's buildings but paid by him personally following a legal dispute with the builder. The company operated a nursing home and had nothing to do with the agricultural business in respect of which the trader was personally VAT-registered.

HMRC assessed to recover this tax and imposed a misdeclaration penalty. The Tribunal confirmed both decisions, holding that the benefit to the business of the funds from the sale was not enough to create a link sufficient to justify a deduction. Nor were the other items not incurred in the course or furtherance of the registered trade.

First Tier Tribunal (TC00998): *NAJ Walley*

5.1.2 Article

Tax Adviser, January 2011, contains an article by Peter Mason about the *RBS Deutschland* case and the latest views on abuse of rights.

Tax Adviser January 2011

5.2 Who receives the supply?

Nothing to report.

5.3 Partial exemption

5.3.1 Partial exemption toolkit

HMRC have published a "toolkit" to help traders operate partial exemption correctly. The same general points apply as for the "output tax toolkit" described at 2.12.1 above.

The checklist is as follows:

	Recognition of the need for a partial exemption calculation	Yes	No	N/A
1	If exempt supplies are made or intended, has the need for a partial exemption calculation been recognised?			
2	Has the VAT liability of existing and intended supplies been correctly identified?			
3	Have any necessary adjustments for private or non-business use and other restrictions been made before the partial exemption calculation is carried out?			
	Attribution			
4	Has input tax been attributed correctly to taxable, exempt and residual use?			
	Apportionment			
5	Has the correct partial exemption method been used?			
6	If a special method has been approved, has it been followed?			
7	If residual input tax has been identified, has it been apportioned correctly to taxable and exempt use?			
8	Have the correct supplies been included in the apportionment calculation?			
9	Does the amount of exempt input tax exceed the de minimis limit?			
	The annual adjustment			
10	Has the annual adjustment been calculated correctly?			

11	Has the need to apply the standard method override been considered?	
12	Where there has been a change of use or intended use, has the initial attribution been adjusted to reflect this?	
13	If credit notes have been issued or received, have any necessary partial exemption adjustments been made?	
14	If input tax has been claimed late, have any necessary partial exemption adjustments been made?	
15	Have bad debt relief adjustments been correctly treated?	
	Capital Goods Scheme	
16	Has the need for Capital Goods Scheme adjustments been considered?	
17	Have Capital Goods Scheme adjustments been calculated correctly?	
18	If a Capital Goods Scheme item has been sold or otherwise disposed of within its adjustment period, have any necessary adjustments been made?	

An example of the explanatory notes is given below for the first question:

1. If exempt supplies are made or intended, has the need for a partial exemption calculation been recognised?

Risk

A business may not recognise that it is making or intends to make exempt supplies. For a list of exempt supplies see Q2. Alternatively a business may be unfamiliar with the partial exemption rules or mistakenly conclude that its exempt input tax is below the de minimis limit (see Q9). For example, a business which has been historically de minimis may incur unusually high levels of exempt input tax in refurbishing a number of exempt rental properties without realising that it has now exceeded the de minimis limit and must carry out a partial exemption calculation to determine how much input tax it can properly claim.

Mitigation

Consider all of the activities of the business, including those which are secondary or incidental, to identify existing or intended exempt supplies. If exempt supplies are identified, ensure that a partial exemption calculation is carried out.

For an example of a partial exemption calculation using the standard method see paragraph 4.8 of Public Notice 706 Partial Exemption (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_PublicNoticesAndInfoSheets&propertyType=document&columns=1&id=HMCE_CL_000857#P196_17674).

Explanation

A business is partly exempt from the moment it first incurs input tax which relates wholly or partly to exempt supplies. When a business is involved in property development, exempt input tax may be incurred long before the corresponding exempt supply is finally made.

If a business is using the Flat Rate Scheme for small businesses, no separate partial exemption calculation is required. All exempt income must, however, be included in the turnover to which the appropriate scheme percentage is applied.

For further information see Flat Rate Scheme for VAT (www.businesslink.gov.uk/bdotg/action/layer?r.s=tl&r.l1=1073858808&r.lc=en&r.l3=1083126689&r.l2=1083126673&topicId=1083079133).

http://www.hmrc.gov.uk/agents/toolkits/vat-partial-exemption.pdf

5.3.2 Framework for Higher Education Institutions

HMRC have updated the "framework" guidance for partial exemption calculations for Higher Education Institutions. The framework is not mandatory and does not replace the content of Notice 706, but adopting its principles will enable HMRC more readily to give approval for a PE special method for which a Statutory Declaration has been made. It is an extensive document with numerical examples, and it deals in particular with the problems of dealing with grant income.

HMRC Press Release 8 March 2011

5.3.3 CGS amendments

Regulations amend the Capital Goods Scheme with effect from 2 March 2011. They make consequential amendments to ensure that the main regulations continue to have their intended effect. Apart from revising the cross-references, the main technical change is to allow for the fact that the self-supply calculation is calculated by reference to months of use whereas the Capital Goods Scheme adjusts by reference to years.

SI 2011/254

5.3.4 Article

ICAEW TAXline, February 2011, contains an article by Neil Warren suggesting practical ways of improving partial exemption recovery. He considers it particularly important to carry out the division of input tax into taxable, exempt and residual "in an assertive manner" – the person responsible for coding expenses should understand the issues.

TAXline February 2011

5.4 Cars

5.4.1 Available for private use

A company claimed input tax of £7,567 on the purchase of a Range Rover. There were no restrictions on private use imposed by the company (which appears to be a "one-man consultancy"), and the Tribunal applied the *Upton* decision to disallow the input tax.

The appellant also contended that he had been led to believe that he would be able to recover the input tax, and he therefore had a legitimate expectation. He could not say exactly when or with whom he had had this conversation, but the Tribunal considered the argument before dismissing it. The main thing he could show that HMRC had provided to him was a copy of Notice 700/64: the Tribunal found that it clearly stated the applicable law and could not have created an expectation that the input tax would be recoverable. If the appellant had an expectation, it had arisen from discussion with other people, not from advice given by HMRC.

First Tier Tribunal (TC1020): *Van-Lauren G Welds Ltd*

5.4.2 50% deduction

The UK's blocking of 50% of the input tax on cars leased for partly business, partly private use is permitted under a derogation that was due to expire on 31 December 2010. The Council adopted a decision allowing the derogation to continue at least until 31 December 2013.

EU Council Press Release 19 January 2011; Council Implementing Decision of 18 January 2011

5.4.3 Numberplates

Readers' Queries in *Taxation*, 3 March 2011, includes an item about personalised numberplates which publicise the business. The answers review the precedent cases and the underlying principle, which is that deduction depends on a subjective business motive (as in *Ian Flockton Developments*). There is no specific rule which denies relief on a personalised numberplate, and previous cases show that it has to be argued on the particular facts.

Taxation 3 March 2011

5.5 Business entertainment

5.5.1 Consultation on new rules

HMRC issued a Brief to announce a short consultation on new legislation to give effect to the *Danfoss* decision – the conclusion that the UK was not entitled to change its input tax blocking rules in 1988 to exclude a deduction for entertainment of foreign customers, because such a deduction was allowed when the 6th Directive took effect in the UK. The change of policy to allow such claims was previously announced in R&C Brief 44/2010.

The draft legislation adds an exception to the exclusion of input tax credit in SI 1992/3222 art.5: "unless the entertainment is provided for an overseas customer of the taxable person and is of a kind and on a scale which is reasonable, having regard to all the circumstances".

Revenue & Customs Brief 09/2011

5.6 Non-business use of supplies

5.6.1 More detail on new rules

HMRC issued a second Brief to explain the new rules which restrict "*Lennartz* accounting". It outlines the background to the changes to the Capital Goods Scheme that took effect on 1 January 2011, and sets out the following summary of the remaining application of *Lennartz*:

Lennartz accounting is now available only in very limited circumstances where, for assets other than land property, ships and aircraft, the goods are used in part:

- *for making supplies in the course of an economic activity that give a right to input VAT deduction (broadly, taxable supplies, supplies that would be taxable if made in the UK or certain financial and insurance supplies to non-EC customers);*
- *in part for the private purposes of the taxpayer or his staff or, exceptionally, for other uses which are wholly outside the purposes of the taxpayer's enterprise or undertaking.*

Taxpayers who have embarked upon Lennartz Accounting in relation to an asset before 1 January 2011 must continue to operate it in respect of that asset. However, for land and property, ships and aircraft any VAT incurred on or after this date is recoverable only to the extent that the asset is used to make taxable supplies or other business supplies carrying input tax credit.

As a transitional measure, following a change in policy arising from an CJEU decision, many taxpayers who had incorrectly been permitted to use Lennartz Accounting were able to continue using this mechanism, unless they chose to unravel the Lennartz Accounting completely (see Revenue & Customs Brief 02/10). From 1 January 2011, any VAT incurred on land and property, ships and aircraft is recoverable only to

the extent that the asset is used to make taxable supplies or other business supplies carrying input tax credit. From 1 July 2011, taxpayers who were incorrectly permitted to use Lennartz Accounting will be able to unravel only where normal assessing time limits still apply to the original claim.

Revenue & Customs Brief 53/2010

5.6.2 Application of old rules

An individual sold a successful computer business in 1996. In 2004 he acquired, through a company, a yacht, and claimed back all the VAT on the purchase. There was some chartering, but there was also private use. HMRC raised an assessment, attempting to apply the *Lennartz* approach to charge output tax on the private use.

One aspect of the company's appeal was to argue that the directors had not applied *Lennartz* but had mistakenly claimed 100%; HMRC were then out of time to assess for the private use proportion which should have been disallowed at the time. The Tribunal was not persuaded that this was correct, and concluded that either the claim for 100% was fraudulent, or else the directors had effectively chosen to apply *Lennartz*. They preferred the second option and confirmed the assessment, with minor adjustments to the amounts (as it was difficult to establish the precise figures for private use and chartering).

The company also claimed that the deemed supply should be zero-rated as a supply of passenger transport and outside the scope to the extent that it took place outside the EU. Applying *Seeling* (Case C-269/00), the Tribunal held that a deemed supply cannot be zero-rated or outside the scope – it can only be taxable.

First Tier Tribunal (TC01014): *Kingfisher Events Ltd (in liquidation)*

5.7 Bad debt relief

5.7.1 No reference yet

The Upper Tribunal heard an appeal and application by HMRC to have questions referred to the CJEU on the compatibility of the UK law on bad debt relief with EU law before 1997. GMAC is claiming over £2m for the period from 1978 to 1997, arguing that the requirements for the customer to be insolvent (up to 1990) and property in the goods to have transferred (up to 1997) were incompatible with EU law, and also the imposition of a time limit for claims in 1997 was unlawful because it did not provide for a transitional period.

The judge identified three separate issues – the "compatibility" issue and "time limit" issues described above, and also a "windfall" issue, under which HMRC alleged that the company would receive an unjustified benefit if its claim was granted. This was summarised "at a high level" by the judge as reliance on both the EU law (to justify the bad debt claim) and the Cars Order (to de-supply the onward sale of a repossessed vehicle) to produce a result that was neither provided for nor envisaged by either the EU law or the UK law.

The judge adjourned the proceedings, stating that there was a real prospect of a resolution of the time limit issue at least without reference to the CJEU:

The first main issue here is whether the prior announcement of the end to the old scheme was sufficient to give effect to the requirements of legal certainty and legitimate expectations. The second main question is whether, once the old scheme had been repealed and assuming that it was done in a way which was not compliant with those requirements, GMAC was barred by lapse of time from relying on its directly enforceable rights following repeal, without an adequate express transitional period, of the mechanism for claiming bad debt relief. We think that the principles of EU law to be applied in answering those questions may well be sufficiently clear as to lead one to expect that a reference is unlikely to be necessary, although the application of those principles in the light of the UK case- law (in particular Fleming) may not be entirely straightforward.

The case should be relisted for the hearing of the substantive appeal.

Upper Tribunal: *HMRC v GMAC UK plc*

5.8 Other input tax problems

5.8.1 More carousel disputes

HMRC used evidence obtained from the Dutch authorities to show that a company was involved in transactions connected with fraud. The First Tier Tribunal held that the evidence was admissible and sufficiently reliable, and was not excluded by legislation on international co-operation between taxing authorities. Partly on the basis of that evidence, the FTT concluded that the company had the means of knowing that its transactions were connected with fraud, and dismissed its appeal against the refusal of input tax repayments.

The taxpayer appealed to the Upper Tribunal, arguing that the judge had been wrong to admit the evidence. The Upper Tribunal considered that admission of the evidence was a case management decision which was well within the FTT's discretionary powers, and dismissed the taxpayer's appeal.

Upper Tribunal: *HMRC v Megantic Services Ltd*

In a separate hearing arising from the same dispute, the trader appealed against the FTT's decision to admit late evidence about transactions involving the First Curacao International Bank. The FTT judge had decided to admit the evidence, holding that the delay in obtaining and analysing the material was not unreasonable in the context of the complex transactions in the case. The Upper Tribunal again upheld this decision, commenting that it should be slow to interfere with case management decisions of a judge who has applied the correct principles and taken into account the relevant factors.

Upper Tribunal: *HMRC v Megantic Services Ltd (no.2)*

The *Brayfal* case represents a rare carousel defeat for the authorities in recent times. The VAT Tribunal decided in 2008 (VTD 20,781) that a trader in a "clean chain" did not have the means of knowledge that the transactions were associated with fraud unless there was a positive finding that the directors knew that the counterparties were fraudulent. All the transactions were genuine, and HMRC had failed to show actual knowledge. HMRC appealed, mainly on the grounds that the reasons for the decision were not adequately explained. The case was remitted by consent to the Tribunal for further consideration; the First Tier Tribunal (TC00410) confirmed its predecessor's decision by a 2-1 majority, the side members outvoting the chairman.

The Upper Tribunal has dismissed HMRC's appeal against this judgment. The *Kittel* and *Mobilx* principles "did not extend to circumstances in which a taxable person should have known that by his purchase it had been more likely than not that his transaction had been connected with fraudulent evasion." It was necessary for HMRC to show that there was no other reasonable explanation, and they had failed to do so here. If anything, the members of the FTT had set the bar higher for Brayfal than the Court of Appeal's judgment in *Mobilx* suggested that they should: they concluded that the company had proved that it had no actual knowledge, whereas the burden should be on HMRC to show that it had the means of knowledge.

The Upper Tribunal stressed that an appeal can only arise on a point of law. For a question of law to arise, the appellant (in this case HMRC) had to:

- identify the finding which was challenged;
- show that it was significant in relation to the conclusion;
- identify the evidence, if any, which had been relevant to that finding; and
- show that that finding, on the basis of the evidence, had been one which the tribunal had not been entitled to make.

It was not permitted to make a selection of evidence coupled with a general assertion that the Tribunal's conclusion had been against the weight of the evidence and had therefore been wrong.

Upper Tribunal: *HMRC v Brayfal Ltd*

On the other hand, the FTT's decision to award the company only 90% of its costs was within the scope of its discretion, and the company's appeal that it should have been awarded all its costs because its case succeeded was rejected by the High Court. The judge commented that costs might be restricted where a party has not been wholly successful, and also where the Tribunal considered that false or exaggerated evidence had been given.

High Court: *Brayfal Ltd v HMRC*

A decision with 743 paragraphs must surely set a record for the Tribunal, even in the context of MTIC fraud. The chairman noted that 70 companies were mentioned in the course of proceedings; she included an index to the decision and a glossary of abbreviations for all the company names. As with many recent appeals, the case concerned refusal of input tax for the periods April and May 2006 (just after the ECJ's decision in *Bond House/Optigen*). Unusually, the appellant was a company with a track record in the computer industry: HMRC acknowledged that it was a genuine company with a genuine business.

The directors and officers of the company tried to play down their knowledge of the risks of MTIC fraud in early 2006. However, the chairman found all three to be unreliable witnesses: cross-examination suggested that they were much more likely to have known very well what risks the company was subject to. At the end of the exhaustive examination of the facts, the Tribunal concluded that they either knew, or else ought to have known, that the company's transactions were connected with fraud. The appeal was dismissed in its entirety.

First Tier Tribunal (TC00886): *Pars Technology Ltd*

Another company was also refused credit in respect of trading in the quarter to May 2006. The Tribunal noted "*the absence of any apparent curiosity about the French company run by a Bulgarian in London which required its goods to be delivered to a freight forwarder in the Netherlands*". There was no reasonable explanation for the company's transactions other than that they were connected with fraud, and the director should have known that. Her appeal was dismissed.

First Tier Tribunal (TC00924): *Eyedial Ltd*

Yet another company was refused credit for £1.27m of input tax arising on 16 purchases and sales of mobile phones in April 2006. The hearing took place just before the Court of Appeal heard the *Mobilx* case: although the hearing could therefore not involve arguments based on that judgment, the Tribunal's decision was based on the principle established by it. The chairman expressed this as "we should ask ourselves whether the Appellant ought to have known that there could be no other reasonable explanation for the transactions than that they were connected to fraud".

The appellant's counsel argued that HMRC should be "put to strict proof" that the transactions were connected to losses of VAT. This involved exhaustive consideration of the evidence. The chairman commented that this appeared to be an attempt to throw up a number of "chinks" of doubt which might obscure the overall picture – while it would be wrong to be influenced by evidence that was wrongly obtained or presented, nevertheless it would also be wrong to be distracted from a clear view of the fair and just result. The chairman concluded that "the circumstances surrounding the Appellant's transactions in this case make it inconceivable that the Appellant did not have actual knowledge that its transactions were connected to fraudulent losses of VAT". The appeal was dismissed.

First Tier Tribunal (TC00971): *Root 89 Ltd*

A similar result arose in a case about contra-trading – the claim was for just over £1m in the quarter to June 2006, on just two mobile phone deals. There is an interesting discussion of the question of whether "actual knowledge of a link to fraud" requires HMRC to prove that the trader acted dishonestly, which would usually require a higher standard of proof. The chairman concluded "the issue of knowledge is determined by objective factors, and does not require proof of dishonesty on the part of the trader allegedly participating in a fraudulent activity". On that basis, the Tribunal was satisfied that the appellant actually knew that the transactions were connected with fraud.

First Tier Tribunal (TC00970): *Maximum Networks Ltd*

A similar case, and similar decision, involved a claim for just under £1m in respect of contra-trading deals in April 2006.

First Tier Tribunal (TC00967): *Abbey (Manchester) Ltd*

A trader had an unusual partial success in a case involving £820,000 of VAT claimed for June and July 2006. The Tribunal was satisfied that the traders were "honest but naïve"; nevertheless, the *Mobilx* judgment requires the traders to ask questions that a reasonable person would ask, and to consider whether the deals offered are too good to be true. The Tribunal held that the traders ought to have known that their transactions were connected to fraud.

On the other hand, HMRC failed to prove that the counterparties to some of the transactions intended fraudulently to evade VAT, and as a result the appeal succeeded to the extent of the VAT on those deals.

First Tier Tribunal (TC00967): *My Secrets Ltd*

Another trader lost an appeal in relation to £260,000 of input tax for July 2006. Once again the Tribunal applied the *Mobilx* decision and considered that the trader ought to have known that fraud was the only credible explanation for the transactions.

First Tier Tribunal (TC00953): *Eurostar Telecom Ltd*

Another trader lost an appeal in relation to £6.6m of input tax for April to July 2006.

First Tier Tribunal (TC00936): *Cell Trading (UK) Ltd*

Another trader lost an appeal in relation to £625,000 of input tax for February 2006. The dealings were so suspicious, and the evidence given by the director so vague and unconvincing, that the Tribunal concluded that the company actually knew of the connection with fraud.

First Tier Tribunal (TC01019): *Euro Quest Trading Ltd*

Yet another company claimed nearly £2m in respect of 13 transactions which took place over the three days 19 to 21 June 2006. The same supplier and customer were involved in each deal. The chairman commented that an unusual feature of the case was that the company had carried out relatively rigorous due diligence procedures. In the end, however, the conclusion was no different from the other cases – indeed, the chairman suggested that the quality of the due diligence convinced the Tribunal that it was merely a smokescreen which the company hoped would fool HMRC into paying its claims. In the context of the rest of the transactions, it appeared most likely that the directors knew that their deals were connected with fraud.

First Tier Tribunal (TC01022): *Mayfair Executive Ltd*

5.8.2 Different input tax problems

A company reclaimed input tax on a number of purchases from three suppliers which HMRC suspected had not taken place. After further investigation, HMRC assessed to disallow the input tax on these grounds. The trader gave explanations which failed to convince the Tribunal in respect of two of the suppliers, and the appeal was dismissed to this extent.

In respect of the other supplier, the Tribunal did not agree that HMRC's evidence showed that the supplies had not taken place. HMRC tried a secondary argument: that they had directed the trader to produce alternative evidence of input tax under reg.29(2) SI 1995/2518, and the trader had failed to do so. This argument was considered in detail, and the chairman concluded that it had no merit. Firstly, the correspondence did not amount to a clear direction under reg.29(2), but was rather a series of attempts to find out more information about the transactions in the course of an enquiry; secondly, it was not open to HMRC to issue such a direction after the event and then disallow the input tax when the trader failed to comply. The input tax in respect of this part of the appeal was deductible.

First Tier Tribunal (TC00887): *Maliha Group Ltd*

A company claimed input tax in relation to transactions with associated companies. HMRC amended its claims for 9 periods to nil. By the time the appeal reached the Tribunal, another 3 periods had been added. The company had partly won an appeal in an earlier hearing in 2006 (VTD 19,756), and it appears that HMRC had returned still convinced that something was not right. In 2009 another Tribunal hearing (*APS-Centriline Ltd and others* TC00117) resulted in the dismissal of a number of appeals. The Tribunal chairman commented that the driving force behind all the businesses (an expert engineer, Mr Lewis) appeared honestly to believe that he was running his businesses in the correct way, but he appeared to regard his way as right whether or not it complied with the Companies Act, HMRC guidelines or any other rules. It was extremely difficult to piece together the facts from the documentary evidence (as in yet another case involving Mr Lewis and his companies, VTD 17,733 in 2002).

The chairman in the current appeal complained that neither side had produced convincing evidence or referred the Tribunal to documents which could show clearly what had happened. On balance, he was minded to disagree with HMRC and find that the company appeared to be carrying on a business; however, there was no evidence that the company had paid for any of the inputs on which it had claimed credit, and it would therefore be denied a deduction by s.26A VATA 1994. Money appeared to go out of its bank account, but to Mr Lewis' personal account rather than to the supplier, and it then came back in again shortly afterwards as an "investment". Mr Lewis did not give a clear explanation which could convince the Tribunal that payment had been made, and the appeals were dismissed.

First Tier Tribunal (TC01021): *Enviroengineering Ltd*

5.8.3 Fuel advisory rates

In view of the substantial increase in the price of fuel since 1 December 2010, HMRC have decided not to wait until 1 June before revising their approved mileage rates. From 1 March 2011 they will be increased further.

The rates from 1 December 2010 (1 June 2010 in brackets) were:

Engine size	Petrol	Diesel	LPG
1400cc or less	13p (12p)	12p (11p)	9p (8p)
1401cc – 2000cc	15p (15p)	12p (11p)	10p (10p)
Over 2000cc	21p (21p)	15p (16p)	15p (14p)

The rates from 1 March 2011 are:

Engine size	Petrol	Diesel	LPG
1400cc or less	14p	13p	10p
1401cc – 2000cc	16p	13p	12p
Over 2000cc	23p	16p	17p

For the month following an announced change (i.e. the month of March – usually the months of June and December) employers may use either the old or the new rate.

5.8.4 Reader's Query

Readers' Queries in *Taxation* contain a problem arising from a trader who paid a builder in cash, possibly for a lower price than might have been charged for a cheque. No VAT invoice was provided, but the adviser has now heard that the builder was investigated by HMRC and had to pay an assessment on underdeclared income. The answers discuss the likelihood of the client being able to claim an input tax deduction for the work, and the wisdom of attempting to do so.

Taxation 31 March 2011

5.8.5 Academies

The Budget included the announcement that, with effect from 1 April 2011, academy schools will be able to recover VAT on their expenditure in the same way that local authorities can in respect of the provision of free education.

The measure will apply to:

- any school that is an existing academy;
- any school currently maintained by the local authority that elects to become an academy;
- any newly formed academy school which is not under local authority control; or
- any independent school that elects to become an academy.

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

6.1.1 Grouping concession

It was announced in the Budget that Finance Bill 2012 will give statutory effect to ESC 3.2.2. This applies to restrict the effect of s.43(2A)ff., which requires a reverse charge where a foreign-established member of a UK VAT group purchases services from a business outside the UK and supplies them intra-group to a UK-established member. The concession allows the value to be capped at the value of services purchased by the overseas group member and recharged to the UK. Without the concession the group would be required to account for VAT on the total value of the supply from the overseas group member to the UK member, including any services sourced in-house. The concession ensures that VAT groups and businesses with overseas branches are treated equally in respect of overseas services bought in from third parties. The Government will commence a technical consultation with stakeholders in May 2011.

Revenue & Customs Brief 16/11

6.2 Other registration rules

6.2.1 Thresholds

The Budget increased the registration and deregistration thresholds by £3,000 each to £73,000 and £71,000 respectively, with effect from 1 April 2011.

SI 2011/897

It was also announced that the threshold will be removed for businesses not established in the UK from 1 August 2012. Presumably that means that any non-established business which makes supplies in the UK must register if the supplies cannot be reverse charged.

6.2.2 Agricultural flat rate scheme

HMRC have published an updated version of the Notice on the Agricultural Flat Rate Scheme which is an alternative to VAT registration for farmers. There is no "what's changed" section. Even though the VAT rate has gone up since the last issue of the document in 2002, the flat rate addition remains 4%.

Notice 700/46

6.2.3 Reader's Query

A Reader's Query in *Taxation* provides a useful case study in the problems of registration. A consultant had not registered for VAT, in spite of having total turnover above the threshold, because some of the supplies had been made to an overseas charity. The consultant believed

that these supplies were outside the scope. However, it was not clear that the recipient was a taxable person, so the place of supply may not have been shifted – in which case the consultant should have registered in the UK in respect not only of those supplies, but also the rest of the turnover.

Taxation 17 March 2011

6.3 Payments and returns

6.3.1 Interest was not a business receipt

Traders using the flat rate scheme (FRS) have to account for FRS VAT on all business income, including exempt receipts. The disadvantage of having to account for tax to HMRC when none was collected from the customer is compensated for in the flat rates, which are supposed to reflect not only the loss of input tax but also the likely proportion of exempt and zero-rated sales which an average trader in a business category would make.

Notice 733 was, until April 2009, not clear about whether HMRC regarded bank interest as exempt business income within the scope of the FRS. Following discussions with two VAT advisers, the FRS policy team amended the guidance in a number of ways and specified that a small company's bank interest should always be regarded as within the scope.

Two companies appealed, arguing that the interest should not be subject to the FRS. They contended that:

- interest on a small company's bank accounts does not constitute consideration for a supply made by the company to the bank – the company is a customer of the bank, not a supplier, and if anything the interest is an inducement of the sort that was considered to be outside the scope of VAT in the *Mirror Group* case about reverse premiums;
- even if it is consideration for a supply, that supply is not made in the course or furtherance of the small company's business, but is rather an investment activity which would be regarded as outside the scope of VAT if undertaken by a sole trader;
- because an unincorporated business can keep its tax reserve in a non-business account, while a company has to retain funds "on balance sheet", treating all interest within a company as subject to the FRS created a fiscal distortion;
- HMRC accepted that interest credited by themselves on early payment of corporation tax was not subject to FRS VAT; this would also create a fiscal distortion in favour of paying the tax early rather than leaving it in the bank account, and there was no logical reason for treating the two types of interest differently.

A number of precedents were cited, including the 1848 House of Lords decision in *Foley v Hill* concerning the relationship between a bank and its customer, and CJEU cases including *Regie-Dauphinoise* (Case C-

306/94) and *EDM* (Case C-77/01) on what constitutes a business of receiving financial income.

The judge (Sir Stephen Oliver) was satisfied, on the authority of *Foley v Hill*, that the customer makes an exempt supply of credit to the bank within Item 2 Group 5 VATA 1994 and the interest received is consideration for that.

The judge also commented in his decision that he believed that both the customer and the bank make supplies which are exempt within Item 8 Group 5: "the operation of any current, deposit or savings account". The appellants had argued that this is clearly what the bank does for the customer in return for bank charges, and HMRC dropped the contention that the customer "operates the account in return for interest" during the hearing – but the judge's view was that "the customer's action of leaving moneys standing to its credit in return for payments of interest from the bank amounts to the customer … making a supply of services to the bank." There is then effectively a barter transaction.

The judge agreed with the appellants that there is a line: at one end, earning interest will be a core business activity (for a bank or a large company with a treasury function), and at the other it will not be a business activity at all (for a private individual). It is therefore necessary to place a particular case on that line. He drew a distinction between 'core business activities', which would certainly be within the scope of VAT (*EDM*); 'satellite activities', which would be within the scope of VAT if they were a direct, permanent and necessary extension of the core business (*Regie*); and satellite activities that were not such an extension, as in the two cases before him. The funds were withdrawn from the core business (in one case as a tax reserve and in the other to strengthen the balance sheet), and holding money formed part of the structure within which it was carried on rather than a business activity in its own right.

The decision does not directly refer to the fiscal distortion arguments, presumably because they were not directly relevant to the result.

It is not yet known whether HMRC will appeal. In theory, this decision is significant to most FRS traders; but very few will be applying for a repayment from HMRC, because very few have accounted for FRS VAT on the interest up to now. It also confirms that the approach of most traders – omitting exempt interest income from Box 6 on the VAT return – is correct, but that does not in any case affect the recovery of input tax because of the exclusion of "incidental financial income" from the partial exemption recovery percentage.

First Tier Tribunal (TC00919): *FanField Ltd; Thexton Training Ltd*

The case is examined from the point of view of the director of FanField, one of the appellant companies, in an article in *Taxation*. A second article by Mike Thexton, who represented Thexton Training Ltd, analyses the arguments and the decision in more detail.

These follow on from three earlier articles by Mike Thexton about the process of starting and continuing an appeal up to the hearing:

- *I want an argument* – the beginning of the appeals procedure, explaining how difficult it can be to institute a technical argument with HMRC (May 2009);

- *I want an argument – Part 2* – the difficulties of advancing such a technical argument to a resolution (March 2010);
- *I had an argument* – an account of the experience of presenting a case in the First-Tier Tribunal (December 2010).

Taxation, 27 January 2011; 3 February 2011

HMRC have confirmed that they do not intend to appeal this decision. However, it is not yet clear whether they will amend Notice 733 to say that interest is not always consideration for an exempt business supply.

6.3.2 More flat rate disputes

The Tribunal has confirmed that a VAT-registered sole trader who also has income from residential lettings is treated as a single taxable entity. If he is registered under the FRS, he has to account for FRS VAT on the lettings income, because it is exempt business income rather than outside the scope.

The appellant's protest that it was an "absurd situation" that he would have to account for VAT on exempt income was rejected, as was his view that a charge to interest represented a "penalty". He claimed that Notice 733 did not make it clear that rental income would be charged to FRS VAT if he had two "separate" sole traderships, but the Tribunal agreed with HMRC that it is the person (natural or legal) and not the business that is relevant for VAT. His appeal against the assessment was dismissed.

First Tier Tribunal (TC00958): *ICAN Finance*

A company applied to register retrospectively for the FRS. The director claimed that he had not been advised of its existence by visiting officers and that he would suffer financial hardship if he was not allowed backdated authorisation. The Tribunal held that there was no obligation on HMRC to draw the scheme to a trader's attention, and the financial effect was not a consideration in respect of periods for which returns had already been filed. The appeal was dismissed.

First Tier Tribunal (TC00940): *Murdoch UK Ltd*

Readers' Queries in *Taxation* contain a problem arising over confusion about the date from which a client should apply the FRS. The client applied to use the scheme with effect from 1 October 2010, but the response shows an effective date of 1 October 2009. The respondents were not unanimous in considering retrospective application of the scheme appropriate, given that it would reduce the client's VAT liability.

Taxation 13 January 2011

HMRC have issued a new edition of Notice 733 *Flat Rate Scheme for Small Businesses*. The notice has been rewritten to make the rules of the scheme clearer. The only changes relate to clarification of the rules on the 1% discount for newly registered businesses, and how to deal with the purchase of reverse charge services.

Notice 733

6.3.3 Payments on account

The payments on accounts rules have been amended by Statutory Instrument to increase the in-year thresholds from £1,600,000 to £1,800,000 and from £2,000,000 to £2,300,000 with effect from 1 June 2011 and to increase the annual threshold from £2,000,000 to £2,300,000 with effect from 1 December 2011. This has been done because of the increase in the standard rate to 20%.

SI 2011/21

6.3.4 Payments by credit card

The fee for online credit card payments to HMRC increased from 1.25% to 1.4% with effect from 1 April 2011.

SI 2011/711

6.3.5 Online guidance

HMRC have updated their online manual on debt management and banking to give further details about requests for "time to pay".

www.hmrc.gov.uk/manuals/dmbmanual/DMBM800520.htm

As of April 2011 enforceable VAT debts will be managed on the HMRC Integrated Debt Management System (IDMS) which has up to now been used for direct tax debts. This is explained in further online guidance.

www.hmrc.gov.uk/manuals/dmbmanual/DMBM950010.htm

6.3.6 Online returns

HMRC have announced that some businesses are still filing VAT returns on paper, even though they are required to file online (i.e. were registered before 1 April 2010 or have a turnover above £100,000). From April 2011, there will be a penalty for continuing to file on paper when an online return is required:

Annual VAT exclusive turnover	Penalty
£22,800,001 and above	£400
£5,600,001 to £22,800,000	£300
£100,001 to £5,600,000	£200
£100,000 and under	£100

Working Together 21

It was announced in the Budget that all remaining traders will be required to file online from 1 April 2012.

6.4 Repayment claims

6.4.1 References on interest

The questions referred by the High Court in Littlewoods plc have been published and given its CJEU reference number:

Where a taxable person has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation, does the remedy provided by a Member State accord with EU law if that remedy provides only for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as section 78 of the Value Added Tax Act 1994?

If not, does EU law require that the remedy provided by a Member State should provide for (a) reimbursement of the principal sums overpaid, and (b) payment of compound interest as the measure of the use value of the sums overpaid in the hands of the Member State and/or the loss of the use value of the money in the hands of the taxpayer?

If the answer to both questions 1 and 2 is in the negative, what must the remedy that EU law requires the Member State to provide include, in addition to reimbursement of the principal sums overpaid, in respect of the use value of the overpayment and/or interest?

If the answer to question 1 is in the negative, does the EU law principle of effectiveness require a member state to disapply national law restrictions (such as sections 78 and 80 of the Value Added Tax Act 1994) on any domestic claims or remedies that would otherwise be available to the taxable person to vindicate the EU law right established in the Court of Justice's answer to the first 3 questions, or is it sufficient that the national court disapplies such restrictions only in respect of one of these domestic claims or remedies? What other principles should guide the national court in giving effect to this EU law right so as to accord with the EU law principle of effectiveness?

CJEU (Case C-591/10): *Littlewoods Retail Ltd and others v HMRC*

Following the High Court's decision to refer the *Littlewoods* case to the CJEU, another reference is being made by the Tribunal.

Grattan is another mail order company. It paid commissions to selling agents which should, since 1978, have been treated as reducing the taxable value of sales of goods to those agents. Grattan originally accounted for output tax on the full amount and later received a repayment with simple interest. Grattan appealed in respect of two disputes with HMRC:

- whether it was also entitled to a repayment for the commissions paid before the 6th Directive came into force, i.e. those paid between 1973 and 1977;
- whether it was entitled to compound interest on all its repayments.

The Tribunal examined the arguments based on EU and UK law and precedent in detail, and decided to refer questions on both issues to the CJEU. It would not be enough to wait for the decision in *Littlewoods*, because the issues were different; it would also not be appropriate to wait

until the *Littlewoods* decision before framing the questions, as HMRC argued.

The judge decided to hear further representations on the precise form of the reference.

First Tier Tribunal (TC00908): *Grattan plc*

6.4.2 Exemption and repayment

A charitable theatre trust supplied tickets which were exempt under the cultural services exemption. It had accounted for output tax on these tickets before a change in the understanding of the law following the *London Zoo* decision of the European Court. In 2007 it made a "Fleming claim" for overpaid output tax between 1990 and 1996.

HMRC argued that the company had reclaimed input tax on theatre renovations in 2000 and 2001. If the supplies had been correctly classified as exempt, this input tax would not have been repaid; the overpaid output tax should be set against the overclaimed input tax. The Tribunal accepted this contention and dismissed the appeal. The taxpayer had argued that s.81(3A) VATA 1994 did not allow HMRC to offset amounts from different periods (in this case a 1990 – 1996 overpayment against an excessive refund from 2000 – 2001); if it did, it was a draconian provision that allowed HMRC to extend time limits for assessment unreasonably. The Tribunal agreed with HMRC's view that the rule was only capable of "defensive" use by HMRC and was reasonable, proportional and as intended by Parliament.

HMRC also argued that the claim was "abusive", but the Tribunal did not agree. It failed on the technical ground rather than on the anti-avoidance ground. Costs were nevertheless awarded on the pre-April 2009 basis to HMRC, who were left to decide whether they would not enforce the award because the Tribunal had decided that the "abuse" argument did not succeed.

First Tier Tribunal (TC00993): *Birmingham Hippodrome Theatre Trust Ltd*

6.4.3 Timing of repayment claim

A garage submitted returns for June and September 2005 in November 2009, after paying centrally issued assessments in respect of those periods. The actual liabilities declared for these periods were lower (while returns for earlier periods had still not been submitted at the time of the hearing). The Tribunal agreed with HMRC that the trader's attempts to get around the three-year cap were ineffective. The trader had been in business since 1959 and registered for VAT since 1973; the loss of a bookkeeper should not have led to such a complete and long-lasting neglect of responsibilities that had previously been complied with. The appeal against a refusal of repayment was dismissed.

First Tier Tribunal (TC01003): *HC Motors Ltd*

In February 2006, a company was assessed in respect of allegedly underpaid output tax on recharges for MOT tests. The company wrote stating that it wished to appeal; HMRC appear to have taken that as a request for a reconsideration, because they wrote again in June 2006

explaining the decision and confirming it, and including information about rights of appeal. The company did not exercise its rights or protest further, but in March 2009 asked for a repayment after becoming aware of the Tribunal's decision in *Duncan* (VTD 20,100).

The Tribunal pointed out that the 2009 application was made more than three years after the end of the return period in which the assessment was raised (the quarter to February 2006, so it was only just outside the limit). Various complaints about HMRC's handling of the matter (which had been referred by the taxpayer to his MP) were a matter for the Adjudicator, not the Tribunal: the appeal had to be dismissed, as the Tribunal had no power to change the statutory time limits.

First Tier Tribunal (TC00883): *Mobile Motoring Maintenance Ltd*

6.5 Timing issues

6.5.1 Updated Notice

HMRC have issued a new edition of Notice 731 *Cash Accounting*. The notice has been rewritten to make the rules of the scheme clearer. The only changes of substance are new accounting rules for cheques, credit card payments and payments collected by third parties.

Notice 731

6.6 Records

6.6.1 Guidance for traders

HMRC have issued a booklet entitled "A general guide to keeping records for your tax return". Although this is mainly aimed at self-assessment income tax returns, it gives examples which are relevant to traders and therefore to VAT.

RK BK1; www.hmrc.gov.uk/record-keeping/index.htm

The leaflet gives a cross-reference to finding more information which is specific to VAT, as well as the VAT helpline number. It also notes the records which a VAT-registered business must keep by law (VAT account, VAT sales and purchase invoices, and import and export documentation).

www.hmrc.gov.uk/vat/managing/returns-accounts/accounts.htm

6.7 Assessments

6.7.1 Decisions out of order

The Upper Tribunal has released a decision, referring a case back to the First-Tier Tribunal, after the FTT has released its own decision after the second hearing. The referral back was for the FTT to exercise a full appellate jurisdiction over the amounts of assessments in respect of sales by a company which operated two wine bars and six delicatessens and it should therefore have paid more attention to the amounts of the assessments rather than considering their validity only in principle. The FTT dismissed the appeal for a second time (TC00864).

Upper Tribunal: *Mithras (Wine Bars) Ltd v HMRC*

6.7.2 HMRC approach upheld

The Upper Tribunal has upheld the First-Tier's decision (TC00244) in a case concerning a restaurant which included disputes about the significance of the officers' meals. HMRC could not produce the receipts or expense claims to support the meals that they claimed their officers had eaten. The trader's representative regarded this as "sinister". He also raised a number of other arguments in defence in the FTT, and introduced a professional statistician as an expert witness to attack HMRC's use of just two dates as the basis for their extrapolation. However, none of the restaurant's management or staff gave evidence.

The FTT examined the various arguments and dismissed them all. As the burden of proof was on the appellant to show that the assessment was not to the best of the officers' judgement, an absence of any evidence from the staff – once there was an indication of suppression – made it difficult to support any other figure than that which HMRC had produced. The basis of that figure was logical and had not been directly undermined by alternative suggestions.

The trader appealed to the Upper Tribunal, arguing that the FTT had erred in law by ignoring the statistical expert's evidence. The Upper Tribunal concluded that the FTT had not ignored it: everything had been taken into account, and the FTT had preferred the evidence of the HMRC officer to the evidence of the statistician. The FTT had applied the proper understanding of "best judgement" in deciding between two competing views of how to estimate the taxpayer's true turnover. The appeal was dismissed again.

Upper Tribunal: *Queenspice Ltd v HMRC*

6.7.3 Online guidance

HMRC have updated their online manual on assessing procedures to clarify the legislation in relation to time limits for assessing long registration periods.

www.hmrc.gov.uk/manuals/vaecmanual/vaec1160.htm

6.8 Penalties and appeals

6.8.1 Withdrawing an appeal

A company appealed against an assessment, then withdrew that claim by e-mail on 7 September 2009. On 24 September it sent a further message to the Tribunals Centre stating that it wished to proceed with the appeals. The First-Tier Tribunal ruled that this was an application to reinstate the appeals and was not valid. The Upper Tribunal has now allowed an appeal against that decision. Sir Stephen Oliver QC held that the e-mail of 7 September was not a 'written notice of withdrawal', as required by Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273), rule 17(1).

Sir Stephen commented that "*the scheme of rule 17(1) and (2) is to give an appellant the unilateral right to withdraw the appeal without permission of the Tribunal and without the intervention of HMRC. The formalities for withdrawal are required to enable the Tribunal and anyone with an interest in the outcome of the proceedings to satisfy themselves that a notice describing itself as a 'notice of withdrawal' means what it says. Rule 17(3) and (4) are there to protect the appellant who for some reason has, deliberately and in good faith, withdrawn his appeal but, for an acceptable reason (e.g. because he has insufficient funds to continue the fight or has come to see the implications of withdrawal), has applied to reinstate the appeal within the 28-day cooling-off period. Rule 17 is not a weapon to enable the Tribunal to cull unmeritorious appeals of non-cooperative traders.*"

Upper Tribunal: *St Anne's Distributors Ltd v HMRC*

6.8.2 Review results

It was reported in the press that "over half of VAT penalties are overturned on appeal". It appears that this relates to a report from HMRC stating that requests for a statutory review lead to the cancellation of penalties in about half the cases. This suggests that the system is working in taxpayers' favour rather than against them; but it also suggests that the front-line officers are too ready to issue penalties in circumstances where a second opinion shows that they are not appropriate.

Financial Times 24 January 2011

6.8.3 Surcharge appeals

A company had incurred a default surcharge liability notice following a misunderstanding about the required date for submission, then had to pay a 2% surcharge after its holding company declared a delay on all third party payments while a financial reorganisation took place.

Following the General Election in May 2010, the directors considered that the company would be very badly affected by public expenditure cuts, and many of the 105 staff were put on notice that they might face redundancy. The chief accountant, who was responsible for submitting the VAT return and authorising the payment, was the only senior manager on the potential redundancy list. He was worried about his job and also having to deal with redundancy issues in his capacity as the finance officer. The VAT return and payment for the quarter to April 2010 were received by HMRC

2 days late on 9 June: the finance officer claimed that he had been distracted by the company's difficulties and his own worries about his job.

HMRC argued that the previous defaults should have alerted the company to the need to comply on time. The company could not plead "reliance on the finance officer" as a reasonable excuse. Nevertheless, the Tribunal accepted that this was an exceptional circumstance in which the trader did have an excuse, and the appeal was allowed.

The Tribunal declined to give an opinion on a secondary argument that the penalty (over £20,000) was "disproportional" for 2 days' delay. The chairman commented that the *Enersys* case was under appeal, and any ruling on this issue should await that decision. Since then, HMRC have dropped their appeal in *Enersys*, so the matter has not been authoritatively considered.

First Tier Tribunal (TC00883): *The Team Brand Communication Consultants Ltd*

A company was late submitting the September 2009 VAT return and paying the liability after the finance director was summarily dismissed for fraud. The replacement director was appointed on 9 November and arranged for a payment on 27 November, but the return was not submitted until 22 January 2010 after investigation and correction of the records.

The Tribunal agreed with HMRC that, after dismissing the only person in the company who knew how to submit a VAT return, the directors should have at least contacted the VAT helpline or taken professional advice. Perhaps they were unfortunate that the dismissal took place at exactly the wrong moment – a week before the return was due to be filed. If it had happened earlier in the quarter, the replacement might have had time to deal with the problem.

First Tier Tribunal (TC00904): *The Phoenix Safe Company Ltd*

Another company claimed that its surcharge was disproportionate, as well as arguing that it had a reasonable excuse on account of difficulties with a BACS transfer that had been reported to HMRC at the time. HMRC had no record of the conversation or of any problems with transfers, and the Tribunal did not find that the evidence was sufficient to back up a reasonable excuse. In this case, the Tribunal was also willing to give a ruling on proportionality: as the surcharge was at 10% for the fourth default, and only amount to £577, it did not appear disproportionate.

First Tier Tribunal (TC00907): *1st Glass and Mirror Company Ltd*

A company was late paying its VAT for six successive periods from 01/09 (help letter issued) through 04/09 (SLN issued) to 07/09 and 10/09 (surcharges were below £400) and 01/10 and 04/10, when surcharges were levied and appealed against. The main evidence was a transcript of a telephone call in which the employee responsible for the VAT return (who had since left the company) had queried the SLN after 04/09. She had been told that the company "had until the 7th of the month to make the return and payment". It was clear from the evidence that the employee had followed this advice to the letter, and had told her successor to do the same. As she had asked for specific advice and it had been misleading (because the helpline had not told her that she needed to allow time for the BACS transfer to clear), the Tribunal ruled that the trader had a

reasonable excuse. If the appeal had been based only on the assertion that the employee had been relied on to file the returns on time, that would have been excluded by s.71 VATA 1994.

First Tier Tribunal (TC01002): *Dental IT Ltd*

A company appeared to compound its own problems by choosing to prepare VAT returns monthly, not operating cash accounting and paying by cheque rather than electronically. Each month for several months it was a few days late; if it had filed and paid online it would have been within the 7 day extension. Its appeal against the eventual surcharges was effectively based on a plea for sympathy for a small business with tight cash flow, and this could not succeed.

First Tier Tribunal (TC00985): *Bridges Cleaning and Hygiene Services Ltd*

A company claimed a reasonable excuse for late submission of returns because it did not have a letterbox and had therefore not received the forms (or, presumably, the surcharge notices). The Tribunal dismissed the appeal, holding that a business ought to have put in place a means of receiving its post; it was also not necessary to receive a blank form in order to calculate or settle the outstanding VAT liability.

First Tier Tribunal (TC01027): *Rocco Mana Ltd (t/a Spearmint Rhino Lounge)*

Meanwhile, HMRC have updated their online manual in respect of changes to default surcharge. The changes include reference to time to pay arrangements agreed with the Business Payment Support Service, and recording, inputting and deleting defaults.

www.hmrc.gov.uk/manuals/vcpmanual/vcp10552.htm

6.8.4 Error penalties

A partnership exchanged contracts for the purchase of a warehouse in May 2009, and opted to tax. Completion was in July 2009, but the partnership claimed the input tax on the purchase early, in its return for the period to June 2009. This was based on a misunderstanding of the tax point for a purchase of land. The return was picked up for verification in August 2009; HMRC later issued a penalty which was mitigated to 15% on account of a "prompted disclosure" under FA 2007 Sch.24. The partnership appealed, arguing that the penalty was too harsh.

The judge considered that the penalty regime required consideration of special circumstances in order to avoid the imposition of penalties that were disproportionate to the risk of tax loss and to the individual taxpayer's culpability. Although HMRC had granted the maximum mitigation allowed by the law for a prompted disclosure, the judge considered that the one-off nature of the transaction, and its unusually large value together with no real likelihood of tax loss constituted special circumstances for reducing the penalty. He further reduced it to 7.5%.

The decision includes a useful review of the rules for reducing a penalty and the taxpayer's rights of appeal. This review was mainly required because the taxpayer's grounds of appeal did not specify which appeal right was being exercised under para.15 Sch.24, and did not consider the "special circumstances" defence in para.17. The judge disagreed with

HMRC's interpretation of the rules and set out in some detail his view of how they should be applied.

First Tier Tribunal (TC00983): *GD & Mrs D Lewis (t/a Russell Francis Interiors)*

6.8.5 Late registration (VATA 1994 s.67)

A plumber was issued with a notice of compulsory registration backdated by over 30 months following an enquiry by HMRC. A penalty of 15% was levied, reduced by 25% for cooperation. A further reduction of 25% was agreed after the trader offered "very sad personal reasons for the non-registration", but HMRC refused to mitigate the penalty any further.

The Tribunal agreed that HMRC's decision was reasonable. The plumber's claim that failure to register had been the fault of his accountant was dismissed: it was the trader's primary responsibility to be aware of the threshold and the rules about exceeding it.

First Tier Tribunal (TC00899): *Brian McAdam Plumbing and Heating*

HMRC have issued a new version of Notice 700/41 which explains the operation of the s.67 penalty. This will continue to apply where the failure to register arose before 1 April 2010. The notice has been restructured to improve readability, but the technical content has not changed significantly since April 1995.

Notice 700/41

6.8.6 Costs

Two shooting syndicates were run as not-for-profit associations for the benefit of members and friends. HMRC ruled that they ought to be VAT registered and could not benefit from the exemption for sporting supplies. The dispute dragged on from 2006 to the making of an appeal to the VAT Tribunal in November 2008. After HMRC had applied for two further extensions of time to produce a statement of case, in February 2009 they accepted that the sporting exemption could apply and the case would be dropped. The syndicates applied for an award of costs on an indemnity basis.

The judge examined the precedents on such awards (not just in VAT cases) and the background to the present dispute. He concluded that there was nothing in this case to put it in the exceptional category of situations in which such an award was appropriate. In his judgment, there was nothing in HMRC's conduct that was sufficiently unreasonable to be "punished" in this way. Costs were awarded on the standard basis under the "old" Tribunals Rules.

First Tier Tribunal (TC00942): *Bowcombe and Upcerne Shoots*

6.8.7 Hardship

A company applied for its appeal to be heard without paying the VAT on the grounds of hardship. The First Tier Tribunal rejected the application, and the company applied for judicial review of this decision (as there is no appeal on a hardship decision to the Upper Tribunal – s.84(3C) VATA 1994).

The judge dismissed the application. There was nothing unlawful or unreasonable about the exclusion of an appeal to the Upper Tribunal on hardship. Member states had discretion to establish the procedures for appealing where tax was said to have been levied wrongly. European rights would be engaged only if the rules for a domestic matter were more favourable than for a European matter, or if a European right could not effectively be enforced because the rules made it excessively difficult to do so. That was not the case here. The rights of the taxpayer were adequately protected by the review of the hardship application by an independent Tribunal; there was also no difficulty in disputing the tax assessment itself on a point of fact or law, if the tax was deposited first. The denial of a right of appeal to the Upper Tribunal on a hardship application was not ultra vires.

High Court: *R (on the application of ToTel Ltd) v First Tier Tax Tribunal*

6.8.8 Online guidance

HMRC have updated their online compliance handbook manual to include new guidance on penalties for inaccuracies and VAT and excise wrongdoing. There is new detail on the procedure which must be followed by an officer to approve a penalty decision.

www.hmrc.gov.uk/manuals/chmanual/CH81011.htm;
www.hmrc.gov.uk/manuals/chmanual/CH400000.htm

HMRC have also updated their FAQs on inaccuracy, failure to notify and wrongdoing penalties. The changes relate to the extension of the new penalty system to Class 1A NIC from 6 April 2011, so the material relating to VAT has not changed.

www.hmrc.gov.uk

6.8.9 Article

Taxation, 17 February 2011, contains an article about the new rules for penalties. It considers the evidence arising from the early application of the unified error penalty regime – mainly arising in VAT returns, which would be submitted and checked before many direct tax returns subject to the new rules – and considers how the new system will operate in relation to direct tax returns in future.

Taxation 17 February 2011

6.8.10 Alternative dispute resolution pilot

HMRC have announced that they will run a pilot scheme to attempt to resolve disputes by alternative means. It will run between February and July 2011, and will involve the selection of suitable cases which have gone beyond the formal HMRC decision and into the review process. The pilot will concentrate on direct tax and VAT disputes involving small and medium enterprises. The HMRC press release states:

Having identified potential cases we propose to divide these between the following groups:

- *Cases involving an HMRC facilitator from the Appeals and Reviews Unit;*
- *Cases involving an HMRC facilitator from a Local Compliance SME team.*

These facilitated groups will be invited to adopt an open and collaborative approach with taxpayers/traders and their advisors. In support of this work the facilitation teams will undergo appropriate training.

Review Rights

We will ensure that no taxpayer/trader rights under the statutory review process are in any way prejudiced or limited by their involvement in this pilot. We will do this by ensuring that wherever these discussions do not resolve a dispute the papers will be returned to the originating review team. The review team will then complete their review before upholding, varying or cancelling the relevant appealable decisions in the normal way.

HMRC Press Release 7 February 2011

6.9 Other administration issues

6.9.1 Implementation of powers

HMRC have updated their summary of the legislation arising from their review of powers, deterrents and safeguards (penalties, compliance checks, time limits and interest) and the date these measures came or will come into effect. The measures for error penalties and compliance checks have applied to VAT for some time; the main outstanding item is the replacement of default surcharge by a new unified penalty regime for late returns and payments. The implementation date for this reform has still not been set.

www.hmrc.gov.uk/about/powers-appeal.htm

Meanwhile, HMRC issued a discussion document to ask for comments about the possibility of simplifying and unifying a range of regulatory penalties. These are the penalties for failure to meet some basic obligation, for example filing an EC Sales List. Comments were invited by 11 March. The discussion document suggested that this latest review is at a preliminary stage and the first comments will help HMRC decide on priorities in taking this project forward.

HMRC Press Release 31 January 2011

6.9.2 Avoidance spotlights

HMRC have updated the "spotlights" on their website. They give the following general warning about tax avoidance arrangements:

Tax planning to be wary of

- *It sounds too good to be true.*
- *Artificial or contrived arrangements are involved.*
- *It seems very complex given what you want to do.*
- *There are guaranteed returns with apparently no risk.*
- *There are secrecy or confidentiality agreements.*
- *Upfront fees are payable or the arrangement is on a no win/no fee basis.*
- *The scheme is said to be vetted by a top lawyer or accountant but no details of their opinion are provided.*
- *The scheme is said to be approved by HMRC (it does not follow that this is true).*
- *Taxation of income is delayed or tax deductions accelerated.*
- *Tax benefits are disproportionate to the commercial activity.*
- *Offshore companies or trusts are involved for no sound commercial reason.*
- *A tax haven or banking secrecy country is involved without any sound commercial reason.*
- *Tax exempt entities, such as pension funds, are involved inappropriately.*
- *It contains exit arrangements designed to sidestep tax consequences.*
- *It involves money going in a circle back to where it started.*
- *Low risk loans to be paid off by future earnings are involved.*
- *The scheme promoter lends the funding needed.*
- *There is a requirement to take out insurance against the failure of the tax planning to deliver the tax benefits.*

They say that they have been robustly pursuing suppliers of telecommunications, internet services and broadcasting services who claim to have relocated their operations to another EU member state in order to take advantage of lower rates on B2C supplies. This policy was explained in RCB 58/2009. They will examine carefully the way in which the business has "relocated" to see if it is still effectively making supplies from the UK.

They also comment on supply splitting, which they describe as dividing what would normally be a single supply into differently rated elements which are then supplied by different business entities. They express the view that a supply should be taxed as a single transaction whenever:

- elements of what would constitute a single supply if made by the same person are supplied by different suppliers;
- the customer has no real opportunity to decline to take an element of the package either because of the contractual terms or pricing structure.

However, they do not explain how they might enforce that view. They comment on the specific rule on printed matter that will be included in FB 2011, but they have no more general weapon to use against such schemes.

They add the comment that "HMRC will continue to take action to counter instances of supply splitting in other areas where 'packages' of goods and services are supplied and the constituent elements are subject to different rates of VAT and where there is evidence of value shifting between the elements to ascribe a higher value to those which are subject to the lower rates of VAT at the expense of those taxed more highly."

Lastly, they say that taxpayers have been giving in and paying the tax in disputes about artificial leasing (described in their list of 10 spotlights at number 2), as well as "*abusive off-shoring of financial structures leading to consumption of services by EU customers*" and "*VAT avoidance on promotional vouchers issued with sales of services or goods*". No further details are given of these victories for HMRC.

http://www.hmrc.gov.uk/avoidance/spotlights.htm

Meanwhile, a list of experts to help HMRC consider the practicality of a General Anti-Avoidance Rule (GAAR) has been announced. The chairman of the working party is Graham Aaronson QC, and he will be assisted by:

- John Bartlett (Group Head of Tax, BP Plc)
- Judith Freedman (Professor of Taxation Law and Director of Legal Research, Centre for Business Taxation, Oxford University)
- Sir Launcelot Henderson (Judge of the Chancery Division of the High Court of Justice)
- Lord Hoffmann (formerly Lord of Appeal, Judge of the Court of Final Appeal of Hong Kong)
- Howard Nowlan (formerly Tax Partner at Slaughter and May, part time Judge of the First Tier Tax Tribunal)
- John Tiley CBE (Emeritus Professor of the Law of Taxation, Director of the Centre for Tax Law, Cambridge University)

Topics which the committee will look at include;

- consideration of existing experience with GAARs and other anti avoidance principles in other jurisdictions;
- what a UK GAAR could usefully achieve; and
- what the basic approach of a GAAR should be.

HM Treasury Press Release 04/11

6.9.3 Extra-Statutory Concessions

HMRC have published a revised (January 2011) version of Notice 48. It gives details of all HMRC ESCs in force at the time of publication and has been rewritten to include details of those that have been granted, or become obsolete, since July 2009. ESCs 3.8, 3.29, 3.37, 4.1, 4.4, 6.1 and 7.1 are now obsolete.

Notice 48

6.9.4 Professional conduct

The CIOT, ATT and other bodies have updated their guidance on professional conduct in relation to core areas of tax work. Chapter 2 sets out the fundamental principles which govern the conduct of members, namely:

- Integrity;
- Objectivity;
- Professional competence and due care;
- Confidentiality; and
- Professional behaviour.

Chapters 3 – 9 apply these principles to tax specific situations which all relate to the tripartite relationship between a member, client and HMRC:

- Chapter 3: Tax returns.
- Chapter 4: Access to data by HMRC and other authorities.
- Chapter 5: Irregularities (including errors).
- Chapter 6: HMRC rulings and clearances.
- Chapter 7: Tax avoidance.
- Chapter 8: Disclosure of tax avoidance schemes.
- Chapter 9: Investigation of tax practitioners by HMRC.

CIOT Press Release 6 January 2011

6.9.5 Tax simplification

The Office of Tax Simplification has issued a report which suggests a number of measures to make tax easier for small businesses. These mainly concentrate on income tax and NIC, but one suggestion is the development of a simpler VAT scheme for small businesses which trade internationally.

HM Treasury Release 10 March 2011

6.9.6 Clearance application

Peter Penneycard explains in *Taxation*, 10 March 2011, that a "clearance application" that was wrongly headed was not properly dealt with by HMRC, even though it reached the right person. Clearance was eventually obtained after an unnecessary delay.

Taxation 10 March 2011

6.9.7 Restraint orders and confiscation orders

During a complex jury trial, HMRC prosecutors applied to the judge for a restraint order against the assets of companies which were alleged to be part of an organised excise and VAT evasion operation. The judge granted the orders, but the Court of Appeal later quashed them, holding that there was insufficient evidence before the judge to justify the conclusions he was required to draw under the Proceeds of Crime Act in order to issue the orders.

In the light of fresh evidence on which HMRC wished to rely, the Court ordered a rehearing, and suggested that such applications should not be heard in future by the judge sitting in the course of a complex jury trial.

Court of Appeal: *R v Windsor and others*

By contrast, HMRC announced that a former solicitor, who was convicted and jailed in 2003 for his part in money laundering the proceeds of a MTIC fraud, has been ordered to serve another 27 months in jail for failing to pay £410,000 which was the subject of a confiscation order.

HMRC Press Release 3 February 2011

Another convicted fraudster was sentenced to a further 8 years in jail for failing to meet a £26m confiscation order for his part in a £20m carousel fraud. He was due to be released early from a 12.5 year term in April, but will now serve further time because he has only repaid £4m.

HMRC Press Release 22 March 2011

The rules on confiscation orders were considered in some detail by the Court of Appeal in a case in which the defendant accepted that he had been involved in a fraud, but disputed the amount by which he had benefited. The Court dismissed his arguments, holding that the lower court had been correct to impose a confiscation order amounting to the total amount of the fraud he had been involved in – even if, as he claimed, most of that money had been paid to foreign businesses with which he had no known connection.

Court of Appeal: *R v Takkar*

6.9.8 Defaulters

HMRC have given more detail about their "managing deliberate defaulters" programme, under which known tax evaders will be placed under close supervision. The level and term of monitoring is likely to last at least two years in every case, with more serious offences warranting supervision for up to five years. Ministers and officials appear to have nicknamed the system "tax cheat check-ups".

http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=418199&SubjectId=2; www.hmrc.gov.uk/about/mdd-q-and-a.pdf

A new factsheet explains:

- what is a deliberate defaulter
- what we do when we find a deliberate defaulter
- why we monitor deliberate defaulters
- who we will monitor

- what we will monitor
- how a defaulter will know if we are monitoring them
- what happens if the monitoring requirements are not met, or we find something wrong
- how long the monitoring will last
- your principal rights.

CC/FS14

There are also questions and answers on the HMRC website.

www.hmrc.gov.uk/about/mdd-q-and-a.pdf

Specifically in relation to VAT, action for deliberate defaulters may include:

- require submission of quarterly or monthly VAT Returns;
- require the same accounting periods for VAT, Income Tax and Corporation Tax;
- withdraw the use of certain schemes such as cash accounting, annual accounting, flat rate scheme and retail schemes if we think it is necessary for the protection of the revenue.

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6.9.9 Prosecutions

Five members of a carousel gang have been jailed for a total of 37.5 years for their part in setting up and operating companies which were involved in a £140m missing trader fraud before 2005. Each set up a company which traded for a maximum of five weeks before ceasing without any assets to pay the VAT liability, which ranged from £26.5m to £39.1m. According to the report, each member was only paid up to £30,000 for their part in the fraud, while the substantial proceeds were laundered through foreign associated businesses.

HMRC Press Release 22 March 2011

6.9.10 Online manual

HMRC have added their *VAT Fraud* manual to their website. It includes guidance to officers on what VAT fraud is, what interventions to use if fraud is suspected, an explanation of the *Kittel* principle, and what to do if fraud is discovered.

www.hmrc.gov.uk/manuals/vatfmanual/VATF10000.htm

6.9.11 Adjudicator's report

The press reported that the number of complaints against HMRC that the Adjudicator has upheld jumped from 108 in 2008 to 229 in 2009 and 446 in 2010. Some of the high-profile problems suffered by HMRC in relation to PAYE codings are likely to explain some of the increase, but there have also been complaints about delays in VAT registration.

Financial Times 28 February 2011

6.9.12 Telephone annoyance

The HMRC bulletin "Working Together" reports the following:

A year ago, agents and advisers were experiencing difficulties when contacting the VAT Helpline. Automated messages were seen as too long, repetitive and not provided early enough in the caller menu options. Additionally agents were reporting that, on occasion, they were being cut off prematurely. Analytical work has led to significant changes to processes and messaging and there have been major and sustained improvements in performance.

Working Together 21

6.9.13 Escape from bankruptcy reversed

A solicitor failed to pay the VAT which she had shown as due on her VAT returns. HMRC applied for a bankruptcy order, which was granted. The solicitor subsequently applied for the order to be annulled, contending that her returns had been incorrect as many of her supplies had been to asylum-seekers who were not resident in the UK, so that by virtue of the Place of Supply of Services Order (and the *Razzak* case), the supplies were deemed to take place outside the UK and she should not have accounted for output tax on them. The High Court granted the solicitor's application and annulled the bankruptcy order.

The Court of Appeal has ruled that the judge erred in law and has restored the decision of the Registrar who declared the solicitor bankrupt. The solicitor had made two voluntary disclosures which had been rejected; given that the statutory demands were made on the basis of her own VAT returns, which had not been amended, there were no grounds for the judge to overturn the liabilities.

Court of Appeal: *Chamberlin v HMRC*

6.9.14 Complaints

ICAEW TAXline, March 2011, contains an article by Martyn Warren about dealing with "problems with HMRC" – ranging from appeals on a technical dispute to complaints about maladministration.

TAXline March 2011