VAT UPDATE
JULY 2012

Covering material from April – June 2012

Notes prepared by Mike Thexton MA FCA CTA

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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 reports the progress of appeals reappeared on 21 January 2011 after lying dormant for some time. It says that it will be updated monthly, but it appears to be much less frequent or regular than that. The latest update appeared on 28 March 2012 (the first time it has lived up to the promise of being updated monthly – but it seems to have fallen into arrears again since then).

Several of the "appeal will be dropped" items are still on the website list, but where they have already been reported in the update they are not reproduced below.

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

Awaiting the CJEU:

- *Littlewoods/Grattan*: the entitlement of traders to interest on VAT overpayments (Advocate-General's opinion on *Littlewoods* in this update).

UK appeals awaiting hearing:

- *Bridport & West Dorset Golf Club Ltd*: HMRC have been granted leave to appeal to the Upper Tribunal against the FTT decision that the UK's exemption for sporting services was not in compliance with the Directive
- *Croall Bryson & Co Ltd*: HMRC are appealing to the Upper Tribunal after the First-Tier Tribunal decided a car dealer was entitled to zero-rate supplies to wheelchair users on the basis of the evidence obtained (hearing date to be confirmed)

- *David Finnamore t/a Hanbridge Storage Services*: HMRC have been granted leave to appeal to Upper Tribunal after First-Tier decided that a trader was supplying a licence to occupy land rather than storage services
- *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 (Upper Tribunal hearing was previously stated as 20 – 23 September 2011, but it now says "date to be confirmed")
- *Esporta Ltd*: HMRC have been granted leave to appeal to the Upper Tribunal after the First-Tier Tribunal decided that sports club subscriptions paid in respect of a notice period were not taxable because the club did not make its facilities available to the members during that period
- *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 – the last update included a preliminary UT decision, which was not to refer questions to the CJEU but to proceed with a substantive hearing (full hearing 13 – 14 February 2012)
- *Honourable Society of Middle Temple*: HMRC have been granted leave to appeal to the Upper Tribunal against the FTT decision that the Society was making separate zero-rated supplies of water as well as taxable land
- *John Wilkins Ltd and others*: Supreme Court refused HMRC permission to appeal one aspect of the case, in which the Court of Appeal decided that motor dealers were entitled in principle to claim compound interest on VAT repayments. Substantive issue stayed until 2012 pending the *Littlewoods* decision in the CJEU.
- *SecretHotels2 Ltd*: HMRC have been granted leave to appeal to the Court of Appeal against the Upper Tribunal decision that a website operator was acting as an agent, not as a principal, in selling hotel accommodation to tourists (hearing scheduled for July 2012)
- *Simpson & Marwick*: HMRC have been granted leave to appeal to the Court of Session against the Upper Tribunal's decision that bad debt relief could be claimed for the full amount of "VAT-only" invoices, rather than only the VAT fraction of them (where the invoice for the net supply had been paid by an insurance company)
- *Total Technology (Engineering) Ltd*: HMRC have been granted permission to appeal to the Upper Tribunal after the First-Tier Tribunal decided that a default surcharge was "disproportionate"
- *The British Disabled Flying Association*: HMRC are seeking permission to appeal to the Upper Tribunal after the First-Tier Tribunal decided supplies of adapted aircraft were eligible for zero-rating – FTT refused leave to appeal, so HMRC have applied directly to the UT

- *UK Storage Company (SW) Ltd*: HMRC have been granted leave to appeal to Upper Tribunal after First-Tier decided that a trader was supplying a licence to occupy land rather than storage services

In this update from previous lists:

- *Greener Solutions Ltd*: HMRC won an appeal to the Upper Tribunal on a First-Tier ruling that a trader did not have the means of knowing that its transactions were connected with MTIC fraud
- *Newey (t/a Ocean Finance)*: HMRC 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 (Upper Tribunal hearing has decided to refer questions to CJEU)

The list also confirms that HMRC will not appeal further in the *London Clubs Management Ltd* case, and have accepted the First-Tier Tribunal's decision on zero-rating of mattresses for disabled people in *Pure Independence (UK) Ltd*.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Compensation for trespass or consideration?

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 or breach of contract 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 First-Tier Tribunal (TC00999) 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 First-Tier 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.

The Upper Tribunal has dismissed an appeal against this decision. The judges considered a number of cited precedents on the question of whether a "licensee in occupation" could sue for trespass, and concluded that they did not apply here – the contract between the company and the landowner did not give it a right to occupy or possess the land. As a result, its retention of the penalties could not be compensation for trespass in its hands, because it had no right to such compensation.

On the contract issue, both sides appealed: the company argued that the payments were for breach of a contract that existed between it and the motorist, and HMRC argued that there was no such contract – the money was received only as a result of the contract between the company and the landowner. Neither party agreed with the FTT's conclusion that the payments were within a parking contract between the company and the motorist.

The judges agreed with HMRC. They distinguished the case of *Bristol City Council*, in which parking signs constituted a contractual offer and the purchase of a ticket from a machine constituted acceptance. Because this company had only a limited licence in relation to the land, it could not make an offer to allow access to that land. The contract for parking was

between the motorist and the landowner, and all receipts of the company were related to its contract with the landowner.

Upper Tribunal: *Vehicle Control Services Ltd v HMRC*

2.2 Disbursements

Nothing to report.

2.3 Exemptions

2.3.1 Portfolio management

The German Federal Finance Court referred questions to the CJEU on whether discretionary portfolio management for individuals (where the manager has powers to take investment decisions without reference to the client) should be exempt from VAT. The questions were:

Is the management of securities-based assets (portfolio management), where a taxable person determines for remuneration the purchase and sale of securities and implements that determination by buying and selling the securities, exempt from tax

- *only in so far as it consists in the management of investment funds for a number of investors collectively within the meaning of Article 135(g) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax 1 or also*
- *in so far as it consists in individual portfolio management for individual investors within the meaning of Article 135(1)(f) of Directive 2006/112/EC (transactions in securities or the negotiation of such transactions)?*

For the purposes of defining principal and ancillary services, what significance is to be attached to the criterion that the ancillary service does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied, in the context of separate invoicing for the ancillary service and the fact that the ancillary service can be provided by third parties?

Does Article 56(1)(e) of Directive 2006/112/EC cover only the services referred to in Article 135(1)(a) to (g) of Directive 2006/112/EC or also the management of securities-based assets (portfolio management), even if that transaction is not subject to the latter provision?

The services which, according to the second question, might be compounded or separated for VAT purposes, were described as:

(a) deciding, on the basis of expert knowledge and observation of the markets, what securities should be bought or sold, and when;

(b) implementing those decisions by actually buying and selling the securities; and

(c) a series of more administrative services connected with holding the securities.

The appellant and tax authority were agreed that the funds in question were not 'special investment funds' for the purposes of the Directive. The Advocate-General (Sharpston) defines such funds as '*joint funds, in which many investments are pooled and spread over a range of securities which can be managed effectively in order to optimise results, and in which individual investments may be relatively modest; such funds manage their investments in their own name and on their own behalf, while each investor owns a share (one or more units) of the fund but not the fund's investments as such*'.

Advocate-General Sharpston has given an opinion that:

- while the listed services (a) and (b) are capable of being sold separately, a customer who asks a portfolio manager to do both clearly regards them as a single supply, and (c) is ancillary to that supply;
- portfolio management services do not qualify for exemption under art.135, which must be narrowly construed – the combination of (a) and (b) is mainly the provision of expertise in choosing investments, rather than 'negotiation' of transactions as referred to in that article and as interpreted by precedent cases;
- although they compete to some extent with exempt management of special investment funds, different treatment is acceptable where it is explicitly provided for by the Directive;
- 'banking, financial and insurance transactions' in art.56 is not to be narrowly construed, so such services provided to persons belonging outside the EU are outside the scope of EU VAT. Presumably they would give rise to input tax deduction because the first conclusion was that they would have been taxable if the place of supply had been Germany.

The opinion accepts that it is possible (as argued by the bank and the Commission) to regard the principal element of the supply as the execution of the transactions in accordance with an agreed investment strategy; however, she does not agree with that view. She also considers whether the Directive explains the purpose of the exemption in art.135(1)(f), and concludes that it does not.

CJEU (A-G) (Case C-44/11): *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG*

2.3.2 Intermediary or advisory?

A partnership introduced wealthy clients to fund managers. Initially it accounted for VAT on the fees it charged for the introductions, but then submitted a repayment claim, arguing that it was acting as an intermediary. HMRC refused the claim, ruling that the services either did not fall within Group 5 Sch.9 (being predominantly "advice") or else were intermediary services in relation to non-exempt investment management (as referred to in Item 9 Group 5) rather than investment transactions (within Items 1 to 4 or 6).

At a late stage before the hearing, HMRC asked for the proceedings to be stayed until after the CJEU had delivered its judgment in the *Deutsche Bank* case (above). The Tribunal considered that it was not absolutely clear that the judgment would be relevant, and also held that the uncertain delay before the judgment would be given was too long. It therefore proceeded to the hearing and gave its own decision.

The decision gives a relatively brief discussion of the issues. The chairman considered it relevant that the firm did not charge a fee if the client did not proceed to make an investment. The introductions were more in the nature of intermediary services in arranging investment transactions, in that the fund managers implemented the advice that had been given about specific investments; it was not correct to regard the services as mere introduction to someone else for the purposes of fund management. The fund managers charged taxable fees to the clients as a necessary consequence of their holding investments in the funds, but that was not the purpose of the introduction. The advice was ancillary to the implementation of that advice, and the whole of the fee was exempt.

First-Tier Tribunal (TC02063): *Bloomsbury Wealth Management LLP*

2.3.3 Mail claims

It has been reported that two companies have brought appeals in the First-Tier Tribunal against HMRC's refusal to accept that Royal Mail charges should have included VAT and therefore should give rise to the right of input tax deduction before the rules were changed in January 2011. The companies are Zipvit, a supplier of vitamins and minerals, and Harrier, the company which recently won its appeal on the liability of photobooks.

The Times, 8 May 2012

2.3.4 Eligible educational body?

A college claimed that it should benefit from exemption under Group 6 Sch.9 because it was a "college of a university". It would be taxable in relation to courses supplied to some other clients, but it believed that it was an eligible body where it was supplying education within the context of the university to which it was affiliated (the University of Wales). HMRC accepted that it was exempt in relation to certain grant-funded training it provided under Item 5 Group 6.

The Tribunal considered comparisons to the earlier cases of *School of Finance and Management* and *HIBT Ltd* in which commercial companies had been held to be acting as parts of universities. Although many of the factors identified in *SFM* were also present here, the Tribunal did not accept that the link between the company and the university was close enough. The company was one of 140 accredited learning centres for the university; clearly they were not all colleges of the university. The link was not enough even if it was right to consider only the courses which were run for the university; if the totality of the company's activities was considered, it was clearly not an eligible body. Its appeal was dismissed.

First-Tier Tribunal (TC02066): *Finance & Business Training Ltd*

2.3.5 Cultural exemption

A students' union claimed a refund of £455,000 for a six-year period, arguing that it should have been eligible for exemption under item 2(b) Group 13 Sch.9 as a "cultural body" managed on an essentially voluntary basis. This claim covered a variety of supplies on which VAT had been accounted for, including concerts, events and balls. The union also claimed exemption for some activities under item 1 Group 12 (fund-raising by a charity), covering the annual Freshers' and Graduation Balls.

The Tribunal held that the claim under Group 13 failed because the union was partly run by "sabbatical officers" who were paid a salary. Although this was not a full commercial amount for a graduate, it was nevertheless too great to be ignored according to the precedent cases. The precedent of *Bournemouth Symphony Orchestra* applied: the proportion of the union's management committee that was paid a salary was roughly equivalent to the proportion of the orchestra's board represented by the paid managing director, and he had been enough to disallow exemption.

The smaller, alternative Group 12 claim failed because the evidence did not demonstrate that the primary purpose of the balls was to raise money. That is a requirement for exemption to apply under that group. The union's appeals were dismissed.

First-Tier Tribunal (TC02017): *Loughborough Students' Union*

2.3.6 Updated notice

HMRC have published a revised and updated notice on *Insurance*. The previous edition was issued in October 2011.

Notice 701/36

2.3.7 Updated manuals

The VAT Finance Manual has been updated to comment on the likely consequences of the Retail Distribution Review which will come into effect in January 2013. The advice to HMRC staff is that most recommendation, referral and intermediary work around product distribution which would continue to be VAT exempt under general principles, even if the way in which it is remunerated is likely to change from mainly commission from suppliers to mainly fees from customers.

www.hmrc.gov.uk/manuals/vatfinmanual/updates/vatfinupdate050412.htm

More detail is given in the Insurance Manual, in which new sections explain the borderline between advice and introductory services. There is also more information about internet introductory services.

www.hmrc.gov.uk/manuals/vatinsmanual/vatins5311.htm

2.4 Zero-rating

2.4.1 Addressing borderline anomalies

An article in *Taxation* examines the Budget proposals on takeaway food, commenting on the difficulties of applying the new rules.

Taxation, 12 April 2012

The deadline for the consultation exercise on "Addressing borderline anomalies" was extended from 4 May to 18 May.

HMRC Press Release 20 April 2012

On 29 May, the press reported – without apparently a formal announcement from HMRC, but rather a response by George Osborne to a question from an MP – that the 'pasty tax' proposal would be heavily amended. Food which is sold straight from the oven appears likely to become standard rated; however, food which is allowed to cool naturally will be zero-rated as 'freshly baked', as before, without worrying about the ambient temperature at the point of supply.

On 28 June, the revised proposals were tabled in Parliament as a new Schedule 1 to the Finance Bill 2012. The new definitions are as follows:

New excepted item

4A Sports drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk, and other similar drinks, including (in either case) syrups, concentrates, essences, powders, crystals or other products for the preparation of such drinks."

New details on catering

In Note (3), omit the words from "and for the purposes of paragraph (b) above" to the end.

After that Note insert—

(3A) For the purposes of Note (3), in the case of any supplier, the premises on which food is supplied include any area set aside for the consumption of food by that supplier's customers, whether or not the area may also be used by the customers of other suppliers.

(3B) "Hot food" means food which (or any part of which) is hot at the time it is provided to the customer and—

(a) has been heated for the purposes of enabling it to be consumed hot,

(b) has been heated to order,

(c) has been kept hot after being heated,

(d) is provided to a customer in packaging that retains heat (whether or not the packaging was primarily designed for that purpose) or in any other packaging that is specifically designed for hot food, or

(e) is advertised or marketed in a way that indicates that it is supplied hot.

(3C) For the purposes of Note (3B)—

(a) something is "hot" if it is at a temperature above the ambient air temperature, and

(b) something is "kept hot" after being heated if the supplier stores it in an environment which provides, applies or retains heat, or takes other steps to ensure it remains hot or to slow down the natural cooling process.

(3D) In Notes (3B) and (3C), references to food being heated include references to it being cooked or reheated.

So it appears that food fresh from the oven can still be zero-rated, provided that it has not been cooked to order and has been cooked in order to be edible (the *John Pimblett* test); but it is clear that food that is kept hot after removal from the oven becomes standard rated in all circumstances.

The government also published a summary of responses to the consultation on anomalies, summarising the amendments that had been made as a result of comments received.

http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032138

2.4.2 Limo transport

A trader provided transport in limousines for special occasions. The vehicles had originally been designed to carry 10 people including the driver. Sch.8 Group 8 VATA 1994 Item 4 zero-rates the supply of transport in a vehicle which has been designed or adapted to carry at least 10 passengers. Both parties accepted that the driver counts as one of the 10 for the purpose of this provision; the issue was that the limousines had been adapted so that they could now only carry 9 people.

The appellant argued that the test could be satisfied if the vehicle had been designed to carry 10 people or had been adapted to carry 10 people. As his vehicles passed one of these tests, his supplies should be zero-rated.

The judges agreed with HMRC (and the FTT) that the most natural interpretation of the expression "designed or adapted" related to the current state of the vehicle. If it was only able to carry 9 people at present, it did not qualify for zero-rating, and the original design was not relevant. Several precedent cases about transport were considered, as well as a precedent in a different area of law which used the phrase 'designed or adapted'. The Upper Tribunal was confident that the right decision had been reached.

Upper Tribunal: *Davies t/a Special Occasions/2XL Limos v HMRC*

2.4.3 Transport?

A company ran a regional airport. It decided to charge passengers a fee for using the airport (an 'airport development fee'), and accounted for VAT on the income. The fee was not part of the ticket price, nor collected through the airlines – it was enforced by requiring presentation of a separate ticket, purchased from a travel agent, at an admission gate. The company then submitted a repayment claim, arguing that the money was not consideration for any supply.

HMRC and the FTT rejected this contention, holding that the passengers had to pay the fee in order to reach their aircraft – admission to the

facilities was a supply for VAT purposes. It was not like the levy in *Apple & Pear Development Council*, which was not closely linked to anything done for the payer by the recipient.

The supply could not be ancillary or incidental to a zero-rated supply of air transport because the supply of transport was made by the airline, not by the appellant. Supplies by different persons cannot be compounded together.

The fee was also not capable of zero-rating as 'making of arrangements for supply of transport', nor was it 'to meet the direct needs of an aircraft or its cargo' (conclusions based on consideration of a large number of precedent cases). It was therefore standard rated.

First-Tier Tribunal (TC01965): *Norwich Airport Ltd*

2.4.4 Working 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) Principal 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. The questions referred were:

Is Article 151(1)(c) of the Principal VAT Directive to be interpreted as exempting a supply in the UK of services of dismantling obsolete US Navy ships for the US Department of Transportation Maritime Administration in either or both of the following circumstances:

(a) where that supply was not made to a part of the armed forces of a NATO member taking part in the common defence effort or to civilian staff accompanying them;

(b) where that supply was not made to a part of the armed forces of a NATO member stationed in or visiting the United Kingdom or to civilian staff accompanying such forces?

The Court has ruled that the exemption does not apply to the dismantling services. From its wording and its context, it appears that the exemption is intended to apply to supplies to staff, not to the armed force itself. The answer is curious, in that it states that the supply of dismantling is exempt '*only where:*

- *those services are supplied for staff of the armed forces of that other State taking part in the common defence effort or for the civilian staff accompanying them, and*
- *those services are supplied for members of the armed forces who are stationed in or visiting the Member State concerned or for the civilian staff accompanying them.*'

It seems unlikely that a service of dismantling ships would ever satisfy these conditions.

CJEU (Case C-225/11): *HMRC v Able UK Ltd*

2.4.5 Caravans

Following the u-turn on hot food, there will also be modifications to the proposed imposition of VAT on static caravans. Those caravans which were previously zero-rated, which were to have become standard rated from 1 October 2012, will now instead be subject to the 5% rate from April 2013.

HMRC have issued an updated version of their Notice on *Caravans and Houseboats*, replacing the February 2004 version. It explains under 'What's changed':

The main changes are as follows:

- *the definition of 'caravan' has been clarified (paragraph 2.1)*
- *the width measurement in paragraph 2.2 has been altered from 2.3 metres to 2.55 metres to reflect a change of law effective from 20 April 2010*
- *the criteria for exempting caravan pitch fees has changed slightly with effect from 1 March 2012 due to minor amendments made when a concession was legislated for (paragraph 3.2)*
- *the treatment of the following has changed with effect from 1 January 2012 due to the withdrawal of extra statutory concessions*
    - *one-off fees for connecting caravans or houseboats to gas, electricity, water and sewerage (paragraph 3.2 and 7.7)*
    - *water and sewerage recharges at caravan sites (paragraph 4.3)*
    - *business rates recharges at caravan sites (paragraph 4.4)*

Further information can be found in Revenue & Customs Briefs 37/11 and 43/11.

Notice 701/20

2.5 Lower rate

2.5.1 EU reasoned opinion

The Commission has sent a reasoned opinion to the UK requesting the removal of the reduced rate from the supply and installation of energy-saving materials. The 2012 Budget included a proposal to remove this for supplies involving charitable buildings from 2013, but the Commission argues that it is not permitted at all under EU legislation. The reduced rate can only be applied to supplies listed in Annex III of the Principal Directive.

If the UK law is not changed within two months, infringement proceedings will commence in the CJEU.

IP/12/676

2.6 Computational matters

2.6.1 Share consideration

A Reader's Query in *Taxation* raises the question of how to treat non-monetary consideration for VAT purposes. A trader has made a supply to a client, but is unlikely to be able to collect the agreed monetary fee. The customer is offering shares in the company instead. The answers point out that this will not be a bad debt, because some consideration will be received; if the shares are accepted in full settlement of the original bill, it seems likely that the principles of *Naturally Yours Cosmetics* will apply to deem the value to be the same as the original invoice. It is therefore important to agree a value for the shares and to issue a credit note to reduce the invoice to that value.

Taxation, 12 April 2012

2.6.2 Updated Notice

HMRC have issued a further update to the Notice *Retail Schemes* (last updated in January 2011). The only change highlighted at the beginning of the Notice is in section 9 on adjustments required for retail chemists.

Notice 727

2.7 Discounts, rebates and gifts

2.7.1 Prizes

In the High Court case of *Customs and Excise Commissioners v Professional Footballers Association (Enterprise) Ltd* (1990), it was held that prizes given at a dinner were not subject to output tax under Sch.5 para.5 VATA 1994: the output tax on the tickets for the events included consideration for the presentation of the prizes, because it was part of the event that people had paid to attend.

Following that case, a ruling was given in relation to medals given for winning Scottish league titles and the Scottish League Cup. The trophies remained the property of the League, but the medals and flags awarded to clubs and players could be subject to Sch.4 para.5. Customs held that the Cup Final was similar to the PFA case: the tickets for the neutral venue were sold by the League, not a club, and the price included seeing the prizes presented. However, the medals for winning the league were different. The games to determine a league would be played at clubs' own grounds, and it would not always be known at which ground the presentation would take place. Accordingly, the gift of medals for winning the league was subject to Sch.4 para.5 if the value was above the limit (then £15) which, in the case of the gold medals for the players, it certainly was. The League then agreed not to claim input tax on the medals and not to account for output tax.

In 2010 the League decided that this was wrong, and made a claim for input tax going back to 2007. Its representative argued that the award of medals for the league championships was more similar to the *PFA* situation (and the League Cup Final) than had been allowed. There were links to taxable sources of revenue including sponsorship and television fees. The membership agreement with the clubs provided that medals would be awarded, which meant that they were not "gifts".

The Tribunal disagreed. The medals were property of the League, transferred without consideration. They were "voluntary" in the sense that the members of the League agreed to join together and allow the medals to be awarded. Once it had been decided that they were gifts, the VAT consequences had to follow. Either they were subject to output tax to claw back the input tax recovery, or they could be blocked from input tax recovery because no output tax was collected. The appeal was refused.

First-Tier Tribunal (TC01983): *Scottish Football League*

2.7.2 Business promotions

HMRC have issued a revised and updated notice on *Business Promotions*. This now incorporates material that previously appeared in a separate notice on *Business Gifts and Samples* (700/35), which has been withdrawn. The previous editions were dated March 2002 and October 1997, since when there have been many developments in case law and policy.

The new notice includes as main headings:

2. Gifts of goods

3. Gifts of services

4. Samples

5. Non-monetary consideration and business promotions

6. Promotions of goods or services for a single price

7. Coupons

8. Face Value Vouchers

9. Cash backs

10. Loyalty Schemes

11. Manufacturer's trade promotions

12. Manufacturer's consumer promotions

13. Retail discount schemes

It will have to change again following the *Lebara* case (see section 2.12).

Notice 700/7

2.8 Compound and multiple

Nothing to report.

2.9 Agency

2.9.1 Temporary dental staff

A dental nurse established an agency in 1976. It made two types of supply: first, of temporary dental staff to dentists, which was the disputed supply, and secondly, of private permanent staff to dentists for an introduction fee. VAT was accounted for on fees for both types of supply.

In 2001, after the business had been transferred as a TOGC to a company, the proprietors discovered that a competitor was not charging VAT on similar supplies, and asked for a ruling from Customs on its own liability. The ruling was that supplies of dental staff would be exempt if made as principal. It was agreed that the temp staff were supplied as principal, and adjustments were made to current returns on the basis that the business was partially exempt.

Following a claim in 2005, the company reclaimed over £300,000 of output tax it had paid in relation to periods from 08/99 to 09/01. In March 2009 the previous owners of the unincorporated business (who still owned the company after the 1999 incorporation) made a *Fleming* claim for another £600,000 plus interest which was claimed to have been overpaid

between January 1985 and December 1996. HMRC refused this claim, and the decision was upheld on review.

HMRC accepted that their interpretation of the law throughout the period under dispute was that the supply of dentists and dentist auxiliaries by a registered nursing agency constituted an exempt supply of dental care or dental services. However, they now argued that the law, properly construed, did not provide such an exemption: that should be applied only to supplies to patients, not supplies of staff. They changed their view of the law in 2007, but allowed the old basis to continue for businesses which had followed it before and continued to meet the same criteria. That was a concession, and a *Fleming* claim could not succeed on the basis of a concession.

HMRC also raised the issue of unjust enrichment, but the FTT considered that it would only be necessary to examine that issue if the appellant was successful on the first issue of the correct liability of the supply.

The appellant's case was based on HMRC's view of the law as set out in Notice 710/2/83, which describes the liability of supplies of nursing staff as agent and as principal. This was the policy throughout the period of claim. It was also clearly the policy which had led to the repayment of output tax to the company in respect of the supplies between 1999 and 2001.

The appellant also argued that the exemption applied to supplies of medical care by certain persons and should be neutral as regards the legal personality through which those supplies were made. The relationship between the appellant and the nurses was tantamount to employment; the nurses could not make supplies for VAT purposes because of their status, so the supply of dental care that they were involved in was made only by the appellant as the quasi-employer.

The FTT examined the way in which the nurses operated. It was accepted by the appellant that they were entirely under the control and supervision of the dentist while they were working in the surgery; the appellant had no direct involvement in the work they did. The FTT considered that the supply was in reality a supply of staff made as agent, not a supply of services made as principal. The fact that HMRC had made a substantial repayment on the basis that the exemption applied, and had then accepted that it applied for a considerable further period, was not determinative of the current appeal.

The appellant did not raise the question of legitimate expectation. The FTT commented that this was not a case in which its jurisdiction was in question, as it would have been if the appeal had been based on a concession; both parties agreed that the appeal should be determined on the basis of the law.

The FTT considered a number of precedent cases and decided that the case law did not give a clear and settled answer. However, it was clear enough to conclude that a supply of staff should be distinguished from a supply of services, and a supply of staff did not enjoy the exemption. It was not conclusive that the supply was made as principal or as agent: it was the nature of the supply itself that would determine the issue. On the evidence, the appellant was providing staff, and HMRC were therefore correct to refuse the claim.

The trader appealed to the Upper Tribunal. The judge accepted HMRC's view that the finding of the FTT was one of fact, amply justified on the basis of the evidence, and could not be overturned. The nurses were under the control of the dentist; the temp agency could not be providing medical care.

The appellant's counsel applied to introduce a new ground of appeal – that output tax should only have been accounted for on the commission element of the payments from the dentists, in line with the recent decision of the FTT in *Reed Employment Ltd*. The judge ruled that this was not an amended ground of appeal, but a wholly new claim which had not been put to the FTT. It could not be introduced in the Upper Tribunal. The appeal was dismissed.

Upper Tribunal: *Sally Moher t/a Premier Dental Agency v HMRC*

2.9.2 Updated Notice

HMRC have issued an updated notice on *Staff* to replace the May 2005 version. It reflects the withdrawal of the staff hire concession (in April 2009) and updates the statements of practice on staff hire, secondments and placements of disabled workers. There are sections on joint employments and paymaster services, and special rules for supplies of directors to companies.

Notice 700/34

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

2.11.1 Exemption applied

A charity organised a flower show. It applied to recover input tax in relation to the costs of the show, arguing that it should be entitled to do so as it had opted to tax the land. The Tribunal ruled that the supplies it was making fell within Sch.9 Group 12, not Sch.9 Group 1, and they were therefore not affected by the option to tax. Although it wanted to charge VAT in this circumstance, the judge noted that the Group 12 exemption was generally for the benefit of charities, and should be applied where the conditions were met.

First-Tier Tribunal (TC01938): *Southport Flower Show Ltd*

2.12 Other supply problems

2.12.1 Voucher changes

Following the decision in *Lebara Ltd* (see 4.2), the government has announced a new clause to be added to the Finance Bill to change the VAT treatment of 'single purpose face value vouchers'. HMRC have published a technical document explaining the change.

The legislation will apply from the date of the announcement (10 May), but no VAT will become payable under the measure until the Finance Bill has received Royal Assent. There are also transitional measures so that traders who have issued vouchers before 10 May which are not redeemed until afterwards will continue to account for VAT on those vouchers using the old rules.

www.hmrc.gov.uk/budget-updates/march2012/vat-facevalue-tech.pdf

A Revenue & Customs Brief gives further explanation. The current treatment of vouchers under Sch.10A VATA 1994 is, in outline, as follows:

Retailer vouchers

Retailer vouchers are issued by a retailer for use in its own outlets. This means that the person who issued the voucher will be the same person that honours the voucher later with a supply of goods or services.

Retailer vouchers are treated as outside the scope when they are issued. The retailer is required to account for output tax when goods or services are supplied in exchange for the voucher. In accordance with the case of *Argos Distributors*, if the retailer can identify the voucher with the consideration originally received for its issue, the output tax on the supply is calculated on that initial consideration, not on the face value.

Where retailer vouchers are bought and sold by intermediaries, they are liable to output tax on the amount paid by the next purchaser in the chain (whether another intermediary or a member of the public). The intermediary who receives the outside-the-scope issue from the retailer is allowed to deduct input tax based on the amount of output tax that the retailer expects to account for on redemption. This will be notified by the issuer on a document which serves as a purchase VAT invoice.

Where the vouchers may be redeemed for a mixture of supplies which include both zero-rated and standard rated items, the issuer will estimate the likely average rate of VAT to be accounted for on redemption and will show that amount on its invoice to the intermediary. Further intermediary sales will account for VAT at the same composite average rate.

Credit vouchers

A credit voucher is issued by someone who will not necessarily redeem it. That person is likely to be the promoter of the voucher scheme; they will promise to pay something (which may be the face value, or may be less) to a retailer who redeems the voucher.

In this case, any transaction in the voucher for up to its face value is ignored for VAT. If it is sold for more than its face value, the excess is chargeable. When it is redeemed, the retailer is charged to VAT on the

value of the voucher in its hands – the amount it can obtain from the issuer in exchange for honouring the voucher.

New treatment

HMRC's interpretation of the *Lebara* decision is that it requires VAT to be accounted for on the issue of vouchers, rather than their redemption, if they can only be used for a 'single purpose'. This means that they must be capable of being used for only one type of supply – although that may cover a number of detailed possibilities – which must only have one VAT liability. A phone card is an obvious example, because it was the subject of the case; however, HMRC give other examples such as a voucher exchangeable for various supplies in relation to electronic gaming. Although the detailed nature of the supplies might be different, this would still count as a single purpose voucher.

A book token, which can be exchanged for standard rated e-books and zero-rated printed books, would not be a SPV. Nor would a voucher for most retail shops such as Marks & Spencer, because they sell zero-rated and standard rated items.

Transitional measures

The transitional provisions will deem there to be a supply to the final consumer by the retailer where:

- a SPV was issued before 10 May 2012;
- it is redeemed for goods or services after 10 May 2012;
- the supply to the end user is made in the UK.

That effectively disapplies the *Lebara* decision to that extent, but it is likely to be regarded as a proportional measure in the circumstances.

The overall effect of the change is to advance the payment of output tax by the issuer of a SPV, and to increase the payment of output tax in relation to vouchers which are never redeemed (which, in the past, would have escaped VAT in relation to their issue price).

There is no change to the treatment of vouchers which are not SPVs, including credit vouchers.

R & C Brief 12/2012

The European Commission has also reacted to the *Lebara* decision by announcing a proposal to change the VAT treatment of vouchers throughout the EU by means of a new Directive. The intention of the new rules is set out as follows:

Firstly, the Commission proposes to harmonise the definition of vouchers for VAT purposes and the point of taxation for voucher transactions, to prevent mismatches which result in double taxation or double non-taxation. The time of taxation will be determined by the nature of the voucher, thereby clarifying if the tax should be charged when a voucher is sold or when it is redeemed for goods and services.

Secondly, the new rules draw a clear line between vouchers and other means of payment. The growing number of mobile devices makes it necessary to distinguish between prepaid telecom credits (which are vouchers) and mobile payment services (which are taxed differently).

Changes in payment technology, notably the increasing use of mobile payments, require that any room for confusion is removed.

Thirdly, the Directive sets up common rules for the distribution of vouchers in a chain of intermediaries, especially where this extends across two or more Member States. A phone card for example can change hands several times in a distribution chain before it reaches the consumer and the businesses concerned need certainty about their tax obligations.

In outline, the proposal:

- distinguishes between single purpose vouchers and multi-purpose vouchers in a new article 30a;
- distinguishes between vouchers and means of payment, which are not subject to any of these rules – in essence, a voucher represents a right to receive goods or services, whereas a means of payment is merely another form of cash;
- provides that the issue of vouchers and subsequent redemption of vouchers constitute a single supply for VAT purposes (new article 30b) – the complication introduced by the presence of the voucher relates only to the timing of the charge on that single supply;
- SPVs will be taxed on issue and MPVs will be taxed on redemption (changes to article 65);
- the distribution of MPVs through intermediaries will be taxed as a service provided by the intermediaries to the issuer.

This last point appears to implement the approach to the Lebara problem that was suggested by the Netherlands government and rejected by the Advocate-General:

- a voucher with a face value of £100 is issued to an intermediary for consideration of £80 – this is treated as the intermediary providing a VATable service to the issuer for consideration of £20. The intermediary sends a tax invoice to the issuer.
- the intermediary sells the voucher to a consumer for the face value of £100 – this is ignored for VAT purposes.
- the consumer redeems the voucher with the issuer – the issuer accounts for output tax on £100 (not £80, as in the Argos Distributors decision).

The intermediary will account for output tax on £20; the issuer will account for input tax on £20 (early) and output tax on £100 (late), and the system will collect the VAT fraction of the amount paid by the consumer.

There are separate rules for discount vouchers where the issuer of the voucher meets the cost of a discount, rather than the redeemer (i.e. the issuer will pay the redeemer something for making supplies to the voucher-holder). It is proposed to treat this discount as a separate supply of services by the redeemer to the issuer of the voucher.

The proposal includes the following example of this treatment:

Company M, a manufacturer, sells goods to a wholesaler W1 for EUR 70. W1 then sells them to W2 for EUR 80 who in turn sells them to R, a retailer, for EUR 90 (all figures VAT inclusive).

R finally sells the goods to the end customer, C, for EUR 100.

Meanwhile, to encourage sales M distributes a free discount voucher which entitles to a EUR 5 discount via newspapers and one of these is held by C when he makes his purchase. This is accepted in part-payment by R who in turn asks M for re-imbursement.

Today, this reimbursement allows M to reduce the taxable amount of the supply to W1. It is however considered impractical to carry this adjustment through the distribution chain and the CJEU solution was to treat the EUR 5 as a third party payment. This however is an imperfect solution, leading to a tax loss, if C is a taxable person (with a right to deduct input tax) or if the chain of supply involves more than one Member State (with a zero-rated intra-EU acquisition).

To deal with this, the proposed point (e) to Article 25 sees the EUR 5 as a redemption service for which R issues an invoice to M (the EUR 5 being the VAT inclusive amount). M no longer adjusts the taxable amount of the original supply and C, who pays EUR 95 in reality, receives an invoice for that amount (all figures include VAT).

It is proposed that the new rules will enter force on 1 January 2015.

IP/12/464; ec.europa.eu/taxation_customs/taxation/vat/key_documents/legislation_proposed/index_en.htm

2.12.2 Scale charges

HMRC have published a Brief and a Technical Note describing proposed changes to the fuel scale charge legislation in s.56 and s.57 VATA 1994. It has been realised that these rules are not compliant with EU law, and they must be changed in order to comply.

The Note describes the basic operation of the scheme:

- a business is required to account for VAT on all road fuel as input tax;
- where fuel in any vehicle is used partly for private motoring, a scale charge must be accounted for on that vehicle;
- if a charge is made to the employee for the private fuel, output tax can be accounted for on the actual consideration instead, but only if that is at least as much as the scale charge;
- by concession, HMRC allow traders to claim no input tax on any road fuel and account for no scale charges (ESC 3.1), or to keep detailed records of business mileage and claim input tax only for business fuel (Para 8.1(c) of Notice 700/64);
- there is also a concession in HMRC guidance PE4450 which allows partially exempt traders to reduce the scale charge where their recovery of input tax on the fuel has been restricted by partial exemption.

HMRC have realised that the *Lennartz* principle requires that traders are given the choice of bringing mixed use assets into the business fully, to the extent only of the business use or not at all. This means that the concessions should not be concessions but should be in the law itself.

HMRC have also realised that a deemed supply (represented by the scale charge) cannot be levied where an actual supply is made. Imposing the scale charge where there is actual consideration of lesser amount is therefore wrong, and this flaw in the legislation will also be corrected. Businesses which believe that they have accounted for too much output tax as a result of this mistake are invited to make claims for repayment, subject to the usual rules.

The partial exemption concession has no authority in law and will be scrapped.

While revising and streamlining the law, HMRC intend to make the annual changes to the chargeable amounts easier to implement. At present they require a Statutory Instrument and are part of the Budget announcements. They may be relegated to tertiary legislation (a Notice or Information Sheet having the force of law) which is easier for HMRC to change. The Commissioners would have a duty to amend the rates annually in line with fuel prices.

The Note contains consultation questions with a closing date for comments of 20 July.

R & C Brief 11/2012; customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID= HMCE_PROD1_032032

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Updated Notice

HMRC have issued a revised edition of the Notice *Land and property* (last revised in March 2002, with updates in December 2003, April 2005 and July 2006). Changes have been made to::

Paragraph 2.5 – definition of 'licence to occupy land'

Paragraph 4.4 – guidance on parking for dwellings, and

Paragraph 7.8 – guidance on the treatment of land and buildings on hand at deregistration.

Notice 742

3.2 Option to tax

3.2.1 Who opted?

A dispute arose about whether some land, in use by a partnership for a commercial golf club business, had been opted by the partnership. The Tribunal had to consider this as a preliminary issue. The decision (given in early 2010) did not appear to contain the consequences of the land being opted – presumably supplies were made with it that were treated as exempt.

Customs received an option letter dated 27 June 1990. It was on letterheaded notepaper referring to a husband and wife who became two of the partners in the firm. The appellants put forward many arguments to try to invalidate the option, but the main one was that the registered firm (a partnership of four, being the husband, wife and two sons) did not exist when the letter was sent. As it came into being later, it was not possible for it to be bound by a letter sent by someone else.

The FTT accepted that the witnesses attempted honestly to recall events which took place over nearly 20 years previously. There was very little documentary evidence to explain why the option had been exercised or what was intended at the time, but the documents that did exist suggested that there was a partnership between the husband and wife and it had later admitted the sons. For VAT purposes, changes in the composition of a partnership are disregarded: the firm is deemed to continue. Accordingly, the four-partner firm was bound by the option notified in the letter dated 27 June 1990, and the appeal was dismissed.

The firm appealed to the Upper Tribunal. Their counsel raised a number of arguments against the FTT's decision, suggesting that it did not take into account all of the evidence or the improbability of the partnership opting to tax in the circumstances that were held to have existed. It was more inherently likely that there were two distinct partnerships – the property-owning one, between husband and wife, and a separate firm which operated the golf club. The option had been exercised by the first partnership and would not therefore bind the second.

The UT judge recognised the difficulty experienced by the FTT chairman in establishing the facts, and did not accept many of the appellant's arguments. However, there was one important issue on which the FTT decision did not explain the reasoning: "*the judge's determination necessarily implies a finding of fact that the land was an asset of the golf partnership. In some circumstances an implication of that kind might be enough. Here, we do not think it is, because it is not apparent from the decision that the judge addressed her mind to the point at all, and in consequence we cannot be confident that she did in fact make such a finding on the evidence before her.*"

The case would be remitted to the FTT for this particular point to be considered and expressly covered in the decision.

Upper Tribunal: *Wrag Barn Golf and Country Club v HMRC*

3.2.2 TOGC and option

A company which operated a retail chemist's shop decided to buy another chemist's shop as an investment property. The company made an offer for the property three days before an auction was to be held, and this was accepted. The board minutes recorded the decision to buy the property for "£300,000 plus VAT". There was correspondence between the solicitors acting for vendors and purchasers concerning the procedures necessary to ensure that the transaction was treated as a transfer of a going concern, but the purchaser did not notify HMRC of an option to tax before the completion date (28 May 2008). They also did not charge VAT to tenants, as discovered by a routine inspection.

In December 2010, the company submitted a form 1614A, asking for 16 May 2008 as the effective date of the option. HMRC responded setting out the evidence required to support a belated notification of an option, and in February 2011 the company submitted a form 1614H (which is used where exempt supplies have been made with the property). HMRC gave permission for the option to take effect from February 2011, at which point the company started to charge VAT to tenants. However, they refused to accept that the option could be backdated to May 2008, which meant that the purchase should not have been treated as outside the scope.

The director accepted that two mistakes had been made: treating the purchase as a TOGC without notifying the option, and failing to charge VAT to the tenants. Nevertheless, he maintained that the directors had decided to opt the property before the purchase, and these mistakes arose from misunderstandings about the effect of the option. The directors had been poorly advised by their solicitors. The tenant was fully taxable and would have been able to recover any VAT that was charged to it.

The Tribunal did not accept that an option had been considered as early as May 2008. The evidence suggested that the directors did not choose to charge VAT on the rent until February 2011. As a result, the VAT on the purchase should have been charged and should not have been recovered immediately; recovery later would be possible under the Capital Goods Scheme, but that would be spread over the remainder of the adjustment period.

First-Tier Tribunal (TC02064): *Atchem Ltd*

3.3 Developers and builders

3.3.1 Extension or new build?

A project involved the demolition of a fourth-floor penthouse apartment and the construction of a new dwelling in its place. The building company argued that it was demolition and construction from new and therefore zero-rated. HMRC ruled that the original planning consent had envisaged the construction of an extension on the top of the existing building, and this would be standard rated.

It appears that, as is common, the project changed as it developed, and different planning applications were made and then modified. Although the project eventually carried out might in theory meet the conditions of zero-rating, it did not do so because it was not in accordance with the planning consent which had been given when the work was carried out. Planning consent was later given to regularise the development and allow it to be retained, but this did not act retrospectively. The absence of current planning consent meant that the work could not be zero-rated.

First-Tier Tribunal (TC01950): *Cameron Black (London) Ltd*

3.3.2 Reduced rate for conversions

A building company carried out works to convert a property containing 36 bedsits for elderly residents into 36 self-contained flats. It charged 5% VAT on the basis that this was a "changed number of dwellings conversion" within Group 6 Sch.7A VATA 1994. HMRC disagreed, and assessed for the difference between the reduced rate and standard rate VAT (£33,000).

HMRC's view of the bedsits was that they were self-contained dwellings. Although the charity which operated the block for the elderly residents provided an estate manager who could be called on for help, HMRC did not accept that the building was in relevant residential use or was an "institution or home". The estate manager did not provide "personal care". As a result, HMRC held that the conversion did not change the number of dwellings at all.

The Tribunal agreed with HMRC that the provision of sheltered housing in a single property did not involve the element of "organisation" that was implied by the word "institution". The residents occupied their bedsits independently of each other. As a result, the services did not change the number of dwellings.

The decision does not go into detail about the distinction between a "house in multiple occupation" (which usually refers to a single dwelling containing bedsits) and a house that has been divided into separate dwellings. A conversion from a HMO into separate dwellings would qualify for the reduced rate.

First-Tier Tribunal (TC02068): *Cordery Build Ltd*

3.3.3 Approved alterations

An article in *Taxation*, 7 June 2012, examines the impact of the proposed changes to the treatment of approved alterations to listed buildings.

Taxation, 7 June 2012

The draft legislation amending the zero-rating provisions has been amended again. Items 2 and 3 of Group 6 (approved alterations) will be omitted, and "substantial reconstruction" will be redefined to cover only projects where, when the reconstruction is completed, the reconstructed building incorporates no more of the original building (that is to say, the building as it was before the reconstruction began) than the external walls, together with other external features of architectural or historic interest.

However, it has been announced that zero-rating will continue if consent for a project was applied for before 21 March 2012, and the transitional period has been extended to 30 September 2015.

http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032138

3.4 Input tax claims on land

3.4.1 DIY cases

An individual had a granny annexe constructed. A DIY claim was refused because the planning consent prohibited separate disposal or use. He argued that the original claim form had not included any reference to this condition, and that HMRC were therefore 'negligent' in not pointing it out to him. HMRC pointed out that the question was clear in the claim form he had submitted, and he had answered it incorrectly – he had denied that there was any restriction.

The strongest argument for the claimant was that the council had, after issuing the restricted planning permission, insisted on the inclusion of various expensive requirements for utilities and separate council tax banding, on the apparent assumption that the properties might subsequently be used or sold separately. The claimant also stated that the granny annexe was in fact currently let out, so its actual use contradicted the planning condition. It seems he did not realise that this might not only get him into trouble with the council, but would also further invalidate the DIY claim, because it would appear that the building had been constructed for a business purpose.

The Tribunal had some sympathy with the claimant in connection with the requirement to include separate utilities, but held that it was his responsibility to be aware of the rules – HMRC could not be 'negligent' in failing to point them out. The law and the facts were clear, and the appeal was dismissed.

First-Tier Tribunal (TC01953): *James J Hopkins*

An unusual point arose in another DIY case. The judge noted that he had recently released a decision on almost exactly the same point, so recently that neither party was aware of it; and as HMRC were still in time to

appeal the first decision, and if they did they would probably appeal the second, he described it in more detail than might be usual.

In both cases, the DIY project resulted in two buildings with restrictive planning consent over separate use or disposal. In the first case (*Catchpole*) the project was a 'new build', in that an existing building had been entirely demolished and replaced with two. In the second case, two non-residential buildings (a barn and separate garage) were converted into residential accommodation. The garage was turned into a bedroom and bathroom with no other facilities – it faced the former barn across a small courtyard, and the intention was that it would be used only as guest accommodation. It was clearly not a 'dwelling' within the statutory definition.

HMRC argued that:

- a dwelling had to be 'a building', and the statutory word could not be extended to include 'buildings';
- the guest bedroom was subject to a planning restriction on separate use or disposal – although this did not explicitly apply to the barn conversion, it could not be sold without the guest bedroom, because that would leave the guest bedroom without a legal use;
- as a result, neither building qualified for a DIY claim.

The Tribunal chairman disagreed with HMRC on both points. The two buildings together constituted a single dwelling. Although the legislation referred to 'a building', it could be interpreted to include the relatively unusual situation in which a single self-contained dwelling comprised more than one building. The Interpretation Act favoured the appellant – the singular should include the plural unless the context absolutely required it not to.

The chairman also ruled that, if he was wrong on the primary contention, he would allow the lesser appeal in respect of the barn conversion alone. Even if it would be foolish and uneconomic to sell it separately, there was no planning condition that forbade it. It was undoubtedly, looked at as a single building, self-contained living accommodation.

First-Tier Tribunal (TC01957): *T Fox*

The Tribunal had to consider the meaning of the expression "a building designed as a dwelling" in relation to an unusual self-build project. The dwelling consisted of two distinct units on separate foundations, connected by a wooden deck. One was a self-contained house, while the other contained only two bedrooms. It appears that the owners wanted to give their children some independence by means of this layout.

HMRC argued that a DIY claim could not succeed in relation to two buildings, because the law referred to "a building". They accepted that the two units together formed a single dwelling, but nevertheless refused the claim.

The Tribunal did not accept the appellant's first argument, that the two units formed "a single building". However, the Interpretation Act required the singular to incorporate the plural unless there was a good reason not to do so; the Tribunal could see no offensive result in reading the condition as "a building [or buildings] designed as a dwelling". If

there were several buildings, including for example a garage and a stable block, they would only qualify to the extent that they were designed as a dwelling – the garage would still be covered by the relevant note, and the stable block would not qualify at all.

The appeal was therefore allowed.

First-Tier Tribunal (TC01995): *Mark Catchpole*

3.5 Other land problems

3.5.1 Listed places of worship scheme

It has been reported that the listed places of worship scheme will receive a grant of £30m to compensate for the addition of VAT to the cost of carrying out approved alterations to listed buildings from 1 October 2012. The scheme exists to subsidise the cost of VAT on repairs to listed places of worship (mainly Anglican churches); the new grant is intended completely to cover the additional cost which will be imposed on works that up to now have been free of VAT. However, church representatives are concerned that it will be difficult to be sure that a grant will be available before having to commit to carrying out a project (given the length of time it takes to plan, finance and carry out such a project), so this is not as helpful as the certainty of the old zero-rating rule.

The Daily Telegraph, 18 May 2012

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

Nothing to report.

4.2 Where is a supply of services?

4.2.1 Telecom vouchers

A UK company (L) sold phonecards to distributors in other member states. It did not account for any output tax, arguing that the supply was to businesses who would account for a reverse charge. HMRC issued a ruling that it should account for output tax on supplies of services to consumers when they redeemed their phonecards. Questions on how this should be dealt with were referred by the Tribunal to the CJEU.

The Advocate-General expressed the opinion that the key to determining this issue is the "legal fiction" in the Directive's treatment of an agent acting in his own name. In reality, where L sells to Intermediary who sells to Consumer, L is agreeing to supply services to C against a prepayment which has been collected by I in the capacity of agent. However, the Directive treats an agent acting in his own name as a principal. If the national court considered that art.6(4) 6th Directive (art.28 Principal VAT Directive) applied to the circumstances of the case, I would be treated as receiving the supply from L (subject to the reverse charge) and as making the supply to C (subject to output tax). L would then have no output tax liability on redemption.

The opinion considers four possible ways of construing the supplies:

- as two successive supplies of services (from L to I and L to C, both chargeable on L – the UK government's position);
- as two parallel supplies of services (telecommunications services from L to C, with ancillary distribution services supplied by I to L – recommended by the Netherlands);
- as a chain of supply (from L to I and from I to C – the taxpayer's position, and also one of two lines favoured by the Commission);
- as a deemed chain of supply under the agency rules, as set out above (the Commission's alternative approach).

The Advocate-General pointed out that phonecards, which operate by providing the consumer with a PIN which enables him to access the international phone network, are not like conventional vouchers – they do not have to be "presented" to be redeemed, and are therefore not akin to a means of payment. They are "a device that facilitates the use of the right of access to telecommunications services, which the customer receives upon the payment of the price to the distributor or his retailer, as the case may be".

The Advocate-General's conclusion was that the first two approaches should be rejected; the third was also unattractive because the distributors do not really acquire telecommunication services from L which they sell on. The most convincing answer was the fourth.

The full court has not come to the same conclusion – it has chosen the third option above in relation to this type of voucher. Its view has now been adopted in the UK by changes to the Finance Bill; but, as reported in 2.12 above, the Commission appears to have proposed to introduce the second option in respect of some vouchers – a result that the Advocate-General dismissed as unrealistic.

The full court's judgment analysed the problem differently. It suggested that there were three possible analyses of the supplies:

- the issuer made a supply of telecommunications services to the distributor; or
- the issuer made a supply of telecommunications services to the end user; or
- the issuer made a supply of telecommunications services to the distributor and to the end user, and the member state could choose which one should be subject to VAT.

Starting from that analysis, the court concentrated on whether there was in reality any supply between the issuer and the end user. As Lebara had no legal relationship with the end users and no knowledge of the price at which the intermediaries sold the phone cards, it could not be said that Lebara made a supply of services to the end users for consideration. The amount paid by the distributors could not constitute the passing on of the end users' consideration to Lebara – there was a chain of supply. Because the vouchers could be used for only a single purpose, the only supply made by Lebara was a supply of telecommunications services to the distributor, which the distributor then sold on rather than using.

The ECJ's answer to the question was therefore that "*a telecommunications services operator which offers telecommunications services consisting in selling to a distributor phonecards which display all the information necessary for making international telephone calls by means of the infrastructure provided by that operator and which are resold by the distributor, in its name and on its own behalf, to end users, either directly or through other taxable persons such as wholesalers or retailers, carries out a supply of telecommunications services for consideration to the distributor. On the other hand, that operator does not carry out a second supply of services for consideration, this time to the end user, where that user, having purchased the phonecard, exercises the right to make telephone calls using the information on the card.*"

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

4.2.2 Consultancy?

Two UK-based doctors were appointed to a panel which carried out medical examinations on people wanting to emigrate to Australia. Their reports were made directly to the Australian Government Department of Immigration and Multicultural Affairs. HMRC ruled that they had to account for VAT on their income; they argued that this was a supply

outside the scope of VAT, being "services of consultants" (within Sch.5 para.3) supplied to a person belonging outside the EU (the Australian government). The fees for the examinations were paid by the applicant for the visa, not by the government.

The Tribunal considered precedents including *Maatschaap MJM Linthorst* and *von Hoffmann*. Not all professional services fell within Sch.5, even though it included the words "and similar services". The Tribunal concluded that the work of the doctors was very similar to that of the vets in the *Linthorst* case – as a result, it was clear that the supplies would not be outside the scope.

Although that was enough to decide the case, the Tribunal also agreed with HMRC that the supplies were made to the UK applicant for the visa, not to the Australian government. The fact that the report was sent to the Australians did not prevent the true line of supply being from the doctor to the individual.

In both cases, HMRC had repaid substantial amounts following voluntary disclosures by the doctors (in at least one case following advice from the Australian government department that the supplies should be outside the scope); the appeal was against recovery assessments which had been raised later to claw back the repayments which HMRC had decided should not have been made. Both doctors added "protection of legitimate expectations" to their grounds of appeal. The Tribunal held that there had been no "detrimental reliance" by the doctors on the erroneous advice of HMRC, so this principle was not engaged. The recovery assessments were confirmed.

First-Tier Tribunal (TC02059): *Dr Nigel Stanley and another*

4.2.3 Freight services

HMRC has published a draft Order formalising temporary arrangements, which were introduced from 15 March 2010 R & C Brief 13/2010, under which supplies of freight transport and related services taking place wholly outside the EU are not liable to UK VAT when performed for UK businesses and charities. A possible problem with the implementation of the VAT Package was highlighted by the response to the Haiti earthquake: a UK-based charity could be subject to a reverse charge on the purchase of transport services, even though the service was supplied by a business outside the EU and the service was performed outside the EU.

The draft Order, open for comment until 31 August 2012, will provide that the place of supply of such services is the place where the services are physically performed. They will therefore be outside the scope of UK VAT, which has been the informal treatment since the R & C Brief was published.

SI 2012/Draft The Value Added Tax (Place of Supply of Services) (Transport of Goods) Order 2012

4.3 International supplies of goods

4.3.1 Denial of zero-rating upheld

A trader in a range of goods zero-rated 47 supplies of washing powder, soft drinks and confectionery to a Spanish customer in 2005 and 2006. HMRC raised an assessment for £73,000 and reduced a repayment claim by £33,000, ruling that the conditions for zero-rating were not satisfied. The First-Tier Tribunal upheld the ruling, and the trader – representing himself – appealed to the Upper Tribunal.

The trader's arguments were that the goods duly left the UK and the supplies were thus properly zero-rated; alternatively, relying on the *Teleos* decision of the CJEU, he had taken every reasonable precaution to ensure that the supplies did not lead to his participation in tax evasion. HMRC argued that the evidence of removal would be inadequate even if it were genuine, that the trader failed to take the precautions which might afford him the *Teleos* protection, and that the FTT's findings of fact relating to those issues could not be overturned by the Upper Tribunal.

The trader's case was based on the assertion that the goods had left the UK by lorry – he had loaded them on vehicles bearing the livery of an Irish haulage company and honestly believed that they had been delivered to Dublin from his premises in Northern Ireland.

The Upper Tribunal accepted that the FTT had erred in law in deciding that the trader needed to show that the goods had reached Spain to qualify for zero-rating. It would have been enough to show that they reached Ireland. However, there was enough evidence to support the FTT's conclusion that even this was in serious doubt.

The Upper Tribunal also agreed with the FTT that the trader had not done enough to be protected by *Teleos*. Although he had apparently produced evidence of despatch which satisfied one HMRC official, this was only in response to the official threatening an assessment if missing evidence was not produced; he had not carried out the checks or obtained the evidence at the time of making the supplies. The FTT decision was summed up as follows:

It is difficult to see how the officers' scepticism about the documents and the conclusions they drew from them can be faulted. Mr MacMahon's argument requires them, in effect, to take the documents at face value even when they can be shown to be false, and to overlook the fact that many documents which should have been produced were not, and to do so against the background of a lamentable failure to take adequate precautions. It is an impossible argument and one which, even if only obliquely, the tribunal rightly rejected.

Upper Tribunal: *MacMahon v HMRC*

4.3.2 LVCR

Following a similar application by Jersey, Guernsey has failed to obtain a judicial review decision in its favour in relation to the withdrawal of Low Value Consignment Relief. LVCR is provided for by EU Directives; Guernsey argued that the selective disapplication of LVCR to particular territories was not permitted by the Directives, and was contrary to the principles of neutrality, non-discrimination and proportionality.

The High Court rejected these contentions. There was nothing in the Directives to suggest that selective disapplication of the relief was not allowed. Further, neutrality and non-discrimination only apply to goods once they are in free circulation in the EU – there is no legal principle to prevent a member state discriminating between imports from different outside territories. As a result, the principle of proportionality was also not engaged.

High Court: *R (on the application of Minister for Economic Development of the States of Guernsey) v HMRC and another*

4.3.3 Sale in customs warehouse

A Slovakian company sold goods which were in a customs warehouse under suspension of import duty. The customer was another Slovakian company, and the goods did not leave the warehouse. The tax authority ruled that there was a supply for VAT purposes at that time. The company argued that the goods were in a suspension regime and therefore could not be subject to VAT. The Slovakian court referred questions to the CJEU.

The Advocate-General has given an opinion that the customs rules and the VAT rules are distinct. This constituted a supply of goods in the course of business within the territory of the EU, and it was therefore subject to VAT unless the member state granted a special exemption within art.16 6th Directive (the provisions now appear to be in arts.156ff. Principal VAT Directive). As Slovakia did not have such an exemption for the present transactions, they were VATable.

As a result, a subsidiary question about abuse of rights did not have to be addressed – there were no rights to exemption, so they could not have been obtained abusively.

CJEU (A-G) (Case 165/11): *Danové riaditelstvo Slovenskej republiky v Profitube spol. s.r.o.*

4.3.4 Cross to bear

A group of clergymen clubbed together to raise money to import small wooden crosses supplied by a family in Bethlehem who make them. One of the clergymen ordered the crosses and received them by post. The group then distributed them free to people who they believed were in spiritual need of the support of such an item.

This had happened occasionally for a number of years without any VAT being added. In 2011 Parcelforce required import VAT of £60 to be paid before releasing the crosses. The importer asked for a refund of this amount on the basis that exemption should apply under the VAT (Imported Goods) Relief Order 1984 Item 1 Group 6 Schedule 2:

"*Basic necessities obtained without charge for distribution free of charge to the needy by a relevant organisation.*"

The notes to the Group provide the following explanation:

"*'Basic necessities' means food, medicines, clothing, blankets, orthopaedic equipment and crutches, required to meet a person's immediate needs*."

This UK provision implements what is now found in Council Directive 2009/132 EC art.43(1)(a) and (2), which has the slightly different provisions:

- Exemption for "*basic necessities obtained free of charge and imported by State organisations or other charitable or philanthropic organisations approved by the competent authorities for distribution free of charge to needy persons*".
- A definition that "*For the purposes of 1(a) 'basic necessities' means those goods required to meet the immediate needs of human beings, such as food, medicine, clothing and bed clothes*".

HMRC argued that crosses cannot be a basic necessity because not everyone is Christian. The judge dismissed this as a fallacious argument: not everyone needs crutches. It was therefore possible that items which were necessary for a class of people would fall within the definition.

The UK legislation is worded exclusively, rather than providing examples. However, the EU law uses the words 'such as', suggesting that other things could be included on the list. However, the Tribunal judge concluded from the context that only items to meet physical needs were intended to be included – all the items listed relate to hunger, illness or physical disability. There was therefore no indication that items meeting spiritual needs should be exempt.

The relief is also intended to apply only to imports which are both obtained free of charge and distributed free of charge. As the clergyman paid for the crosses, he failed this condition. The judge also dismissed an attempt to rely on low value consignment relief. VAT was correctly charged on the importation.

First-Tier Tribunal (TC01964): *The Venerable Hugh Glaisyer*

4.3.5 International trade problem

Readers' Queries in *Taxation* included a question about a UK business buying table lamps from a Chinese manufacturer. The goods were delivered directly to a customer in Dubai, and commission was paid by the UK business to both a UK agent and a Dubai agent. The answers dealt with the place of supply and recovery issues: the lamps themselves would be outside the scope of UK VAT, but their supply would be taxable in the UK if made here so would justify recovery; the place of supply of the agency services would be the UK, so the UK agent should charge VAT and the Dubai agency fee would be subject to a reverse charge. Both amounts would be recoverable as input tax.

Taxation, 26 April 2012

4.3.6 Sailaway

HMRC have issued a new version of their Notice *Sailing your pleasure craft to and from the United Kingdom*, updated from the April 2011 version. The section "What's changed" lists the following:

It has been rewritten and restructured to improve readability and includes:

- *Changes following the introduction of the UK Border Agency (UKBA)*
- *new information regarding importing foodstuffs from outside the EU into the UK*
- *changes to the section on relief available under 'Temporary Admission' for temporarily imported non EU vessels*
- *new contact details for temporary admission purposes.*

Notice 8

4.3.7 Intrastat guide

HMRC have reissued the *Intrastat General Guide*, replacing the January 2012 version. It deals with the withdrawal of paper forms and the advancing of the due date to the 21st of the month. There are also:

- Updated contact details for the obtaining approval of exchange rates for VAT purposes (paragraph 5.6).
- A new paragraph (17.5) to confirm the Intrastat reporting of Onward Supply Relief (OPR).
- Revised guidance to clarify that if you submit by EDI, you will still need to complete the Supplementary Declaration in full when providing credit note details (paragraph 7.2) or NoTC 18 data (paragraph 7.4). This also applies when using the low value consignment commodity code (paragraph 20.1).

Notice 60

4.3.8 Postal guide

HMRC have updated their *Guide for international post users*, replacing the November 2011 version. The main change is the withdrawal of LVCR for imports from the Channel Islands. There are also clarifications in a number of sections about the role of the UK Border Force.

Notice 143

4.4 European rules

4.4.1 ERICs

HMRC have issued a technical note about legislation to be introduced in Autumn 2012 to enable VAT relief on goods and services supplied to a European Research Infrastructure Consortium (ERIC) and used for the consortium's research activity, in accordance with the EU ERIC Regulation.

A draft of the statutory instrument implementing this measure has been issued. The SI will grant exemption from VAT on importation and acquisitions of goods from outside the UK, and a new zero-rating group in Sch.8 will relieve supplies (including reverse charges on services) whose place of supply is the UK.

VAT (Relief for European Research Infrastructure Consortia) Order 2012 (draft)

4.4.2 Tax trends

A report from Eurostat highlights the increases in standard rates of VAT throughout the EU over the last 12 years, as well as changes in personal and corporate tax rates over the same period. Note that only 15 of the countries were members of the EU in the year 2000.

	Tax on personal income			Tax on corporate income			VAT		
	2000	2011	2012	2000	2011	2012	2000	2011	2012
EU27*	44.8	37.5	38.1	31.9	23.4	23.5	19.2	20.7	21.0
EA17*	47.1	42.2	43.2	34.4	25.9	26.1	18.1	19.7	20.0
Belgium	60.6	53.7	53.7	40.2	34.0	34.0	21.0	21.0	21.0
Bulgaria	40.0	10.0	10.0	32.5	10.0	10.0	20.0	20.0	20.0
Czech Rpb	32.0	15.0	15.0	31.0	19.0	19.0	22.0	20.0	20.0
Denmark	62.9	55.4	55.4	32.0	25.0	25.0	25.0	25.0	25.0
Germany	53.8	47.5	47.5	51.6	29.8	29.8	16.0	19.0	19.0
Estonia	26.0	21.0	21.0	26.0	21.0	21.0	18.0	20.0	20.0
Ireland	44.0	41.0	41.0	24.0	12.5	12.5	21.0	21.0	23.0
Greece	45.0	49.0	49.0	40.0	30.0	30.0	18.0	23.0	23.0
Spain	48.0	45.0	52.0	35.0	30.0	30.0	16.0	18.0	18.0
France	59.0	46.7	46.8	37.8	34.4	36.1	19.6	19.6	19.6
Italy	45.9	45.6	47.3	41.3	31.4	31.4	20.0	20.0	21.0
Cyprus	40.0	30.0	38.5	29.0	10.0	10.0	10.0	15.0	17.0
Latvia	25.0	25.0	25.0	25.0	15.0	15.0	18.0	22.0	22.0
Lithuania	33.0	15.0	15.0	24.0	15.0	15.0	18.0	21.0	21.0
Luxembourg	47.2	42.1	42.1	37.5	28.8	28.8	15.0	15.0	15.0
Hungary	44.0	20.3	20.3	19.6	20.6	20.6	25.0	25.0	27.0
Malta	35.0	35.0	35.0	35.0	35.0	35.0	15.0	18.0	18.0
Netherlands	60.0	52.0	52.0	35.0	25.0	25.0	17.5	19.0	19.0
Austria	50.0	50.0	50.0	34.0	25.0	25.0	20.0	20.0	20.0
Poland	40.0	32.0	32.0	30.0	19.0	19.0	22.0	23.0	23.0
Portugal	40.0	50.0	49.0	35.2	29.0	31.5	17.0	23.0	23.0
Romania	40.0	16.0	16.0	25.0	16.0	16.0	19.0	24.0	24.0
Slovenia	50.0	41.0	41.0	25.0	20.0	20.0	19.0	20.0	20.0
Slovakia	42.0	19.0	19.0	29.0	19.0	19.0	23.0	20.0	20.0
Finland	54.0	49.2	49.0	29.0	26.0	24.5	22.0	23.0	23.0
Sweden	51.5	56.4	56.6	28.0	26.3	26.3	25.0	25.0	25.0
UK	40.0	50.0	50.0	30.0	26.0	24.0	17.5	20.0	20.0

The "area" rates are straightforward arithmetical averages of the rates in the countries concerned.

STAT/12/77

4.4.3 Use of open market value

Art.80 of the Principal Directive authorises Member States to substitute the open market value of a supply for the actual consideration in certain circumstances to prevent tax avoidance. These include:

- the obvious case where a supply between connected persons has been carried out at below market value to reduce the irrecoverable input tax for the purchaser who is not entitled to full deduction;
- the less obvious cases where the supply is made above or below market value to distort the partial exemption recovery percentage of the supplier.

The Bulgarian law applied the market value principle to a situation in which a company with a full right of deduction purchased a property from a connected person at above market value. The tax authority ruled that the purchaser could not deduct the input tax on the excess consideration paid. The company appealed, and questions were referred to the CJEU. Advocate-General Sharpston has given an opinion that it is not permitted. Art.80 provides the only circumstances in which a market value rule can be applied, so a rule which goes beyond the situations listed is contrary to the Directive. The full court has confirmed this opinion in a judgment which also dealt with another case about the supply of prefabricated poly-tunnels in Bulgaria.

The opinion notes that the order for reference does not go into the circumstances in as much detail as might be desired; it is therefore perhaps not possible to see the tax avoidance that the authorities were trying to prevent. However, the opinion concludes that the law itself is not compatible with the Directive, regardless of the circumstances, because it does not reflect the Directive's required conditions for application of the open market rule.

CJEU (Case C-621/10): *Balkan & Sea Properties v Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' (and related appeal)*; (Case C-129/11): *OOD Provadiinvest v Director of the Varna Office 'Appeals and the Administration of Enforcement'*

4.4.4 International airlines

The Advocate-General has given an opinion in a dispute about the extent and meaning of the exemption for supplies 'to airlines operating mainly for reward on international routes'. A Finnish company bought two aircraft from a French manufacturer and failed to account for acquisition tax, even though the supplier accounted for the sales as intra-community despatches. The Finnish authorities required acquisition tax to be accounted for, and also ruled that the onward supply – leasing to an associated company which operated the aircraft – was exempt without a right of recovery.

The Advocate-General has given an opinion that the exemption for supplies to airlines applies not only to supplies directly to such airlines, but also to the supply to an intermediary of an aircraft which will be supplied on to an operator. This would be in line with the purpose of the exemption and the principle of fiscal neutrality. In addition, the airlines

covered by the exemption include charter airlines which run international routes for the benefit of companies and individuals.

The fact that the owner of the airline used the aircraft for personal purposes (for which he paid a charge) would only undermine the exemption if "it can be established that the aircraft are not genuinely intended to be exploited commercially by the airline and that instead they are solely for private use – in short, final consumption – by a natural or legal person".

CJEU (A-G) (Case C-33/11): *Re A Oy*

4.4.5 Second-hand scheme

Polish law allows partial VAT recovery by traders in respect of some cars. This is not in accordance with the Directive, but is covered by a "standstill clause" as a measure in force when Poland joined the EU. Where a trader has partially recovered the VAT, a partial VAT charge will be levied on the sale of the vehicle.

A second-hand car dealer included in the margin scheme both cars which were bought from people who charged no VAT and from people who made this partial charge following partial recovery. The Advocate-General has given an opinion that this is not in accordance with the Directive: the margin scheme can only apply to goods on which no VAT at all was charged, because no VAT has been recovered by the previous owner. Allowing other such goods to be included in the margin scheme would permit non-taxation of some of the proceeds of sale.

CJEU (A-G) (Case C-160/11): *Bawaria Motors Spółka z o.o. and Minister Finansów*

4.4.6 Exemption for land or securities

Spanish law imposes a charge to capital duty on certain transactions in shares. The VAT Directive permits member states to regard shares in companies as equivalent to rights over land where they give the holder effective rights over the land; the Spanish courts have therefore referred questions to the CJEU about the interaction of the capital duty provision with EU law. It is possible that the transfer of such shares should be taxable rather than exempt (if the underlying land is not exempt); it is possible that the capital duty is an indirect tax other than VAT which should not be levied on a VATable transaction; and it is possible that the capital duty breaches rules on free movement of capital.

The questions referred are:

Is it a requirement of Article 13B(d)(5) [6th Directive] that transactions by a taxable person involving the sale of shares which amount to acquiring title to immovable property be subject to VAT and not be exempt, in view of the exception made in respect of securities giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof?

Does [the Directive] permit a provision such as Article 108 of Spanish Law 24/1988 on the Stock Market, which provides that the acquisition of the majority of the capital of a company whose assets essentially comprise immovable property is liable to an indirect tax other than VAT, namely

capital transfer duty, without regard to the possibility that the parties to the transaction may be acting in a business capacity, bearing in mind that had the immovable property been transferred directly, instead of transferring the shares or interests, the transaction would have been subject to VAT?

Is it compatible with the freedom of establishment under Article [43] EC (now Article 49 TFEU) and with the free movement of capital under Article 56 EC (now Article 63 TFEU) for a provision of national law such as Article 108 of the Spanish Law on the Stock Market of 28 July 1988, as amended by the 12th additional provision of Law 18/1991, to provide that duty is chargeable on the acquisition of the majority of the capital of companies whose assets essentially comprise immovable property situated in Spain, without offering the possibility of demonstrating that the company over which control is obtained is economically active?

CJEU (Reference) (Case C-139/12): *Caixa d'Estalvis i Pensions de Barcelona v Generalidad de Cataluña*

4.4.7 Chargeable event

Bulgarian law provides special rules for barter transactions, imposing the VAT charge at the time that one party provides consideration, even if the other party has not yet met their part of the bargain. A series of questions has been referred to the CJEU about whether this operates correctly in relation to transactions in building land and services between non-taxable natural persons and a building company. The possible problem appears to be the fixing of a tax point by a non-taxable person carrying out a transaction that would, if carried out by a taxable person, be exempt.

CJEU (Reference) (Case C-139/12): *Sani Treid EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' - Varna pri Tsentralno Upravlenie na Natsionalnata Agentsia za Prihodite*

4.4.8 Right to deduct

Hungarian anti-fraud measures imposed a liability on customers who failed to satisfy themselves that their suppliers had acted properly in issuing VAT invoices. The CJEU has held that the Hungarian law went further than a proportional response to the risk of loss through fraud: it imposed a strict liability if the supplier was engaged in fraud, whereas EU legal precedents required that the trader "knew or ought to have known" that the supplier was fraudulent. It was not permitted to impose further responsibilities on the purchaser, such as making sure that the supplier had properly accounted for VAT and obtaining documentary proof to support that conclusion.

CJEU (Case C-80/11, Case C-142/11): *Mahagében Kft and Péter Dávid v Nemzeti Adó és Vámhivatal Dél-dunántúli Regionális Adó Foigazgatósága*

4.4.9 Deduction

The Advocate-General has given an opinion that VAT incurred on demolishing buildings is deductible where the intention is to build new buildings which carry on a taxable trade. The Bulgarian authorities had wanted to apply adjustment of input tax recovery on the basis that the

buildings which had been purchased were then not put to the taxable use that had initially justified recovery of input tax. The Advocate-General noted that there was a direct and immediate link to taxable transactions, not just from the intended future use of the replacement buildings, but also through the sale of scrap metal from the demolition.

CJEU (A-G) (Case C-234/11): *Haskovo AD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto', gr. Varna, pri Sentralno Upravlenie na Natsionalna Agentsia po Prihodite*

4.4.10 Chain of supply

The Advocate-General has given an opinion about intra-community supplies of goods where the customer is not established in the EU and is not registered for VAT in the EU. The circumstances were similar to a triangulation transaction, except that the intermediate supplier was American: a German company sold equipment to a US customer and delivered them directly to the US company's final customer in Finland. The German authorities ruled that the German company had to charge VAT.

The opinion is not available in English, but it appears that it suggests that member states should not restrict exemption (i.e. zero-rating) of intra-community despatches by imposing a requirement that the supplier has recorded the customer's VAT registration number. This would be a surprising conclusion, because it is normally regarded as a condition for treatment as a despatch. It would also remove one of the conditions for triangulation to apply – that all three parties are registered for VAT in different member states.

CJEU (A-G) (Case C-587/10): *Vogtländische Straßen- Tief und Rohrleitungsbau GmbH (VSTR) v Finanzamt Plauen; other participant: Bundesministerium der Finanzen*

4.5 Eighth Directive reclaims

4.5.1 Conditions for claim

The CJEU has confirmed that the six-month time limit for making claims under the 8th Directive was a mandatory time limit which member states were required to use, rather than a merely indicative limit which they could vary. A trader who failed to make a claim within the appropriate time forfeited the right to recovery.

Presumably the same principles apply to the electronic refund system under the 2009 Directive.

CJEU (Case C-294/11): *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Elsacom N.V.*

5. INPUTS

5.1 Economic activity

5.1.1 Legal expenses

Questions have been referred by the German court to clarify whether an employer has a right to deduct any or all of the input tax on legal expenses incurred in defending an employee against a criminal charge where the circumstances leading to that charge allegedly arose from the performance of the duties of the employment. The questions include the "*Redrow*" issue that the supply appears to be made both to the company and to the employee, raising the possibility of an apportionment.

CJEU (Reference) (Case C-104/12): *Finanzamt Köln-Nord v Wolfram Becker*

5.1.2 Supplies to staff

An interesting question has been referred by the Bulgarian court. It asks whether a trader should be entitled to input tax recovery on goods supplied without consideration to employees of sub-contractors who supply it with staff, where such supplies to its own employees would be considered to be incurred in the course of business and would therefore enjoy input tax deduction. The expenses in question include transport to places of work which are otherwise difficult to get to by public means (recognised as a business expense in the *Julius Filibeck* case), and health and safety equipment and protective gear.

CJEU (Reference) (Case C-124/12): *AES-3C Maritsa Iztok I EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' - Plovdiv*

5.2 Who receives the supply?

5.2.1 Legal services supplied to predecessor

A company purchased the assets and undertaking of another company from its administrators. It settled a number of legal bills which were made out in the name of the predecessor company. HMRC disallowed the input tax on these invoices, and the Tribunal confirmed this decision. Although there were good commercial reasons for settling the invoices, they did not represent supplies made to this company for the purposes of its taxable business. It had not taken on the registration number of the old business, which meant that it could not be regarded as the same entity for VAT purposes. The Tribunal was not provided with any evidence about the agreement for transfer of the business that might have included terms about transferring the right to claim the VAT.

No penalty was imposed by HMRC because the company had asked the Advice Line about the correct treatment, and had been told to deduct the tax. There is no reference in the decision to the company trying to use this advice as justification for retaining the VAT – it seems that the HMRC follow-up visit and disallowance was accepted as a reasonable

response that would negate any reliance on "legitimate expectations" or misdirection.

First-Tier Tribunal (TC02016): *Chain Telecommunications Ltd*

5.2.2 Sales force problems

A Reader's Query in Taxation considers whether an employer can recover input tax on the reimbursement of various expenses incurred by employees, including payments for fuel and for mobile phones.

Taxation, 19 April 2012

5.3 Partial exemption

5.3.1 Mixed use building

A German company constructed a building which included commercial premises and residential accommodation. It rented the building out and claimed input tax. The tax authority prescribed that the partial exemption calculation should be based on floor area; the trader argued that this was not in accordance with the Directive, which prescribes turnover as the standard method.

The Advocate-General has given an opinion supporting the tax authority. The Directive does not preclude a member state from prescribing a different method of apportionment, provided that it is aimed at guaranteeing a more accurate split than would be achieved by the operation of the general rule. It would be for the national court to determine whether that was satisfied in a particular case.

The opinion includes a detailed analysis of the Directive's provisions on special methods, and a discussion of the extent to which member states can allow or prescribe them. The UK government submitted – and the opinion appears to agree – that a member state's laws should not be framed in such a way that special methods became more common than the standard method. The turnover-based calculation should be used unless it is clear that it does not give a fair result.

CJEU (A-G) (Case C-511/10): *Finanzamt Hildesheim v BLC Baumarkt GmbH & Co. KG*

5.3.2 Articles

In an article in *Accountancy*, Graham Elliott discusses the *Macaw Properties* case and the importance of "intention" in determining VAT recovery. As long as the intention to make taxable supplies can be demonstrated, input tax is deductible; frustration of that intention (as opposed to a change of intention) will not lead to a clawback.

Accountancy, May 2012

In an article in *Taxation*, Neil Warren considers the use of the partial exemption de minimis rules to generate recovery of input tax incurred on buy-to-let residential property. A sole trader who has a wholly taxable business and also residential letting must deal with both activities within

the same VAT registration; as long as the input tax on the exempt activity is no more than £7,500pa and half the total input tax, it is all recoverable.

Taxation, 31 May 2012

5.4 Cars

5.4.1 Not qualifying cars

A sole trader ran a self-drive hire and chauffeuring business. He claimed input tax on the purchase of six vehicles. HMRC ruled that they were not qualifying vehicles and disallowed the credit; if that was correct, he would also be subject to a misdeclaration penalty. In respect of one car (a Mercedes), HMRC believed that it was not used exclusively for business; in respect of the others (among them a Lamborghini bought for £162,000), there was insufficient evidence both that it had been bought and paid for, and that it was a qualifying car.

The Tribunal first considered the relevant case law – *Upton t/a Fagomatic* in relation to exclusive business use, and the recent case of *Best Buy Supplies* in relation to the FTT's jurisdiction when dealing with a decision to accept or refuse alternative evidence for input tax under reg.29 (supervisory, not appellate).

The trader acknowledged that he used the Mercedes for home-to-work travel if it was available. Although he said he attached magnetic advertising panels to it so that it was "still in business use" while he was driving it, the Tribunal ruled that this was enough to disallow the input tax in full.

In respect of the Lamborghini, contradictory documents were produced in evidence. The Tribunal decided that, on the balance of probabilities, the true purchase document was one which showed no VAT.

In relation to the other four cars, the trader had evidence of a VATable purchase in the form of invoices from the supplier of the cars to the leasing company which supplied them on to him, but he did not have VAT invoices made out in his name from the leasing companies. The Tribunal decided that the HMRC officers had not considered their own 2007 statement of practice on "input tax deduction without a valid VAT invoice", and if they had, there was a real possibility that they might have concluded that the input tax was deductible. As a result, the decision was unreasonable and should be set aside.

No excuses were offered in relation to the misdeclaration penalties. As a result of the other findings, the penalty in relation to the input tax on the Lamborghini was upheld, and the penalty in relation to the four lease-purchased cars was discharged.

The trader also asked to be able to dispute a ruling made in 2006 that another £46,000 of input tax on an Aston Martin and a Ferrari was not deductible. The Tribunal did not accept that there was a good reason to hear an appeal on this issue so long after the event.

First-Tier Tribunal (TC01915): *Sean Collins t/a Unique Vehicles*

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

5.6.1 Article

In an article in *Taxation*, Neil Warren considers the choices available to a business which buys an asset partly for business and partly for non-business use. He covers the current position on the "*Lennartz* mechanism" and the types of asset on which it is now only permissible to claim for the business proportion of input tax.

Taxation, 26 April 2012

5.7 Bad debt relief

Nothing to report.

5.8 Other input tax problems

5.8.1 Carousels

A sole trader claimed over £20m of input tax in relation to transactions in mobile phones in the 5 monthly periods from February to June 2006, together with an assessment for nearly £6m in respect of input tax that had been repaid already. The Tribunal found that the trader carried out his due diligence procedures in the expectation that they would satisfy HMRC rather than for any other reason; he actually knew, and certainly ought to have known, that the transactions were connected with fraud. His appeals on both matters were dismissed.

First-Tier Tribunal (TC01923): *Darren Richard Leitch (t/a London Mobile Communications)*

A company claimed over £8m of input tax in relation to 49 transactions in mobile phones in the 4 monthly periods from April to July 2006. After the usual detailed examination of all the facts, the Tribunal concluded that the trader actually knew that all the transactions were connected with fraud, and dismissed the appeal. A request to make a reference to the CJEU was also refused.

First-Tier Tribunal (TC01946): *Mavisat Ltd*

A company claimed over £11m of input tax in relation to 74 transactions in mobile phones in the 3 monthly periods from March to May 2006. The principal director was found to be an unreliable witness and dishonest, in spite of character references being given by two people who had lent

money to the business (one of them a vicar). The appeal was dismissed on the grounds of actual knowledge of connection with fraud.

First-Tier Tribunal (TC01967): *Harwich GSM Ltd*

A company applied for a stay of proceedings in its MTIC appeal until after the CJEU had released its judgments in five cases (including those described at 4.4.8 above). It also applied for disclosure of the UK government's submissions in relation to these cases, and asked the Tribunal to refer questions to the CJEU.

The chairman rejected all these applications. There was no reason to delay the finding of facts that the First-Tier Tribunal needed to carry out. HMRC's representations in the other cases could not possibly be relevant to this case, which would have to be argued in front of the Tribunal on the merits of representations made there; and the question of any reference to the CJEU could only be determined after the facts had been found.

First-Tier Tribunal (TC01993): *Coast Telecom Ltd*

A similar application, with a different chairman but a similar result, was made in another MTIC case.

First-Tier Tribunal (TC02005): *M Daryanani and others t/a Teletape; TT Exports Ltd*

A trader had an unusual partial success in the First-Tier Tribunal in a case involving £820,000 of VAT claimed for June and July 2006. The FTT 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 FTT 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 three deals.

The trader appealed to the Upper Tribunal in relation to the finding that it ought to have known that some of the transactions were connected with fraud. The judge reviewed the particular reasons given by the FTT for its decision, and upheld it as one of fact which was justified on the evidence. He noted that the appellant's arguments had so little impact on the correctness of the FTT's decision that it was not necessary to go into HMRC's other arguments supporting that decision. The appeal was dismissed.

Upper Tribunal: *My Secrets Ltd v Revenue and Customs Commissioners*

An appellant in a MTIC case applied for the judge (Mr Tildesley) to be "recused" from the appeal (which had been heard in part) because of perceived bias. This was based on the fact that the judge had heard another case in which two of the witnesses in the current case had appeared, and he might therefore be prejudiced in favour of or against

them. Another judge (Mr Berner) heard the application and refused it, holding that Judge Tildesley had acted with scrupulous fairness throughout the proceedings. There was nothing in the applicant's submissions that suggested the judge had closed his mind and formed his decision before the hearing.

First-Tier Tribunal (TC02022): *Tricor PLC (formerly PNC Telecom PLC)*

Returning from procedure to the more routine argument about input tax, a case related to claims for nearly £2.5m of input tax on purchases of mobile phones in April and May 2006. Unusually, the defence accepted that there had been VAT defaults but denied that they were fraudulent; it also disputed the level of its connection with the defaults, because the connections had to be traced from one chain to another through a contra-trader.

The Tribunal concluded that there was insufficient evidence to be sure that all the defaults arose from fraudulent evasion of VAT, but still considered that there was a sufficient connection to fraud to deny input tax to the appellant. It was not necessary for a trader to be aware of the specific fraud that was being committed; it was enough for the trader to have failed to consider the possibility and so to have failed to carry out appropriate due diligence. The Tribunal considered the history of the company's trading and decided that it ought to have done more to protect itself from the risks that it was taking.

First-Tier Tribunal (TC02058): *P S Gill & Son (UK) Ltd*

5.8.2 Company car fuel advisory rates

The fuel-only advisory mileage rates have in recent times changed twice a year, but after quarterly changes in 2011 HMRC have updated them again in March and June 2012. The changes are small but affect more of the rates than the March 2012 amendments (although there is no change on standard petrol engines).

The rates from 1 June 2012 (1 March 2012 in brackets) are:

Engine size	Petrol	LPG
1400cc or less	15p (15p)	11p (10p)
1401cc – 2000cc	18p (18p)	13p (12p)
Over 2000cc	26p (26p)	19p (18p)

Engine size	Diesel
1600cc or less	12p (13p)
1601cc – 2000cc	15p (15p)
Over 2000cc	18p (19p)

For the month following an announced change (i.e. the month of June) employers may use either the old or the new rate.

http://www.hmrc.gov.uk/cars/fuel_company_cars.htm

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 Thresholds

HMRC have issued a supplement to Notices 700/1 and 700/11 setting out the current and historical registration and deregistration thresholds. It points out that the distance selling threshold in Sch.2 VATA 1994 has remained £70,000 since it was introduced in 1993, while the other thresholds increase annually (registration was required at £37,600 in 1993).

Supplement to Notices 700/1 and 700/11

6.2.2 Registration and charitable activities

A not-for-profit company received donations of second-hand furniture and passed some of it on to people in need. It also ran a shop selling the furniture to the public in order to fund its operations. From 2005 to 2010 it carried on a correspondence with HMRC about the need to register for VAT. HMRC ruled that it could not be exempt as a charity (presumably because it would then make exclusively zero-rated supplies) unless it was recognised by them as such, and that required the company to be registered with the Charity Commissioners.

The Tribunal agreed with HMRC that the objects of the company were not exclusively charitable before they were changed on 26 June 2010; HMRC were correct to register the company on a compulsory basis from 1 November 2006. The Tribunal did not agree that it was necessary for the company to have registered with the Charity Commissioners in order to qualify (as it now is since 1 April 2012), but comparison of the original objects with the revised version confirmed that the company was not a charity on the date HMRC had set for its registration.

First-Tier Tribunal (TC01960): *Wirral Independent Recycling Enterprise (“WIRE”) Ltd*

6.2.3 Deregistration

A plumber exceeded the registration threshold in 2006 and registered for VAT with effect from 1 December 2006. He was then told by his accountant that he did not need to charge VAT after April 2008 because his turnover had fallen. The returns, default surcharge notices and centrally issued assessments which arrived in the post were only a result of HMRC inefficiency, and he should ignore them.

When eventually HMRC insisted that he was still supposed to be registered and would have to account for a considerable amount of VAT as well as penalties (for failing to point out that a centrally-issued

assessment was too small) and surcharges, he appealed to the Tribunal. He argued that he had reasonably relied on his accountant's advice, but the Tribunal did not accept that this was enough to discharge either the VAT or the penalty. His turnover, as disclosed by his bank statements and his income tax accounts, remained well above the threshold throughout; even if he had initially believed that his accountant had deregistered him, the stream of HMRC paperwork should have alerted him to the fact that HMRC were unaware of this.

First-Tier Tribunal (TC01930): *Dean Alan Perks*

6.2.4 Registration and joint venture

Two Scottish companies entered into an agreement concerning the acquisition and sale of two sites which had development potential. One of them (MH) issued invoices to the other (MD), charging VAT on the basis that they represented a supply of services. MD appealed to the FTT for a determination that VAT was not due. This was significant to the parties because their profit-sharing agreement took VAT into account as a cost; if VAT was due on these payments from MD to MH, it would affect the distribution of the profits of the venture. They had already fought an action in the Court of Session to argue about how the proceeds of sale of the sites should be split between them.

The FTT examined the history of the property transactions and the two individuals who were behind the companies, Mr Meikle (for MH) and Mr Munro (for MD). Although the companies had signed a joint venture agreement in 2005, it seemed to the Tribunal that the activities were in reality carried out by a joint venture which existed between Meikle and Munro. The Tribunal concluded that there were no supplies by MH to MD, so they could not carry VAT. In effect, the individuals had contributed their services to the joint venture: "as such, that is not a supply of services for a consideration and is therefore outwith the scope of VAT". The payments made between the companies reflected payments to Meikle's nominee, his company, and were in respect of the profits of the joint venture between the individuals. The Tribunal did not draw any conclusions about any further possible fiscal consequences for the parties (e.g. the possibility that they should have been registered as individuals or as a partnership).

The case appears to mix together the normal treatment of a partnership (where contributions by the partners and distributions of profit are outside the scope of VAT) and a joint venture (where one of the venturers is usually treated as making all the supplies to third parties, and the others are treated as making supplies to the "lead venture").

First-Tier Tribunal (TC01971): *Maritsan Developments Ltd*

6.3 Payments and returns

6.3.1 Payments on account

HMRC have issued an updated Notice on *Payments on account*. The main change is the revision of the thresholds which came into effect in 2011 following the increase in the VAT rate.

Notice 700/60

6.3.2 No retrospection

A former head teacher set up a business to advise failing schools. Her husband assisted her with administration, and they used a third party accountant for accounts preparation. In 2010 they realised that they were required to register for VAT. At the same time, the husband fell ill, and was later diagnosed with a kidney tumour. The principal was therefore preoccupied and unable to investigate fully how the VAT system operated. She relied on her accountant to take appropriate action.

While the accountant filed the VAT returns on time, he did not apply for the Flat Rate Scheme, even when requested to do so (after two returns had been submitted on the normal basis). The principal (described in the Tribunal report as a “director”, but the business does not have “Ltd” in its name) changed to a different firm of accountants which applied for retrospective admission to the scheme.

The Tribunal agreed with HMRC that their policy with regard to retrospective admission was reasonable – because the FRS is supposed to be a simplification of the rules, rather than about the money, retrospective admission will not be granted where the liability for a period has already been calculated. Although this might be allowed in exceptional circumstances, the Tribunal did not consider that the circumstances of this business warranted retrospection. The husband’s illness was clearly harrowing, and the Tribunal had sympathy with the appellant, but the real problem lay in the failure of the previous accountant to act. HMRC had taken a reasonable decision.

First-Tier Tribunal (TC01975): *JMB Wilmington*

6.4 Repayment claims

6.4.1 Reclaim by care home

A partnership and a company registered for VAT in 2006 in order to take advantage of the *Kingscrest* decision in 2005 which established that residential care homes could charge VAT to local authorities (which the authorities could recover under s.33 VATA 1994) and therefore recover their own input tax. The two businesses had operated a care home in succession, as a partnership from 1980 to 1986, and as a company from 1986 to 1992, when the trade ceased. The two businesses made “long registration period returns” from their respective commencement dates to their respective cessations of trade claiming input tax of nearly £67,000. This information had been extracted from the annual accounts, and

adjustments had been made in respect of the proportion of residents who were paid for by the local authority and who were private payers.

HMRC reduced the returns to nil, arguing that the company could not claim the input tax in isolation. It would have to account for output tax as well. The company contended that the local authorities could recover the output tax so there was no need to charge it. The First-Tier Tribunal agreed with HMRC: it was not permissible to claim the input tax without accounting for the output tax. If the annual accounts could produce one figure they could be used to produce the other. The company would be better off leaving the matter as it had originally been treated by HMRC – exempt.

The Upper Tribunal found fault with some of the details of the FTT's decision – for example, it had referred to HMRC letters refusing the repayment as "assessments", which they were not – but it agreed with the overall conclusion. HMRC were entitled to refuse a repayment on the grounds that the output tax that should have appeared on the returns would have been greater than the input tax that was claimed, and it was not possible for the claimants to ignore the output tax on the basis that it would have been reclaimed by the person to whom it might have been charged.

Upper Tribunal: *Benridge Care Homes Ltd v HMRC*

6.4.2 Out of time claims

HMRC have commented on the recent CJEU decision in *Banca Antoniana Popolare Veneta SpA* (Case C-427/10). The Court ruled that the bank had been "totally deprived of the opportunity" to make a VAT reclaim, and under the legal principle of effectiveness should be allowed to do so. HMRC do not consider that this establishes an automatic right to make out-of-time claims for overpaid VAT.

The problem in Italy was that the bank's customers were entitled to make claims for overpaid VAT from the bank when the tax authority stated in 1999 that certain supplies should have been exempt; the bank was required by the courts to honour these claims, but as the VAT had been paid to the authorities between 1984 and 1994, the bank was unable to recover it. The customers enjoyed a 10-year time limit, while the bank was subject to a 2-year time limit.

HMRC note that the CJEU decision depended on the following findings:

- until the publication of the circular in February 1999, the tax authority had not considered that the VAT exemption applied;
- the judgments of the Italian courts holding that it didn't had not been overturned;
- the 1999 circular was retroactive and had the effect of moving the starting date for the time limit for claims back to the date on which the VAT was paid;
- this had the effect that, when the circular was published, the two-year time limit for making claims against the tax authority for VAT wrongly accounted for between 1984 and 1994 had already expired;
- at all times the bank acted as a prudent and alert economic operator;

- on the facts of this case, the application of the time limits made it impossible or excessively difficult to make a claim against the tax authority and left the bank bearing the economic cost of the VAT which it had wrongly accounted for.

HMRC emphasise that the UK's time limit for making claims is now 4 years, and a trader is at liberty to bring a claim against them at any time. HMRC therefore do not agree that the CJEU decision supports any widening of opportunity to make claims for repayment of VAT in the UK.

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They do not comment on the apparent discrepancy between the normal 6-year time limit for making commercial claims (which may be extended if the cause of damage could not be known at the time of the original transaction) and the 4-year absolute limit for VAT reclaims. This is currently being tested by the investment trust litigants in a High Court action, which has been held over until the resolution of the FII Group Litigation in the Supreme Court.

6.5 Timing issues

Nothing to report.

6.6 Records

6.6.1 Invoicing rules

HMRC have published a technical note explaining the changes to the rules on VAT invoices which must be implemented by 1 January 2013 in line with Council Directive 2010/45/EU. The overall aim of the Directive is to assist businesses by removing some of the obstacles to the use of electronic invoices. HMRC comment that most of the required changes are already incorporated in UK law, so the technical note explains the further minor changes required to comply. Draft legislation is included for consultation.

The original invoicing directive allowed member states to impose additional conditions on the use of electronic invoices such as requirements for electronic signatures to prove authenticity. The UK decided not to adopt these additional conditions, but retained them as an option because traders might meet them when dealing with counterparties in other states (several of which have included such requirements).

It will also no longer be a requirement for a UK business to issue an invoice complying with the VAT regulations in respect of a cross-border supply which would be exempt under art.135(1)(a) to (g) Principal VAT Directive (i.e. insurance and financial services).

Permission to issue simplified invoices (omitting in particular the name and address of the customer) will be extended from retailers to any supplier making a supply for up to £250.

References on invoices which explain the treatment of the supply will be simplified – it will be possible just to state 'exempt', 'margin scheme: [type of margin scheme]', 'reverse charge' or 'self-billing' as appropriate, rather than having to refer to the underlying legislation.

The time limit for issuing a VAT invoice for an EU cross-border supply will be harmonised as the 15th of the month following that in which the goods are removed or the services are performed.

http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_032093

In a Tax Information and Impact Note, HMRC comment that all businesses will have to familiarise themselves with the new rules, but this will cost only £15 per business and about £5m for the UK economy as a whole. This compares favourably with the potential administrative savings from operating the new rules.

6.7 Assessments

6.7.1 Assessment

HMRC raised an assessment on 31 August 2010 in relation to supplies made by a company in the periods 08/06 to 08/07. The assessment was amended on 24 September, and a further assessment was issued in relation to periods 02/07 to 05/08.

The company appealed on two grounds: firstly, that the assessments were out of time, and secondly, that they related to accountancy services supplied to an Irish business, and were therefore outside the scope of UK VAT (at the time, under Sch.5 para.3).

The company's Group Financial Controller gave evidence that the services concerned (which were not described in detail on the invoices) comprised:

- *"organised banking facilities via Barclays Bank PLC (2005 through to 2006)*
- *liaised with various professional advisors throughout this period prepared, cashflows, fund statements, reconciliations (2004 through to 2007)*
- *reviewed and considered operational reports prior to circulation (2004 through to 2007)*
- *prepared cash reconciliations for Trinergy Limited funds (2004 through to 2007)*
- *prepared quarterly management information throughout the period*
- *liaised with Trinergy Limited auditors annually in respect of inter-company transactions and balances."*

However, HMRC's investigation had suggested that other matters were included in the invoices, such as the use of a private plane and wine purchases. It was agreed between the parties that there was a single supply of services (so these other elements must have been incidental), but HMRC did not accept that it fell within the description "accountancy".

In relation to the timing issue, the company argued that the eventual assessment was based on numbers it had supplied in May 2008. However, the Tribunal accepted that the investigation had revealed further information, and until the company's advisers had provided some details in a letter in December 2009, HMRC did not have knowledge sufficient to justify the issue of the assessment. It was therefore in time.

However, the Tribunal agreed with the company that the services supplied were properly described as "accountancy". HMRC had become distracted by the schedules of costs which were used to work out how much would be charged for the service; they had believed that these schedules revealed what was actually supplied. Rather, this was the same calculation that any professional firm would carry out to determine how much to bill – it related to the nature of the company's inputs, not its outputs. The appeal was allowed on this ground.

First-Tier Tribunal (TC02006): *Matrix Securities Ltd*

6.7.2 Self-billing and liability

A scaffolding contractor made supplies to a building company. Self-billing arrangements were in force, so the building company raised invoices and sent them to the contractor, acting as its own input tax invoices and the contractor's output tax invoices. However, in relation to two particular projects (the construction of halls of residence for the Universities of Sussex and Surrey), the self-billed invoices did not include any VAT. The scaffolding contractor had assumed that this was correct, and therefore did not account for any VAT itself on the receipts from the builders.

Unfortunately, only the supply by the main contractor can be zero-rated in the case of construction of relevant residential property buildings (although the Tribunal relates this rule incorrectly, suggesting that "only the main contractor makes supplies in the course of construction"). Initially, the officer investigating assessed only for VAT in relation to the hire of scaffolding; the contractor issued VAT-only invoices to the building companies, which paid them (after some argument); but then the officer realised that the RRP certificate (produced by one of the builders to support the argument that the scaffolding supply should be zero-rated) proved that the whole of the supply should have been standard rated. A further assessment was raised.

One of the builders paid this larger amount, but the other had gone into administration. The contractor disputed the liability, arguing that HMRC should pursue the company which issued the invoice. They have the power to do so under s.29 VATA 1994, but that depends on the exercise of their discretion. The Tribunal sympathised with the trader, but held that the root of the problem lay in their acceptance of incorrect self-billing invoices. Had they disputed them at the time, they would have been able to recover the VAT from the builder while it was still solvent. The Tribunal could not force HMRC to exercise the discretion under s.29, and

comments made by the officer investigating (that he would be happy to contact the customer to discuss the issue) fell short of an assurance that HMRC would do so (which might have created a legitimate expectation that the scaffolding contractor would not be liable for the VAT).

First-Tier Tribunal (TC02053): *Gemini Riteway Scaffolding Ltd*

6.7.3 A tangled web

A British truck manufacturing company was bought by a Canadian company in 1996 and sold on to a German company in 2000. Following the German acquisition, accounting discrepancies were discovered. On further investigation, it appeared that there was a £100m "hole in the balance sheet". Part of this related to overclaims and underdeclarations of VAT. The chief financial officer appeared to have carried out an extensive fraud, not for personal gain but to keep the company going. He had concealed what he had done from all his colleagues.

An investigation by accountants took several years to establish the extent of the problem, including the amount of fictitious VAT entries. As the investigation progressed from March 2001 onwards, HMRC raised several assessments, culminating in a s.60 penalty levied on the company (for £2.7m, 20% of the total understated VAT of £13m) and a final assessment in early 2004. The company appealed against these assessments, but only did so within the statutory time limit in respect of the last one.

The First-Tier Tribunal had to consider first whether to allow appeals out of time in respect of the earlier assessments, and concluded that there was no good reason to do so. It also went through the complicated history of the fraud and its unravelling and decided that the assessments should not be displaced, nor should the penalty be reduced by more than the 80% mitigation that HMRC had already allowed. The only adjustment to the company's liability was to remove some transposition errors from the base figure for the s.60 assessment – as these were innocent errors in the midst of the dishonesty, they should not be subject to a civil evasion penalty (reducing the penalty by about £36,000).

Costs, which must have been substantial, were awarded to HMRC. This was done under the transitional rules – before April 2009, HMRC would apply for costs if the case was complex, and also in s.60 cases.

The company appealed to the Upper Tribunal. This was mainly concerned with an argument about whether the assessments were raised within time: as they related to fraud, HMRC would have a 'backstop' time limit of 20 years rather than the usual 3 (now 4) years from the end of the return period, but they would still have to raise an assessment within 1 year of having knowledge of facts sufficient to justify the assessment.

The company argued that the HMRC officer involved in the investigation had formed an opinion that the relevant employee was dishonest no later than a meeting on 3 October 2002. The assessment to a s.60 penalty was not raised until March 2004, and was therefore out of time. A further report was submitted by the company's accountants in January 2003; again, the company argued that this started the 12 month clock for an assessment, so the assessments were raised too late.

The accountants' final report was submitted in July 2003 and accepted by the HMRC officer. HMRC argued that this was the start of the 12 month time limit, and the assessments were clearly raised within it.

The Tribunal considered the rules for the 12 month 'clock' as set out by Dyson J in the *Pegasus Birds* case:

1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

2. The evidence in question must be sufficient to justify the making of the assessment in question (see Customs and Excise Comrs v Post Office [1995] STC 749 at 754 per Potts J).

3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see Customs and Excise Comrs v Post Office [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see Heyfordian Travel Ltd v Customs and Excise Comrs [1979] VATTR 139 at 151, and Classicmoor Ltd v Customs and Excise Comrs [1995] V&DR 1 at 10).

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223) (see Classicmoor Ltd v Customs and Excise Comrs [1995] V&DR 1 at 10–11, and more generally John Dee Ltd v Customs and Excise Comrs [1995] STC 941 at 952 per Neill LJ).

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act.

The company's counsel argued that HMRC should have raised an assessment at an earlier date and amended it later. It was not reasonable to wait until they had a 'perfect' assessment; as soon as they could raise 'an assessment', time started to run against them. However, the Upper Tribunal accepted that the 'New Approach' to dishonesty investigations, which was being applied to this case, made it reasonable for HMRC to hold off exercising their judgement until the taxpayer's representatives had produced a definitive report. They had been asked to do this and had agreed. That was not unreasonable. The final accountants' report was 'the last piece of the puzzle' which justified the raising of an assessment.

There was a further argument about the calculation of the s.60 penalty, which was expressed as 20% of the underdeclared tax for a number of periods. The maximum penalty was 100%, but 80% mitigation was

allowed for co-operation. The company argued that the penalty should be calculated taking into account overpayments that had been made in some periods (apparently also part of the employee's fraud, to give himself leeway for further manipulation of the figures). HMRC argued that this 'netting off' effect had been taken into account in setting the level of mitigation and also in choosing the period over which the penalties would be levied, which was shorter than might have been the case on a strict application of the law.

Both Tribunals criticised the slightly haphazard way in which the penalty was arrived at. However, it is clearly an area in which the final figure is a matter of judgement; the First-Tier Tribunal concluded that the penalty was not unreasonable, and the Upper Tribunal confirmed that this decision was arrived at fairly and within the FTT's authority.

Lastly, there was an appeal on the question of costs. The company's counsel argued that there were procedural irregularities in the way the FTT had awarded costs, and also substantive grounds on which it should not have done so. The Upper Tribunal rejected all these arguments and confirmed the award.

Upper Tribunal: *ERF Ltd v HMRC*

6.7.4 Best judgement

A trader appealed against assessments for nearly £1m in relation to VAT and excise duty not declared on fuel smuggled across the border between Northern Ireland and Eire. The trader had pleaded guilty to criminal charges in relation to this activity in 2006, and had been the subject of a (much smaller) confiscation order under the Proceeds of Crime Act. He argued that this had satisfied his whole liability to HMRC, and they could not now raise an assessment.

The Tribunal did not accept this argument. A confiscation order was issued for different reasons and under different law, and was not necessarily an alternative to an assessment. The fact that one had been issued and complied with did not engage the principle of res judicata in favour of the trader. The appellant had made no attempt to dispute the factual basis of the assessments, which therefore stood.

First-Tier Tribunal (TC02015): *Michael Nugent and another*

6.7.5 No defence

A trader appealed against assessments raised to disallow input tax. He was not represented at the hearing, although his father turned up to request an adjournment. The Tribunal did not accept that there was any good reason for further delay; the assessments were based on the trader's own SAGE accounting records, and there was no evidence to back up the claims for input tax. The appeal was dismissed, and a misdeclaration penalty was confirmed.

First-Tier Tribunal (TC02057): *Matthew Granger*

6.8 Penalties and appeals

6.8.1 Careless errors?

In an article in *Taxation*, Graham Elliott describes a 'baker's dozen' of possible VAT mistakes, including falling foul of MTIC fraud, missing a reverse charge, claiming back VAT on a TOGC, and claiming input tax on a car without taking appropriate steps to prevent any possibility of private use. He comments on the likelihood that HMRC would argue that all these errors involve carelessness and would therefore carry a penalty tariff of 30% unless an unprompted disclosure was made.

Taxation, 24 May 2012

6.8.2 Defaults

A trader denied receiving surcharge liability notices and argued that HMRC had failed to pay cheques in promptly, which was the reason for them receiving the VAT later than the due date. The director also argued that a small business with turnover of up to £150,000 should not have surcharges imposed on it.

It was apparent to the Tribunal that the surcharge notices had been sent out, and it was not credible that the appellant had not received any of them; the returns and cheques were received so late that any delay could not be blamed on HMRC; and there was no provision in the law or in any concession similar to the one the director claimed to exist. The appeal was dismissed.

This appeared to be another in a run of cases in which HMRC's issue of a "help letter" for the first default, followed by not collecting surcharges below £400 at 2% and 5%, lulled the trader into believing that surcharges would not be collected at all.

First-Tier Tribunal (TC01913): *OC2 Ltd*

A company within the payments on account regime pleaded a reasonable excuse for a range of defaults over a range of 10 return periods from 07/06 to 12/08. At the hearing HMRC accepted that the surcharges should be cancelled for the first three periods and part of the fourth.

The Tribunal accepted evidence showing that the company's bank had failed to act on instructions to make a payment for that fourth period that were clearly given in good time. The company had had a history of problems with its account manager, and changed to a different bank shortly afterwards. That was consistent with its explanation that the problem was beyond its control and it had taken reasonable steps to resolve the issue. A further balancing payment was also not paid because the bank failed to act on instructions, and this excuse was also accepted by the Tribunal.

The remaining defaults related to a period in which the company believed that it had fallen out of the payments on account regime. It claimed not to have received a schedule of required payments in February 2008, as it had in previous years, and by its own calculations reckoned it had fallen below the threshold (according to HMRC, this only happened a year later). HMRC claimed that it had sent the schedule and would have expected the company to check whether POA were required. The company also

claimed not to have received surcharge notices for the resulting late POA until the last of the periods for which POA were required, so it had no reason to realise that it was liable to make POA.

The Tribunal agreed that the reasonable belief that POA were not required, and the apparent failure of HMRC to communicate the fact that they were, constituted a reasonable excuse for all the surcharges.

First-Tier Tribunal (TC01929): *Banham Patent Locks Ltd*

A company paid its VAT for several periods by instalments. Surcharges were imposed but one was below £400 and three were later withdrawn. However, the company remained within the surcharge regime; when it made a further payment (in two instalments – one a day late and one two days late), a surcharge at 10% was imposed.

The company had attempted to make a 'faster payment' on the due date. At the time, HMRC were unable to accept faster payments, which was why the money arrived late. This had been explained in a leaflet that was sent to the company with the surcharge liability notice. This fact led the Tribunal to conclude that the company did not have a reasonable excuse.

The decision is unusual in that the current Finance Director of the company, who appeared as its representative in the appeal, asked for a full reasoned decision to explain it. The chairman has therefore set out the logical basis of the conclusion that 'the company had been told not to pay this way so it should not have tried to' in more detail than might normally be considered necessary.

First-Tier Tribunal (TC01937): *Sew and Go Ltd*

A company cancelled its direct debit and paid by cheque instead, but the cheque arrived late. When a surcharge of over £8,000 was applied, the company appealed, not pleading a reasonable excuse but offering two different defences: first, that setting different deadlines for cheques and electronic payments was discriminatory and therefore unreasonable; and second, that the penalty was disproportionate.

The Tribunal did not accept the first argument. The legal status of the distinction was not clear (as the relevant passages in Notice 700 were not in 'force of law' boxes), but it was within HMRC's discretion to set different deadlines. It also appeared that the payment was indeed made late, and there was no reasonable excuse. The directors should have been aware that payment by electronic means was mandatory, and they had deliberately cancelled the direct debit.

HMRC's representative accepted that the Tribunal had jurisdiction to consider the proportionality defence, but pointed out that HMRC regarded both *Enersys* and *Total Technology* as wrongly decided, and the second case is under appeal to the Upper Tribunal. The Tribunal considered precedents on proportionality in detail, and concluded that the 15% surcharge in this case was not 'manifestly unfair', even if very large in amount compared with the company's resources and turnover. The company had not intentionally withheld payment, but it had intentionally cancelled the direct debit; that was a deliberate act which it should not have done, and it undermined the defence that the penalty was too harsh.

First-Tier Tribunal (TC01954): *The Oxbridge Research Group Ltd*

A restaurant had significant financial difficulties and entered the surcharge regime. It made a 'time to pay' application in respect of the period 11/08, and continued to pay late after that for the next four periods, suffering surcharges at 10% for the first and then 15% for the remaining three.

The Tribunal considered that records of conversations between the Advice Service and the trader suggested that he had been given misleading advice. It had not been clearly explained at any point that a time to pay arrangement only related to a single period and would have to be renewed regularly; some of the phone calls appeared to give the opposite impression, that the trader could ignore the surcharges because TTP was in force. The appeal was allowed on alternative grounds: either the TTP agreement continued throughout the period and the trader had adhered to its terms, or else the trader's belief that it did so constituted a reasonable excuse.

First-Tier Tribunal (TC01974): *The Copperfields Restaurant*

A curious detail arose in a case where the trader's excuse was dismissed as it appeared to be no more than a misunderstanding over the due date for payment – that could not be good enough, particularly for a 10% surcharge when the rules ought to have been checked. The decision records, without further details, that '*In June 2011 HMRC had incorrectly made a double deduction on the agreed payments*'. This was the subject of a complaint and an internal investigation, but the overpayment was much smaller than the underpayment and could not therefore be a reasonable excuse for late payment of a much larger amount. However, if HMRC had the power to 'deduct payment', it suggests that they had a direct debit in force. It is therefore not clear why the payment of the disputed period was late, unless the return itself was submitted too late for HMRC to call for the VAT in time.

First-Tier Tribunal (TC01976): *Paint Finish Ltd*

A company entered the surcharge regime because of a misposting of £39.50 in the accounting system. The VAT account showed this as an overpayment from an earlier period, so the company paid £39.50 less than was shown on the VAT return. Even though this was a minor misunderstanding and a small amount of money, it was enough to constitute a default and there was no excuse.

The surcharge period was extended after one payment that was made by electronic transfer on a Thursday in the belief that HMRC would receive it the next day; without any evidence that this had been checked with the bank, the company had no excuse for the fact that the money arrived on the Monday, a day late. It was further extended for a period in which the trader claimed to have submitted a paper return in good time and then subsequently sent an electronic one when it realised that the paper one had not arrived; the Tribunal held that there was no evidence that the paper return had been sent, and no excuse.

Two further periods were in default when an employee keyed in CHAPS instructions too late in the day for the money to arrive on the same day. She claimed not to have noticed that the printout showed the arrival date as the following day, but the Tribunal considered that a reasonable person would have checked.

However, the Tribunal allowed the appeal against the later surcharges because it was not satisfied that, on the evidence, HMRC had demonstrated that it had sent out surcharge liability extension notices. If the extensions had not been served on the taxpayer, the period had come to an end and the surcharges were not valid. HMRC argued that their computer records showed the notices being generated, but HMRC accepted the employee's evidence that she opened the post and kept a complete file of everything that arrived from HMRC: the letter creating the surcharge period was in her file, and the imposition of the disputed surcharge, but not the extensions for the defaults in the middle.

First-Tier Tribunal (TC02001): *Garnmoss Ltd t/a Parham Builders*

6.8.3 Other late payment penalties

A property development company was in financial difficulties. Rather than filing the corporation tax return for the past period, which showed a profit on which it would have to pay tax, the director chose to delay filing while he attempted to negotiate new sources of finance. He believed that he would be able to reduce the CT liability by losses of the next period when he finally filed, and would only have to pay interest on the late payment of tax. When he finally submitted the CT return a year late, he discovered that HMRC could charge a 10% penalty based on the outstanding tax (£40,120 – reduced from twice that figure because HMRC accepted that the return was submitted on 30 April 2009 rather than the following day, which would have doubled the penalty).

The Tribunal expressed sympathy for a hard-pressed businessman doing what he thought was the right thing to protect his company, but could not accept that this constituted a reasonable excuse for late filing. In spite of the possibility that HMRC would have been unsympathetic and would have taken enforcement action had he submitted the return, the correct course of action would have been to file and then ask for time to pay. The penalty was confirmed.

First-Tier Tribunal (TC01970): *Sterling Developments (London) Ltd*

6.8.4 Suspension of penalties

One of the important new developments in the post-2009 penalty regime is the possibility that HMRC will suspend a penalty, rather than collecting it, so the trader will escape the charge if behaviour improves. There is anecdotal evidence that HMRC are unwilling to suspend penalties, choosing instead to enforce them even if the policy purpose of suspension might apply. A company has now won the right to suspend penalties for careless application of the partial exemption rules.

The company received a visit from an officer who discovered errors in attribution of purchases for partial exemption purchases in the periods 08/09 and 11/09. Penalties of £266 and £424 (at 15% for careless error, prompted disclosure, full co-operation) were imposed but suspended subject to the condition that the company would in future operate an agreed listing of posting codes in allocating expenditure for its partial exemption calculations.

The Tribunal took evidence from a director about the discrepancies subsequently found and penalised by an officer in respect of the periods

08/10 and 11/10. The decision notes that it was difficult to match up the files of documentary evidence with the assessments or the explanations, but the Tribunal was satisfied that the company had been careless. A claim that partial exemption involved 'an element of subjectivity' was rejected by the chairman.

The Tribunal noted that HMRC had clearly accepted that errors of this type were suitable for suspension of penalties, as they had already suspended the penalties for the previous year. The company was also under a suspended penalty in relation to tax point errors for the period 05/10, which suggests that the anecdotal evidence may be wrong. HMRC, not surprisingly, regarded the repetition of partial exemption errors as something that should now trigger a payable penalty.

HMRC's review decision on the penalties recorded the following reasons for refusing to suspend them:

- further careless errors had been made after earlier penalties had been suspended;
- the errors were of the same sort as those that led to the earlier suspended penalties (failure to allocate expenditure correctly);
- the trader failed to contact HMRC for advice in dealing with the expenditure which it wrongly allocated.

In order to reject the HMRC decision and require the penalties to be suspended, the Tribunal had to find that this decision was 'unreasonable'. The decision considers each of the grounds for the decision as follows:

- clearly the existence of previous suspended penalties was not an overriding reason not to suspend current penalties – 05/10 had been suspended even though there were already other penalties under suspension.
- the condition imposed by the suspension in relation to partial exemption was hard to understand in an area in which the trader clearly had difficulties – the policy purpose of suspension was to educate the trader, and HMRC's conditions failed to do this;
- it would have made more sense for HMRC to impose a condition that 'the trader should contact HMRC if unsure', rather than regarding failure to contact them as something which ruled out further suspension.

The Tribunal concluded that the decision not to suspend the penalties was unreasonable and allowed the appeal.

First-Tier Tribunal (TC01978): *Shelfside (Holdings) Ltd*

6.8.5 Dishonesty

An individual registered a business named 'Dreams In Reality' and submitted a repayment claim for over £60,000 which was supposed to be in relation to the purchase of a 'supercar', an aeroplane and a piano. HMRC refused the claim on the basis that there was no evidence that these purchases had taken place, and imposed a s.60 penalty at 100% – without any co-operation, there was no reason to mitigate it at all. The

trader gave no explanations and failed to attend the hearing, pleading ill-health (but providing no evidence of that).

The Tribunal confirmed the penalty and awarded costs against the taxpayer.

First-Tier Tribunal (TC01919): *Stella Walker*

Another trader disputed a penalty of £63,105 in relation to evasion between July 2002 and October 2008. He did not dispute that he had traded during that period above the registration threshold without accounting for VAT, and he accepted the amount of VAT payable and the basic calculation of the penalty; he argued that there should have been greater mitigation.

Under the pre-2009 policy, HMRC had mitigated the potential penalty of 100% of the VAT (£210,353) by 40% (the maximum) for 'early and truthful explanations of the amount of the arrears' and 30% (out of a possible 40%) for 'embracing and meeting of responsibilities under Public Notice 160'. It was not possible to secure 100% mitigation without unprompted disclosure, which had not occurred in this case.

The Tribunal agreed with HMRC that their approach was in accordance with the legislation and was, if anything, generous. The penalty was confirmed.

First-Tier Tribunal (TC01991): *Peter Vaughan Orwin t/a P C Joinery*

A trader appealed against dishonesty penalties that were raised under both the old and the new regimes – in respect of s.60 VATA 1994 for periods up to December 2008, and under Sch.24 FA 2007 for periods from March 2009 onwards. The trader was a scaffolding contractor whose boards had been seen by HMRC officers carrying out inspections of building sites – several of these sightings could not be traced to sales in the company's records. There were other inconsistencies in explanations and documentation that increased the officers' conviction that sales were understated.

The trader's main ground of appeal was that the accounts were correct – the officer had failed to understand the way the business worked, and had assumed understatement where there was none. There could therefore be no dishonesty.

The Tribunal considered that the appellants failed to satisfy the burden of proof to displace the assessments. These appeared to have been raised to the best of the officer's judgement: there were reasonable grounds to suspect understatement, and in the circumstances the amount of the assessment appeared to have been arrived at logically and fairly.

On the other hand, the burden of proof for the penalties lay on the Crown. The Tribunal was also not satisfied that HMRC had discharged their burden to show that the directors had been dishonest. It could equally well have been the result of negligence or carelessness. As the only penalties under consideration were for dishonesty and deliberate concealment, they had to be discharged. The VAT itself was due, but the penalties were not.

First-Tier Tribunal (TC02027): *Joint Scaffolding Ltd*

6.8.6 Late appeals

An interesting point of procedure arose in a case in which a trader applied to the Tribunal for permission to make a late appeal against an assessment in relation to *Rank* repayments. It had been repaid VAT of £38,000 plus interest in March 2011. It had made a claim to this overpayment in 2006, and HMRC finally agreed to pay it in line with the decisions of the High Court and First-Tier Tribunal in favour of the appellant in two parts of the *Rank* dispute.

At the same time as issuing the repayment, HMRC raised a protective assessment asking for the money back again. The trader did not appeal against this for four months, not realising that it was necessary. After taking advice the trader lodged an appeal, and HMRC objected. They went through the normal reasons for rejecting appeals which are made late, and commented that there would be no prejudice to the trader: if HMRC's appeals against the decisions which led to the repayment were unsuccessful, the assessment would be withdrawn.

The Tribunal noted that this was not certain in the law. If it refused leave to appeal, the trader would have to rely on HMRC 'doing the right thing' if its appeals failed. The particular point of interest in this is that the FTT hearing took place in late March 2012, well after the CJEU had handed down its decision in the *Rank* case. Although that decision gave HMRC some small hope of finding particular circumstances in which it could still argue about *Rank* repayments, it hardly seemed likely to lead to a complete rejection of the decisions which had led to the repayments to this trader.

The Tribunal made no comment on the CJEU decision, but concluded that the prejudice to the trader outweighed the lesser prejudice to HMRC in allowing the appeal to proceed. The Tribunal also took into account that the delay was only four months, much less than some of the other late appeal applications in recent cases.

First-Tier Tribunal (TC01952): *Cascade Amusements*

A trader appealed in February 2009 against several Post Clearance Demand Notices in respect of customs duties which were issued in 2006 and confirmed on review later that year. The time limits for appealing against such decisions are broadly the same as for VAT.

The judge disapproved HMRC's representation of the correct procedure to follow as a two-step approach: first, to consider the reasons given by the appellant for the delay, and only then to consider all the circumstances. The judge believed that the Tribunal's discretion was 'at large', i.e. unfettered, and this two-step approach gave too much emphasis to the reasons when all the circumstances should be considered together.

In relation to the first group of PCDNs, the judge held that the importer had taken a conscious decision at the time not to appeal, on the grounds that the evidence available at the time suggested that the origin documents it had relied on were false. It was now seeking to reverse that conscious decision, and there would be prejudice to HMRC if it was allowed to do so.

In respect of a second group of PCDNs, there were two reasons to come to a different conclusion. First, there was an arguable case that the PCDNs

themselves had been issued out of time by HMRC. This should be considered by the Tribunal on appeal. Second, there was no conscious decision not to appeal. HMRC had been asked to review the decisions, and had confirmed them by default through not issuing a review decision within 45 days. The trader had not realised that this triggered a deadline for appealing; it had believed that the ball was in HMRC's court. For this reason the appeals out of time against the second group of notices would be allowed to proceed.

First-Tier Tribunal (TC01962): *Elnagy International Ltd and related appeals*

A company ceased trading in 2005. HMRC uplifted its books and records in early 2006 and in March sent a letter stating that 'an assessment will follow' for over £140,000 of VAT which was stated to be the result of both over and underpayment errors. There was a dispute about what further correspondence was sent and when, but HMRC argued that this letter in any case constituted notification of a best judgement assessment to the trader, and therefore triggered the deadline for making an appeal. A formal appeal was not entered until much later, so HMRC applied for it to be struck out as out of time.

The judge considered that there was a lack of clarity in the way the assessment was raised which contributed to the delay. The delay was, even so, very long, amounting to some 2 years after the company's liquidators appeared to become aware of the existence of an assessment against which they ought to appeal. There was also confusion between the professional advisers and the shareholder/director about who ought to proceed with the appeal.

The judge concluded that the prejudice to the appellant would be greater from a refusal than the prejudice to HMRC from granting the application. The appellant would still suffer the burden of displacing the assessment, so the fact pleaded by HMRC – that it would be difficult to provide reliable evidence after such a long time – would count more against the appellant than against them. The application to strike out was refused, and various directions made about how the case should proceed.

First-Tier Tribunal (TC02011): *Sunlander Outdoor Products Ltd*

In a MTIC dispute, a company applied to the FTT for leave to appeal out of time against a decision made in relation to input tax on one specific deal in its 04/06 return period. The company claimed that it had not received the decision letter, and only became aware that a decision had been taken while dealing with correspondence about another matter (the disallowance of input tax on another 16 deals in the same period).

The FTT weighed the various issues and dismissed the application. The only evidence to support the contention that the decision letter had not been received was a witness statement from a director who did not attend the hearing. This was not sufficiently clear about some of the details, and the Tribunal therefore did not accept that there was sufficient justification for the delay. It is not clear whether the application would have had more success if the director had attended and given evidence in person, or why he did not do so (to back up the opportunity to appeal about over £160,000 of input tax).

The company appealed to the Upper Tribunal. The FTT gave leave to appeal, commenting that there was little case law on the approach to be taken by a Tribunal in determining whether to allow an extension of time. The judge considered that the FTT had adopted the correct approach and had reached a decision that was open to it. It was not for the appellate tribunal to reach its own decision, but to review the way in which the decision below had been arrived at; there was no reason to overturn it.

Upper Tribunal: *Data Select Ltd v Revenue and Customs Commissioners*

6.8.7 Procedure

A trader reclaimed a considerable amount of VAT in relation to input tax incurred in making supplies which it had wrongly treated as exempt. HMRC applied to have the appeal stayed behind the hearing in the Upper Tribunal of the *Birmingham Hippodrome* case, on the grounds that similar issues arose. That case was about a situation in which a trader had treated exempt supplies as taxable; it had recovered a significant amount of input tax on capital works as a result of that mistake, more than four years before the mistake was realised; and HMRC successfully objected to a repayment of output tax, on the basis that the input tax wrongly recovered ought in fairness to be taken into account.

The Tribunal considered that it had discretion to direct a stay or not; however, the starting point was the appellant's statutory right to bring an appeal, which meant that there had to be solid grounds for deciding on a stay. The trader's objection was relevant, although not overwhelming.

The chairman was most influenced by the differences between the cases. The current appeal concerned supplies of "studio facilities" between 1973 and 1989 which the company had treated as exempt "property letting". In effect, the arguments were reversed. Although it was likely that the other case would provide some guidance that might be useful, they were not so similar that this was an overriding reason to delay the current appeal. HMRC's application was refused.

First-Tier Tribunal: (TC02054): *Pinewood Studios Ltd*

6.8.8 Costs

A dispute about costs is a reminder of the uneven playing field that a trader is on. The decision lists the unhappy chronology of a dispute in 64 paragraphs; HMRC issued various assessments (not VAT) against which the trader appealed, and eventually the case was dropped without a hearing. The trader applied for costs. The Tribunal concluded that it could only make such an award if it considered that HMRC had acted unreasonably, and it did not come to that conclusion. The trader had therefore argued, and won, but nevertheless lost all its costs and time involved in the dispute.

First-Tier Tribunal (TC01910): *Thomas Maryan t/a Hazeldene Catering*

A company lodged an appeal against a decision to refuse its application for a licence under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999. The decision was made in 2008 and the appeal was lodged on 25 September 2008; the appeal was heard in 2010 and the decision in favour of the company was issued on 29 December 2010. The company subsequently applied for costs to be awarded.

The Tribunal had to consider whether this application for costs was made out of time, and if it was, whether such an application should be entertained; and if it was entertained, either because it was not late or should be admitted, whether costs should be awarded either under the transitional rules for appeals or the post-2009 rules.

After lengthy consideration of the facts and precedents, the judge concluded that it would not be appropriate to award costs. An application to apply the 'old' costs rules to all or even part of the appeal was made much too late; and the judge did not consider that costs could be awarded under the 'new' rules, because HMRC had not acted unreasonably.

First-Tier Tribunal (TC01914): *Eastenders Cash and Carry plc*

Another trader succeeded in negotiating a reduction in an output tax assessment, following which its appeal was withdrawn. At that point it applied for the pre-2009 costs regime to be applied so that it could recover some of the costs of conducting the argument, as it had been partly successful. HMRC objected, arguing that it would have had to apply for the old costs regime at a much earlier stage. When the trader appealed to the Tribunal in support of its costs claim, HMRC sought its own costs of the hearing on the new basis, arguing that the trader had acted unreasonably.

The Tribunal accepted HMRC's argument in relation to the costs of the original appeal, but did not agree that the trader had acted unreasonably. No costs were awarded to either party.

First-Tier Tribunal (TC02056): *AK Optical Ltd t/a Hale Eyecare*

6.9 Other administration issues

6.9.1 Dashboard

HMRC have offered a new online service for small businesses called the "tax dashboard". This provides "a simple way for businesses to see how much tax they have already paid and how much they still owe" (including liabilities, payments and repayments, penalties and interest). At present it covers PAYE, corporation tax and self-assessment income tax, but VAT will be added later. Traders who are signed up for online services can also enrol for the dashboard. Details are available from the HMRC website.

HMRC Release 12 April 2012

6.9.2 Updated Notice

HMRC have issued an updated General VAT Guide Notice 700, replacing the February 2011 edition. It includes new information about the options available to businesses who want to find out more about how VAT works; updated information providing a complete list of historic VAT rates; updated information on the place of supply of services rules, following major changes in 2010; and new guidance on the flat rate scheme for small businesses. The full list of amendments is perhaps a useful reminder of things that have changed recently:

1	New information about the options available to businesses who want to find out more about how VAT works - paragraph 1.
3	Updated information providing a complete list of historic VAT rates - paragraph 3.3.
4	Updated information on the place of supply of services rules, following major changes in 2010 - paragraph 4.8.
5	Updated information on services received from outside the UK, following major changes to the place of supply of services rules in 2010 - paragraph 5.
8	Updated information regarding supplies of mobile phones, computer chips and emissions allowance - paragraph 8.
10	Revised guidance on the time limits for reclaiming input tax – paragraph 10.
10	New information about repayment of input tax if you do not pay your supplier - paragraph 10.6A
12A	New guidance on input tax recovery in respect of mobile phones provided to employees
13	Revised information which take3s into account changes to the capital goods scheme – paragraph 13.
15	Updated information on imported services, following major changes to the place of supply of services rules in 2010 - paragraph 15.
17	Updated information regarding use of a third party to transmit invoices – paragraph 17.
19	New guidance on the flat rate scheme for small businesses – paragraph 19.3A
19	Revised guidance on how to correct errors on previous VAT returns – paragraphs 19.11 and 19.
20	Updated guidance on the submission of electronic VAT returns – paragraph 20.3.
20	Updated guidance on the Annual accounting scheme – paragraph 20.
27	New information about the need to be aware of possible fraud – paragraph 27.4.
28	Revised guidance about appealing against an HMRC decision, following changes to the UK Tribunals system – paragraph
20	Revised information on the place of supply of services rules, following major changes in 2010 – paragraph 29.2.
31	Removal of this section. Schedule 5, VAT Act 1994 was removed from 1 January 2010 following major changes to the place of supply of services rules

Notice 700 The VAT Guide

A further edition was issued in May 2012 after someone noticed that the April 2012 version still contained the misdirection concession, and the sample VAT invoice showed the wrong standard rate of VAT.

6.9.3 HMRC performance

The Public Accounts Committee has published a review of HMRC's Compliance and Enforcement Programme. This operated from 2006 to 2011, generating £4.32 billion in extra revenue from an investment of £387 million.

However, the PAC noted that the "tax gap" was estimated at £35 billion of uncollected tax. Staff numbers had been reduced by 3,387 to meet headcount targets, possibly losing the opportunity to collect another £1.1bn. The programme was boosted in 2010 by the investment of a further £917m, a decision supported by the PAC.

www.publications.parliament.uk/pa/cm201012/cmselect/cmpubacc/1892/189202.htm

6.9.4 Manual updates

HMRC have amended their online manuals as follows:

VAT Assessment and Error Correction Manual: updated VAEC7410 on error correction time limits

www.hmrc.gov.uk/manuals/vaecmanual/updates/vaecupdate030512.htm

VAT – Fraud Manual: new section added on 'conduit traders' involved in MTIC fraud

www.hmrc.gov.uk/manuals/vatfmanual/updates/vatfupdate240512.htm

6.9.5 Updated Notice

HMRC have issued an updated notice on *Insolvency*, replacing the November 2011 edition. The changes appear to be minor – two different addresses, a change of procedure on claiming VAT refunds with form 426, and an amendment to the procedure for finalising a trader's partial exemption calculations.

Notice 700/56

6.9.6 Proceeds of crime

The Court of Appeal has considered another appeal against confiscation orders related to alleged MTIC frauds. In one case, the order was reduced by £200,000 which the judge in the lower court had incorrectly added to the "benefit" which was to be cancelled by the confiscation; however, the overall judgment was fair and reasonable in accordance with precedent cases.

Court of Appeal: *R v Bagnall and another*

HMRC have successfully prosecuted three men who took part in a 'carbon trading' VAT fraud. The size of the fraud was reported as £38m, but it is not recorded how much of this has been recovered. The gang were sentenced to a total of 35 years in prison.

The Daily Telegraph, 20 June 2012

6.9.7 Litigation and settlement strategy

HMRC have published the final version of a 'commentary' on the new Litigation and Settlement Strategy. A draft version was issued in July/August 2011 as 'guidance'. This commentary is intended to remain as a stand-alone work of reference, while guidance on the LSS will be incorporated into the HMRC manuals in due course.

The introduction sets out the following background information:

The Litigation and Settlement Strategy (LSS) – Annex 1 – sets out the principles within which HMRC handles all tax disputes subject to civil law procedures. This includes most of HMRC's compliance activity.

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The LSS reflects all three of HMRC's key strategic objectives by considering:

- *the overall effectiveness of disputes handling (to maximise revenue flows);*
- *how to reduce the scope for disputes arising and settle those that do arise as quickly and efficiently as possible (to improve customer experience); and*
- *the efficiency of disputes handling (to reduce costs).*

The two key elements of HMRC's approach to tax disputes are:

i. *supporting customers to get their tax right first time, so preventing a dispute arising in the first place; and*

ii. *resolving those disputes which do arise in a way which establishes the right tax due at the least cost to HMRC and to its customers, which in most cases will involve working collaboratively.*

Understanding the way in which HMRC staff are told to deal with disputes may help practitioners to be more efficient in settling disputes, avoiding the pursuit of solutions which cannot be accepted by HMRC and making offers that are more likely to be looked on favourably.

HMRC Release 3 April 2012

6.9.8 ADR

HMRC have published the final version of guidance on the use of alternative dispute resolution (ADR) in resolving tax disputes. The main changes from the draft published in July/August 2011 concern examples of cases where ADR has been effective and the inclusion of further information on phase 2 of the 'large and complex' pilot that will run throughout 2012/13.

The case studies which relate to VAT are as follows:

"Fleming" claim resolved

1. In January 2009, following the "Fleming" decision, a house-building company claimed repayment of output VAT that had been incorrectly charged for periods from 1985 until 1997. The company had incurred soft landscaping costs in relation to the construction of private residential developments. Until 1999 HMRC believed that soft landscaping costs

within the plot of a house were not deductible, but in 2000 the court in the Rialto case determined that they were in fact zero-rated.

2. The company's claim was based on the average % of soft landscaping costs to total cost of sales in the years 2000 to 2003, applied back to all years from 1985 to 1997. It supplied some evidence of soft landscaping in years from 1995 to 1999 but HMRC contended that the evidence did not make it clear that the shrubs, trees etc were planted in the individual plots or were part of the communal landscaping on the estate.

3. The agents said that no more documentary evidence was available, but they wrote that the company directors had said that there were minimal communal areas.

4. The claims were listed for the First Tier Tribunal. The facilitator spoke to the agents, who agreed the claims for periods prior to 1992 were unlikely to succeed at Tribunal. The agents also agreed to revisit the % of costs attributable to soft landscaping in the later years. The decision-maker confirmed that there was evidence of soft landscaping, but it was inconclusive whether it was on individual plots or in communal areas.

5. After a week the agents submitted revised claims, which were acceptable to the decision-maker. The tax and interest saved were respectively £105k and £118k; totalling about 2/3 of the sums originally claimed.

VAT issue around contract

1. A customer made a request for mediation around the issue of classification of a contract as to whether the contract should be classified as a Hire Purchase contract or a lease contract for VAT purposes.

2. At a meeting, the HMRC specialists and solicitors considered that the facts were not in dispute and that, as the issue was therefore black and white, there was no scope for mediation.

3. Accepting this analysis, the ADR Panel agreed that the issue was not one which HMRC should deal with through mediation, but suggested that a facilitated discussion should be held including the customer, agent and HMRC specialists to ensure that both sides fully understood the facts and how they were being interpreted.

4. At the meeting, a presentation was made by the customer as to how their contract worked and how it differed from others in the market. Whilst accepting that there were features of the contract which pointed towards the contract being hire purchase and other features which pointed towards it being a lease, HMRC were of the opinion that one feature above all the others was determinative as to whether the contract was one for hire purchase or one for a lease.

5. This was explained to the customer, who reluctantly accepted that the opinion could validly be held.

6. Although this is an example which shows that the decision to refuse to engage in mediation was a good one, the facilitated discussion assisted in helping the customer understand HMRC's decision around the contract and opened up lines of communication as to how to resolve the ongoing dispute.

HMRC Release 3 April 2012

HMRC have announced that the ADR pilot, which has been running in selected parts of the country, will now be available to SMEs and individuals wherever they are. HMRC's press release comments as follows:

Cases potentially suitable for this pilot may involve any of the following features:

- *Facts that are capable of further clarification*
- *Disputes that might benefit from obtaining more suitable evidence*
- *Factual and/or technical matters in which there is legitimate scope for any party to obtain a better understanding of the other's arguments*
- *Issues which are capable of further mediation and settlement by agreement within the framework of the Litigation and Settlements Strategy (LSS)*

Cases not suitable for this pilot may involve any of the following features:

- *Cases which cannot be legitimately settled within the parameters of the LSS other than by litigation*
- *Issues which require clarification in the wider public interest. These might include matters of industry-wide application*
- *Issues linked to or involving co-ordinated appeals issues ("Stood behind" cases) e.g. 'Compound Interest' type disputes*
- *Cases that could only be resolved by an HMRC departure from its established technical or policy view*

HMRC (NAT) 49/12

6.9.9 Campaigns

HMRC reminded electricians that the deadline to register for their voluntary tax disclosure under the "Electricians Safe Tax Plan" was 15 May 2012. The tax owed then has to be paid by 14 August 2012.

HMRC Release 4 May 2012

A similar campaign is in progress for people who have undeclared income from trading on the internet. The e-Markets Disclosure Facility had a registration deadline of 14 June to take advantage of reduced penalties. Full disclosure and payment must then be made by 14 September 2012.

HMRC Release 10 May 2012

6.9.10 Right of set-off

A company won an appeal against disallowance of input tax in a rare finding of the First-Tier Tribunal that knowledge of fraud was not the only feasible explanation for the transactions which led to the reclaims. HMRC subsequently sought to set off the resulting repayment of VAT against corporation tax and PAYE owed by the company, and disputed whether interest was due on the VAT.

The High Court held that the two matters were not so closely connected that HMRC should have a right of set-off. HMRC's claim to set off the sums owing and repayable was dismissed.

However, the company was entitled to a repayment supplement, and was therefore not entitled to interest under s.27 Tribunal, Courts and Enforcement Act 2007.

High Court: *Emblaze Mobility Solutions Ltd v HMRC*

6.9.11 New manual

HMRC have published their Securities Guidance Manual, covering new powers to seek security for PAYE and NICs from April 2012. This supplements the existing powers to require a deposit of security in relation to VAT and other indirect taxes.

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

Appeals against notices requiring security have been relatively rare recently. Two directors of a company operating a pub appealed against a notice which was issued after a predecessor company had gone into administration owing VAT, and the successor company had failed to submit its first VAT return or pay over any VAT in respect of its first return period. The notice of appeal effectively pleaded hardship in difficult economic circumstances; this generally confirms the reasonableness of HMRC's view that there is a risk to the revenue, and the failure of the directors to turn up to the hearing meant that the Tribunal could only dismiss their appeal.

First-Tier Tribunal (TC01992): *The Distinctive Pub Company (Stratford) Ltd*

6.9.12 Consultation tracker

HM Treasury has issued an updated version of the Tax Consultation Tracker. It shows the following state of play on VAT-related consultations. Links to all the consultation documents can be found in the pdf version at the web address shown.

Title	Description	Type	Timing
VAT: addressing borderline anomalies	Consultation on draft secondary legislation to simplify the VAT rules.	Formal	Closed 18 May (www.hmrc.gov.uk/budget2012/vat-con-4801.htm)
VAT: road fuel scale charges	Consultation on changing UK law to comply with EU law and on streamlining the scheme.	Informal	Open for comment 25 April – 20 July (customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032032)
VAT relief for European Research Infrastructure Consortia (ERICs)	Consultation on draft secondary legislation to be introduced to provide VAT relief on a supply of goods or services to an ERIC.	Informal	Open for comment until 30 June (www.hmrc.gov.uk/drafts/vat-relief-eric.htm)
VAT:	Consulting on changes to	Formal	Open for comment until 12 July

Implementation of invoicing rules	existing UK VAT invoice regulations to reflect the changes introduced by Council Directive 2010/45/EU.		
VAT: exemption for education providers	Consultation to establish how to apply a VAT exemption to degree courses provided by commercial providers of Higher Education that adhere to BIS` regulatory framework ensuring they align with the VAT treatment of similar courses provided by traditional universities.	Formal	Due to be published in July
VAT: freight transport services	Consultation on draft legislation.	Informal	Open for comment until 31 August
VAT treatment of small cable-based transport	A consultation on the implementation, impact, administrative burdens and proposals for evaluation relating to the introduction of a reduced rate of VAT for small cable-based transport.	Formal	Due to be published in June

http://www.hm-treasury.gov.uk/tax_updates.htm

Meanwhile, a new consultation on a "General Anti-Abuse Rule" (GAAR) is in progress, running to 14 September 2012. It is likely that such a rule will apply to all the other taxes in the UK but not to VAT, which is regarded as a special case for two reasons: first, the authority of the Principal VAT Directive; and second, the existence already of the case law on abuse of rights.