VAT Voice©

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RECRUITMENT SECTOR WARNS OF JOB CUTS FOLLOWING WITHDRAWAL OF THE STAFF HIRE CONCESSION

Further to HMRC's original announcement in Budget 2008, and the reminder in Revenue & Customs Brief 08/09, the long-standing Staff Hire Concession was withdrawn from 1 April 2009. It was introduced in 1997 as a temporary means of dealing with the distortion caused by the Reed Personnel Services case. However, such was the popularity of the concession amongst hirers of temporary staff that could not reclaim VAT (e.g. charities, banks, care providers), that it lasted for 12 years. The concession worked by allowing temp agencies to only charge VAT on their margins, not on the wages and other statutory costs of the temps. The withdrawal means that VAT is now due on the full hire charge, and increases the cost of hiring temporary staff in those sectors.

Following the Budget 2008 announcement, intensive lobbying began to keep the concession, led by the Recruitment & Employment Confederation ('REC'). Representations were made by the REC at the highest level to the Treasury and the Department for Business about the potential impact of this change to the charging of VAT. However, as HMRC stated in R&CB 08/09, the concession was found to be unsupported in both UK and EU law, and for that reason alone, could no longer be maintained.

On 31 March 2009, Kevin Green, Chief Executive of the REC, made the following statement on the REC website:

> *"Implementing a tax on jobs is not a sensible move during a recession. We are deeply concerned that the Government's decision to remove this concession will result in fewer jobs in the labour market. The REC has campaigned long and hard on retaining the concession, and we are now alerting recruitment agencies and their clients to the change, so that they can make the necessary adjustments and ensure that VAT is charged correctly on the supply of temporary staff from today."*

It should be noted that two related concessions for secondment of staff at no profit, and the placement of disabled staff under the 'sheltered placement scheme', are unaffected by the withdrawal, and remain in place (see Notice 700/34 'Staff' for further details).

Comment: *Advisors of businesses operating in the affected sectors should ensure that their clients are aware of the withdrawal and its financial impact.*

Inside this issue...

REFUND OPPORTUNITY FOLLOWING BAD DEBT RELIEF CHANGE

In a recent case, the VAT Tribunal allowed a claim for VAT bad debt relief on invoices not paid by an insolvent customer, but offset by relevant input tax.

The Tribunal held that bad debt relief was available to the extent that input tax relief had been claimed on VAT Returns (i.e. the VAT paid on purchases), despite the fact that the VAT due to be paid on the submission of a number of the returns had not in fact been paid. As a result of the decision, the Appellant was immediately entitled to a refund of VAT of approximately £180,000.

HMRC has changed policy, making this a significant decision for insolvency practitioners and businesses struggling to pay their VAT.

The summary of Revenue & Customs Brief 18/09 on page 4 of this VAT Voice has further details on this.

Latest VAT News

REVENUE & CUSTOMS BRIEF 08/09

VAT: withdrawal of Staff Hire Concession from 1 April 2009
As outlined in our front page article, this Brief reminds business of the withdrawal of the Staff Hire Concession on 1 April 2009.

The Brief explains how the concession is set out in part A of the Statement of Practice in Notice 700/34, and points out that Parts B & C of the SOP (i.e. non-profit secondments and sheltered placements) are unaffected.

Under the new rules, anyone acting as principal must charge VAT on the whole supply. Those acting as agent are unaffected by the withdrawal, and can continue to account for VAT purely on the commission. The Brief points out that in some cases, such as a supply of care services, there may still be eligibility for VAT exemption.

The Brief closes by confirming that the normal tax point rules will apply for supplies before and after 1 April 2009, but for supplies that actually span that date, the concession will be available to the extent that it was performed prior to 1 April 2009 (i.e. apportion the invoice to reflect services performed before and after the withdrawal date). In-depth coverage can be found in VAT Information Sheet 03/09.

REVENUE & CUSTOMS BRIEF 10/09

Tribunals Reform - changes to the tax appeals system and new internal review process
An outline of the new tax appeals system and HMRC's new internal review process, both of which are effective from 1 April 2009.

The Brief advises that from that date, there will be a major change to the current system of tax tribunals. To coincide with this, HMRC will change the way it handles disagreements about tax. The new review process will help provide a more consistent approach to the way HMRC resolves disputes with those who disagree with appealable tax decisions.

The Tribunals, Courts, and Enforcement Act 2007 introduced two new bodies, the First-tier Tribunal and the Upper Tribunal, to be administered by the Tribunals Service within the Ministry of Justice. Currently, there are three main tribunals which deal with appeals against HMRC decisions but from 1 April, they will be abolished and replaced by a single Tax Chamber in the First-tier Tribunal, which will consider all disputes and hear appeals in relation to both direct and indirect tax.

Tax appeals will transfer to the First-tier Tax Chamber on 1 April. A right of appeal against decisions of the First-tier Tax Chamber will also be created to a new chamber in the Upper Tribunal known as the Finance and Tax Chamber. The First-tier Tribunal will deal with the vast majority of appeals, apart from a very small number of the most complex appeals that will transfer straight to the Upper Tribunal.

Some straightforward First-Tier appeals will be dealt with on paper without the need for HMRC or taxpayers to attend a hearing, but where a hearing is needed, the Tribunals Service will arrange it.

To coincide with the tribunal reform, HMRC says that taxpayers will be entitled to request an internal review of appealable tax decisions. This new legal right to a review will replace reconsiderations and mandatory reviews in indirect taxes (although mandatory reviews will remain for decisions about the restoration of seized goods).

HMRC says that reviews will be optional, and will be done by a trained Review Officer not previously involved with the appealed decision

to enable a balanced and objective view to be taken. In the vast majority of cases, the Review Officer will be outside the immediate line management chain of the original decision maker. HMRC says the new process will require reviews to be completed reviews within 45 days (unless another period is agreed with the customer), but if taxpayers do not want a review, or do not agree with the result of the review, they can still appeal to the Tribunal for a decision.

REVENUE & CUSTOMS BRIEF 11/09

VAT: Leisure Trusts providing all-inclusive membership schemes

Details of a policy change by HMRC in respect of leisure centre membership schemes which allow unlimited access to leisure facilities. HMRC says that community leisure centres run by non-profit making trusts will be most affected, but supplies made by commercial organisations are not affected, and remain taxable at the standard rate. The Brief supersedes advice given in R&CB 50/07.

Under Schedule 9, Group 10 VAT Act 1994, supplies of services closely linked with, and essential to, sport or physical education, in which an individual takes part, are exempt from VAT when supplied by an 'eligible body' (essentially a non-profit making body).

Previously, HMRC's view was that where a scheme offers unlimited use of a variety of both taxable and exempt facilities over a period, typically in return for a monthly or annual payment, there is generally a single supply of the standard rated right to use the facilities. However, following representations from the leisure industry and comments from the Court of Appeal in *Weight Watchers (UK) Ltd [2008],* HMRC no longer sees the supply as a right to use the services, but as being the supply of underlying services.

The Weight Watchers case indicated that the transaction should be seen from the viewpoint of the consumer, not the supplier. The extent of the linkage between the transactions must be considered from an economic point of view. The question then is whether it would be artificial to split the transaction into separate supplies. If it would be artificial, there is then a single supply, and the predominant element from the viewpoint of the consumer will determine whether the supply is exempt or standard-rated.

The Brief says that the VAT liability depends on the nature of the supply, which has to be decided at the time the all-inclusive fee is paid. Where there is a single supply that would be artificial to split, there can only be one overarching liability. Usually, the typical consumer purchasing an all-inclusive package will have access to a range of facilities at the leisure centre, most of which would be exempt if supplied individually due to being closely connected to participant sporting activity (e.g. use of the swimming pool, changing rooms, showers). Therefore, where the predominant reason for purchasing an all-inclusive package is to use the range of available sports facilities, the single supply is exempt.

Some all-inclusive packages may include facilities that would be standard-rated if supplied on their own (e.g. sauna facilities). However, provided that the predominant reason for buying the package is to use the sports-related services, the supply of the package is still exempt. If the predominant reason for buying the package is to make use of standard-rated facilities, the single supply is standard-rated.

The overall affect of the policy change will be that most all-inclusive packages will become exempt after previously being treated as taxable. This will have partial exemption implications, and, on the face of it, Capital Goods Scheme ('CGS') implications too. However, HMRC says the policy change represents what the true liability always was, and that the CGS adjusts the true amount that was initially claimable. Therefore, no significant CGS adjustments are likely provided that the way sports facilities are supplied have not changed since any capital expenditure was incurred.

However, if sports providers acquired a CGS building as part of a TOGC, then CGS adjustments may be required if the previous owner deducted input tax on the item (which is likely if the previous owner was a Local Authority).

HMRC say that the policy should be implemented from 1 April 2009, and there is no requirement to make adjustments in respect of supplies made prior to this date. However, where a business wishes to make a claim to HMRC for a repayment of output tax incorrectly accounted for, they may do so subject to the usual time limits and unjust enrichment conditions. The Brief points out that claims for overpaid output tax must be net of any overclaimed input tax calculated under the partial exemption rules.

REVENUE & CUSTOMS BRIEF 15/09

VAT: Extra Statutory Concession (ESC) 3.5 – 'Misdirection'
An announcement that HMRC will withdraw the long-standing 'misdirection' concession (also known as the 'Sheldon Statement') with effect from 1 April 2009.

The misdirection concession set out the circumstances in which HMRC would regard itself as bound by incorrect advice given to taxpayers in respect of VAT and IPT.

The Brief says that a number of court cases in recent years have defined the circumstances in which HMRC can regard itself as bound by incorrect advice. In addition, HMRC provides information on when taxpayers can rely on advice given by HMRC via the following link:

http://www.hmrc.gov.uk/pdfs/info-hmrc.htm

Given this, HMRC says ESC 3.5 Misdirection is no longer necessary, because it has been overtaken by other published guidance.

HMRC says it will not accept any further claims under ESC 3.5 from 1 April 2009. Taxpayers should either look at the online guidance or contact the NAS.

REVENUE & CUSTOMS BRIEF 18/09

VAT: Implications to the Bad Debt Relief conditions as a result of the Tribunal decision in Times Right Marketing Ltd
This brief announces a significant change in the treatment of VAT Bad Debt Relief claims made when the net VAT due on a return has not been paid, or has only partly been paid. The change follows the recent VAT Tribunal decision *in Times Right Marketing Limited (In Liquidation) (LON/2006/1376).*

In the Times Right case, the company had appealed against HMRC's rejection of a Bad Debt Relief ('BDR') claim on the grounds that the net VAT due on return had not been paid. The Tribunal found that the deduction of input tax from output tax due should actually be seen as 'payment' of the netted-off output tax.

HMRC now accepts that where a BDR claim is made, payment will be taken to have been made to the extent that output tax is covered by deductible input tax.

The Brief then gives two examples of BDR claims under the revised treatment – the first where none of the net tax due has been paid, and the second where only a part-payment has been made. In example 1, there is output tax of £200K, input tax of £110K and eligible bad debts in the period of £120K. Example 2 is the same, except that £20K of the £90K net tax due has been paid. The examples assume all of the other BDR conditions have been met.

The examples show how BDR is now available on the **excess of input tax over output tax due on non-bad debt supplies** (i.e. £110K minus £80K = £30K in Example 1, and £100K minus (£80K-£20K) = £50K in Example 2).

HMRC are now inviting retrospective claims for repayment of underclaimed BDR, but point out that normal BDR time limits apply. Claims must be made within 3 years and 6 months of either the date on which the consideration that was written off as BDR was due and payable, or the date of the supply.

REVENUE & CUSTOMS BRIEF 19/09

VAT: Partial Exemption - Changes to the Standard Method
The Brief is a short summary of the content of VAT Information Sheet 04/09, which details the four changes to the partial exemption standard method effective from 1 April 2009.

- *in-year provisional recovery rate*
- *early annual adjustment*
- *use-based option for new partly exempt businesses*
- *widening the scope of the standard method*

HMRC says the changes are being made following responses to the consultation on ideas to simplify the partial exemption rules confirmed strong support for their implementation.

The first three changes are optional, and businesses can benefit from them without seeking approval from HMRC. However, the fourth change is compulsory and affects businesses that make:

- *supplies of services to customers outside the UK*
- *certain financial supplies such as shares and bonds*
- *supplies made from establishments located outside the UK*

See VAT Information Sheet 04/09 on page 7 of this VAT Voice for full details.

REVENUE & CUSTOMS BRIEF 27/09

VAT: Changes to the Tour Operators' Margin Scheme
The Brief publicises three key changes to be made to the Tour Operators' Margin Scheme ('TOMS') from 1 January 2010, in order for it to comply fully with EU law.

HMRC says the European Commission wrote to the UK raising concerns that the UK TOMS arrangements are not fully compatible with the EC VAT Directive (2006/112 EC).

Following legal advice, the UK has accepted that aspects of the scheme were not implemented properly, and has now committed to make the necessary changes to the TOMS to bring it into line. The changes concern:

- supplies to business customers for subsequent resale
- supplies to business customers for their own consumption and supplies of educational school trips
- use of market values in respect of in house supplies

Following the commitment to make the changes, HMRC carried out a consultation exercise with the travel industry which expired on 31 August 2008. HMRC had originally considered 1 April 2009 to be a reasonable implementation date, but as a result of responses to the consultation, now agrees that a date of 1 January 2010 would give business more time to prepare for the changes.

1. Supplies to business customers for resale (known as 'the opt in')
By concession, HMRC has allowed tour operators who normally make holiday sales to the public but occasionally sell to other travel businesses for onward resale, the option of accounting for tax on the latter within the TOMS. This was intended to ease the administrative difficulties that operators might otherwise incur in having to use the normal VAT rules.

HMRC says that the UK has had to accept that the EC VAT Directive refers to supplies made to the 'traveller'. The 'traveller' is the person who consumes the travel, and so the scheme should not be used when the travel service is sold to a person other than the traveller, such as when supplies are made to business customers for resale. From 1 January 2010, affected tour operators will have to account for the VAT due under the normal VAT rules, which, in some cases, may give rise to a requirement to register for VAT in other Member States.

2. Supplies to businesses for their own consumption and the provision of school trips (known as 'the opt out')
The TOMS has always included travel services which are supplied to other businesses for their own consumption in the special scheme. However, tour operators have been allowed to opt out of the TOMS in respect of such supplies, meaning that business customers have been able to recover VAT charged on those supplies. HMRC has also treated the provision of school trips as a non-business activity, and allowed them to be excluded from TOMS as well, enabling local authorities to recover the VAT charged in relation to LEA schools.

HMRC says that the Commission has clarified that the term 'traveller' should not be restricted to the physical person who consumes a travel package, but also covers legal persons that consume the travel package, for example, businesses which pay for employee travel, and the supply of school trips to local authorities. Accordingly, from 1 January 2010, businesses receiving supplies of travel services from tour operators will no longer be able to recover VAT on such supplies. Those LEA schools that previously took advantage of the concession set out at para 3.4 of Public Notice 709/5 will no longer be able to recover VAT on UK school trips purchased from tour operators. However, there will be no change for trips organised directly by a school, such as day trips on coaches to a zoo or museum.

3. Market values
The current UK TOMS calculation requires the margin to be apportioned with reference to the actual costs incurred in putting the package together. However, in *MyTravel (C-291/03)* the ECJ held that where it is possible to establish an appropriate market value for that part of the selling price which corresponds to the in-house supplies, this should be used to apportion the selling price between in-house and bought-in elements. The margin can then be calculated on each element, and the scheme calculation completed accordingly.

However, the ECJ also said the cost-based method could be used where this accurately reflected the structure of the package. HMRC considers that, as the cost-based method assumes a fixed percentage mark-up across all elements of the package, the package should also be on a fixed mark-up basis to meet the condition. If it is not possible to determine a market value, tour operators can continue using the current cost-based method.

Whilst the concept of market values is complex, based on the ECJ's findings, certain parameters should be used when deciding whether it is possible to establish such a value:

- *The market value (selling price) must be within the context of the tour operator's business, e.g. a tour operator could not use the price of a scheduled airline flight in determining a market value of the flight forming part of a package holiday.*
- *The market value must be on a like-for-like basis, i.e. it should be determined on the basis of the price of similar services supplied by the taxable person, and not forming part of a package. If the taxable person does not provide similar services, it may be possible to use the price of comparable services provided by other taxable persons.*
- *Across-the-board averages may be used if correctly weighted and reviewed regularly.*

HMRC says that it is clear that market values need to be considered on a case-by-case basis. Where such values are to be used, they will simply slot into the current calculation method at the appropriate point.

REVENUE & CUSTOMS BRIEF 28/09

VAT: Reverse charge accounting for businesses trading in mobile telephones and computer chips: renewal of EU derogation
HMRC confirmation that the UK has received ECOFIN approval for the reverse charge derogation to be extended to 30 April 2011. The current ECOFIN derogation, which began on 1 April 2007, expires on 30 April 2009. HMRC says the extension will be formally put in place in May, with retrospective effect.

VAT INFORMATION SHEET 03/09

Withdrawal of the VAT Staff Hire Concession on 1 April 2009
Detailed coverage of the withdrawal already covered by the front page of this VAT Voice and by R&CB 08/09.

VAT INFORMATION SHEET 04/09

VAT: Partial Exemption - changes to the standard method
Further to R&CB 19/09, this Info Sheet gives details of the four 1 April 2009 changes to the standard method. The four changes are below, the first three of which are optional:

- in-year provisional recovery rate
- early annual adjustment
- use-based option for new partly exempt businesses
- widening the scope of the standard method

1. In-year provisional recovery rate
This change allows existing partially-exempt businesses to use the previous tax year's residual recovery percentage (i.e. from the last annual adjustment) as a provisional rate for the current year. The annual adjustment at the end of the current year eventually corrects it, and then becomes the provisional rate for the next year, and so on.

2. Early annual adjustment
This change allows a business to carry out an annual adjustment in the fourth quarter of its tax year rather than in the first quarter of the following tax year.

3. Use-based option for new partly exempt businesses
The new rules enable a new partly exempt business to recover its input tax on the basis of use in the following situations:

- During its 'registration period' – which is the period from the date of registration to the day before the start of its first tax year
- During its first full tax year after the end of its registration period (provided it incurred no exempt input tax in that period)
- During any tax year, provided it did not incur input tax relating to exempt supplies in its previous tax year (i.e. it was not partially exempt in the previous tax year).

4. Widening the scope of the standard method
This change is the compulsory one, and will affect businesses that make:

- supplies of services to non-UK customers
- certain financial supplies such as shares and bonds
- supplies from non-UK establishments

The change widens the scope of the standard method so that it now deals with input tax on all supplies unless it is dealt with separately under Reg 103A (Investment Gold).

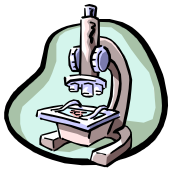
VAT INFORMATION SHEET 05/09

Electronically supplied services: Special scheme for non-EU businesses
Details of the March currency exchange rates to be used in the Special Scheme for Non-EU Businesses relating to the supply of electronically supplied services.

VAT INFORMATION SHEET 06/09

VAT: Opting to tax supplies of land and buildings – new automatic permission ('APC') and changes to concessionary VAT recovery
From 1 May 2009, a new APC will replace condition 3 of the four existing APCs found in para 5.2 of Notice 742A (condition 3 applies where the only input tax to be recovered relates to tax charged upon surrender of a lease). In addition, from 1 May 2010, there will also be changes to the concessionary recovery of VAT.

The new APC has 2 requirements, the first of which must always be satisfied. If the second requirement also applies, then that must be satisfied too. The first requirement relates to outputs, and looks at supplies intended or expected to be made. The second requirement relates to inputs, and looks at the VAT incurred on costs or purchases.



In Focus

Company directors converting part of their house into an office – reclaim the VAT!

With more and more people now choosing to working from home, the question of what can be done with the VAT on the conversion costs is becoming a common issue. In this article, we explain what the rules are, and how you can go about reclaiming that VAT.

Example The Managing Director of a company, Mr Jones, works from home a lot, and is considering having his loft converted into an office to give him more room. The office will contain the usual computers, desks, etc., and be decorated and furnished in line with the proposed use. The full cost of the building work, decorations and equipment will come to £20,000 plus VAT which the company will pay because it will all be used for business purposes. The VAT on the work and equipment will come to £3,000, and Mr Jones wonders if the company can recover this.

Classic solution The normal answer is that the company can recover the VAT on the equipment, as they own it, and it is for business use. However, the VAT on the building work and decorations cannot be recovered because, prima facie, it is specifically blocked by the VAT legislation (s.24 (3) and (7), VAT Act 1994). This states "*where a company purchases, acquires, or imports goods or services which are used or to be used in connection with the provision of domestic accommodation by the company for a director, those goods or services are not treated as used or to be used for the companies business, and any input VAT is not recoverable".*

Tip There is a little known (even to HMRC) concession to this rule that allows the recovery of input VAT in certain circumstances. HMRC's published and internal guidance states "*Where a domestic room or rooms is put to business use, you may agree to an apportionment using an objective test to the extent to which the room is put to business use*" (HMRC Manual V1-13, Section 14, para 14.7, and VAT Notice 700, Section 33,)

This means that if Mr Jones can show HMRC that he intends to use the loft conversion for entirely business purposes, then the company will be able to recover the VAT on the building work and materials. If he can show that the carpets and decorations are for a business purpose as well, than the company will be able to claim that VAT back too. The staff dealing with VAT written enquiries are more experienced in this area than normal VAT Officers, and have more time to consider the matter without the pressure to make a quick assessment. If you make a reasonable case, you should have no trouble getting the VAT back.

The same principle used in this article would also apply to extensions, garage conversions, and even using a shed at the bottom of the garden as your office. Provided there is genuine business use, and the purchases and decorations are in line with the proposed use, the VAT should be recoverable by the company.

BUDGET 2009 – SUMMARY OF VAT CHANGES

1. Increased turnover thresholds for VAT registration and deregistration
New registration and deregistration taxable turnover thresholds have been announced, taking effect from 1 May 2009.

The registration threshold increases from £67,000 to £68,000, with the deregistration threshold increasing accordingly from £65,000 to £66,000.

The registration and deregistration threshold for the acquisition of relevant goods from other EU member states increases from £67,000 to £68,000.

2. Change in the standard rate
HMRC confirmed that the standard rate will revert to 17.5% on 1 January 2010.

3. Change of rate - anti-forestalling legislation
Targeted legislation will be introduced in Finance Bill 2009 to counter schemes purporting to apply the 15% VAT rate to goods or services to be supplied on or after the date the rate returns to 17.5%.

The measure provides that in certain circumstances a supplementary charge to VAT of 2.5% will be due on supplies of goods or services on which VAT of 15% has been declared.

4. Option to tax change
The current automatic option to tax concessions are to be withdrawn and replaced with a single concession designed to simplify the process of opting to tax. The new rules will come into force on 1 May 2009. Details will be notified in an Information Sheet to be published shortly**.**

5. Changes to VAT fuel scale charges
The VAT fuel scale charges for taxing the private use of road fuel have decreased. This reflects changes in fuel prices and ensures that the table of CO^2 bands remains aligned with the equivalent tables used for direct tax purposes.

The new rates apply to VAT return periods beginning on or after 1 May 2009.

6. Change in the place of supply rules for cross border services EC Sales lists and recovery of VAT incurred in other EU Member States from 2010
The new rules aim to ensure that, as far as possible, VAT is due in the country in which the service is consumed (e.g. where the customer is established) rather than where the supplier is established. As such, UK business customers will be liable to account for UK VAT on most services provided by their overseas supplier under the 'reverse charge' provisions, rather than the supplier charging VAT. The new rules take effect from 1 January 2010, and include:

- *new time of supply rules for services (BN75);*
- *European Sales List (ESL) reporting for supplies of cross-border services and changes to ESLs for goods (BN76); and*
- *a new electronic refund procedure for VAT incurred in other EU Member States (BN77).*

The main changes relating to the recovery of VAT incurred in other EU Member States are:

- *businesses will be able to submit claims up to 9 months from the end of the calendar year in which the VAT was incurred, rather than 6 months as at present;*
- *tax authorities will have 4 months, rather than 6 months, to make repayments, unless further information is requested, in which case the deadline extends up to a maximum of 8 months;*
- *the Member State of Refund will pay interest in cases where the business meets all its obligations but deadlines are not met by the tax authorities; and*
- *all EU Member States will be required to afford a right of appeal against non-payment in accordance with the procedures of the Member State of Refund.*

7. Exemption for gaming participation fees

From 27 April 2009, gaming and bingo participation fees will be exempt from VAT. There is also an increase in the money prize limit for bingo duty exemption that may be offered on small-scale amusements provided commercially at, for example, family entertainment centres and adult gaming centres from £50 to £70.

Other changes include an increase in the rate of bingo duty to 22%; removing the need to list individual games for the purposes of gaming duty and extending the scope of gaming duty to include charges for commercially provided equal chance gaming; raising the gross gaming yield bandings for each gaming duty band in line with inflation; extending the scope of remote gaming duty to include remote bingo and removing remote bingo from the scope of bingo duty; clarifying the existing excise definitions of 'gaming' and 'gaming machine'.

8. Reduced 5% VAT rate on children's car seat bases

From 1 July 2009, a new reduced rate of 5% will apply to children's car seat bases.

TRIBUNAL SAYS SALES OF COLD SANDWICHES NEXT TO SHARED SEATS WAS NOT 'CATERING'

The case concerned the Appellant's appeal against a ruling by HMRC that cold food sold by the Appellant should be standard-rated.

The disputed supplies were the 'made to order' cold sandwiches sold from Subway kiosks in three different food courts. The Appellant argued that the seating areas next to the kiosks were not 'premises' from which the food was supplied, because the kiosks shared those seating areas with other food outlets in the food court, and had no control over them. The Appellant further argued that the supplies of cold food were not supplied *'for consumption on the premises on which they were supplied',* and that because they were not otherwise '*in the course of catering',* and were clearly supplies of food for human consumption, they had to be zero-rated.

In reaching its decision, the Tribunal held that '*the facts of this case indicate perfectly clearly that the kiosks are not in any common sense terms the same premises as the places where the food is consumed. No food could be consumed in the kiosks, and in respect of none of the three outlets does the lease even purport to give any rights of occupation or even use over the seated areas to the appellant*.' The supplies of cold food from the three kiosks were correctly zero-rated because they did not fall under the term 'catering.' The Appellant's appeal was therefore allowed.

Made to Order Ltd (VTD 20,959)

DOOR ENTRY CHARGE MEANS SAUNA BUSINESS ACTED AS PRINCIPAL FOR VAT PURPOSES

The Appellant operated a sauna business in Edinburgh, and following a VAT assurance visit, had been assessed by HMRC for the full consideration paid at the door, as well money paid by the clients direct to the hostesses.

Previously, the VAT Tribunal had found for the Appellant on monies paid to hostesses, holding that they were self-employed, and the money received by them directly from customers was not the Appellant's income. However, regarding the money collected on entry, the Appellant kept a fixed £5 for itself, and also retained 50% of the remaining consideration, in respect of the supply of the room and facilities (the other 50% being passed onto the hostesses). HMRC had argued that the Appellant was required to account for VAT on the full value, not just the £5 and 50% share. The Tribunal found the facts of the case unique, but was of the view that the service provided was one of entry, and VAT was due on the full consideration received at the door. However, HMRC's assessment had included an estimate of the value of monies passing between the customers and hostesses, which had been calculated by scrutinising a website called 'Punternet'. The Tribunal found the assessment calculation to be flawed, and dismissed the appeal, directing HMRC to recalculate the assessment. The Appellant appealed against the Tribunal's finding that VAT was due on the full consideration paid at the door.

The Court of Session agreed with the Tribunal that the Appellant's business structure was different to that of previous self-employed stylists or 'Spearmint Rhino' cases. The Court also agreed that the entry fee was consideration for a supply by the Appellant to the customer of allowing entry and use of the facilities. The subdivision of money was irrelevant, and there was no suggestion that the collection of the entry fee was done as an agent.

Joppa Enterprises Limited v HMRC, Court of Session (CSIH 17), 6 March 2009

TRIBUNAL SAYS ACCOUNT WORK NOT SUPPLIED BY TAXI DRIVERS

This dispute concerned whether supplies of taxi services to account customers were being made by the individual drivers or by the Appellant acting as principal.

The taxi business was acquired in 2006, but in June 2007, the Appellant company ceased trading as a taxi business and commenced trading as a vehicle leasing company, supplying vehicles to be used as taxi cabs. The drivers were self-employed and had previously entered into a Principal Statement of Terms and Conditions under the previous ownership. These agreements were not retracted, but the Appellant argued they were unenforceable. As part of the business transfer arrangement, the Appellant had inherited a block of account customers. Information on these account journeys was collated and invoices sent out to the customer on a monthly basis, with the Appellant retaining 10% of the invoice value (the balance being passed on to the drivers). The Appellant argued that it should be treated as an agent for both cash and account customers. HMRC argued there were significant differences between the two types of work, and relied on cases such as '*Crossleys Private Hire Cars'* which found the taxi firm acted as principal because it bore the risk of bad debts, fixed the fares, and kept detailed records of the work carried out.

The Tribunal agreed with HMRC that the Appellant was acting as principal in respect of the account customers. The Chairman relied on the '*Carless'* High Court decision, which warned Tribunals not to conduct an elaborate analysis, and that the decision to be made 'was essentially one of fact'. In this case, the Chairman said the issue was a straightforward question of asking who made the supply of taxi services to account customers, which he found to be the Appellant.

Bath Taxis (UK) Limited (VTD 20,974)

TRIBUNAL ALLOWS ZERO-RATE FOR ALTERATION OF A LISTED BUILDING

This was an appeal against HMRC's decision not to accept the zero rating of building works supplied under item 2, Group 6, Schedule 8 VAT Act 1994 (i.e. works to listed buildings). Interestingly, the appeal was not made by the supplier of the services, but by the recipient, who incurred and suffered the VAT cost on those supplies.

Item 2 states that zero-rating applies to *"The supply, in the course of an approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."* The new building in question was physically separate to, but within the curtilage of, an existing Grade II Manor House. The issue was whether its separate use or disposal was prohibited by the statutory planning consent. There are a number of definitions and conditions contained within the notes to Group 6. Note 2 has a number of conditions which must be satisfied and includes *"(c) the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision."*

HMRC contended the terms of the planning did amount to a prohibition of use and/or disposal. The Appellant argued that restriction did not mean prohibition, citing the *Nicholson* Tribunal case in which the Chairman criticised HMRC's incorrect legal interpretation. HMRC cited a number of cases, including *Thompson (VTD 15,834)* to support the fact that the *Nicholson* was wrongly decided. Given the lack of binding case law on item 2(c), the Tribunal sought to identify the intention of Parliament for note 2. The Chairman dismissed HMRC's contention that Note 2 was intended to *"give relief to new housing stock supplied to the open market, and that the line was specifically drawn to deny relief to added accommodation within existing housing stock, including annexes that might be physically separate from existing units but which have to be used in connection with existing units".* The Tribunal held that separate use was not prohibited by the terms of planning,

and that Note 2(c) was met. HMRC agreed that their argument on separate disposal was 'more difficult to make,' and the Tribunal again found that the disposal condition in Note 2(c) was also met. The appeal was thus allowed.

The Tribunal went on to discuss costs in great detail. The Appellant had sought costs on an indemnity basis, but these were granted on a standard basis. An interesting point to note was the Appellant's complaint that HMRC refused to confirm whether they received advice as to their chances of success being more or less than 50%, citing legal privilege. HMRC's published litigation strategy says litigating where their chances of success are below 50% will only be justified where there are significant amounts at stake, or there is a fundamental point of principle. The Chairman noted this was not within the jurisdiction of the Tribunal, but may be an issue for judicial review or investigation by the Parliamentary Commissioner for Administration.

Steven Lunn (VTD 20,981)

HIGH COURT SAYS 'MISDIRECTION' CANNOT BE APPLIED TO ALLEGED MISADVICE BY HMRC'S HELPLINE

This case was an application for a Judicial Review to quash an assessment issued by HMRC. The Appellant, which was a wholesale supplier of beverages, had experience of supplying goods to other EU countries.

In 2005, a new customer approached the Appellant to buy soft drinks, but wanted them delivered to a VAT registered end customer in Poland. The new customer was based in Belize with a European office in Poland, but was not registered for VAT. Not wanting to deal direct with this customer, the Appellant was concerned about the VAT treatment, and contacted the National Advice Service (NAS). The Appellant claimed the telephone advice it was given suggested the new customer could be invoiced without VAT by using the address and registration of the Polish end customer.

The call record made by the NAS officer differed from that, saying the supply could only be zero-rated where all the conditions of section 3 of Notice 725 were met. As the Belize business was the Appellant's customer, and was not VAT registered, all the conditions could not be met. Consequently, HMRC raised an output tax assessment of £315,504.

In dismissing the Appellant's claim, the High Court found that the best evidence was the call note made by the NAS which indicated that the taxpayer was directed to the appropriate conditions for zero rating.

The Court went on to address a number of the other points raised by the parties, the first of which related to Extra Statutory Concession 3.5 (also known as the 'Sheldon Statement'). The concession says that *"where an officer, with the full facts before him, has given a clear and unequivocal ruling on VAT in writing, or knowing the full facts has misled a registered person to his detriment, any assessment of VAT due will be based on the correct ruling from the date the error was brought to the registered person's attention".* HMRC argued that due to the uncertainty of the telephone conversation, it could not be said that HMRC acted irrationally in refusing to apply the ESC on misdirection (Sheldon Statement) and assessing for VAT. The Court found no legal basis for this, stating the issue of whether there has been an abuse of power or unfair conduct is a matter for the courts, and not a public authority. However, the Court went on to say that even if it accepted the Appellant's version of the telephone conversation, the claim would still have been dismissed on the basis that the law required there to be VAT on the supply. It said the Appellant had not made a full disclosure of the facts, and that, perhaps more crucially, the NAS is only a source of general advice rather than binding rulings – something that the people who use it need to appreciate.

Comment: *We have said to clients on many occasions that great caution needs to be taken when acting upon any advice they have received from the NAS!*

VAT Tips

GETTING BACK THE VAT ON THE COSTS OF A HOLDING COMPANY

If you set up a holding company to provide management services to one or more subsidiaries, it can either register for VAT individually because it makes taxable supplies to its subsidiaries, or else it can register as part of a VAT group registration.

However, what do you do if it is a 'pure' holding company that makes no taxable supplies at all? Although a pure holding company makes no taxable supplies, it will receive costs for professional services such as accountancy and legal fees.

What can be done to recover VAT on such costs? Well, because it makes no taxable supplies, it can't register for VAT in its own right. However, it can register for VAT as part of a VAT group, which then enables it to recover all the VAT on its overheads.

However, although HMRC have accepted this in their own internal guidance (*HMRC Manual V1-13, Section 15, para 15.3*) and published a News Release as long ago as 1993 (*News Release 59/93*), some of its Officers do not seem to be aware of it, and will say that it cannot register for VAT. If this happens, you should draw the Officer's attention to the above publication. This should speed up your VAT registration, so that you can quickly reclaim all the input VAT you are entitled to!

GET YOUR KICKS FROM A VAT 66!

If you travel or incur costs in the EU, it is now that time of year to make sure that you claim the VAT back on any of these costs, for example, hotel bills, conferences or exhibitions you have attended.

How do I make a claim? The first thing you need is a VAT 66 certificate from the Grimsby VAT Registration Unit, which can be requested by letter, fax, or email (they don't provide a number for telephone requests for some reason). You will next need to get a VAT 65 application form, which is on HMRC's website at www.hmce.gov.uk. Remember that the VAT65 form must be completed in the language of the country you are claiming the refund from. This can prove difficult, but in a lot of cases, the actual amount of text you will need to write is minimal. Once you have both forms, you can then list all the invoices and VAT amounts, and send the VAT 65 and 66 along with the original invoices to the country's tax authority. A list of the relevant addresses can be found in Notice 723 or on the HMRC website.

Tip 1 The period of a claim is a calendar year, and you have 6 months to make the claim. This means that you should have sent the claim by 30 June in the following year. Most countries are fairly stiff about the time limits and late claims are normally rejected, so make sure you make your claim on time.

Tip 2 The current paper-based process for reclaiming EU VAT is to be replaced by a fully electronic system from 1 January 2010. HMRC are still consulting on this, so those expecting to make a claim next year will need to keep track of developments over the summer. **Alternatively, you could consider asking us to do it for you!**

VAT Solutions (UK) Ltd is a leading firm of independent Chartered Tax Advisers specialising in VAT. We provide advice and assistance on all VAT matters, and also advise on Customs Duty, Excise Duty, Intrastat, Climate Change Levy, Aggregates Levy, and Landfill Tax.

Our experienced consultants are ex-Officers of HMRC that were previously employed by 'Big Four' accountancy firms. If you have a query about this leaflet or VAT in general, please contact Steve Allen or Andrew Needham at either of our offices listed below:

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