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De Voil Indirect Tax Intelligence

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NEWS IN BRIEF

Legislation

The Climate Change Agreements (Eligible Facilities) Regulations 2012, SI 2012/2999

This instrument consolidates all earlier sets of Eligible Facilities Regulations for the Climate Change Agreements (CCA) scheme and came into force on 1 January 2013, before the new CCA scheme is introduced on 1 April 2013. Under the new scheme, the reduced rate of climate change levy for participating electricity suppliers is amended to 10% (currently 35%) and if the eligible energy use at a site is at least 70% (currently 90%), the CCA holder can claim relief on 100% of their energy use.

The Finance Act 1994, section 30A (Appointed Day) Order 2012, SI 2012/3015

This Order appoints 1 January 2013 as the commencement date for powers allowing the Northern Ireland Assembly to set rates of air passenger duty on direct long-haul flights departing from Northern Ireland.

The Aircraft Operators (Accounts and Records) (Amendment) Regulations 2012, SI 2012/3020

These Regulations came into force on 1 January 2013 (with the exception of Reg 4, which comes into force on 1 April 2013.). They amend the Aircraft Operators (Accounts and Records) Regulations 1994, SI 1994/1737 in order to change the particulars that must be contained in an Air Passenger Duty Account maintained by aircraft operators of the number of passengers carried in each accounting period at each rate of duty.

The amendments are necessary following the devolution of the power to set direct long haul rates for air passenger duty to the Northern Ireland Assembly in theFinance Act 2012, and the introduction of a new higher rate of Air Passenger Duty to be applied to certain aircraft from 1st April 2013.

Excise Duties (Surcharges or Rebates) (Hydrocarbon Oils etc.) Order 2012

This Order, which came into force on 1st January 2013, adjusts the liabilities to excise duty (and, where applicable, the rights to rebate in respect of such duty) in respect of liquid fuels that are chargeable by virtue of the Hydrocarbon Oil Duties Act 1979 ("the Oil Act"). The adjustments made by this Order negate, temporarily, the effect of section 20 of the Finance Act 2011 in relation to those fuels. The adjustments are all in the form of a deduction from the amount payable (or an addition to the amount of rebate allowable) of a specified percentage not exceeding 10 per cent.

Adjustments to rebates are dealt with by article 4. Adjustments of liabilities to duty are dealt with by articles 3 and 5. For ease of reference and comprehension of effect, the figures in columns (*B*) and (*D*) of the Tables in this Order indicate the amounts payable (duty liability) or allowable (rebate) both before and after the adjustment is made.

Section 20 of the Finance Act 2011 amended the Oil Act so as to increase the effective rates of duty, with effect from 1st January 2012. The result of the adjustments made by this Order is that, while the rates of duty (and rebate) are as set by section 20 of the Finance Act 2011, a person will be entitled to adjust the amount a person is actually liable to pay (or allowed by way of rebate) by the amounts specified in this Order: a person will be liable to pay the same amount as if section 20 of the Finance Act 2011 had not come into effect.

The Excise Duties (Surcharges or Rebates) (Hydrocarbon Oils etc.) Order 2011 made the same adjustments as are made by this Order in relation to products that are charged with duty on or

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after 1st January 2012 and before 1st August 2012. Section 188 of the Finance Act 2012 provides that on or after 1st August 2012 but before 1st January 2013 the Oil Act has effect as if the amendments made by section 20 of Finance Act 2011 had never been made.

Value Added Tax (Small Non-Commercial Consignments) Relief (Amendment) Order 2012, SI 2012/3060

This Order came into force on 1 January 2013. It amends the Value Added Tax (Small Non-Commercial Consignments) Relief Order 1986, art 3(2) such that references to "£40" are to be substituted with "£36".

EUCouncil Directive 2006/79/EC sets the relevant limit to €45 and requires national implementing provisions to apply the equivalent in national currency by reference to the exchange rate obtained at the first working day of October. This Order gives effect to that requirement.

The Value Added Tax (Reduced Rate) (Cable-Suspended Passenger Transport Systems) Order 2013, SI 2013/draft

As announced in Budget 2012, this draft order amends VATA 1994 to reduce the rate of VAT applicable to the carriage of passengers on small, cable-suspended transport systems from 20% to 5% with effect from 1 April 2013. This will apply where vehicles carry fewer than 10 people each, as transport in larger vehicles is zero-rated. This reduction will be evaluated after three years.

Air Passenger Duty (2012 Act) (Commencement) Order (Northern Ireland) 2012, 2012 No 445

This Order provides for the coming into operation of provisions of the Air Passenger Duty (Setting of Rates) Act (Northern Ireland) 2012 on 1st January 2013.

The Climate Change Levy (General) (Amendment) (No 2) Regulations 2012, SI 2012/3049

These Regulations amend the Climate Change Levy (General) Regulations 2001 (SI 2001/838) ("the General Regulations") and are made to take account of the removal of the exemption for indirect supplies of electricity produced in a combined heat and power (CHP) station which takes effect from 1st April 2013.

Certified electricity produced in a CHP station may be supplied exempt from CCL. Regulation 3 amends the definition of "QPO electricity" in regulation 51A of the General Regulations so that electricity produced in a CHP station can only be certified if it was produced before 1st April 2013.

Regulation 4 amends Schedule 2 to the General Regulations so that the obligations in it relate only to the outputs of a CHP station produced before 1st April 2013. With effect from 1st January 2013, it also provides the relevant Authority with revised CHP Levy Exemption Certificate reconciliation arrangements in relation to CHP stations that have participated in the CHP Quality Assurance programme for the completed calendar year ending 31st December 2012.

Excise Duties (Road Fuel Gas) (Reliefs) Regulations 2012, SI 2012/3056

These Regulations, which came into force on 1st January 2013, provide for a partial relief from the excise duty charged on road fuel gas. The relief is allowed only in respect of road fuel gas that is charged with duty on or after that date.

The result of the application of the relief (which is provided in the form of a remission of part of the duty that is chargeable) is that the amount a person would otherwise be liable to pay in respect of excise duty on road fuel gas is reduced by the amounts specified in these Regulations: a person will therefore be liable to pay £0.2470 per kilogram on

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natural road fuel gas and £0.3161 per kilogram on other road fuel gas.

The rates of duty charged on road fuel gas are prescribed by section 8(3) of the Hydrocarbon Oil Duties Act 1979 ("the Oil Act").Section 20(3) of the Finance Act 2011 amended section 8(3) of the Oil Act so as to increase the rates of duty, with effect from 1st January 2012. The Excise Duties (Road Fuel Gas) (Reliefs) (No. 2) Regulations 2011 made the same adjustments as are made by this Order in respect of road fuel gas that was charged with duty on or after 1st January 2012 and before 1st August 2012. Section 188 of the Finance Act 2012 provides that on or after 1st August 2012 but before 1st January 2013 the Oil Act has effect as if the amendments made bysection 20 of Finance Act 2011 had never been made.

The result of the application of the relief is that from 1st January 2013 a person will pay the same amount as if section 20(3) of the Finance Act 2012 had not come into effect.

Budget 2013

The Chancellor of the Exchequer has announced that the date of the 2013 Budget Statement will be 20 March 2013.

Draft Finance Bill 2013

Overview of measures—indirect tax

HM Treasury has published draft legislative measures in the Finance Bill 2013. Measures relating to, or affecting, indirect taxes include:

- **VAT: reduced rate for energy-saving materials in charitable buildings**—buildings used by charities for non-business purposes will be removed from the scope of the reduced rate of VAT for the supply and installation of energy-saving materials. The reduced rate will continue to apply to the supply and installation of energy-saving materials in residential accommodation, including accommodation operated by charities.
- **VAT: road fuel scale charges**—the annual process of updating road fuel scale charges will be simplified from 2014. UK legislation and practice will be streamlined to incorporate two extra-statutory concessions from the date of Royal Assent to Finance Bill 2013. A third concession relating to partial exemption will be withdrawn from 1 January 2014 and advice for affected businesses will be published.
- **VAT: refunds for NHS bodies**—as a result of changes arising from the Health and Social Care Act 2012, from 1 April 2013 the following NHS bodies will be added to the named bodies which are entitled to recover the VAT paid in relation to certain non-business purchases:

  a) the National Health Service Commissioning Board
  b) clinical commissioning groups
  c) the National Institute for Health and Care Excellence and the Health and Social Care Information Centre.

- **VAT: reduced rate for small cable-suspended transport**—the rate of VAT applied to small, cable-suspended transport systems with fewer than 10 passengers will be cut to 5% from 1 April 2013, with a review in three years' time. This is a reduction of 15%.
- **VAT: reduced rate energy saving materials ("ESM") in charity buildings**—the reduced rate for the installation of ESM in buildings used solely for a relevant charitable purpose is to be withdrawn. Legislation will be introduced in Finance Bill 2013 to amend Group 2 to exclude all reference in Items 1 and 2 to "a building intended for use solely for a charitable purpose". The measure will have effect on the installation of ESM supplied on and after 1 August 2013.
- **Combined bingo**—the accounting arrangements will be amended to remove the qualifying condition that

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the game is played entirely in the UK and will have effect for accounting periods that begin after Royal Assent to Finance Bill 2013.

- **Herbal smoking products**—tobacco-free (herbal) smoking products will become liable to excise duty, in the same way as tobacco products. Following consultation the government has decided to maintain a limited exemption for non-tobacco smoking products that are used exclusively for medicinal purposes. It has also moved the effective date back to 1 January 2014.
- **Air passenger duty: business jets**—the HMRC will be given the power to implement special accounting schemes for operators of business jets and small aircraft. The details will be contained in secondary legislation.
- **Vehicle excise duty administration**—tax disc postage costs will be reduced by extending the grace period to 14 days, following the payment of tax, on the non-display of a tax disc in a vehicle. It will also support indefinite off-the-road declarations. The legislation will be effective for tax discs posted on or after Royal Assent to Finance Bill 2013.
- **Carbon price floor**—the final primary provisions needed to deliver the carbon price support (CPS) rates of climate change levy (CCL) from 1 April 2013 will be included, which form part of the government's carbon price floor. This will include the CPS rates of CCL for 2015–16 and a number of changes to the detailed provisions, including how supplies to combined heat and power (CHP) stations will be taxed. Secondary legislation, coming into force on 1 April 2013, will also set out the detailed administrative provisions to enable HMRC to administer the CPS rates of CCL.
- **Fuel duty**—the fuel duty rate will remain at the current level (see SI 2012/3055 above).
- **Data-gathering from merchant acquirers**—as announced in theAutumn Statement, legislation will be introduced to amend HMRC's data-gathering powers. This amendment will allow HMRC to issue notices to merchant acquirers, who process card transactions, requiring them to provide bulk data about businesses accepting credit and debit cards.
- **Customs and excise modernisation**—measures will be introduced to update customs and excise powers by:
  - strengthening the powers to detain goods on reasonable grounds pending investigation of their duty status. Statutory safeguards relating to time limits and the issue of detention notices will be introduced;
  - replacing the current fines of £50 and £500 on ships involved in the smuggling of revenue goods with a single appealable maximum fine of £10,000;
  - amending the Customs and Excise Management Act 1979 to make it clear the term "goods" includes any container.

(Seehttp://www.hm-treasury.gov.uk/d/fb2013_overview_of_legislation_in_draft.pdf)

European Commission

Clamping down on tax evasion and avoidance: Commission presents the way forward

Around one trillion euros is lost to tax evasion and avoidance every year in the EU. The European Commission on 6 December presented an Action Plan for a more effective EU response.

It sets out a comprehensive set of measures, for now and for the future, to help Member States protect their tax bases and recapture billions of euros legitimately due. The Commission also adopted two Recommendations, one on tax haven and

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the other on aggressive tax planning, to encourage Member States to take immediate and coordinated action on specific pressing problems.

For more information see:

- the press release (IP/12/1325 –http://europa.eu/rapid/press-release_IP-12-1325_en.htm);
- the questions and answers (MEMO/12/949 –http://europa.eu/rapid/press-release_MEMO-12-949_en.htm);
- the Action Plan(http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/com_2012_722_en.pdf)
- the recommendation on tax havens (http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/c_2012_8805_en.pdf);
- the recommendation on aggressive tax planning (http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/c_2012_8806_en.pdf; and
- the new dedicated web section (http://ec.europa.eu/taxation_customs/taxation/tax_fraud_evasion/index_en.htm).

Government Publications

Revenue & Customs Brief 33/2012: Change in VAT treatment of insurance mis-selling reviews and helpline services

HMRC have issued RCB 33/12 dated 5 December 2012. It announces a change in HMRC policy on the treatment of supplies to insurers of pensions mis-selling review services and helpline services and will remove the current VAT exemption with effect from 1 April 2013, in response to a challenge by the European Commission. The change will not affect similar services involving Payment Protection Insurance (PPI) or Protection and Indemnity (P&I) Club managers, although HMRC will be revising guidance on the latter. Businesses will not be required retrospectively to account for VAT on past supplies following removal of the exemption, but will not be able to recover input tax against those supplies that remain treated as exempt.

The text of the Brief is set out in full below.

"**Enquiries from the European Commission into the UK's VAT exemption of insurance mis-selling reviews and helpline services**

Purpose of this Brief

This Brief announces a change in the UK VAT treatment of supplies to insurers of certain mis-selling review services and helpline services following enquiries received from the European Commission ("the Commission").

Who needs to read this?

- Insurers
- Businesses that supply helpline services to insurers
- Businesses that might supply insurers with mis-selling review services in the future should further reviews be instigated by the regulatory authority.

This Brief does not affect businesses that supply banks and other lenders with Payment Protection Insurance ("PPI") mis-selling review services. PPI review services have always been subject to VAT and will not, therefore, be impacted by this change.

1.1 Background

The UK currently exempts from VAT mis-selling review services and stand-alone helpline services supplied to insurers by insurance intermediaries, subject to certain conditions being met. This policy is set out in Paragraph 10.3 Notice 701/36 Insurance (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000129&propertyType=document) and

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Paragraph 10.4 Notice 701/36 Insurance (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000129&propertyType=document) and in sections VATINS5410 and VATINS5420 of the VAT Insurance guidance manual.

In both cases, the policy to exempt these services is based on UK case law (the relevant decisions are *Century Life Plc [2000] EWCA Civ. 366*, which concerned the provision of pensions mis-selling review services by an insurance agent; and *C & V (Advice Line) Services Limited VTD 17310*, which concerned the services of a legal helpline that, amongst other things, advised insurance policyholders on the making of insurance claims).

The Commission has recently queried the UK's basis for treating such services as exempt and has expressed the view that the services are taxable in light of a number of recent judgments of the European Court of Justice ("ECJ") on the application of the EU VAT exemption to insurance related services.

Having reviewed the position, HM Revenue & Customs (HMRC) has concluded that the Commission is correct in its view that these services are taxable and that the UK case law which had previously indicated otherwise has now been superseded by subsequent decisions of the ECJ. Consequently HMRC has informed the Commission that its current policy to exempt these services will be amended from a future date.

1.2 The new VAT treatment

1.2.1 Pensions mis-selling review services

HMRC no longer accepts that exemption applies to the services described in Paragraph 10.3 Notice 701/36 (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000129&propertyType=document) (Pensions mis-selling review services carried out on behalf of insurers) and in sections VATINS5410 and VATINS5420 of the VAT Insurance guidance manual. HMRC now considers all mis-selling review services to be liable to standard rated VAT.

There has been no change in the VAT treatment of PPI mis-selling review services. HMRC has always maintained that these services are liable to VAT at the standard rate and the VAT treatment for mis-selling reviews outlined in HMRC guidance has never applied to them. For the current exemption to apply the third party provider must be an insurance agent acting as an intermediary between an insurer and an insured party. This means that the insurer must be the party that is legally liable to have the reviews carried out and bear any claims for compensation or other redress. PPI reviews, however, are being carried out on behalf of banks and other lenders because, in this instance, they are the parties identified by the regulator as being liable for the mis-selling.

1.2.2 Helpline services

HMRC no longer accepts that exemption applies to the services described in Paragraph 10.4 Notice 701/36 (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000129&propertyType=document) (helplines supplied to insurers to provide assistance to insured parties on matters such as variations of contract and the making of claims).

However, if an insurance broker or agent provides helpline services to an insurer as part of a single supply which also includes the provision of exempt insurance related services (see section 9 Notice 701/36 Insurance (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_

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ShowContent&id=HMCE_CL_000129&propertyType=document)), the supply will have a single VAT liability which will be determined in accordance with its principal element (if there is a principal element to which other elements are ancillary) or its main focus or predominant nature. For example, if helpline services are provided as an ancillary part of a contract for exempt insurance related services, the supply will be exempt from VAT.

1.2.3 Date from which new policy takes effect

Businesses that are affected by the change in policy are required to start accounting for VAT on any supplies made on or after 1st April 2013.

If they have relied on HMRC guidance to treat supplies as exempt in the past, they will not be required to retrospectively account for VAT on those supplies as long as they met the terms of the published policy. They will not, however, be able to recover any input tax against those supplies that remain treated as exempt.

The VAT Insurance guidance manual and Notice 701/36 will be updated in due course.

1.3. Further information about Commission's query

In addition to querying the treatment of pensions mis-selling reviews and helpline services, the Commission has also queried HMRC's basis for applying exemption to the services of P&I Club Managers, as described in Paragraph 10.2.1, Notice 701/36 (customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&id=HMCE_CL_000129&propertyType=document). Having reviewed this matter, HMRC concluded that the services of P&I Club managers have been correctly treated as exempt but that the notice does not accurately portray the range of services that the managers actually provide. The Commission has accepted that, when correctly characterised, the services of P&I Club managers are properly exempt. The VAT insurance notice will be updated shortly to reflect the true position.

Issued 4 December 2012"

Revenue & Customs Brief 34/12 – withdrawal of Notice 701/59

HMRC have issued RCB 34/12 dated 11 December 2012. It announces that on 30 November 2012, HMRC withdrew Notice 701/59 (Motor vehicles for disabled people) and replaced it with two new customer and dealer orientated help sheets, which may be found at:

http://www.hmrc.gov.uk/helpsheets/vat1615.pdf (guidance for customers); and

http://www.hmrc.gov.uk/helpsheets/vat1616.pdf (guidance for suppliers)

Revenue and Customs Brief 35/12 – voluntary scheme for motor and boat dealers

HMRC have issued RCB 35/12 dated 11 December 2012. It announces that HMRC are introducing a new voluntary scheme for motor and boat dealers. The purpose of the scheme is to gather information from traders about zero-rated sales of adapted motor vehicles and boats to disabled people.

The text of the Brief is set out in full below.

"Purpose of this Brief

To note that, from 30 November 2012 HM Revenue & Customs (HMRC) is introducing a new voluntary scheme for motor and boat dealers. The purpose of the scheme is to gather information from traders about zero-rated sales of adapted motor vehicles and boats to disabled people.

Readership

All VAT-registered motor vehicle and boat dealers who make sales under the zero-rated, adapted motor vehicle or boat disability scheme.

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Background

The VAT zero rate relief for adapted motor vehicles and boats for wheelchair users allows regular wheelchair users to purchase a motor vehicle or boat that has been specifically designed or adapted to enable them to enter and drive (or otherwise be carried in) the vehicle at the zero rate of VAT, provided that the vehicle is for the domestic and personal use of the wheelchair user.

How will the scheme work?

This scheme for adapted motor vehicles and boats was announced at Budget 2012.

It is entirely voluntary. The aim of the scheme is to gather information from suppliers of vehicles and boats about the use of the VAT zero rate, on sales of motor vehicles and boats adapted for the use of wheelchair users.

Participating car dealerships and boat suppliers can provide information to HMRC by completing a survey form about their zero-rated motor vehicle and boat sales.

Why do you want us to provide additional information?

HMRC need further information in order to establish how often the relief is used, the types of adaptations required, the costs involved and the types of vehicles purchased.

How will this information be used?

Currently HMRC has very little information about how much the relief is used.

HMRC will use the information to establish general trends, values and numbers. In addition it will help HMRC gain a better understanding of the current use of the relief to assist to improve guidance."

Further details of the scheme may be found athttp://www.hmrc.gov.uk/vat/sectors/motors/dvs.htm

Revenue and Customs Brief 38/12 – information gathering consultation on the withdrawal of the exemption for business supplies of research services between eligible bodies

HMRC have issued RCB 38/12 dated 20 December 2012. It sets out details of a consultation in relation to the exemption of supplies of research between eligible bodies. The contents of the Brief are reproduced in full below.

"Purpose of this Brief

The purpose of this Brief is to announce the publication of a consultation on the withdrawal of the VAT exemption for business supplies of research services between eligible bodies.

Who should read this brief

All suppliers of business research and those that commission research.

Background

The UK has received notification from the European Commission that its exemption for business supplies of research between eligible bodies does not comply with European legislation. The UK has accepted that this is the case and plans to withdraw the exemption from 1 August 2013.

HMRC have discussed the impact of withdrawal with representative bodies but have been unable to ascertain from these discussions the full impact on those affected.

In these discussions HMRC were informed that the impact of the withdrawal will be minimal when compared to the totality of all research conducted in the UK. Our best estimate is that it is likely to affect less than one per cent by value of all research undertaken in the UK.

The purpose of the consultation therefore is to gather information that will allow HMRC to assess more accurately the impact of the withdrawal of the exemption and to see whether there are any possible options to mitigate that impact.

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Who are eligible bodies?

Eligible bodies are generally Government departments, schools, universities, charities and other public bodies. It is only supplies of research between these bodies that will be affected. All other research will maintain its current VAT liability.

The Consultation

The consultation document is available on the HMRC website from 20 December 2012 under the "What's New" section.

Issued 20 December 2012"

Revenue & Customs Brief 40/12 – VAT: Connection charges for water

HMRC have issued Revenue and Customs Brief 40/12 dated 28 December 2012. It explains HMRC's change of policy on the VAT liability of first time connection charges for water, and may be viewed at http://www.hmrc.gov.uk/briefs/vat/brief4012.pdf

Customs Information Paper (12) 65 – Tariff Preference: extended derogation for tuna products from Mauritius, Seychelles and Madagascar

HMRC have issued CIP (12)65 dated 28 December 2012. It announces that the European Union has extended the application of a nil preferential rate of duty for preserved tuna and tuna loins from Mauritius, Seychelles and Madagascar until 31 December 2017.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2012/cip6512.pdf.

VAT Information Sheet 18/2012 – New means of transport: revised Form VAT 411

This Information Sheet, dated 5 December 2012, announces that HMRC are introducing a revised Form VAT 411 with effect from 1 January 2013, on which to declare details of "new means of transport" sold to customers who intend to take it to another EU member state. The old VAT 411 will continue to be accepted until the end of March 2013.

The Information Sheet may be viewed in full athttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_032435

Tax Information and Impact Note: VAT relief for European Research Infrastructure Consortia

This note provides background information on the VAT (Relief for European Research Infrastructure Consortia) Order 2012, which provides for zero-rating of supplies of goods or services to a European Research Infrastructure Consortium with effect from 1 January 2013.

It may be viewed in fullat http://www.hmrc.gov.uk/drafts/tiin-eric.pdf

Notice 452 – Machine Games Duty

HMC have published Notice 452 (December 2012). It explains the Machine Games Duty regime, which comes into force on 1 February 2013.

Notice 700/9 – Transfer of a business as a going concern

HMRC have published a revised December 2012) edition of Notice 700/9. The main change is the inclusion of a link to form VAT 68 "Request for transfer of a registration number" in new section 11. The new edition does not appear to reflect HMRC's change in policy set out in Revenue and Customs Brief 30/12 occasioned by the decision in *Robinson Family Ltd* (see the weekly summary for 19 November 2012).

Company cars – advisory fuel rates from 1 December 2012

HMRC have published new advisory fuel rates for company cars, which apply from

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1 December 2012. The rates are to be used only where employers either reimburse employees for business travel in their company cars, or require employees to repay the cost of fuel used for private travel. HMRC will also accept the figures in the table for VAT purposes though employers will need to retain receipts in line with current legislation.

The rates may be viewed in full athttp://www.hmrc.gov.uk/cars/advisory_fuel_current.htm

Code of Practice 9 (COP9): HMRC investigations where we suspect tax fraud

HMRC have updated COP9, deleting a reference to an expiry date in section 2.6 and making a number of other minor changes, including a re-designed flowchart in Appendix 1.

The revised COP9 may be viewed athttp://www.hmrc.gov.uk/admittingfraud/cop9.pdf

Closing in on tax evasion: HMRC's approach

This document sets out some of the ways in which HMRC is using data analytics in pursuit of tax evasion. It looks at HMRC's achievements to date and at activity planned in the coming months and for the longer term. These plans include:

- including a measure in the Finance Bill enabling HMRC to obtain data from merchant acquirers about businesses that receive credit and debit card payments. This will help to identify businesses that do not declare their full sales, or that operate in the hidden economy;
- launching a campaign on missing VAT returns;
- beginning five further taskforces' using Connect to target high risk groups. This will include projects in EU cross-border tax evasion and tax repayment fraud;
- holding discussions with intermediaries such as tax agents on public concern on tax evasion, the behaviours and arrangements that may indicate evasion and how agents can help their clients to comply with the law.

(Seehttp://www.hmrc.gov.uk/budget-updates/march2012/tax-evasion-report.pdf)

Customs Information Paper (12) 60 – Tariff Preference: Autonomous Trade Preferences for Pakistan – Amendment to CIP (12) 54

HMRC have issued CIP (12)61 dated 4 December 2012. It makes amendments to CIP (12) 54 to reflect the date of the EC Regulation giving effect to the introduction on 15 November 2012 of nil preferential rates of duty for 75 products originating in Pakistan.

The Paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2012/cip-12-60.pdf

Customs Information Paper (12) 61 – Enhanced validation on CHIEF for non-UK issued EORI numbers

HMRC have issued CIP (12) 61 dated 4 December 2012. It concerns the implementation on 18 December 2012 of an enhanced validation rule on non-UK issued Economic Operator Registration and Identification (EORI) numbers on the CHIEF system.

Customs Information Paper (12) 62 – Annual revalorisation of the euro to pound sterling

HMRC have issued CIP (12) 62 dated 17 December 2012. It announces that revised limits affected by the 2012 revalorisation of the euro against the pound sterling come into force from 1 January 2013. The limit for VAT small non-commercial consignments relief is reduced from £40 to £36. Low value consignment relief remains unchanged at £15 and the Customs Duty waiver remains at £9.

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Customs Information Paper (12) 63 – Wine: New procedures for declaring VI documents

HMRC have issued CIP (12) 63 dated 17 December 2012. It announces that, with effect from 1 February 2013, the declaration in Box 44 of VI documents and specific accompanying documents in connection with wine imports becomes a mandatory requirement for consignments in excess of 100 litres.

Customs Information Paper (12) 64 – Enhanced validation on CHIEF for non-UK issued EORI numbers

HMRC have issued CIP (12)64 dated 17 December 2012. It replaces CIP (12) 61 on enhanced validation of non-UK issued EORI numbers from 18 December 2012 and contains expanded information on the use of EORI number GB013466934000.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2012/cip6412.pdf

Machine Games Duty registration deadline extended to 11 January 2013

Online registration for the new Machine Games Duty (MGD) regime has been extended until 11 January 2013, after representation from the industry.

MGD comes into force on 1 February 2013. Anyone responsible for premises from which gaming machines and other machine games are provided for play must be registered with HM Revenue & Customs (HMRC) before that date. HMRC cannot guarantee that registration applications received after 11 January will be processed in time.

Failure to register could lead to a penalty of up to 100 per cent of the tax due.

HMRC's MGD Online Registration Service is a secure, quick, and easy way to register, and will give an immediate on-screen acknowledgement that HMRC has received the application. For more information and to register follow the link towww.hmrc.gov.uk/machinegamesduty/.

MGD will replace both Amusement Machine Licence Duty (AMLD) – an annual charge for making a gaming machine available for play – and standard-rate VAT on net takings. It will be payable where customers pay to play a game on a machine in the hope of winning a cash prize that is greater than the cost to play.

(See http://www.hmrc.gov.uk/news/reg-deadline-mgd.htm)

Excise Information Sheet 12/2012: Third party destructions

HMRC have issued Excise Information Sheet 12/12 dated 2 January 2013. It is a reminder to excise businesses who arrange for third parties to destroy excise goods on their behalf of HMRC's specific destruction requirements for alcohol and tobacco goods, including liability to duty and penalties where goods are not destroyed in accordance with those requirements. It may be viewed in full athttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_ShowContent&propertyType=document&id=HMCE_PROD1_032510

Excise Information Sheet 1/2013: Anti-forestalling restrictions on removals of cigarettes in the run up to Budget 2013

HMRC have issued Excise Information Sheet 1/13. It explains the restrictions on the numbers of cigarettes that can be removed to home-use in the period before the Budget, and may be viewed in full athttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_ShowContent&id=HMCE_PROD1_032499&propertyType=document.

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Summary of responses to technical note on changes to VAT invoice rules

This document provides a summary of responses to the HMRC technical note issued in May 2012 concerning implementation of the EU Invoicing Directive with effect from 1 January 2013. The changes to UK legislation are made in SI 2012/2951 and SI 2012/2953.

The full text may be viewed athttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_032466

NAO report on HMRC service performance

A report by the National Audit Office into the "customer" service performance of HM Revenue and Customs has concluded that, while the department has made some welcome improvements to its arrangements for answering calls from the public, its current performance represents poor value for money for "customers".

For full details, see http://www.nao.org.uk/publications/1213/hmrc_customer_service.aspx

European Commission

New EU VAT Invoicing Directive takes effect from 1 January 2013

The European Commission has reminded businesses that the new Invoicing Directive comes into effect from 1 January 2013. The directive removes barriers to the use of electronic invoices as well as the requirement for VAT invoices to be issued for cross-border exempt financial supplies. The main changes are transposed into UK law by SI 2012/2951.

(See Press release IP/12/1377 (http://europa.eu/rapid/press-release_IP-12-1377_en.htm)).

Taxation of telecommunications, broadcasting and electronic services

The Commission on 18 December 2012 adopted the final proposal in a package of measures that will enable making the taxation of telecommunications, broadcasting and electronic services fairer and more business friendly as of 1st January 2015.

In 2008, the VAT Directive was modified in order to take into account the development of e-commerce. At that time, to better ensure taxation at the place of consumption, it was agreed that, as of 1st January 2015, telecommunications, broadcasting and electronic services would be taxed at the place of the customer, i.e. at the place where the customer is established or resides.

Once the new rules are in place, there will be a level playing field for all businesses in the sectors concerned, regardless of their size or corporate structure. In particular, this should contribute to the development of e-commerce in the single market.

In order to ensure simple compliance with the new rules, the suppliers of these services will be able to comply with their VAT obligations in the whole of the EU by submitting a single VAT return in the Member State in which they are identified.

For the customer the VAT rate will be the same regardless of where his supplier is established.

For details of the proposal, see COM(2012) 763 final (http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/e-services/com_2012_763_en.pdf)

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Court of Justice of the European Union

Bonik EOOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

In *Bonik EOOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECJ Case C-285/11; 6 December 2012 unreported* the principles laid down in *Kittel v Belgian State* were applied in a Bulgarian case where the ECJ held that "a taxable person may not be refused the right to deduct VAT in relation to a supply of goods on the ground that, in view of fraud or irregularities committed upstream or downstream of that supply, the supply is considered not to have actually taken place, where it has not been established on the basis of objective evidence that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with VAT fraud committed upstream or downstream in the chain of supply – a matter which it is for the referring court to determine".

Grattan plc v HMRC (No 5), ECJ Case C-310/11

In *Grattan plc v HMRC (No 5), ECJ Case C-310/11; 19 December 2012 unreported (Advocate-General's opinion)* a company (G) sold goods by mail order through agents, to whom it paid commission. Initially it did not claim a deduction for this commission. However, following the ECJ decision in Marks & Spencer plc v C & E Commrs (No 4), it claimed a retrospective deduction, backdated to April 1973. HMRC accepted that the effect of Article 11C1 of the EC Sixth Directive was that G was entitled to such a deduction for the period from 1 January 1978, but rejected G's claim for the period from 1973 to 1977 on the basis that neither the EC Second VAT Directive nor FA 1972 gave G the right to make such a deduction. The tribunal referred the case to the ECJ for a ruling on the interpretation of Article 8 of the Second Directive. Advocate-General Kokott delivered an Opinion in favour of HMRC, holding that "a taxable person does not have a directly effective right to treat the basis of assessment of a supply of goods as retrospectively reduced where, after the time of that supply of goods, the recipient of the supply received a credit from the supplier which the recipient then elected either to take as a payment of money, or as a credit against Arbortext Editor Unformatted Print: tvc_updater_weekly.xml Printed Fri Jan 04 10:27:06 2013 User: Doltonaj Page: 2 amounts owed to the supplier in respect of supplies of goods to the recipient that had already taken place".

Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" – grad Burgas pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v Orfey Bulgaria EOOD

In *Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" – grad Burgas pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v Orfey Bulgaria EOOD, Case C-549/11; 19 December 2012 unreported*, a Bulgarian case, the ECJ held that Articles 63 and 65 of Directive 2006/112/EC "must be interpreted as meaning that, in circumstances such as those of the main proceedings, where a building right is established in favour of a company in order to erect a building, by way of consideration for construction services of certain real property in that building and that company has undertaken to deliver on a turn-key basis to the persons who established that building right, they do not preclude the VAT on those construction services from becoming chargeable as from the moment when the building right is established, that is to say, before those services are performed, provided that, at the time that right is established, all the relevant information concerning that future supply of services

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is already known and, therefore, in particular, the services in question are precisely identified, and the value of that right may be expressed in monetary terms, which it is for the national court to verify".

Court of Appeal

HMRC v Secret Hotels2 Ltd

In *HMRC v Secret Hotels2 Ltd, CA [2012] EWCA Civ 1571* a company (S) operated a website through which it marketed hotel accommodation outside the UK. About 94% of its sales were to travel agents and about 6% to holidaymakers. It failed to account for VAT on its supplies. HMRC issued assessments charging output tax of more than £7,000,000. S appealed, contending that it was acting as an agent for the owners of the hotels, and should not be required to account for UK VAT. The First-tier Tribunal rejected this contention and dismissed the appeal, holding that S was acting as an independent principal and "was not simply supplying agency services to the hotels, but was itself supplying the holiday". Accordingly S was required to account for VAT under the tour operators' margin scheme. The Upper Tribunal reversed this decision but the CA unanimously restored it. Sir John Chadwick observed that S had "treated deposits and other monies which it received from holidaymakers and their agents as its own monies. It did not account to the hotel operators for those monies. It did not enter those monies in a suspense account so as to take advantage of Article 11A(3)(c); and so cannot rely on the exclusion from the scope of Article 26 of the Sixth Directive which is contained in the second sentence of that Article."

High Court

R (oao TNT Post UK Ltd) v HMRC (No 2)

In *R (oao TNT Post UK Ltd) v HMRC (No 2), QB [2012] EWHC 3380 (Admin)* following the decision in R (oao TNT Post UK Ltd) v HMRC (No 1), in which a company (T) had applied for judicial review of the UK's VAT treatment of postal services, the detailed provisions of VATA 1994, Sch 9, Group 3 were amended by F (No 3) A 2010 with effect from 31 January 2011, and were also amended by the Postal Services Act 2011 (Consequential Modifications and Amendments) Order 2011 (SI 2011/2085) with effect from 1 October 2011. T subsequently made a further application for judicial review, contending that despite the amendments, the UK's treatment of postal services continued to contravene EC law. The QB granted the application. Kenneth Parker J observed that there had been "some ambiguity in the language used by the court in stating the ratio of the judgment" and held that it was not clear whether "the court meant to limit the VAT exemption to a provider of universal postal services, in respect of only those services supplied by such a provider that fell within the description of universal postal services". He concluded that, in view of this ambiguity, there should be a further reference to the ECJ.

R (oao Company of Proprietors of Whitchurch Bridge)

In *R (oao Company of Proprietors of Whitchurch Bridge), QB [2012] EWHC 3579 (Admin)* the *Whitchurch Bridge Act 1792* established a company (W) to build and maintain a toll bridge over the River Thames. It was accepted that the tolls which W charged were exempt from VAT. In 2010 W applied to the Treasury to be included as a "specified body" under *VATA 1994, s 33(3)(k)*, so that it could claim refunds of VAT. The Treasury rejected the application, and W applied for judicial review. The QB rejected this application. Burnett J held that the Treasury had been entitled to decide that bodies which had no power to levy local taxation should not be specified under *s 33(3)(k)*.

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Tribunals

Upper tribunal

HMRC v Total Technology (Engineering) Ltd v HMRC

In *HMRC v Total Technology (Engineering) Ltd v HMRC, UT [2012] UKUT 418 (TCC)* a company (T) paid its VAT liability for the period ending 30 June 2009 one day late. HMRC imposed a surcharge of £4,260. T appealed, contending that the surcharge was disproportionate. The Upper Tribunal rejected this contention and upheld the surcharge, holding that "there is nothing in the VAT default surcharge regime which leads us to the conclusion that its architecture is fatally flawed". The tribunal specifically distinguished the earlier decision in *Enersys Holdings UK Ltd*, which involved a very much larger surcharge. The surcharge here did not give rise to any breach of the principle of proportionality.

Atlantic Electronics Ltd v HMRC (No 4)

In *Atlantic Electronics Ltd v HMRC (No 4), UT [2012] UKUT 423 (TCC)* a company reclaimed input tax of more than £1,000,000 on the purchase of a large number of mobile telephones. HMRC rejected the claim on the basis that the transactions formed part of an MTIC fraud, and the company appealed. HMRC applied for several witness statements to be admitted in evidence. The company objected to some of the statements. The First-tier Tribunal directed that statements by two of HMRC's witnesses should be excluded. HMRC appealed to the Upper Tribunal, which upheld the First-tier decision in respect of one of the witnesses. Judge Bishopp observed that "this was evidence HMRC wished to put in after the expiry of the time limit imposed by tribunal directions, already extended several times, and when they knew that an application for permission would be necessary. A litigant wishing to put in late evidence has a duty to make the application promptly and, in a case such as this where the evidence is being compiled, to forewarn his opponent: it is not a case in which doing so would undermine the purpose of the evidence. HMRC did not forewarn, and took an unexplained amount of time to produce the evidence." However Judge Bishopp allowed HMRC's appeal in respect of their other witness, whose statement related to the conviction of one of the people involved in the transactions on two acounts of conspiracy to cheat the revenue. Applying the principles laid down by Lightman J in *Mobile Export 365 Ltd v HMRC*, "the presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary".

First-tier tribunal

Mr & Mrs S Gardiner v HMRC

In *Mr & Mrs S Gardiner v HMRC (2012) TC02390* a woman operated an equestrian business. She and her husband obtained planning permission for the construction of a new dwelling to be used by an employee of her business. They claimed a refund of VAT under VATA 1994, s 35. HMRC rejected the claim on the grounds that VATA 1994, s 35(1)(b) provided that a refund was only due where the works were "otherwise than in the course of any business". The First-tier Tribunal dismissed the couple's appeal against this decision, applying the principles laid down in *Poultries Al Hilal Ltd (VTD 20381)*.

C Dockett v HMRC (2012)

In *C Dockett v HMRC (2012) TC02391* an individual (D) registered for VAT in 2000. He ceased trading in 2007, after having submitted several returns claiming repayments. HMRC had attempted to arrange a meeting with him to discuss these repayment claims, but in November 2007 D emigrated to Spain without informing HMRC or arranging a meeting. In April 2008 HMRC issued

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assessments to D's last-known UK address. They subsequently discovered his Spanish address and sent copies of the assessments to that address. D appealed, contending that he had not received the original assessments and that the copies had been issued outside the statutory time limit. The First-tier Tribunal dismissed his appeal, finding that the original assessments had been validly issued within the time limit. Judge Cannan found that D had failed to comply with VAT Regulations, SI 1995/2518, reg 5(2), which required him to notify them of his change of address. In issuing the assessments, HMRC had complied with VATA 1994, s 98(4), which provided that "any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative".

Groundwork Cheshire v HMRC

In *Groundwork Cheshire v HMRC (2012) TC02407* a trust (G) arranged for a subsidiary company to provide certain environmental services, and services relating to health and safety, to local businesses. The recipients were not charged for these supplies, as G obtained funding from the North-West Regional Development Agency and the European Regional Development Fund. HMRC issued a ruling that the supplies were outside the scope of VAT (so that G was not entitled to recover the related input tax). G appealed, contending that the funding which it received should be treated as third-party consideration. The First-tier Tribunal accepted this contention and allowed the appeal, holding on the evidence that "there is a direct link between the services provided to clients and the funding received".

Hawes & Curtis Ltd v HMRC

In *Hawes & Curtis Ltd v HMRC (2012) TC02415* a company (L), which was not registered for VAT, was the lessee of several shops which were occupied by an associated company (H). H reclaimed input tax on the payments. HMRC rejected the claim on the basis that the supplies were made to L rather than to H. The tribunal dismissed H's appeal against this decision. Judge Cornwell-Kelly held that "since (L) was not at the material times registered for VAT and had not opted to tax property rents, it could not pass on the right to deduct tax on the rents to the taxpayer company".

KC Noble v HMRC

In *KC Noble v HMRC (2012) TC02417* a contractor (N) reclaimed input tax in respect of invoices purportedly issued by a deregistered supplier (H). HMRC rejected the claim on the grounds that the invoices did not appear to be authentic. The First-tier Tribunal dismissed N's appeal. Judge Khan observed that N had clearly received some supplies, but that he had not shown that he had received them from a taxable person.

Cambrian Hydro Power Ltd v HMRC

In *Cambrian Hydro Power Ltd v HMRC (2012) TC02423* in November 2011 a company (C) applied to be registered from 1 January 2012. In February 2012 it applied for its registration to be backdated to April 2009, so that it could reclaim input tax incurred in 2009 and 2010. HMRC rejected the claim, and C appealed. The First-tier Tribunal directed that "the matter be referred back to HMRC for a reconsideration of the decision to refuse (C's) backdated registration to 1 April 2009 and to substitute a new decision". Sir Stephen Oliver observed that HMRC VAT Manual V1–28, para 8.8, stated that "in limited circumstances we may permit a retrospective change to the effective date of registration if there has been a genuine error in completing the VAT1 by the person registering". On the evidence, C's director appeared to have made a genuine error in originally requesting an effective date

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of registration of 1 January 2012, because he had not realised that this would prevent C from reclaiming some of the input tax which it had incurred.

David Rudling and Alan Dolton LexisNexis

EDITORIAL

In need of care and attention

Recent Tribunal and Court decisions highlight the need for taxpayers to deal adequately (and promptly) with their VAT affairs and the scope for HMRC to legislate to reduce inequality

Marc Welby is a senior VAT Partner at BDO LLP and the Executive Editor of DVITI. The views expressed in this article are his own. He can be contacted at marc.welby@bdo.co.uk or 020 7893 3580

As this 200th issue of DVITI coincides with the end of 2012 and the start of 2013, I was contemplating writing something appropriate to the time of year. However, and aside from wishing to extend to all readers a Happy New Year, inspiration failed me. Inevitably, therefore, I turned my attention to reading through the decisions of the FTT, UTT, High Court, Court of Appeal and ECJ released over recent weeks, in the hope of finding a subject matter for this Editorial. I was immediately struck by how many of those decisions covered old ground or revisited old issues. Some of these are dealt with elsewhere in this issue, e.g. *Secret Hotels2 Limited* in the Court of Appeal (agent v principal and *Reed Personnel* issues) and *Cloud Electronics Holdings Limited* before the FTT (recipient of a supply) and so I will refrain from commenting on these.

Groundwork Cheshire (FTT) dealt with the topic of subsidies and whether or not these were linked to the price of a supply, matters dealt with by the ECJ in 2001 in *Office des produits wallons ASBL v Belgium* and again, in 2002, in *Keeping Newcastle Warm Limited; McAndrew Utilities Limited* (*FTT*) looked at the validity of VAT invoices and alternative evidence in the context of the construction industry. The case brought by *the Company of Proprietors of Whitchurch Bridge v HM Treasury* (*Queens Bench*) was a judicial review application against the refusal of HMT to grant VAT Act 1994, s.33 status, to the claimant in circumstances where the claimant did not levy local taxes and thus did not meet one of the basic conditions for gaining s.33 status. Nothing too surprising in the decision of the Court there.

SC Gran Via Moinesti SRL v Agentia Nationala de Administrare Fiscala (*ANAF*) *and another* saw the ECJ dealing with yet another case concerning the right to deduct. This time it was in the context of a taxpayer who bought land with buildings together with permission to demolish those buildings in order to build a complex of residential housing: could there ever have been any doubt over the right to deduct? or any question that demolition prior to construction should create an obligation to repay the initial deduction? Clearly the tax administration thought so, as did the lower courts in Romania, requiring the taxpayer to go to the Court of Appeal in Bucharest, which then referred the case to the ECJ. The decision was another of those recent cases which went straight from Hearing to Judgment without an Advocate General's Opinion and the Court, wholly unsurprisingly, held that the taxpayer did indeed have a right to deduct the VAT in question and had no obligation to repay the VAT when the buildings were demolished to enable construction of residential properties.

For most taxpayers and their advisers there is, perhaps, little ***new*** to be learnt from the cases referred to above. Which is not to say that those cases should be ignored or disregarded as my emphasis was on the "new": the fact that such cases keep coming forward, however, indicates that it is ***old*** lessons which are not being learned. Other recent cases may help demonstrate this more forcibly, namely, *Cambrian*

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Hydro Power Limited [2012] UKFTT 764 (*TC*) and *Hawes & Curtis Limited [2012] UKFTT 758* (*TC*). In addition to the salutary lessons to be learned by taxpayers, both of these cases also suggest that there is scope for HMRC policy (and/or the relevant legislation) to be reviewed and (hopefully) revised.

In *Cambrian* the issue before the FTT was the effective date of registration of a company which was not required to be registered for VAT – it was an intending trader – but had nonetheless applied to be registered on a voluntary basis. This was so that it could recover VAT incurred on planning etc costs incurred in relation to a proposed hydro electric power project. *Cambrian* commenced in business in 2009 but only sought VAT registration with effect from 1 January 2012. Shortly after being registered it applied to HMRC for the registration to be backdated to April 2009, having realised that although it could seek to claim back VAT on goods purchased up to four years earlier it was restricted to six months in the case of services (Regulation 111, Value Added Tax Regulations 1985). HMRC refused the application, on the grounds that there was no liability for *Cambrian* to be registered earlier and there had been no Departmental error on the part of HMRC during the registration process.

Under paragraph 9, Schedule 1, VAT Act 1994, HMRC can register a person not liable to be registered "from such earlier date as may be agreed between them and him" but that discretion applies only where the person is not liable to be registered and is not already registered. Had *Cambrian* asked for an earlier date of registration at the time of its application, i.e. pre registration, HMRC would have been required to consider it but once *Cambrian* was registered there was no such requirement. The Tribunal was clearly sympathetic to the Appellant and concluded that there had been a genuine error made by *Cambrian* when registering for VAT. However, and notwithstanding that HMRC policy, set out in their internal manual, allowed for changing the date of registration in the case of error (under their general "care and management" powers under Section 6, CEMA) the other conditions for retrospection were not met. The one fall-back position was if the registration officer felt that there were "mitigating circumstances".

The Tribunal concluded that the officer in question could not have known of the applicant's error and therefore could not have considered whether or not there were mitigating circumstances. The Tribunal's decision was therefore to allow the appeal and to direct that HMRC reconsider the decision to refuse the application for backdating.

Whether or not the taxpayer ultimately succeeds in this case, the lesson for other taxpayers (and their advisers) is clear: the moment a business is established or formed it should consider whether or not it would be beneficial to register for VAT. This is particularly so for intending traders where the lead time between investment and making taxable supplies may stretch out to six months or longer. Whilst a business is not registered it is essentially exempt from VAT and so has no entitlement to VAT recovery; once registered it can rely on the (limited) provisions of Regulation 111 to recover some of the VAT previously incurred but it will not be entitled to claim all of it, as Cambrian found out. In such circumstances consideration should be given to applying for a retrospective or backdated registration at the time the registration application is submitted.

From HMRC's perspective I believe they should review whether the differential VAT recovery treatment between pre-registration goods and pre-registration services can continue to be justified, leastways in its current form. If HMRC are prepared to countenance a retrospective voluntary registration (where it is applied for before a VAT registration has been effected) thereby allowing a greater recovery of input VAT, then why not amend the provisions of Regulation 111 to allow for such recovery without the need for a

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retrospective registration? The alternative would be to enable retrospective registration in circumstances which currently are not covered either through greater exercise of their "care and management" provisions or, preferably, by amendment to Schedule 1.

Hawes & Curtis Limited is another sad tale of a business's misfortune in relation to VAT. The company is a high class manufacturer and seller of shirts which has been in existence for 100 years or more. In 2001 it experienced significant financial difficulties and was bought by a Mr Suleyman. The Landlord of its premises in London's Jermyn Street (No. 23) was only prepared to grant a new lease, which would allow the business to be continued there, if the lease was granted to a company with a more reliable covenant. In stepped another of Mr Suleyman's companies, Low Profile Properties Limited (LPP), which agreed to take on the lease. The lease itself provided that it could be used as a shop "trading under the name or style of Hawes & Curtis". The decision did not record any further details of the lease. As a matter of fact the shop was occupied by the appellant. Further leases with other landlords were entered into by LPP for premises which, again, as a matter of fact, were occupied by the appellant. Apparently none of the leases allowed for sub-letting and there were no licences or consents to allow the appellant to occupy or trade from the properties.

Invoices from the landlords for rent (plus VAT) were invoiced to LPP. The appellant, however, paid the invoices direct to the landlords and claimed the VAT charged as input tax. Notwithstanding this, the Tribunal found – despite a sworn statement of Mr Suleyman that the landlords all knew of the true identity of the occupying company – that there was no direct relationship between the landlord and the appellant and that there was no proof that the "landlords of the shops it traded in made or intended to make supplies to it, or ever intended to deal with it whether through the agency of LPP or otherwise, or even that they acquiesced in the taxpayer as a limited company occupying their premises." The Tribunal found that there was no supply to the appellant and that the supplies under the leases were made to LPP. As a consequence of this and the fact that LPP was not registered for VAT and had not opted to tax any of the properties in question, the VAT on the landlords' rents became an irrecoverable cost to the appellant: LPP could not recover the VAT as input tax and could not charge it on as VAT to the appellant.

Perhaps one of the unfortunate aspects of this case is that the appellant was "unrepresented". In addition, much of the Tribunal's findings resulted from a lack of evidence to support the contentions of the appellant, with references to "it has not been proved" and "there was before the Tribunal no corroborative evidence". Perhaps the evidence never existed. It is, however, clear from the transcript that at the beginning of the hearing not even copies of the leases in question nor the relevant rent invoices had been produced; it is therefore perhaps more likely that other evidence simply had not been adduced, hence why it was not presented. This begs the question of how the case had even reached the position of a hearing: typically one would have expected both sides to have agreed and produced a list of documents in advance and for such documents to have been made available to the other side and to the Tribunal in the form of an agreed bundle.

Leaving to one side such procedural matters, it is possible that, had it been able to produce evidence to make good its assertions, the appellant may have found itself with a different outcome in the appeal. What, for example, if the leases allowed occupation by LPP "or companies in the same group as LPP" – would this have altered the analysis? What if the Appellant had been able to produce evidence that, despite what was set out in the leases, the landlords were fully aware that "Hawes & Curtis" was not a trading name of LPP but was a reference to Hawes & Curtis

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Limited and that the appellant was occupying the premises with their knowledge?

Of course, the appellant and LPP could have avoided the position they had found themselves in altogether if LPP had simply registered for VAT and had opted to tax each of the properties as and when it entered into each of the new leases.

LPP did neither. The fact that it did not suggests it had not even considered the VAT implications of entering into leases for premises to be occupied by another company. As a result HMRC gained a windfall due to technical breaches. Sadly those technical breaches cannot be remedied, leastways not as the law currently stands. Schedule 10, VAT Act 1994, at paragraph 19, states that an option has effect from the date it is exercised or such later date as may be specified. HMRC has no discretion to allow a back-dated option. It appears wholly feasible, however, that (subject to the appropriate political will) the law could be amended, to introduce a third possibility, e.g. "or such earlier date as may be agreed by the Commissioners in such circumstances as the Commissioners may specify in a notice published by them". This would give HMRC the power to determine and to prescribe the circumstances in which it would be fair and equitable to allow a retrospective option to tax to be made. This could be drawn narrowly, e.g. so as only to cover cases involving connected persons and where the VAT arising from any retrospection would in all cases be fully recoverable.

In suggesting that HMRC review the possibility of legislating to allow retrospective registrations and options to tax I am not advocating that they should attempt to legislate for every case where a taxpayer unwittingly gets himself into trouble or where with more care the trouble could have been avoided. The cases of *Cambrian* and *Hawes & Curtis* demonstrate, however, that there are circumstances where the consequences of a taxpayer not paying sufficient care and attention to his VAT affairs are sometimes disproportionate and inequitable. "tis the season of goodwill and all that … and it might make for a better reception at Budget time than last year …

Marc Welby
BDO LLP

CASES & COMMENT

Secret Hotels2 Limited (formerly Med Hotels Limited) [2012] EWCA Civ 1571

Court of Appeal (Civil Division)

This is a recent judgment from the Court of Appeal ("**CA**") concerning an appeal by HMRC. The Upper Tribunal ("**UT**") found in favour of the taxpayer, reversing the decision of the First Tier Tribunal ("**FTT**").

Secret Hotels2 Limited, formerly Med Hotels Limited ("**Medhotels** "), a UK based company, operated a website through which it marketed hotel, villa and apartment accommodation in the Mediterranean and the Caribbean.

HMRC issued Notices of Assessment, totalling in excess of £7million, on the basis that Medhotels was making supplies of hotel accommodation as a principal (or in its own name) and liable to account for VAT in the UK under the Tour Operators Margin Scheme ("**TOMS**"). Medhotels appealed, contending that it was acting as agent for disclosed principals (the hotel operators) and that therefore, Medhotels' commission on sales was outside the scope of the TOMS and UK VAT.

The FTT, taking into account both the contractual documents and Medhotels' behaviour, agreed with HMRC and concluded that Medhotels was a tour operator and "*was not simply supplying agency services to the hotels, but was itself supplying the holiday.*"

This decision was overturned by the UT, which focused on the express terms of the

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contractual agreements and found that an agent/principal relationship did exist between Medhotels and the hotel operators and that the holidaymaker was contracting with the hotel operator, and not Medhotels.

Issues

The primary legal issue under appeal was whether the FTT had made an error of law in determining the nature of the supply for VAT purposes by reference to both the contractual documents and the behaviour of Medhotels.

The second issue was then whether the FTT was entitled to reach the conclusion that it did (i.e. that Medhotels was acting as principal in its own name).

Decision

The CA allowed HMRC's appeal.

The primary issue: did the First Tier Tribunal err in law in its approach?

The CA held that the making of a VAT supply is not identical to the performance of a contractual obligation, even when that obligation is the provision of goods or services. Therefore, the contractual document alone does not always answer the question of "what is the nature of the VAT supply?". Consequently, the nature of a VAT supply is to be ascertained from "the whole facts of the case". The FTT had not made an error of law.

The second issue: was the First Tier Tribunal entitled to reach the conclusion it did?

Given the facts, the CA held that the FTT was entitled to find that Medhotels was acting as principal in its own name and therefore liable to account for UK VAT under the TOMS.

Particular emphasis was placed on the following factors:

1 Medhotels dealt with holidaymakers in its own name in respect of the use of its website.
2 Medhotels dealt with holidaymakers in its own name when the hotel operator was unable to provide accommodation and the holidaymaker rejected the alternative offered.
3 Medhotels dealt with complaints and compensation in its own name, without involving the hotel operator.
4 Medhotels used the services of other taxable persons (the hotel operators) in the provision of travel facilities marketed through its website.
5 Regarding VAT, Medhotels dealt with the hotel operators in a manner inconsistent with a principal/agent relationship by failing to present the hotel operators with invoices detailing Medhotels' commission. These invoices would have allowed the operators to account for VAT in their own Member States.
6 Medhotels treated deposits received from holidaymakers as its own monies.

Cloud Electronics Holdings Limited [2012] UKFTT 699 (TC)

First-tier Tribunal

This case concerned whether Cloud Electronics Holdings Limited ("**CEHL**") had the right to recover input tax incurred on professional fees in relation to a management buy-out.

The Issue

CEHL was incorporated on 28 February 2008 as the acquisition vehicle for a management buy-out of Cloud Electronics Limited ("**Cloud Electronics**") and was registered for VAT with effect from 1 March 2008. CEHL incurred various professional advisers' fees in the course of the management buy-out, including fees for due diligence, accounting, corporate finance and legal advice (the **"MBO Services"**).

CEHL sought to recover some of the input tax incurred on the MBO Services by way of its VAT return. HMRC subsequently issued CEHL with an assessment to repay that input tax, which HMRC

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contended was irrecoverable. In addition, CEHL submitted a voluntary disclosure to recover further input tax which had not been included in their VAT return, which HMRC rejected. CEHL appealed the decision to reject the voluntary disclosure and the assessment.

Decision

The Tribunal identified that in order to recover the input tax in question, CEHL must satisfy two tests:

- The supply must have been made to it (the "to whom" test) and
- The services must have been used for the purposes of CEHL's business (that is, incurred for the purposes of an economic activity carried out by CEHL) (the "purpose" test)

In relation to the "to whom" test, HMRC argued that because CEHL had not been incorporated or registered for VAT at the date of the relevant engagement letters, it was not in existence to receive the relevant supplies and there was therefore no entitlement to recover the input tax.

In relation to the "purpose" test, HMRC argued that the MBO Services were consumed in the acquisition process, and had no direct and immediate link with CEHL's taxable business. Furthermore, HMRC argued that they could not be directly and immediately linked to the business, because in managing Cloud Electronics, CEHL was not carrying out an economic activity.

The Tribunal considered that both tests had been met. In deciding that the "to whom" test was met, the Tribunal identified the following as relevant factors:

1. Despite not being in existence at the time, the engagement letters all referred to CEHL, as well as the management buy-out team;
2. The MBO Services were rendered over a period of time and most of the work was done after the incorporation of CEHL;
3. The tax points of all the professional advisers' fees were in either March or April 2008 and therefore after the incorporation of CEHL.

In deciding that the "purpose" test had been met, the Tribunal identified the following as relevant factors:

1. The fees were incurred to determine whether CEHL should invest in Cloud Electronics (rather than, for example, to determine whether to invest in CEHL; a decision that it was evidenced had been taken before the MBO Services were provided). The Tribunal therefore considered that the MBO Services were for the purposes of the management of Cloud Electronics (i.e. CEHL's business);
2. The management services provided by CEHL to Cloud Electronics went further than simply managing the debt that arose on the acquisition of the shares in Cloud Electronics. The level of management charges demonstrated that CEHL was supplying substantial management services to Cloud Electronics and carrying out a economic activity to which the MBO Services were directly and immediately linked.

The Tribunal therefore allowed the appeal.

Commentary

The case reinforces the significance of principles set out in earlier decisions in *BAA Limited*, and serves as an important reminder of the significance of:

- Ensuring that engagement letters are properly drafted from a VAT perspective; and
- Establishing whether the acquisition vehicle has its own independent economic activity to enable a direct and immediate link between advisers' services, and the supplies it makes ; and
- Considering the timing of invoicing by advisers.

Further clarification on the issue of VAT recovery on transaction costs in expected in the case of *BAA Limited*, which was

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heard in the Court of Appeal on 17 – 19 July 2012, and *Airtours Holiday Transport Limited* (currently stood over to await the decision in *WHA/Viscount* which is due to be heard in the Supreme Court in January 2013). It is interesting that the Tribunal felt able to decide this appeal without waiting for the decisions one or both of *BAA* and *Airtours.*

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Deloitte LLP

INPUT TAX – CONCESSIONARY TREATMENT

Unhappy Mundays!

Graham Brearley – Senior Manager with Grant Thornton UK LLP – looks at a recent VAT Tribunal decision in the case of Mundays LLP. The views expressed are those of the author and are not necessarily those of the firm.

There has been much talk recently about tax avoidance. It seems that every time you open a newspaper, someone is being attacked for allegedly not paying the right amount of tax to the UK Exchequer or every time you switch on the TV, some ill-informed politician or commentator is remonstrating about this corporation or that corporation not having paid enough tax. Never mind that, under existing tax legislation, the corporations in question may well have paid what is legally due, it seems that a moral or ethical dimension to the payment of tax is emerging with even the Chancellor of the Exchequer – with his now famous statement – jumping on the band-wagon calling aggressive tax planning "morally repugnant".

It is clear that the times have certainly changed since the Duke of Westminster's tax case in 1936 where Lord Tomlin penned the famous line about every man being "entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be". From a VAT perspective, it seems that old adage has withered on the vine post *Halifax*. A man may certainly be entitled to order his affairs in a particular way, but if, by doing so, he gains a tax advantage and that tax advantage was the motive for doing so, this could now be construed as an abuse of rights.

On a personal note, I have always been of the view that what we require from our legislators in our tax system is legal certainty. The law should be drafted so that, as a citizen, one can know, with a degree of certainty, that you have paid the right amount of tax at the right time. By introducing a moral dimension, legal certainty, in my view, is somehow eroded and we are left with a subjective approach to taxation at one end of the scale and, if recent times are anything to go by, taxation by the media at the other. Get the law right and then enforce it!

It seems to me that, in our western style democracy, if the State wishes to tax its citizens (including its business corporations), it should lay down laws which are both certain and sufficiently precise so as to achieve the objective pursued. Equally, those laws should be sufficiently robust so as to prevent tax avoidance. As a theoretical example, let's imagine that a law is passed that says all citizens with blonde hair will be taxed. If you are a blonde citizen, it would not be too difficult to avoid the tax by simply dyeing ones hair to a different colour. However, a clever legislator should, in my view, anticipate that move and should write the law in such a way that the tax would be levied on all "naturally" blonde citizens making it much more difficult for the tax to be avoided. Heading the hair dyers off at the pass as it were!

Introducing morality into taxation is only going to make life difficult. Who is to be the judge of what is or is not morally acceptable? Far better in my view to have legal certainty then there can be no blurring at the edges. In the above example, if the citizen chose to dye his or her hair to a colour other than blonde solely for the

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purposes of avoiding the tax is that choice morally repugnant tax planning? Indeed, is it any more morally repugnant than, say, the blonde citizen who chooses to leave the jurisdiction of the State so that he is no longer required to pay taxes there? One could, also, equally ask is it not just as morally repugnant if the legislator fails so miserably to foresee the loopholes in the laws they are introducing? Take, for example, the Billions of Euros lost to Missing Trader fraud over the last decade or so! It takes a fraudster to take advantage of the system, but it also takes a poor system and poor policing by the Member States to create the opportunity for fraud in the first place. Don't get me wrong, I'm not condoning fraud, merely highlighting the fact that tax can be lost just as easily through the State's incompetence as through morally repugnant planning. It is a difficult conundrum which is by no means new and "the battle" will, I am sure, continue to rage apace.

Where is all of this heading I hear you ask? As I read the recent First-tier Tribunal's decision in the case of *Mundays LLP* (*TC02374*), I couldn't help thinking that the stance taken by HMRC in the case was morally questionable. It seems to me that, if the State publishes a concession which provides a tax relief, but then it does not apply that concession and, thus, denies the taxpayer the tax relief in question, such action is as morally repugnant as tax planning.

The concession in question in the Mundays LLP case is the one published by HMRC in their Manual VIT 13700 relating to the recovery of input tax on accountancy fees by professional partnerships. Mundays LLP – a firm of solicitors with about 25 partners – utilised the concession and claimed back input tax on its accountants fees in relation to the preparation of the Partnership tax return and the individual Partner's individual tax returns.

The concession clearly states that "it is arguable that income tax is the responsibility of the partner as an individual and is not strictly a business matter" [of the partnership]. However, it then goes on to say, " in order to avoid disputes over small amounts of tax our policy is that VAT on a partnership's accountancy fees should usually be claimed in full subject to the normal rules". Finally, the published concession concludes with "the only exception to this is where the accountant's fees clearly relate to taxation matters that do not relate to the VAT registered business. An individual might, for example, be charged significant costs relating to inheritance tax. This would not normally be related to the VAT registration and input tax should not be claimed. Usually, however, a partner's tax advice can be treated as entirely business related".

In essence therefore, this concession acknowledges that the fees charged by accountants for preparing the partner's individual tax liabilities is **not** a business expense of the firm. Ordinarily therefore, the firm is not entitled to reclaim the VAT on these fees as input tax. This is because, under section 24(1) of the VAT Act 1994, for VAT to qualify as "input tax" it must be incurred by a taxable person on goods or services which are used or to be used for the purpose of any business carried on or to be carried on. However, recognising that it is the business that commissions and pays for the accountant's work in relation to the calculation of the partnership's profits and the partner's individual tax liabilities, HMRC's policy is to, in effect, ignore section 24(1) or, perhaps, more accurately, to deem that the accountant's fee is a business expense of the taxable person.

The only other condition is that the amounts of tax in question should be "small". Exactly what "small" means is not defined. In the Mundays LLP case, the VAT in question for each Partner was approximately £170 per year (based, as it was, on an individual accountancy fee of approximately £900 per partner per year). The taxpayer assumed that this amount met the "small" condition and claimed the VAT back as input tax. Unfortunately, despite the clear policy set out in the

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concession, HMRC considered that the fees charged by the accountants related solely to the personal liabilities of the partners and the VAT was therefore not input tax of the partnership and the amount claimed per partner was, in any event, not "de-minimis". HMRC issued an assessment in the sum of £18,024 covering a four year period. Not surprisingly, the taxpayer appealed to the First-tier Tribunal.

The Tribunal concluded that, on the facts of the case, almost all of the partners' tax liabilities arose directly out of their trading as partners of the firm. However, it also concluded that the filing of personal tax returns of the partners by the partnership cannot be said to be a business purpose of the partnership. As such, as a matter of law, and without recourse to the published concession, the VAT could not be reclaimed as input tax by the partnership.

Jurisdiction

In light of the fact that the concession is a deviation from what the law states, HMRC also argued that the Tribunal had no jurisdiction to adjudicate on HMRC's refusal to pay the claim. The question of jurisdiction was considered by the Tribunal but, ultimately, it was decided that, even if it had jurisdiction, the appellant could not succeed. This was because, in the Tribunal's view, the appellant would have to demonstrate that it was within the terms of the concession and that it had relied on the concession to its detriment.

Surprisingly, the Tribunal stated that it had to agree with HMRC that, if it had jurisdiction, the concession "was not intended to cover invoices of this size" and the appellant cannot rely on it. Furthermore, the Tribunal concluded that, if it has jurisdiction to adjudicate over whether the appellant has met the terms of the concession, it seems likely that, even under the VAT Directive, in order to establish a claim based on legitimate expectation, the appellant would have to show that it had relied on that expectation to its detriment. However, the Tribunal stated that "it is difficult to see any detrimental reliance in this case: all the appellant did was reclaim as input tax VAT which was not all, strictly, as a matter of law, its input tax. It has not altered its position to its detriment.

The Tribunal held that VAT charged on the proportion of the accountant's fee that related to the partnership's business could be reclaimed by the partnership, but that the proportion that related to the preparation of the partner's individual tax returns could not be reclaimed.

Conclusion

We can only go on the facts as they are presented by the Tribunal in its decision. Given that the policy – as stated – confirms that HMRC will treat "partner's tax advice as entirely business related" one can only assume that there are other factors at play in this case which, as a third party, we are not aware of and which were not alluded to as part of the Tribunal hearing.

The question of whether £170 VAT per year per partner is "small" is not, I would suggest, the real issue here. Clearly, the policy – that "partner's tax advice is treated as a business expense" – is qualified by the condition that the amounts in question must be "small" but, unfortunately, the policy is silent on this point. My experience is that the amounts of VAT incurred by the partners in this case in respect of the preparation of their personal tax returns is not out of sync with the norm and, cannot, in my view be regarded as excessive. Whether the amounts are "small" is a subjective question but, in this day and age, I would suggest that £170 is not "large".

That being the case, and assuming that there are no other issues which have influenced HMRC's stance, in my view, the decision not to apply the concession in this case is unconscionable, nay "morally repugnant". If HMRC has changed its policy, then it should issue a Revenue & Customs Brief to publicise the fact. If,

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however, it wishes to continue the policy, it should now state clearly and unequivocally what it considers to be "small" so that taxpayers can have some legal certainty going forward.

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JURISDICTION OF THE TRIBUNAL

Jarvis and the FTT's jurisdiction to address human rights violations

Introduction

It is not every day that the First-Tier Tribunal ("the FTT") strikes out a claim because it lacks jurisdiction, but then also rules that the FTT did not comply with the Claimant's right to a fair hearing, and that furthermore, the FTT was unable to do anything about it – not even to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 ("the HRA"). This is precisely what happened in the case of *Jarvis v HMRC [2012] UKFTT* (*483*) (TC) ("*Jarvis*").

If, in light of the decision in *Jarvis,* the FTT is unable to hear a dispute what can a Claimant do to seek redress in a similar claim? What procedural steps are available that would enable such a Claimant to raise his or her human rights claim? This article considers the case of *Jarvis* in greater detail and seeks to answer these questions.

Jarvis v HMRC

The claim in *Jarvis* arose from the penalty applied to a partner for the late filing of a tax return. Mr and Mrs Jarvis were both partners in a partnership. Mr Jarvis was the representative partner for tax purposes, which meant that he was required to file the returns in accordance with a notice served pursuant to section 12AA of the Taxes Management Act 1970 ("the TMA"). Mr Jarvis did not file the 2009/2010 tax return on time and both partners were served with two late penalty notices of £100 each in February and August 2011.

Mrs Jarvis appealed against both of the penalties issued against her on the basis that she was not a partner at the relevant time, because she neither played an active part in the business nor received any money from the business during the relevant period. HMRC liaised with Mrs Jarvis in relation to her appeals and considered whether she had any "reasonable excuse" for the partnership's failure to file a tax return. The test of "reasonable excuse" was the only basis upon which such penalties can be set aside pursuant to section 93A(7)(a) TMA (which was in force at the relevant time, but has since been replaced by similar provisions in paragraph 25 Schedule 55 of the Finance Act 2009). It is noteworthy that, pursuant to this section only the reasonable excuse of the representative partner is relevant to an appeal, but this did not stop Mrs Jarvis' case from being considered, or appeal making its way to the FTT. Notwithstanding its failure to mentioned the matter in correspondence, HMRC resisted the appeal on the sole basis that Mrs Jarvis was not the representative partner and therefore there was no valid appeal before the FTT.

In the words of Judge Brannan in *Jarvis*, section 93A is "*a somewhat unusual penalty provision*" (see paragraph 26). This is because it imposes a penalty on every partner but only gives a right of appeal to the representative partner. Furthermore, Judge Brannan found that this was the clear intention of Parliament (paragraph 39). That this is so emerges quite clearly from the wording of section 93A(6)(a), which provides as follows:

> "…[N]o appeal against the determination of any of those penalties shall be brought otherwise than by the representative partner or a successor of his [.]"

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Before exploring the human rights implications of the "unusual" nature of this penalty, which formed the majority of the judgment, Judge Brannan found that Mrs Jarvis had "*no right of appeal in her own name against the penalty imposed on her*", and that she must rely on her husband to bring the appeal in respect of this penalty (see paragraphs 27 and 60). Furthermore, Judge Brannan did not consider that it would appropriate to substitute Mr Jarvis for Mrs Jarvis under Rule 9 of the Tribunal's rules for the simple reason that Mr Jarvis had not himself appealed against any penalties.

Having effectively concluded the matter of the appeal as a matter of domestic tax law, the FTT went on to consider the human rights implications of its lack of jurisdiction. In the first instance, Judge Brannan considered whether the penalty fell within the criminal (as opposed to the civil) limb of the right to a fair trial pursuant to Article 6(1) of the European Convention on Human Rights ("the ECHR"). In reaching his decision, Judge Brannan relied on the principles repeated and applied in the European Court of Human Rights ("the ECtHR") case of *Jussila v Finland* (*2007*) *45 EHRR 39* ("*Jussila*"). The three principles were (i) that the starting point was whether domestic law regarded the offence as criminal, disciplinary or otherwise; (ii) the nature of the offence; and (iii) the nature and degree of severity of the penalty. The ECtHR in *Jussila* went on at paragraph 35 to decide that in relation to tax matters or otherwise the minor nature of the penalty provided no basis for removing an offence, otherwise criminal by nature, from the scope of Article 6. Accordingly, Judge Brannan at paragraph 36 of *Jarvis* found that the penalties were deterrent and punitive in nature, and of general application to all persons trading in partnership, and therefore fell within the criminal limb of Article 6(1).

In finding that Article 6(1) ECHR applied to the dispute at issue, Judge Brannan went on to consider whether Mrs Jarvis had been accorded the right to a fair hearing in accordance with it. In considering this question, Judge Brannan considered whether the FTT, in dealing with an appeal under section 93A TMA was a tribunal of "full jurisdiction". The reason for this enquiry was that the ECtHR in *Umlauft v Austria* (*1995*) *22 EHRR 76* at paragraph 37 had stated that decisions taken by administrative authorities must be subject to control by a judicial body that has "*full jurisdiction*". Strasbourg case law had also developed this concept in relation to tax tribunals in a number of other jurisdictions. Judge Brannan helpfully discussed the test, under Strasbourg case law, in relation to the notion whether a tribunal had full jurisdiction as follows at paragraph 53:

> "If domestic law provides for a penalty at a fixed rate, the fact that a tribunal does not have discretion to reduce the rate set by the national legislature does not, of itself, prevent the tribunal being a tribunal of full jurisdiction. Provided that, otherwise, the tribunal has the power to determine all questions of fact and law and can substitute its own decision for that of the tax administration, and is not limited to a purely supervisory role (eg if the tribunal can intervene only where the decision is "unreasonable" in the *Wednesbury* sense), it will be a tribunal of full jurisdiction for the purposes of Article 6".

Judge Brannan noted that the FTT's only roles was to consider whether there was a "reasonable excuse" for the representative partner's failure to file a partnership return, and if not to confirm the penalty determination. He therefore concluded at paragraph 57 that the FTT did not have full jurisdiction to determine all matters of fact and law or substitute its own view for that of HMRC. He therefore concluded that the FTT was not a tribunal of full jurisdiction as required by Article 6(1) ECHR in relation to Mrs Jarvis' appeal, though on the reasoning given the same conclusion would apply if the representative partner had brought the appeal.

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No doubt recalling section 3 of the HRA, which requires legislation to be read and given effect to in a way which is compatible with Convention rights so far as it is possible to do so, Judge Brannan stated at paragraph 58 of *Jarvis* that in light of the clear terms of section 93A(7) TMA, which limited the FTT's jurisdiction to considering whether there was a "reasonable excuse" for the representative partner filing a partnership return late, he had doubts whether it was possible to construe that provision in a way which can give effect to Mrs Jarvis' rights to access a tribunal of full jurisdiction under Article 6(1) ECHR.

Finally, Judge Brannan noted that as well as finding that the jurisdiction of the FTT meant that it could not comply with the Claimant's right to a fair hearing under European human rights law, furthermore the FTT could not make a declaration of incompatibility pursuant to section 4 of the HRA, because such a declaration must at a minimum be made by the High Court or Court of Appeal (see paragraph 59).

Jurisdictional Limits

The jurisdictional problem identified in *Jarvis* is limited. It applies only to the penalties applied to non-representative partners. On many other matters of course, the FTT does indeed act with "full jurisdiction", in the sense that it does have "*the power to determine all questions of fact and law and can substitute its own decision for that of the tax administration*".

It is important to read the reasoning at paragraph 57 of *Jarvis* very carefully. It is *not* saying, as some have done, that even if a challenge to a partnership penalty had been brought by the representative partner that the FTT could not be regarded as having "full jurisdiction" for the purposes of Article 6(1). In every respect, the crux if the decision in *Jarvis* focussed on Mrs Jarvis' situation as a non-representative partner. It is in relation to such non-representative partners that the FTT cannot determine all matters of fact and cannot substitute its own decision for that of HMRC.

It is quite clear that in relation to representative partners the FTT *did* have such jurisdiction. Section 93A(7) TMA provided that the tribunal *may* (a) set the determination aside if the representative partner or successor had a reasonable excuse for not delivering it or (b) confirm the determination if that was not the case.

Accordingly, the result in *Jarvis* has a very narrow scope because it only applies to non-representative partners in relation to the challenge of penalties applied for late partnership returns. It is, as Judge Brannan rightly points out, a "*somewhat unusual penalty provision*" in the sense that it imposes a penalty on a party who is unable as a matter of law to challenge that penalty.

How to pursue matters further

Although this is an unusual case, it does not make matters any easier. Short of awaiting a legislative initiative to remedy this apparent denial of access to a "full tribunal" to non-representative partners seeking to challenge such penalties, there appear to be three procedural routes for pursuing the matter further.

First, a Claimant such as Mrs Jarvis may avoid embarking upon an appeal before the FTT altogether and instead opt for redress before the Administrative Court by seeking judicial review of HMRC's decision to impose the penalty. The existence of the decision in *Jarvis* will provide the material to respond to any defence that there is an alternative means of redress available to the taxpayer.

Secondly, a Claimant might follow in Mrs Jarvis' footsteps and first take an appeal to the FTT, and then (assuming that the same outcome would follow) seek permission to appeal to the Upper Tribunal. Pursuant to section 4(5) HRA, the Upper Tribunal likewise has no jurisdiction to make a declaration of incompatibility, and accordingly a claimant

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would need to seek to persuade the Upper Tribunal or the Court of Appeal to grant permission for the matter to progress to the Court of Appeal. Pursuant to SI2008/2834, the Claimant would need to demonstrate that there was an important point of principle or practice, or some other compelling reason for the relevant appellate court to hear the appeal from the Upper Tribunal. The fact that the Claimant has no other way to vindicate his or her right to a fair hearing pursuant to Article 6(1) ECHR may provide just such a reason.

Thirdly, if all else fails (and therefore having exhausted all domestic remedies) a Claimant could pursue the matter at the ECtHR in Strasbourg. The ECtHR only has jurisdiction to decide whether there has been compliance with the Convention, and not to overturn domestic legislation. Nevertheless, taking this action would raise the profile of the problem, and in so doing the Claimant could also make a claim for damages and costs before the ECtHR.

All of these procedural options are expensive and would take a very long time. Normally the sums at stake in such appeals will be, by contrast, nominal to these costs. It may therefore be that the only practical alternative available to the non-representative partner would be to follow Judge Brannan's advice at paragraph 61 of *Jarvis*, and to persuade the representative partner to bring an appeal. Of course, there may be occasions where this may not, for a variety of reasons, be a practical alternative. In these circumstances it is regrettable that non-representative partners would have to fight vindicate their right to a fair hearing.

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CUSTOMS

Reforming the Generalised System of Preferences: EU Refocuses Trade Priorities in Favour of Poorer Countries

The European Union has revised its Generalised System of Preferences ("**GSP**"), notably reducing the number of beneficiary countries from 176 to 89. The result is that many key economic players such as Brazil, Malaysia and Russia will no longer benefit from preferential treatment on imports into the EU. The list of products that may benefit from preferential tariff treatment under the GSP has also been revised. The reforms, most of which will apply from 1 January 2014, are likely to impact traders currently benefiting from GSP, and particularly those trading with counterparts in countries that have experienced significant economic growth in recent years.

Rationale for reform

The GSP, in place since 1971, is intended to encourage sustainable development and to reduce poverty by eliminating and reducing import duty rates, quotas and other barriers to international trade between the EU and developing countries. Thus, the GSP effectively provides an exemption to less developed countries from the World Trade Organisation's (WTO) "most favoured nation" (MFN) principle, which obliges WTO member states to treat all imports from other member states no worse than they treat imports from their "most favoured" trading partner.

The GSP is generally considered to have provided less developed countries with an opportunity to boost their exports significantly – imports worth around EUR 60 billion are reported to be made under the GSP each year – and is considered to be one of the most generous of such schemes adopted globally to date. At the same time, the GSP has not been free from

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criticism from some factions as being economically ineffective, largely due to the complexity and costs of adhering to its strict rules of origin requirements, which can dent the very margins the scheme is intended to create.

The GSP is updated regularly to ensure it continues to reflect its overall aims and the ever-changing global economic landscape. In May 2011, and as previously reported in this journal[1], European Trade Commissioner Karel de Gucht announced arguably the broadest ranging reforms to the GSP since its beginnings in 1971. In the words of de Gucht, the reforms are intended "to give poorer countries a competitive edge whilst recognising that others are now ready to take their rightful place on the world trade stage".[2] This is to be achieved by way of a rethink of the countries that may benefit from the GSP regime. For some time, GSP has been available to imports from 176 beneficiary countries, which can be divided into three broad groups:

(i) standard GSP countries;
(ii) so-called "GSP+" countries, which bestows enhanced preferences on "vulnerable" countries that sign up to international conventions relating to human and labour rights, environment and good governance; and
(iii) "Everything But Arms" countries, generally speaking the poorest countries, which benefit from duty- and quota-free access to the EU for imports of all goods other than military items.

The revised GSP came into force on 20 November 2012, following its initial publication on 31 October 2012 by way of Council and Parliament Regulation (EU) No. 978/2012, and is intended to concentrate preferential treatment on low and lower-middle income countries that do not already have preferential access to the EU market by way of another bilateral or unilateral trading arrangement, such as a separate Free Trade Agreement ("**FTA**"). While the new GSP Regulation is already in force, the majority of its provisions will only start to apply from 1 January 2014. Further implementing legislation will be adopted throughout 2013 to address some of the specifics and procedural aspects of the new regime. The preferences under the existing GSP will continue to apply during the transitional period up to and including 31 December 2013.

As noted above, it is anticipated that, with effect from 1 January 2014, the number of beneficiary countries will be reduced from 176 to 89. Countries may no longer benefit from GSP if they:

- meet World Bank minimum income per capita thresholds; or
- are already entitled to preferential EU market access under a separate FTA with the EU, that is at least as good as under the GSP.

The specific countries that will continue to benefit from GSP will be reassessed prior to the implementation of the new regime on 1 January 2014 according to latest World Bank statistics. However, they are currently expected to include 49 least developed countries under the Everything But Arms programme, as well as 40 low income and lower-middle income countries as classified by the World Bank.

The countries that will lose out on GSP include:

- 20 countries that have achieved high or upper middle-income, according to World Bank classification for three consecutive years. This includes many countries that have seen significant growth in economic strength and competitiveness in recent years, including, for example, many high income economies in the Middle East such as Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates, and upper-middle income countries such as Argentina, Brazil, Malaysia, Russia and Venezuela;
- 34 countries that have entered into bilateral or autonomous arrangements with the EU such as FTAs since the

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adoption of the existing GSP, and therefore already benefit from preferential access to the EU market. This includes, for example, partner countries benefiting from the Euromed (e.g., Egypt, Morocco, Tunisia) and Cariforum (e.g., Belize, Jamaica, Trinidad & Tobago) agreements; and

- 33 countries that qualify as Overseas Countries and Territories of the EU (including several Caribbean states like Aruba, Bermuda and the British Virgin Islands and other territories such as French Polynesia and Greenland), which also already have preferential access to the EU market under alternative arrangements.

Meanwhile, many countries (e.g., India, Ukraine) and trade blocs (e.g., ASEAN, Mercosur) are currently involved in negotiations with the EU towards preferential trade arrangements, with South Korea (July 2011) and Singapore (agreed in principle in December 2012) most recently reaching agreement on separate FTAs with the EU. This signifies an intended sea change on the part of the EU to move away from reliance upon GSP and towards the growth of specific bilateral (and mutually beneficial) agreements with partner countries.

Under the new GSP, where a country is listed by the World Bank as high-income or upper middle income for three consecutive years, it will be removed from GSP at the beginning of the following year and subject to a transitional one year period allowing for traders to adapt. Where a country becomes ineligible for GSP as a result of entering into an alternative preferential arrangement with the EU, even if only on a provisional basis, it will be granted a transitional period of two years to leave the GSP.

Changes to GSP+

As summarised above, the "GSP+" regime allows "vulnerable" developing countries meeting certain international standards in the areas of human rights, labour, environment and good governance to benefit from enhanced preferential treatment. Countries are currently considered vulnerable if (i) their GSP imports account for less than 2% of all imports from all GSP beneficiary countries and (ii) their exports to the EU are not sufficiently diversified (which is the case where its seven largest categories of export items account for more than 75% of its exports to the EU). Under the new GSP, the criteria for defining vulnerability will be relaxed, reducing the total GSP import threshold from 2% to 1% (which, notably, would allow countries such as Pakistan and Ukraine to benefit from GSP+, leading to potential opportunities for the likes of Pakistan's textile industry to increase competition with European producers).

Under the current system, GSP+ applicant countries must commit to ratify and implement relevant international conventions, to report to the European Council every three years and to accept monitoring obligations. Under the new GSP+ regime, these obligations are extended to ensure a high degree of compliance with the relevant international conventions and to require a *binding* commitment to ratify conventions, accept monitoring and to cooperate with the EU. The new GSP+ will also include enhanced monitoring on beneficiary countries, by way of a European Commission report submitted to the European Council and Parliament every two years. Further, the onus will be on the beneficiary country to demonstrate a positive record in complying with the relevant international conventions (currently, the onus lies with the EU to show that a country is in breach of these obligations). The list of GSP+ beneficiary countries under the new regime is currently empty, and countries that meet the entry criteria will be entered into GSP+ as and when they successfully apply.

Revised product coverage

The range of products covered by GSP will be extended to include certain metals that are important commodities for many

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developing countries. In addition, several other products that were previously subject to duty reductions will now be duty free, while other products that are currently subject to preferential duty rates may now be either removed or subject to a different rate of duty. A full list of the products to be added from 1 January 2014 is available on the European Commission's website. By way of summary, the product changes include:

- the addition of duty free treatment for various earth metals, rare-earth metals, and other metals and chemicals (such as alumina, ammonium sulphate, sodium nitrate and raw cadmium, lead, magnesium, titanium and tungsten). These products, and in particular rare-earth metals used for consumer electronics and other purposes, are a key commodity for many developing nations;
- duty free treatment of items that were previously subject to reduced duty rates (including carnations, certain forms of tobacco, polyethylene terephthalate and certain video recording apparatus).

In addition, there will be changes to the level of preferential duty rates applied to various goods benefiting from GSP, and it is therefore important for traders to check the revised duty rates for any goods they are importing under GSP.

"Graduation" levels and safeguards

Safeguards will be introduced in respect of preferential imports of textiles and agricultural products, that will allow the EU to suspend preferential treatment where the level of non-EU imports exceeds certain thresholds.

Similarly, the new GSP regime will amend current "graduation" thresholds – that is to say, fixed limits on imports of specific product groups into the EU that are deemed to be sufficiently competitive and therefore may be excluded by the EU from preferential treatment under GSP. Under the existing GSP, the EU may revoke preferential treatment where imports of specified products from a particular GSP country exceed a percentage (currently 15% or 12.5% for textiles/clothing) of total imports of the same products from all GSP beneficiary countries over a three year period. Following implementation of the new GSP, the number of product categories that may be excluded from preferential treatment will be expanded from 21 to 32 (to be defined during the course of 2013), while graduation thresholds will move to 17.5% (14.5% for textiles). Further, the graduation mechanism will be removed entirely in respect of all GSP+ countries.[3]

What this means for importers and exporters

It is clear that the purpose of the new GSP is to continue to drive forward economic growth in the world's least developed nations, while balancing the need for the EU to carefully consider its position in an increasingly competitive (and often unstable) global economic environment. However, these developments are not without criticism. For instance, some have argued that the use of World Bank classification as the means for ranking developing countries in accordance with Gross Domestic Product fails to recognise the fact that many resource-rich countries will be excluded from the new GSP regime despite continuing high levels of poverty. Many countries in South America, Africa and the Caribbean, for instance, will no longer be able to make use of GSP (although may continue to benefit under other preferential arrangements). At the same time, growing economic powers such as China, India and Indonesia will continue to benefit from GSP, subject to product graduation thresholds.

In the meantime, importers and exporters currently relying upon GSP should be mindful of the adoption of the new regime, and consider taking any necessary steps in advance of the 1 January 2014 implementation deadline. EU traders importing goods into the EU from GSP

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beneficiary countries should check whether the originating country is still eligible for preferential treatment under GSP, and whether the preferential duty rate that is currently applicable to the imported goods will change. To the extent that traders are no longer able to benefit from preferential treatment under the new GSP, care should be taken to review supply chains prior to 2014 and consider how goods are to be sourced or supplied under the new system. Where traders are no longer able to benefit from GSP, it may be necessary to pay increased attention to opportunities under other preferential arrangements, such as the agreement of new FTAs between the EU and its partner countries.

Whether the new GSP system will in fact succeed in achieving its purported goals, by way of a tangible increase in EU imports of products from the world's least developed countries coupled with a growth in bilateral trading arrangements, remains to be seen.

1 Revis & Stonebank, DVITI Issue 173; Revis & Williams, DVITI Issue 188.

2 Karel de Gucht, European Commissioner for Trade, Press Conference on the GSP Review, Strasbourg, 10 May 2011.

3 Graduation currently does not apply to Everything But Arms countries.

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