De Voil Indirect Tax Intelligence

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NEWS IN BRIEF

Legislation

HGV Road User Levy Act 2013

The HGV Road User Levy Bill (Session 2012–13) received Royal Assent on 28 February 2013 as the HGV Road User Levy Act 2013 (c 7). It makes provision for charging a levy in respect of the use or keeping of heavy goods vehicles on public roads in the United Kingdom, and for connected purposes.

The Value Added Tax (Reduced Rate) (Cable-Suspended Passenger Transport Systems) Order 2013, SI 2013/430

This order introduces a 5% reduced rate of VAT for small, cable-suspended transport systems carrying not more than nine passengers, with effect from 1 April 2013. The reduced rate will apply to the transport of passengers only and not where systems are located in areas such as theme parks which make an overall charge for admission. The measure was announced in Budget 2012 and the order published in draft in December 2012.

Air Passenger Duty (Amendment) Regulations 2013, SI 2013/493

These regulations come into force on 1 April 2013. They provide for an annual accounting scheme and occasional operator scheme for the use of small to medium businesses or occasional operators to minimise the administrative burden of air passenger duty (APD) (which will affect business jets and smaller aircraft after 1 April 2013).

Annual accounting scheme

Currently APD is declared and paid on a monthly basis. This is appropriate for the current trader population many of whom operate several hundred routes to both short and long haul destinations. However, for smaller operators who may not have many passengers, fly predominantly to short haul destinations and are likely to have in the main manual systems, monthly declarations could be onerous. An annual accounting system, where operators declare on a single return their whole year's liability, will reduce the administrative burden on them.

In order to make this scheme available to as many small operators as possible, while taking into consideration the need to protect the revenue, eligibility for the scheme is limited to operators with an estimated annual APD liability of no more than £500,000.

Occasional operator scheme

Under the current APD regime, aircraft operators are required to notify HMRC of their liability to be registered within seven days of their becoming so liable (i.e. when they carry chargeable passengers on a chargeable aircraft). Once registered they are then required to complete and submit monthly returns.

Extending APD to smaller aircraft operators means that many who make ad hoc one off flights will also be required to notify their liability to register. Such operators may then not fly into the UK again for many months. Including such operators in the register and requiring them to make monthly returns would be burdensome. Instead this instrument introduces a scheme where occasional operators with an estimated annual APD liability of no more than £5000 will be able to declare and pay APD as and when they carry chargeable passengers on a chargeable aircraft.

The Climate Change Agreements (Eligible Facilities) (Miscellaneous Amendments) Regulations 2013, SI 2013/505

These amending regulations enable until 31 May 2014 the Environment Agency, as administrator of the climate change agreement (CCA) scheme, to estimate the supply of "reckonable energy" used within an energy-intensive installation for the purposes of the 70% eligibility test for a

CCA, in cases where the operator of a facility has insufficient data from the previous 12 months to determine that figure. These regulations come into force on 31 March 2013. The new CCA scheme begins on 1 April 2013.

The Climate Change Agreements (Administration) (Miscellaneous Amendments) Regulations 2013, SI 2013/508

These amending regulations, coming into force on 31 March 2013, enable the Environment Agency to estimate the amount of climate change levy that would be payable by a greenfield facility over the first 12 months of a climate change agreement, for the purposes of calculating any penalty. This is to avoid disadvantage to such facilities which may not have data available for this initial period. The regulations also provide for measurement of emissions in carbon dioxide equivalent, such as methane or nitrous oxide.

The Value Added Tax (Independence Payment) Order 2013, SI 2013/601

This Order comes into force on 8 April 2013. It amends the relevant Value Added Tax primary law provisions following the introduction of the new personal independence payment and armed forces independence payment to ensure that these provisions continue to have the same effect. The effect of the Order is that the value added tax reliefs that currently apply to persons who are in receipt of a disability living allowance (in some cases by virtue of entitlement to the mobility component) will additionally apply to persons who no longer receive that benefit but instead receive one of the two new specified benefits.

The Hydrocarbon Oil Duties (Reliefs for Electricity Generation) (Amendments for Carbon Price Support) Regulations 2013, SI 2013/657

These Regulations, which come into force on 1 April 2013, amend the Hydrocarbon Oil Duties (Reliefs for Electricity Generation) Regulations 2005 (S.I. 2005/3320) ("the principal Regulations") which introduced a relief from excise duty for rebated oils used to produce electricity. Except in the case of a claim for relief for rebated oils used to produce electricity in a generating station, or the outputs of a combined heat and power station, situated in Northern Ireland, the Regulations reduce the amount of relief that can be claimed by the amounts specified in Schedule 2 (as inserted by regulation 9) ("the Carbon Price Support rates").

Regulation 3 inserts a definition of "outputs" in relation to a combined heat and power (CHP) station and amends the definition of "qualifying oil" to include heavy oil on which a rebate has been allowed under section 13ZA of the Hydrocarbon Oil Duties Act 1979. Consequential amendments are also made to the definitions of "qualifying duty" and "qualified claimant".

Regulation 4 amends regulation 3 of the principal Regulations so that it applies to qualifying oil or qualifying bioblend used to produce outputs of a CHP station.

Regulation 5 reduces the amount of relief that is allowed on qualifying oil or qualifying bioblend used to generate electricity in a generating station by the Carbon Price Support rates.

Regulation 6 makes consequential amendments to regulations 7 and 11 of the principal Regulations as a result of the re-numbering of the Schedule.

Regulation 7 re-names the heading to Part 4 of the principal Regulations and substitutes regulations 9 and 10 with new regulations 9 and 10.

New regulation 9 specifies the relief to which Part 4 applies and contains interpretation provisions.

New regulation 10 provides for relief on qualifying oil or qualifying bioblend used to produce outputs of a CHP station. The relief is scaled back according to the efficiency percentage of the station and, where a quantity of the oil or bioblend is referable to the production of electricity in the station (as determined in accordance with new regulation 10(5)), the amount of relief allowed is reduced by the Carbon Price Support rates.

Regulation 8 makes consequential amendments to regulation 13 of, and the Schedule to, the principal Regulations.

Regulation 9 re-numbers the Schedule to the principal Regulations and inserts new Schedule 2 which specifies the Carbon Price Support rates.

The Landfill Tax (Amendment) Regulations 2013, SI 2013/658

These Regulations, which come into force on 1st April 2013, amend the Landfill Tax Regulations 1996 (S.I. 1996/1527) ("the principal Regulations").

Regulation 3 amends regulation 31(3) of the principal Regulations. The maximum credit a landfill site operator may claim against annual landfill tax liability, in respect of qualifying contributions made, is changed from 5.6% to 6.8% for contribution years beginning on or after 1st April 2013.

Regulation 4 updates a reference to section 72 of the Charities Act 1993 in regulation 33(1B)(c) of the principal Regulations. This section has been replaced by section 178 of the Charities Act 2011 ("2011 Act"). A body cannot be an eligible body for the purposes of regulation 33 of the principal Regulations if it is controlled or managed by a person who is disqualified from being a charity trustee or a trustee for a charity by virtue of section 178 of the 2011 Act. The meaning of "charity trustee" is given in section 177 of the 2011 Act.

The Value Added Tax (Consideration for Fuel Provided for Private Use) Order 2013, SI 2013/659

This Order amendssection 57 of the Value Added Tax Act 1994 (c.23) ("the Act"). References to sections 56 and 57 are references to sections 56 and 57 of the Act.

Value Added Tax is payable if road fuel that is an asset of a business is used for private motoring. Section 56 provides that where the fuel of a business is provided for private use it is to be treated as a taxable supply for consideration. Articles 16 and 74 of Council Directive 2006/112/EC ordinarily require that, where a business's goods are provided for the private use of the owner or staff, the value of that supply is determined by reference to the purchase price of the goods; however, the UK has been permitted to derogate from those Articles where a business's fuel is used for private motoring, so that a business may also value those supplies by using a flat-rate which is dependent upon the vehicle's CO2 emissions rating. The derogation requires that the flat-rate amounts be adjusted annually to reflect changes in the average cost of fuel.

The flat-rate amounts, which are determined with reference to the vehicle's CO2 emissions figure, are set out in a table in section 57 ("Table A"). Notes (1) to (6) in section 57(3) set out how a vehicle's CO2 emissions figure is to be established.

This Order substitutes a new Table A. The substituted Table A amends the flat-rates to reflect changes in the average cost of fuel. The new rates apply to prescribed accounting periods starting on or after 1st May 2013.

The Value Added Tax (Increase of Registration Limits) Order 2013, SI 2013/660

This Order amends Schedules 1 and 3 to the Value Added Tax Act 1994 c.23 ("the Act") with effect from 1st April 2013.

Persons who make taxable supplies or acquisitions from other Member States ("acquisitions") must be registered for the purpose of the Act if the value of the taxable supplies or acquisitions that they make exceeds a prescribed value. The values are prescribed in Schedule 1 and Schedule 3 respectively. This Order increases the registration values from £77,000 to £79,000.

Persons registered in relation to taxable supplies or acquisitions may not de-register unless the value of the taxable supplies or acquisitions that they make falls below a prescribed value. The value for taxable supplies is prescribed in paragraph 4 of Schedule 1. The value for acquisitions is prescribed in paragraph 2 of Schedule 3. This Order increases the deregistration value for taxable supplies from £75,000 to £77,000 and the deregistration value for acquisitions from £77,000 to £79,000.

Value Added Tax (Amendment) Regulations 2013, SI 2013/701

These regulations come into force on 15 April 2013. They implement a new notification scheme in relation to the arrival in the UK of motorised land vehicles. A person bringing a land vehicle into the UK will have to notify HM Revenue and Customs (HMRC) within 14 days of the vehicle's arrival in the UK. This notification will be required to license and register the vehicle.

The existing notification scheme for acquisitions of new means of transport such as ships, aircraft and land vehicles, is contained in the Value Added Tax Regulations 1995, SI 1995/2518, reg 148.

SI 1995/2518 is amended to limit the scheme to new ships and new aircraft and introduce a revised time limit for notification to match the time limit for the new notification scheme.

For vehicles acquired from within the EU, all those acting in a private capacity have to pay any due acquisition VAT at the time of notification. Taxable persons acting in a business capacity will continue to pay through their VAT returns.

HMRC must be notified of the arrival of a land vehicle in the UK before:

- any application to license it
- any application to and register it

Budget 2013

The Chancellor of the Exchequer announced his budget on 20 March. The proposals in relation to indirect tax are set out below. Some have previously been announced (primarily in the Chancellor's Autumn Budget Statement) but are nevertheless included for completeness. The references in brackets are to Tax Information and Impact Notes (TIINs), or to the Overview of Tax Legislation and Rates (OOTLAR), which may be viewed athttp://www.hmrc.gov.uk/budget2013/ootlar-main.pdf

General

Criminal Investigations: Powers of HM Revenue and Customs

When the Inland Revenue and HM Customs and Excise merged in 2005, legislation prevented the automatic transfer of powers from one regime to another.

Currently, therefore, some of HMRC's criminal asset recovery powers under the Proceeds of Crime Act 2002, in respect of former Inland Revenue functions, can only be exercised by the police on HMRC's behalf. With effect from the date of Royal Assent to the Finance Act 2013 HMRC officers will be able to use these powers.

(http://www.hmrc.gov.uk/tiin/2012/tiin4785.pdf)

Power to Detain Goods

With effect from Royal Assent to Finance Act 2013, Customs and Excise Management Act 1979 s 139 is to be amended, and a new Schedule inserted, to clarify HMRC's powers of detention of things where there are reasonable grounds to suspect that those things may be liable to forfeiture. The amendments will also allow the things to be detained and, with the agreement of a person responsible, to remain at the place where they are first detained rather than being removed and detained elsewhere.

(http://www.hmrc.gov.uk/tiin/2012/tiin886.pdf)

Customs Penalties: Fines on Ships

With effect from Royal Assent to the Finance Act 2013, the level of fine which may be imposed where a vessel of 250 tonnes or more has been used for smuggling is to be increased from a maximum of £500 to a maximum of £10,000.

(http://www.hmrc.gov.uk/tiin/2012/tiin4830.pdf)

Data-Gathering from Merchant Acquirers

With effect from Royal Assent to Finance Act 2013, merchant acquirers and other businesses that process credit, debit and charge card transactions for retailers will be "data-holders" for the purpose of FA 2011 Sch 23. This will allow HMRC to issue a notice to merchant acquirers requiring them to provide information regarding credit and debit card sales made by retailers, and the retailers' name, address, VAT number if available, and bank account details.

(OOTLAR 1.68; A128)

Customs Powers: Definition of Goods

With effect from Royal Assent to Finance Act 2013, the definition of "goods" contained in Customs and Excise Management Act 1979, s 1 will be amended to make it clear that it includes containers. This is to put beyond doubt that HMRC's powers to search, examine and require information includes any container.

(http://www.hmrc.gov.uk/tiin/2012/tiin4831.pdf)

Value Added Tax

VAT Registration Thresholds

With effect from 1 April 2013, the VAT registration threshold will be increased from £77,000 to £79,000. The deregistration threshold will be increased from £75,000 to £77,000. The registration and deregistration thresholds for acquisitions from other EU member states will be increased from £77,000 to £79,000.

(OOTLAR 1.57; B28)

Withdrawal of VAT Exemption for Business Supplies of Research between Eligible Bodies

Subject to the responses to a consultation which closed on 14 March 2013, the Government plans to introduce secondary legislation to withdraw, with effect from 1 August 2013, the exemption for supplies of research between eligible bodies (e.g. Government departments and educational establishments).

(OOTLAR 1.58)

Extension of the Education Exemption to For-profit Providers of Higher Education

In Budget 2012, the Government announced that they would consult on and review the VAT treatment of university degree level education with a view to extending the existing exemption to commercial entities supplying such education. The responses to the consultation have identified a number of significant issues and concerns with the options proposed. The Government is seeking to develop alternative options which will also cover possible changes to the exemption for further education (a point that a large number of respondents made). The Government has therefore decided to spend more time exploring the issues raised and will consult again on this matter later in the year with a view to legislation in a future finance bill.

(OOTLAR 2.40)

Tax Relief for Health Bodies

Following changes to be introduced by the Health and Social Care Bill, legislation is to be included in Finance Bill 2013 which will:

- allow certain newly created NHS bodies to make claims for refunds of VAT under VATA 1994, s 41;
- exempt those bodies from corporation tax.

The changes will come into force with effect from 1 April 2013 (in respect of refunds of VAT) and from Royal Assent to Finance Act 2013 (in respect of corporation tax).

In addition, following changes proposed in the Care and Support Bill, the Government will introduce legislation in Finance Bill 2014 to include the Health Research Authority and Health Education England within section 41 of the VAT Act 1994.

(http://www.hmrc.gov.uk/tiin/2012/tiin2058-2124.pdf; OOTLAR 2.39)

Personal Independence Payment (PIP) and Armed Forces Independence Payment (AFIP)

From Royal Assent to the Finance Act 2013, the IT exemption for employer-supported childcare for disabled children will be amended to include a reference to PIP. From 1 April 2013 the definition of a disabled person for capital allowances purposes will be extended to include reference to recipients of PIP or AFIP. From 1 April 2013 consequential amendments will be made to legislation on insurance premium tax, the reduced rate of VAT and the zero rate of VAT to include references to PIP and AFIP.

(http://www.hmrc.gov.uk/tiin/2012/tiin2015-2017-4793-4829.pdf)

Reduced Rate for Energy-saving Materials in Charitable Buildings

Legislation will be introduced in Finance Bill 2013 which will mean that, with effect from 1 August 2013, buildings used for a relevant charitable purpose will no longer benefit from the reduced rate of VAT in respect of 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.

(http://www.hmrc.gov.uk/tiin/2012/tiin4778.pdf)

Car Fuel Scale Charges

The scale used to charge VAT on fuel used for private motoring in business cars will be amended from the start of the first VAT period beginning on or after 1 May 2013.

With effect from Royal Assent to Finance Act 2013, deemed supplies of road fuel (i.e. in respect of private or non-business use) will be taxed according to the rules set out in VATA 1994 Sch 4. Valuation of the deemed supply by scale charge is to be retained as an optional method within VATA 1994 Sch 6; the scale charge table will be updated annually by HMRC.

Anti-forestalling arrangements apply from 11 December 2012, such that deemed supplies of fuel made between that date and the date of Royal Assent will be valued under the new arrangements to the extent that the actual use of the fuel is after the date of Royal Assent.

(http://www.hmrc.gov.uk/tiin/2012/tiin4784.pdf; OOTLAR 1.55, 1.56; B29)

Treatment of Small Cable-based Transport

The rate of VAT applicable to the carriage of passengers on small cable-based transport will be reduced 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.

(http://www.hmrc.gov.uk/tiin/2012/tiin2212.pdf)

Changes to the Place of Supply Rules for VAT

Currently, intra-EU business-to-consumer supplies of telecommunications, broadcasting and e-services are taxed in the Member State in which the business is established. With effect from 1 January 2015, European legislation requires that these supplies be taxed in the Member State in which the customer is located. To save the need for affected businesses to register for VAT in all Member States in which they have customers, a "mini one stop shop" system will be introduced from 1 January 2015. This will give businesses the option of registering in the UK only, and accounting for VAT due in other Member States using a single return. The requisite legislation will be introduced in Finance Bill 2014.

(OOTLAR 2.37;http://www.hmrc.gov.uk/budget2013/vat-place-supply-rules.pdf)

Review of the Retail Export Scheme (tax free shopping)

The Government will consult on options for redesigning the Retail Export Scheme. This scheme allows refunds of VAT on goods bought in the UK by non-EU visitors who export those goods in their personal luggage. The consultation will be launched in the summer and will focus on changes that make the scheme easier to use and understand, reduce the scope for error, improve compliance, protect revenue and represent good value for money for the taxpayer. Responses to the consultation will enable HMRC to explore the impact of a range of options, including the potential for introducing a digital scheme.

(OOTLAR 2.35)

Changes to Zero-rating of Exports from the UK

The Government will consult on secondary legislation on VAT zero-rating of certain supplies of goods for export outside the EU. These changes will treat sales to businesses who are VAT registered in the UK but have no business establishment here as zero-rated where they arrange for the export of the goods to a non-EU destination.

(OOTLAR 2.36)

Refunds Made by Manufacturers

Legislation will be introduced in Finance Act 2014 to enable regulations to be made to allow manufacturers to reduce their VAT payments to take account of refunds they make directly to final customer. The Government will consult further to support the design of the legislation.

(OOTLAR 2.38)

Customs Duty

Penalties

The Government will consult on modernising customs civil penalties to create a fairer, consistent, more transparent and effective system, while securing our borders and protecting revenue. The changes will bring the customs civil penalty regime in line with other HMRC penalties. Legislation will be in Finance Bill 2014.

(OOTLAR 2.48)

Alcohol Duty

Duty on beer, wine and spirits

The duty rates for spirits, wine and made-wine, cider and perry will increase by 2% above the rate of inflation with effect from 25 March 2013. With effect from the same date, the rates of duty on beer will be reduced by 6% (in the case of low strength beer), 2% (in the case of beer between 2.8% and 7.5% alcohol by volume), and 0.75% (in the case of high strength beer).

(http://www.hmrc.gov.uk/budget2013/tiin-4005.pdf; OOTLAR 1.47; A97; B15)

Tobacco Duty

Change in Rate

The duty rates for all tobacco products increased by 2% above the rate of inflation with effect from 6 p.m. on 20 March 2013. This adds 26 pence to the price of 20 cigarettes, 9 pence to the price of a pack of 5 small cigars, 26 pence to the price of a 25g pouch of hand-rolling tobacco, and 14 pence to the price of a 25g pouch of pipe tobacco.

(OOTLAR 1.46, B15)

Herbal Smoking Products

With effect from 1 January 2014, herbal smoking products will be treated as if they contained tobacco, and will become liable to tobacco products duty. This change is being made in order to bring UK legislation into line with European Directive 2011/64/EC.

(http://www.hmrc.gov.uk/tiin/2012/tiin4755.pdf)

Hydrocarbon Oil Duty

Fuel Duty

The fuel duty increase of 3.02 pence per litre (ppl) that was due to come into effect on 1 January 2013 has been cancelled. The further increase of 1.89 ppl that was due to take effect from 1 April 2013 was initially deferred to 1 September 2013, and has subsequently also been cancelled.

(http://www.hmrc.gov.uk/tiin/2012/tiin1094.pdf; http://www.hmrc.gov.uk/budget2013/tiin-2522.pdf; OOTLAR A99. For the rates of duty applicable until 1 September 2014, see OOTLAR B20.)

Gaming/Gambling

Gaming duty

Legislation will be introduced in Finance Bill 2013 to raise the gross gaming yield (GGY) bandings for gaming duty in line with inflation (based on RPI). The revised GGY bandings used to calculate gaming duty must be used for accounting periods starting on or after 1 April 2013.

(OOTLAR 1.45; B17)

Combined Bingo

Under current legislation, "combined bingo" (bingo which is played simultaneously in more than one place and promoted by more than one person) must be played entirely in the UK in order to qualify for the provisions in the Betting and Gaming Duties Act 1981, s 20A, which are intended to prevent double-counting of receipts. The Finance Bill will remove this requirement for accounting periods beginning on or after the date of Royal Assent. This is intended to encourage UK bingo promoters to expand their customer base by linking with overseas operators to offer "combined" games of bingo.

(http://www.hmrc.gov.uk/tiin/2012/tiin4773.pdf)

Climate Change Levy (CCL)

Rates of CCL

Legislation will be introduced in Finance Bill 2013 to increase the rates of CCL in line with inflation (based on RPI), from 1 April 2014.

(OOTLAR 1.51, B18)

Carbon Price Floor

Further to the measures included in the Finance Act 2011 and Finance Act 2012 relating to the introduction of a carbon price floor on 1 April 2013, a number of additional measures are now to be introduced.

The measures:

- clarify the time at which a deemed supply for the purpose of Carbon Price Support rates of Climate Change Levy (CCL) takes place;
- clarify who is responsible for accounting for CCL on the deemed supply;
- clarify how the Carbon Price Floor will operate in relation to Combined Heat and Power (CHP) stations, non-CHP generators and stand-by generators.

The measures will not apply in Northern Ireland.

(http://www.hmrc.gov.uk/tiin/2012/tiin4013.pdf; OOTLAR 1.52, A103, A104, B18.)

Exemptions for Energy Used in Metallurgical and Mineralogical Processes

The Government will introduce exemptions from the CCL for energy used in metallurgical and mineralogical processes from 1 April 2014. It will seek views from industry after the Budget, with the intention of introducing legislation in Finance Bill 2014.

(OOTLAR 2.34)

Landfill Tax

Rates of tax

Legislation will be introduced in Finance Bill 2013 to increase the standard rate of landfill tax by £8 per tonne to £80 per tonne for disposals of waste made, or treated as made, to landfill on or after 1 April 2014. The lower rate will remain frozen at £2.50 per tonne for 2014–15.

(OOTLAR 1.53, B19)

Value of landfill communities fund (LCF)

A statutory instrument laid on 20 March 2013 will maintain the potential value of the LCF for 2013–14 at £78.1 million of claimable landfill tax credit. This will be achieved by amending the maximum credit that landfill site operators may claim against their annual landfill tax liability for contributions made to environmental bodies enrolled under the LCF from 5.6 per cent to 6.8 per cent from 1 April 2013.

(OOTLAR 1.54)

Air Passenger Duty

Rate of Duty

Legislation will be introduced in Finance Bill 2014 to increase air passenger duty in line with inflation (based on RPI) from 1 April 2013.

With effect from 1 April 2013, APD will be extended to smaller aircraft and business jets (5.7 tonnes threshold, compared to the current 10 tonnes threshold). At the same time, amendments to the Air Passenger Duty Regulations 1994 provide for a scheme under which an operator may account for and pay APD on an annual basis.

(OOTLAR 1.50, 2.30, B19; http://www.hmrc.gov.uk/tiin/tiin708.pdf; http://www.hmrc.gov.uk/budget-updates/11dec12/old2012.pdf (para 1.58))

Vehicle Excise Duty

Vehicle Excise Duty: Tax Disc Display Waiver

At present, where registered vehicle-keepers have applied for a tax disc before the expiry of their existing disc, there is a five-day "period of grace" in which the requirement to display a tax disc is waived. With effect from the date of Royal Assent, this period will be extended to 14 days.

(http://www.hmrc.gov.uk/tiin/2012/tiin2070.pdf)

Vehicle Excise Duty for Heavy Goods Vehicles

Vehicle excise duty rates on heavy goods vehicles, buses, and related categories of vehicle that are linked to the lower HGV rate, will be frozen for 2013/14. Rates for other vehicles will be increased in line with inflation.

Legislation will be introduced in Finance Bill 2014 to reduce and restructure VED for HGVs. These changes will have effect from 1 April 2014.

(http://www.hmrc.gov.uk/budget2013/tiin-2566.pdf; OOTLAR 1.49, 2.31, A108, B21-B27)

VED Disability Exemption

During 2013, the Government is introducing a new benefit called the personal independence payment (PIP). The Finance Bill will provide that people who receive an "enhanced mobility" PIP will be exempt from paying VED, and that people who receive a "standard mobility" PIP will receive a 50% discount on VED. This will take effect from 8 April 2013.

(http://www.hmrc.gov.uk/tiin/2012/tiin2352.pdf)

Reduced pollution certificates (RPCs) – Legislation will be introduced in Finance Bill 2014 to remove RPC VED discounts for vehicles within the HGV road user scheme. The discounts for Euro IV-VI vehicles will be replaced with grants, to be provided by the Department for Transport, until 31 December 2016. These changes will have effect from 1 April 2014. Legislation will be introduced in a future finance bill to remove RPC VED discounts for Euro I-III vehicles outside the HGV road user levy scheme. These changes will have effect from 1 April 2016.

(OOTLAR 2.32)

Classic Vehicles

Legislation will be introduced in Finance Bill 2014 to extend by one year the cut off date from which classic vehicles are exempt from VED. From 1 April 2014, a vehicle manufactured before 1 January 1974 will be exempt from paying VED.

(OOTLAR 2.33)

Government Publications

Tax Information and Impact Note: VAT online registration and removal of threshold for non-UK established businesses

This note, dated 8 March 2013, replaces the version first published in December 2011. It has been updated to reflect actual introduction of the new online VAT registration service from 31 October 2012 and the requirement for non-UK businesses to register regardless of the value of their supplies in the UK from 1 December 2012.

The note may be viewed in full at http://www.hmrc.gov.uk/tiin/vat-online.pdf.

Notice 144 – Trade imports by post: How to complete Customs documents

HMRC have issued a revised (March 2013) edition of Notice 144. It is intended to give general guidance to postal importers of trade consignments for which a declaration (entry) on a Single Administrative Document (SAD) is required. Further information on the completion of SAD forms is contained in the Integrated Tariff of the United Kingdom (the Tariff).

Notice 163 – Wine Production

HMRC have issued a revised (March 2013) edition of Notice 163. It has been updated to inform readers of the new guidance on the classification of alcohol where fermented and distilled alcohols are mixed – see paragraph 25.7.

Section 9 (on alcoholic strength) has also been amended for consistency with what is contained in law.

Notice 550 – Air Passenger Duty

HMRC have issued a revised ((March 2013) edition of Notice 550. It has been updated to cover changes:

- to rates including the APD rate increase with effect from 1 April 2013;
- to the introduction of the new higher rate of APD (also with effect from 1 April 2013) that will apply to passengers on aircraft of 20 tonnes or more and equipped to carry fewer than 19 passengers; r
- resulting from the extension of APD to business jets and smaller aircraft, of 5.7 tonnes and over;
- resulting from the devolution of certain APD rates to the Northern Ireland Assembly;
- to the list of Band B destinations has also been updated to include South Sudan.

HMRC have also revised the sections on "class of travel" and generally re-arranged the notice to make it shorter and more user-friendly.

Notice 551 – Special accounting schemes for Air Passenger Duty (APD)

HMRC have issued a revised (March 2013) edition of Notice 551. This notice has been updated to account for the introduction of business jets andsmaller aircraft of 5.7 tonnes and over.

Notice 735 – VAT reverse charge for mobile phones and computer chips

HMRC have issued a revised (February 2013) edition of Notice 735. It has been rewritten to to include details of the application of the reverse charge procedure to emissions allowances in the UK, to address situations where supplies are disaggregated, and for general readability.

Notice 780 – Common Agricultural Policy import procedures and special directions for goods

HMRC have issued a revised (March 2013) edition of Notice 780. It provides importers with information about importing goods falling under the Common Agricultural Policy (CAP). It contains a brief introduction to the CAP, information on CAP licensing, provides information on the types of CAP and explains some special procedures that apply to certain CAP goods.

Notice 800 – CAP exports

HMRC have issued a revised (March 2013) edition of Notice 800. It provides importers with information about exporting goods falling under the Common Agricultural Policy (CAP) by explaining:

- the types of customs procedures for exporting CAP goods
- CAP licences and how to use them
- export refunds and duties
- victualling ships and aircraft, and victualling warehouses, and
- how to obtain export refund before export.

HMRC to close enquiry centres and provide mobile advisors

HMRC are consulting on plans to close their network of 281 enquiry centres and replace them with mobile advisors providing face-to-face help and other services for taxpayers with particular needs. A pilot for the new services will run in the North East between June and October 2013. If successful, HMRC will implement their plans across the UK between February and May 2014. The consultation will run until 24 May 2013.

(Press release (NAT) 51/13 dated 14.3.13)

Changes to VAT place of supply rules and introduction of the "mini one-stop-shop"

HMRC have published a Q&A on changes to the VAT place of supply rules from 1 January 2015, which will make supplies of telecommunications, broadcasting and e-services taxable in the EU member state in which the consumer is located, rather than where the business is established. Legislation to implement the relevant EU law in the UK will be introduced in the 2014 Finance Bill. The "mini one-stop-shop" will give businesses the option of registering in just one place.

The Q&A may be viewed athttp://www.hmrc.gov.uk/budget2013/vat-place-supply-rules.pdf

HMRC launches extended "Managing Serious Defaulters" scheme

From 1 April 2013, HMRC's "Managing Deliberate Defaulters" programme, first launched in February 2011, becomes "Managing Serious Defaulters". The new scheme will now include those who, since 2009: have become insolvent as a way of dodging their tax obligations; have received a civil evasion penalty for dishonestly evading VAT; or are required to give a security deposit for VAT, environmental taxes, PAYE or NICs.

For further details,see http://www.hmrc.gov.uk/news/tax-defaulters.htm. See also CC/FS14 (http://www.hmrc.gov.uk/compliance/cc-fs14.pdf).

Customs Information Paper (13) 13: Change to HMRC offices dealing with customs clearances of vehicle imports

HMRC have issued CIP (13) 13 dated 28 February 2013. It announces that from

4 March 2013, HMRC are centralising the processing of privately imported vehicles at the National Clearance Hub in Salford.

For full details, seehttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-13.pdf.

Customs Information Paper (13) 14: Inward Processing update – discharge of civil aircraft and parts

HMRC have issued CIP (13) 14 dated 6 March 2013. It provides updated guidance and clarification on the importation of raw materials and parts for civil aircraft and subsequent discharge under Article 544(c) of the Customs Code Implementing Provisions. It replaces Paragraph 13.8 in Public Notice 221.

For full details, seehttp://www.hmrc.gov.uk/jccc/cips/2013/cip13-14.pdf.

Customs Information Paper (13) 15: Review of Outward Processing Relief (OPR) Customs

Procedure Codes

HMRC have issued CIP (13) 15 dated 6 March 2013. It lists those Customs Procedure Codes to be split to exclude repairs and replacements and those to be deleted with effect from 1 April 2013, following a review.

For full details, seehttp://www.hmrc.gov.uk/jccc/cips/2013/cip13-15.pdf.

Customs Information Paper (13) 16: Review of ERTS and temporary storage policy – update 1

HMRC have issued CIP (13) 16 dated 6 March 2013. It sets out some key recommendations of the ERTS (Enhanced Remote Transit Sheds) and Temporary Storage policy review ahead of publication of the formal review report, expected on 31 March 2013.

For full details, see http://www.hmrc.gov.uk/jccc/cips/2013/cip-13–16.pdf.

Customs Information Paper (13) 17 – Tariff Preference: Implementation of a free trade agreement between the EU and Peru

HMRC have issued CIP (13) 17 dated 22 March 2013. It concerns a preferential free-trade agreement between the EU and Peru, which took effect on 1 March 2013.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2013/cip17-13.pdf

Customs Information Paper (13) 18: Tariff classification of flat panel display monitors – updating CIP (12) 49

HMRC have issued CIP (13) 18 dated 22 March 2013. It advises of a delay in the draft EC proposal concerning duty suspension for flat panel displays.

The proposal will be subject to a Council Regulation, and it was anticipated that the Regulation would be published around April 2013. The Commission has advised that the proposal has not been sent to the Council (as of late March 2013) as the Commission has not finalised their internal consultations.

Consequently, the proposed amendments will not be published in April 2013. Until the proposal is submitted to the Council, it is not currently possible to give a revised publication date.

Customs Information Paper (13) 19: EU-US AEO Mutual Recognition & HMRC IT Systems – change to previous CIP

HMRC have issued CIP (13) 19 dated 25 March 2013. It explains the current implementation status of the EU-US AEO mutual recognition agreement and the impact on HMRC's IT systems. It replaces CIP (13) 05 issued in January 2013, making changes to section 3 for the sake of clarity.

Excise Info Sheet 2/2013: UK movements of LPG in excise duty suspension

This information sheet, dated 28 February 2013, explains the importance for warehousekeepers of completing the accompanying document for intra-UK duty-suspended movements of liquid petroleum gas (LPG). Without this document (previously known as Form W8), removal from the warehouse will create an excise duty point.

The information sheet may be viewed in full athttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_032612

Excise Info Sheet 3/2013: Export declaration – special treatment for Single Transport Contract

This information sheet, dated 11 March 2013, explains how HMRC will issue a report of export, ending an excise duty-suspended movement and discharging the movement guarantee, at the time an exporter claims Single Transport Contract simplification on the export declaration. This means it is possible for an excise duty-suspended movement to be discharged before goods have physically left the territory of the EU. HMRC stresses the responsibility of dispatching warehousekeepers in ensuring movements are covered by an electronic Administrative Document and a valid movement guarantee before the goods leave their premises.

The sheet may be viewed in full athttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_ShowContent&propertyType=document&id=HMCE_PROD1_032642

Air Passenger Duty – 1 April 2013 changes

HMRC have issued a briefing note dated 4 March 2013 (http://www.hmrc.gov.uk/air-passenger-duty/april-2013-changes.pdf) which contains a brief summary of the changes that may affect aircraft operators following the extension of Air Passenger Duty to private jets and smaller aircraft from 1 April 2013. HMRC published a more detailed briefing note (http://www.hmrc.gov.uk/air-passenger-duty/briefing-note-feb2013.pdf) on the changes in February.

Draft guide to the Carbon Price Floor (Notice CCL1/6)

HMRC have published in draft a new public notice on the introduction of the carbon price floor on 1 April 2013. This will require owners of electricity generating stations and operators of combined heat and power stations to account for new carbon price support rates of climate change levy on fossil fuels (gas, LPG and solid fuels) used in electricity generation. Comments on the draft guidance are invited by 12 April 2013.

The draft notice may be viewed at http://www.hmrc.gov.uk/climate-change-levy/cpf.pdf.

Calculating carbon price support rates of CCL and fuel duty – combined heat and power stations

This HMRC factsheet, dated 12 March 2013, provides guidance for operators of combined heat and power (CHP) stations on how to calculate carbon price support rates of climate change levy (CCL) and fuel duty from 1 April 2013. CHPs are liable to account for CCL and fuel duty on the proportion of fuels used to generate electricity, but are exempt or relieved in respect of non-electrical outputs. This proportion is determined using the "boiler displacement" method as an efficiency measure.

The factsheet may be viewed in full athttp://www.hmrc.gov.uk/factsheets/chp-factsheet.pdf.

Court of Justice of the European Union

Åklagaren v H Åkerberg Fransson

In *Åklagaren v H Åkerberg Fransson* (*Case C-617/10, ECJ*); *26 February 2013 unreported* a Swedish case, an employer (F) was ordered to pay penalties and surcharges for submitting incorrect VAT returns. Subsequently the Swedish Public Prosecutor's Office began criminal proceedings against him, charging him with providing false information. He defended the proceedings, contending that he was being charged twice with the same offence, and that this was a breach of Article 50 of the EU Charter of Fundamental Rights. The case was referred to the ECJ, which rejected this contention, holding that "the *ne bis in idem* principle laid down in Article 50 of the EU Charter of Fundamental Rights of the European Union ("No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law") does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine".

GfBk Gesellschaft für Börsenkommunikation mbH v Finanzamt Bayreuth

In *GfBk Gesellschaft für Börsenkommunikation mbH v Finanzamt Bayreuth* (*Case C-275/11*); *7 March 2013 unreported* a German case, the ECJ held that Article 13B(d)(6) of the EC Sixth Directive "must be interpreted as meaning that advisory services concerning investment in transferable securities, provided by a third party to an investment management company which is the manager of a special investment fund, fall within the concept of "management of special investment funds" for the purposes of the exemption laid down in that provision".

European Commission v Republic of Ireland

In *European Commission v Republic of Ireland* (*Case C-108/11*); *14 March 2013 unreported* the Republic of Ireland applied a reduced rate of VAT to the supply of greyhounds and horses, which were "not normally intended for the preparation or production of foodstuffs for human or animal consumption", and to the hire of horses and certain insemination services. The European Commission applied to the ECJ for a ruling that this contravened *Articles 96* and *98* of *Directive 2006/112/EC*. The ECJ granted the declaration.

GfBk Gesellschaft fur Borsenkommunikation mbH v Finanzamt Bayreuth

In *GfBk Gesellschaft fur Borsenkommunikation mbH v Finanzamt Bayreuth* (*Case C-275/11*)*; [2013] All ER* (*D*) *118* (*Mar*) GfBk was an undertaking whose objects were the dissemination of information and recommendations relating to the stock market, the provision of advice relating to investment in financial instruments and the marketing of financial investments. In December 1999, GfBk had concluded a contract with an investment management company (IMC) which managed a retail investment fund in the form of a special investment fund under the German law on Investment Management Companies (the KAAG). GfBk thereby undertook to advise the IMC "in the management of the fund" and, "constantly to monitor the fund and to make recommendations for the purchase or sale of assets". GfBk further undertook to "pay heed to the principle of risk diversification, to statutory investment restrictions … and to investment conditions …". The parties had agreed that GfBk would be paid for its advice on the basis of a percentage calculated by reference to the average monthly value of the investment fund. Pursuant to that contract, from 1999 to 2002 GfBk had provided the IMC at issue in the main proceedings, by telephone, fax or email, with recommendations concerning the purchase and sale of securities. The IMC had entered those recommendations into its purchase and sale order system and, after checking that they had not infringed any statutory investment restriction applicable to special investment funds, implemented them, often within a few minutes of receiving them. Although the IMC had made no selection of its own in the management of the investment fund, the final decision and final responsibility had continued thereby to lie with it. GfBk had been informed of the action taken following its recommendations and received daily statements of the composition of the investment fund for which it had provided advice. In the context of the fiscal procedure relating to turnover tax, GfBk had requested that its advisory services to the IMC at issue in the main proceedings be exempted from VAT as outsourced services for the management of a special investment fund. The Tax office had refused that request, taking the view that the services supplied by GfBk had not been covered by the "management of special investment funds" within the meaning of art 13B(d)(6) of Council Directive (EEC) 77/388 (the Sixth Directive) and could not therefore warrant such exemption. GfBk brought legal proceedings to challenge the decisions taken against it. In the appeal on a point of law which it brought before the Federal Finance Court (the referring court), the latter decided to stay proceedings and refer a question to the Court of Justice of the European Union (the Court) for a preliminary ruling.

By its question, the referring court asked, in essence, whether and under what conditions advisory services provided by a third party to an IMC concerning investment in transferable securities fell within the concept of "management of special investment funds" for the purposes of the exemption laid down in art 13B(d)(6) of the Sixth Directive. Consideration was given to Council Directive (EEC) (on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities) (the UCITS Directive).

The Court ruled:

It was settled law that in order to determine whether advisory services provided by a third party to an IMC concerning investment in transferable securities fell within the concept of "management of special investment funds" for the purposes of the exemption laid down in art 13B(d)(6) of the Sixth Directive, it was necessary to examine whether the advisory service provided by a third party concerning investment in transferable securities was intrinsically connected to the activity characteristic of an IMC, so that it had the effect of performing the specific and essential functions of management of a special investment fund. Services consisting in giving recommendations to an IMC to purchase and sell assets were intrinsically connected to the activity characteristic of the IMC, which consisted in the collective investment in transferable securities of capital raised from the public. The fact that advisory and information services were not listed in Annex II to Directive 85/611, did not preclude their inclusion in the category of specific services falling within activities for "management" of a special investment fund within the meaning of art 13B(d)(6) of the Sixth Directive, since art 5(2) of the UCITS Directive stated itself that the list in the annex was "not exhaustive". The fact that advisory and information services provided by a third party did not alter the fund's legal and financial position likewise did not preclude them from falling within the concept of "management" of a special investment fund, within the meaning of art 13B(d)(6) of the Sixth Directive.

Article 13B(d)(6) of the Sixth Directive should be interpreted as meaning that advisory services concerning investment in transferable securities, provided by a third party to an IMC which was the manager of a special investment fund, fell within the concept of "management of special investment funds" for the purposes of the exemption laid down in that provision, even if the third party had not acted on the basis of a mandate within the meaning of art 5g of the UCITS Directive.

Wheels Common Investment Fund Trustees Ltd and other companies v HMRC

In *Wheels Common Investment Fund Trustees Ltd and other companies v HMRC* (*Case C-424/11; [2013] All ER* (*D*) *117* (*Mar*) Wheels Common Investment Fund Trustees Ltd (Wheels) was the trustee of a fund pooling for investment purposes the assets of occupational pension schemes established by the Ford Motor Company in order to meet its obligations under national legislation and collective agreements. Each of those schemes provided pensions to a category of former employees, calculated by reference to the final salary of the members of the scheme and their length of service with the company. During their employment, the members of the scheme, which was open to all employees but was not compulsory, paid contributions of a fixed amount deducted from their salary. The employer also made contributions, in an amount sufficient to ensure funding for the remaining cost of providing pension benefits. At the material time, Capital International Ltd (CIL) provided fund management services to Wheels. In accordance with the provisions of United Kingdom VAT legislation, it charged Wheels VAT on those services. In September 2007, after delivery of the judgment in *JP Morgan Fleming Claverhouse Investment Trust plc v Comrs of HM Revenue and Customs [2008] STC 1180* , the scope of items 9 and 10 of Group 5 of Sch 9 to the Value Added Tax Act 1994 was extended, with effect from 1 October 2008, to give effect to that judgment. From that date, those items exempted the management of collective investment undertakings in the form of an open-ended investment company (OEIC) or an authorised unit trust (AUT) and the management of closed-ended collective investment undertakings such as investment trust companies. CIL claimed repayment from HMRC of the VAT in respect of the fund management services which it had supplied, on the ground that those services came within the exemption laid down in art 135(1)(g) of Council Directive (EC) 2006/112 (on the common system of value added tax) (Directive 2006/112) or art 13B(d)(6) of art 13B(d)(6) of Sixth Council Directive (EEC) 77/388 (on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment) (the Sixth Directive), depending on the period concerned. By decision of 2 January 2008, HMRC rejected that claim. Wheels thereupon appealed to the First-tier Tribunal (Tax Chamber) (the referring tribunal) against that decision. Whilst, according to the referring tribunal, the services supplied to Wheels were services relating to "management" within the meaning of the exemption laid down in art 13B(d)(6) of the Sixth Directive and art 135(1)(g) of Directive 2006/112, there was doubt as to whether the fund held by Wheels was to be classified as a "special investment fund" within the meaning of that exemption. In those circumstances, the referring tribunal decided to stay proceedings and to refer certain questions to the Court of Justice of the European Union (the Court) for a preliminary ruling.

By its questions, the referring tribunal asked, in essence, whether and under what conditions assets of a retirement pension scheme, and the investment fund in which they were pooled, were a "special investment fund" within the meaning of art 13B(d)(6) of the Sixth Directive and art 135(1)(g) of Directive 2006/112. Consideration was given to Council Directive (EEC) 85/611 (on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities), as amended by Directive (EC) 2001/108 of the European Parliament and of the Council of 21 January 2002 (the UCITS Directive).

The Court ruled:

It was settled law that funds which constituted undertakings for collective investment in transferable securities within the meaning of the UCITS Directive were special investment funds. As was clear from art 1(2) of that directive, undertakings for collective investment in transferable securities were undertakings which, such as AUTs and OEICs, had as their sole object, in accordance with the objective pursued by the exemption provided for in art 13B(d)(6) of the Sixth Directive and art 135(1)(g) of Directive 2006/112, the collective investment in transferable securities of capital raised from the public. Further, funds which, without being collective investment undertakings within the meaning of the UCITS Directive, displayed characteristics identical to theirs and thus carried out the same transactions or, at least, displayed features that were sufficiently comparable for them to be in competition with such undertakings should also be regarded as special investment funds. However, an investment fund in which the assets of a retirement pension scheme were pooled could not be regarded as a collective investment undertaking within the meaning of the UCITS Directive. Such a fund was in fact not open to the public but constituted an employment-related benefit which employers granted only to their employees. Such a fund was therefore not identical to funds that constituted "special investment funds" within the meaning of art 13B(d)(6) of the Sixth Directive and art 135(1)(g) of Directive 2006/112. Nor was such an investment fund sufficiently comparable with collective investment undertakings as defined by the UCITS Directive to be in competition with them. A number of characteristics differentiated them, so that they could not be regarded as meeting the same needs.

Article 13B(d)(6) of the Sixth Directive and art 135(1)(g) of Directive 2006/112 should be interpreted as meaning that an investment fund pooling the assets of a retirement pension scheme was not a "special investment fund" within the meaning of those provisions, management of which might be exempted from VAT in the light of the objective of those directives and the principle of fiscal neutrality, where the members of the scheme did not bear the risk arising from the management of the fund and the contributions which the employer paid into the scheme were a means by which he complied with his legal obligations towards his employees.

Valsts ieņēmumu dienests v Ablessio SIA

In *Valsts ieņēmumu dienests v Ablessio SIA, ECJ Case C-527/11; 14 March 2013 unreported* a Latvian company applied to be registered for VAT. The tax authority rejected the application on the basis that the company "did not have the material, technical and financial capacity to carry out the declared economic activity, namely providing construction services". The company appealed, and the case was referred to the ECJ, which held that *Articles 213* and *214* of *Directive 2006/112/EC* "must be interpreted as meaning that the tax authority of a Member State may not refuse to assign a value added tax identification number to a company solely on the ground that, in the opinion of that authority, the company does not have at its disposal the material, technical and financial resources to carry out the economic activity declared, and that the owner of the shares in that company has already obtained, on various occasions, such an identification number for companies which never carried out any real economic activity, and the shares of which were transferred immediately after obtaining the individual number, where the tax authority concerned has not established, on the basis of objective factors, that there is sound evidence leading to the suspicion that the value added tax identification number assigned will be used fraudulently". It was for the national court "to assess whether that tax authority provided serious evidence of the existence of a risk of tax evasion".

Skatteverket v PFC Clinic AB

In *Skatteverket v PFC Clinic AB* (*Case C-91/12*)*; 21 March 2013 unreported* a Swedish case, a company (P) operated a clinic which provided plastic surgery and cosmetic treatments such as breast augmentation and reduction. It reclaimed input tax relating to these supplies. The tax authority rejected the claim on the basis that P was making exempt supplies of medical care. P appealed, and the case was referred to the ECJ for a ruling on the interpretation of Article 132 of Directive 2006/112/EC.

The ECJ held that P's services could fall within the concept of medical care "where those services are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health". However, where the surgery was "for purely cosmetic reasons", it did not qualify for exemption. The ECJ also held that "the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it" was not "decisive in order to determine whether that intervention has a therapeutic purpose".

Supreme Court

HMRC v Aimia Coalition Loyalty UK Ltd (aka Loyalty Management UK Ltd)

In *HMRC v Aimia Coalition Loyalty UK Ltd* (*aka Loyalty Management UK Ltd*)*, SC [2013] UKSC 15* following the ECJ decision in *HMRC v Loyalty Management Ltd, ECJ Case C-53/09; [2010] STC 2651*, the Supreme Court upheld the CA decision in favour of the company (by a 3–2 majority, Lord Carnwath and Lord Wilson dissenting). Lord Reed held that "VAT should be chargeable on (L's) taxable supplies only after deduction of the VAT borne by (L's) necessary costs". This included "the cost of securing that goods and services are provided to collectors in exchange for their points: that is to say, the payments made by (L) to the redeemers". Therefore L "should be authorised to deduct from the VAT for which it is accountable the VAT charged by the redeemers, so that it accounts for VAT only on the added value for which it is responsible. Only in that way will VAT be completely neutral as regards (L)".

Court of Appeal

Vehicle Control Services Ltd v HMRC

In *Vehicle Control Services Ltd v HMRC, CA [2013] EWCA Civ 186* a company (V) operated a "parking control" service for landowners. It did not account for VAT on all of the amounts which it received from motorists.HMRC issued an assessment, and V appealed, contending that the disputedamounts were penalties for contraventions which should be treated as damages for trespass and as outside the scope of VAT. The CA unanimously accepted this contention and allowed the appeal. Lewison LJ observed that the contract between V and the landowner gave V the right to eject trespassers, and the contract between V and the motorist gave it the same right. He held that where V imposed an additional parking charge instead of towing away a vehicle, that charge represented damages for trespass which was outside the scope of VAT.

High Court

Investment Trust Companies (in liquidation) v R & C Comrs

In *Investment Trust Companies* (*in liquidation*) *v Revenue and Customs Commissioners [2013] All ER* (*D*) *272* (*Mar*)*, [2013]* *EWHC 665* (*Ch*) the instant proceedings arose following the giving of judgment in the main proceedings on the 2 March 2012 (see *[2012] All ER* (*D*) *84* (*Mar*)). That case concerned the overpayment of VAT paid by the claimant companies to HMRC. An issue arose as to whether the claimants should be confined to a cause of action in the law of restitution to recover tax that had been unlawfully exacted, as established in *Woolwich Equitable Building Society v IRC [1993] AC 70* (*Woolwich*). In the judgment, the court decided to adjourn determination of the final issue until the Supreme Court had given its judgment in *FII Group Litigation v HMRC [2012] UKSC 19*. Following that judgment, the Grand Chamber of the European Court of Justice gave judgment on a preliminary issue in *Littlewood Retail Ltd v HMRC Case C-591/10*. In the light of those judgments, the parties made further submissions to the court.

The claimants submitted, inter alia, that it was clear, as a matter of principle and logic, that a *Woolwich* claim was available only to a taxpayer properly so-called, and that in the instant context it was irrelevant that the claimants were persons who had borne the economic burden of the tax. They further submitted that, alternatively, it was at best highly questionable whether the *Woolwich* principle ought to be extended in favour of persons who had borne the economic burden of a tax, and that it would be wrong to confine the claimants to such an uncertain remedy.

The court ruled:

If the instant claim was to be characterised as a *Woolwich* claim, it would follow that any end user of goods or services who had borne the burden of unlawfully levied VAT would, as a first rather than a last resort, be able to maintain a direct action against HMRC to recover it. That would be inappropriate, and would tend to undermine the constitutional significance of the Woolwich principle. Therefore, as a matter of English law, the scope of the *Woolwich* remedy would be confined to those who had themselves paid the sums which it was sought to recover to a public authority in response to an apparent statutory requirement to do so).

It followed that the issue had to be decided in the claimants' favour.

Tribunals

Upper Tribunal

Reed Employment Ltd v HMRC (No 3)

In *Reed Employment Ltd v HMRC* (*No 3*), *UT [2013] UKUT 109* (*TCC*) a company (R) which operated an employment agency had accounted for VAT on the whole of its receipts from its clients. In 1997 it submitted a substantial repayment claim, covering the period since 1991, on the grounds that it should only have accounted for VAT on its commission. In 2003, following the ECJ decision in *Marks & Spencer plc v C & E Commrs* (*No 4*), Customs made a repayment. R made a further claim, dating back to 1973, seeking to recover output tax relating to supplies to clients which were wholly or partly exempt or were not registered for VAT. Customs rejected this claim and R appealed. In 2009, following the ECJ decision in *Marks & Spencer plc v C & E Commrs* (*No 5*), and while its appeal was pending, R made two additional repayment claims in respect of supplies to clients who were taxable (and thus were able to recover output tax in full). HMRC rejected these claims on the grounds that they would lead to unjust enrichment. The First-tier Tribunal held a preliminary hearing in 2011 and allowed R's appeal in principle with regard to the 2003 claim, accepting R's contention that it should only have accounted for VAT on its commission. Judge Berner held that "the proper analysis of the nature of (R's) supply to its clients does not depend on whether (R) was acting in a particular case as principal or as agent". However, with regard to the claims which R had made in 2009, Judge Berner upheld HMRC's contention that these had been new claims rather than amendments to the claim made in 2003, with the result that HMRC was entitled to rely on the defence of unjust enrichment. The Upper Tribunal dismissed R's appeal against this decision. Roth J observed that the 2009 claim covered "supplies to a different category of client (ie those not wholly or partially exempt from VAT) who had been consciously excluded from the 2003 claim".

Brunel Motor Co Ltd v HMRC

In *Brunel Motor Co Ltd v HMRC, UT [2013] UKUT 6* (*TCC*) a company (Q), which was a member of a VAT group, sold cars which were manufactured by an unrelated company (F). In 2002 Q went into receivership. It held a number of cars for which it had not paid F. In accordance with provisions in the relevant "supply agreement", F reclaimed the cars and issued credit notes. Q's receivers subsequently submitted a claim for repayment of input tax in respect of these cars. Customs rejected the claim and the representative member of Q's VAT group appealed, contending that the credit notes should not have been treated as effective for VAT purposes, and that F should have claimed bad debt relief instead.

The VAT Tribunal rejected this contention and dismissed the appeal, but the CA remitted the case to the First-Tier Tribunal, which reviewed the evidence andallowed the appeal, holding (by the casting vote of Judge Nowlan) that there had been no agreement between Q and F for the rescission of the original supplies of cars. HMRC appealed to the Upper Tribunal, which upheld Judge Nowlan's decision as one of fact.

British Association of Leisure Parks, Piers & Attractions Ltd v HMRC

In *British Association of Leisure Parks, Piers & Attractions Ltd v HMRC, UT [2013] UKUT 130* (*TCC*) an association was formed in 1938 to represent proprietors of amusement parks and similar attractions. It registered for VAT from 1982. In 2008 it claimed a repayment of VAT on its members' subscriptions, contending that they should be treated as exempt from VAT under VATA 1994, Sch 9, Group 9. HMRC rejected the claim and the First-tier Tribunal dismissed the association's appeal, finding that it was primarily a "trade association" and holding that its subscriptions failed to qualify for exemption. The Upper Tribunal upheld this decision as one of fact.

First-tier Tribunal

Sandwell Metropolitan Borough Council v HMRC

In *Sandwell Metropolitan Borough Council v HMRC* (*2013*) *TC02554* a borough council operated a crematorium. It allowed mourners to place memorials, including urns, for a 10-year period (which was renewable on payment of a further fee). HMRC issued a ruling that it was required to account for VAT on these supplies. The council appealed, contending that it was granting a licence to occupy land which was exempt from VAT. The First-tier Tribunal accepted this contention, holding that most of the memorials comprised a "letting of immovable property". (However, plastic plaques which were attached to a stake in a rose garden did not qualify for exemption.)

Brockenhurst College v HMRC (2013) TC02569

In *Brockenhurst College v HMRC* (*2013*) *TC02569* a college of further education operated a restaurant, which was staffed by students. Initially it accounted for output tax on supplies at the restaurant, but it subsequently submitted a repayment claim on the basis that it should have treated the supplies as exempt. HMRC rejected the claim on the basis that the supplies were standard-rated supplies of catering and the college appealed, contending that they should be treated as exempt supplies of vocational training. The First-tier Tribunal accepted this contention and allowed the college's appeal, finding that "the operation of the college restaurant is an integral part of the provision of educational and vocational training. It is required as part of the examination body requirement and as part of the course and curriculum".

Coopers Fire Ltd v HMRC

In *Coopers Fire Ltd v HMRC* (*2013*) *TC02570* a company (C) manufactured retractable fire curtains. HMRC issued a ruling that supplies of these curtains were standard-rated. C appealed, contending that they should be treated as building materials, within VATA 1994, s 35. The First-tier Tribunal accepted this contention and allowed the appeal. Judge Sadler held that "fire curtains are an established and fully accepted method of providing fire safety and fire protection in dwellings in which such features are required to be incorporated or where it may be prudent to incorporate them".

Longridge On The Thames v HMRC

In *Longridge On The Thames v HMRC* (*2013*) *TC02574* a charity was formed "for the advancement of education in water, outdoor and indoor activities for young people generally". It arranged for the construction of a training centre on a site which it owned on the River Thames. HMRC issued a ruling that the construction of the centre was standard-rated, and the charity appealed, contending that it qualified for zero-rating. The First-tier Tribunal accepted this contention and allowed the appeal. Judge Sadler held that the charity was not carrying on a business, and that the building was used solely for a relevant charitable purpose.

David Rudling and Alan Dolton
LexisNexis

EDITORIAL

When is an elephant not an elephant?

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The decision of the European Court of Justice in *Valsts ieņēmumu dienests v Ablessio SIA Case C-527/11*, released on 13 March 2013, is another of the seemingly increasing number of cases which proceed to judgement without a written opinion of the Advocate General. Although dangerous to generalise, the written decisions in such cases do tend to suffer somewhat. The case, in a nutshell, concerned whether or not the Valsts ieņēmumu dienests ("VID"), the Latvian VAT authority, was entitled to refuse to register Ablessio SIA ("Ablessio") for VAT purposes, ostensibly on the grounds that Ablessio "did not have the material, technical and financial capacity to carry out the declared economic activity, namely providing construction services". At this point I should make clear that there were no findings recorded in the decision that Ablessio was in any way involved in any fraudulent activity and what follows should not be construed as suggesting that it was.

What struck me when first reading the case was that the VID's action, in refusing to register Ablessio, on the face of it appeared to be a reasonable and rational decision in the circumstances described. Equally, however, it did appear as though the VID's life could have been made easier if they had ensured that the VAT legislation was better drafted in the first place as the subsequent challenge from Ablessio was founded around whether or not the VID was entitled to take the action it did under Latvian VAT law. As always, when governments legislate to protect the revenue there must be balance so as to ensure taxpayers' rights are also safeguarded. Similarly, the courts must balance taxpayer rights and the rights of tax administrations, something which is not always easy to achieve.

Turning to the facts in this case, the VID had refused to register Ablessio following findings that it had no fixed assets and had concluded no agreement to lease such fixed assets; an occupational lease had been entered into to rent an office but with a non-residential area of only 4m² – larger than a broom cupboard but hardly spacious. Finally, although it was said to be supplying (or intending to supply) construction services, the company was not registered in the Register of Construction Companies, had not carried out any actual commercial activities since it was established, and the only employee was the chairman of the board of directors who, apparently, was unremunerated.

Under Article 3(1–1) of the Latvian VAT law it states that "The VID is entitled to refuse to enter a person in the register of taxable persons subject to VAT where:

(1) …
(2) after a request from the VID, that person does not submit information or submits false information regarding his material, technical and financial capacity to carry out the declared economic activity."

Ablessio appealed the VID's decision to the District Administrative Court. The Court held that as Ablessio had provided the VID with the required information and the accuracy of that information had not been contested the legal conditions enabling the VID to refuse to register an economic operator had not been fulfilled. The VID appealed the decision to the Regional Administrative Court, which upheld the decision of the lower court. In so doing, it said that the VAT law "did not authorise the VID to assess whether a person who wishes to be entered in the register of taxable persons subject to VAT is capable of carrying out an economic activity." Furthermore the Court thought it irrelevant that "that person" (the shareholder) had previously VAT registered several undertakings which were immediately transferred to other persons "who did not possess sufficient revenue to provide the share capital, since the Law on VAT does not provide that such circumstances constitute a ground for refusing to register a person in the register."

The decisions of the Latvian Courts suggest that under Latvian law the VID can call for evidence on the ability of a person to carry out an economic activity and, if it is not provided, or the information provided is false, the application to register can be refused. However, if accurate information is provided and that information leads the VID to the conclusion that there is no possibility that an applicant could conduct a business, the VID is nonetheless obliged to register that person. The logic is reminiscent of something from Alice in Wonderland. Needless to say, the VID appealed and the referring court asked two questions, namely:

"1 Is Directive 2006/112 … to be interpreted as prohibiting refusal of the individual registration number that identifies a taxable person, on the basis that the holder of the taxable person's shares previously obtained on various occasions an individual number for other undertakings which did not carry out any real economic activity, and the shares of which were transferred by the holder to other persons immediately after obtaining the individual number?

2 Is Article 214, in conjunction with Article 273, of Directive [2006/112] to be interpreted as permitting the tax authority, before assigning the individual number, to verify the capacity of the taxable person to carry out the activity that is subject to tax, where this verification is intended to ensure correct collection of the tax and prevent tax evasion?"

The above appear to be two very distinct and very different questions to which the referring Court appeared to be seeking simple "yes" or "no" responses in each case, presumably as it could foresee cases arising where either one or the other of the features was present, but not both. In its wisdom the ECJ re-wrote the questions into one, and essentially asked itself whether for the purposes of preventing evasion a tax administration could refuse a VAT registration where both features were present.

The Court proceeded to examine the "essential aim" of identifying taxable persons, concluding that it was "to ensure that the VAT system operates properly" (*Case C-438/09 Dankowski*). Furthermore it held that "the allocation of a VAT identification number provides proof of the tax status of the taxable person for the purposes of applying VAT and simplifies the inspection of taxable persons with a view to ensuring the correct collection of the tax …"

The ECJ confirmed that a Member State has certain discretion and can refuse to assign an individual number to a taxable person where it has legitimate grounds for so doing. However, that discretion was said to be fettered and, in the view of the ECJ, as those at an early stage of their economic activity may be unable to prove that they already have the material, technical and financial resources to carry out an economic activity at the time they apply to register a Member State is precluded from refusing to assign a VAT identification number in those circumstances. At the same time, the ECJ acknowledged that Member States have a legitimate interest in preventing tax evasion. Member States must ensure that entries in the register of taxable persons are accurate, to ensure that the VAT system operates properly, and the Court accepted that they must therefore check an applicant's status as a taxable person before assigning that person a VAT identification number (*Case C-273/11 Mecsek-Gabona*, paragraph 63).

What followed in the decision is particularly interesting. The Court considered that measures to police the potential misuse of identification numbers had to be proportionate and necessary for the correct collection of the tax and the prevention of evasion, and must not systematically undermine the right to deduct VAT (*Case C-146/05 Collée* paragraph 26). The ECJ then proceeded to explain that under settled case law the use of identification numbers is only a formal requirement for the purposes of control and cannot undermine the right to deduct where the substantive conditions giving effect to such rights are met (*Case C-263/11 Rēdlihs*, paragraph 48; and *Mecsek-Gabona*, paragraph 60). As a consequence, it was said that the refusal to assign a VAT identification number cannot, in principle, have any effect on the taxable person's right to deduct input VAT. Having reached this conclusion, i.e. that in order to prevent evasion a Member State can withhold a VAT identification number so as to protect the revenue so long as it did not remove from that taxable person the right to deduct VAT, one might be forgiven for thinking that the Court would then proceed to conclude that, in the circumstances of the case, VID was indeed entitled not to issue a VAT number to Ablessio. Not so.

The Court considered that "in order to be considered proportionate to the objective of preventing evasion, a refusal to identify a taxable person by an individual number must be based on sound evidence giving objective grounds for considering that it is probable that the VAT identification number assigned to that taxable person will be used fraudulently. Such a decision must be based on an overall assessment of all the circumstances of the case and of the evidence gathered when checking the information provided by the undertaking concerned." It then proceeded to explain (lest there be any doubt) that it was the jurisdiction of the national court and not the ECJ to find and assess those facts, the role of the ECJ being confined to providing the criteria for interpretation of EU law.

Addressing the circumstances of Ablessio, the Court considered that "the fact that a taxable person is not in possession of the material, technical and financial resources to carry out the declared economic activity is not, in itself, sufficient to demonstrate that it is probable that the latter intends to commit tax evasion. However, it cannot be excluded that circumstances of this nature, *corroborated by the presence of other objective elements leading to the suspicion of the taxable person's fraudulent intentions*, may constitute factors that have to be taken into account as part of the overall assessment of the risk of evasion."

The Court then proceeded to explain that the VAT Directive does not limit the number of applications for individual VAT identification numbers that may be made by the same person acting on behalf of different legal entities. In itself this is unsurprising and, indeed, to have concluded otherwise would have been wrong. However, the statement that the VAT Directive does not "permit the inference that the transfer of control of these legal entities after they have been identified for VAT purposes constitutes an illegal activity" is more surprising. Of course the VAT Directive does not state that such inferences can be made but then again the Directive says nothing (at all) about the transfer of control of legal entities, let alone what may or may not be inferred following a transfer of control. The comment seems unnecessary. What is relevant is the statement that such circumstances (multiple applications for registration followed by the transfer of legal ownership) can nonetheless be taken into account as part of an overall assessment of the risk of evasion.

Having concluded that the referring court needs to determine whether the tax authority has established "to the requisite legal standard the existence of sound evidence" that registering Ablessio "might result in the misuse of the identification number or other VAT fraud" the ECJ then ruled that "… the answer to the questions referred is that … the tax authority of a Member State may not refuse to assign a VAT identification number to a company solely on the ground that … the company does not have at its disposal the material, technical and financial resources to carry out the economic activity declared, and that the owner of the shares in that company has already obtained, on various occasions, such an identification number for companies which never carried out any real economic activity, and the shares of which were transferred shortly after obtaining the individual number, where the tax authority concerned has not established, on the basis of objective factors, that there is sound evidence leading to the suspicion that the VAT identification number assigned will be used fraudulently."

By analogy, what the Court appears to be saying is that an animal may look like an elephant, it may walk like an elephant and it may even smell like an elephant but that does not mean it is an elephant. That conclusion needs to be reached on the basis of objective factors. In other words, one should first take a blood sample and check its DNA and then, and only then, reach the conclusion that it is indeed an elephant. To answer the question in the title: when you don't have its DNA.

As noted at the outset, in the context of this case the wording of the Latvian Law could have been better; however, the Latvian Courts and the ECJ itself (once again) appear to be setting the bar higher for the tax administration than appears to be justified. At the risk of repeating the opening comments, although there need to be safeguards to protect the innocent there must be a balance between taxpayer rights and the duty of tax authorities to protect the revenue. As Advocate General Jacobs said:

> "None of the parties should be subjected to a *probatio diabolica*; that is to say, compelled to prove something which cannot be proved or can only be proved with the utmost difficulty …" (*Case C-429/93 Bristol-Myers Squibb & Others v Paranova*)

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CASE AND COMMENT

Composite Supplies at Separate Rates: Colaingrove Ltd v HMRC

In the 1990's VAT practitioners learned that multiple elements of a supply could be taxed as one composite supply; all that was required was that the principal supply be for the better use and enjoyment of the principal supply. Then, in the first decade of this millenium we learned that a composite supply could exist without principal and ancillary elements: they could be "economically indivisible". Then, last year, in its Judgment in *Deutsche Bank* the ECJ identified a new sub-category of composite supply: one where the elements are economically indivisible but where there is no predominant element. So, it seems until recently there were three different types of composite supply: the *CPP* composite supply; the *Levob* composite supply and the *Deutsche Bank* composite supply. In *Colaingrove Ltd v HMRC [2013] UKFTT 116* (*TC*) the Tribunal did not identify a new category of composite supply but it did redefine what it means to be a composite supply.

It would be fair I believe to describe the consequences of a finding of a composite supply that the supply is to be treated not as the supply of several elements which comprise the thing supplied but the supply of one thing. This carries with it several consequences; the first is that the rate of VAT applicable is that applicable to the single composite supply and not its individual elements and, second, the place of supply rules will apply to that single composite supply and not its various elements.

In *Colaingrove* the first tier tax tribunal concluded that – in very limited circumstances – a composite supply can be liable to VAT at two separate rates. Before considering the decision it is necessary to consider the two pillars on which it was constructed: *Talacre Beach Caravan Sales v C&E* (*Case C-251/05*) *[2006] STC 1671* and the *French Undertakers Case*.

Talacre v HMRC

In *Talacre*, we saw the first hint that it might be possible to have a composite supply liable at two rates. In that case, it was accepted by HMRC that, in selling caravans, Talacre made composite supplies of the caravan and its contents. However, HMRC argued that, notwithstanding the existence of the composite supply the contents of the caravan were liable to VAT at the standard rate. This argument arose, and was successful, because the UK provisions which zero-rated caravans specifically excluded removable contents but, more importantly the legislation had excluded removable contents from the zero-rating since before 1 January 1991. Because of this, and because the zero-rating was one which was "grandfathered-in" pursuant to Article 28(2)(a) of the Sixth Directive HMRC argued that it was simply impermissible for the contents to be liable at the zero-rate. According to the ECJ if the contents were to be liable at the zero-rate as a consequence of the existence of a composite supply this would serve to extend the scope of the zero-rating laid down for the supply of the caravans themselves.

The Court concluded that its jurisprudence on composite supplies:

> "does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by Article 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid"

Therefore, it was not the mere fact that the UK legislation excluded the contents which rendered them liable at a separate rate; it was the fact that by dint of their exclusion prior to 1991 the State was now precluded from applying the zero-rate. In my view *Talacre* must be read in light of the fact that the contents were expressly excluded from zero-rating prior to 1991, otherwise a zero-rate could never extend to cover an entire composite supply (unless all of the elements were themselves zero-rated) since it would by definition be extending the zero-rate to items which could not themselves be zero-rated pursuant to Article 28(2)(a). Because of this, *Talacre* has for some time being regarded as having been decided on unique facts.

Commission v France

In *Commission v France* (*Case C-94/09*) (hereinafter the "*French Undertakers Case"*) the ECJ brought the *Talacre* analysis one step further. In that case the ECJ considered whether French legislation was compatible with the VAT Directive. Article 98 of the VAT Directive entitles, but does not oblige, member states to apply up to two reduced rates on certain supplies which are listed in Annex III. Amongst those supplies is "the supply of services by undertakers and cremation services, and the supply of goods related thereto." The French Republic had decided to apply the zero-rate only to the transportation of the deceased. The Commission challenged this position on the basis that it resulted in the French Republic applying two different rates to *"two components of a supply which must be regarded as a composite supply"*.

The starting point for the ECJ's analysis was that there was nothing in the text of Article 98 which required that it be interpreted as meaning that the reduced rate could be charged only if it is applied to all aspects of a category of supply covered by Annex III. Accordingly a selective application of the reduced rate was permissible provided that no risk of distortion of competition resulted. The Court expressed it thus:

> "subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of a category of supply covered by Annex [III] to the [VAT] Directive".

As we will see shortly these "concrete and specific aspects" comprised a major element of the taxpayer's submissions in *Colaingrove*. The Court held that if a member state chose to apply the reduced rate in an *a la carte* fashion it must nevertheless comply with the principle of fiscal neutrality. So, two conditions existed and the Commission argued, in effect, that there was also a third condition, namely that the zero-rating could not be applied to elements only of a composite supply. The ECJ disagreed and held that the principles governing composite and multiple supplies:

> "may be applied on a case-by-case basis, in order to prevent, inter alia, the contractual structure put in place by the taxable person and the consumer from leading to an artificial splitting into a number of fiscal transactions of a transaction which, from an economic point of view, must be regarded as a single transaction, [but] they cannot be regarded as decisive for the purpose of the exercise by the Member States of the discretion left to them by Directive 2006/112 as regards the application of the reduced rate of VAT."

So, where a member state has been given the power to apply a reduced rate to particular supplies listed in Annex III it may chose to only apply the reduced rate to elements of those supplies provided that they are doing so in respect of "concrete and specific aspects" and doing so does not result in a breach of fiscal neutrality.

The *French Undertakers case* is not authority for the fact that any composite supply which contains a reduced rate element is liable to VAT at two different rates, though the implication of the Judgment does appear to be that in France a composite supply of undertaker's services is liable to VAT at two different rates because the State has expressly – and legitimately – decreed that it should be so (though this is not 100% clear from the Court's judgment).

Colaingrove v HMRC

The Appellant is a member of the Bourne Leisure Group and owns, amongst others, "Haven" and "Butlins". It provides accommodation at its holiday parks in the form of static caravans, chalets and pitches for caravans owned by holiday-makers. One of it business lines is the offer "Sun Holidays". These are cut-price holidays offered in static caravans or chalets to the readers of The Sun newspaper. One of the features of the offer is that the customers must pay a separate charge for the electricity that will be supplied to the caravan or chalet. As it is not practical to engage in meter reading for each holiday maker, a set charge of £12 per day is payable at least 56 days in advance of the commencement of the holiday.

It was accepted by HMRC that electricity supplied at pitch-sites to those who own their own caravans was liable to VAT at the reduced rate. Similarly it was accepted that if the supply of electricity was done on a metered basis it would constitute a separate element of the supply and would also be liable at the reduced rate. It was alleged however that because a flat-fee was payable which did not relate to the amount of power consumed by any particular customer the supply was a composite supply liable to VAT at the standard rate applicable to the supply of holiday accommodation. Ultimately the Tribunal agreed with HMRC that, following *Weight Watchers (UK) Ltd* and *David Baxendale*, the typical Sun Holiday customer was purchasing a composite supply. However, this conclusion was only reached after the Tribunal had first considered the taxpayer's principal argument, namely that irrespective of the existence of a composite supply, two separate rates applied.

The Tribunal analysed *Talacre* and the *French Undertaker's case* in some detail and concluded that the latter:

> "Is authority for the entitlement of a Member State to legislate that a reduced rate of VAT will apply to a supply of goods or services in relation to which a reduced rate is authorised under the relevant European Union Legislation notwithstanding that the application of the CPP jurisprudence would lead to the conclusion that such supply was merely an element in a larger single complex supply which receives the tax treatment appropriate to the nature of the larger single complex supply taken as a whole."

In accordance with the *French Undertakers case*, the Tribunal also held that the reduced rate element must comprise a "concrete and specific element" and it must not lead to a breach of fiscal neutrality.

The difficulty was that in the *French Undertakers Case* the member state had expressly chosen to exclude certain elements of a composite supply from the reduced rate which it implemented in its legislation with the result that it applied the reduced rate to only a portion of a composite supply. In *Colaingrove* there was no question of the legislature having chosen to apply a reduced rate to only part of an Annex III activity – it was simply alleged that the manner in which the reduced rate had been applied in the legislation made it clear that the reduced rate applied to electricity was intended to survive the incorporation of that supply into a standard-rated composite supply.

In my view, whatever the rights or wrongs of the Tribunal's decision, it is hard to see how this case falls squarely within the *French Undertaker's Case*. It may well constitute an appropriate extrapolation from the principles set down in that case but in the French Undertakers case Annex III permitted the application of a reduced rate to an identified composite supply. By electing to apply the reduced rate to only one element of that supply there was a clear intention to apply two different rates to the composite supply. In Colaingrove the challenge was proving a clear legislative intention to apply two rates to the composite supply of a caravan and electricity.

The taxpayer relied upon the fact that the reduced rate applied to the supply of electricity only when it was used for a "qualifying use". Note 3 of Group 1 Sch 7A, VATA defines such a use as including "domestic use" and Note 6 provided that if the electricity was supplied for use in, *inter alia*, "self-catering holiday accommodation" or "a caravan" it was liable to VAT at the reduced rate. This demonstrated, according to Roderick Cordara QC for the taxpayer:

> "the intensity of the Parliamentary intent' that the electricity supplied to a caravan or self catering accommodation should attract the reduced rate."

The argument then was simply that having provided expressly for the application of a reduced rate to such supplies, the reduced rate remained applicable irrespective of whether the supply formed merely one element of a composite supply of standard-rated holiday accommodation.

On the other hand, of course, it might merely be indicative of a legislative intent that the reduced rate should apply "only" where there is a qualifying use as opposed to "always" where there is a qualifying use.

HMRC argued that this approach would:

> "completely rob the CPP line of authority of its force and undermine the principle which lies behind the rule in CPP', which was there to prevent over-complication of VAT and the need to separate out, in relation to every transaction, each concrete and specific element which could be identified in order to decide what rate of tax was applied to it"

The Tribunal concluded:

> "It seems to us, that applying the French Undertakers in the way that we propose would not open the floodgates and wash away the CPP jurisprudence, because French Undertakers can, as we see it, only apply in the very limited class of case where a reduced rate of VAT is in issue and the domestic legislation imposing it indicates and intention that the CPP jurisprudence should not apply."

It is not clear to me why the Tribunal says that its decision will only apply in respect of the reduced rate. It is true that Article 98 and Annex III are permissive (providing that member states "may …") but that would appear only to produce the result that, as in the *French Undertakers Case*, the member state could bifurcate a composite supply contained within Annex III when implementing its decisions on rating. On the other hand, the Judgment in *Colaingrove* would appear to apply in any circumstances where the legislature has indicated a clear intent to apply a particular rate of VAT to any element of a composite supply. The Tribunal was clearly satisfied that this was not so but the basis for this satisfaction is not clear to me.

A further question arises regarding the place of supply. If there is a highly specific rule for the place of supply of a particular good or service in particular circumstances is that indicative of a legislative intent that the place of supply of that element will be immune from its inclusion in a particular supply? If so, one could end up with composite supplies with different rates and different places of supply.

One cannot help but admire the ingenuity of the taxpayer's argument in *Colaingrove* but HMRC's floodgate concerns would not appear to be unfounded. One would have thought that an appeal is almost inevitable and it will be very interesting to see whether the Upper Tribunal will agree that *Colaingrove* comes within the "*very limited class of case*" created by *Talacre* and the *French Undertakers case*.

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ZERO-AND REDUCED-RATING

Reduced rates – leaner and greener?

In October 2012 the European Commission issued a consultation paper entitled "Review of existing legislation on VAT reduced rates". Following on from the Communication on the future of VAT issued in December 2011 (COM(2011)851), this consultation paper covers one of the priority actions needed to create "a simpler, more efficient and more robust VAT system in the EU" being the review of the current VAT rate structure.

In addition to proposals to abolish reduced rates which have a distortive effect to the functioning of the internal market, one specific area of focus is the European Commission's proposals to abolish reduced rates on goods and services whose consumption is discouraged by other EU policies, such as goods and services deemed to be harmful to the environment, health and welfare.

At Section 6 of the consultation paper, the Commission has chosen to focus its efforts on climate change mitigation and environmental policies and has identified four specific areas where the abolition or amendments of the reduced rate provisions are being contemplated.

These are

- Water
- Energy
- Waste, and
- Housing

So in its desire to create a slimmed down and leaner list of goods and services eligible for reduced rating, the Commission appears to be aiming to make VAT a little greener too!

Housing

From a UK perspective clearly the most topical of the four focus areas chosen by the European Commission is that relating to housing, given the infraction proceedings currently being taken against the UK.

The Commission advises that improved construction and use of buildings would influence 42% of final energy consumption, 35% of greenhouse gas emissions and over 50% of all extracted materials. Since housing has such a significant impact on the environment, construction and building improvement is therefore a crucial industry for achieving environmental and climate change aims.

At present Annex III Item (10) of Council Directive 2006/112/EC ("the VAT Directive") permits member states to apply a reduced rate of VAT of not less than 5% to the "provision, construction, renovation and alteration of housing as part of a social policy."

One of the Commission's ideas is to restrict the application of the reduced rate to those supplies that take resource efficiency into account. This is countered however with the complexities that would be involved in differentiating between types of supply and the additional burdens this would put upon businesses in the sector. Such a differentiation would therefore be at odds with the Commission's desire for a "simpler" VAT system.

Taking the Commission's idea to restrict the reduced rate to the construction of energy efficient buildings and works undertaken to buildings to make them more energy efficient, one would have thought that the installation of energy saving materials in buildings would fall squarely into what they had in mind. But given the recent proceedings against the UK, obviously not!

The UK currently has numerous VAT reliefs applicable to housing ranging from the zero-rating of major interests in new dwellings and construction services in the course of constructing new dwellings to the reduced rating of services of converting buildings to dwellings and the renovation of empty dwellings. These reliefs theoretically could be under threat (yes, including the zero-rated ones, see the section on water below) if the Commission amends the VAT Directive.

However, the UK relief most imminently at risk is the application of the reduced 5% VAT rate to the installation of energy saving materials in residential accommodation and buildings intended for use solely for relevant charitable purposes at VAT Act 1994 Schedule 7A Group 2. Eligible energy saving improvements include the installation of micro-combined boilers, insulation, controls for central heating and hot water systems, solar panels, wind turbines but notably not double glazing.

Infraction proceedings against the UK

In 2012 the Commission began taking infraction proceedings against the UK in relation to the reduced rate applicable to the installation of energy saving materials, since in their view it goes beyond the scope of what is allowed under the VAT Directive. On 21 June 2012 the European Commission asked the UK to amend its legislation and bring it into line with the Directive.

The UK has relented (reluctantly) on one specific provision – the installation of energy saving materials in charitable buildings, since HMRC has accepted that the 5% VAT rate can only be applied to housing and does not extend to charitable buildings which themselves are not housing. The 5% VAT rate available to the installation of energy saving materials in charitable buildings will therefore be withdrawn with effect from 1 August 2013.

Although the Commission has been advised of the UK's proposals to amend the UK law, it clearly has not been enough to halt the infraction proceedings and since the UK did not go far enough in its amendment of the UK legislation, it was announced on 21 February 2013 that the Commission has decided to take the UK to the European Court of Justice on the matter.

Looking at the Commission's decision to take this case on it does seem rather at odds with their green agenda. Surely the installation of such energy saving materials cannot be harmful to the environment and should be something that is positive encouraged. The vast majority of the eligible installations in my view should certainly fall within the definition of alteration of housing, whether the works are part of a social policy is open to debate but what is the Commission's real problem with our reduced rating of such supplies?

Firstly the Commission claims that there is no scope for the application of a universal reduced rate to energy saving materials, though they do accept that the installation of energy saving materials could be covered by the current provisions applicable to the supply of goods and services in the housing sector if the conditions are met, i.e. that if the goods and services are used for social policy purposes in the construction, renovation and alteration of housing.

The Commission also stated that economic studies have shown that reduced rates are often not the best way to achieve policy objectives or change consumer choices. Taking the example of energy efficiency promotion, the Commission names a number of reasons why the application of a reduced rate of VAT is not the most efficient way of delivering on the goal.

1 It is difficult to define the products, which can develop and evolve quickly, thus creating uncertainty about the amount of tax that would be due. This affirms the Commission's concerns about added complexity in the VAT system if reduced rating was only available to resource efficient construction and other works.
2 A reduced rate would not target the population who need it most as a reduced rate would be universally applied.
3 In the case of energy efficient products, businesses are likely to represent a large proportion of those wishing to invest in them. This VAT is most likely to be deductible by businesses anyway and frequently reduced rates are not fully passed on to consumers in the form of lower prices.

Finally the Commission notes that there are more efficient ways of promoting energy efficient materials while remaining in line with the EU law. (i.e. through the use of direct subsidies).

The UK government will therefore need to argue that the proposed "Green Deal" energy efficiency plans constitute a social policy and not merely a financing scheme. (The Green Deal is a scheme which offers an incentive to make energy saving improvements to homes and businesses without having to pay all the costs up front. Consumers and businesses will then pay off the cost of the work in instalments through their electricity bills). Initial feedback from the Commission on this is that although the Commission supports the objectives of the "Green Deal", the Commission does not believe that breaking the EU VAT rules will help in achieving those objectives. This will however be for the European Court to decide.

To me the Commission's views on the UK's reduced rate for the installation of energy saving materials give the impression of how they intend to approach the application of the reduced rate to housing more generally. It is quite possible that simplicity will ultimately prevail on this one.

Water

Member states are currently able to apply a reduced rate of VAT to the supply of water by virtue of Item (2) of Annex III of the VAT Directive. The Commission queries that given the current water shortages experiences by some regions and the expectation that this situation will worsen in the future due to climate change, whether the application of a reduced rate of VAT is compatible with the objectives of resource efficiency.

Although the Commission accepts that the reduced rate is motivated by social reasons due to it being a basic household need, since water is also a vital input for business and industry and the current reduced rate provision is universal, there is a difficulty targeting the reduced rate to this specific social objective.

One would think that the easy thing to do here would be to limit the application of a reduced rate to household consumption rather than business. However, as the Commission points out household use of water can go beyond basic needs such as for swimming pools, fish ponds and decorative gardening! As a result the Commission's suggestion is to abolish the availability of reduced rating to the supply of water and explore whether the social objectives could be achieved by the implementation of national social policies which target vulnerable social groups.

The supply of water in the UK is zero-rated (and not reduced rated) under VAT Act 1994 Schedule 8 Group 2. The supply of water for use by businesses in water intensive industries, defined as

- Energy and water supply industries
- Extraction of minerals and ores other than fuels; manufacture of metal, mineral products and chemicals
- Metal goods, engineering and vehicle industries
- Other manufacturing industries
- Construction

are however specifically excluded from the UK zero-rating provisions. In addition certain water products such as mineral water are also not eligible for zero rating.

The UK is at present able to apply the zero rate to the supply of water by virtue of a derogation granted to the UK under Article 110 of the VAT Directive, since zero-rating was applied to the supply of water by the UK prior to 1 January 1991 and the provisions had been adopted for clearly defined social reasons. It should be noted however that these derogations granted to member states were intended to be temporary and only applicable until the adoption of "definitive arrangements". The consultation document does make clear that the Commission's review of reduced rates does extend to zero-rates, super reduced rates and parking rates granted to member states via derogation. Therefore our zero rate provision for water could in theory be at threat.

Energy

It is the view of the Commission that the application of reduced rates to the supply of energy might distort decisions on the optimal level of energy consumption and it was noted that some member states currently apply the reduced VAT rate to high polluting products for which EU proposals in the Energy Taxation Directive propose higher rates of taxation (not VAT).

By abolishing the reduced rate, the Commission claims that neutrality would be achieved. Similar to the water issue above, the Commission suggests that the impact of such a change on vulnerable social groups could be mitigated by national policies. One again assumes that this could be tackled by subsidies.

The UK does apply a reduced rate to the supply of domestic fuel and power under VAT Act 1994 Schedule 7A Group 1 and the continued application of the reduced rate in the UK is clearly vulnerable. In my view out of all of the four areas raised by the Commission, this is the one where change is most likely to happen.

Waste

At the present time member states are able to apply a reduced rate to the supply of services in connection with street cleaning, refuse collection and waste treatment under Item 18 of Annex III. The Commission has identified that this treatment may be inconsistent with the EU's policy on waste management contained in the Waste Framework Directive. This Directive names a five step waste hierarchy (best option first)

1 Prevention
2 Re-use
3 Recycling
4 Other recovery such as energy recovery
5 Disposal – i.e. landfill

At the moment the reduced rate provisions do not take into consideration this hierarchy and the Commission queries whether this hierarchy can be reflected in the VAT rate structure.

Domestic household waste collection in the UK is typically covered by our council tax payments administered by local authorities. Since this is treated as a non-business activity (permitted by Article 13 of the VAT Directive), one would assume that any change in the European legislation would not affect this. Commercial waste disposal activities are not covered by any form of VAT relief in the UK and as such the withdrawal of waste disposal from the list of supplies eligible for reduced rate treatment in the VAT Directive is unlikely to have any impact on the UK.

Summary

No matter how well intentioned the Commission's policies on the environment are, the biggest question when it comes to VAT is all around timing. In the Commission's Communication of 2011 entitled Roadmap to a Resource Efficient Europe (COM(2011)571), it states that significant improvements in resource efficiency are needed by 2020. Given how long it normally takes for amendments to the European VAT legislation to be implemented (at least several years), I fear that bringing the VAT system into line with such green initiatives will not make this particular deadline.

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EXEMPTION FOR FUND MANAGEMENT AND INVESTMENT FUNDS

Fund management – Wheels and GfBk

It is the standard cliché when similar events happen after a protracted pause since the previous such event to refer to it as like waiting for a bus – none for ages and then several all at once. The reason why it happens with buses has been much discussed (primarily amongst those with too much time on their hands). There is a book titled "Why Do Buses Come in

Threes? The Hidden Mathematics of Everyday Life". However, no book is needed – the simple answer is that the bus is a pack animal, nervous hunting on its own but never happier than when accompanied by a number of its fellows.

As with buses, so with the Court of Justice of the European Union ("CJEU") and judgments on VAT and fund management[1]. The EU law exemption for fund management is for "the management of special investment funds as defined by Member States" (article 135 (1)(g) of the Principal VAT Directive). The CJEU's previous forays into fund management were the *Abbey National case* (*C-169/04*) which was decided in May 2006 (dealing with the meaning of "management") and the *Claverhouse case* (*C-C-363/05*) in June 2007 (dealing with which investment funds could receive exempt fund management services). Claverhouse established that the discretion afforded to Member States to determine what funds qualified as special investment funds for the purposes of the exemption was extremely circumscribed both in terms of which funds qualified as special investment funds and the need to extend exemption to other funds that are sufficiently similar.

Since then, there has been an ominous silence in Luxembourg not broken until 7 March when the CJEU gave judgment in the cases of *Wheels Common Investment Fund Trustees Ltd* (*Case C-424/11*) (*"Wheels"*) and *GfBk* (*Case C-275/11*) (*"GfBk"*).

In an echo of the earlier cases, Wheels and GfBk each consider one limb of the exemption – Wheels, like Claverhouse, is concerned with what funds qualify as special investment funds; and GfBk, like Abbey, is concerned with what constitutes exempt management.

Wheels

The Wheels judgment is concerned with pension schemes for UK employees of the Ford Motor Corporation. Wheels itself is a common investment fund pooling the assets of various occupational pension schemes ("OPSs"). The pension schemes are defined benefit schemes, meaning that the pension to which an employee is entitled is linked to their salary at retirement age and number of years' service and not to the value of contributions made by or on behalf of employees and the investment performance of the fund. In such OPSs, it is the employer that bears the risk and enjoys the benefit of investment performance.

The First Tier Tribunal sent a detailed set of questions comprising 17 individual parts. The CJEU felt that the issues were sufficiently straightforward that an Advocate General's Opinion was not needed. It also felt that the 17-handed question could be rephrased as asking "whether and under what conditions assets of a retirement pension scheme, and the investment fund in which they are pooled, are a "special investment fund" within the meaning of [the Directive]".

The Court cited Claverhouse as setting limits on the extent of the Member States jurisdiction. The exemptions must be applied consistently with the objectives of the Directive. The purpose of the exemption for fund management is "to facilitate investment in securities by means of investment undertakings by excluding the cost of VAT and, in that way, ensuring that the common system of VAT is neutral as regards the choice between direct investment in securities and investment through collective investment undertakings".

It also cited the principle of neutrality as requiring that "similar supplies of services, which are thus in competition with each other" should not be treated differently for VAT purposes.

Thus, the issue was whether Wheels was either identical to funds that constitute special investment funds or sufficiently comparable to be in competition with them. According to the CJEU, "special investment funds" are "funds which constitute undertakings for collective investment in transferable securities within the meaning of the UCITS Directive" (paragraph 23). Article 1 (2) of the UCITS Directive makes clear that undertakings for collective investment in transferable securities "have as their sole object, in accordance with the objective pursued by the exemption provided for in Article 13B (d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/412, the collective investment in transferable securities of capital raised from the public".

Wheels could not fit within this definition as it was not open to the public – as an OPS, it was "an employment-related benefit which employers grant only to their employees". The Court then considered whether it was sufficiently similar to special investment funds such that exemption should still apply.

It concluded that Wheels was not sufficiently similar. The key reason for this was that the members of the pension fund did not bear the investment risk arising from the management of the fund. That risk was borne by the employer who would have to top up the fund if it was insufficient to meet the entitlements of current pensioners or would benefit if the fund was in surplus (pension fund surpluses not being terribly common in the current state of the economy). Further, the employer could not be seen as the investor since, despite being at risk for the performance of the fund, the employer was acting in a different capacity to private investors – Ford paid into the pension fund in order to comply with its legal obligations towards its employees and not in the capacity of a private investor.

For these reasons, the CJEU concluded that fund management services provided to Wheels should be taxable.

Before considering the consequences of this judgment in the pensions area, it is worth noting the approach of the Court to the principle of neutrality. Recent case law has seemed to limit the scope of the principle – in *Deutsche Bank* (*Case C-44/11*), the Court held that "that principle cannot extend the scope of an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions" (paragraph 45). In Wheels, on the other hand, the Court was prepared to see the exemption for management of special investment funds extended to the management of funds that were not special investment funds but were sufficiently similar that they were in competition. It is difficult to see this as anything other than extending the scope of an exemption in the absence of clear wording to that effect. It remains to be seen how the principle of neutrality develops in future cases, whether the minimal Deutsche Bank line is followed, or the more expansive formulation in Wheels (it will be seen below that the expansive approach was also taken in GfBk).

The Wheels judgment confirms the position taken by HMRC, at least as far as defined benefit schemes are concerned. It is clear that no occupational pension fund would qualify as a special investment fund since all are, by definition, open only to employees. However, the judgment does not determine whether a defined contribution fund is sufficiently similar to a special investment fund. In such funds, the risk as to the performance of the fund lies entirely with the individual. In that respect, the reasoning of the Court in Wheels would not apply. That is not to say that it is inevitable that exemption would apply to such pension funds but rather that the reasons given for the dissimilarity of Wheels do not apply.

There is a further issue in respect of defined benefit funds such as Wheels. Employees are typically permitted to make Additional Voluntary Contributions ("AVCs") to such funds. These are sums paid by the employee (sometimes with some level of matching funds from the employer) that are invested along with the other funds and in respect of which the benefits of the investment are enjoyed by the employee. In other words, AVCs can be seen as equivalent to a defined contribution element to a defined benefit fund. To the extent that fund managers charge fees in respect of managing AVCs and these can be separately identified, it may be argued that these fees are subject to a different VAT treatment.

Not content with these two judgments related to pension fund management, the CJEU has another two cases before it on similar matters. *PPG Holdings* (*Case C-26/12*) will have its Advocate General's Opinion delivered on 18 April. That case is concerned with whether an employer can deduct input tax charged by a fund manager on the basis that it, rather than the fund, is the recipient of the supply. Given the weight placed in the Wheels judgment on the fact that it is the employer that takes the risks and benefits of investment performance in a defined benefit scheme, it may be that PPG's position has been strengthened in respect of such schemes.

ATP Pension Services (*Case C-464/12*) is concerned with the liability of fund management services provided to a defined contribution scheme and should therefore answer the questions left unanswered by Wheels. It also asks whether there can be exemption on the basis of the operation of accounts and the making of payments and transfers for the fund manager (this latter is based on the nature of the Danish system of pensions but the judgment may be of wider application).

Many fund managers had made repayment claims to HMRC in advance of the Wheels case. Where those claims relate to defined benefit schemes, they will now fail (subject to any argument as to the AVCs). However, the position is very much open in relation to defined contribution schemes; employers, funds and fund managers should continue to monitor the output of the Court in the cases referred to above.

It should also be noted that there is a variety of tax treatments across the EU. As such, the Wheels judgment will change the position in some Member States such as Belgium, Germany, Italy and Luxembourg where the management of defined benefit schemes is currently treated as exempt. Taxpayers operating in more than one location should consider the position separately in each.

GfBk

GfBk is concerned with the question of what services constitute exempt management. It was not in dispute that the fund customer was a special investment fund. GfBk provided non-discretionary investment advisory services. That is, it researched the securities market and provided its client with purchase and sales recommendations on a continuous basis. The client retained the right to decide whether or not to execute GfBk's recommendations, but in practice merely checked whether the recommendation was in line with German legal and regulatory requirements. If so, the recommendation would be processed through the order system, often in minutes.

GfBk argued that its services were exempt fund management but this was rejected by the German tax authorities and the matter was referred to the CJEU by the German Supreme Court. The Advocate General recommended that the Court should find the services to be exempt and the Court agreed.

Having set out the characteristics of special investment funds as it did in Wheels, the CJEU held that advisory services of the type provided by GfBk would fall within the concept of exempt management if the service "is intrinsically connected to the activity characteristic of an [investment management company], so that it has the effect of performing the specific and essential functions of management of a special investment fund" (paragraph 23).

The Court then noted that recommendations of which assets to purchase or sell are intrinsic to the activity characteristic of an investment management company given its key purpose of the collective investment in transferable securities of capital raised from the public.

In *Abbey National*, the Court had referred to the activities set out at Annex II of the UCITS Directive under the heading "Administration" to identify exempt fund management activities. However, the fact that advisory services were not in Annex II did not preclude exemption, nor did the fact that GfBk had no power to change the legal and financial position of its fund client.

The CJEU then considered the principle of fiscal neutrality. It asked itself whether that principle precluded exemption for GfBk when advisory services provided to natural persons who invest directly in securities are subject to VAT. Its conclusion was that there was no breach – the purpose of the exemption was to permit small investors to pool their assets without generating an extra VAT cost. It then found what it regarded as a further breach of the principle of neutrality if GfBk were to charge VAT – those special investment funds which employed their own investment advisors would have a VAT advantage over those who used third parties.

This is a somewhat odd conclusion on fiscal neutrality – on the basis of the judgment in GfBk, the VAT system is not neutral in terms of advice given to a person directly investing in securities and a person doing so through a collective vehicle. The Court seems to be comparing the collective investor with an individual investor who gets advice from a stockbroker who also executes transactions but this is not analogous to the position of the fund in GfBk. The comparison drawn between those funds that do, and those that do not, employ advisors is even more peculiar. It is axiomatic that when an exempt business outsources services that it could carry on itself, it may incur an extra VAT cost. Some outsourced activities may be exempt in their own right but others will not – as readers will be aware, the issue of the scope, and limits, of the exemption for financial outsourcing has been a recurring feature of litigation in the domestic courts and the CJEU (including, of course, these cases). I am not aware that the potential incidence of VAT on such outsourced services has ever been considered to be a breach of the principle of neutrality by the CJEU before. As in Wheels referred to above, the approach to fiscal neutrality in this case certainly seems at odds with the more restrictive view taken in other recent cases such as *Deutsche Bank*. It remains to be seen which of these two approaches to fiscal neutrality will predominate in future cases.

Finally, it had been argued by the German authorities that GfBk's services could not be exempt because it did not have the correct mandate required under the UCITS Directive. This could not be determinative because of the settled case law that unlawful transactions must be taxed in the same way as lawful transactions.

The judgment in GfBk contradicts the current policy of HMRC, which requires fund managers advising on investments to have discretion to enter into transactions before their services can be exempt. The specific fact pattern of GfBk may be rare in the UK – GfBk had de facto but not de jure discretion in that its recommendations would only be rejected by its customer if they resulted in investments of a type not permitted for the fund – GfBk would, of course, seek to ensure that it never made such recommendations.

In the UK, one would expect an advisor in the position of GfBk to be given discretionary power so that its services were exempt. The writer understands it to be a German regulatory requirement that prevented such discretion being given to GfBk but there is no similar regulation in the UK. Thus, although the judgment expands the ways in which exempt investment advice can be given, if it is applied in a restrictive manner, it may be of limited practical application.

However, it is not clear from the judgment that such a restricted view would be permissible. The crux of the finding of exemption is that recommendations to purchase and sell assets are intrinsically connected with the activity characteristic of a special investment fund. This could potentially apply to all investment advice given to special investment funds, whether or not it will lead to a transaction shortly thereafter. This would be a major extension of the way that the exemption is applied in the UK.

Funds, and providers of advisory services, may wish to consider their positions in the light of this judgment and whether it would be advisable to submit claims in respect of VAT charged on research/advisory services. In essence, the question is whether the judgment is peculiar to the German regulatory system so that exemption has been given because GfBk is as close to having discretion to execute on its recommendations as German law will allow (as stated above, in practice, its fund client executed its recommendations almost instantaneously). This would be on the basis that it would be a breach of the principle of neutrality to permit a regulatory safeguard to impose irrecoverable VAT in the supply chain (it may be that GfBk will be given a narrow interpretation in the same way that *Faxworld* (*Case C-137/02*) has been by the Court of Appeal as, effectively, a way to prevent the arcane nature of German regulation imposing an unintended VAT cost). Alternatively, the CJEU may have intended to make a wider point about the liability of investment advice given to special investment funds. This would represent a significant change in the way that the exemption operates in the UK.

Conclusion

The forthcoming CJEU cases of PPG and ATP Pension Services should provide the much needed clarity on input tax recovery for employers operating occupational pension schemes and in respect of whether defined contribution schemes qualify as special investment funds.

In terms of the scope for exemption for services provided to special investment funds, GfBk has extended the scope, at least as it has been understood in the UK, to cover certain supplies of investment advice where the advisor has no discretion to carry out transactions. As with Wheels, this judgment has left a number of unanswered questions as to the scope of exemption for advice but, unfortunately, there are no forthcoming CJEU cases where these issues will be considered.

It is to be hoped that HMRC will provide timely and helpful guidance as to their interpretation of these cases, although, in the view of the writer, it may well be that further litigation will be needed, potentially before the CJEU, to clarify the scope of the exemption for advice arising from GfBk.

[1] Any professional writers reading this article will undoubtedly have admired the effortless segue from introductory story with buses to the heart of this piece.

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CUSTOMS

HP n'est pas une pipe: or how to classify multifunction printers for customs purposes

The adoption of the WTO's Information Technology Agreement ("ITA") in 1996 promised a brave new world for importers of high-tech products. Key components of the digital age – including semiconductors, computers, telecommunications equipment and more – were to benefit from zero import duty across WTO member state signatories, the intention being that around 96% of the world's trade in such goods would benefit from increased freedom of movement, greater profit margins and, ultimately, increased innovation. The ITA is generally viewed as a success: according to WTO figures, global exports of IT products have tripled during the lifetime of the agreement and access to affordable technology has substantially improved, particularly for developing countries.

At the same time, there have been several challenges to whether certain WTO member state customs authorities have adhered to the spirit of the ITA. Most notably, Japan, Taiwan and the United States successfully brought an action before the WTO in respect of the European Union's alleged failure to adhere to its international commitments in fully implementing the ITA by subjecting certain IT products to duties upon importation into the EU. Further, the ITA has been criticised by some for its limited product coverage and perceived inability to keep pace with the innovative markets it is designed to promote; indeed, at the time of writing, the WTO is working towards a revised consolidated list of products for inclusion within the scope of the ITA.

For customs practitioners, the ITA has certainly led to one helpful outcome, and that is the generation of a wealth of case law on the interpretation of the customs classification rules for high-tech and multifunctional products. Over recent years, LCD monitors, set-top boxes and multifunction printers have emerged as the three principal culprits for review by the European courts as a result of ITA-related classification appeals. In January 2013, multifunction printers once again landed in Luxembourg's dock following an appeal by Hewlett-Packard Europe BV ("HP") against a decision of Dutch Customs regarding the proper classification of three models of devices imported by HP into the Netherlands during 2009.[1]

The Court of Justice's decision in this latest case follows a line of judgments regarding multifunction printers[2] and provides some helpful insights on their proper classification. In particular, the *HP* decision considers the following issues: (i) the weight to be given to certain product specifications when determining the technical classification, and importantly the "essential character", of multifunction devices; (ii) the application of Article 9(2) of Council Regulation (EEC) No. 2658/87, which provides that changes in the EU's Combined Nomenclature ("CN") may not lead to a change in duty rate for certain products; and (iii) the extent to which multifunction printers may fall within the scope of the ITA. This article is intended to outline the factual and legal context of the HP case and provide an overview of the Court's findings in respect of each of the three issues listed above.

Changes to classification of multifunction printers from 1 January 2007

On 1 January 2007, the European Commission introduced a new heading 8443 to the CN regarding various types of printing machinery. Heading 8443 specifically provides for different categories of multifunction printers including, in particular, subheadings 8443 31 10 and 8443 31 91:

> 8443Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof:
>
> - Other printers, copying machines and facsimile machines, whether or not combined:
>
> 8443 31 – – Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network;

> 8443 31 10 – – – Machines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute
>
> – Other
>
> 8443 31 91 – – – – Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine

Many of the subheadings within this new heading 8443, including subheading 8443 31 91, are dutiable at 6%.

Before 2007, there was no specific heading for multifunction printers within the CN. Instead, such products were typically classifiable under one of the following CN subheadings:

- subheading 8471 60 20, relating to "*printers*" falling within a more general umbrella heading (8471) for parts of automatic-data-processing machines, and attracting a zero duty rate;
- subheading 9009 11 00, relating to "*electrostatic photocopying apparatus operating by reproducing the original image directly onto the copy*", also attracting a zero duty rate; or
- subheading 9009 12 00, relating to "*electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy*", attracting a duty rate of 6%.

When the Commission introduced heading 8443 it also deleted subheading 8471 60 20 and heading 9009 from the CN. The result of these changes was that, from 1 January 2007, many multifunction printers incorporating a scanning function, which had previously been classifiable under subheadings 8471 60 20 or 9009 11 00 and thus had been exempt from import duty, were now classifiable under heading 8443 31 91 and subject to 6% duty.

Background to HP's appeal

In 2009, HP imported three models of multifunction printers into the Netherlands. These were intended for use in households and small- and medium-sized businesses and combined both a laser printing module and a scanning module. The printers had scanning and printing functions when either connected directly or through a network to an automatic data-processing machine (in other words, a computer). The printers also had a copying function that could be used independently from an automatic data-processing machine. Some of the printers were also capable of sending and receiving faxes.

Following release of the goods into free circulation, Dutch Customs issued an assessment to HP in respect of the imported products, classifying each item under subheading 8443 31 91 and requiring payment of import duties at a rate of 6%. While HP did not dispute the classification under this subheading, HP appealed against this assessment stating that, before 1 January 2007, the products were classifiable under subheading 8471 60 20 and thus attracted no import duties.

From a legal perspective, the European Commission has broad discretion to define the subject matter of tariff headings for the classification of goods, provided it does so in line with the World Customs Organisation's Harmonised System. However, pursuant to Article 9(2) of Council Regulation (EEC) No. 2658/87, the Commission has no power to act on its own to amend customs duty rates when making changes to the subject matter of tariff headings. Accordingly, if it were established that the printers at issue ought to have been classified under subheading 8471 60 20 and exempt from customs duty, and those goods were now classifiable under subheading 8443 31 91 and subject to 6% duty, the Commission would have exceeded its powers in violation of Article 9(2).

Thus, HP argued that, if imported prior to 2007, the printers would have been classified under subheading 8471 60 20. It followed that, if HP were to establish that it was correct in this regard, the Commission's amendments to the relevant tariff headings (in deleting subheading 8471 60 20 and largely replacing it with subheading 8443 31 91) would not be compatible with Article 9(2). Conversely, Dutch Customs argued that such imports would have been classified under subheading 9009 12 00 prior to 1 January 2007 and subject to 6% duty, in which case the payment of 6% duty in respect of the 2009 imports under subheading 8443 31 91 would be consistent with Article 9(2).

Secondly, HP argued that the imposition of a 6% duty rate on IT equipment that had previously been duty free was inconsistent with the ITA. Dutch Customs rejected HP's arguments and HP appealed to the Haarlem Customs Court, which subsequently referred the issues to the Court of Justice.

Findings of the Court of Justice

Proper classification of printers imported by HP

The Court of Justice issued its judgment in this case on 17 January 2013. The Court first considered the question of whether the printers, if imported prior to 1 January 2007, ought to have been classified under subheading 8471 60 20 (thus duty free) or under subheading 9009 12 00 (subject to 6% duty). In reaching its conclusion, the Court considered two earlier cases that had addressed the proper classification of multifunction printers.

In *Kip Europe*, the Court had previously found that certain multifunction printers ought to be classified under subheading 9009 12 00 on the basis that they were capable of performing a variety of operations (printing, electronic scanning and reproduction) to the extent that "*none of the functions corresponding to those operations can be regarded as giving those machines their essential character, without, in principle, requiring all machines having those three functions to be classified as photocopiers*".[3] At the same time, the Court had also considered other models of multifunction printers, similar to those imported by HP in 2009, and concluded that, had such items been imported before 1 January 2007, it is *possible* they would have been classified under subheading 8471 60 20, although the Court was not required to reach a definitive view in this regard.

In *Rank Xerox*[4], the Court had confirmed that heading 9009 could encompass photocopiers incorporating an "*optical system and of the direct reproduction type*" as well as those which incorporated an "*intermediate for reproduction by the indirect process*". In that case, the product in question comprised a scanning device, a digital storage device that performed reproduction functions by converting the image into digital data, and a printing device; the Court found that the product in question ought to be classified under subheading 9009 12 00.

Finally, the Dutch referring court had noted in its reference to the Court in *HP* a judgment of the Cour d'Appel de Paris of 20 May 2010, which concerned multifunction printers having the same objective characteristics and properties as those imported by HP in 2009. In that judgment, the Cour d'Appel found that "*not being principally a copier or scanner, the printer function is predominant; in fact …, the printer represents not only most of the volume and weight of the machine, but also its value; consequently, the machine in question comes under [subheading 8471 60]*". Interestingly, the Court did not expressly address this French decision in reaching its judgment in *HP*.

Ultimately, the Court found that, on the basis of the "*objective characteristics and properties*" of the printers imported by HP in 2009, they ought to have been classified under subheading 9009 12 00 because "*they perform a number of functions, namely scanning, printing, copying and in some cases fax, none of which can be regarded as giving them their essential character*".[5]

Application of Article 9(2)

It followed from the Court's conclusion that the European Commission had not violated Article 9(2) of Council Regulation (EEC) No. 2658/87 by imposing a duty rate of 6% on these imports. Dutch Customs would have been entitled to levy 6% duty on the products had they been classified under subheading 9009 12 00 prior to 2007 and Dutch Customs was therefore entitled to continue to do so under subheading 8443 31 91 in respect of the 2009 imports.

Compatibility with the ITA

HP also argued that the multifunction printers in question should be treated as being subject to the ITA, because the list of products falling within the scope of the ITA included:

> "automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included" as well as "digital electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect) process".

The Court considered whether classification under a dutiable subheading such as 8443 31 91 would be inconsistent with the EU's commitments to the WTO under the ITA. The Court referred to a WTO Panel Report adopted in 2010 on the correct classification under EU customs laws of certain IT products falling within the scope of the ITA, including multifunction printers. In this 2010 report, the WTO had concluded that certain multifunction printers connected to an automatic data-processing machine (and of a similar nature to those imported by HP in 2009) could not be classified under subheading 9009 12 00:

> "because the [products] are not photocopiers incorporating an optical system that operate by reproducing the original image onto the copy via an intermediate (indirect process), they cannot fall within the scope of the concession in subheading 9009 12 …, regardless of the primary, secondary, or equivalent nature of the copying function vis-à-vis these machines' other functions".

As a result of the WTO's findings in the 2010 Panel Report (as well as its equivalent report for 2011), the European Commission subsequently took steps to amend the relevant tariff headings, *inter alia*, in order to distinguish between "photocopying" and "digital copying" equipment. The Commission deleted subheading 8443 31 91 from the CN and introduced new subheadings 8443 31 20 (attracting a duty rate of 2.2%) and 8443 31 80 (duty free) intended to capture multifunction printers in greater conformity with ITA requirements, as follows:

> 8443 31 – – Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network
>
> 8443 31 20 – – – Machines having digital copying as principal function, where the copying is performed by scanning the original and printing the copies by means of an electrostatic print engine
>
> 8443 31 80 – – – Other

Notwithstanding this, the Court in *HP* concluded that it was unable to declare invalid (under the ITA) the 9009 12 00 classification of the printers in question. The Court found that "*given their nature and purpose, the WTO agreements are not in principle among the rules in the light of which the Court of Justice is to review the legality of measures adopted by the European Union institutions. It is only where the European Union intends to implement a particular obligation assumed in the context of the WTO or where the European Union measure refers expressly to specific provisions of the WTO agreements that the Court can review the* *legality of the measure at issue in light of the WTO rules*".[6] Accordingly, while the relevant WTO Panel Reports were taken into account by Commission in adapting and developing the relevant tariff headings, but are not legally binding in this context as a matter of European law.

Conclusions

The Court's judgment in this case once again serves to highlight the difficulties importers may face in persuading customs authorities of the "essential character" of a certain multifunction device when seeking to present an argument in favour of a particular customs classification. In cases where the "essential character" of a multifunction product is not clearly distinguishable, importers may find that customs authorities have broad discretion to classify the items in question under an unfavourable (that is to say, higher duty) heading. The fact that the Court did not address the 2010 ruling of the Cour d'Appel de Paris appears to suggest that arguments of "essential character" based on characteristics such as weight and value of constituent parts or functions may not be sufficient to convince the European courts as to a particular classification. It also seems that the Court is unwilling, and arguably unable, to diverge from the developing body of jurisprudence in this area as a result of cases like *Kip Europe*.

In any event, the *HP* case provides an opportune moment for suppliers and importers of multifunction printers to review their import classifications in light of the Court's current thinking. Such reviews can often lead to future cost savings and the ability to reclaim overpaid duties in the event that imported products have been misclassified under an incorrect tariff heading attracting higher duty rates. This review exercise may also mitigate the risk of future classification queries or demands for payment from customs authorities that take the view that imported products have been misclassified under a tariff heading subject to a lower duty rate than ought to have been payable on the goods. Finally, those importers that submitted protective claims at the time of the 1 January 2007 changes to the CN discussed in this article may also find they are now in a position to reclaim overpaid duty in light of the *HP* case, on the basis that they had incorrectly classified their imports prior to 2007.

[1] *Case C-361/11 Hewlett-Packard Europe BV v Inspecteur van de Belasting*
[2] Notably Joined *Cases C-362/07* and *C-363/07* Kip Europe and Others
[3] Ibid. at paragraph 62
[4] *Case C-67/95 Rank Xerox* at paragraph 21
[5] Joined Cases *C-362/07* and *C-363/07 Kip Europe and Others* at paragraph 48.
[6] In this regard, the Court cited *Case C-377/02 Van Parys*, paragraphs 39 and 40, and Joined *Cases C-319/10* and *C-320/10 X and X*, paragraph 35.

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