Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

De Voil Indirect Tax Intelligence

ISSUE 204 MAY 2013

NEWS IN BRIEF

Legislation 2
Government Publications 2
Court of Justice of the European Union 8
Court of Session 9
Tribunals 9

EDITORIAL

Property and the "too difficult" tray 12

CASES & COMMENT

PFC Clinic AB (*Case C-91/12*) 15
Colaingrove Limited [TC02534] 17

ECONOMIC ACTIVITY/BUSINESS

Does Yarburgh Survive? 18

WHO CAN JOIN THE CLUB?

Eligibility for membership of VAT Groups 21

CUSTOMS

What is obvious negligence? 25

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 1

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

NEWS IN BRIEF

Legislation

Publication of Finance Bill 2013

Finance Bill 2013 was published on 28 March 2013 (formally known as Finance (No. 2) Bill of the current Parliamentary session). The Bill contains 232 clauses, 49 Schedules and runs to 615 pages. The explanatory notes weigh in at some 550 pages.

(See www.hm-treasury.gov.uk/finance_bill_2013.htm, and www.hm-treasury.gov.uk/d/explanatory_notes_for_finance_(no.2)_bill.pdf).

The Climate Change Levy (General) (Amendment) Regulations 2013, SI 2013/713

These amending regulations give effect to the new carbon price support rates of climate change levy (CCL) from 1 April 2013. These rates will apply to self-supplies of coal and other solid fossil fuels, gas and LPG (but not oil) delivered to generating stations and used in producing electricity. The reduced rate of CCL for climate change agreement participants is also amended to 10% from 1 April 2013.

Scottish Government introduces Landfill Tax (Scotland) Bill

The Landfill Tax (Scotland) Bill was introduced to the Scottish Parliament on 17 April 2013. The Bill will replace the UK landfill tax regime with a Scottish Landfill Tax from 1 April 2015 under devolved powers contained in the Scotland Act 2012. This is the second of three Bills planned under the devolved powers: the Land and Buildings Transaction Tax (Scotland) Bill was published in December 2012 and a Tax Management Bill will follow later in 2013.

The Renewable Transport Fuel Obligations (Amendment) Order 2013, SI 2013/816

The renewable transport fuel obligation (RTFO) provides support for UK biofuels by requiring suppliers of more than 450,000 litres of relevant hydrocarbon oil annually to supply a certain percentage of their fuel as biofuel. For these purposes, suppliers can either redeem certificates or pay a buy-out price. These amending regulations bring suppliers of fuel used in non-road mobile machinery within the scope of the RTFO from 15 April 2013 and include "gas oil" and "low-sulphur gas oil" within the definition of "relevant hydrocarbon oil".

The Denatured Alcohol (Amendment) Regulations 2013, SI 2013/Draft

These draft amending regulations will allow educational establishments to receive small amounts (up to 5 litres a year) of industrial denatured alcohol and trade-specific denatured alcohol without prior written authorisation from HMRC. They also alter the prescribed formulation for "completely denatured alcohol" in accordance with the proposed EU formulation with effect from 1 July 2013.

Government Publications

Revenue & Customs Brief 9/2013: VAT treatment of services to employers in connection with group personal pensions

HMRC have issued RCB 9/13 dated 17 April 2013. It advises that businesses advising employers in relation to the setting up or administration of group personal pensions should charge VAT at the standard rate to employers on services rendered in return for "consultancy charges" or other fees.

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

"VAT: Corporate pensions – FSA's Retail Distribution Review – treatment of "consultancy charges" for services supplied to employers

Purpose of this Brief

This Brief confirms the VAT implications of regulatory changes that will affect the

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 2

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

way that Employee Benefit Consultants ("EBCs") and others providing services to employers for the setting up and administration of work place contract-based pensions will be remunerated in the future.

Services supplied to employers or Trustees in respect of occupational pension schemes held through trusts are not covered by this Brief.

Who needs to read this?

- Businesses (such as EBCs) that advise and assist employers and/or employees in connection with contract-based Group Personal Pension plans.
- Employers that receive these services.

Action to take

Businesses supplying the above services need to establish the following to determine the VAT treatment:

- what is the precise nature of the service supplied, and
- who is the recipient of that service?

Businesses that advise and assist employers in relation to the setting up and/or ongoing administration of Group Personal Pensions should charge standard rated VAT to employers on services provided to them in return for "consultancy charges" or other fees.

Employers should be aware that they will normally be able to recover the VAT that is charged to them on these services as input tax, subject to partial exemption and input tax rules (further information in paragraph 1.4 below).

The VAT treatment of services provided to employees will depend upon the nature of the services provided (further guidance can be found in the VATFIN and VATINS guidance manuals). Services to employees, even if paid for by the employer, will not generally attract input tax recovery.

1.1 Background

Employers may seek advice and assistance from EBCs and other pension consultants on the setting up of and/or ongoing administration of workplace personal pensions. This market includes group personal pensions, group stakeholder pensions and group self-invested personal pensions – collectively referred to as GPP schemes.

Although some pension consultants have charged employers for such services (including advice and services provided to the employer's staff) in the past, it appears to have been more common for them to make no charge for these services, but to rely instead on commission paid by the pension provider.

As a result of the Financial Services Authority's (FSA's) Retail Distribution Review ("RDR"), EBCs and other pensions consultants have been banned from receiving commission based remuneration with effect from 1st January 2013 (subject to exceptions under transitional arrangements for clients engaged before this date). These businesses are now required to agree "consultancy charges" with the employer instead, which may in some cases be supplemented by separate fees charged directly to the employer.

1.2 Analysis of VAT liability

In order to fall within the finance or insurance exemptions, it is necessary for the provider to act as an intermediary (or one of the intermediaries) between the individual employees and the pension provider with a view to the conclusion of an individual pensions contract.

Based on the typical contractual arrangements reviewed by HMRC and its discussions with the pension consultants industry this does not appear to be the position in respect of the services currently provided by pension consultants in return for "consultancy charges". On the contrary, the "consultancy charge" is a fee paid in return for advisory, administration and other services supplied to the employer. The fact that the (net of VAT) "consultancy charges" are paid via the pension provider does not alter the VAT analysis. The same VAT analysis also applies to any separate fees charged to employers.

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 3

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

EBCs and other pensions consultants should therefore account for standard rated VAT on "consultancy charges" and any separate fees charged to employers for these services.

We understand the future use of consultancy charging is still under review and the position could change going forwards. If, therefore, the nature of the services remunerated by consultancy charges changes in future and it can be demonstrated those services meet the conditions for VAT exemption outlined above, any charges made for the provision of those services will be VAT exempt.

1.3 Invoicing arrangements

Consultancy charges are consideration for supplies of services by the pension consultant to the employer in respect of which the employer is liable to pay any VAT due. The pensions consultant is therefore required to provide a VAT invoice to the employer for taxable services provided to them that are remunerated by way of "consultancy charges". This is the case even though, in practice, the consultant will not receive the net charges from the employer but from the pension provider, who will deduct the charges from contributions and/or members' funds and remit them to the consultant.

1.4 Employers' entitlement to recover input tax

The VAT incurred on consultancy charges and other fees charged by EBCs and other pensions consultants in connection with the setting up and administration of corporate pension schemes will be recoverable as input tax by VAT registered employers that incur the costs in the course or furtherance of their business, subject to any necessary input tax restrictions.

If an employer makes exempt supplies, the amount of input tax that can be deducted may be restricted as, normally, input tax can only be deducted if it relates to taxable supplies. Further information on this is in Notice 706 Partial exemption.

Issued 17 April 2013"

Information Sheet 6/2013 – Notification of Vehicle Arrivals (NOVA)

HMRC have published Information Sheet 6/13 dated 11 April 2013. It provides guidance on the NOVA system, which from 15 April 2013 enables individuals and businesses to notify HMRC online of vehicles imported into the UK. The new system is intended to reduce the scope for VAT evasion under the paper-based procedures.

The paper may be viewed in full at http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_032698

(See also Customs Information Paper (13) 20 and Notice 728)

Notice 41 – Alcoholic Ingredients Relief

HMRC have issued a revised (April 2013) edition of Notice 41. The Reference to "black beer" in the notice has been removed following the abolition of the excise duty exemption for this product (with effect from 1 April 2013).

Notice 162 – Cider production

HMRC have issued a revised (April 2013) edition of Notice 162. The notice was recently updated (in February 2013) to inform of the addition of dimethyl dicarbonate ("Velcorin") as a permitted ingredient in cider and perry – see section 25.

In this update, section 9 (on alcoholic strength) has been amended for consistency with what is contained in law.

Notice 175 – Motor & heating fuels: relief from excise duty on oils used to generate electricity

HMRC have issued a revised (April 2013) edition of Notice 175. This notice

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 4

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

replaces the June 2009 version to reflect the introduction of the carbon price floor from 1 April 2013.

The main changes to its content are in the following parts of the notice:

Paragraph/Section	Content
2.1	Background to the relief and the introduction of the carbon price floor
2.5	Amount of duty you can claim relief on
2.6	Carbon price support rates of fuel duty
3.1	Combined Heat and Power (CHP) stations: Background
3.3	Amount of relief
3.4	What is relevant fraction
3.5	How to determine the quantity of oil referable to the production of electricity
3.6	How to calculate your claim
3.7	CHP stations in Northern Ireland

Notice 728 – New means of transport

HMRC have published a revised (April 2013) edition of Notice 728. Most of the changes reflect the introduction of a new legal requirement to notify HMRC about land vehicles brought into the UK from 15 April 2013, using the online NOVA system.

(See also Information Sheet 6/13 and CIP(13)20).

VAT Information Sheet 4/2013 VAT: taxing holiday caravans

HMRC have issued Information Sheet 4/13 dated 2 April 2013. It replaces Information Sheet 11/2012, to provide more information on sales of second-hand caravans from 6 April 2013, including details of the evidence required to determine whether they were occupied before that date. Legislation in FA 2012 withdraws zero-rating for larger, static holiday caravans with effect from 6 April 2013, replacing it with a 5% reduced rate, although zero-rating remains for caravans complying with the current standard for residential use.

The information sheet may be viewed in full athttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_032682

Revenue & Customs Brief 7/2013 VAT: Levy on "single-use" carrier bags in Northern Ireland

HMRC have issued RCB 7/13 dated 2 April 2013. It confirms that no VAT is due from retailers who charge only the minimum of 5 pence for each carrier bag under regulations (SR 2013/4) coming into force in Northern Ireland on 8 April 2013. All receipts in respect of single-use carrier bags should be brought into account in calculating trading profits for income tax and corporation tax purposes.

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

"Introduction

On 8 April 2013 a levy of 5 pence will be introduced on single use carrier bags supplied in Northern Ireland.

This Brief explains the VAT treatment of the levy.

Legislative framework

The levy is being introduced under The Single Use Carrier Bags Charge Regulations (Northern Ireland) 2013 which requires retailers to charge a minimum of 5 pence for each single use carrier bag provided to customers. Retailers may charge a higher amount if they wish.

Retailers are required to pay the "net proceeds" of their charges to the Department of Environment Northern Ireland (DoENI). In cases where a retailer charges the minimum of 5 pence, the full amount must be paid to DoENI.

However, a retailer who charges more per bag must pay DoENI 5 pence less VAT (5p x 5/6 = 4.17p)

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 5

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

Certain bags are currently exempt from the levy, for example, "bags for life".

Detailed guidance on how the scheme operates is available from the DoENI website:

Guidance on the single use carrier bags charge regulations (Northern Ireland) 2013 (www.doeni.gov.uk/guidance_on_the_single_use_carrier_bags_charge_regulations__ni__2013.pdf)

VAT implications

Where only the 5 pence levy is charged for a carrier bag and it is remitted in full to the DoENI, no VAT is due from the retailer in any circumstance.

However, where the charge exceeds 5 pence, then VAT is payable on the total amount where the bags are supplied by VAT registered businesses. For example, if a retailer charges 12 pence for a bag then VAT of 2 pence will be due from the retailer (12p x 1/6 = 2p).

If only the 5 pence levy is charged, then this amount should not be included in the DGT for any Retail Schemes. If taking the example above, 12 pence is charged, the bag should be treated as a standard rate good for Retail Schemes.

Direct Tax implications

For the purposes of Corporation Tax and Income Tax, all receipts in respect of single-use carrier bags should be brought into account in calculating trading profits. A deduction for the "net proceeds" statutorily payable to DoENI is available. Figures should be adjusted for VAT when accounts are drawn up on a VAT-exclusive basis. For the avoidance of doubt, where only the minimum amount is charged, the VAT-exclusive price to be brought into account will be 5 pence per single bag as no VAT will be due.

Issued 02 April 2013"

Tax agents: dishonest conduct factsheet

This factsheet concerns HMRC's new powers with effect from 1 April 2013 to investigate dishonest conduct by tax agents, charge civil penalties and publish this information in certain cases. It may be viewed in full athttp://www.hmrc.gov.uk/agents/strategy/tafs.pdf.

Tax and procurement: Summary of consultation responses and policy note

Following consultation, the government has confirmed it will require suppliers bidding for government contracts over £5 million on or after 1 April 2013 to self-certify their tax compliance. Suppliers will have to notify "occasions of non-compliance" under the new general anti-abuse rule, the "Halifax" principle, or DOTAS, found in returns submitted since 1 October 2012, with a look-back period of six years. The government has also published a policy note for departments to follow when preparing procurement documentation.

The summary may be viewed in full athttp://www.hmrc.gov.uk/budget2013/tax-procure-con-resp.pdf.

Customs Information Paper (13) 20 (Revised): Introduction of the Notification of Vehicle Arrivals (NOVA) online service

HMRC have issued a revised version of CIP (13) 20 dated 11 April 2013. They have amended this paper to include a list of commodity codes for certain types of vehicle imported from outside the EU not covered by the NOVA system for a temporary period after launch. For all vehicles brought into the UK from other EU member states, NOVA begins on 15 April 2013.

The Paper may be viewed in full at http://www.hmrc.gov.uk/jccc/cips/2013/cip13–20.pdf

(See also Information Sheet 6/13 and Notice 728)

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 6

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

Customs Information Paper (13) 22: Temporary Admission of works of art, collectors items and antiques removed from a customs warehouse

HMRC have issued CIP (13) 22 dated 16 April 2013. It concerns the requirement to use Temporary Admission instead of the customs warehousing temporary removal arrangements for activities such as the exhibition of works of art, collectors' items and antiques, with effect from 30 June 2013.

The UK policy of permitting goods to be entered to the customs warehousing arrangements and temporarily removed from the warehouse for the purpose of exhibition and similar activities has been a long established practice. However following discussions with the EU Commission and other Member States it has been confirmed that the correct customs procedure to be used is Temporary Admission (TA).

From 30th June 2013 all goods imported for exhibition with a view to sale, possible sale, for sale by auction or similar activities, should be entered to TA, either directly at import or on removal from a customs warehouse if a period of storage is required. Businesses which currently use the customs warehousing arrangements and temporarily remove goods for exhibition or similar activities should note that from the 30th June 2013 temporary removal will no longer be authorised for these purposes; they should contact their Supervising Office so their customs warehouse authorisation can be amended, and this permission removed.

If the temporary removal arrangements from a customs warehouse are use solely for the purpose of viewing, the current arrangements may continue as detailed in the customs warehouse authorisation.

It should be noted that "viewing" in the context of this paper cannot be applied to items temporarily removed for display at a venue which allows public access for example fairs/galleries/exhibitions.

Customs Information Paper (13) 24: Additional rates of duty on goods from the USA

HMRC have issued CIP (13) 24 dated 19 April 2013. It provides advance notice of an increase in the duty rate, and inclusion of additional Commodity codes 620462 31 10 and 620462 31 90, to the list of goods affected by retaliatory measures in relation to the "Byrd Amendment". Although the Byrd Amendment has been repealed, the illegal subsidies to US business still continue.

As such, and in line with the World Trade Organisation (WTO) approved arrangements for retaliation against the US, the EU intends to increase the rate of retaliatory duty with effect from 1 May 2013.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2013/cip13-24.pdf

Proposed change to formulation for Completely Denatured Alcohol – responses to consultation

Following consultation on a standardised EU formulation for "completely denatured alcohol" (or methylated spirits), HMRC will bring in the revised formulation for excise duty purposes from 1 July 2013. The purple dye added to methylated spirits currently produced in the UK will be removed from the new EU formulation.

For full details of the consultation response, seehttp://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageVAT_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_032709

(See also The Denatured Alcohol (Amendment) Regulations 2013, SI 2013/Draft above)

Air passenger duty: measuring "seat pitch" on a private/business jet

HMRC have issued supplementary guidance for air passenger duty operators on

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 7

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

the measurement of "seat pitches" for particular seat configurations in smaller aircraft. The "seat pitch" is used to determine whether reduced or standard rates of air passenger duty apply.

For full details, seehttp://www.hmrc.gov.uk/air-passenger-duty/adden-apd-brief.pdf

Court of Justice of the European Union

European Commission v Ireland (No 3)

In *European Commission v Ireland (No 3), ECJ Case C- 85/11; 9 April 2013 unreported* the European Commission applied to the ECJ for a ruling that, by permitting non-taxable persons to be members of a VAT group, Ireland had failed to comply with its obligations under Article 11 of Directive 2006/112/EC. The ECJ rejected the Commission's contentions, holding that "it is not apparent from the wording of Article 11 of the VAT Directive that non-taxable persons cannot be included in a VAT group". The ECJ also observed that it was arguable that the inclusion of non-taxable persons in VAT groups "contributes to administrative simplification both for the group and for the tax authorities and makes it possible to avoid certain abuses".

HMRC v Sunico ApS (and related appeals)

In *HMRC v Sunico ApS (and related appeals), ECJ Case C-49/12; 11 April 2013* unreported HMRC formed the opinion that three Danish companies had participated in a MTIC fraud. They took proceedings against the companies in the Danish courts. The Danish High Court (Østre Landsret) referred the case to the ECJ for a ruling on whether the proceedings were within the scope of EC Regulation 44/2001. Advocate-General Kokott upheld HMRC's contention that the proceedings were within that regulation.

Rusedespred OOD v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

In *Rusedespred OOD v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite, ECJ Case C-138/12; 11 April 2013 unreported*, a Bulgarian case, a company (R) had accounted for VAT on a supply, and its customer (E) reclaimed input tax. The tax authority formed the opinion that R should have treated the supply as exempt, and rejected E's claim for input tax. R subsequently sought to correct its return and recover the output tax which it had accounted for. The tax authority rejected the claim and R appealed. The case was referred to the ECJ, which gave judgment in favour of R, holding that Article 203 of Directive 2006/112/EC "must be interpreted as precluding a tax authority from refusing, on the basis of a provision of national law intended to transpose that article, the supplier of an exempt supply the refund of value added tax invoiced in error to a customer on the ground that the supplier had not corrected the erroneous invoice, in circumstances where that authority had definitively refused the customer the right to deduct that value added tax and such definitive refusal results in the system for correction provided for under national law no longer being applicable". The ECJ also held that the principle of neutrality "may be relied on by a taxable person in order to contest a provision of national law that makes the refund of value added tax invoiced in error conditional on the correction of the incorrect invoice, in circumstances where the right to deduct that value added tax has definitively been refused and such definitive refusal results in the system for correction provided for under national law no longer being applicable".

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 8

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

European Commission v Kingdom of Sweden, Case C-480/10; 25 April 2013 unreported; European Commission v United Kingdom, ECJ Case C-86/11; 25 April 2013 unreported

In *European Commission v Kingdom of Sweden, Case C-480/10; 25 April 2013 unreported; European Commission v United Kingdom, ECJ Case C-86/11; 25 April 2013 unreported* the European Commission applied to the ECJ for a ruling that, by restricting the availability of VAT grouping to the financial and insurance sectors, Sweden had failed to comply with its obligations under Article 11 of Directive 2006/112/EC. The ECJ rejected the Commission's contentions, holding that "the Commission has failed to show that the restriction of the application of the scheme provided for in Article 11 of the VAT Directive to undertakings in the financial and insurance sector was contrary to European Union law". The ECJ reached a similar decision in a case which the European Commission brought against the UK. The ECJ held that "the Commission has not established that the objectives of Article 11 of the VAT Directive militate in favour of an interpretation according to which non-taxable persons cannot be included in a tax group".

Court of Session

Simpson & Marwick v HMRC

In *Simpson & Marwick v HMRC, CS [2013] CSIH 29,* a Scottish case, a firm of solicitors which provided legal services in respect of insurance claims claimed bad debt relief in respect of the full amounts which insurance companies had declined to pay. HMRC issued an assessment on the basis that relief was only available for the VAT fraction of the debt, as in *AW Mawer & Co*. The CS unanimously upheld the assessment (reversing the Upper Tribunal decision and restoring the First-tier decision). The CS held that "the proper construction of (VATA 1994, s 36) is the construction for which HMRC contend. The refund to which the taxpayer is entitled is stipulated in section 36(2) as the "amount of VAT chargeable by reference to the outstanding amount". The words "outstanding amount" are defined in subsection (3) by reference to the amount of the "consideration", or the extent to which the "consideration" has been written off. But as (VATA 1994, s 19) makes plain, the "consideration" is an amount inclusive of VAT." The CS also observed that the solicitors had "provided a taxable service for which they received partial payment of the consideration". There was no reason why "they should not be responsible, in the normal way, for the proportionate amount of VAT on the part consideration which they received".

Tribunals

Upper Tribunal

Scottish Football League v HMRC

In *Scottish Football League v HMRC, UT [2013] UKUT 160 (TCC)* in 1996 the Scottish Football League (SFL) had reached an agreement with Customs that it would not reclaim input tax on the cost of medals which it purchased for presentation to the winners of its divisional championships, and would not be required to account for output tax on the onward supply of the medals. However in 2010 the SFL submitted a repayment claim, backdated to 2007, on the basis that it should be allowed to reclaim the input tax without being required to account for output tax. HMRC rejected the claim and the First-tier Tribunal dismissed the League's appeal, holding that the award of the medals was "a supply by way of a business gift in terms of VATA 1994" and that "since output tax has not been paid on the medals by the deemed consumer, input tax recovery is not available to the SFL". The Upper Tribunal upheld this decision, holding that "the purchase of the medals relates directly to the award of the medals".

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 9

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

HMRC v The British Disabled Flying Association

In *HMRC v The British Disabled Flying Association, UT [2013] UKUT 162* (*TCC*) the British Disabled Flying Association is a registered charity, which was formed in 1994 with the aim of allowing "disabled persons" to enjoy "opportunities in aviation". It purchased two light aircraft. HMRC issued a ruling that VAT was chargeable on the supplies of the aircraft. The BDFA appealed, contending that the supplies, and its subsequent expenditure on adapting, repairing and maintaining the aircraft, qualified for zero-rating under Sch 8, Group 12, Item 2(g). The Upper Tribunal held that "the question of whether an item has the physical characteristics to qualify as designed solely for use by a handicapped person must be decided by reference to the item's physical characteristics at the time of supply". On the evidence, the tribunal found that one of the aircraft qualified for zero-rating, since it "had been adapted for use by disabled persons prior to its sale to the BDFA". However, the other aircraft did not qualify, as it had not been adapted for use by disabled persons at the time the BDFA purchased it.

First-tier Tribunal

A Barkas v HMRC

In *A Barkas v HMRC* (*2013*) *TC02601* an individual (B) owned a site which included two adjacent barns. He obtained planning permission to convert one of the barns into a house, while using the other barn as a commercial building. The planning permission included a condition that "the workshop/office within the application site shall only be used/operated by the occupiers of the dwelling hereby granted permission". B undertook the conversion and applied for a refund of the VAT under VATA 1994, s 35. HMRC rejected the claim on the basis that effect of the planning permission was that zero-rating was precluded by VATA 1994, Sch 8, Group 5, Note 2(c). The First-tier Tribunal allowed B's appeal. Judge Poole observed that the effect of the condition was that it was "unlikely that the owner would ever wish to dispose of the dwelling separately from the commercial building". However, he held that it did not impose any specific prohibition on the separate use or disposal of the residential dwelling.

Earlsferry Thistle Golf Club v HMRC

In *Earlsferry Thistle Golf Club v HMRC* (*2013*) *TC02602* a Scottish golf club (E) did not own a golf course, but paid another club (G) an annual fee for the right to use G's course at specific times. Following the ECJ decision in *HMRC v Canterbury Hockey Club*, E submitted a repayment claim on the grounds that the fees charged by G should have been treated as exempt from VAT. HMRC rejected the claim, but made a repayment to G, which in turn made a repayment to E. In 2011, following the First-tier Tribunal decision in *HMRC v Bridport & West Dorset Golf Club Ltd*, E submitted a further claim. HMRC again rejected the claim and E lodged an appeal with the First-tier Tribunal, contending that there was an appealable matter, within VATA 1994, s 83(1)(b). HMRC applied for the appeal to be struck out but the First-tier Tribunal dismissed HMRC's application. Judge Ruthven Gemmell observed that the Upper Tribunal had referred the case of *HMRC v Bridport & West Dorset Golf Club Ltd* to the ECJ, and directed that E's appeal should be stood over pending the ECJ decision in that case.

Copthorn Holdings Ltd v HMRC

In *Copthorn Holdings Ltd v HMRC* (*2013*) *TC02605* in 2010 a company (C), which was the representative member of a VAT group, applied for two associated companies to be included in its group registration with retrospective effect, backdated to 2007. HMRC refused the applications, and C appealed. Judge Clark held that "the normal timing for the effective date of registration is the date of receipt of the

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 10

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

application, but that HMRC had "a discretion to permit group registration to take effect from an earlier or later date". In the present case, HMRC had failed to specify the date from which they were willing to treat the two companies as part of C's VAT group, and had failed to comply with the terms of VATA 1994, s 43B(4). He directed that the applications should be remitted to HMRC for reconsideration.

J Hillis v HMRC

In *J Hillis v HMRC (2013) TC02611* a solicitor (H) began self-employment in 2009 and became liable to register for VAT in November 2010, but did not do so until December 2011. HMRC imposed a penalty under FA 2008, Sch 41 but the First-tier Tribunal allowed H's appeal, directing that the penalty should be reduced to nil. Judge Tildesley reviewed the Public Bill Committee debate on 12 June 2008 and expressed the view that "the penalty regime under Sch 41 is primarily directed at taxpayers who deliberately avoid their responsibilities to notify HMRC of their obligation to pay tax. The penalty regime is not intended for taxpayers who make a genuine mistake on their liability and disclose their mistake to HMRC."

The "Spotting The Ball" Partnership v HMRC (and related appeals)

In *The "Spotting The Ball" Partnership v HMRC (and related appeals), [2013] UKFTT 210 (TC), TC02624* a partnership and several companies, which had accounted for VAT on takings from "spot the ball" competitions, submitted repayment claims, contending that they should have treated the takings as exempt. HMRC rejected the claims but the First-tier Tribunal allowed the appeals in principle, holding that "spot the ball" was a game of chance within VATA 1994, Sch 9, Group 4, Note 2(c).

Exeter Estates Ltd v HMRC

In *Exeter Estates Ltd v HMRC (2013) TC02632* in 2007 a company (E) acquired a large site adjoining a dual carriageway. The site included a petrol station, and several warehouses and offices. E advised HMRC that it had made an option to tax the site. In 2011 HMRC formed the opinion that E had failed to account for VAT on rental income from several buildings which it had opted to tax, and issued an assessment. E appealed, contending that in 2007, four weeks after its initial letter to HMRC, it had sent a further letter stating "option to tax to be limited to area etched red on enclosed plan, excluding buildings etched blue". The First-tier Tribunal accepted E's evidence and allowed its appeal. Judge Gort found that "it was quite clearly not (E's) intention to opt to tax the buildings outlined in blue on the Land Registry document" and that it was more likely that the letter had been lost by the Royal Mail or by HMRC than that it was never posted.

JNK 2000 Ltd v HMRC

In *JNK 2000 Ltd v HMRC (2013) TC02635* a company (J), which manufactured vehicle parts, reclaimed input tax on the purchase and maintenance of a helicopter. HMRC issued an assessment to recover the tax, considering that the helicopter had been purchased for the private use of J's controlling director, who was an experienced helicopter pilot. J appealed, contending that it had used the helicopter for business travel and had also hired it to a customer. The First-tier Tribunal accepted J's evidence and allowed its appeal, finding that it had acquired the helicopter "with a view to making supplies wholly for business purposes".

M Reid v HMRC

In *M Reid v HMRC (2013) TC02655* a solicitor (R) provided intermediary services for prospective purchases of capital redemption bonds. He did not account for tax on such supplies, treating them as exempt. HMRC issued an assessment charging tax on the basis that the supplies

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 11

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

failed to qualify for exemption and that certain entries in R's books constituted payment of the supplies. R appealed, contending as a preliminary point that the book entries did not constitute payment. The First-tier Tribunal accepted this contention and allowed the appeal (without deciding the substantive issue of whether the supplies were taxable or exempt).

David Rudling and Alan Dolton
LexisNexis

EDITORIAL

Property and the "too difficult" tray

I am not alone amongst practitioners in seeing property as one of the most interesting areas on which we advise. It has a certain concreteness that many other areas (particularly financial services) lack, but that is never combined with simplicity. It presents plenty of very arguable points, a raft of conditions that have to be met or may be fallen foul of, and significant issues of property law which, though essential for the practitioner to understand, cannot be allowed to ride roughshod over wider principles of European VAT law.

We are thus left with a number of conundrums which seem resilient to solution. To what extent do rights over land need to equate to rights of exclusive occupation in order to be exempt? How much elaboration in the service carries one over the line beyond which a supply essentially of land becomes a supply of other (potentially taxable) services? Is a supply which is economically identical to a supply of land but is not, for legal reasons, such a supply, to be treated as though it were such a supply (and what does fiscal neutrality have to say about that)? Where are the boundary lines in regard to "services related to land" for the purposes of the place of supply rules? Do planning designations impact on the treatment of a land or construction supply? How are we ever going to establish consensus on what is or is not a land related TOGC? I could happily go on listing them.

So I thought I would do an editorial on some aspects where HMRC have apparently struggled, with varying degrees of valour, with land related issues.

Residential Property and Planning Designation

Cast your mind back to Brief 47/11 dated 30 December 2011. This clarified HMRC policy on the impact of planning consent category on the VAT treatment of construction services. It tackled the issue that many dwellings were being constructed under the C2 Care designation rather than under C3 Dwelling designation. It confirmed that C2 designation would not be regarded as a factor when considering the VAT definition of the building. That definition was set out specifically in the VAT legislation and did not require any particular planning consent except that an appropriate planning consent must be duly complied with. As C2 is appropriate, then it was also sufficient. This turned out to confirm a ruling I obtained for a client some five years before that announcement.

But the Brief was said specifically to be limited to "extra care accommodation"; defined as accommodation whose occupants could call on care services as and when needed. Commonly, such accommodation may only be occupied by people of a certain age, (though anyone may own it) and where many occupants hope never or hardly ever to call on the extra service, but are reassured by the fact that it is provided as and when needed. So, the dwellings are both designed and largely used in a manner which is identical to a normal flat, and the thought that any difference should apply would immediately strike one as an anomaly.

But HMRC reserved a matter for future consideration, promising to consider it (and implicitly to comment on it) early in 2012. In other words, at the time of writing the Brief, they expected a delay of

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 12

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

some two to three months before commenting further. It is worth observing that it is now around eighteen months and at the time of writing (in April) I have heard nothing more on it.

The matter was the treatment of "other kinds of accommodation". This is not particularly helpful. It creates a need to guess what it is that HMRC clearly felt a need to consider in the general area of housing that was not designated C3. Is it student flats, and whether they can be regarded as pupil accommodation or dwellings? Or does it relate to accommodation which has more regular care provision, literally built into the price of the accommodation but which cannot be regarded as a care institution? And whatever it may be, why has there been no further comment. Or, to put it another way, why was further comment promised but not delivered, particularly since the principle discussed need not have been said to be limited to their idea of "extra care accommodation"?

Sub-granting and TOGC status

Something similar happened with the issue relating to TOGC treatment involving property, in the aftermath of the ground breaking *Robinson Family decision* (*TC02046*).

This was the decision which caused HMRC to accept that it had been wrong to insist that, for TOGC to apply, the entire interest held by the seller had to be transferred. Notoriously, this meant that their policy blocked TOGC status where a 999 year lease for premium (with minimal ground rent) was granted from a freehold (often described ambiguously as a "virtual freehold"). In a case concerning long leases and grants of sub-leases of nearly the same length as the lease, the First tier Tribunal held that the grant was in substance that of an asset of a property rental business and that TOGC treatment could not be denied. HMRC issued Brief 30/12 to confirm that their policy would be amended as regards grants to new interest holders who would carry on the same property rental business as the grantor (subject to specific policy details that have been extensively explored in other articles).

But there were two fundamental aspects it reserved for later comment. One related to other analogous VAT situations, and the other related to SDLT.

Taking the VAT issues first, HMRC decided that their new policy did not necessarily cover either a surrender of a lease to a superior landlord (who would thereby automatically inherit the existing rental sub-leases) or an identical situation to *Robinson* except in that the property was part of a business other than a property rental business (such as where the property is used for a retail business).

All the Brief says is that HMRC are "reviewing" these points. It does not imply any timeframe. However, at the time of writing this in April there is no sign of any further comment on these two issues, which is notable since the Brief was issued in November 2012, which itself was a substantial delay from the May 2012 case decision date. By the time you are reading this, more than a year may have passed since the decision, but you may not yet have learnt of HMRC's resultant policy in the two reserved matters.

It also again begs the question why these two scenarios were selected in order to cast doubt. What can be the problem with either, given their acceptance of the *Robinson* doctrine without so much as an appeal to the Upper Tribunal. A surrender delivers to the landlord a complete asset. The fact that it merges into an existing landlord asset cannot have any impact on the fact that the business is transferred to the landlord. The fact that the landlord is already in that business cannot either. Are they trying to imply that the landlord is already carrying out the very same business and is thus incapable of being given a transfer of the underlying tenant's business? If so, that seems at best a very strained point of view. And the notion

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 13

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

that there is a difference when the property is used for a business other than a rental business, presumably on the basis that the *Robinson* case related only to a property rental business, is even more unconvincing. That difference is entirely circumstantial.

It is difficult to understand why HMRC have given themselves more time to think about these points. The answers are obvious once they have conceded the *Robinson* point.

Robinson SDLT

Brief 30/12 also reserved judgement over what to do concerning the over-levying of SDLT on transactions wrongly denied TOGC treatment (owing to SDLT being calculated on the VAT inclusive price). It was not suggested that the SDLT had been correctly levied, but they wanted more time to think about what to do about the excessive SDLT.

Naïve it may have been, but your author thought that the issue had an aspect of urgency about it. After all, SDLT returns can only be amended within one year, and if that was all they were going to allow then it would be better we were told about it promptly. As it turned out, we had to wait until 15 April, some five months after the Brief, to learn of the policy, given in Brief 08/13. Thankfully this allowed the error correction claim mechanism to be deployed by suspending Case G of paragraph 34A, Schedule 10, FA2003 in this case (the provision which does not allow corrections where the error arose from a common practice). This gives the taxpayer a whole four years in which to make a claim. But I still believe that taking five months to publish a conclusion of relatively blinding obviousness, presumably in order to forestall judicial review actions by taxpayers, thus potentially reducing the retrospection that *Robinson* ought to have allowed by several months strikes me as unfortunate and an unjustifiable use of official power.

And that is not all. Since most TOGCs are cases where, were they not afforded TOGC treatment, the buyer would reclaim all of the VAT, the only real concern in many cases is the SDLT value, and that only concerns the buyer. So, if VAT had been the only issue, many *Robinson* TOGCs would go uncorrected. In that case, the buyer ought not to be denied the SDLT reduction. He should not have to require the seller to claim the overcharged VAT merely to allow him a reduction in SDLT. But nothing so sensible is explicitly offered in Brief 08/13. Indeed, by using words of Delphic neutrality, we are left with text that seems to imply both interpretations, leaving the taxpayer to work out whether to make a claim without asking the seller to claim the VAT, or whether to forego a claim unless the seller agrees to assist. So, five months has been taken to reveal a solution which is blinding in its obviousness and at the same time excessive care has been taken by HMRC to dodge one of the central issues involved.

Partly occupied property and TOGC status

I have a couple more cases to comment on but will do so briefly as they are likely to be or to have been covered thoroughly elsewhere in De Voil. However they touch on my theme.

The first arises from the Tribunal decision in *Royal College of Paediatricians and Child Health*. This focussed on HMRC's well known policy concerning TOGCs where the tenanted part of the property is a small proportion. HMRC accords the building the status of single indivisible asset, and thus allows TOGC treatment on the entire price, not merely a proportion to reflect the tenanted part. And their policy explicitly accepts that this means that the buyer may be able to occupy that part (whether or not for exempt purposes) rather than seeking tenants for it.

I am not going to concentrate on whether HMRC's policy is correct or one they could challenge, but clearly it represents an avenue for significant loss of VAT

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 14

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

revenue and SDLT (except where a charity is the buyer of course).

The case is intriguing since HMRC abandoned their published policy and challenged the TOGC treatment (also challenging the seller's input tax recovery as their "second basis" for assessment, which was a bizarre and desperate second line of defence). They seem to have thought that the College had taken their policy too literally when it installed its very small associated (but third party) tenant as a proposed tenant of the seller of their new property in order to give the seller a rental business asset to transfer to themselves. The agreement to lease which the seller issued to the small tenant (and which could only lead to the grant of a lease if completion was achieved with the College) was regarded by HMRC as falling short of putting a genuine business in the hands of the seller, despite precedent on the issue of agreements to lease, and despite HMRC's published policy allowing it.

HMRC clearly felt that this case was simply too audacious, and too indicative of the fiscal risk entailed in their policy to be allowed to go unchallenged. Or else, they wanted a good reason to be forced (they might say) to change that policy, namely through winning their case against the College and thus precipitating legal interpretation that was incompatible with the policy they had espoused. Was it that last point that caused them not to argue "*abuse*" against the College, or was it merely that there was nothing in the arrangements that were inconsistent with an ordinary commercial operation?

But the plan did not work and the College won. HMRC's policies have been made to look illogical and their failure to stand by the extant policies to appear to be an act of weakness. What next? Another borderline anomaly to be cleared up?

Zero rated charity construction

Finally, we have a case in a line of now fairly old cases relating to whether a building is to be used for a relevant charitable purpose; or, whether the charity carries out a business. This case is *Longridge* (*TC02574*). It related to a charity providing water based sports mainly for young people, though there was some adult provision.

These cases are always decided on the basis of "standing back and looking at the picture as a whole" and so can seem notoriously subjective. The facts in this case, as in precedents, are complex, and the case decision report may not even have done them full justice. To my eyes, and at the risk of over simplification, this case seemed to turn on the use of volunteer labour by the charity. Otherwise, I cannot see the basis for the decision, particularly if considering the financial model. HMRC lost, on facts that they must have felt fairly confident would deliver victory.

It cannot be easy for HMRC to see some charities saying that the operation they run is not a business simply because of volunteers being involved, and thus achieving major VAT savings, where other charities seek significant input tax recovery running businesses that are structurally loss making. Whilst one charity cannot have it both ways, the sector as a whole (if it is fair to describe the vast panoply of charity as a "sector") seems to want to, and this contradiction is one that causes one of the most intractable dilemmas for HMRC.

Graham Elliott
Withers Worldwide

CASES & COMMENT

PFC Clinic AB (Case C-91/12)

Court of Justice of the European Union (CJEU)

The Decision

This case concerned the VAT treatment of plastic surgery and cosmetic treatments provided by PFC Clinic AB ("PFC").

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 15

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

PFC is a clinic providing services involving both cosmetic and reconstructive plastic surgery. PFC sought to recover its input tax on the basis that those services were fully taxable.

The Swedish tax authorities rejected the claim for input tax on the basis that the services provided by PFC constituted "medical care" which was exempt from VAT. The relevant exemptions are contained in Article 132(1)(b) and 132(1)(c) of Directive 2006/112/EC (the "Exemptions"). PFC appealed the tax authority's decision.

The Swedish Supreme Administrative Court referred questions to the CJEU as follows, asking:

1. Whether the Exemptions should be interpreted as covering services which consist of plastic surgery and/or cosmetic treatments.
2. Whether, in assessing the application of the Exemptions, it should be considered whether the treatments are carried out with the purpose of preventing or treating illnesses, physical impairments or injuries.
3. Whether the patient's understanding of that purpose can be taken into consideration.
4. If it is of any importance whether the intervention is carried out by licensed medical professionals, or that such professionals decide on its purpose.

The CJEU made the following comments in answering the questions posed by the national court:

- The concept of "medical care" is intended to cover services that have as their purpose the diagnosis, treatment and, insofar as possible, cure of diseases or health disorders. The CJEU expressly stated that this would include psychological health issues.
- Supplies of services consisting of plastic surgery and other cosmetic treatments 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 is for purely cosmetic reasons, it cannot not fall within that concept.
- It follows that the purpose of the services is relevant to determine whether the services in question are exempt from VAT.
- However, the subjective understanding of the person who undergoes plastic surgery or a cosmetic treatment is not in itself decisive for determining the purpose of the intervention.
- Determining whether a service has a therapeutic purpose is a medical assessment and must be based on findings of a medical nature, made by a person qualified for that purpose.
- It follows that where the services are supplied or undertaken by licensed members of the medical profession, or the purpose of such interventions is determined by such professional, this may influence the assessment of whether the services fall within the concept of "medical care" or "medical treatment" for the purposes of the Exemptions.

Commentary

The judgment is in line with previous CJEU case law on this issue and seems to support the current approach by HMRC to the exemption of cosmetic treatments and surgery. It provides further clarification on the tests to be applied in determining whether something is "medical care" in the context of cosmetic surgery.

It will be interesting to see how the guidance given by the CJEU in this case affects the approach to cosmetic and reconstructive treatments on a practical level. In light of the CJEU's comments, it seems that a non-medically qualified service provider may need the support of a qualified licensed professional to confirm that the procedure in question is being carried out for a medical reason. It remains to be seen whether the meaning

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 16

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

and scope of a "medical" or "therapeutic" purpose will be explored in further litigation.

Colaingrove Limited [TC02534]

First-tier Tribunal

The First-tier Tribunal ("FTT") allowed an appeal over the treatment of supplies of holiday accommodation and power by the operator of a holiday camp to customers taking short term holidays in static caravans or chalets.

Facts

Colaingrove supplied holiday accommodation and power (gas and/or electricity) – which was charged for separately from the accommodation – at holiday parks which it owned or operated. The taxpayer argued that the supplies, insofar as they were supplies of power, or "concrete and specific" elements of supplies which include the provision of power, should properly have been subject to VAT at the reduced rate. The charge for power was fixed and collected separately by the taxpayer from the customer at the time when the customer made a holiday reservation.

HMRC contended that the power concerned was being provided as part of supplies of fully serviced holiday accommodation, and such supplies are standard-rated in their entirety.

Both Colaingrove and HMRC relied on the case *Commission v France* (*Case C-94/09*) – the "French undertakers" case, in which the Court of Justice of the European Union found that the transport of a body by French undertakers could be subject to the reduced rate of VAT, despite the fact that it formed an element of the wider supply made by the undertaker. Colaingrove contended that there is nothing in European legislation on reduced rates which requires that the reduced rate be charged only if it is applied to all aspects of a category of supply, and that a selective application of the reduced rate cannot be excluded.

The Tribunal accepted the taxpayer's argument that even though the supplies of power were integral to the supply of holiday accommodation, the charges for them were still subject to the reduced rate of VAT. It also held that no abuse arising from artificial splitting was proved as no distortion of competition would result from the charges made for power attracting the reduced rate of VAT. The UK's legislation specifically provided for a reduced rate for supplies of electricity for consumption in a caravan. This was a distinct circumstance allowing the reduced rate.

In addition, FTT found that the *Card Protection Plan* ("CPP") jurisprudence was inappropriate and the appeal succeeded on this basis. The Tribunal went on to hold that were *CPP* jurisprudence to be appropriate, there would be a single complex supply of serviced holiday accommodation and this would not be artificially split for VAT purposes. Although the taxpayer's appeal succeeded, this secondary finding might suggest, perhaps, some lack of confidence in the primary conclusion.

Comments

This shows that generally accepted approach to single/multiple supplies, which is to start with *CPP*, is not always correct. HMRC have appealed *Colaingrove* to the Upper Tribunal. However, as the FTT's answer seems to be well founded in EU law, it is likely that the taxpayer will ultimately remain successful. In summary, a positive decision for maintaining reduced rates in the correct circumstances.

Amy Bache & Candice Walker
Deloitte LLP

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 17

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

ECONOMIC ACTIVITY/BUSINESS

Does Yarburgh Survive?

Graham C Brearley LLB(Hons) – Senior Manager at Grant Thornton UK LLP asks whether the High Court's judgment in Yarburgh Children's Trust survives the test of time.

Yarburgh Children's Trust [2002] STC 207, is one of those funny VAT cases. Not "funny" in an hilarious way, but "funny" in an odd or peculiar way. Those familiar with the case will know that both the VAT Tribunal (as it then was) and the High Court confirmed that the activity undertaken by the Trust – of letting a building for rent – did not constitute a business activity. As a consequence, and, in my view, contrary to European law, that activity was found to be outside the scope of VAT. In turn, as a result of that finding, the charity could claim zero-rating for the construction of a relevant charitable building.

It is one of the more exciting aspects of law that issues – sometimes extremely important issues – can be determined on the precise meaning given to a particular word or the precise placement of a comma or full stop. Having re-read the judgment of the Court in Yarburgh Children's Trust recently, it reminded me that this is one of those cases.

Business / Non-business or "economic" activities

Article 1 of the VAT Directive 2006/112 establishes a common system of VAT and Article 2(1)(c) confirms that, as far as the supply of services for consideration is concerned, if the services are supplied by a taxable person acting as such, under that common system, such supplies shall be subject to VAT. The Article refers to supplies being "made by a taxable person acting as such" which begs the question what is a taxable person? The Directive helps us here. Article 9 of the Directive gives us a precise definition and stipulates that, under the common system, "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. In simple terms therefore, a supply of services for consideration is within the scope of the tax (and thus tax is chargeable) if it is made by someone who, independently, carries out an economic activity.

This begs further questions. What is an "economic activity" and what is meant by the term "independently"? Again, the Directive provides us with precise answers to those questions. Firstly, as far as "economic activity" is concerned, Article 9 states that the expression "economic activity" is to be regarded as including any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions. For the avoidance of any doubt (if any should exist), Article 9 also stipulates that, in particular, the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall be regarded as an economic activity. (note the use of the word "shall" – in other words, this is a mandatory requirement). As far as the expression "independently" is concerned, Article 10 of the Directive explains that the condition of "independence" excludes services provided by employees or by other persons in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

The next question to resolve is whether the letting of a property for consideration is an activity which is to be classified as an economic activity bringing it within the scope of the common system of VAT. The Directive, once again, provides the answer. Article 25(1) of the Directive provides a simple definition – "supply of services" shall mean any transaction which does not constitute a supply of goods – and, without going into detail

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 18

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

here, it is clear that the letting of a property does not constitute a supply of goods such that, not being a supply of goods, it must therefore be a supply of services.

On the face of it, therefore, the activity of letting a property for consideration in the form of rent by a person acting independently is an activity which, under the precise terms of the Directive, is to be regarded as an "economic activity", and, thus, an activity which falls squarely into the scope of the common system.

Yarburgh Children's Trust (the Trust)

Given the facts of this case, I have to say that I still have great difficulty reconciling the High Court's judgment. In essence, the facts were very simple. The Trust constructed a building which, after its completion, was let to a separate charity (a playgroup) under the terms of a formal lease. That lease granted the building to the playgroup for a term of 21 years at an initial rent of £2,800 per annum renewable every three years and subject to an upward only rent increase based on inflation.

On the face of it, therefore, the Trust is receiving consideration in the form of rent for a supply of services and, as such, one would have expected the High Court to have ruled that that activity was an economic activity and, therefore, within the scope of VAT. How is it that the High Court came to a different conclusion? It seems that the answer to that question is the definition of the term "exploitation" within Article 9. Counsel for the Trust argued, and the Court accepted that, in the circumstances, the fact that the property had been let for consideration was not sufficient grounds for bringing the supply within the scope of VAT. It was necessary to consider the wider context of the transaction and to determine whether the letting for consideration amounted to the "exploitation" of tangible property. Based on established authority and subsequent European jurisprudence, the context of the Trust's transaction was such that, in the circumstances, the activity could not be regarded as exploitation. In the wider context, the activity was not to be regarded as an economic activity.

According to my dictionary, the noun "exploitation" means "use or utilisation, especially for profit". It seems to me that, on the evidence, over the term of the lease, the Trust was entitled to a minimum income from the property of some £58,800. (which does not take account of any indexation). The Trust had contributed £32,000 to the construction costs so, it seems, it was clearly going to make a profit. Although the profit may not have been as great as a full commercial lease entered into between a landlord and tenant, nonetheless, it can be seen that, if the dictionary definition is correct, the Trust could be said to be using or utilising the property for profit. However, Justice Patten states in his judgment that "the balance of authority is against treating a transaction or activity as economic or as part of a business merely because it results in a consideration or produces income".

The Court held that the VAT Tribunal was entitled to look at the wider context in which the letting activity came to be carried out. If it did not do so, the Court would be unable to decide whether the transaction was a supply of services for consideration by a taxable person acting as such. It is necessary for the Tribunal to enquire into the wider picture as it will need to ascertain the nature of the activity, the terms upon which and manner in which the activity is carried out and the nature of the relationship between the parties to the transaction.

Citing EC Commission v France (Case C-50/87), Justice Patten justifies this approach. In that case, the European Court of Justice (as it then was) had ruled that in certain circumstances, the granting of a lease for a low rent should be regarded as something of a "concession" rather than an economic activity. On the basis of this decision, the Court was satisfied that the VAT Tribunal had correctly concluded that the lease to the playgroup,

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 19

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

although at an annual rent, did not constitute an economic activity. The Court recognised that the lease to the playgroup was a letting at a low rent on the terms of a lease which only came into being in order to satisfy the requirements of lottery funding. The arrangement, far from being commercial or business-like in nature was designed simply to facilitate the use of the new building by a second charity (the playgroup). On that basis, the Court held that the letting of the property was an informal arrangement between closely connected organisations in conformity with their respective aims. As such, the use of the building by the Trust was not the exploitation of the property.

Rēdlihs v Valsts ieņēmumu dienests (Case c-263/11)

In a more recent case, the Court of Justice of the European Union (CJEU) considered the issue of whether the exploitation of tangible property constituted an economic activity and came to a somewhat different conclusion. In this case, the Latvian Authorities concluded that the taxpayer's sale of timber from a woodland constituted an economic activity and, as a result, the taxpayer was required to be registered for VAT. The Taxpayer, on the other hand, argued that the sale of timber had not been concluded for the purposes of making a profit, but merely to alleviate damage caused by a storm. In other words, the taxpayer was not exploiting the woodland for the purposes of obtaining income on a continuing basis but merely clearing the land and disposing of the damaged timber.

The CJEU held in this case that the concept of "economic activity" was objective in character in the sense that the activity had to be considered per se and without regard to its purpose or results. Consequently, the fact that the supplies of timber had been made in order to alleviate the consequences of a case of force majeure had no effect on the question whether those supplies had to be regarded as an economic activity. The fruits of tangible property, such as the sale of timber from a private forest had to be regarded as "exploitation" of that property if the sales were effected for the purposes of obtaining income therefrom on a continuing basis. This was an issue of fact which had to be assessed having regard to all of the circumstances of the case.

In light of this judgment, I do wonder whether, if Yarburgh had been referred to the CJEU, the outcome of the case would have been the same. On the one hand, following Commission v France, it seems that the CJEU accepts that the exploitation of a property for a low rent does not automatically constitute an "economic activity" and that all of the circumstances of the supply should be taken into account. On the other hand, in the Rēdlihs case, the CJEU stipulates that the concept of "economic activity" is objective in character and that if supplies are made for the purposes of obtaining income therefrom on a continuing basis (a matter for the national courts to determine), they will be regarded as falling within the concept of exploitation.

One of the factors which persuaded the High Court to find for Yarburgh was that the lease it granted to the playgroup was required by the terms of the lottery funding in order to give the playgroup security of tenure. Given that Article 9 requires us to ignore the purpose or result of an activity when determining whether a person is or is not a taxable person, I would have thought that this factor should have been ignored. The Court also seems to forget that the playgroup tenant was already in occupation of a Trust building and paying a licence fee (albeit a relatively nominal fee). It seems, therefore, that the Trust simply continued to "exploit" the property after the formal lease was granted.

All in all, I still find Yarburgh a difficult case to reconcile. It does seem that HMRC has the same difficulty too. Following the High Court judgment, it issued Business Brief 4C/03 which stated that its existing policy on what constitutes

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 20

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

a business activity for VAT purposes had not altered as a result of the Yarburgh case. An "interesting" response!

Graham C Brearley
Grant Thornton UK LLP

WHO CAN JOIN THE CLUB?

Eligibility for membership of VAT Groups

The UK and Ireland (amongst others) have recently been the subject of infraction proceedings by the European Commission who were of the view that national legislation on VAT grouping was too inclusive: *Case C-86/11 European Commission v United Kingdom ("EC v UK")*. Specifically, the European Commission took the view that undesirable "persons" were being invited to join the intra-group VAT-free party, namely those poor souls cast out from the fiscal light and forced to live in the penumbral regions of VAT: non-taxable persons.

The ability to group together related "persons" is found in Article 11 of the VAT Directive. This grants Member States the option to permit grouping in the following terms:

"*After consulting the advisory committee on [VAT], each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.*

A Member State exercising the option provided for in the first paragraph may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision."

The astute reader will see the problem immediately: Article 11 permits a Member State to treat as a single taxable person closely related "persons" – but the adjectival prefix "taxable" is conspicuous by its absence. In light of this, the UK's implementation in section 43 VATA 1994 permits qualifying companies to be grouped together for VAT purposes, giving rise to a deemed single taxable person. Importantly, section 43A VATA 1994 defines eligible group companies as follows:

> "*(1) Two or more bodies corporate are eligible to be treated as members of a group if each is established or has a fixed establishment in the United Kingdom and –*
>
> *(a) one of them controls each of the others,*
>
> *(b) one person (whether a body corporate or an individual) controls all of them, or*
>
> *(c) two or more individuals carrying on a business in partnership control all of them.*
>
> *(2) For the purposes of this section a body corporate shall be taken to control another body corporate if it is empowered by statute to control that body's activities or if it is that body's holding company within the meaning of section 736 of the Companies Act 1985.*
>
> *(3) For the purposes of this section an individual or individuals shall be taken to control a body corporate if he or they, were he or they a company, would be that body's holding company within the meaning of that section.*"

The UK's implementation focuses upon the links between the various entities but, importantly, status as a taxable person is not a requirement: Article 9 of the VAT Directive, as implemented by VATA 1994, is absent.

This omission was not one confined to the UK: Ireland, the Czech Republic, Denmark, and Finland adopted the same position. The European Commission thought this a step too far: VAT grouping was an exception to the basic rule that a taxable person should be treated as a separate and distinct fiscal entity and taxed accordingly. In light of the fact that VAT grouping was a derogation from a fundamental principle of VAT, the European Commission considered that the terms of Article 11 of the VAT Directive should be read restrictively, i.e. confined to taxable persons only. In addition to such textual arguments, the European Commission

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 21

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

was apparently concerned about possible abuse by taxpayers and the fact that domestic legislation by Member States exercising the option granted by Article 11 of the VAT Directive may have thereby introduced a structural breach of the principle of fiscal neutrality: a non-taxable person embraced by a VAT group enjoyed commercial and fiscal advantages that were not extended to non-taxable persons outside the exclusive curtilage of the VAT group.

The European Commission commenced infraction proceedings against, *inter alios*, the UK and Ireland. In November 2012, Advocate General *Jääskinen* delivered his opinion in *Case C-85/11 European Commission v Ireland* (*"EC v Ireland"*) which applied to all related infraction proceedings, including *EC v UK*.

As noted by Melanie Hall QC in "The AG opinion in EC v Ireland on VAT groups" *Tax Journal*, Issue 1150, 32, the Opinion of AG *Jääskinen* left little room for doubt as to his views: he was trenchantly of the opinion that non-taxable persons could indeed be included within a VAT group, both on a textual analysis of Article 11 of the VAT Directive and based upon his view that such a result was consistent with the aims and purpose of VAT grouping *per se*. Mrs Hall predicted a favourable result for the taxpayer and she has been proved quite right: the CJEU resoundingly rejected the arguments of the European Commission. Consequently, the CJEU has approved the practice of the UK and other Member States that extends membership of VAT groups to non-taxable persons including, for example, passive holding companies and shell or non-trading companies.

As noted by AG *Jääskinen* at [38] of his Opinion in *EC v Ireland*, the Explanatory Memorandum to the proposal for the Sixth VAT Directive stated that "… *in the interests of simplifying administration or of combating abuses* (*e.g. the splitting up of one economic operator among several taxable persons so that each may benefit from a special scheme*) *Member States will not be obliged to treat as taxable persons those whose "independence" is purely a legal technicality*": see COM(73)950, 20 June 1973. Importantly, subject to ensuring that abuse was not inadvertently fostered, grouping of companies for VAT purposes was an administrative convenience. Specifically, it was a deeming provision. As noted by AG *Jääskinen* at [40] of his Opinion:

> "The forming of a VAT group results in the creation of a single taxable person for VAT purposes which is in all aspects comparable to a taxable person consisting of only one entity. Regardless of its nature as a special scheme, VAT grouping neither introduces limitations nor broadens the rights of a taxable person as defined in Article 9 of the VAT Directive."

The CJEU has adopted an equally firm line and a structure that bears a striking resemblance to that adopted by AG *Jääskinen* in *EC v Ireland*.

First, after the usual recitation of the parties' arguments, the CJEU engaged in a purely textual analysis of Article 11 of the VAT Directive: see [32]. Quite simply, the CJEU relied upon the fact that the wording of Article 11 of the VAT Directive lacks any express limitation to the qualifying "persons" eligible to enter into a VAT group. Specifically, there is no requirement that the said "persons" must satisfy the requirements of Article 9 of the VAT Directive, i.e. being a taxable person. Further, at [33] – [35], the CJEU looked at the drafting history of what is now Article 11 and found no justification for imposing the limitation as suggested by the European Commission. See also the Opinion of AG *Jääskinen* at [28] – [34].

The CJEU did not address squarely the European Commission's argument *reductio ad absurdum* that the legislation of Ireland and the UK permitted the creation of VAT groups comprised exclusively of non-taxable persons. With respect, this was a daft argument and rejected as such by AG Jääskinen at [35] of his Opinion: supplies between non-taxable persons –

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 22

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

whether intra- or extra-group – would, by definition, fall outside the scope of VAT in any event.

The CJEU also declined to adopt expressly the reasoning of AG Jääskinen based upon the principle of legal certainty (see Opinion at [36]), i.e. Article 11 refers to "persons" and not "taxable persons". In those circumstances, he reasoned, tax-payers and fiscal authorities should be able to rely upon the clear wording of the legislation. The omission of this reason in the judgment of the CJEU is a tacit rejection of AG's invitation to adopt a stricter approach to statutory construction thereby avoiding, at least in the context of taxation, the inherent uncertainty created by the principle of purposive construction and the resulting malleability of the legislative text. What the CJEU did do, however, was to focus upon the wording and structure of Article 11 of the VAT Directive to reach the conclusion, at [36], that Article 11 is directed exclusively to the result or outcome of grouping – namely, being treated as, or deemed to be, a single person. To this extent, the CJEU considered that Article 11 of the VAT Directive was concerned with "outcome" and not the requirements of eligibility and could not be restricted as argued by the European Commission.

Finally, the CJEU looked at the context and objectives of Article 11 of the VAT Directive more generally and concluded that grouping was directed to two ends: administrative simplification and/or prevention of abuse: see [43] – [44]. Interestingly, the European Commission's concerns about abuse in this regard were rejected by the CJEU on the basis that Article 11(2) of the VAT Directive itself obliges Member States to take measures to prevent abuse: see [45].

Although not expressly adopting all of the AG's reasoning, the Opinion remains interesting reading to understand the nature and effect of VAT grouping, irrespective of the taxable nature of its members.

As noted by AG Jääskinen at [45] – [47], VAT grouping does indeed result in cash flow advantages for members of the VAT group. However, far from being a cause of complaint, this was merely the result of creating the umbrella of a VAT group under which the members could shield their activities from fiscal assessment. This approach of the AG is noteworthy because, rather than treat such advantages as potentially abusive or at least suspect, they are deemed to be nothing more than the normal, expected and permitted consequences of grouping. Indeed, the CJEU at [44] took the view that the inclusion of non-taxable persons within a VAT group may not only contribute to administrative simplification and actually prevent abuse but could also be "*indispensible to those ends of it alone establishes the close financial, economic and organisational links which must exist between the persons constituting that group in order for it to be regarded as a single taxable person*". This is clearly a reference to the passive holding company (or similar) which sits a the apex of a company structure and, via its ownership of subsidiaries, creates the intra-company relationships which qualify for grouping under Article 11 of the VAT Directive.

As is not uncommon, AG Jääskinen's Opinion was more discursive that the judgment of the CJEU. Specifically, his Opinion at [48] gave an example of the effect of out-sourcing that may be of interest to taxpayers in the financial services sector seeking fiscal efficiencies:

"Where an economic operator is not entitled to deduct input VAT incurred on a purchase, it might be economically advantageous for it to produce the goods or services itself. For example, a bank that is not entitled to deduct VAT might benefit economically if it produces IT services needed for its banking activities internally rather than buying them from a third party. However, if the VAT grouping option is available, it may outsource its IT service provision to a subsidiary belonging to the group and still gain the same advantage."

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 23

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

To be fair, this is nothing more than an entirely orthodox view that the structure of one's business and how it is organised internally may well have fiscal consequences, albeit a view that HMRC are often loathe to accept. What is clear, however, is that AG Jääskinen is plainly of the opinion that deliberately structuring one's business by way of out-sourcing and grouping in order to gain a tax advantage is entirely legitimate and should not trigger scrutiny by national tax authorities concerned about "abuse of rights" under *Case C-255/02 Halifax [2006] STC 919*.

What is not squarely addressed by the CJEU – because it did not arise on the facts of the reference – is what happens to the fiscal rights and liabilities of the members of the VAT group inter se. That is, Article 11 of the VAT Directive gives rise to a fictitious entity, namely a single conglomerate for VAT purposes: the representative member. The representative member is the interface between the tax authorities and the VAT group companies. It is this representative member who, for administrative convenience, is liable to account to the tax authorities for the tax owed by all members of the group and to whom repayments are made. What, however, happens (if anything) to the directly effective rights of the constituent members if the VAT group is disbanded or if they leave the VAT group? Are rights, for example, to reclaim VAT repatriated to the individual member on departure from, or demise of, the VAT group? Alternatively, did those rights ever leave the individual companies? Is any "reversion" of the right illusory, precisely because they never really left the individual company? Alternatively, if a company is assimilated into the Borg, are its individual rights irretrievably transferred to the collective, i.e. the representative member? Does it / should it matter whether or not the VAT group continues to exist?

The judgment of the CJEU is silent on such matters. AG Jääskinen's opinion sheds some light of these issues, albeit obliquely. For example, his Opinion at [40]:

> "The forming of a VAT group results in the creation of a single taxable person for VAT purposes which is in all aspects comparable to a taxable person consisting of only one entity. Regardless of its nature as a special scheme, VAT grouping neither introduces limitations nor broadens the rights of a taxable person as defined in Article 9 of the VAT Directive."

This would suggest that, ultimately, the rights and liabilities remain those of the individual members, irrespective of measures put in place to give effect to administrative convenience. Indeed, the same view was echoed by the European Commission and recorded by the CJEU in *EC v UK* at [20]:

> "Neither the wording of Article 11 of the VAT Directive nor the preparatory documents relating to that directive state that that provision was intended to alter the concept of a "taxable person" or to extend the rights and obligations of taxable persons to others."

This is relevant to what may be a peculiarly UK problem arising from HMRC's "long-tail" liability to refund VAT as a result of *Fleming* claims. Such claims may be of some antiquity and cover periods when a VAT group did exist but which has now been disbanded; alternatively, the claimant taxpayer may have left the VAT group and claims individually; alternatively still, the representative member (whether or not the same representative member in existence at the relevant time) may make a claim for VAT owed to a member or erstwhile member of the group. In such cases, where the liability to repay VAT is not in issue, to whom should HMRC pay the money?

This thorny issue is not resolved by *EU v UK* but is the subject of on-going litigation in the First-tier Tribunal. VAT grouping will therefore continue to be of interest for some years to come.

David Scorey
Essex Court Chambers

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 24

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

CUSTOMS

What is obvious negligence?

The General Court of the European Union gave further guidance on this matter on 19 March 2013 in *Case T324/10, Firma Léon Van Parys NV* (*the applicant*) *v European Commission***.**

The case was an application for annulment of part of Commission decision C (2010) 2858 of 6 May 2010 finding that post-clearance entry in the accounts of import duties was justified and that remission of those duties was not justified in the case of the applicant.

The case provides useful examples of common trade practices that the Court found do not amount to obvious negligence.

Facts

Between 22 June 1998 and 8 November 1999 the applicant, through its customs agent, lodged with the Antwerp Customs Office (Belgium) 116 import declarations for bananas from Ecuador.

The import declarations were supported by 221 import licences, apparently issued by the Kingdom of Spain, which allowed bananas to be imported into the European Community as part of a tariff quota with payment of a reduced customs duty of EUR 75 per tonne, under Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1), as amended.

By letter dated 1 February 2000 the European Anti-Fraud Office (OLAF) informed the Belgian customs authorities that forged Spanish import licences, bearing forged stamps from the Spanish authority responsible for the issue of those documents, had been used to import bananas into the Community. In the course of an investigation the customs authorities discovered that the 221 import licences presented by the applicant to the Antwerp Customs Office, during the period from 22 June 1998 to 8 November 1999, were forged Spanish licences.

On 5 July 2002 the Belgian customs and excise authorities drew up a report ("the Report of 5 July 2002"), which it sent to the applicant and the customs agent, among others, listing the findings made. According to the Report of 5 July 2002 233 import licences used by the applicant represented forged Spanish licences, 221 of those licences having been presented in Antwerp and 12 in Hamburg (Germany). As regards the period from 1 January to 8 November 1999, 107 licences were involved, all presented by the applicant to the Antwerp Customs Office.

By letter of 26 July 2002 the Belgian customs and excise authorities required the applicant and the customs agent to pay the amount of EUR 7 084 967.71 for the banana imports dating from 1 January 1998 to 8 November 1999, corresponding to the application of a customs duty of EUR 850 per tonne imported, under Article 18(2) of Regulation No 404/93.

After the applicant and the customs agent had challenged the recovery of post-clearance customs duties imposed on them, the Belgian customs and excise authorities were of the opinion that the request for waiver of postclearance recovery and for remission of duties should be granted, and by letter dated 14 December 2007 transferred the file to the Commission of the European Communities so that it might take a decision, in accordance with Articles 871 and 905 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

In its letter of 14 December 2007 the Belgian customs and excise authorities were of the opinion that it was not possible in the present case to apply Article 220(2)(b) of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 25

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

(OJ 1992 L 302, p. 1, "the CCC") as there was insufficient evidence to justify a finding that an error had been committed by either the authorities of the Member States or by the Commission. On the other hand it found that remission of duties was required, under Article 239 of the CCC, as there was a special situation for the purposes of that article, and the applicant and the customs agent had not acted with obvious negligence.

The applicant's case was examined, in accordance with Articles 873 and 907 of Regulation No 2454/93, by a group of experts composed of representatives of all Member States, at a meeting on 12 April 2010.

By decision C (2010) 2858 final of 6 May 2010 ("the contested decision"), the Commission allowed post-clearance entry in the accounts of import duties (Article 1(1)) and remission of duties in the case of the customs agent, (Article 1(2)), but not in the case of the applicant, (Article 1(3)).

As regards the imports made in 1999, the Commission pointed out, in recital 11 of the contested decision, that, when the imported goods were released for free circulation, the customs agent had presented import licences, apparently issued by the Spanish authorities, which the applicant had obtained from two Spanish companies through a Portuguese trader ("M"). The Commission stated that the applicant did not appear on the licences since it had simply purchased the use thereof and since it was not a transferee.

In recital 32, the Commission expressed its opinion that post-clearance entry in the accounts of the duties legally owed should be carried out, on the ground that no error on the part of the customs authorities could be found in this case because the licences were forged and Spanish authorities had had no part in drawing up those licences.

In recitals 45 to 49, the Commission described the irregularities found in the administration of the tariff quota which amounted to a special situation *inter alia*:

1 The failure to detect the fact that the banana imports covered by the import licences exceeded that quota; and
2 The inadequacy of the Spanish authorities' precautions regarding the issue of import licences, more specifically in notifying information regarding the model of the stamp used for the issue of those licences. Accordingly, the Commission considered that such circumstances exceeded the normal commercial risk which an operator had to bear and that they constituted a special situation covered by Article 239 of the CCC.

However the Commission considered that the applicant had acted with obvious negligence and had not shown sufficient diligence.

The Commission observed, in recital 60, that there was no trace of contacts between the applicant and the companies that were presented as the holders of the import licences, whereas, in its view, such contacts appeared indispensable so that the goods could be released for free circulation, as the names of those companies appeared on the declarations of release for free circulation, for which those companies might have been held liable. In recitals 60 to 61 the Commission concluded that if the applicant had contacted those firms, it would have been apparent that they were not aware of the sale of the use of the licences issued in their name, and that the arrangements made and the lack of contacts showed that the applicant was ready to take risks to import bananas benefitting from the tariff quota. Secondly, the Commission highlighted the commercial relations between the applicant and M, namely the fact that the negotiations for the sale of the import licences were conducted directly between them (recital 62), that the payments were made into a personal account of M and not into an account of M's employer (recital 63), and that the applicant had not adduced evidence that the import

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 26

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

licences, which it returned to M, were in fact received by him, whereas the holders of those licences had to recover them in order to secure the release of the guarantee that they had provided (recital 64). Thirdly, the Commission noted that the purchase of the use of the licences was charged using pro forma invoices sent by two Spanish companies, and that the invoices were sent by fax from unknown addresses or by unknown persons, and that all of the operational arrangements, over which the applicant seemed to have no concerns, did not fall within standard trading practice.

The Commission concluded, in recital 67, that the applicant had not shown the diligence to be expected of an experienced operator and that, accordingly, the applicant could not have the benefit of a finding that there was no obvious negligence. On the other hand, the Commission was of the view that the applicant's customs agent had not engaged in any deception or obvious negligence and that he could, therefore, benefit from remission of import duties.

By application lodged at the Registry of the General Court on 11 August 2010, the applicant brought an action claiming that the General Court should annul Article 1(1) and (3) of the contested decision.

Applicant's pleas in law

In support of its action, the applicant relied on six pleas in law:

1. Infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC, of the provisions of Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6) and of Regulation No 2362/98, of the trading practices recognised by the World Trade Organisation (WTO), of an error in the classification of the facts and infringement of the probative value of the documents;
2. Infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC and of the principle of proportionality;
3. Infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC, of the former Article 211 EC, of the principle of legitimate expectations and of the general legal principle of *patere legem quam ipse fecisti*;
4. Infringement of the Treaty and of the rules relating to its application, in particular of Article 239 of the CCC and the principle of equal treatment;
5. Infringement of the Treaty and of the rules relating to its application, in particular of Article 220(2)(b) of the CCC;
6. Infringement of essential procedural requirements and in particular of the rights of the defence.

The Court first examined the fifth and sixth pleas in law of the action, made against the post-clearance recovery of duties under Article 220(2)(b) of the CCC. The Court then considered the first four pleas together made in favour of the remission of duties under Article 239 of the CCC.

Waiver under Article 220(2)(b) of the CCC

The Court observed that under Article 220(2)(b) of the CCC the waiver of post-clearance recovery by the national authorities is subject to three cumulative conditions. Provided that those three conditions are fulfilled, the person liable is entitled to a waiver of postclearance recovery (see, by analogy, *Case C251/00 Ilumitrónica [2002] ECR I10433*, paragraph 37 and case-law cited).

First, non-collection of the duties must have been due to an error made by the competent authorities themselves. Secondly, the error they made must be such that the person liable, acting in good faith, could not reasonably have been able to

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 27

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

detect it in spite of the professional experience and exercise of due care required of him. Thirdly, the person liable must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned (see, by analogy, *Ilumitrónica*, paragraph 38 and case-law cited).

The Court found that there was no evidence that the non-collection was due to an error on the part of the Spanish authorities.

The Court observed that it is apparent from Article 4(3) of the CCC, that "customs authorities" means the authorities responsible inter alia for applying customs rules. Accordingly, it follows that this includes the administrative authorities of the Member States and non-Member States which are responsible for ensuring the supervision and control of the customs rules, in accordance with the definition of those tasks provided by Article 4(13) and (14) of the CCC. Although the Commission plays a role in the administration of the customs tariff enabling the import of bananas with a reduced customs duty, it cannot on that basis be considered to be a customs authority for the purposes of the CCC. Accordingly, any errors made by it, in that context, are not capable of conferring entitlement to the waiver of post-clearance recovery under Article 220(2)(b) of the CCC.

The sixth plea in law – infringement of essential procedural requirements and in particular the rights of the defence was rejected by the Court on the particular facts of the case.

I note that the Court was not asked to consider the error made by the Belgian customs authorities. The Belgian customs made the error of accepting customs declarations to a reduced rate of duty relying on forged licences. With respect, the applicant failed to make the appropriate plea in law.

Obvious negligence – second indent of Article 239(1) of the CCC

General observations

The Court observed that Article 905 of Regulation No 2454/93, which sets out and expands on Article 239 of the CCC, constitutes a general fairness clause intended in particular to cover exceptional situations which, in themselves, do not fall within any of the cases provided for in Articles 900 to 904 of that regulation (*Case C86/97 TransExImport [1999] ECR I1041*, paragraph 18). It is clear from Article 905 that repayment of import duties is subject to two cumulative conditions, namely, first, the existence of a special situation and, secondly, the absence of deception or obvious negligence on the part of the economic operator (*Case T282/01 Aslantrans v Commission [2004] ECR II-693*, paragraph 53). Accordingly, repayment of duties must be refused if either of those conditions is not met (*Case T75/95 Günzler Aluminium v Commission [1996] ECR II-497*, paragraph 54, and *Aslantrans v Commission, paragraph* 53).

The contested decision stated that the condition of the existence of a special situation was satisfied in this case. Consequently, the General Court's examination exclusively related to the question of whether the Commission was right to find that there was obvious negligence.

According to the case-law, in order to assess whether there is obvious negligence within the meaning of Article 239 of the CCC, account must be taken in particular of the complexity of the provisions non-compliance with which resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader (*Cases C48/98 Söhl & Söhlke [1999] ECR I7877*, paragraph 56, and *Case C156/00 Netherlands v Commission [2003] ECR I2527*, paragraph 92).

The Commission enjoys a margin of discretion when adopting a decision pursuant to Article 239 of the CCC (see, by

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 28

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

analogy, *Case T290/97 Mehibas Dordtselaan v Commission [2000] ECR II-15*, paragraphs 46 and 78). The repayment or remission of import duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure, and, consequently, the provisions which provide for such repayment or such remission are to be interpreted strictly. In particular, since a lack of obvious negligence is an essential condition of being able to claim repayment or remission of import duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited (*Söhl & Söhlke*, paragraph 79 above, paragraph 52).

However, although the Commission has some discretion as regards the application of Article 239 of the CCC, it cannot disregard its duty to balance, on the one hand, the European Union interest in full compliance with the provisions of customs legislation, and, on the other hand, the interest of an importer acting in good faith not to suffer harm which goes beyond the normal commercial risk (see judgment of 30 November 2006 in *Case T382/04 Heuschen & Schrouff Oriëntal Foods v Commission*, paragraph 46 and case-law cited).

Burden of proof of obvious negligence

The Court observed that, where the customs authorities have concluded that it could not be established that there was deception or obvious negligence on the economic operator's part, it is for the Commission, when it intends to depart from the position taken by the national authorities, to prove, on the basis of relevant facts, that there was in this case obvious negligence on the part of that operator (*Case T26/03 Geologistics v Commission [2005] ECR II3885*, paragraphs 78 and 82).

In its letter of 14 December 2007, the Belgian customs and excise authorities were of the opinion that there was a special situation within the meaning of Article 239 of the CCC and that the applicant had not acted with obvious negligence.

There were five factors relied on by the Commission to find the lack of due care:

1. The lack of contact between the applicant and the entities holding the import licences;
2. The purchase of the use of the licences by direct negotiations between the applicant and M;
3. The payments made to the personal account of M;
4. The lack of evidence of receipt by M of the licences sent by the applicant;
5. The invoicing for the purchase of the use of the licences by pro forma invoices sent by fax, certain of them from unknown addresses or persons.

The Court dealt with the Commission's five factors in three groups. The following common trade practices, according to the Court, do not amount to obvious negligence.

Lack of contact between the applicant and the entities holding the import licences

On this point the applicant claimed that, other than by bearing a disproportionate administrative burden, having regard to the large number of licences in dispute, it could not contact each licence holder. It acted within the framework of normal commercial relations by leaving M to manage the contacts with its network.

The Court did not accept, as a general rule, that an economic operator who imports goods into the European Union and who, with that objective, resorts to the use of an intermediary to obtain use of the import licences, is regarded as lacking in prudence or diligence if he does not carry out checks of the holders of the licences. Recourse to the service of such an intermediary comes within the practical methods used to carry out the business of imports within the discretion

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 29

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

of the importer and is aimed at facilitating that business, since the importer may consider that, in a particular economic context, the intermediary is a person who is better placed than he is to find newcomer operators who have obtained licences and who wish to transfer use thereof. In the absence of any other detailed information capable of giving rise to doubts on the part of the operator as to the authenticity of the import licences used, it cannot be considered that contact with the holders of the import licences was indispensable to enable releasing the imported goods into free circulation.

Consequently, the court found [103] that the Commission had not established that the circumstances described in recitals 60 and 61 of the contested decision constituted a lack of diligence on the part of the applicant.

Direct negotiations with M, payments made to the personal account of M and lack of evidence of receipt by M

On this point the applicant claimed that it was normal to make payments into M's personal account, since M operated on an independent basis and it acted in this way with other intermediaries; that it could not be criticised for not having checked whether the licences which it returned to M were actually received by him, which would constitute a disproportionate burden of work and would not be consistent with standard trading practices, and that it would have been informed if M had not received the licences, in the light, in particular, of the regular nature of their business relations.

In defence, the Commission stated that a diligent operator would ensure that payments were made to the appropriate accounts and that it would check that the licences which it returned were actually received. The Commission stated that a diligent operator ought to have had concerns as to the fact that M wanted large amounts to be paid into his own name and into private accounts, without his employer being aware of it.

The Court noted that the applicant had maintained commercial relations with M since 1997, having previously had relations during several years with a Portuguese international trading firm for which M worked. The commercial relationship for the purchase of the right to use the licences in dispute was established solely between the applicant and M. Nothing in the contested decision or in the Commission's written pleadings calls into question the applicant's assertion that M carried out his activity as an intermediary independently or indicates that M had fraudulently carried out that activity. Therefore, the Court found that the Commission's arguments could not be upheld, since they were based on the idea that recourse to an intermediary, who was, moreover, employed by an international trading firm, to purchase right to use the licences in dispute presented an increased risk of fraudulent practices.

Therefore the Court held [108] that:

- neither the applicant's negotiations directly with M for the purchase of the use of the licences in dispute,
- nor the payments for all of those purchases into M's personal account,
- nor the lack of a request to M for proof of receipt of the licences used that it returned to M

show that the applicant displayed a lack of due care.

Receipt of pro forma invoices sent by fax

The applicant claimed that the use of pro forma invoices is a standard trading practice, used with other intermediaries and by other importers, those invoices constituting order forms on the basis of which it paid M, who subsequently established the final invoices. The fact that the pro forma invoices had been sent by Spanish companies which the applicant did not know, did not constitute a particularity which ought to have encouraged it to be more

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 30

Letterpart Ltd • Size: 240mm x 162mm • Date: May 1, 2013 • Time: 15:0

vigilant, as the operators in question were undertakings unknown in the banana sector and all of the contacts with those operators were managed by M.

To substantiate the applicant's lack of diligence, the Commission relied particularly on the fact that the pro forma invoices for the purchase of the rights to use the licences in dispute were sent from unknown faxes and by unknown persons.

The pro forma invoices in question originated from Spain, the fax numbers were Spanish and the reference to Spanish "copy shops" appeared on the invoices received by fax. The rights to use the licences in dispute were purchased from a Spanish undertaking. The pro forma invoices all include a postal address and a telephone number, referred to in their letterheads. One of the invoices includes the reference "casa de fotocopia" (photocopy service) in the upper margin and another includes a Spanish fax number.

The Court found that the fact that the pro forma invoices had been sent by fax from an unknown addresses does not show lack of diligence on the part of the applicant.

Firstly, the fact that a pro forma invoice originating from an undertaking having its registered office in Spain is sent from a fax machine situated in that country does not require the recipient to raise his level of diligence.

Secondly, the fact that one of the five invoices sent by that Spanish undertaking to the applicant had been sent from what appeared to be a photocopy service cannot, in itself, give rise to doubts on the part of the applicant as to its commercial relationship with that undertaking or as to the authenticity of the invoices in dispute.

The Commission had doubts whether the payment of very large sums of money on the basis of such invoices fell within standard trading practice. But the Court observed that without other detailed information relating to the use of the pro forma invoices, it could not be held that the Commission's doubts were established.

Therefore the Court held [116] that receipt of pro forma invoices by fax did not amount to a lack of due care.

Therefore the Court held [117] that the Commission had not discharged the burden of proving obvious negligence.

Comment

Since the case of *Söhl & Söhlke* in 1999, it has rather too easy for national authorities and the Commission to characterise common business practices as obvious negligence. In *Firma Leon Van Parys* the Court found that certain common business practices did not amount to obvious negligence. Whereas it may be too early to say that the tide has turned, there is certainly more weight to put into the traders' side of the balance that the Court had in mind in *Heuschen & Schrouff Oriëntal Foods v Commission*.

Jeremy White
Pump Court Tax Chambers

Letterpart Ltd • Typeset in XML • Division: DVITI_204 • Sequential 31

CONTRIBUTORS

David Rudling and Alan Dolton
LexisNexis

Graham Elliott
Withers Worldwide

Amy Bache & Candice Walker
Deloitte LLP

Graham C Brearley
Grant Thornton UK LLP

David Scorey
Essex Court Chambers

Jeremy White
Pump Court Tax Chambers

Subscription enquiries
LexisNexis Customer Services
Tel: +44 (0)84 5370 1234
Email: customer.services@lexisnexis.co.uk

EXECUTIVE EDITOR

Marc Welby
BDO LLP

Assistant Editors

Graham Elliott
Withers Worldwide

John Davison
Independent Indirect Tax consultant

SPECIALIST EDITOR

Giles Salmond
Deloitte LLP

Editorial enquiries
Halsbury House
35 Chancery Lane
London WC2A 1EL
Commissioning: Tanya Campbell
Technical: David Rudling
Production: Tanya Campbell

The data contained in this publication is intended to be a general guide and cannot be a substitute for professional advice. Neither the author(s) nor the publisher accept responsibility for loss occassioned to any person acting or refraining from acting as a result of material contained in this publication. This is a Butterworths' publication.

Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire

Published 12 times per year: £476

Copyright Reed Elsevier (UK) Ltd 2009

ISSN 1363–9560