Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59

# De Voil Indirect Tax Intelligence

ISSUE 208 SEPTEMBER 2013

## NEWS IN BRIEF

Government Publications 2
European Commission 7
Tribunals 8
Court of Justice of the European Union 12

## EDITORIAL

Pension fund costs 12

## CASES AND COMMENT

Mercedes-Benz Financial Services UK Limited 14
Fiscale Eenheid PPG Holdings 15

## CONTEXT IS EVERYTHING!

The CJEU interpretation of VAT law 16

## HERE COMES THE SUN

Solar panel dumping dispute 19

## CUSTOMS

*Halifax* explained 24

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 1

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



# NEWS IN BRIEF

## Government Publications

### Revenue & Customs Brief 25/2013 VAT: Insolvency services – further clarification of Tribunal ruling in Paymex

HMRC have issued RCB 25/13 dated 2 September 2013. It gives further clarification of their position on the VAT treatment of supervisors' fees in voluntary arrangements, in circumstances where the conditions for exemption as set out in the Paymex decision are not met. The brief also confirms that the same conditions for the exemption apply to trust deeds.

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

"HMRC Revenue & Customs (HMRC) Brief 17/13 (www.hmrc.gov.uk/briefs/vat/brief1713.htm) published on 8 July 2013 further clarified the VAT treatment of supervisors' fees in light of the Paymex judgment, following on from Brief 27/11 (www.hmrc.gov.uk/briefs/vat/brief2711.htm) published on 19 July 2011 and Brief 35/11 (www.hmrc.gov.uk/briefs/vat/brief3511.htm) published on 20 September 2011.

In issuing Brief 17/13, HMRC did no more than re-state the existing legal position which was unaffected by the Paymex judgment. When handling any repayments of VAT HMRC takes into account all relevant circumstances of the case including published guidance before verifying the repayment as being appropriate.

The provisions of Brief 17/13 also apply to trust deeds in that the same firm of trustees must conduct the trust deed from the trustee's appointment through to its conclusion in order for the supply to constitute a single exempt supply for VAT purposes.

Issued 2 September 2013"

### Revenue & Customs Brief 19/2013: Senior Accounting Officer guidance updates

HMRC have issued RCB 19/13 dated 6 August 2013. It concerns a number of updates to the Senior Accounting Officer (SAO) guidance, which HMRC regard as policy clarifications, rather than changes. These include: the responsibilities of companies whose shares are held by a parent on trading account (such as banks or private equity groups) to comply with their SAO obligations; use of correct SAO certificates; and duties of the SAO of the representative member of a VAT group, which HMRC acknowledges was not covered explicitly in previous guidance.

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

"**1. Introduction**

This Revenue & Customs Brief draws attention to:

(1) HM Revenue and Customs' (HMRC's) view on companies falling within the Senior Accounting Officer (SAO) rules which meet the qualifying criteria and whose shares are held by a parent on trading account (commonly a situation involving banks or private equity (PE) groups).
(2) Recent updates to HMRC's SAO Guidance (SAOG):

(a) the form of certificate that an SAO must provide to HMRC as prescribed in the SAOG (SAOG15200www.hmrc.gov.uk/manuals/saogmanual/SAOG15200.htm onwards)
(b) other recent updates to the SAOG, including:
- clarification of HMRC's interpretation of the 'turnover test' (SAOG11232www.hmrc.gov.uk/manuals/saogmanual/SAOG11232.htm)
- provision of an example of balance sheet aggregation (SAOG11285www.hmrc.gov.uk/manuals/saogmanual/saog11285.htm)

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 2

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



- clarification of HMRC's view on the operation of the SAO rules when a qualifying company fails to identify its SAO (SAOG12100www.hmrc.gov.uk/manuals/saogmanual/SAOG12100.htm; 12200www.hmrc.gov.uk/manuals/saogmanual/saog12200.htm; 16300www.hmrc.gov.uk/manuals/saogmanual/SAOG16300.htm; 16400www.hmrc.gov.uk/manuals/saogmanual/SAOG16400.htm; 16500www.hmrc.gov.uk/manuals/saogmanual/SAOG16500.htm)
- slightly revised wording in SAOG14330 (www.hmrc.gov.uk/manuals/saogmanual/SAOG14330.htm); 14352 (www.hmrc.gov.uk/manuals/saogmanual/SAOG14352.htm) and 14353 (www.hmrc.gov.uk/manuals/saogmanual/SAOG14353.htm) to improve consistency of language with the SAO legislation
- clarification that the concept of 'in all material respects' should be considered in relation to a company and not a group (SAOG14330www.hmrc.gov.uk/manuals/saogmanual/SAOG14330.htm)
- clarification of HMRC's view on the responsibilities of an incoming SAO in relation to the period covered by their predecessor (SAOG15200www.hmrc.gov.uk/manuals/saogmanual/SAOG15200.htm)
- clarification of HMRC's application of the SAO penalty provisions in group situations (SAO18300www.hmrc.gov.uk/manuals/saogmanual/SAOG18300.htm, 18400www.hmrc.gov.uk/manuals/saogmanual/SAOG18400.htm, 18500www.hmrc.gov.uk/manuals/saogmanual/SAOG18500.htm and 18600www.hmrc.gov.uk/manuals/saogmanual/SAOG18600.htm)
- clarification of HMRC's view that the SAO for the representative company in a VAT group must carry out his or her SAO duties in relation to the group's VAT liabilities (SAOG14335www.hmrc.gov.uk/manuals/saogmanual/SAOG14335.htm; 14460www.hmrc.gov.uk/manuals/saogmanual/SAOG14600.htm; 15100www.hmrc.gov.uk/manuals/saogmanual/SAOG15100.htm; 16710www.hmrc.gov.uk/manuals/saogmanual/SAOG16710.htm; 18400www.hmrc.gov.uk/manuals/saogmanual/SAOG18400.htm and 18600www.hmrc.gov.uk/manuals/saogmanual/SAOG18600.htm)
- revised wording to reflect recent organisational changes in HMRC (SAOG13100www.hmrc.gov.uk/manuals/saogmanual/SAOG13100.htm; 13400www.hmrc.gov.uk/manuals/saogmanual/SAOG13400.htm; 16100www.hmrc.gov.uk/manuals/saogmanual/SAOG16100.htm; 16300www.hmrc.gov.uk/manuals/saogmanual/SAOG16300.htm; 16500www.hmrc.gov.uk/manuals/saogmanual/SAOG16500.htm; 16600www.hmrc.gov.uk/manuals/saogmanual/SAOG16600.htm; 16700www.hmrc.gov.uk/manuals/saogmanual/SAOG16700.htm; 16900www.hmrc.gov.uk/manuals/saogmanual/SAOG16900.htm)
- revised wording and updated guidance regarding penalty assessments, appeals, reasonable excuse and postponements (SAOG20100www.hmrc.gov.uk/manuals/saogmanual/SAOG20100.htm and 22450www.hmrc.gov.uk/manuals/saogmanual/SAOG22450.htm)

These updates do not represent changes in policy – they are intended to clarify HMRC's interpretation of the SAO rules. However, the updates regarding HMRC's view on the duties of an SAO for the representative company of a VAT group provide clarification regarding an issue not previously explicitly addressed by the SAOG.

**2. Who needs to read this?**

Companies and SAOs falling within the SAO rules and their agents. Further detail is given below.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 3

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



### 3. Shares held on trading account and the SAO rules

A UK company will fall within the SAO rules if it is a 51% subsidiary of another company, provided that it meets all the SAO qualifying criteria, even if its shares are held on trading account. This situation will commonly arise where a bank or private equity (PE) group holds shares on trading account.

It is a question of fact who the SAO for a company is. The SAO of a company, whose shares are held on trading account by another, may be an officer of the company which holds the shares; an officer of the company whose shares are held or even an officer of another company within the group.

Where such a company comes within the SAO rules for the first time, for example as a result of a 'debt for equity' swap, it is possible that its SAO and other officers may not be immediately aware of their obligations under this legislation. It may be possible – depending on the facts of each case – that a company whose shares are held on account by another and its SAO have a 'reasonable excuse' in the first instance for not complying with their respective SAO-related obligations, provided these failures are put right without delay once they became aware of their obligations.

HMRC expects that where this situation arises, companies holding the shares of other companies on trading account will have appropriate systems and governance in place to be able to identify those other companies, and will ensure that HMRC and those companies are advised of the position and their SAO obligations. However, the legal responsibility to notify the name of the SAO lies with the qualifying company itself, not with the owner of its shares.

If a company falling within the SAO rules does not have a HMRC Customer Relationship Manager (CRM), and has not come to HMRC's attention for SAO purposes, the company should contact HMRC to discuss being allocated a CRM.

### 4. The form of SAO certificates

SAOs are required to provide the Commissioners of HMRC with a certificate for each financial year of the company. The certificate must state whether the company had appropriate tax accounting arrangements throughout the financial year and, if it did not, give an explanation.

This certificate must be provided by such means and in such form as is reasonably specified by HMRC.

When the SAOG was revised in April 2012, HMRC updated its guidance in respect of the specified form that an SAO certificate must take, and provided detailed specimen examples (SAOG15200www.hmrc.gov.uk/manuals/saogmanual/SAOG15200.htm onwards). However, HMRC has continued to see examples of certificates which do not state unambiguously whether the tax accounting arrangements were appropriate or not.

It is the SAO's responsibility to make a considered judgement, in the light of all of the information available to him or her, to determine whether or not the company had appropriate tax accounting arrangements for the year. Therefore, the certificate specifications in the SAOG are intended to provide a clear and categorical form of wording to enable SAOs to fulfill their obligation. Any alternative form is unlikely to meet HMRC's requirements.

To this effect, the guidance at SAOG15200 (www.hmrc.gov.uk/manuals/saogmanual/SAOG15200.htm) onwards has been updated to clarify that HMRC will not accept ambiguous certificates.

### 5. SAO duties in respect of VAT groups

VAT group treatment allows two or more corporate bodies to account for VAT under a single registration number with

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 4

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



one of the corporate bodies in the group acting as the representative member. The group is registered in the name of that representative member, who is responsible, on behalf of all of the other members of the group, for completing VAT returns and paying and reclaiming VAT.

All supplies of goods and services made by any member of the group to a third party outside the group are treated as having been made by the representative member. Similarly, any supply of goods or services made by a third party outside the group to any member of the group is treated as having been made to the representative member (further information is available in the VAT Groups manual (www.hmrc.gov.uk/manuals/vgroups/Index.htm).

The SAO of a qualifying company must take reasonable steps to ensure that the company establishes and maintains accounting arrangements that enable the company's VAT liabilities to be calculated accurately in all material respects. Where a company is the representative member of a VAT group it is responsible, on behalf of all of the other members of the group, for completing VAT returns and paying and reclaiming VAT. It is for the SAO of that representative member to be satisfied that their company is receiving accurate information from the other group companies to enable it to accurately complete its VAT returns. It is HMRC's view that the arrangements that will be needed to gain this satisfaction will fall within the main duty obligations of the SAO of the representative member.

The guidance at SAOG14335 (www.hmrc.gov.uk/manuals/saogmanual/SAOG14335.htm); 14460 (www.hmrc.gov.uk/manuals/saogmanual/SAOG14600.htm); 15100 (www.hmrc.gov.uk/manuals/saogmanual/SAOG15100.htm); 16710 (www.hmrc.gov.uk/manuals/saogmanual/SAOG16710.htm); 18400 (www.hmrc.gov.uk/manuals/saogmanual/SAOG18400.htm) and 18600 (www.hmrc.gov.uk/manuals/saogmanual/SAOG18600.htm); has been updated to reflect HMRC's view on this matter.

**6. Applying the updated guidance**

These updates to the SAOG do not represent changes in policy and will apply from the date of publication.

HMRC appreciates that there is likely to be a lengthy sign-off process for SAO certificates. This may mean that some certificates will have been drafted before the guidance was updated, but will be submitted to HMRC after the updated guidance is published. If, following publication of the revised guidance, an SAO submits a certificate which does not comply with the updated guidance, HMRC will consider the facts of the case to determine whether the SAO had a reasonable excuse for not submitting a certificate in accordance with the revised guidance.

HMRC is also aware that its view on the duties of an SAO for the representative company of a VAT group was not previously explicitly addressed by the SAOG. In relation to this issue, HMRC will not charge penalties where previously SAOs have not acted in accordance with the new guidance for any period up to the first period commencing after the publication of this revised guidance.

Issued 5 August 2013"

## Notice 827 European Community Preferences: export procedures

HMRC have published a revised (August 2013) edition of Notice 827.

This notice has been amended to take account of the new reciprocal preferential trade agreements between the EU and the following countries: Serbia, Montenegro and Bosnia-Herzegovina.

It includes reference to the New Notice 830: Tariff Preference: New GSP Rules of origin (wef 01/01/11) and the South Korea Guide (wef 01/07/11) and also includes some minor textual amendments to the notice.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 5

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



It links to information on the ACP countries that are part of the MAR agreement and to information on the Cariforum States.

It includes the name change for the Department for Business Innovation & Skills (BIS) from the Department for Regulatory Reform (BERR) and also the address change for the Association of British Chambers of Commerce.

It includes the current details for applying to be a UK or EC-wide approved exporter and provides the address to forward INF4 Information Certificates.

It updates the autonomous countries that the EU grants a feature that is known as Donor country content at section 9 of the notice.

It updates the scope and usage of preference documentation at section 20 of this notice including the current value limits and takes account of the change to the value limits for exporting low-value goods.

The information on appeals shown at the end of the notice has been updated.

## Notice 828 Tariff Preferences: Rules of origin for various countries

HMRC have published a revised (August 2013) edition of Notice 828.

This notice has been amended to take account of the new reciprocal preferential trade agreement which came into force from 1 July 2011 between the EU and South Korea. Under these procedures any exporter can issue a preferential origin declaration on an invoice or other commercial document where the value is €6,000 or less, and exporters known as 'approved' exporters who have been approved by the relevant authorities to do so can issue invoice declarations for consignments of any value

At section 9 the new minimal processing lists for the Cariforum (EPA) States and South Korea have been included.

It amends the 'Wholly Produced' lists at section 4 and includes a new list for South Korea products.

It takes account of the reciprocal agreement between the EU and the Cariforum (EPA) States and the Interim Market Access arrangements (MAR) between the EU and certain ACP states.

It also takes account of minor changes to the bilateral cumulation, some minor textual amendments to the previous notice (December 2010) and minor additions to the glossary at section10.

## HMRC launch alternative dispute resolution service in full

HMRC have launched their Alternative Dispute Resolution service in full from 2 September 2013. This follows a two-year trial, which began in specified regions before being made available nationally in May 2012.

Alternative Dispute Resolution (ADR) uses independent HMRC facilitators to resolve disputes involving VAT (and direct taxes) between HMRC and customers during a compliance check. It aims to find a fair and quick outcome for both parties, helping to reduce their costs and avoid a tribunal. It is available to small business and individual taxpayers where a tax issue is in dispute, whether or not an appealable tax decision or assessment has been made by HMRC.

For more information on ADR, including how to apply for the process, visitwww.hmrc.gov.uk/adr/smei.htm.

## Charging foreign hauliers in the UK moves a step closer

A time-based levy for all heavy goods vehicles (HGVs) using UK roads will be implemented in April 2014. The levy will apply to both domestic and EU HGV drivers. Northgate Public Services has been appointed to design, build and finance the foreign operator payment system which will be used as part of the

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 6

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



HGV levy. The contract with Northgate Public Services will run until 2019.

The foreign operator system creates an opportunity for foreign HGV drivers to purchase the levy prior to entry into the UK. The levy will be purchased through sales channels including telephone sales, online sales and by other means of sale. A database on the system will enable those who have not purchased the levy to be identified. Those who do not pay the levy will face a fine. The levy will not discriminate between UK and other EU HGV drivers. UK HGV drivers will pay the levy as part of their VED.

For further details, seewww.gov.uk/government/news/charging-foreign-hauliers-in-the-uk-moves-a-step-closer.

### HMRC's new approach to supporting customers who need extra help – responses to consultation

HMRC have published a summary of responses received to their consultation on proposals to close their network of enquiry centres and replace them with mobile advisors providing face-to-face help and other services for taxpayers with particular needs, which ran between March and May 2013. A final decision on whether to go ahead with the new approach will be made in early 2014. A pilot for the new services is running in the North East until October 2013.

The summary may be viewed at:https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225976/3805_NES_Consultation_summary_accessible.pdf.

### Customs Information Paper (13) 45 – Tariff Preference: changes to the list of GSP beneficiary countries

HMRC have issued CIP (13) 45 dated 22 July 2013. It concerns retrospective changes made to the list of GSP beneficiary countries, in particular the addition of South Sudan and the dissolution of the former Netherlands Antilles, and may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-45.pdf.

### Customs Information Paper (13) 46 – Tariff Preference – Lifting of trade restrictions between the EU and Myanmar and restoration of Myanmar's GSP preferential status

HMRC have issued CIP (13) 46 dated 26 July 2013. It **announces the lifting** restrictive measures on trade between the EU and Myanmar, because of its political situation and human rights violations.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2013/cip-13-46.pdf

### Customs Information Paper (13) 47 – Tariff Preference: Implementation of free trade agreement between EU and Colombia

HMRC have issued CIP (13) 47 dated 5 August 2013. It announces that the EU has concluded a reciprocal preferential trade agreement with Colombia, which will apply from 1 August 2013.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2013/cip13-47.pdf.

### Customs Information Paper (13) 48 – Customs duty repayments

HMRC have issued CIP (13) 48 dated 7 August 2013. It announces a new database for the repayment of customs duty, expected to go live on 2 September 2013.

The paper may be viewed in full athttp://www.hmrc.gov.uk/jccc/cips/2013/cip13-48.pdf

## European Commission

### Protecting Intellectual Property Rights: Customs detain €1 billion worth of fake goods at EU borders in 2012

EU Customs detained almost 40 million products suspected of violating intellectual

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 7

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



property rights (IPR) in 2012, according to the Commission's annual report on customs actions to enforce IPR.

Cigarettes accounted for a large number of interceptions (31%), miscellaneous goods (e.g. bottles, lamps, glue, batteries, washing powder) were the next largest category (12%), followed by packaging materials (10%). Postal and courier packages accounted for around 70% of customs interventions in 2012, with 23% of the detentions in postal traffic concerning medicines.

For further information see the press release (IP/13/761 –http://europa.eu/rapid/press-release_IP-13-761_en.htm), the questions and answers (MEMO/13/738 – http://europa.eu/rapid/press-release_MEMO-13-738_en.htm?locale=en) and the full report (http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/statistics/index_en.htm).

### Fight against tax fraud and tax evasion: a new EU campaign

A new EU campaign against tax fraud and tax evasion has just been launched by the European Commission. A video is available in 23 EU languages fromhttp://ec.europa.eu/taxation_customs/taxation/tax_fraud_evasion/missing-part_en.htm, also in 23 languages, along with key information on the problem and the actions being taken.

The fight against tax fraud and tax evasion is on the agenda of the G20 Summit of 5–6 September. Seehttp://www.european-council.europa.eu/home-page/highlights/global-economy-on-top-of-the-g20-summit-agenda?lang=en.

## Tribunals

### First-tier Tribunal

### Palatial Leisure Ltd v HMRC (2013) TC02792

### VAT: purchase of gaming machines

A company (P), which operated several gaming machines, had accounted for VAT on the basis that its supplies were excluded from exemption under UK law. It subsequently submitted a repayment claim on the basis that its supplies prior to December 2005 had qualified for exemption under EC law. HMRC accepted the claim in principle but issued a ruling that the amount of the claim for the period ending March 2005 had to be restricted to take account of the fact that P had reclaimed input tax on the purchase of gaming machines. P appealed, contending that the input tax should be treated as residual rather than as wholly attributable to exempt supplies, on the basis that the machines had been used to make taxable supplies after December 2005. The First-tier Tribunal dismissed P's appeal, observing that HMRC had accepted that input tax incurred after 31 March 2005 could be treated as residual, and holding that regulation 101(2)(d) had to be interpreted as meaning that 'there is no place for hindsight in ascertaining whether goods or services are used or to be used for making taxable or exempt supplies outside the "longer period adjustment" – except in the case of capital goods. In the interests of legal certainty, the ascertainment of the purposes for which goods or services are used or are intended to be used must be made at the time the input VAT becomes chargeable.'

### S Tarafdar (t/a Shah Indian Cuisine) v HMRC (2013) TC02794

### Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules (SI 2009/273), rule 10

In a case where HMRC withdrew an assessment on a restaurant proprietor, the proprietor applied for costs. The First-tier Tribunal dismissed the application, holding that HMRC had not acted unreasonably.

### B Burton v HMRC (2013) TC02797

### VAT: incorporation of barn into existing house

The owner of an 18th century house enlarged it by incorporating an existing

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 8

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



barn, and claimed a refund of VAT under VATA 1994, s 35. HMRC rejected the claim on the basis that the work did not qualify as a 'residential conversion'. The First-tier Tribunal dismissed the owner's appeal against this decision.

### Wrag Barn Golf & Country Club v HMRC (No 3) (2013) TC02802

### VAT: whether letter constituted an option – whether option irrevocable

A married couple acquired a farm in 1967. In 1987 they arranged for a newly-incorporated associated company to convert part of the farmland into a golf course. In June 1990 the couple registered for VAT as a partnership, and opted to tax the golf course. In February 1991 the couple entered into a partnership agreement with their two sons to operate a golf club on the course. In 2001 a VAT officer inspected the partnership records and formed the opinion that the partnership had failed to abide by its option to tax the golf course. HMRC issued a ruling that the option was irrevocable. The partnership appealed, contending that the option had only been made by the couple who owned the land, and did not bind the separate partnership formed in 1991 which included their sons. Judge Green rejected this contention and dismissed the appeal, but the Upper Tribunal remitted the case for rehearing by a different judge. At the rehearing, Judge Sinfield upheld Judge Green's decision, finding that the golf course had been an asset of the partnership at the time the election was made.

### Simple Solutions GB Ltd v HMRC (2013) TC02809

### Authenticity of invoices disputed

HMRC issued assessments on a company (S) in the construction industry, on the basis that it had reclaimed input tax on false invoices. The First-tier Tribunal allowed S's appeal, finding that the invoices were genuine and represented genuine supplies, and awarded costs to S.

### Drumkinnon Joinery & Building Ltd v HMRC (2013) TC02810

### Default Surcharge – Rate of surcharge where business transferred as going concern

In 2010 a sole trader (H) transferred his business, including his VAT registration, to a newly-incorporated company (D). In 2011 D submitted a VAT return late. HMRC imposed a default surcharge at 15%. The First-tier Tribunal allowed D's appeal, observing that in computing the 15% surcharge, HMRC had taken into account several defaults by H before he had transferred the business. Judge Sheppard held that when H's VAT registration was cancelled, 'his surcharge liability compliance history ceased. A new history commenced on the registration of the separate entity (D).'

### Rapid Sequence Ltd v HMRC (2013) TC02826

### VAT: company supplying locum doctors to hospitals

A company (R) supplied medical doctors to hospitals on a locum basis. HMRC issued a ruling that it was required to account for tax on its supplies. R appealed, contending that its supplies should be treated as exempt under VATA 1994, Sch 9, Group 7, Item 5. The First-tier Tribunal rejected this contention and dismissed the appeal. Judge Herrington held that although R's supplies appeared to fall within the wording of Item 5, that provision had to be interpreted in accordance with Article 132(1)(c) of Directive 206/112/EC, and that R's services did not amount to 'medical care' within Article 132(1)(c). Item 5 had to be given 'a conforming construction so that it is consistent with the UK's obligation not to grant an exemption which goes beyond the permitted scope of the exemption in Article 132(1)(c)'. Therefore Item 5 should be construed as referring to 'the provision of medical care services provided by a deputy', rather than simply to 'the provision of a deputy'.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 9

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



### Chancellor, Masters & Scholars of the University of Cambridge v HMRC (No 2) TC/10/06359 unreported.

#### Partial Exemption – University

A university, which was partly exempt and had agreed a special method for attributing its input tax, reclaimed input tax on professional fees relating to the management of an endowment fund which invested donations which the university received, and which was used to finance both taxable and exempt activities. HMRC rejected the claim on the basis that the university's investment activities were not an economic activity (and if it had been an economic activity, the fees would have related to exempt supplies). The First-tier Tribunal allowed the university's appeal, holding that the input tax should be treated as residual and as partly recoverable under the university's special method. Judge Connell held that 'the VAT system achieves the greatest degree of simplicity and neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of supply'. He specifically rejected HMRC's contention that 'overheads relating to a non-economic activity undertaken for the purchase of an economic activity should not be regarded as recoverable'.

### BS Eyin v HMRC (No 2) (2013) TC02834

#### HMRC mitigating penalty by 40% – no further mitigation appropriate

HMRC formed the opinion that a trader (E) had underdeclared his turnover, and imposed a penalty, which they mitigated by 40%. E appealed. The First-tier Tribunal slightly reduced the amounts of the underlying assessments, but upheld the imposition of the penalty. Judge Nowlan held that 'the percentage reductions that HMRC has conceded were certainly fair, if not generous'.

### General Motors UK Ltd v HMRC (2013) TC02835

#### Valuation of self-supply

A major car manufacturer (G) had accounted for VAT on the basis that, when it took into its own use a car which it had manufactured or imported, it had made a deemed self-supply and VAT was chargeable on two-thirds of the retail list price of each car. Subsequently it submitted a substantial repayment claim on the basis that it should have accounted for VAT on a lower amount. HMRC rejected the claim and G appealed.

The First-tier Tribunal reviewed the evidence in detail and allowed G's appeal in principle. Judge Hellier held that, for the period from 1987 to 1993, the value of the self-supply should be calculated as the lower of the purchase price of the cars and the cost of their cars. For the period from 1994 to 1996, the value of the self-supply should be calculated by reference to the purchase price of the cars. For this purpose, the 'purchase price' should be defined as 'the price in which someone in the appellant's position would have paid for the cars had it bought them at the time of their appropriation'. In the case of imported cars, this was 'the import price payable to the relevant sister company under whatever agreement subsisted between them at the time'. In the case of cars assembled in the UK, this was 'the list price less the discount and rebates the appellant would have got as a bulk purchaser in its bargaining position', except that where a car could have been purchased from a sister company for less than this amount, 'that import price would be the purchase price'. The 'cost price' should be defined as including 'all the expenses attributable to bringing the car to its condition at the time of appropriation and includes direct expenses of manufacture, related overheads and cost of development and design'. The appeal was adjourned in the hope that the parties could agree the figures.

### Chancellor, Masters & Scholars of the University of Cambridge v HMRC (No 2) (2013) TC02836

#### University: partial exemption

A university, which was partly exempt and had agreed a special method for attributing its input tax, reclaimed input tax on

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 10

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



professional fees relating to the management of an endowment fund which invested donations which the university received, and which was used to finance both taxable and exempt activities. HMRC rejected the claim on the basis that the university's investment activities were not an economic activity (and if it had been an economic activity, the fees would have related to exempt supplies). The First-tier Tribunal allowed the university's appeal, holding that the input tax should be treated as residual and as partly recoverable under the university's special method. Judge Connell held that 'the VAT system achieves the greatest degree of simplicity and neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of supply'. He specifically rejected HMRC's contention that 'overheads relating to a non-economic activity undertaken for the purchase of an economic activity should not be regarded as recoverable'.

### Sunnyside Property Company Ltd v HMRC (2013) TC02839

#### VAT: lease of nursing home – whether separate supply of facilities

A company (SN) operated a nursing home. In 2003 the ownership of the premises was transferred to a newly-incorporated associated company (SC), which leased them back to SN. SC subsequently reclaimed input tax on the refurbishment of the premises. HMRC rejected the claim on the basis that the input tax was wholly attributable to exempt supplies. SC appealed, contending that it was making separate standard-rated supplies of facilities in addition to its exempt supplies of a lease of the premises. The First-tier Tribunal rejected this contention and dismissed the appeal, holding that SC was making a single composite exempt supply of property and services, and that none of the input tax was attributable to taxable supplies.

## Upper Tribunals

### Davis & Dann Ltd v HMRC (and related appeal), UT [2013] UKUT 374 (TCC)

#### Input Tax – Razor blades

A company (D) reclaimed input tax on the purchase of a large quantity of razor blades. HMRC rejected the claim on the basis that it appeared that the transactions were connected to MTIC fraud. D appealed. The First-tier Tribunal dismissed the appeal, finding that D's directors should have known that the transactions were connected to MTIC fraud. However the Upper Tribunal reversed this decision. Judge Gammie observed that the First-tier decision gave the impression 'that the quantity of razor blades purchased and sold by the appellants' had been the conclusive factor, and expressed the view that 'the transactions were entirely explicable as ordinary market transactions'. He held that the First-tier Tribunal had 'erred in concluding that the only reasonable explanation for the circumstances in which the appellants' purchases took place was that they were connected to fraud'.

### HMRC v Able UK Ltd [2013] UKUT 318 (TCC)

#### EC Directive 2006/112/EC Article 151(1)(c)

A UK company supplied 'ship decommissioning services' to the US Navy. HMRC issued a ruling that it was required to account for VAT on these supplies. The company appealed, contending that they qualified for exemption under Article 151(1)(c) of EC Directive 2006/112/EC. The Upper Tribunal directed that the case should be referred to the ECJ, which held that Article 151(1)(c) 'must be interpreted as meaning that a supply of services such as that at issue in the main proceedings, made in a Member State party to the North Atlantic Treaty and consisting in dismantling obsolete ships of the Navy of another State party to that treaty, is exempt from VAT under that provision only where those services are supplied for

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 11

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



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

Following this decision, the Upper Tribunal gave judgment in favour of HMRC.

London College of Computing Ltd v HMRC UT [2013] UKUT 404 (TCC).

Education-Definition of 'eligible body'

A company (L) provided computer tuition. Initially it accounted for VAT on its supplies, but it subsequently submitted a repayment claim on the basis that it should have treated them as exempt supplies of education. HMRC rejected the claim on the basis that L was not an eligible body. L appealed, contending that it had an 'articulation agreement' with Middlesex University and should therefore be treated as a college of that university. The Upper Tribunal, in agreeing with the First-tier Tribunal, dismissed L's appeal, holding that L had not in fact qualified as an 'eligible body'. Judge Hellier held that L did not 'have objects similar to the aims of a public body supplying school or university education or vocational training'. Judge Bishopp held that there was nothing in the articulation agreement 'which could conceivably be construed as being intended to constitute (L) as a college of the university'.

## Court of Justice of the European Union

### Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH (Case C-300/12, ECJ); 18 July 2013 unreported (Advocate-General's opinion)

European Community Law – 'Consideration' (Article 11A1(a))

In a German case, a company which traded as a travel agent granted customers discounts from the prices originally charged by tour operators, and claimed that these discounts should be deducted in computing the taxable amount. The tax authority rejected the claim, the company appealed, and the case was referred to the ECJ. Advocate-General Wathelet delivered an Opinion in favour of the company, applying the principles laid down in *Elida Gibbs Ltd*.

**David Rudling and Alan Dolton**
**Lexisnexis**

# EDITORIAL

## Pension fund costs

The recent decision in the European Court of Justice in *PPG Holdings BV* (*PPG*) (*C-26/12*) has provided an opportunity for businesses to reclaim VAT on the costs that have been incurred on a defined benefit pension fund.

### Reclaim opportunity

This decision permits employers to reclaim VAT on costs incurred on managing its own pension fund. HMRC have until now permitted businesses to reclaim the VAT incurred on day-to-day management costs. This decision may permit businesses to reclaim the VAT incurred on the investment activities. Businesses should submit a protective claim for this VAT as soon as possible for the last four years.

For the VAT to be reclaimed the management and investment services need to be supplied to the company and not the pension fund. The invoices need to be addressed to the business and paid for by the business. In addition, the costs are not to be passed on to the pension fund. Claims must be quantified as to the period and amount involved and HMRC will expect the usual supporting documentation for this claim. It is expected that HMRC will be particularly interested in ensuring that there has been no recharge of costs to the pension funds.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 12

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



## HMRC's view

HMRC's opinion was that the VAT on the costs of administering and managing the fund was deductible but the VAT credits could not be claimed in respect of investment management costs. The reason is that HMRC regarded these supplies as being made to the pension fund for financial supplies made by the fund. As any VAT incurred was for an exempt supply the VAT was not deductible.

One difficulty with the decision is that the ECJ has not, as is usual, finally determined the case but outlined the principles that the national court must then apply. Although this decision has been addressed to the Dutch court the principles outlined are clear and HMRC will be obliged to follow them, although HMRC will not extend the principles in any way. The ECJ did raise points for the Dutch national court to determine. The matters to be determined are detailed in the ECJ's reasoning, discussed below.

## ECJ Decision

The ECJ decision was more favourable to the taxpayer than the Advocate General's opinion. The Advocate General held that VAT on day-to-day administration costs were deductible and the VAT on the costs of the management costs were not deductible. The ECJ held that a taxable person, who has set up a pension fund in the form of a separate entity to safeguard the pension rights of his employees, may reclaim the VAT incurred on services relating to the management and operation of that fund. The ECJ included one proviso, that there must exist a direct and immediate link which is apparent from all the circumstances of the transaction in question.

There was an alternative question asked of the ECJ; whether the supplies should have been exempted as a supply to a special investment fund. As the first question (whether the VAT incurred could be reclaimed) had be answered in the affirmative this question need not be answered. The ECJ also pointed out that this question had been addressed in the decision *Wheels Common Investment Fund Trustees and Others Case C424/11*.

## Reasoning

The following general points were made by the ECJ when coming to its decision:

- the VAT system is meant to relieve businesses entirely of the burden of the VAT paid or payable in the course of its economic activities;
- the VAT system is to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results;
- the existence of a direct and immediate link between an input and an output give rise to the right to deduct; and
- a taxable person has a right to deduct even where there is no direct and immediate link between a particular input and outputs where the costs incurred are part of the general costs and are components of the price of the supplies made. These costs still have a direct and immediate link with the taxable person's economic activity as a whole

The ECJ then made the following specific points relating to the services acquired for the purpose of the administration of employees' pensions and the management of the assets of the pension fund. The ECJ found that PPG had set up the fund to comply with a legal obligation imposed on it as an employer. Consequently these costs form part of its general costs. The ECJ held that it was for the referring court to verify that these costs do become component parts of the price of PPG's products.

Thus the ECJ held that the if there was no right to deduct the input tax paid the taxable person would be deprived of the tax advantage resulting of the deduction system and the neutrality of VAT would

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 13

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



also no longer be guaranteed. Thus, the ECJ held that the VAT on the costs could be deducted.

**John Davison**
**Independent Indirect tax consultant**

## CASE AND COMMENT

### Mercedes-Benz Financial Services UK Limited [2013] UKFTT 381 (TC)

First-tier Tribunal

Mercedes-Benz Financial Services Limited ("MBFS") had offered a leasing product called "Agility" since 2007. The issue in this appeal was whether MBFS was making a supply of goods or a supply of services in doing so. MBFS considered it was a supply of services, but HMRC disagreed. MBFS therefore appealed to the Tribunal.

MBFS considered that Agility was a rental agreement with an option to purchase and that in the normal course of events, title in the motor vehicle would not pass unless and until the customer chose to purchase the vehicle. HMRC considered that the mere possibility that title would pass was sufficient to make supply a supply of goods, and that it did not need to be inevitable that title would pass.

The Tribunal examined the choices open to customers who obtained finance from MBFS. Those customers had three choices, namely:

- if the customer decided that he/she would like to purchase the vehicle, then a hire purchase was recommended;
- if the customer decided that he/she would not like to purchase the vehicle, then a leasing product was recommended.
- if the customer was undecided, or wanted to keep their options open, then the Agility product was recommended.

Agility was thus marked as a separate product, and gave the customer the option at the end of the lease (a) to purchase the car; (b) to return the car; or (c) purchase the car and part-exchange it for a new one.

The Tribunal considered the detail of the agreement and concluded that it was akin to a hire purchase agreement rather than a lease. It did so by comparing the agreement to the hire purchase agreement, noting the similarities and concluding that this therefore meant the Agility contract was also a hire purchase agreement. Examples included:

- Both were described as a hire purchase agreement for the purposes of the Consumer Credit Act 1974.
- Both incorporated an option to purchase the vehicle, and had a nominal fee when the option was exercised.
- Both gave the customer the right not to exercise the option to purchase, as under both it was not obligatory for the customer to purchase the car.
- Both contained a detailed breakdown of the cost of the vehicle and the charge for credit.
- The financial structuring of both was comparable.

The Tribunal noted Article 14 of the Principal VAT Directive, which stated:

'1. *"supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.*
2. *In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:*

   (*b*) *the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment.*'

The Tribunal concluded that "the description of the agreement as a hire purchase, the provision for a deposit payment, the specified financial information including

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 14

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



the cash price for the vehicle, the substantial capital payment inherent in the contract structure, and the option to purchase were compelling indicators of Agility being a contract of sale of a car." It added that "on a proper analysis the sole realistic option under the agreement was to purchase the vehicle".

When added to other evidence such as website and marketing material, this led the Tribunal to conclude that, in the normal course of events, "the possible passing of title was an essential feature of Agility rather than an eventuality which may only arise in limited and exceptional circumstances … The transfer of ownership was, therefore, central to the Agility contract, not tangential."

Accordingly, the Tribunal concluded that this constituted a supply of goods.

### Commentary

This is not the last word in this matter, as MBFS have appealed to the Upper Tribunal. One would expect that a principal issue on appeal to be how to analyse the choices that the customer genuinely had at the end of the Agility contract – even if it may be very likely that most customers will exercise the option to purchase the car, it is not inevitable, and so do you look at what most customers are likely to do? In essence, the First-Tier Tribunal's answer is "yes". But, given the increasing sophistication and variety of financing products in the automotive market, other products could arise where the answer is less clear than the First-Tier Tribunal has concluded in this case. Therefore, this case could give rise to some important jurisprudence on leasing issues, and may even require a reference to the Court of Justice of the European Union to clarify this point.

## Fiscale Eenheid PPG Holdings (Case C-26/12)("PPG")

## Court of Justice of the European Union (CJEU)

### The Decision

This case considered whether an employer had the right to deduct the input tax incurred on supplies made to an employee pension fund (but paid for by the employer), and the exact scope of such a right, should it be deemed to exist.

In this case, PPG and its subsidiaries were required under Dutch law to put in place pension arrangements for their employees. The relevant law stipulated that these arrangements should take the shape of a fund-based pension scheme and that the fund should be set up as a separate legal entity.

The fund was set up as a defined-benefit fund, meaning that the amounts paid to employees following retirement were determined from the outset and were not dependent on the performance of various investments made by the fund. After the fund was set up, PPG contracted with various suppliers for administration, asset management, auditing and consultancy services to be provided to the fund. These services were paid for by PPG and were not on-charged to the pension fund.

PPG attempted to deduct the VAT charged by these various suppliers as its own input tax, claiming that these costs represented general or overhead costs of the business and should therefore be recoverable.

The Dutch tax authorities refused to allow PPG to deduct the VAT incurred on these services, suggesting that this VAT was not PPG's to deduct, as PPG could not be regarded as the recipient of the services. The authority also argued that the pension fund did not qualify as a special investment fund.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 15

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



The following questions were referred to the CJEU.

1. Can a taxable person who has, under the requirements of national law, established a separate pension fund for his employees, deduct the tax which he has paid on the basis of services supplied to him in respect of the implementation and operation of the fund?
2. Can a pension fund such as the one at issue here, be classified as a special investment fund within the terms of Article 13B(d)(6) of the Sixth VAT Directive?

The CJEU held that an employer that has set up a separate pension fund for its employees can recover the VAT it incurs on management and operation services provided to the fund, as long as it can show a direct and immediate link between the services received and its taxable activities. The CJEU set out that even if a link could not be established between the input tax incurred and a particular transaction, a deduction could be made as long as the costs of the services in question were part of the business' general costs and formed a component of the price of goods/services supplied.

In PPG's case, it was held that the sole reason for setting up the fund and acquiring the relevant services was to comply with a legal obligation, and given that this obligation arose by virtue of PPG's taxable activities, it could be considered that there was a direct and immediate link.

The CJEU did not agree with the suggestion that PPG could have set up the fund in an alternative manner, i.e. not as a separate legal entity, and therefore recovered the tax directly. The CJEU considered that taking such a view would restrict the ability of a taxable person to choose an organisational structure and was therefore not tenable.

The CJEU applied the criteria set out in *Wheels Common Investment Fund Trustees Ltd* Case C-424/11 to determine the answer to the second question and had no hesitation in concluding that the fund at issue here did not fall within the definition of a special investment fund.

### Commentary

This judgment could allow many employers to recover more VAT than they currently do under UK law and HMRC practice. However, the exact ability of employers to do so will depend on a range of factors in each particular case.

HMRC have yet to release any guidance in relation to the application of *PPG* in the UK, in particular whether employers may be able to recover all of the VAT incurred in relevant situations, as opposed to the "70/30 split" currently applied by way of concession in many cases.

It should be noted that, even on a prospective basis, entities will have to consider the manner in which costs are currently invoiced and incurred, as well as any possible recharge of costs, as this may be determinative of whether the broader recovery position suggested by the CJEU in *PPG* is applicable.

**Oliver Jarratt, Amy Bache & Candice Walker**
**Deloitte LLP**

## CONTEXT IS EVERYTHING!

## The CJEU interpretation of VAT law

How many times over the years have we read in Court of Justice of the European Union (CJEU) opinions and judgments that VAT exemptions under the Directive must be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on each supply for consideration which is made by a taxable person. That expression has become a mantra which the Court replicates – almost on a cut and paste basis – whenever it is asked to provide guidance to National Courts.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 16

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



As a practitioner, the mantra has become entrenched over the years. One instinctively knows that any attempt to widen the meaning of an exempting provision will be met with some resistance. It was surprising, therefore, to note that, despite such entrenchment, the Court will, sometimes, be a bit more flexible. Two recent cases have highlighted this. The first case relates to the exemption for supplies of aircraft and the second case relates to the supply of services in connection with the management of special investment funds.

### A Oy (Case C-33/11)

In simple terms, this case related to the acquisition by A Oy (A Finnish company) ('A') of a business jet from a manufacturer based in France. 'A' failed to account for any acquisition VAT when the aircraft arrived in Finland and the Finnish Tax Authority (the Authority) issued an assessment to collect the tax that was purportedly due on the taxable acquisition in Finland.

Article 15 of the 6th Directive falls under the heading 'Exemption of exports from the Community and like transactions and international transport'. Article 15(6) exempts from VAT the supply, modification, repair, maintenance, chartering and hiring of aircraft used by airlines operating for reward chiefly on international routes. Employing a strict interpretation of the VAT exemption contained in Article 15(6), (which the CJEU had, hitherto, encouraged), the Authority contended that, as 'A' was not an airline operating for reward chiefly on international routes, the exemption from VAT could not apply to the acquisition of the aircraft. In essence, the Authority took the view that the exemption only applied if the 'use' of the aircraft for international flights was by 'A'. Consequently, according to the Authority, VAT was payable by 'A' on the taxable acquisition of the aircraft.

But that was not the end of the story! 'A' had a sister company B Oy ('B') and, whilst 'A' was registered as the owner of the aircraft with the Finnish Civil Aviation Authority, 'B' was designated as the user of the aircraft. 'B' was in fact in the business of organising international charter flights and of ensuring that the aircraft in its control were maintained and managed correctly. Under an agreement with 'A', 'B' was entitled to hire the aircraft from 'A' for its own commercial purposes (i e for international charter flights). The Authority considered that, even though 'B' was clearly an 'airline' (as defined), the 'use' of the aircraft by 'A' was not 'use by an airline' and did not qualify for exemption.

Nonsense said the Court! – One cannot look at the words of the law in isolation. It is necessary to also take into account both the context and the objective pursued by the Directive. Clearly, here, the CJEU considered that the context and objective of the provision in question was to grant an exemption for the supply of aircraft when they are intended chiefly for use on international routes. The Directive does not make the exemption conditional on the identity of the user of the aircraft in question but, simply, requires that the aircraft is to be so used for the supply of it to benefit from the exemption. It seems therefore that, provided the aircraft is to be used for the requisite purpose at some stage along the supply chain, the supply of the aircraft will qualify for exemption. So much for a strict interpretation!

I have to say that I was surprised when the Court delivered this judgment. Given the mantra, I had expected it to take a narrow, literal approach to the interpretation of the Directive. By allowing the exemption to apply to any supply of the aircraft within the supply chain provided that the aircraft is ultimately put to the requisite use, I can't help feeling that the scope of the exemption has been somewhat widened. Not that I am complaining. The judgment removes a great deal of complexity for aircraft operators and owners. Provided the aircraft is ultimately used by an airline operating for reward chiefly on international routes, any VAT charge in the supply chain should be removed.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 17

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



## GfBk (Case C-275/11)

A financial services case – (not particularly my forte). The question here was whether the services provided under a contract by GfBk to an Investment Management Company (IMC) qualified for VAT exemption under the provisions of Article 13B(d)(6) of the 6th Directive which exempts the management of special investment funds (as defined by Member States).

Under the contract, GfBk simply provided the IMC with investment recommendations relating to the purchase and sale of securities. It was up to the IMC whether or not to act on those recommendations. However, GfBk was provided with daily statements as to the composition of the particular fund for which it provided advice. GfBk sought a ruling from the German tax authority that the advisory services it provided to the IMC fell within the term 'management of special investment funds'. The German tax authority said 'no' (taking a narrow view) third party advisory services were not 'management services' and were not covered by that term. Not surprisingly, GfBk appealed and, during the litigation through the German courts the matter was referred to the CJEU for a preliminary ruling.

On the face of it, adopting a narrow literal approach, one can see where the Bundesgerichtshof (the referring German Court) were coming from! Surely, the function of 'management' of an investment fund (special or otherwise) is a function that can only be undertaken by the person engaged to manage it (i e the Fund Manager)? If that is correct, it is difficult to understand how a supply of advisory services provided **to** the Fund Manager by an entirely separate third party could ever be regarded as part and parcel of the Manager's function. In my view, that's a bit like saying that the supply of legal text books by a publisher to a law firm is a supply of legal services! It clearly isn't, it's a cost component of the legal services. To say that it is a supply of legal services would be to contort the imagination.

Anyway, what do I know? In its wisdom, the CJEU ruled that the services provided by GfBk do actually fall within the term 'management of special investment funds'. It is the nature of the service being provided which is important and not the identity of the person making the supply. The Court confirmed that to qualify for exemption, however, the services in question 'must, viewed broadly, form a distinct whole and be specific to and essential for the management of a special investment fund'. Well, that's clear!

According to the Court, in order to determine whether advisory services provided to the IMC by a third party fall within the concept of 'management of special investment funds', it is necessary to examine whether the advisory service is intrinsically connected to the activity characteristic of an IMC so that it has the effect of performing the specific and essential functions of such management.

When the Advocate General delivered his opinion in this case, he said that to determine whether an intrinsic connection exists between a service and the activity carried out by a common fund, in short, it is a question of identifying those services that are typical of a common fund and to single them out from other economic activities. The Advocate General had used a simple example of this in his opinion by stating that functions such as the computation of units and shares or a proposal to purchase or sell assets are clearly activities that are typical of an investment fund but not of a construction company. However, whilst there is nothing to preclude a construction company from carrying out financial investment activities, these activities would not be regarded as characteristic or typical elements of, and in that sense, specific to, the business of construction.

In the case of advisory and information services such as those provided by GfBk,

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 18

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



the Court agreed with the Advocate General that such activities are activities specific to a special investment fund. GfBk makes recommendations concerning transactions which the IMC may subsequently carry out in its capacity as a manager of a special investment fund. Consequently, the services provided by GfBk are eminently characteristic of a collective investment undertaking.

For a service to be autonomous (ie 'a distinct whole'), it is important that the service does not become 'blurred' with other services provided by the recipient of the third party's services. Accordingly, a service that, 'viewed broadly', forms a 'distinct whole' is one that cannot be confused with other services already performed by the recipient. For example, where an IMC already carries on accounting activities that is evidenced by the fact that it has an internal accounts department which covers the whole of the service, it would be difficult to differentiate an accounting service provided by a third party from the one already performed internally by the IMC. In other words, in such an example, the service provided by the third party would lose autonomy because the recipient of the service already performs the same service itself.

This judgment provides excellent guidance on the issue of whether outsourced services can or cannot benefit from VAT exemption. Although this case was concerned solely with the issue of whether 'advice and guidance' services provided by GfBk could qualify as 'management of special investment funds', the rationale of the case may be applicable in many other instances. Provided the outsourced service meets the criteria of being intrinsically connected, autonomous and continuous, there is clearly room to argue that other services provided by third parties may also benefit from VAT exemption.

It is clear from these judgments that when interpreting VAT law (and in particular when interpreting exemptions), that a simple literal view is not always possible nor desirable. Following the *A Oy* judgment, it is clear that the exemption for supplies of aircraft applies to all transactions where the ultimate use of the aircraft (by a party not necessarily directly connected with the transaction) is for a qualifying purpose. Similarly, in the world of fund management, it is clear that the exemption for the supply of the management of special investment funds applies where functions ordinarily performed by a fund manager are, in certain circumstances actually performed by a third party sub-contractor.

**Graham C Brearley LLB(Hons)**
**Grant Thornton UK LLP**

## HERE COMES THE SUN

### Solar panel dumping dispute

> *'After weeks of intensive talks, I can announce today that I am satisfied with the offer of a price undertaking submitted by China's solar panel exporters, as foreseen by the EU's trade defence legislation. This is the amicable solution that both the EU and China were looking for'.*

On 27 July 2013, EU Trade Commissioner Karel De Gucht announced what appeared to be the beginning of the end for the European Union's long-running, and much publicised, dispute with China over concerns that Chinese-origin solar panels and components are being illegally dumped into the EU market to the detriment of European industry. The solar panel saga acts as an interesting indicator of the political and economic pressures that may be applied through trade defence measures, and a (precautionary) signpost for European businesses seeking to source products and components from or export their goods to China.

#### Introduction

Mr De Gucht's announcement followed nine months of investigation by the European Commission into claims that Chinese solar panel manufacturers are selling

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 19

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



their products into the European market below cost thanks to substantial government subsidies received from Beijing, undercutting European producers and putting European jobs at risk. This led to a preliminary decision by the European Commission to impose anti-dumping duties at rates as high as 67.9% on imports of the affected goods from China.

As a result of the agreement reached between China and the European Commission, Chinese exporters of solar panel products have agreed to a voluntary undertaking to adhere to minimum pricing requirements, as established by the Commission, for imports into the European Union, whereby they commit to stop dumping and keep solar panels above a certain minimum price level, or face anti-dumping duties on EU imports at an average rate of 47.6%.

The agreed remedy (which remains preliminary – the European Commission has until 5 December 2013 to finalise its investigation and adopt definitive measures) appears to have brought an end to one of the most significant anti-dumping investigations conducted by the EU to date and averted, at least for the time being, a wider trade war between the EU and China with potentially far-reaching consequences across several important industry sectors.

While some have breathed a sigh of relief at the parties' appetite to reach a conciliatory and pragmatic solution, others have viewed the Commission's response as a frustrating nod to China's ever-increasing political clout, one which raises concerns for the future of European manufacturing in the solar industry and beyond, and which calls for much soul-searching within the EU as to its ability to promote a united front regarding future economic relations with China going forward.

## Legal Basis for an Anti-Dumping Investigation

European Union anti-dumping legislation, primarily Council Regulation (EC) No. 1225/2009 of 30 November 2009 (the '**2009 Regulation**'), provides that the European Commission is legally obliged to open an investigation where it receives a valid complaint from a significant proportion of the affected European industry which provides evidence of harm as a result of products being dumped (that is to say, exported for sale into the EU market at a price that is lower than that at which the same products are sold in the domestic (in this case, Chinese) market) in such a way as to cause material injury to European Union industry. The Commission is required to arrive at a final decision as to the imposition of definitive measures within 15 months of the commencement of an investigation.

Following an investigation, anti-dumping duties may be implemented if the following four elements are established:

- the products in question are in fact being dumped on the EU market (as determined by Article 2 of the 2009 Regulation);
- there is a material injury to EU industry (in that the imports have caused or threaten to cause damage to a substantial part of the industry within the EU, such as loss of market share, reduced prices for producers and resulting pressure on factors such as production, sales, profits and productivity);
- there is a causal link between the dumped imports and the injury; and
- community interest calls for intervention to prevent such an injury (such a determination being made on the basis of Article 21 of the 2009 Regulation).

## Background to the Commission's Investigation

In July 2012, complaints were lodged with the European Commission, pursuant to Article 5 of the 2009 Regulation, by two industry associations, EU ProSun and EU ProSun Glass, on behalf of more than 20 European producers of solar equipment. The complaints stated that

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 20

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



imports of Chinese-origin crystalline silicon photovoltaic modules (that is to say, solar panels) and their key components are being dumped into the EU market. The industry associations set out their view that the Chinese government offers amounts equivalent to billions of Euros to Chinese manufacturers in support of the manufacturing in and export from China of solar panels, in a way that allows Chinese manufacturers to offer products for dumped prices over sustained periods at a price very substantially lower than could be offered by their European counterparts. China is the world's largest producer of solar panels, with approximately 65% of all solar panels being produced in China. Chinese manufacturers imported in the region of EUR 21 billion worth of solar panels into the European Union during 2012, and are reported to control approximately 80% of the solar panel industry in Europe, making this one of the most (if not the most) significant anti-dumping investigations handled by the European Commission to date.

Following a preliminary analysis, the Commission established that the complainants had proved there was sufficient *prima facie* evidence to warrant the opening of an investigation, and announced, on 6 September 2012, that it had commenced an investigation into the affected market.

Six months into the investigation, on 1 March 2013, the Commission published Commission Regulation (EU) No. 182/2013, introducing registration requirements for solar panels and components imported into the EU from China. The purpose of these requirements was to track all imports of Chinese origin goods falling within the affected tariff headings (namely, certain products classified under subheadings 3818, 8501 and 8541 of the EU Customs Tariff) so that anti-dumping duties, if subsequently introduced by the Commission, could be applied retrospectively.

The Commission then published a further decision on 4 June 2013, by way of Commission Regulation (EU) No. 513/2013, to impose provisional anti-dumping duties on the relevant products. This decision outlined the Commission's detailed methodology for conducting its investigation and its conclusion that the four requisite elements, as outlined above, were met. Consequently, the Commission set a provisional duty rate of 11.8% on imports of the affected products into the EU, to run from 6 June 2013 to 5 August 2013. This rate was to rise from 6 August 2013 to an average rate of 47.6%, with various different rates assigned to certain specifically listed Chinese manufacturers, rising up to a maximum anti-dumping duty rate of 67.9%.

The Commission noted its willingness to pursue discussions with the relevant Chinese manufacturers, in conjunction with the Chinese Chamber of Commerce, in order to try to reach a negotiated solution that would encourage the sale of products at a price that would be acceptable for all parties, with a view to suspending the provisional anti-dumping duties in the event that such a solution were reached.

## Initial Reaction and Further Wrangling

In what was been perceived by some as a retaliatory gesture by the Chinese government in response to the Commission's ruling, China's Minister of Commerce announced on 1 July 2013 that China had decided to conduct anti-dumping and anti-subsidy investigations into a number of European industries.

First, China opened a dumping investigation into European wine imported into China, raising concerns in particular from the French and other Mediterranean governments whose wine industries are increasingly dependent on both exports to Chinese consumers and Chinese investment in European vineyards.

China also threatened to bring a separate case against imports of luxury automobiles, raising particular concerns amongst German manufacturers such as BMW,

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 21

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



Mercedes and Audi, which have enjoyed significant growth in China over recent years, as well as among producers of other luxury brands in Italy, Britain and elsewhere. China has also probed whether to impose dumping duties on solar-grade polysilicon imported from the United States, the European Union and South Korea.

At the same time, China engaged in lobbying campaigns directed at European producers who benefit from the supply of cheap Chinese components, as well as towards individual member states, highlighting the potential harm that might be caused to the European economy if the Commission were to levy dumping duties on Chinese-origin solar products.

Mr De Gucht initially stood firm, emphasising the importance of a united European common trade policy and once again outlined his long-held view that the subsidies offered by the Chinese government, coupled with China's apparent intention to shut European traders out of the Chinese market by way of retaliatory dumping measures, would be seriously detrimental to European industries. However, with several member states (and in particular the German government, which has made considerable inroads in promoting a Sino-German 'special relationship' in recent years), speaking out in opposition to dumping duty rates which they perceived to be prohibitive (and potentially damaging to broader trade relations), Mr De Gucht and the Commission appeared to accept that an alternative solution would be required in order to avoid the emergence of a more wide-ranging, tit-for-tat trade war that would detrimentally affect an already fragile European economic landscape.

### An 'Amicable Solution'

As noted above, Mr De Gucht issued a press statement on 27 July 2013 explaining that the EU and China had negotiated a settlement that represented an 'amicable solution' to both parties. This comprised voluntary undertakings offered by Chinese exporting producers of solar panels to accept minimum pricing thresholds when importing the affected products to the European Union. Mr De Gucht did not disclose the agreed minimum pricing levels accepted by the Chinese exporters, although stated that a floor price of around 80 cents per watt peak capacity of a solar panel, as had been advocated by EU ProSun, had not been entertained as part of the discussions. A European Commission official was later reported to have commented that the undertakings set a minimum price of between 55 and 57 cents per watt, which applies to the first seven gigawatts of capacity sold in the EU, beyond which the 47.6% duty rate will apply.

The European Commission approved this decision on 2 August 2013, by way of Commission Decision 2013/423/EU and the adoption of Commission Regulation (EU) No. 748/2013, which took effect from 6 August 2013. Pursuant to this Regulation, Chinese exporters are exempt from anti-dumping duties if the following four criteria are met:

- a company specifically listed in the Regulation manufactured, shipped and invoiced directly the relevant products either to their related companies in the EU acting as an importer or to the first independent customer acting as an importer and clearing the goods for free circulation in the EU;
- the imports are accompanied by a commercial invoice containing specific information regarding the exporting company, the relevant products and including a statement that the goods are being imported in accordance with the terms of the undertaking offered by the company and accepted by the European Commission;
- the imports are accompanied by an Export Undertaking Certificate issued by the China Chamber of Commerce for Import and Export of Machinery and Electronic Products, certifying

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 22

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



that goods are covered by the undertaking offered by the company and accepted by the European Commission; and

- the goods declared and presented to customs correspond precisely to the description on the undertaking invoice.

## Reception

Many European producers reacted to the Commission's decision with distress, with EU ProSun stating that the 56 cent minimum pricing level represents the current dumping price for Chinese components. By contrast, the average price of a solar panel manufactured in Germany is reported to be 77 cents per way (as at July 2013). EU ProSun has stated that it will pursue action before the European courts against the agreement, on the basis that a suspension of anti-dumping measures is only permissible under the 2009 Regulation where the minimum price is adequate to remove to injury caused by the dumping to European industry – a situation which EU ProSun strongly feels has not been achieved.

Meanwhile, it is possible that Chinese exporters may consider challenging certain aspects of the EU measures before the European courts, and in particular may take issue with the Commission's methodology in determining the products affected by the investigation.

What this means is that although both China and the EU are keen to signal an end to this dispute, there is a very real possibility that the issue of solar panels will live on for some time through legal challenges and further scrutiny in Luxembourg (even if it is possible that such challenges will be kept on hold pending the announcement of the Commission's definitive findings in December).

The solar panel saga can be seen as a useful indicator of the balance of power between the EU and China. It is clear that the two will remain extremely important and interdependent trading partners for the foreseeable future. At the same time, the threat of a broader EU-China trade war continues to simmer. The EU has asked the World Trade Organisation to examine the legality of anti-dumping duties adopted by China on imports of European stainless steel tubes, and is also investigating the supply of telephone network equipment into the EU by two Chinese producers. China has agreed to cease its investigation into imports of European wines but its investigation into alleged dumping of automobiles continues to hang over European producers. And recent times show that both the EU and China are certainly not closed to the notion of opening investigations into other industry sectors, often at short notice, where it is deemed appropriate to do so.

In the recent build up to the latest discussions on China's ongoing dispute with Japan over the Senkaku/Diaoyu islands, Chinese deputy foreign minister Li Baodong stated:

> *'[a] meeting between leaders is not simply for the sake of shaking hands and taking pictures, but to resolve problems. If Japan wants to arrange a meeting to resolve problems, they should stop with the empty talk and doing stuff for show.'*

Mr De Gucht will no doubt also take heed from this message, and will be acutely aware of the levers available to China in order to resolve problems in reaching an 'amicable solution' in any future trade disputes – even if such a solution leaves a bad aftertaste for European industry. In the meantime, European companies sourcing products or components from China or seeking to export their goods to China should be vigilant of the significant financial consequences that could arise from the escalation of future trade defence measures being brought by either party.

**Mathew Butter**
**Director of M&R Tax Advisers Ltd**

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 23

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



# CUSTOMS

## Halifax explained

When asked, in the 1960s, what he thought was the significance of the French Revolution, an eminent Chinese historian is said to have replied that it was too early to tell. At a mere distance of seven years from the decision of the European Court of Justice in the case of *Halifax*, the same answer seems appropriate. Since the initial shock, in the winter of 2006, at the intrusion into British tax jurisprudence of the truly alien concept that an arrangement might comply with the letter of the law but still be struck down, there has been a steady process of judicial consideration, and even clarification, of what was really meant by that momentous decision. With every passing year, its moment declines a little. No longer can it be seen as the broad spectrum antibiotic much desired by taxing authorities to neutralise the ingenuity of the accountants and lawyers, and paper over the cracks of poor statutory drafting ('you knew what we meant, even if we did not say it …'). The broadly expressed principles of the initial judgment have been relentlessly explored and analysed by the UK Courts, which traditionally seek to use language with far greater precision and consistency than their European counterparts. (This comes from an historic need to read the words of statutes with great care: after all, without any written constitution, the British have never had anything else to which to refer.) The cases in which the UK Courts have pushed the ECJ to show its hand very fully on this issue have been *Cadbury Schweppes* (*2006*), *Weald Leasing* (*2010*), *RBS GmbH* (*2010*) and *Ocean Finance* (*2013*). It is no accident that the UK has accounted for thrice as many ECJ references than all the other Member States put together.

The recent Court of Appeal decision in *Pendragon v HMRC [2013] EWCA Civ 868*, can be seen as the fruit of this process. (*WHA*, the only other Court of Appeal case on the subject, came too early (2006) to be of use (only *Halifax* itself had then been decided), and misfired recently in the Supreme Court (2013), which paid the taxpayer the compliment of ducking the *Halifax* issue.) By contrast, the *Pendragon* decision was able to harvest the combined implications of the slew of ECJ decisions on abuse, and give authoritative guidance.

The focus of the judgment was on the correct approach to the second limb of the two-stage *Halifax* test of whether an arrangement constituted an abuse of EU law. Stage one involves identifying whether the arrangement in question involves a policy-offence to underlying principles of EU VAT law, notwithstanding formal compliance with it. That issue was left in the background. Stage two involves deciding whether the essential aim of the arrangement in question was to obtain a tax advantage. This latter point emerged as the focus of the judgment. It is to be stressed that the test is cumulative: both limbs must be activated, before an abuse can be found to exist.

It is unknown whether the Chinese historian mentioned above could have said when a used car was not a second-hand car for VAT purposes. Confucius would probably have observed that a used car is not a second-hand car in the absence of a prior sale to a private buyer. It would follow that where a car has simply been used for demonstrator purposes by the car dealer, it would not qualify for the underlying purpose of the margin scheme, which is to mitigate the effects of historically 'trapped' VAT on vehicles which have been the subject of transactions where input tax could not be deducted. Such was the argument on the first limb of *Halifax* in *Pendragon*. However, that was not how the UK margin scheme worked. KPMG had noted this and advised Pendragon that demonstrator cars could benefit from long standing UK legislation concerning the desupply of cars, TOGCs, and transfers of vehicles subject to financing transactions, so as to become margin vehicles on the occasion of their first disposal to private purchasers. As a result,

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 24

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



input tax could be reclaimed on the acquisition of the cars, but (given the lack of any profit margin in the hands of the final seller), no output tax would be due on the sale. The UK legislation was later amended, so the case had only historic significance – an advantage for the taxpayer.

The taxpayer also had the advantage that the First Tier Tribunal made extensive factual findings in its favour. The KPMG arrangement involved various in-house companies entering into, first, an intra-group sale of newly purchased cars (whereby output tax was paid, and a right to reclaim input tax arose). Secondly (on the same day), the cars were the subject of an intra-group hybrid lease to dealerships. This generated a fully taxable income stream. Step three involved the assignment of the leases to a third-party bank (off-shore), by way of security for a substantial loan. At step four, the finance was then repaid and the hybrid leases assigned by the third party lender to other group companies by way of TOGC, (a non-supply). Finally, the cars were then sold to private buyers under the margin scheme.

It was agreed throughout the case that the arrangement 'worked' in UK law – pursuant to the complex provisions of Art 8 of the UK Cars Order SI 1997/1615 (read with Art 5 of the Special Provisions Order 1995, as it then stood), whereby the last step fell within the margin scheme as a result of the status of the prior two steps.

However, there was no doubt that as a matter of normal commercial practice car dealers needed large lines of finance and had to give security for it. Therefore, those elements of the arrangement were clearly normal commercial elements. Further, the price at which the various supplies were made, including the rate of interest charged for the loans, all survived scrutiny: the worst that the Upper Tribunal could say as to the latter was that the loan was relatively expensive. However, the precise way in which that was achieved, using captives, TOGCs etc, was clearly tax driven.

Was that fatal? Did it engage the second leg of *Halifax*? Agreeing with the FTT, and disagreeing with the Upper Tribunal, the Court of Appeal held that it was not abusive. It reviewed *Halifax* in the light of the later ECJ decisions, and concluded that what mattered was the objective character of the transaction, rather than the motives of those involved, or the opinions of their advisers. It is good that this highly contentious area has now been clarified. Much debate has stemmed from the ambiguous way that the ECJ had stated the second limb of the two-stage test, using the word '*aim*', which suggests the (subjective) motive or purpose *of the parties*. From that misunderstanding, it is but a short step to saying that any element of a transaction that is 'tax driven' in terms of its inclusion or terms, is abusive. However, closer examination of the wording used (and of the remarks by the Advocate-General), shows that it is the aim of the *transaction* that matters. How can a transaction have an aim? The key, as the Court of Appeal found, lies in the concept of European law that a transaction can have an inherent purpose or aim, ie the essential *objective* function, which is independent of the *subjective* motives of the parties. In other words, it is how the transaction measures up to normal commercial standards. Thus, the aim or nature of the transaction may be that it is designed to make a profit by reason of furnishing a supply. In such a case, it is a normal commercial operation, and can be the vehicle for delivering a tax advantage (eg *RBS GmbH*). Alternatively, it might be such as to have no inherent profitability, and indeed be abnormal in commercial terms (see eg *Part Service*), in which case it is simply not a transaction that a commercial operation would make. In such a case the only *explanation* for the transaction was be as a piece in a game of fiscal chess – rather than any kind of commercial step. This is not an easy distinction to comprehend. But it contains the most important aspect of this decision, which is the first case to grapple with such points properly.

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 25

Letterpart Ltd • Size: 240mm x 162mm • Date: September 6, 2013 • Time: 12:59



Commerciality is not to be confused with the discredited defence of having a commercial effect – see the direct tax case law (eg *Furniss v Dawson, et al.*). The clue to commerciality is to be found, first, in the well-known check list of factors material to finding abuse in *Part Service* and, secondly, in such cases as *Weald* and *RBS GmbH,* in both of which clearly tax-driven elements were accepted as proper, but only so long as they were carried out on normal commercial terms. Where they were not (ie the rate of payments in *Weald*), they were struck down as abusive. This makes complete sense: VAT is a tax on commercial transactions. *Halifax* made clear that even artificial transactions were still economic activities. No value judgment was to be made as to those. However, in making the value judgment for abuse purposes, only the objective nature of the transaction will be material. Otherwise, two identical transactions might be treated differently, depending on the motives of the parties or the advice received, which would not be right. If motive and advisors' opinions are excluded, then there is only the objective nature of the transaction.

Specifically, at paragraph 157, the Court of Appeal grappled with the difficult question of sub-elements of an otherwise commercial arrangement, which may be seen in isolation to be , '*completely unnecessary from an ordinary commercial point of view* (*as in Halifax itself, or in WHA*) [whereas] *in other cases the element in question may be one of several possible ways of carrying out something which would itself be a normal part of the arrangement … What would have been a normal thing to be done may have been done in a relatively unusual way.*' It added, '*Given that parties are allowed to choose in what way they organise their affairs … it may be more difficult to treat such a step as abusive and artificial if it can be regarded as no more than one of a number of possible ways of carrying out a stage in the arrangements which is, in itself, normal and responsive to ordinary commercial considerations.*'

This is an intellectually rigorous passage, which is addressing the difference between something that is merely tax-driven, but otherwise done on commercial terms, (which is acceptable) with something that is both tax-driven and uncommercial (which is abusive). The traditional approach of the Commissioners has tended to elide the two. By 'uncommercial', is meant something done in a way that no business person would do, eg there would be no profit, or no market for the product, the price makes no sense, etc.

In the background of the case, but not ultimately featuring in the decision, was the concession that HMRC made to the Supreme Court in the course of the *WHA* litigation. This flows from the fact that the abuse doctrine is one of EU law: it does not exist in British law. It follows from this that, where the tax advantage only arises from a UK statutory provision, which does not reflect EU VAT law properly (eg is too generous), the abuse doctrine cannot apply, since the advantage is of purely UK origin. This was debated in the Supreme Court in *WHA*, and HMRC publically maintained the concession. It is understood that it reconsidered the concession in the course of *Pendragon,* but stated that did not seek to withdraw it. It is clearly of the greatest importance for taxpayers to know the precise position on this point. No doubt a public notice setting out the precise nature of the concession is being drafted by HMRC.

**David Scorey**
**Essex Court Chambers**

Letterpart Ltd • Typeset in XML • Division: DVITI_208 • Sequential 26

CONTRIBUTORS

**David Rudling and Alan Dolton**
LexisNexis

**John Davison**
Independent Indirect tax consultant

**Oliver Jarratt, Amy Bache & Candice Walker**
Deloitte LLP

**Graham C Brearley LLB(Hons)**
Grant Thornton UK LLP

**Matthew Butter**
Director of M&R Tax Advisers Ltd

**David Scorey**
Essex Court 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 2013

ISSN 1363–9560