

Information for Traders

Ernest Grayston discusses methods of improving the flow of information from HMRC and other Government Departments to traders

All traders involved in VAT and all aspects of international trade, including IIT members taking the Customs Route, should be interested in what follows. Also the thousands of traders who already use the websites mentioned below. The reason for this article is that the uktradeinfo.com site has undergone a refresh, as from 20 October, to improve accessibility and performance. Navigation on the new site will not change: all the pages can be accessed from the tabs along the top of the page and via menus on the left-hand side of each page as before. It is recommended that existing users and new traders should interrogate the facilities available to them.

There had always been a problem for HMRC of finding the most effective way to communicate with traders. In 1969 the Joint Customs Consultative Committee (JCCC) was set up. The JCCC comprises HMRC and trade association representatives who meet quarterly to discuss changes. The associations can then disseminate information to their members. The problem is that

many traders, especially SMEs, are not members of those associations. The advent of the Internet has made it much easier for traders to be kept up to date, as explained below.

International Trade Blueprint

The International Trade Blueprint set out the future development of HMRC's policy with regard to international trade over the next five to seven years. Over this period there would be considerable changes to accommodate the introduction of a revision of the SAD (Single Administrative Document) – SAD H (now done), the revised MCC (Modernised Customs Code) and the new Implementing Regulation, the new computer system to replace CHIEF (Customs Handling of Import and Export Freight), electronic Community Transit. The new Implementing Regulation will take about two years before it comes into force.

Realising that more information would be required, two more sites were created.

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HMRC's website (www.hmrc.gov.uk) caters for all aspects of HMRC activities. To go to the customs part of the site, click on 'Import and export' (ignoring quotes) under 'businesses & corporations' on the home page. It is assumed that readers are familiar with the material available on this website.

UKTrade Alert service

The website mentioned at the beginning of this article, www.uktradeinfo.com, belongs to HMRC's Statistics and Analysis of Trade Unit (SATU). SATU has been operating a web alert service through this website since March 2004. Interested parties can register free of charge to receive information via the alert service. The service alerts subscribers to relevant information and news from a variety of sources, including the European Commission Europa website; JCCC papers; Business Briefs; VAT Notes; NCTS (New Community Transit System); CFSP (Customs Freight Simplified Procedures); CHIEF; NES Information Papers; Excise news; DTI (Department of Trade & Industry); as well as relevant publications from other government departments, such as DEFRA (Department for Environment, Food and Rural Affairs). When subscribers register for the service they can select the sources of information they wish to receive and can then amend online where necessary. As well as disseminating information to a wide audience, the service can also be used to carry out surveys, invite consultation and invite feedback from the trade. This service provides an ideal opportunity for all departments of HMRC to communicate with traders at a much wider level than the JCCC and an opportunity to inform importers/exporters and consult with them directly. The main benefit for traders is that instead of having to trawl through a lot of information, they can indicate only those subjects that they are concerned with. This will allow traders to concentrate on their business activities.

To access the UKTrade Alert service go to www.uktradeinfo.com and click on 'Sign up for email alerts'. You are then presented with an online form to fill in with your details and traders can choose, at the moment, to receive up to 30 different types of information.

These are sub divided as follows:

- * Information from Uktradeinfo.com
- * Information sectors from HM Revenue & Custom's (sic) website
- * Information from other Government Departments.

Traders will then receive email alerts indicating what the alert covers, with a hyperlink to click on for that information. Your choice can be amended at any time and it would be prudent to check every so often as to whether any other links have been added

The Alert service will save traders time in alerting them to only the information that they require. As an example, the DTI site has a direct link to Notices to Importers/Exporters.

Businesslink – International Trade

This organisation was set up by the DTI, in preference to the existing Chambers of Commerce. The website is at www.businesslink.gov.uk/.

This provides advice and guidance on the procedures you need to follow, and about the market information you need to consider, from across government departments:

- * learn the basics of trading internationally
- * find out about customs procedures and reliefs which may apply to your international trading
- * interactive tools to tailor advice for your business
- * a free online 'UK Trade Tariff' (note that at the moment this just covers Volume 2 of the UK Tariff that lists the commodity codes. Several users have asked recently whether Volumes 1 and 3 could be included too.)

From the Businesslink home page click 'International trade' on the left-hand side. In the main column of the page which appears there are various categories of information and in the right column are three headings 'Tools', 'Find' and 'Useful tools on other sites', which are self-explanatory.

Under 'Classifying your goods' in the main column is 'How to classify difficult goods'. This provides 17 headings under which the Tariff Classification Branch of HMRC has provided guidance. If there is any doubt there is a telephone number to ring the Tariff team for further information.

Summary

The advent of email facilities has enabled HMRC and other Government Departments to include all the information needed to keep traders informed of the procedures to be followed. They are also keen to be informed of any other information that may be required by traders. There are also contact numbers for further queries.

Review of the Institute's Ethical Rules

A working group is being set up to undertake a review of the Ethical Rules. The Group will carry out its work via a combination of meetings and email although at this time it is difficult to judge how long this work will take and how much time will be involved. The current Ethical Rules can be found at www.theiit.org.uk. The Group will comprise both Directors and members and any Associate or Fellow member who is interested in taking part in this working group should send their details to Terry Davies, Secretary General – terry@theiit.org.uk.

IIT joins the CFE

Friday, 26 September 2008 marked a milestone in the history of the Institute: it was elected a member of the Confederation Fiscal European with immediate effect.

What does this mean? Firstly the financials: it means the Institute will pay an annual fee for membership, but in this life nothing is for nothing!

What does the Institute get for this? It has the right to send members to Fiscal Committee meetings, to Professional Committee meetings and to the General Assembly and Council. It will be

contributor to debates and submissions that truly make a difference. Its first representative to this committee will be John Voyez, of Smith and Willilamson.

The Professional Affairs Committee is a relative newcomer within CFE but it is seen as the 'place to be'. This is because the nature of the profession of tax adviser is under close scrutiny. Revenue

*by Ian Hayes,
IIT director
and
representative
to the CFE*

*Terry Davies, Secretary General, with Henk Koller,
Chairman of the CFE Professional Affairs Committee*

involved in the process of making representations to the Commission, the European Parliament, the OECD and other key European bodies. It will have close and developing relations with all the key tax advisory bodies throughout Europe. The networking opportunity is without parallel.

The Fiscal Committee is the working heart of the CFE. It is divided into two sub-groups, direct and indirect tax, which look at prospective legislative changes and the effect of judicial decisions on taxpayers with a view to promulgating information, making public pronouncements and submitting learned and considered reports thereon. It publishes books and each spring organises a forum to which key politicians, Eurocrats and practitioners are invited.

Clearly the Institute's interests will be focused on the Indirect Tax committee, where other members will be expecting it to make an impact, especially in those non-VAT taxes in which Institute members excel. It will participate in working parties established for specific issues and be an equal

Bob Davies, Chairman, and Andrew Clarke. CFE Past President

authorities need intermediaries. It is unable to function without them. Increasingly this reliance will be subjected to risk analysis and those who are found wanting will discover greater difficulties in obtaining swift resolution or agreement. The Committee is looking at this on a pan-European basis and has the weight to be heard in Brussels, where key decisions will be made.

*Bob Davies, Terry Davies, Maria Lourdes Perez-Luque,
CFE President, and Michael Conlon QC*

The CFE, as representative of the vast majority of tax advisers in Europe, is on the case. There are issues of human rights and competition law to consider and by membership and participation in the committee, the Institute will be able to participate in, and benefit from, the debate in a way that could not even be dreamed of before membership of CFE. Its first representative on this committee will be Terry Davies, Secretary General.

The CFE is the leading pan-national organisation within Europe capable of dealing with politi-

*Bob Davies, Chairman, Michael Conlon QC, President,
and Nick Goulding, CIOT President*

cians, administrators and Eurocrats on an equal level. Its views are respected and advice on key issues is often sought. It is managed by a Board which is made up of the President, three Vice-presidents, the Chairman of the Fiscal Committee and the Chairman of the Professional Affairs Committee, the Treasurer and the Secretary General. There is a small staff based in Brussels and an administrative office in Berlin.

Its affairs are overseen by the meetings of its members in Council, normally held in April, and in General Assembly, normally held in September, where the Institute's interests will be represented by the President, Michael Conlon, and Chairman, Bob Davies, respectively.

All these meetings are excellent opportunities to network and at the Madrid meeting at which the pictures in this article were taken Michael, Terry and Bob were working the room with a zeal that was a wonder to behold. For the Institute, expansion of the Diploma programme is very important and nowhere are there likely to be greater and more fitting partners than within the CFE.

As a tax body with a very broad church there are currently members from 20 countries, only one of which is wholly specialised in indirect taxes - this Institute. In making his address to the General

Assembly, Michael Conlon lay great emphasis on the specialised nature of the membership and the contribution it wishes to make, not only in relation to VAT but also in respect of customs duties, excise duties and green taxes. His words were warmly welcomed.

The development of tax practice within the EU is growing apace. Ian Hayes, a director of the Institute, already a member of the Professional Affairs Committee, is chairing a working party which is looking at the true meaning of 'liberal profession'. The significance of this lies in what may or may not develop as the required norms of tax practice and whether it becomes yet another regulated profession.

Certainly membership of CFE gives the Institute significantly greater strength, both to proclaim its professional status and to defend its position against any inroads revenue authorities may seek to make without our consent or negotiation. By becoming a member of CFE it has achieved an ability to influence and participate at a level of great significance.

From small beginnings the Institute has come of age.

To find out more about CFE you can visit www.cfe-eutax.org.

Public Bodies and VAT: Clarification

The judgment handed down by the ECJ on 16 September 2008 in *Isle of Wight Council and others* Case C-288/07 (reported in Issue 101 of *Indirect TaxVoice*) completes something of a litigative troika that does much to clarify when a public body, notably a local authority, comes within the scope of VAT.

The provisions of Article 13(1) of the EC Principal VAT Directive (formerly Article 4(5) of the EC Sixth VAT Directive) are quite well rehearsed: 'states, regional and local government authorities ... governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities [unless] treatment as non-taxable persons would lead to significant distortions of competition'.

This has led to a test in three parts, each of which must be met if a local authority (or similar public body) is to be able to avoid treating fees and charges received in return for the performance of its activities as liable to VAT, thereby achieving so-called 'non-business' treatment in the UK vernacular.

The benefit of such 'non-business' treatment for a UK local authority, of course, is that no output VAT need then be accounted for on such fees and charges but, taking advantage of the peculiar UK law provisions in section 33, VAT Act 1994, the local authority can fully recover all VAT incurred on associated expenditure.

The three parts of the test are:

- * the body undertaking the activity in question must be a body governed by public law
- * it must be acting as such under public law, interpreted to mean acting under a special legal regime not applicable to private-sector operators (see *Commune di Carpaneto Piacentino and others* Joined Cases C-231/87 and C-129/88) and
- * 'non-business' treatment must not create a significant distortion of competition.

The *Isle of Wight* case concerned the last of these three tests and addresses how significant distortion of competition should be determined and measured; earlier this year, however, the VAT Tribunal got to grips with the other two tests in the case of *The Chancellor, Masters and Scholars of The University of Cambridge* 20,610.

The *University of Cambridge* case, which focused primarily on the meaning of 'body gov-

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VAT &
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erned by public law', was prompted by the earlier decision of the Court of Session in *Edinburgh Telford College v HMRC* [2006] STC 1291 and these two decisions, taken together with the *Isle of Wight* case and another High Court decision, *Riverside Housing Association Ltd v HMRC* [2006] STC 2072, provide a comprehensive framework against which to judge whether a public body is a taxable person or not.

Edinburgh Telford College

The *Edinburgh Telford College* case concerned whether a Scottish college was acting in a non-business capacity when providing further education (if so it was entitled to zero-rating on the construction of a new building).

The decision of the Court of Session, upholding that of the Tribunal (decision 18,913), concentrated on whether the College was acting under a special legal regime when providing further education under arrangements entered into with the Scottish Executive, which provided the funding therefor.

The outcome came as something of a surprise, with the Court ruling that, in order to determine whether a special legal regime exists, consideration must be taken of the overall statutory and regulatory environment within which the public body undertakes the activities in question. Previously, the view of most practitioners (and HMRC) had been that a special legal regime can only be determined by close reference to the specific legal provisions explicitly governing those activities.

The *Edinburgh Telford College* decision thus opened up some interesting possibilities and the revised interpretation placed upon 'special legal regime' has been broadly accepted by HMRC.

What *Edinburgh Telford College* did not do was address the question of whether the College was a public body, a point taken as read, much to the subsequent chagrin of HMRC!

Riverside and Cambridge

Earlier this year the High Court upheld the decision of the Tribunal (decision 19,341) in *Riverside Housing* that the Association was not engaged in activities other than by way of business and so could not benefit from zero-rating for the construction of new headquarters premises.

Though the case was disposed of primarily on first principles, that the Association was engaged in business, the Court alluded to the fact that the Association was not a body governed by public law, quoting from ECJ jurisprudence (including *Carpaneto*, along with *Ayuntamiento de Sevilla* Case C-202/90) that such should be interpreted to mean 'part of the institutions of the state' and not a primarily private body undertaking functions on behalf of the state.

The omens were thus not good for the University of Cambridge, which, emboldened by the success of *Edinburgh Telford College* and as,

in effect, a test case, sought to argue that it was entitled to lower-rating on supplies of fuel and power on the ground that, when undertaking its core activity of delivering higher education, it acts as a body governed by public law under a special legal regime.

The Tribunal ruled that the term 'body governed by public law' means a body engaged in acts of public administration as part of the democratic state and is not determined by how the body is constituted or created (the University had sought to argue that its statutory origins and susceptibility to judicial review proceedings in certain circumstances rendered it a body governed by public law).

As an aside on this point, the Tribunal further rejected the University's arguments on the ground that, if followed, they would mean a body could be partly a public body and partly not, a situation the Tribunal saw as patently absurd, in that any given body must be either wholly one thing or wholly the other, it being the question of whether it is acting under a special legal regime that further qualifies acting as a public body.

That being so, the University is not a public body.

Though that disposed of the case, the Tribunal went on to rule that, unlike in *Edinburgh Telford College*, the law on higher education in England does not constitute a special legal regime. Thus, even if the University were a public body, its provision of higher education would not fall within Article 13(1).

Finally - and perhaps of most interest from a legal-technical perspective - the Tribunal ruled that, even had it found the University to be a public body and its provision of higher education governed by a special legal regime, Article 13(1) does not operate to deem such a non-business activity but merely treats such public service activities as outside the scope of VAT. Indeed, on this point it is interesting to note that EU law still tends to refer to such services, somewhat misleadingly, as 'exempt from VAT'.

HMRC Brief 27/08

Following the *University of Cambridge* decision HMRC issued Brief 27/08, outlining its views on the meaning of 'body governed by public law' and 'special legal regime' in the light of that decision and those in *Riverside Housing* and *Edinburgh Telford College*. HMRC broadly accepts all three decisions, which thus provide some clarification on when public bodies can be treated as non-taxable persons.

One caveat remains, however; perhaps not surprisingly, the University of Cambridge has sought leave to appeal to the High Court and, given the importance of the subject and the Tribunal's comments on Article 13(1), it is a distinct possibility that the question may yet be referred to Luxembourg.

Collectors' Piece

HMRC v West

High Court; 2 October 2008

The taxpayer sought to import a Ford Zephyr under heading 97.05 ('Collections and collectors' pieces of ... historical ... interest') and so free of duty.

Following *Daiber v Hauptzollamt Reulingen* [1985] ECR 3363 it was accepted that to be a 'collectors' piece' the car must:

- (i) be relatively rare
- (ii) not normally be used for its original purpose
- (iii) be the subject of special transactions outside the normal trade in similar articles and
- (iv) be of high value.

HMRC operated under a rule of thumb that set 'high' value at a minimum of £20,000, which the Zephyr did not match. However, Sir Andrew Park noted in the High Court that if the other three conditions were satisfied it would be surprising if the fourth were not satisfied too. The question was not whether the car attained some arbitrary value but whether it had a high value in comparison to its value otherwise than as a collectors' piece. This car did satisfy that condition and thus was properly to be classified under heading 97.05.

Canterbury Hockey Club and another v HMRC Case C-253/07

ECJ; 16 October 2008

The issue in question here was whether affiliation fees paid by the clubs to England Hockey were properly exempt from VAT. HMRC argued that the exemption in Article 13.A.1(m) of the Sixth VAT Directive 77/388/EEC for 'certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education' applied only where the recipient of the services was an individual person, not a legal person such as either of the taxpayers. The ECJ ruled that:

1. Article 13.A.1(m) is to be interpreted as meaning that, in the context of persons taking part in sport, it includes services supplied to corporate persons and to unincorporated associations, provided that – which it is for the national court to establish – those services are closely linked and essential to sport, that they are supplied by non-profit-making organisations and that their true beneficiaries are persons taking part in sport

2. The expression 'certain services closely linked to sport' in Article 13.A.1(m) does not allow the Member States to limit the exemption under that provision by reference to the recipients of the services in question.

Thus the case will revert to the High Court for it to decide whether on the facts the services supplied by England Hockey to the appellants are closely linked and essential to sport.

JFB and FR Sharples

Tribunal decision 20775

Mr and Mrs Sharples are in business as a partnership. Their self-invested personal pension (SIPP) scheme purchased Bilney Hall, which is used as a care home. The partnership purchased adjoining land (part of the Bilney estate) and built seven sheltered housing units thereon.

The planning permission included the conditions that the units must not be occupied by persons under 55 years of age and that the freehold on which the units stand was not to be disposed of separately from the freehold of Bilney Hall, although transfers of the freehold between Mr and Mrs Sharples and the trustees of the SIPP were permitted.

One of the conditions for zero-rating the building of new dwellings is found in the definition of a building designed as a dwelling:

'the separate use, or disposal of the dwelling is not prohibited by the term of any covenant, statutory planning consent or similar provision' – see Value Added Tax Act 1994, Schedule 8, Group 5, Note 2(c).

The appellants argued, and the Tribunal agreed, that the separate use of the sheltered housing units was not prohibited by the planning condition. It was the appellants' case that the 'separate use' and 'disposal' tests in Note 2(c) are alternative, such that if either is not prohibited Note 2(c) is satisfied. HMRC argued for the alternative interpretation that for Note 2(c) to be satisfied both separate use and disposal must be 'not prohibited'. Case law favours both interpretations but the Tribunal sided with HMRC in holding that if either separate use or disposal is prohibited the building is not designed as a dwelling.

That did not defeat the appellants' case, however, since they intended to show that not only was separate use not prohibited but disposal was not prohibited either. There were two possible ways of satisfying this condition: that disposal was not prohibited because the partnership was permitted to dispose of the land to the trustees; and that disposal did not, as alleged by HMRC, mean disposal of the freehold interest in the land, it also meant sale by long leasehold and the appellants indeed intended to dispose of the units by means of 999-year leases, which the local authority had approved.

The Tribunal agreed that sale of a 999-year leasehold interest amounted to disposal for this purpose. The legislation was concerned with use of the building as a dwelling, not with absolute ownership of the land on which the dwellings stood.

The appeal was therefore allowed, with costs of £400.

Chris Reece summarises recent cases of interest or importance

The Rewritten Schedule 10

The option to tax rules used to be found in 3 densely-packed paragraphs. They are now to be found in 34 paragraphs!

The new Schedule 10 is not merely a rewrite of the old but contains a series of amendments. The main ones are as follows:

- (i) new certification procedures disapply the option where buildings are to be converted into dwellings and where land is supplied to housing associations;
- (ii) a revised definition of 'occupation';
- (iii) a new way of opting to tax (a 'Real Estate Election');
- (iv) changes to the 'cooling off period';
- (v) new rules governing revocation after 20 years;
- (vi) automatic revocation if no interest has been held in a property for six years;
- (vii) an option to tax now applies to both the land and buildings on the same site;
- (viii) an ability to exclude a new building from an option to tax;
- (ix) new appeal rights where HMRC refuses to grant a permission under Schedule 10 (but only if HMRC acts unreasonably).

Notable exceptions

It is worth noting that no change is made to the 'beneficiary' rule now in paragraph 40 to the effect that if the benefit 'of the consideration' for the grant of an interest accrues to a person that person is treated as the person making the grant not the actual grantor.

To change this rule appears to have come within the 'too difficult' category.

In its new Notice 742A HMRC says that this rule applies in a simple nominee situation but not where the beneficiaries are numerous – for example, where there is a unit trust. To say this avoids numerous complications (for example, if the paragraph applied to a unit trust would all unit-holders have to opt for tax before a valid option would bind the trustees?) but it lacks any logical justification.

Statute not the end of the story

One feature of the new Schedule 10 is that despite its length it does not contain all the relevant statutory rules. In a number of cases various conditions must be met before something can or cannot be done (for example, revocation of an option) but these requirements are as set out in a notice pub-

lished by HMRC (new Notice 742A). Thus, it is not possible to merely look at the new Schedule 10, despite its length, and be aware of all the relevant rules. Schedule 10 and the new Notice 742A must be looked at together.

The real estate election

The new Schedule 10 (see paragraph 21) contains a new way to opt to tax, to be known as a real estate election (REE).

Where such an election is made it has effect only with respect to interests in land acquired after the election is made by the person opting or, where that person is a member of a VAT group, by any other member of that group at that time.

What it does is to obviate the need to exercise individual options as regards property acquired after the making of the REE.

Where it is made it does not amount to the exercise of the option at the time it is made but rather when and if an interest in land is acquired the option is treated as exercised on the day on which the acquisition is made.

A number of points are to be noted:

(i) While notification of the REE is required (within 30 days – see paragraph 21(7)) there is no requirement to notify when and if new interests in land are acquired. If there were there would be no merit in making such an election. HMRC has power, however, to obtain such information from a person 'making' a REE.

(ii) Because when a REE is made an option is only treated as exercised on the day of acquisition, the ability to revoke immediately after exercise, which has now been extended from three to six months, applies from the day each new interest is acquired.

A REE may not be revoked, save by HMRC in limited circumstances, but once an acquisition has been made the normal power to revoke, subject to the satisfaction of certain conditions, will apply.

(iii) It should be noted that a REE has no effect where a person has made a previous specific election in respect of the land acquired having effect from a time prior to the time of acquisition of the land (see paragraph 21(3)).

Where a REE is made the option is treated as exercised on acquisition of an interest in land. There may be circumstances (for example, on a TOGC) where a person wishes to ensure that an election has effect at a certain time – in that case the earliest time at which a grant is made which

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Inn Chambers,
looks at
changes made
by the new
legislation and
discusses the
practical
implications.
This article is
based on the
presentation
made by
David at this
year's Indirect
Taxes
Conference.*

can include the payment of a deposit. In such a case the REE may not be effective.

To ensure that the TOGC rules apply a specific option should be exercised in respect of the property to have effect from a date earlier than acquisition (that is, prior to contracts being entered into).

(iv) A REE has no effect where a person owns an existing interest in land and then acquires a further interest in the same land after the REE is made.

In such a case a specific option will have to be exercised in respect of the land (see paragraph 21(4)).

(v) Hitherto a few large taxpayers have made what has become known as a global option to tax – typically an option over the whole of the UK. The ability to make such an option has not been removed by the new rules but it is likely to disappear. This is because:

* Paragraph 24 provides that an option exercised by any person is treated as revoked if a person does not have an interest in the property for any period of six years beginning after the option has effect. There are no transitional rules so that it may be that many global options will immediately (on 1 June 2008) have ceased to have effect in respect of unacquired land if the election was made more than six years ago.

* Hitherto where a global option has been exercised HMRC has by concession allowed the right to revoke to apply to each property when acquired rather than within three months (now six months) of the time the option had effect. This concession has now been withdrawn so that the six-month period will apply to the time the global option has effect. It follows from this that the ability to change one's mind is more limited with a global option than where there is a REE.

* An existing global option and a REE cannot coexist. Paragraph 22(2) provides that once a REE is exercised any option to tax exercised before such time in respect of land and buildings that neither the person exercising the REE nor a member of its VAT group has an interest in is automatically revoked. This does not prevent future specific exercises of the option which are wanted to have effect prior to the date of acquisition.

Revocation

Rules regarding revocation are now contained in detail in the new Schedule. To an extent these rules represent an enactment of prior HMRC practice.

Cooling off period – paragraph 23

The old rule permitted revocation within three months in certain cases; this has now been extended to six months.

It also required consent to be obtained from HMRC in all cases, as well as certain conditions being satisfied, namely:

- * no tax being chargeable or credit for input tax being claimed as a result of the exercise
- * no TOGC.

The new rules are slightly different:

- * it is a condition that the taxpayer has not used the land since the option had effect;
- * again no tax must have become chargeable nor a TOGC made;
- * as regards input tax, the condition that no credit for input tax must have been obtained as a result of the exercise is now contained in Notice 742A but in respect of this requirement if it is not satisfied revocation is still possible if HMRC gives its consent.

Hitherto where a global option has been exercised HMRC has by concession allowed the right to revoke to apply to each property when acquired rather than within three months (now six months) of the time the option had effect. This concession has now been withdrawn so that the six-month period will apply to the time the global option has effect.

The ability and need for HMRC to give consent has therefore gone. The ability of HMRC to give consent only overrides one requirement.

Revocation after 20 years

Revocation after 20 years permitted by 1995 changes required the consent of HMRC in all cases. The position is now that revocation is possible if either the taxpayer obtains prior permission or if certain conditions specified in Notice 742A are met.

These conditions are either that:

1. the taxpayer or associate has no interest in the property when the options is revoked or;
2. if four conditions are satisfied:
 - * ownership for 20 years and since the option had effect

- * capital goods adjustments cannot be made
- * no grants of interest in preceding 10 years at less than open market value or which will give rise to a supply after revocation for a consideration significantly greater than consideration for a supply before revocation (except normal rent review)

- * no goods supplied to taxpayer prior to revocation are attributable to supply of property by taxpayer more than 12 months after the options is revoked.

The disapplication provisions

The new Schedule 10, in paragraphs 12 to 17, contains the redrafted anti-avoidance rule that disapplies the option in specified circumstances. The rule applies when broadly two conditions are satisfied at the time of the grant of an interest:

(i) that the property is a capital item of the grantor concerned for the purposes of the capital goods scheme; and

(ii) the property will be occupied for exempt purposes by the grantor or certain associates.

The redrafted rules are essentially the same albeit with certain redefinitions.

(a) One of the requirements of the disapplication provisions is that occupation of the property

At present there is no authority determining that the abuse of rights doctrine applies to the option to tax. As a matter of principle, it appears strongly arguable that it does not. It is not a doctrine applicable to UK law generally and therefore there is no basis for saying that it is applicable to a set of rules created under UK law, merely because such rules are contemplated by and permitted by EC Directive.

by a relevant person must not be 'wholly or substantially wholly for eligible purposes [that is, taxable purposes]'.
The previous rule was 'wholly or mainly' for eligible purposes.

In its Notice 742A HMRC says 'substantially wholly' means land occupied at least as to 80% for eligible purposes.

This has force of law and while it accords with prior HMRC practice, such practice did not previously have force of law (and probably was incorrect). Now it does.

(b) The question of when a person is in occupation of land has been the subject of recent litigation in the case of *Newnham College* [2008] STC 1225. This case involved a leaseback scheme involving the college library and the specific question that arose was whether the college remained in occupation of the library.

There are two points worth commenting on.

(i) One question that arose was as to the meaning of occupation for these purposes. The taxpayer contended and the House of Lords held that the term 'occupy' had the meaning that the term had been given by the European Court for the purposes of the Sixth Directive. In other words, referring to *Sinclair Collis* [2003] STC 898 – it was the right to occupy as if that person were the owner and to exclude any other person from enjoyment of such a right. On the facts the House of Lords held by a majority that there was not such occupation.

HMRC had argued that a different and broader approach should be adopted so that occupation meant any physical presence on the land for the purpose of making use of it. This was not accepted by their Lordships.

While *Newnham College* represents a tax avoidance case that succeeded, it is a doubtful precedent. This is because HMRC deliberately did not argue that the 'abuse of rights' doctrine rendered the arrangements ineffective. HMRC said that it wanted a decision on the efficacy of the UK legislation alone.

(ii) A very live question in the circumstances is whether the abuse of rights doctrine has any application to the option to tax rules, bearing in mind that these rules do not represent community legislation by reference to which the doctrine has been expressed by the European Court to apply. The option to tax rules are rather rules contemplated and permitted by community legislation.

In the *WHA* case [2007] STC 1707 it was argued that as reliance was being placed on national legislation, transposing provisions of the Sixth Directive, the abuse principle was not applicable. Lord Neuberger said that the principle extended to domestic legislation and rules intended to implement or reflect the terms of the Directive. This hardly covers the option to tax, which is something permitted by the Directive but does not implement or reflect its terms.

Nevertheless, if the doctrine does not apply to matters permitted but not provided for in the Directive a rather odd situation arises of certain provisions in the VAT Act being subject to the abuse of rights doctrine and some not.

Perhaps this is why Lord Neuberger went on to express the view in *WHA*:

'I do not see any reason in principle or logic why the applicability of the abuse principle should be limited to schemes which depend on their efficacy solely on community law, whether transposed into domestic legislation or of direct effect.'

The *Newnham College* case was, as I have said, not concerned with the abuse doctrine. Nevertheless, Lord Neuberger said that:

'... on the face of it the Commissioners would have a strong case for applying that principle in the present case'.

At present there is no authority determining that the abuse of rights doctrine applies to the option to tax. As a matter of principle, it appears strongly arguable that it does not. It is not a doctrine applicable to UK law generally and therefore there is no basis for saying that it is applicable to a set of rules created under UK law, merely because such rules are contemplated by and permitted by EC Directive. Having said this, and in particular bearing in mind the approach of Lord Neuberger, it is difficult to be optimistic that this is what the UK courts will ultimately hold.

CGS and disapplication

A requirement of the anti-avoidance provisions, in Schedule 10 paragraphs 12 to 17, is that for them to apply the grant giving rise to the supply must be made by someone described as a 'developer'. The use of this term is entirely confusing, because there

is no requirement that a person must develop before he is a 'developer' for this purpose.

For this purpose a person is a developer if he holds the property as a capital item or if the property is expected to become a capital item either for the grantor of the interest or for a transferee.

A 'capital item' is an item falling within the capital goods scheme and the grant must be made before the end of the period during which adjustments may be made relating to the deduction of input tax as respects that capital item.

In applying the anti-avoidance rules what is relevant to know is whether the property in question is subject to the capital goods scheme and, if so, the period during which it is so subject. The capital goods scheme rules are set out in Regulations 113 to 117 of the VAT Regulations 1995 (SI 1995/2518). In broad terms, property will be a capital item if taxable supplies (either on an acquisition or a building) have been made in respect of it in excess of £250,000 (excluding rent).

Note:

(i) An item is not a taxable item if a person uses it solely for the purposes of selling it.

Thus a developer who develops property solely in order to sell will not hold the property he develops as a capital item. Nevertheless, the anti-avoidance provisions apply on the grant of an interest in land if the grantor expected that the building would become a capital item in respect of a transferee.

(ii) The TOGC rules do not apply if on a transfer:

* the item would become a capital item for the purchaser; and

* that person's supplies would involve exempt use (that is, use not mainly for taxable purposes) by the purchaser, a connected person or a person providing finance.

Thus if a developer builds and lets property to a bank and the bank then lends money to a purchaser to buy the property, the TOGC rules will not apply on the sale. There will, in such circumstances, not only be a VAT charge on the sale but the anti-avoidance provisions will subsequently apply so as to prevent an exercise of the option to tax permitting recovery.

Particular difficulty arises if the bank in the above example occupies merely a small part of the building. A person is said to occupy land if he occupies only part of it (paragraph 17(10)). Does this mean that a lease to the bank in the above example of, say, 5% of the total lettable area of the building precludes the TOGC rules applying at all?

(iii) Schemes have been implemented to manipulate the rules applicable where a capital item is sold. These rules apply where the 'whole interest' is sold.

The rule in Regulation 115(3) is that the taxable/exempt nature of that supply determines the calculation of the adjustment in all remaining intervals.

This was sought to be exploited in the case of *Centralan Property* [2006] STC 1542, where an exempt lease at a premium was granted followed by a taxable sale of a freehold at a small charge. The taxpayer argued that only on the freehold sale was the whole interest of the taxpayer sold and therefore that such taxable sale governed the mechanics for making adjustments in the subsequent intervals.

This welcome decision removes a possible pitfall existing in a not uncommon situation where a refinancing occurs on a business being acquired. It should be noted that there is real doubt whether the requirement in our domestic legislation that assets must be used in the 'same kind of business' does not go beyond what the European Directive envisages.

The European Court held, however, that as the two disposals were closely and inextricably linked both were to be taken account of in making adjustments in proportion to their respective values. The arrangement failed because most of the value arose on the exempt grant of the lease rather than the taxable sale of the freehold.

To counter schemes of this sort more generally, HMRC introduced new paragraphs 115(3A) and (3B) in 1997, so that if as a result of a sale the input tax relieved exceeds the tax charged on the ultimate sale, HMRC is given power to secure that the input tax relief is limited to the output tax charged.

TOGCs

Morton Hotels 20039 is a case which concerned the sale of three hotels which were immediately subject to a sale and leaseback of the properties by the initial purchaser. HMRC argued that the TOGC rules did not apply because the assets transferred (that is, the land) were not used after the sale in the same business. Rather different assets (the leases) were used.

The Tribunal rejected HMRC's argument. It held that the requirement was that the assets had to be used in the same way as before but that there was no requirement that the specific proprietary interest acquired had to be retained.

This is a welcome decision and removes a possible pitfall existing in a not uncommon situation where a refinancing occurs on a business being acquired. It should be noted in any event that there is real doubt whether the requirement in our domestic legislation that assets must be used in the '... same kind of business ...' does not go beyond what the European Directive envisages (see *Zita Modes Sarl* [2005] STC 1059).