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We bring you the sad news of Hugh Mainprice's recent demise but trust you will be uplifted by this brief tribute.

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The views expressed in this newsletter are not necessarily those of the Institute and no legal responsibility can be accepted by the Institute for opinions, advice or recommendations expressed

Hugh Mainprice

24 March 1928 – 11 February 2009

It was with much sadness that we learned that Hugh Mainprice had passed away on 11 February. Hugh is survived by his daughter, Clare and we send her our deepest sympathy, as we do to all Hugh's family.

The Institute

Hugh was admitted an Associate Member of the Institute of Indirect Taxation in 1998 and from that time he was an active supporter of the Institute. He gave generously of his time to speak at conference and also to act as an examiner for the Associate examination.

India

Hugh was born in India, in Madras, where his father's company made 'the best gin in the country'. His mother died when Hugh was three, and Hugh and his elder brother, Richard, were sent home to England. After school at Sherborne, and national service in the Army, Hugh joined the Colonial Service and was posted to Kenya. In Kenya Hugh threw himself into sports – mainly cricket and rugby (Hugh and some friends set up a local branch of the Harlequins Rugby Football Club). Then Hugh met Lyn, a schoolmistress at the Kenya High School, and they married a year or so later.

Kenya

Hugh returned to Kenya in the Crown Law Office, and joined the Attorney-General's Chambers in Nairobi. He was very successful, and often prosecuted cases and defendants in fluent Swahili. When Independence came, Hugh was the Registrar of Mombasa, and third in line to be Attorney-General of Kenya.

Customs

All further promotion now being blocked, Hugh returned to England where he joined a large brewery company in the Midlands as what would now be called Deputy General Counsel. After this Hugh returned to London and joined HM Customs and Excise in 1964 as a lawyer and remained there until

1972. Whilst there Hugh was heavily involved in writing the VAT legislation and indeed advised on VAT before the Finance Act 1972 came into force.

VAT

Then Hugh met the love of his life. A fascinating French system of taxation called 'Taxe Sur le Valeur Ajoutée' – known in English as Value Added Tax. VAT, which to the rest of the UK was a nasty but necessary part of joining the European Economic Community, became Hugh's abiding passion. Soon Hugh, who had been a member of the London Symphony Chorus, an amateur body which sang with the LSO and was much in demand by some of the greatest conductors in the world, had dropped all his other hobbies and left the Civil Service to practise the then unknown trade of a VAT legal expert. 'Hugh,' his friends would often ask, 'What are you going to do in two or three years' time when everybody knows all about VAT and nobody needs you any more?' Hugh always said he would be dead long before anybody knew all about VAT, let alone everybody knowing all about VAT. These views, expressed by Hugh in 1972, that nobody will ever know all about VAT are probably correct as correct today as they were then.

The Tribunal

He first appeared in the VAT Tribunal in April 1973, in the *Rentokil* case, which was the fourth appeal heard by the Tribunal and where he appeared frequently thereafter. In fact, as Hugh was fond of telling people, his firm appeared in so many VAT appeals that Lord Grantchester, a former Tribunal President, described him as 'his best customer after Customs & Excise'.

Interests

Studying and practising VAT may seem a strange way to spend one's life but Hugh had many interests as well as VAT, studying and photographing wildlife, travelling to distant corners of the world, including the Galapagos Islands and Antarctica, rugby, cricket, music, history, wine ... but VAT, and his late wife, Lyn, remained the abiding passions of his life.

Readers are invited to submit ideas for articles they would like to write - please email articles@theiit.org.uk

Compliance Checks and Payments

The November 2008 consultation document 'Compliance checks: The Next Stage' [see <http://snipurl.com/cr36t>] seems to deal mainly with direct taxes. However, I now see that Questions 8 onwards in Chapter 6: 'Questions for consultation' have an indirect tax aspect and would comment on these as follows.

Detailed response

Question 8: 'HMRC would welcome views on whether a record-keeping requirement should be introduced for PRT and SDRT.'

We doubt that there is much point in introducing a record-keeping requirement for either PRT or SDRT. Both of these taxes are dealt with almost wholly by large businesses, which are likely to be maintaining appropriate records. We cannot see any point in introducing an unnecessary requirement simply because there is such a requirement in relation to those taxes for which small businesses might need to be persuaded to maintain records.

Question 9: 'HMRC would welcome views on replacing the powers described above with the new compliance checking framework. Are there particular reasons why certain taxes should not be brought into the new framework?'

Similarly, we can see no point in changing powers that seem to work satisfactorily in practice simply for the sake of conformity. Such a change of itself risks leading to unwelcome behavioural changes.

Question 10: 'HMRC would welcome views on applying powers to involved third parties and on the draft legislation.'

We find it hard to envisage who might be 'involved third parties' in relation to the various taxes mentioned in Chapter 5 (other than inheritance tax, where we can see that a lifetime donee or the trustees of a lifetime trust could be an involved third party). Again, we do not see any point in creating powers simply for the sake of conformity.

Question 11: 'HMRC would welcome views on what documents HMRC should be able to inspect at business premises for SDRT and PRT.'

Apart from the Companies Act records, the documents that HMRC might want to inspect for SDRT are Contract Notes – although it needs to be realised that by its nature the documents that might be needed to check SDRT are very varied, and indeed there may often be no documents at all.

PRT is too specialist a tax for us to venture a comment on it.

Question 12: 'HMRC would welcome views on introducing a requirement for the taxpayer's or Tribunal's approval before exercising a power to enter private premises for the purposes of valuation for IT, CGT, CT, IPT, SDLT and SDRT. Would other safeguards be appropriate in addition to or instead of this?'

As it is up to the taxpayer to disprove an assessment, we find it hard to conceive how a person who will not allow a valuation visit can gain an advantage. We would have expected HMRC to do a valuation on an aggressive basis and would expect the Appeal Tribunal to support such a valuation in those circumstances.

We believe that powers to enter private premises are politically very sensitive, particularly in the light of the assurances given by the Minister in last year's Finance Bill debates. If HMRC feels that such a power is essential, we agree that it should need external authorisation from the Tribunal. We also think that because of the very sensitive nature of such a power, any application for approval needs to be on an *inter partes* basis.

Question 13: 'HMRC would welcome views on the options for applying the aligned time limits in FA 2008 to the other taxes. HMRC would also welcome views on whether there are circumstances where the change in time limits could disadvantage vulnerable taxpayers, and how could this risk best be addressed?'

We think it would be sensible to align the time limits with those for other taxes.

Question 14: 'HMRC would welcome views on retaining a penalty where a person fraudulently or negligently provides incorrect information or documents by including it in Schedule 36 to FA 2008.'

We agree that a penalty should be retained where a person fraudulently provides incorrect information.

We are concerned about linking fraudulently and negligently, particularly in the context that both Finance Acts 2007 and 2008 have done away with the concept of negligence and have introduced a new concept of failure to take reasonable care.

Whilst we can see a need for a penalty for failure to take reasonable care when complying with an information notice, it would be wholly contrary to the reforms that have already been made to impose the same level of penalties for carelessness as apply to fraud.

*Robert Maas
responds to
HMRC on the
Institute's
behalf*

Guidance on Constructive Knowledge

Kip Europe SA and Hewlett Packard International SARL v Administration des douanes – Direction générale des douanes et droits indirects

ECJ, Joined Cases C-362/07 and C-363/07, 11 December 2008

The ECJ was asked to rule on the Tariff classification of combined printer-scanner-copiers.

It stated that if the printer-scanner functions were paramount it would be a unit of an automatic data processing machine (Heading 8471). However, if the copying function was not secondary to those other functions the classification should be decided under GIR 3(b), based on the 'essential character' of the item. If that did not produce a solution GIR 3(c) provided that the items would be classified under Heading 9009 (photocopiers).

Sopropé – Organizacoes de Calcado Lda v Fazenda Publica

ECJ, Case C-349/07, 18 December 2008

Sopropé claimed preferential origin for imports of footwear but the Portuguese customs authority divined that the stated origin was false and made a post-clearance demand.

Sopropé argued that its rights of defence were infringed by the authority's only giving it eight days to produce evidence supporting the claimed origin. Sopropé did not produce any evidence helpful to its case within that period.

The ECJ stated that this was a matter for the national court but opined that as regards post-clearance recovery of customs import duties, a period within which a taxpayer might exercise his right to a hearing which could not be less than 8 days or greater than 15 days did not, as a matter of principle, make it impossible in practice or excessively difficult to exercise the rights of defence conferred by EU law.

This was because, firstly, the undertakings which might be affected by the procedure at issue were professionals which carried out importations on a regular basis. Furthermore, the applicable EU legislation provided that those undertakings had to be able to furnish proof, for the purposes of inspection, of the lawfulness of all the transactions that they had effected.

Lastly, the general interest of the EU and, in particular, the interest in recovering its own revenue as soon as possible meant that inspections had to be capable of being carried out promptly and effectively.

Magoora sp zoo v Dyrektor Izby Skarbowej w Krakowie

ECJ, Case C-414/07, 22 December 2008

Poland joined the EU on 1 May 2004. At that time it placed no restriction on the recovery of input tax in relation to use of fuel for business motoring. However, in August 2005 it introduced such restriction.

The ECJ held that Poland was allowed to retain the position on input tax deduction which prevailed on accession to the EU but that it was not permitted to amend national law in contravention of the objectives of the VAT Directive subsequent to accession.

It was up to the national court to decide whether the new law contravened the objectives of the VAT Directive.

Comment: Since the VAT Directive does not prescribe restrictions on the recovery of business fuel it is safe to assume that a law which does so without the backing of a derogation or grandfathered rights is contrary to the objectives of the Directive.

K-1 sp zoo v Dyrektor Izby Skarbowej w Bydgoszczy

ECJ, Case C-502/07, 15 January 2009

K-1 made a claim for repayment of VAT but the tax authority not only disallowed part of its input tax (on the ground that the supply in question did not carry VAT) but also imposed on K-1 an additional tax liability as a form of penalty.

The ECJ ruled that such a penalty was not incompatible with the First and Sixth VAT Directives (in particular Article 33 of the latter), that it did not require a derogation and, indeed, that it was provided for by Article 22.8 of the Sixth Directive (imposition of obligations necessary for the correct levying and collection of VAT and for the prevention of fraud).

HMRC v Livewire Telecom Ltd and Olympia Technology Ltd

High Court, 16 January 2009

Both respondents were refused input tax repayments on the ground that they knew or ought to have known that their transactions were connected to missing-trader fraud but both were successful at the Tribunal. HMRC appealed.

The respondents argued that HMRC should not be able to argue unsuccessfully in the Tribunal that they had known about the missing-trader fraud, then argue an appeal on the basis that they merely

Chris Reece summarises several recent indirect tax cases from the UK and Europe

NEWS FROM THE COURTS

ought to have known about the fraud. Mr Justice Lewison rejected this defence on the basis that HMRC had not relied solely on actual knowledge in the Tribunal, as was clear from its written submissions.

The Judge then clarified that in a contra-trader scenario, if the contra-trader has been dishonest it is sufficient for HMRC to show that the trader ought to have known about the contra-trader's dishonesty. HMRC does not have to prove that the trader

HMRC is entitled to order a trader to align its accounting periods within a group so as to correct a cash flow disadvantage to the Exchequer. HMRC is also entitled to distinguish between associated and non-associated traders, since additional advantages are available to associated traders.

ought to have known about the defaulting trader in the 'dirty' chain of transactions.

However, if the contra-trader has not been dishonest HMRC must demonstrate that the trader ought to have known about the defaulting trader's dishonesty.

The Judge dismissed HMRC's appeal in respect of Livewire and allowed the Olympia appeal, remitting the case to be reheard. The Tribunal in Olympia's case had based its decision on whether the inexperienced and naive proprietor of Olympia ought to have known of the fraud, whereas the test should have been whether a reasonably competent person ought to have known about the fraud.

Mobilx Ltd (in administration) v HMRC

High Court, 3 February 2009

In another MTIC 'knew or ought to have known' case, the Tribunal had stated three reasons for finding that Mobilx ought to have known its transactions were connected with fraud:

- * Mobilx had stated on registration that it would be trading in phones but had then proceeded to trade in computer chips, apparently misleading both HMRC and its own advisers – the High Court held that the Tribunal could not reasonably have inferred from this that Mobilx ought to have known its transactions were connected with fraud

- * the extremely high level of profit made by Mobilx – again, this was not of itself sufficient reason for a finding of constructive knowledge of fraud

- * Mobilx had repeatedly been told its transactions were connected with fraud but had continued to trade – this was sufficient objective reason for the Tribunal's decision, so the appeal was dismissed.

Marks and Spencer plc v HMRC

House of Lords, 4 February 2009

HMRC accepted many years ago that teacakes were properly zero-rated but declined a repayment to M&S on the ground of unjust enrichment.

The VAT Tribunal ruled that M&S should be entitled to only 10% of its claim. However, the ECJ ruled (see [2008] STC 1408) that the UK had acted unlawfully by discriminating between payment and repayment traders at the relevant time. The ECJ left it to the national court to devise a means of correcting that discrimination (repayment traders had been refunded in full but the ECJ did not order the national court to rule that payment traders must also be refunded in full).

The House of Lords appeared prepared in principle to consider how to correct the discrimination but HMRC had already decided to refund M&S in full. Accordingly, the House of Lords did not follow up the issue in the circumstances and simply allowed M&S's appeal.

HMRC v David Baxendale Ltd

High Court, 5 February 2009

Baxendale supplied a weight-loss programme consisting of both special food and counselling. The High Court ruled that the Tribunal had been wrong to find that Baxendale made separate supplies of food and of weight-loss support services. In fact it made a single supply of standard-rated weight-loss services. The Tribunal should have looked at the question from the point of view of the typical customer, not from the point of view of the supplier.

Comment: The argument against looking at such matters from the point of view of the customer is that it reduces certainty, since different 'typical' customers may have different views of the supply. The supplier is on this view supposed to have only one intention in making the supply.

R (oao BMW AG and another) v HMRC

Court of Appeal, 18 February 2009

The applicant is a company which buys cars from an associated manufacturer in the UK and exports them. It was making monthly returns until ordered by HMRC to make quarterly returns.

The applicant sought judicial review of HMRC's decision to require it to align its VAT accounting periods with its associated company and was successful in the High Court. The Judge held that HMRC's policy was rational and lawful but it should have considered whether the applicant had gained a significant cash flow advantage which would not have been available to it had it been both manufacturer and exporter.

The Court of Appeal quashed that decision. It held that HMRC is entitled to order a trader to align its accounting periods within a group so as to correct a cash flow disadvantage to the Exchequer. HMRC is also entitled to distinguish between associated and non-associated traders, since additional advantages are available to associated traders.

Filing and Paying on Time and Interest

I am setting out below the comments of the Institute of Indirect Taxation on your consultation document of November 2008 'Meeting the Obligations to File Returns and Pay Tax on Time' [see <http://snipurl.com/cr9om>].

Our comments of course apply only to indirect taxes.

Question 1: 'Do you agree with the findings of the internal and external research presented above? Is there any other analysis or evidence that you could share with HMRC regarding penalties or tax debts?'

We have no comments.

Question 2: 'Is the proposal outlined above that penalties should be suspended where a taxpayer has entered into a time to pay arrangement with HMRC an appropriate way of supporting taxpayers who have difficulties in meeting their payment obligations?'

We agree that penalties should be suspended where a taxpayer has entered into a time to pay arrangement.

Question 3: 'Are the safeguards proposed appropriate? Is the draft guidance appropriate? What modifications, if any, are required?'

We are sceptical whether a common legislative formulation of reasonable excuse aligned across taxes provides a safeguard for taxpayers. The draft guidance given at Annex D seems to us far too restrictive.

There is a large body of VAT tribunal decisions on what is a reasonable excuse for VAT purposes, but the vast majority of the excuses that have held by VAT tribunals to be reasonable do not fall within the scope of Annex D. We think it far better to simply have a let-out where there is a reasonable excuse and leave it to the VAT tribunals, or the new First-tier tribunals, to decide on a case-by-case basis whether or not such an excuse exists.

Existing VAT law limits the scope of what can constitute a reasonable excuse but, in order to achieve fairness, VAT tribunals have often circumvented the limitations by looking beyond the immediate excuse and focussing on a prior event that created that excuse. We think that this shows that seeking to statutorily define what is and is not a reasonable excuse is unhelpful. As the new First-tier tribunals will have jurisdiction across all of the taxes, the tribunal itself is likely to ensure that a common approach to reasonable excuse will be applied.

On Annex D we believe that HMRC should analyse the many reasonable excuse cases decid-

ed by the VAT and Duties tribunals and base its guidance on that analysis.

Question 4: 'Does the model presented for late filing meet the design principles – fairness, effectiveness and influences behaviour?'

It needs to be recognised that for VAT purposes it is fortuitous whether a return results in tax being payable to or by HMRC, whereas direct tax returns normally result in a payment being due. Furthermore computer-generated VAT assessments seem to be issued virtually automatically where a return is several months overdue. We also doubt that many taxpayers submit VAT returns without payment of the VAT due, except where they need to enter into a time to pay arrangement. We accordingly do not believe that there is a need for separate penalties for late returns and late payments in relation to VAT.

We also consider that a penalty for late payment where a return happens to be a payment return, but no recompense to the taxpayer (other than interest) for late receipt of a repayment because a repayment return is filed late, creates unfairness.

Question 5: 'Are the modifications to the late filing penalty model, to reflect the frequency of the obligations, appropriate?'

We are sceptical to what extent the proposed models are appropriate for VAT. Annual returns apply only to the Annual Accounting scheme. This requires interim payments to be made electronically and failure to submit the return timeously risks the taxpayer being excluded from the scheme.

It is hard to see any purpose in imposing penalties in such circumstances.

For quarterly returns we can see the benefits of fixed penalties of increasing amounts within a default window.

We believe that the current position under the VAT default surcharge, where the first default gives rise to a warning but not a penalty, works well in the context that most taxpayers then submit later returns due in the window timeously and that accordingly it should be retained.

We are sceptical whether it is sensible for HMRC to allow a VAT return to remain outstanding for 6 or even 12 months. We do not think that tax-related penalties are likely to be an effective means of enforcing submission of the return.

Indeed, where returns are submitted late because of lack of funds, a tax-related penalty could well exacerbate the problem and result in a

*Two further
submissions
from the
Institute to
HMRC*

REPRESENTATIONS

behavioural change to delay the return even longer.

Monthly VAT returns occur in two situations. The first is where the taxpayer is expected to be a consistent repayment trader. Such a person is unlikely to deliberately delay claiming the repayments to which he is entitled. The second is where HMRC require security as a condition of registration and the taxpayer agrees to make monthly returns as a condition of HMRC accepting a reduced amount of security. We doubt that HMRC will allow such a person to be late in submitting returns without that triggering some form of action. We doubt that penalties are the appropriate way to achieve a behavioural change in either case.

Question 6: 'Does the model presented for late payment penalties meet the design principles – fairness, effectiveness and influences behaviour?'

Bearing in mind that VAT Annual Accounting can be used only by very small businesses and that the taxpayer will have made electronic payments on account, we think that a tax-related penalty for late payment where the payment is a month late is harsh.

Question 7: 'Are the modifications to the late payment penalty model, to reflect the frequency of the obligations, appropriate?'

As stated earlier, we believe that it is unusual for VAT returns to be submitted without any payment due being made at the same time. Accordingly we cannot see a need for penalties for late payment as these are aimed at the same behaviour as the penalties for a late return.

Question 8: 'Is the overall package of penalties suggested for late filing and late payment likely to be effective, fair and to influence behaviour?'

In the context of VAT we do not believe that the proposed package is likely to be fair. Nor do we think it likely to influence behaviour in cases where the underlying reason for a late return is lack of funds. It is likely to influence behaviour in other cases.

Interest

I am setting out below the comments of the Institute of Indirect Taxation on your consultation document of November 2008: 'Interest - Working Towards A Harmonised Regime' [see <http://snipurl.com/cr91b>].

The Institute welcomes in principle the proposal to pay and charge interest across all taxes, provided that this is done in a consistent manner.

In particular, interest on VAT repayments should run from the due date of the relevant VAT return.

The current restrictive rules in VATA 1994, s 79 in relation to repayment supplements are not appropriate in a system that regards interest simply as commercial restitution for not having use of the money. Such restitution ought not to be dependent on whether, or the extent to which, the period

for which the funds are not available to the taxpayer is attributable to delays by HMRC.

We assume, however, that, as at present, interest will not be either payable or receivable where an error in a VAT return is corrected in a later return in accordance with Regulation 34(3) of the VAT Regulations 1995. It would clearly be both burdensome and inconsistent with this simplification measure to need to separately identify such corrections simply in order to allow an interest charge to be created.

We also have concerns over how small amounts of interest will be collected, or paid to a taxpayer, in the context that VAT is normally paid at the same time as the return is submitted. Is it intended that if a return is submitted a few days late, HMRC will assess an interest charge and seek to collect it separately? If so, we think that there ought to be a de minimis exemption. We also think that it ought to be possible for a taxpayer to add the amount assessed to the tax due on his next VAT return rather than to be required to pay separately what will often be trivial amounts.

We have no strong feelings on the adoption of Bank of England base rates as a starting point. What matters is the actual rate charged or paid.

We do not see any justification for a differential rate in the context of VAT. Whether a return results in a payment or repayment being due is outside the control of the taxpayer, as it is dependent on when sales and expenditure take place. In such circumstances it is clearly unfair for interest to be charged at one rate where a return results in tax being due but to be paid at a lower rate on those occasions where the input tax exceeds the output tax on a return.

In the context of VAT the argument at paragraphs 3.16 and 3.17 of the consultation document are misplaced. [3.16 Having differential rates for all taxes would reflect commercial practice for borrowing and lending and discourage arbitrage between tax and non-tax debts, and in turn would provide fairer levels of recompense in a clear and simple way as opposed to the inconsistencies within the current regime. One way to balance the concept of a differential with the principle of simplicity would be to have just one rate for late payment interest and one for repayment interest. 3.17 Removing the differential would not be fair, particularly for those who pay on time in that they would see late payers gaining an unfair financial advantage. Being seen to address this type of arbitrage reassures the compliant taxpayer that others are not gaining an unfair advantage.] A repayment trader is far more in the position of a person lending money to HMRC than borrowing from it. He is forced to lay out the VAT element of a purchase at the time of the purchase and to later reclaim that amount from HMRC, often up to three months after he makes the payment. There is no question of arbitrage. It is simply a matter of recovering a payment that has, in effect, been laid out on behalf of HMRC.

Deregulation of Maritime Transport

As usual, I will start by asking 'Who is this article for?', to which the answer is 'Everyone involved in the maritime trade with ports in other Member States'.

TAXUD-NEWS contains press releases issued by the European Commission. On 23 January 2009 one of five items was worded as follows:

'The European Commission on 21 January adopted an action plan aimed at creating a maritime transport area without borders in Europe. The plan includes measures aimed at simplifying customs procedures. For more information see the press release (IP/09/85).'

Not everyone knows of or subscribes to TAXUD-NEWS press releases. As it is of prime importance to everyone engaged in 'Short Sea Shipping' with other Member States, details of the 'action plan' are worth examining.

The action plan

Press release IP/09/85 states:

'On the 21st January 2009, the European Commission adopted an action plan aimed at creating a maritime transport area without borders in Europe. This plan includes several legislative measures, including a proposal aimed at simplifying administrative formalities based on Community regulations and recommendations to Member States for reducing the administrative burdens imposed on shipping companies.

"By making maritime transport more attractive and creating new openings for it, the proposed measures will lead to a more balanced use of transport modes, based on their own merits rather than on historically different administrative formalities; this will be beneficial for the environment and for the economy," emphasised European Commission Vice-President Antonio Tajani. "The Commission considers that the necessary conditions for setting up a barrier-free maritime transport area are now in place and that relevant measures may be introduced in a staggered fashion between 2010 and 2013."

"The creation of a barrier-free maritime transport area in Europe should curb the demand for road haulage, reduce freight forwarding costs, while preserving expertise and promoting jobs in the lines of work necessary for the operation of maritime transport.

"The Commission points to several measures which should be put in place by the Member States. The various port inspection bodies that

monitor compliance with customs, tax and health regulations and the conformance of plant and animal products often act without coordination, thus generating costs and delays which could easily be reduced. The Commission calls on the Member States to review and simplify their practices in these areas, which often come under the responsibility of local authorities.

'More important, however, are the legislative measures, which are aimed at simplifying customs procedures and other reporting formalities. A Proposal for a Directive of the European Parliament and of the Council on reporting formalities for ships arriving in and departing from Community ports is annexed to the communication. Measures simplifying customs procedures will be adopted at the beginning of 2009 and guidelines aimed at accelerating plant and animal checks will be published in 2009. Port administrations may still carry out spot checks.

"The action plan includes measures that are ongoing under the Modernised Customs Code, such as simplifying the formalities for Community shipping routes which include a stop in a neighbouring country, or measures that will be proposed at a later stage, along with the Member States' recommendations, mainly in the aim of coordinating, where local conditions allow, inspections conducted by the various administrative services in the ports or to award pilot exemption certificates (PECs) to experienced captains.

"The reduced costs and delays resulting from this administrative streamlining will benefit the entire economy and the end consumers. The proposed measures should help offset the downturn in the sector that may be feared on account of the financial crisis, designed as they are to enhance its competitiveness in relation to other modes of transport.

"The creation of the single market in 1993 has helped streamline the administrative formalities for land-based transport to a great extent. Maritime transport, however, remains subject to complicated administrative procedures, even if a vessel is travelling between two EU ports (intra-Community maritime transport).

'Facilities have certainly been put into place, but administrative complexity remains the norm and discourages numerous users from using maritime transport.

'Yet, maritime transport offers numerous advantages. It is a viable solution for transporting a large proportion of the goods traded within the

Ernest Grayston looks towards a European maritime transport area without barriers

INTERNATIONAL TRADE

European Union, which has 100,000 km of coastline and 1,200 trading ports, and whose maritime tradition has marked its history from the very beginning.

'A summary of replies to the preliminary public consultation is available online at: [<http://snipurl.com/crlgl>].'

Clicking on this hyperlink takes you to three documents, as follows:

- * 'Towards a European maritime transport area without barriers' is a link back to the press release reproduced above

- * 'Consultation results: Summary of contribu-

The demand was repeated in the Council Conclusions concerning the Lisbon Strategy of 12 February 2007. At the end of 2006, the European Economic and Social Committee reiterated its demand in favour of abolishing controls performed at the internal frontiers for maritime transport.

tions received' is, indeed, a summary of responses to the Commission's consultation, which ran from 18 October 2007 until 20 January 2008. The document describes it as 'an open consultation on a "European maritime space without barriers" reinforcing the internal market for intra-European maritime transport'. The document does not, unfortunately, say which of the Member States took part in the consultation exercise.

- * 'Commission Staff Working Document' goes into detail about the objective of the consultation. Summarised below are the main points of the document. It is recommended that those traders who will be affected by the proposed action plan should download the full details.

Introduction

The working document starts thus:

'Since 1993, Community goods transported by road, inland waterway and rail between EU Member States without transiting a third country have benefited to a large extent from free circulation in the EU.

'This is not true for maritime transport of goods, which is subject to complex administrative procedures that decrease its attractiveness.

'In maritime transport, voyages from one port of an EU Member State to another, even without calling at any intermediate non-EU port or freeport or meeting another ship en route, are always considered international also when cargo transported is Internal Market cleared goods. A vessel is considered to leave the customs territory when it leaves

a Community port for another Member State port.

'These administrative procedures involve a wide set of EU and international legislations which include, in particular, customs and tax rules, immigration, trade statistics, environment and waste, phytosanitary veterinary and health protection, security and safety. They have different objectives and rationales, and they apply either to the transport service, the vessel and its crew or to the goods themselves. However, they all hinder the free circulation of goods inside the Internal Market.

'The Council stressed the necessity to encourage the use of Short Sea Shipping in its Conclusions on the promotion of Short Sea Shipping of 11 December 2006 and for this purpose to simplify the administrative procedures on it.

'The demand was repeated in the Council Conclusions concerning the Lisbon Strategy of 12 February 2007. At the end of 2006, the European Economic and Social Committee reiterated its demand in favour of abolishing controls performed at the internal frontiers for maritime transport.'

Formalities

At Annex 2 is 'An indicative list of formalities for vessels entering or leaving EU ports

'Three main Authorities collecting information from the ships are: harbourmasters in ports, customs in port, vessel traffic services controlling ships traffic along the coasts. There are three main representatives of the ship, the shipmaster, the ship agent, the ship operator (owner or carrier). Formalities applicable to intra-EU maritime transport depend on each port. They may include:

- 'Voyage reporting services: Territorial waters entrance or departure: The requirements depend on each country. For instance, in France, the message is called SURNAV and must follow the model defined by the Maritime Prefect: ship identification, date and time, position of the ship, speed, port of departure, port of arrival, time of entrance or departure of territorial waters, draft, cargo (MARPOL 73), radio conditions, defects.

- 'Port navigational services: Pilot card: The pilot card is a vessel information sheet containing the main characteristics of the ship: name, call sign, IMO number, MMSI, displacement, deadweight, year of building, length, breadth, draft, air draft main engine, propellers, thrusters, rudder, anchors, full sea speed. Little drawings and charts complete the explanations. Sometimes a "Pilot Checklist" is attached to the pilot card.

- 'Customs Summary declaration: The form gives the identification of vessel, flag, carrier, code number, master's name, voyage, port of loading, port of discharge and the list of goods carried on board, with B/L references, shipper or consignee, consignee, description of cargo, number and marks of packages, cargo control numbers, list of containers, kind of goods, quantities and weight, transit

reference. The manifest can be very short (i.e. for break bulk cargo) or very long as for containers. It is signed by the master or his representative.

'Collection of data on ships and goods: The forms used for setting up statistics are the same than those used for collection of ports dues. (DN, DSM, manifests ...).

'Border controls: No specific forms for the lists of crew and passengers are imposed by the Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006. The lists must be drawn up in duplicate.

'Phytosanitary inspections: Member States shall organise at random occasional checks, at any time and at any place where plants, plant products or other objects are moved. Systematic import inspection of regulated material moving between two places within the Community over non-Community territory is not needed if there are no specific risks identified, but the possibility for occasional checks should always remain.

'Products of animal origin and live animals: Council Directive 89/662/EEC concerning veterinary checks in intra-Community trade and Council Directive 90/425/EEC concerning veterinary and zootechnical establish that controls have to be carried out at the place of origin and at the place of destination of the goods/animals. In case of arrival of products/animals in places where other such products/animals may originate from a third country (such as ports) a documentary check is provided for in the Directives.

'System of import control procedures for animals and animal products (TRACES): The system requires all controls to be carried out at the external border with documentary, identity and physical checks all carried out in the specified and approved border inspection posts listed in the Official Journal. Animals or products are then issued with the Common Veterinary Entry Document (CVED) and released for free circulation into the single market.

'Maritime declaration of health: The Maritime declaration is a standardised IMO FAL form. The document includes the identification of the vessel, master's name, deratting certificate or exemption, number of passengers, number of crew, the list of former ports of call (for the last 4 weeks), a set of questions about cases of illness on board, to be answered by yes or no, and particulars of every case of illness or death occurring on board must be mentioned in a schedule annexed to the declaration. The Declaration is certified true and correct by the ship master.

'Dangerous goods manifest: The dangerous goods manifest is a list of all dangerous goods on board of the ship. The IMO FAL form 7 is a model template more or less adopted by all carriers, with identification of ship, shipping agent and master's name, voyage reference and port of loading and discharge. Each dangerous cargo is referenced with name, booking number, number and kind of packages, class, UN number, flashpoint, marine

pollutant, mass, stowage position on board, shipper's name, emergency contact and phone. The form is signed by the carrier or his ship agent.

'IMO Dangerous goods declaration: The shipper who exports dangerous goods must give to the carrier a declaration the "IMO dangerous goods declaration" or "Multimodal dangerous goods form" depending of modes of transport. The two forms give both the necessary information about identification of shipper, carrier, places of receipt, port of loading, final destination, full description of goods, mass, IMDG class, container/vehicle packing certificate, and a signed attestation of the ship-

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per as to the accuracy of his declaration, asserting that goods are in all respects in proper condition for transport according to the applicable international and national regulations.

'Collection of port dues on vessels or passengers: The "declaration of vessel dues" (DN) form includes the ship name and flag, number of the voyage, names and of the ship and his local ship agent, port of departure and destination, characteristics of the ship, number of passengers and level of dues, total amount to pay, and is certified by the ship agent.

'Collection of port dues on cargo: The "dues on cargo" (DSM) form includes the shipper and consignee names and addresses, ship name and flag, port of departure and destination, kind of goods, number of packages, NST number, reference and level of dues, total amount to pay, mode of payment (cash or guarantee) and is certified by the consignee or his local agent.'

Conclusion

Issuing a press release is an ineffective way of publicising the important proposed changes to the UK maritime traffic with ports in other Member States. Therefore readers of this article could help in passing on the contents to either clients involved in the maritime trade described, or who know of companies involved.

No doubt the responsible authorities in Member States will start actioning the required changes in 2009 but being forewarned should help everyone prepare for the proposed changes.

Services: Place of Supply

Here are the Institute's comments on the consultation document of 22 December 2008: 'VAT Place of Supply of Services' [<http://snipurl.com/cra62>]. The paragraph numbering is that used in the consultation document.

3.2: We are unclear what is proposed where a supply to a person in his private capacity is made to a person who happens to be a taxable person in a business capacity. Recital (4) to Directive 2008/08/EC states: 'Taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them ... These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff.' This suggests to us that the new place of supply rules are intended by the EC to apply to all supplies to a taxable person acting as such, including supplies that are exempt or outside the scope of VAT, but not to apply to a supply to a taxable person acting in a personal capacity.

However the draft UK legislation seems to apply the new rules to all supplies to a taxable person irrespective of whether or not he is acting in a business capacity. Furthermore it is stated at 3.15.2: 'Current policy does not require the application of the reverse charge provisions in cases where supplies are received for a non-business activity – this cannot continue beyond 1 January 2010. Instead any VAT-registered person receiving such supplies will have to account for VAT on them under the reverse charge procedure regardless of how the service is used.' Unless 'a non-business capacity' is intended to exclude a private capacity, this seems to us to be inconsistent with the Directive. It is also inconsistent with the intention of distinguishing between B2B and B2C supplies, as the tax treatment of B2C supplies to be used by a person in a private capacity will vary, depending on whether or not he happens to be a VAT-registered person, because he carries on business as a sole trader. This seems irrational.

3.2.2: Whilst we recognise the difficulties, we are unhappy at a taxpayer's obligation being dependent on HMRC guidance rather than statute.

3.3: The EC law appears to apply to all services 'connected with immovable property'. We are unclear why the proposed UK legislation should limit the scope of the provision to the specific services listed in the proposed new paragraph 1. For example the provision of self-storage facilities is probably connected with land, but is probably not either a licence to occupy land or a contractual right in relation to land.

We are also sceptical whether the phrase 'involved in matters relating to land' has the same meaning as 'connected with immovable property'. For example if a VAT consultant gives advice on the

VAT treatment of a disposal of land that seems to be a matter 'relating to land' but it is unlikely to be one 'connected with' that land.

We note that the new Article 47 omits 'including ... services for the preparation and coordination of construction work, such as the services of architects and of firms providing on-site supervision' that is contained in the existing Article 45. We would have expected there to be a reason for this change, but the draft UK legislation seems to assume that there is not.

3.4: We are unclear why the expression 'pleasure cruise' is used rather than simply 'cruise', particularly as that has made it necessary to extend the natural meaning of 'pleasure' to also embrace education or training. We would have thought that pleasure, education and training are together exhaustive of the reasons for cruises. What type of cruise is 'pleasure cruise' intended to exclude?

3.6.2: The EC law in new Articles 53 and 54 appears to differ, whereas the UK legislation seems to assume that both have the same meaning. Article 53 covers services in respect of admission and ancillary services related to the admission, whereas Article 54 applies to both services and ancillary services relating to the listed activities. 'Related to' is a wider expression than 'in respect of'. We would have thought commission charged by ticket agents is not 'in respect of admission' but is 'related to' the activity to which the ticket relates.

3.10: The draft paragraph 10 seems far wider than the new Article 46. Article 46 seems to apply only to services of agents, whereas paragraph 10 will apply to any service that facilitates the supply of another service. This seems to us to create scope for both double taxation and non-taxation, unless other Member States adopt the same wide definition as the UK.

3.12: We note that Article 54 uses 'loading, unloading, handling and similar services' as examples of ancillary transport activities, leaving open what other types of activity might fall within the expression. However the UK legislation defines 'ancillary transport services' as limited to loading, unloading, handling and similar activities. For example packaging might be an ancillary transport activity under EC law but would not be under UK law.

3.15: The EC law appears to apply only for fixing the place of supply of non-taxable activities whereas the UK legislation seems to go beyond that and to impose a tax charge where none would otherwise exist.

It is unclear why the new section 8(1)(b) should apply where the services are used 'primarily' for private purposes, although it does not do so where they are used 'wholly' for such purposes. This seems inconsistent with the EC decision in *Bakcsi*.

*Yet more
comments
from Robert
Maas, on
behalf of the
Institute*