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*The Institute's 2009 **Indirect Taxes Conference** will be held on 17 September at the London Hilton on Park Lane Hotel, 22 Park Lane London W1K 4BE.*

*Speakers will be: Michael Conlon QC, Temple Tax Chambers; David Goy QC, Grays Inn Chambers; Rob Jenkins, International Trade Solutions; Peter Jenkins; Robert Maas, Blackstone Franks; Juliet Roche, HMRC; David Southern, Temple Tax Chambers; Nick Warner, PKF; Dan Warren, Ernst & Young; Jeremy White, Pump Court Tax Chambers.*

*The conference agenda and delegate registration form will be available in July.*

# From Associate to Fellow

One aspect of membership that I have found puzzling in my time as Membership Director has been the distinct lack of applications from Associate members applying to go on to become a Fellow of this Institute. The Institute's Development Committee met towards the end of March and considered that there might be a number of possible reasons.

The ones they thought the most likely were lack of time, deemed lack of knowledge and/or ability to write a thesis. I can assure you that in order to attain a Fellowship you don't have to be a highly rated barrister, an author of numerous books on indirect taxation, or a top specialist in a narrow field.

This article, therefore, is intended to give a very brief insight into achieving the Institute's highest honour.

## Cost

There are some costs involved in applying for Fellowship but these are relatively minimal. There is an initial fee of £20 plus VAT, which comes with the application outlining the proposed thesis title and subject matter – see below for details about subject matter.

Once the application is accepted, there is a Fellowship candidate registration fee of £80 plus VAT. Once the thesis subject is accepted, there is no time limit in which it must be submitted, although the candidate registration is reviewed every three years if the candidate has not submitted his or her thesis. There is an annual registration fee payable after the first year of registration of £25.00 + VAT.

Here at the Institute we know how much members benefit from using the designatory letters, AIIT, on their CV, business cards and letterheads. Is it time for you to consider how much more effective it would be to use FIIT and the benefits this could bring?

## Subject matter

Speaking as someone who has successfully gone through the process, I feel that some candidates could see choosing a topic as a stumbling block. This is not the case. Clearly a complex topic requires substantially more input to achieve the desired result than a simple one, but in accepting the subject matter for a thesis, we are more concerned with the appropriateness of the subject

matter rather than its complexity. It goes without saying, however, that it does have to have the potential for a well reasoned paper. Those of you considering the idea might find it useful to see a small selection of presentation titles which have been accepted and where Fellowship has been awarded.

1. An analysis of duty accounting and payment in relation to UK excise duty for both the production and warehousing regimes, and the case against the mandatory requirement for financial guarantees as a condition of deferred payments.

2. Tour Operators' Margin Scheme – Hit or Miss – or Mess.

3. VAT in the Property Industry.

4. The application of VAT to Government Funded Training Schemes.

5. A Tide in the Affairs of Men. (This application was received in 1998, the year which marked the Silver Jubilee of the UK's accession to the EEC and the introduction of VAT. The thesis considered how the UK met the challenge and responded to the increasing (then) impact of Community law in this field.)

Example 1. seems quite complicated at first sight, but this is not necessarily the case for someone who is working in that particular area of excise duty. Similarly the area of the TOMS is generally accepted to be a complex one for those who have to plough through the relevant legislation and calculations for a large operator, but turning the problems into a thesis might not prove as difficult as first thought, as there is substantial Tribunal and Court material to rely on.

Very occasionally an application is rejected as being unsuitable for a Fellowship thesis. For example, the title 'A consideration of the possible introduction of a bed tax', whilst interesting, was considered too narrow and essentially economic rather than tax-technical (dealing with the tax itself).

## Advice

Anyone considering writing a thesis might find it helpful to talk to someone who has gone through this and who can talk about the possible pitfalls encountered in putting pen to paper.

The membership section of the IIT website ([www.theiit.org.uk](http://www.theiit.org.uk)) includes a paper setting out the rules for the submission of a thesis, including an application form. However, if you wanted to get some insight into how to go about actually putting

*Ian Fleming  
FIIT, the  
Institute's  
Membership  
Director,  
would like to  
see more  
applications  
for Fellowship.  
Those  
interested  
should email  
membership  
@theiit.org.uk  
or call 01883  
730658.*

## REPRESENTATIONS

a thesis together and you felt it would help to speak to one of our Fellow members, I am sure they would be happy to offer words of encouragement and advice. Contact can be made through the Secretary General by telephone (01883 730658) or email (terry@theiit.org.uk).

Please do not think that a thesis has to be long and complicated to succeed – it does not – in fact unnecessarily long and complicated theses are more likely to be rejected.

With a word limit of between 15,000 and 30,000 words, there is plenty of scope for a well argued

paper on what might be considered by some to be a 'simple' topic.

In concluding I want to say to you that I would be happy to talk to anyone considering taking the step from AIIT to FIIT. I can be contacted via the Institute (see the details at the head of this article). And, finally, applications for Fellowship are not restricted to members of the Institute. Non-members can apply to be admitted direct to Fellowship and if you know someone who might be a suitable candidate please let them have a copy of this article.

# Payments, Repayments and Debt

I am setting out below the comments of the Institute of Indirect Taxation on your November 2008 consultation document on Payments, Repayments and Debt [which can be found at <http://snipurl.com/cr8at>]. The paragraph numbering below is to that in the consultation document. Our comments are addressed primarily to VAT. Nevertheless we have addressed the questions at 4.47, albeit that they do not appear to be addressed to VAT, as they appear equally applicable to VAT.

## Questions at 4.47

'Are the design principles the correct ones, and do the proposed schemes meet them?'

We believe that what taxpayers want is flexibility so that a payment can be made when a business's cash flow permits it. We believe that on occasions many small businesses would make payments in advance of the due date if the system were to encourage this.

The design principles do not really meet this objective. They require the level of payments to be determined at the start of the year. They also require a business to give HMRC direct access to its bank account, as the principles require payment by direct debit. Whilst most businesses will already have provided their bank details to obtain VAT registration, we think that many will be reluctant to authorise HMRC to make direct debits on their account.

'Are there other ways to achieve the same aim?'

HMRC could simply say that if taxpayers wish to make payments in advance of the due date for tax, they are welcome to do so and the payment will be credited to their account and set against future liabilities. A taxpayer would then be able to pay in advance as and when his cash flow permits but would not be able to build up arrears without

entering into more formal arrangements. We accordingly support the aspiration in paragraph 4.31.

'To what extent are these schemes attractive enough to encourage take-up?'

We are sceptical whether the proposals will encourage take-up in relation to VAT. They are not much different from the VAT annual accounting scheme, where we believe that take-up has been poor.

'How might the regularity of payments best be ensured?'

We have no comment as we do not believe that regular payments are desirable.

'How could it be ensured that payments are spread equally either side of the due date?'

We doubt that it is necessary to ensure an equal spread, although that is obviously desirable.

'What should be the minimum level of monthly payment?'

We do not think that there needs to be a minimum.

'How should the schemes cater for later claims which affect the amount of the liability?'

We do not think it sensible to run two plans in tandem as envisaged at 4.35. It is surely as much in the interest of HMRC as for taxpayers for taxpayers to make a single payment that can be readily budgeted for. If two regular payments are agreed without reference to one another there is a serious risk that neither plan can be adhered to in times of cash flow difficulties. Accordingly we think that the monthly payment should be recalculated where a later claim is made. This applies irrespective of whether the claim results in an increase or reduction of the amount due. However, if a reduction means that the taxpayer has overpaid the tax statutorily payable up to the date of the reduction he should be entitled to claim repayment of the excess.

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

'What further safeguards would be appropriate?'

We have no comments.

### Questions at 5.11

'To what extent does the proposal [to collect small sums through PAYE] strike the right balance between HMRC and debtor?'

We assume that there is no intention to recover VAT debts through PAYE, as an employee cannot make VATable supplies.

'Are there further safeguards that should be considered?'

We have no comments.

### Question at 5.39

'Are there any particular debtor/third party relationships that should be excluded from these provisions?'

We are not aware of any.

### Questions at 6.12

'In what circumstances should HMRC be able to seek a security?'

We question whether the concept of security is compatible with the Human Rights Act. We are accordingly opposed to any extension to other taxes and believe that the concept of seeking security ought to be reviewed, particularly in the current economic climate. The real question seems to us to be whether, and to what extent, HMRC should have a power of veto over the creation of new businesses – which is what a requirement for security gives them.

We note at para 6.2 that the current powers are used sparingly. However the VAT tribunal decisions contain many instances where a requirement for security was made because one person connected with a business had a tenuous connection with an earlier failed business.

'Should the existing models be aligned?'

We believe that criminal sanctions are wholly inappropriate where a person is doing no more than seeking to create a new business and new employment opportunities whilst he tries to convince HMRC that they have formed a mistaken view as to the viability of the new business. It is particularly wrong that a person who appeals against a requirement for security is at risk of being criminalised retrospectively should he lose his appeal.

We accordingly oppose any extension of the current VAT model, but if a security requirement is felt essential, would be in favour of alignment with the excise duty model.

We believe that the appropriate way to deal with phoenixism is to use the Company Law procedures to ask the courts to disqualify a director of a failed company from acting as a director or shadow director.

'Should the existing VAT model apply automatically across regimes, so that a trader required to provide VAT security must also provide PAYE security even if there has been no PAYE default?'

No. There is a major difference between VAT and PAYE. PAYE is deductible at the time a payment is made, so a business that can afford to make the payment should also afford to pay the PAYE. VAT is largely outside the taxpayer's control insofar as VAT is normally payable irrespective of

*We believe that criminal sanctions are wholly inappropriate where a person is doing no more than seeking to create a new business and new employment opportunities whilst he tries to convince HMRC that they have formed a mistaken view as to the viability of the new business.*

whether or not the amount to which it relates has been received.

'Could the use of securities be made to work for direct taxes based on profits?'

We doubt it as profits are far more variable than turnover.

'What would be a suitable sanction for not providing a security?'

A suitable sanction might be a civil penalty. However we are sceptical whether any sanction is appropriate except where the non-payment is clearly a deliberate tactic to deprive the Treasury of tax. Where a new business has a genuine belief that it will be able to meet its VAT liabilities but that proves wrong, a financial penalty will merely exacerbate the problem. The most appropriate approach would be for HMRC to contact a business that is believed to be 'at risk' if tax payments are not made within seven days of the due date, with a view to either helping it to pay the tax or taking enforcement action at an early date.

'What would be suitable safeguards?'

We believe that a right of appeal to the Tribunal is essential.

'What would be the advantages and disadvantages of requiring employers to pay PAYE into a designated account?'

We cannot see any benefit to anyone in requiring PAYE to be paid into a designated account. That would be far more likely to encourage non-compliance. The reason that a business does not pay over PAYE is normally lack of funds. That lack of funds will not be remedied by a requirement to transfer the non-existent funds into a designated bank account.

'Are there other ways in which the desired policy aim can be achieved effectively?'

We have dealt with this above.

# Place of Supply: All Change for 2010

It feels as though the 2010 VAT changes have been a long time coming. Indeed, in June 2003, the European Commission launched an open consultation for views on how the rules on the place of supply of services should be improved. This consultation was based on the idea of shifting taxation, when the customer is a business, from the place where the supplier is established or has a fixed place of business to the place where the customer is located – that is, by effectively extending the rules discussed later for services supplied where received.

The consultation recognised that the basic rule, which looks to where the supplier is located, worked adequately when VAT was first introduced but is now increasingly leading to administrative complexities, distortions of competition and double- or non-taxation.

The results of that consultation were published in September 2003. The Commission subsequently presented, in December 2003, a formal proposal on the same lines as had been put forward in the initial Consultation. But this was subject to exceptions for certain services for which special arrangements currently exist (for example, services related to immovable property and transport services), so as to avoid imposing disproportionate administrative burdens upon certain traders. The Commission intended to put mechanisms in place to ensure that the proposal would not lead to increased tax evasion.

In July 2005 the Commission also announced a proposal to change the rules for taxing services supplied to private consumers. These changes build on the amendments proposed in December 2003 to the rules just referred to. The current rule is that, when a trader supplies a service to a private consumer, the trader is responsible for applying VAT at the rate of the country where he has his place of establishment. However, with the increasing supply of services across borders, this no longer always ensures that tax accrues to the Member State of consumption. It can also lead to distortion, as companies have an incentive to locate their activities in countries with low rates of VAT.

Suppliers of digital products from outside the EU are already required to charge VAT on sales to private consumers at the rate applicable in the Member State where the customer is resident but this rule does not currently apply where the non-EU supplier establishes itself within the EU. Nor does it apply to EU or non-EU suppliers of other

services capable of being supplied at a distance (such as distance teaching).

On 4 December 2007 ECOFIN agreed to key reforms to the rules on the place of supply of services, most of which will come into effect from 1 January 2010. The draft Directive amending Directive 2006/112/EC has now been released, although the detailed implementation of these new rules is still under consultation. Indeed, HMRC issued a consultation document on the new package on 22 December 2008, together with draft legislation for the new rules (a new section 7A and Schedule 4A to be inserted into the VAT Act 1994).

## Key changes

The key changes to expect are these.

- \* The place of supply for services in B2B situations will shift to the location of the recipient.

- \* The place of supply rules for B2C services will continue to be primarily where the supplier is established.

- \* There will be exceptions for specific services, namely restaurant services, the hiring of means of transport, cultural, sporting, scientific and educational services, services related to land and B2C supplies of telecommunications broadcasting and electronic services.

- \* The existing special scheme for electronically supplied services, applicable to non-EU business providers, will be expanded to include telecommunications and broadcasting services. From January 2015 this will extend also to EU businesses supplying these services.

- \* Additional reporting obligations will be introduced for business making intra-EU supplies of services.

## B2B – the new basic rule

Where services are to be supplied by one taxable business to another, under the new place of supply rules the basic rule becomes that the place of supply will be the country in which the recipient belongs (new section 7A(1), VATA 1994). The first important point to note here, therefore, is that although colloquially we now tend to refer to the new rules as applicable to B2B services, there is a requirement there that the recipient is regarded as a taxable person (that is, it is not sufficient merely to be a business).

Where the place of supply is in the recipient's country, the recipient will be required to account

*Janet Paterson,  
of Creaseys,  
reviews the  
new place of  
supply of  
services rules*

for VAT in its home country, under the reverse charge procedure. Note that where supplier and recipient are in the same country, the supplier will charge VAT in the normal manner.

While this seems as though it should be a simple enough 'basic rule', unfortunately the question as to where a recipient belongs is not that straightforward. Although the draft legislation attempts to cater for this in section 9, VATA 1994, there would still seem to be a number of questions as to practical application. The tests consider where the recipient has its business establishment, or some other fixed establishment, which are tests that we are used to from the existing law. It also confirms that we should treat the supply as being made to whichever of the person's business establishment, or other fixed establishment, is most directly concerned with the supply. However, as we already know from the raft of existing case law on the question as to which office a supply is made, this is not an easy question to answer.

The issues that are going to surround this problem already exist for services currently within Schedule 5, VAT Act 1994. However, effectively these issues will now be made more widespread. The issues are illustrated well in the case of *HMRC v Zurich Insurance Co* [2007] STC 1756. This was a case of a Swiss insurance company which operates through a number of branches in Switzerland and elsewhere, one of which is in the UK. It embarked on the installation worldwide of new SAP financial accounting software, contracting for this through its Swiss head office, which also engaged PricewaterhouseCoopers in Switzerland to provide consultancy services. The Swiss head office bore the cost of the software licence but the cost of the consultancy was spread amongst the branches concerned. The agreement with PwC envisaged that some of this consultancy work would be provided by other PwC offices, one of which was in the UK. Initially, fees were charged by PwC (UK) to the UK branch of Zurich and then recharged by it to its head office. Later, they were invoiced to the Zurich head office as part of a composite charge from PwC in Switzerland. The case was over the place of supply of the consultancy services and whether this was where the appellant company was established (Switzerland), as the appellant contended, or where it had a fixed establishment (the UK).

The Tribunal looked at the matter in terms of economic reality and, bearing in mind the place of contracting, which location bore the cost, what was done (and for the benefit of which establishment the work was done), and concluded that the place of contracting was the most important because, amongst other things, it was to the Zurich head office that PwC would look for payment. The fact that Zurich's UK branch might bear the cost was of no concern and the Tribunal was not persuaded that there was any relevance in the direct tax treatment, under which costs and profits were to be attributed to a particular permanent establishment.

The case was then appealed to the High Court and, in his decision, Mr Justice Park was fairly scathing of the decision of the Tribunal, saying that 'VAT is not charged on the supply of the service of making a contract for services. It is charged on the supply of the services which have been contracted to be supplied.' So much of the services had indeed been supplied at the UK office of Zurich, with the UK office of Zurich benefiting from it (and, indeed, claiming capital allowances in its UK tax

*The new basic rule is subject to new Schedule 4A, containing the exceptions to the rule.*

*The list of exceptions to the basic rule from 2010 is considerably shorter than the lists that we are currently used to in Schedule 5, the Place of Supply of Services Order, etc.*

computations) that it was held that the services should indeed be regarded as supplied in the UK. On further appeal to the Court of Appeal, the decision of which was released on 15 March 2007, this decision by the High Court was upheld.

HMRC says that it is aware of the problems with global contracts and it is planning to issue guidance in this area – watch this space!

### **Exceptions to the basic rule**

The new basic rule is subject to new Schedule 4A, containing the exceptions to the rule.

The list of exceptions to the basic rule from 2010 is considerably shorter than the lists that we are currently used to in Schedule 5, the Place of Supply of Services Order, etc. The revised list now includes the following.

(i) Services connected with immovable property. This uses much the same wording as the exceptions we are currently used to, although there is some clarification in aspects of the wording of the draft legislation. However, there are still some areas lacking clarity, particularly in relation to travel agents' commissions for hotel bookings; HMRC has promised this will be raised at EC level.

(ii) Passenger transport. Again this is along much the same lines as the exceptions we are currently used to but with some tweaking and clarifications in aspects of the wording.

(iii) Short-term hire of means of transport – in which case the place of supply is to be where the vehicle is put at the disposal of the customer. Interestingly, short-term hire of means of transport is stripped out as a new category, regarded as an exception from 1 January 2010 (previously there was no real distinction in the length of hire). From 1 January 2013 there are plans to have an additional exception for the long-term hiring of means of

## VAT IN PRACTICE

transport introduced to Schedule 4A (although this will only impact for supplies to non-business users).

(iv) Services and ancillary services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs and exhibitions, including the supply of services of the organisers of such activities that are supplied where they are physically performed. In a similar vein to the current position, these services will still be regarded as supplied where performed.

*Businesses will need to spend much of their attention this year, therefore, in ensuring that their systems can accommodate the 2010 changes – although one can but hope that they don't have to wait until Christmas for HMRC to give further guidance on the areas needed.*

However, further changes are set to be made to this category of service, such that after only a year, B2B supplies of services in this category will follow the basic rule (that is, so supplied where the customer is based), with the exception of admissions to events and ancillary services related to admissions.

(v) Restaurant and catering services will be regarded as supplied in the country in which the services are physically carried out. Unfortunately, though, there is no specific definition of catering services for this purpose.

(vi) Restaurant and catering services supplied on ships, planes and trains. Here the place of supply will generally be the country in which the relevant point of departure is located, along the same lines as the current legislation.

(viii) Use and enjoyment. The place of supply of goods (other than a means of transport) will be subject to the use and enjoyment rule.

(ix) Telecommunication and broadcasting services will be subject to the use and enjoyment rules.

(x) Electronically-supplied services will also be subject to the use and enjoyment rules.

(xi) Intermediaries. Supplies by persons consisting of the making of arrangements for a supply by or to another person, or of any other activity intended to facilitate the making of such a supply, where the recipient is not a taxable person, will follow the place of supply of the main supply. This is along similar lines to the current situation, except that the exception will apply only to B2C situations, not B2B situations.

(xii) Transport of goods. Supplies of the transport of goods for non-taxable persons will be based on where the transportation takes place (as is the current situation for all supplies in this category).

(xiii) Ancillary transport services and valuation and work on goods. When supplied to a non-taxable person, these will be regarded as taking place where the service is performed (as is the current situation for all supplies in this category).

(xiv) Electronic services. When supplied to non-taxable persons these will be regarded as taking place in the country in which the recipient belongs (as is currently the case).

(xv) 'Old Schedule 5'. The services that were within Schedule 5 will not continue in their current format but they will endure as a separate category for services supplied to non-taxable persons outside the EC, in which case the place of supply will still be regarded as outside the EC.

### B2C services

In the event that the customer is not a taxable person, the next basic place of supply rule (new s 7A(2), VATA 1994) provides that the place of supply will be where the supplier belongs. Effectively, this is what we have under the existing rules and it will apply for non-taxable businesses as well as private individuals making purchases of services.

It will also effectively apply for non-EU purchasers of services (where they are not VAT-registered within the EU), although there are 'force of attraction' rules to provide that just because a party might be registered in a particular Member State through a fixed establishment there, if the establishment is not connected with the receipt of a particular supply, the VAT registration of that fixed establishment can be ignored for the purpose of considering the place of supply.

Generally speaking, therefore, services falling within the B2C category will remain unchanged come January 2010.

### Administrative issues

The requirement to operate the reverse charge on a wider category of services is going to significantly impact businesses, which will need to adjust their accounting systems accordingly. They will also need to ensure proper systems are in place to check that customers' VAT numbers are valid, etc.

In addition, businesses will need to complete EC Sales Lists to cover the services they supply abroad under the reverse charge mechanism. Setting up the reporting systems to accommodate this could be particularly challenging, as it is oversimplistic to assume that all supplies to a particular customer would always fall within the same category for VAT purposes and therefore business' reporting systems will need to be able to identify the different categories of supply involved.

Businesses will need to spend much of their attention this year, therefore, in ensuring that their systems can accommodate the 2010 changes – although one can but hope that they don't have to wait until Christmas for HMRC to give further guidance on the areas needed.

# Credit, Massage, Shooting and 'Voupons'

## **Staatssecretaris van Financiën v Kamino International Logistics BV**

*ECJ, Case C-376/07, 19 February 2009*

This case concerned LCD display monitors capable of showing pictures from a computer and other devices – a DVD player, for example.

The ECJ confirmed that the monitors were not excluded from classification under Heading 8471, as units of a kind used 'principally' in an automatic data-processing (ie computer) system within the meaning of Note 5(B)(a) to Chapter 84 of the Combined Nomenclature, solely because they were capable of displaying signals coming both from an automatic data-processing machine and from other sources.

It would therefore be up to the national court to decide whether the monitors in question were used 'principally' in a computer system.

## **Brunel Motor Co v HMRC and another**

*Court of Appeal, 26 February 2009*

A car dealer in Brunel's group went into administration. Consequently it became immediately liable to pay for all the cars it had bought for resale from Ford. It could not make payment and so Ford repossessed the cars, issued credit notes for them and sold them to the receiver. HMRC recognised the credit notes and so repaid the output tax to Ford. However, Brunel refused to recognise the credit notes and so refused to repay to HMRC the input tax it had claimed.

The VAT Tribunal and High Court found in favour of HMRC and Ford but the Court of Appeal has now remitted the matter to the Tribunal to make findings as to the legal basis under which the credit notes were issued. This was necessary because the credit notes must have legal effect in order to have effect for VAT purposes.

## **Joppa Enterprises Ltd v HMRC**

*Court of Session, Inner House, 6 March 2009*

Joppa ran a massage parlour. Its customers paid a time-based entry fee, which entitled them to enjoy the facilities of the parlour and the company of the parlour's hostesses. The facilities included saunas, showers, TV, newspapers and access to a private room. Additional fees for additional services were negotiable between the customer and the hostess. The entry fee was divided between Joppa and the hostesses such that the first £5 went to Joppa and the remainder was divided equally. Joppa sought to account for VAT on the net amount it received – that is, £5 plus half the remainder of the entry fee.

HMRC sought VAT on everything paid by the customer.

The VAT Tribunal held that fees negotiated between the hostesses and their customers were in respect of services supplied by the hostesses, so that Joppa had no need to account for any VAT in respect thereof. HMRC did not appeal against that part of the Tribunal's decision. However, the Tribunal also held that the entry fees were entirely in respect of services supplied by Joppa and that part of the decision has now been upheld by the Court of Session on appeal. The Court held that the services represented by the entry fee were supplied by Joppa alone and that any private agreement between Joppa and the hostesses as to division of that fee did not affect the analysis.

## **British Association for Shooting and Conservation Ltd v HMRC**

*Chancery Division, 6 March 2009*

The appellant exists to promote the interests of its members, who are interested in shooting. It claimed to be making exempt supplies, either of a sporting nature or of a political or civic nature. It failed in its appeal to the Tribunal on the grounds that its supplies were not closely enough linked to participation in sport and its aims were not of a public nature but merely for the benefit of its members.

The appellant has, however, been partially successful in its appeal to the High Court. Mr Justice Lewison held that the Tribunal had applied the wrong legal test of whether the appellant was supplying sporting services (that the supply should have a direct link with actual participation in sport), such test having been updated in the meantime by the ECJ's decision in *Canterbury Hockey Club v HMRC Case C-253/07*. The case must therefore be remitted for a new Tribunal hearing on the point. However, the Tribunal's decision on the civic supplies point was upheld.

## **Chancellor, Masters and Scholars of the University of Cambridge v HMRC**

*Chancery Division, 10 March 2009*

Cambridge claimed to be acting as a public authority in discharging its educational functions and thus only liable to pay VAT at the lower rate in respect of electricity supplied to it.

The VAT Tribunal disagreed and the High Court has now dismissed Cambridge's appeal too. The concept of acting as a public authority was not to be determined under the laws of each Member

*Chris Reece summarises the most recent indirect tax cases from the domestic and European courts*

## NEWS FROM THE COURTS

State but under European principles, interpreted as to the facts by the national court.

### **HMRC v Isle of Wight Borough Council and others**

*Chancery Division, 11 March 2009*

This case has been remitted to the VAT Tribunal for findings of fact in relation to the ECJ's recent ruling about the meaning of significant distortion of competition in the context of supplies made by public bodies. The ECJ's decision was discussed in detail by Ian Harris on page 5 of Issue 101 of *Indirect TaxVoice*.

### **Community Housing Association Ltd v HMRC**

*Chancery Division, 12 March 2009*

The appellant is a registered social landlord which generally makes exempt supplies of social housing. In 2006 the appellant set up a subsidiary to carry out development projects. The appellant transferred the benefit of all projects currently under way and the subsidiary paid the appellant the total incurred by it on those projects, including VAT.

The appellant therefore made a taxable supply to the subsidiary and so sought to recover the VAT it had incurred so far on those projects.

HMRC refused repayment and the VAT Tribunal agreed that the input tax incurred by the appellant had been referable to the appellant's exempt supplies of social housing.

The High Court has allowed the appellant's appeal, holding that the input tax was directly and immediately linked to the taxable supply to the subsidiary, not to the appellant's wider supplies of social housing.

**Comment:** This seems so obvious it's a wonder that HMRC took the point, let alone persuaded the Tribunal that it was right.

### **Umbro International Ltd v HMRC**

*Chancery Division, 12 March 2009*

Article 78(3) of the Customs Code provides that: 'Where revision of the declaration ... indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.'

In *Overland Footwear Ltd v CCE* Case C-468/03 the ECJ ruled that the effect of Article 78(3) was that HMRC would be required (subject to a cap) to repay duty if the declared customs value erroneously included a buying commission. On the basis of that ruling Umbro made a claim to HMRC for a refund of what it alleged had been overpaid customs duty.

However, the Tribunal held, and the High Court has now confirmed, that Umbro had not produced convincing evidence that the customs value had erroneously included a buying commission, since

Umbro was unable to prove that its supplier had acted as its buying agent.

### **HMRC v Boots plc**

*Chancery Division, 16 March 2009*

Boots accounted for VAT under a bespoke retail scheme (BRS). For a period in 2002 and 2003 Boots ran a promotional scheme under which customers who spent more than £15 received a 'voupon' entitling them to a discount of £5 on a future purchase. Boots and HMRC disagreed about the time at which the voupon should be accounted for. Boots originally accounted for VAT by reducing the consideration when a voupon was presented in order to pay for goods.

However, Boots then alleged that the voupous were face-value vouchers such that it was entitled to reduce the consideration for the original supply by £5 and account for the full consideration on a subsequent sale (beneficial to Boots both in cash flow terms and, more importantly, giving Boots the reduction whether or not the voupon was redeemed).

HMRC originally rejected this new way of accounting for the voupous and then later agreed with it temporarily, making a repayment to Boots, before changing its mind and making an assessment to recover some of the refund.

The VAT Tribunal allowed Boots' appeal, on the basis that when HMRC agreed to the revised method of accounting for the voupous, that amounted to an agreed amendment to Boots' BRS. However, the High Court has now held that that was a decision which on the facts no reasonable Tribunal could have reached. HMRC's appeal was allowed and the assessment upheld.

### **Elshani v Hauptzollamt Linz**

*ECJ, Case C-459/07, 2 April 2009*

Mr Elshani was discovered to have introduced 150 cartons of cigarettes into Austria from Kosovo without paying duty. The question arose whether the customs debt had been extinguished and the ECJ ruled that it could not have been, since the discovery took place inside the EU, beyond the first customs office situated within the EU.

### **MMC Midlands Ltd v HMRC**

*Chancery Division, 3 April 2009*

MMC carried out quarrying operations, digging up limestone and extracting fluorspar from that. The VAT Tribunal held that aggregates levy was payable in respect of the limestone because it was not 'won' with the fluorspar and because the quarrying of limestone was the main purpose of MMC's activities, so the limestone was not 'spoil'.

The High Court has upheld that decision: the limestone was won when it was dug from the ground and the fluorspar won when it was separated from the limestone – the two did not happen at the same time; and on the facts it was reasonable of the Tribunal to conclude that MMC's main purpose was the quarrying of limestone.

# SAD, Safety and Security

**A**s usual, I begin by asking who should read this article? The answer is anyone involved in submitting summary and/or customs declarations on the Import Control System (ICS), the Export Control System (ECS), or the New Computerised Transit System (NCTS). Also, those who need to be registered for Economic Operator Registration and Identification (EORI).

Customs Information Paper (CIP) (09) 09 provides an update on developments since CIP (08) 79 was issued in December 2008. To try and help traders I have combined parts of the two papers. Throughout the CIPs are highlighted links to the relevant EU documents. To read them you will have to view the two CIPs on the HMRC website – [www.hmrc.gov.co.uk](http://www.hmrc.gov.co.uk). CIP (08) 79 gave a broad summary of recent legal developments as they related to the SAD (Single Administrative Document), safety and security and other related issues. The more recent CIP builds on that, updating the reader on key changes, and links to documents they will need to see.

## The changes

CIP (08) 79 listed three separate changes to the Community Customs Code (CCC). These had been voted on in their relevant committees, but not yet published in the Official Journal (OJ):

- \* TAXUD 1603/2008 in respect of changes to the data elements in Annex 30a of the CCC as amended by Regulation 1875/06

- \* TAXUD 1435/2008 in respect of EORI

- \* TAXUD 2007/2008 in respect of the safety and security rules.

Please note that new consolidated document 1725/2008 has still not been published in the OJ, so is not yet law. However, subject to any required linguistic or legal revisions, CIP (09) 09 explains how the consolidated text of the legal amendment to the CCC will look.

## EORI scheme

The latest guidance on the implementation of EORI remains that in CIP (08) 61, issued late last year and linked to CIP (08) 79. Since then CIP (09) 13 has been issued. It explains the changes made to the SAD Additional Information (AI) Statement Codes, to enable Economic Operators to identify imports/exports and revenue due against individual branches/divisions. There are details on the application procedure and there is mention that the EORI FAQ has been updated.

To find and download any of the documents mentioned in this article go the HMRC website. On the home page, under 'business & corporations' (top right), click on 'Import & export'. For access to

CIPs, click on 'JCCC Papers' (in the introductory paragraph). That will lead you to lists of CIPs for 2009 and 2008. Half-way down the previous page click on 'International trade developments' and that will lead you to a page with a link to the EORI Scheme Home Page, which will give you access to all the documents relating to the EORI Scheme.

Those traders who have already received confirmation of their EORI number may not need to read through all the extra data.

## TAXUD 1617/2008

This document covers changes to forms used in the ICS, the ECS and the NCTS. Its content has been voted on and agreed by the Commission and Member States. It is not yet published in the OJ. However, as it will be published as an amendment in its own right, without consolidation into document TAXUD 1725/2008, it is likely to be published much quicker. These changes come into effect on 1 July 2009. The forms have all been introduced or amended to include safety and security data items for the first time.

To summarise, this document introduces the following changes:

- \* A new version of the Export Accompanying Document (EAD) (and accompanying List of Items (EADLoI), for use where more than one goods item is being declared) has been introduced to include safety and security data items from Annex 30A.

- \* A new Transit/Security Accompanying Document (TSAD) (and accompanying List of Items (TSADLoI) for each goods item) has been introduced for use where a Community/Common Transit movement and NCTS/TIR is required to include safety and security data from Annex 30A.

- \* A new paper 'Export/Security Single Administrative Document' (ESS) (and accompanying List of Items (ESSLoI), for use where more than one goods item is being declared) will be available in situations in certain Member States where an electronic combined export declaration and Exit Summary Declaration (EXS) cannot be submitted because either the customs system or the system of the person lodging the declaration is not functioning.

- \* A new paper 'Security and Safety Document' (SSD) (and accompanying List of Items (SSDLoI), for use where more than one goods item is being declared) will be available where either an entry summary declaration (ENS) or an exit summary declaration (EXS) cannot be submitted electronically in circumstances similar to those at the bullet point above.

In the UK, exports will continue to be cleared on Customs Handling of Import and Export Freight (CHIEF). Therefore there is no requirement to

*Ernest Grayston provides an update on the single administrative document, safety and security provisions*

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implement separate paper fallback for ECS. In the ECS system, an ECS message is generated only when CHIEF gives permission to progress. ECS messages will be stored in a queue until the ECS system recovers. The fallback procedures for CHIEF/NES/NCTS will, therefore, remain unchanged. Export and import procedures are set out in the Tariff. Fallback procedures for Transit are set out in the Transit Manual. The ESS form (mentioned above) will be used from 1 July 2009 in place of the existing export SAD if CHIEF export fallback is invoked. The current SAD will continue to be used for imports and transit/TIR, supplemented by the SSD when required.

The ESS form will also be used from 1 July 2009 for the export procedure 'Customs Input of Entry' (CIE) and replace paper SADs for export Merchandise in Baggage (MIB).

Any consequent changes to these procedures will be publicised as soon as possible.

When the new forms are available, they will be published in the Tariff and/or Transit Manual and on the HMRC website (under 'forms').

A final version of the agreed document can be found at <http://snipurl.com/ff3c8>. Please note this may itself be subject to linguistic or legal changes before it appears in the OJ.

### **TAXUD 1468/2007**

This document, which deals with data changes to ICS and NCTS, has been taken off the agenda of the SAD Committee for now.

### **TAXUD 2051/2008**

Transitional measures for entry/exit summary declarations will run from 1 July 2009 to 31 December 2010. During this time, there will be no obligation to lodge an entry/exit summary declaration. However, there is no transitional measure regarding the requirements in relation to export declarations which begin on 1 July 2009.

### **Transitional provisions**

The following information was issued by the European Commission in press notice MEX/09/0402 (see <http://snipurl.com/ff4an>) on 2 April 2009:

'Transitional period until 31 December 2010 for electronic advance declarations:

'The European Commission adopted today a Regulation which sets a transitional period from 1 July 2009 to 31 December 2010 during which traders will have the option of submitting electronic entry or exit summary declarations on goods before they enter or leave the EU. Unanticipated delays have occurred in the implementation process of electronic entry or exit summary declarations so that not all actors [this is "euro speak" for traders] will be in a position to submit those declarations by 1 July 2009. In order to increase security

in the international trade in goods, the EU has introduced in 2006 the obligation for traders to submit electronic advance information to customs authorities in order to enable them to carry out computerised risk analysis on the basis of such information before the goods are presented to customs (IP/06/1821). During the transitional period, goods not declared in advance will be submitted to risk analysis after arrival or before departure of those goods. The Regulation can be found at these web links: [<http://snipurl.com/ff411> and <http://snipurl.com/ff4n7>]. Further information on the security aspects of customs can be found at this web link: [<http://snipurl.com/ff4pi>]. Further information on the Community Customs Code and its implementing provisions can be found on this website: [<http://snipurl.com/ff4r7>].'

### **MASP in TaxVoice**

An article on the Multi-Annual Strategic Plan (MASP) was published in the August 2008 issue of *Indirect TaxVoice*. This outlined the purpose of the security amendment, and the ICS and the ECS. It might be worth reading it again. These extracts are included in an attempt to give the overall perspective on these two subjects.

The article said the security amendment aims to secure and facilitate the supply chain. It introduces Authorised Economic status, pre-arrival/departure information, data sharing and community-wide electronic risk management procedures. The security amendment also gives the legal vires for the introduction of the ICS, the ECS and the Risk Management Framework (RMF). Please see Annex A of JCCC Paper 54/05 for details.

On the subject of ICS and ECS the article said that part of the MASP is the introduction of electronic systems allowing customs clearance in cases where more than one Member State is involved. This objective has already been achieved with regard to transit (NCTS), apart from the TIR procedure, and is already being pursued with regard to the ECS, which will form the basis of a community-wide Automated Export System (AES). The next logical step is to introduce an ICS, which could later form the basis of a Community-wide Automated Import System (AIS).

### **Conclusion**

The European Commission has not allowed sufficient time for all the 27 customs authorities to prepare for the proposed changes. Software developers have to develop the software and then traders really need at least six months to make sure the software is working properly.

It is hoped that the UK tariff will be amended in sufficient time for traders to be ready for the extensive changes to be introduced from 1 July 2009. Also in sufficient time for traders to have staff properly trained.