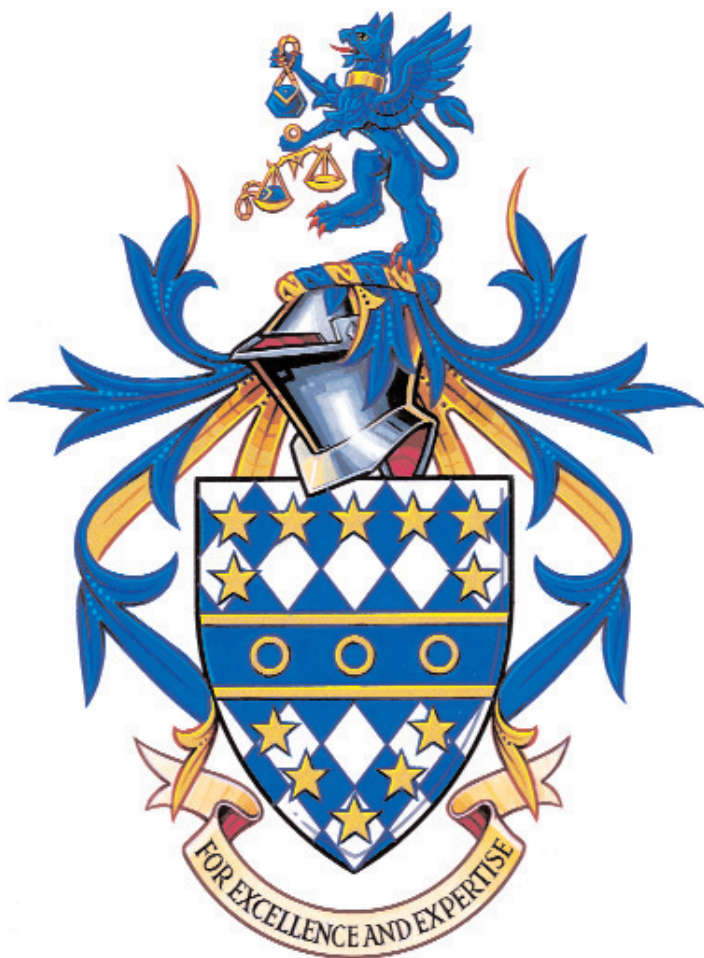


Indirect TaxVoice



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On **page 3** Chris Reece summarises cases on: whether or not traders are entitled to compound interest when the legislation only provides for simple interest; and whether a trader should nevertheless have been allowed the benefit of an extra-statutory concession, even though it did not come within the concession's precise terms.

On **page 4** Phil Challen reports back from the Customs Duty section of the Institute's 2009 Indirect Taxes Conference, at which Phil was not only chairman but also had to fill in as presenter of someone else's talk on preferential and non-preferential origin. As ever, Conference appears to have been a great success for all concerned.

On **page 7** Glyn Edwards also reports from Conference, his commentary concentrating on the VAT section in the morning but also including the combined afternoon conference. Of particular note is Glyn's suggestion that he may have found a speaker who is more critical of HMRC than Robert Maas is wont to be.

On **page 10** Janet Paterson looks forward to the change in standard rate of VAT back to 17.5% on 1 January 2010. Janet points out that rate changes are more common than we realise and compares the time of supply rules in various situations.

On **page 12** Robert Maas has produced another set of representations to Government. This time he is looking at HMRC's consultation paper on bulk and specialist information powers. Whilst a proportion of the content of the paper relates only to direct taxes, there is still much of vital interest to indirect tax practitioners.

We invite comments on the articles in this (and any other) issue and, as always, suggestions for future subject-matter, especially from those prepared to write such articles. Please email enquiries@theiit.org.uk.

VAT News Summary and Commentary

Update on mandatory online filing of VAT returns

I mentioned in the last issue of *Indirect TaxVoice* that online filing of VAT returns becomes mandatory for most businesses from 1 April 2010.

HMRC estimates that approximately 95% of VAT-registered businesses have access to a computer, and HMRC is actively seeking possible alternatives for the 5% that may not be able to access a computer near to their home or business. With this in mind HMRC is promising that the draft regulations on penalties for failure to submit electronically will be waived during the first year, although the usual penalties for non-payment of VAT will still be due.

Online filing of VAT returns will be compulsory from 1 April 2010 for those taxpayers with an annual turnover of £100,000 or more. However, what is not so widely known is that the first VAT return that must be submitted electronically is the one covering an accounting period that falls wholly within the new rules. This means, for example, that taxpayers with a May quarterly stagger will not have to file returns electronically until September 2010, when the August return is due. This is because only two (April and May) of the three months (March, April and May) covered by the May return fall within the new regime.

The biggest issue currently for taxpayers and their agents is the procedure for registering and appointing an agent to complete VAT returns, and the use of a PIN number that HMRC will only send out by post to the taxpayer. We welcome the establishment of a working party to iron out problems in respect of these procedures in advance of 1 April 2010.

We urge VAT-registered businesses to begin the online registration process as soon as possible, even if it transpires that they do not need to submit their first return online until September 2010, as in the example above. This will ensure, as far as possible, that specific issues are resolved before the first return is due.

Opportunity for theatres to claim back VAT

HMRC is now inviting theatres to make claims for under-recovered VAT going back to April 2006.

This follows the success at the Tax Tribunal for *Garsington Opera*. In that case, HMRC had disallowed input tax recovery on the opera's production costs on the basis that those costs related

solely to supplies of admission rights. As admission rights granted by Garsington Opera are exempt from VAT, HMRC maintained there was no right to input VAT recovery.

Garsington contended that the production costs had a direct and immediate link with other income, such as sponsorship, CD sales, touring income and prop sales. As this income is subject to VAT, it should have the right to recover a proportion of the input tax incurred on production costs. The Tribunal agreed with Garsington that the VAT on the production costs fell to be residual, and therefore recoverable in part.

It had been feared that HMRC may appeal the decision; fortunately it has accepted the Tribunal's judgment and revised its policy. HMRC's new policy is to allow partial recovery of VAT on production costs, provided that there is a firm intention at the time the costs were incurred that the cultural body will make taxable supplies as well as exempt supplies of admission. Theatres and operas can now revisit their VAT recovery calculations and make claims for any VAT they believe they have under-recovered.

VAT oddities and Energy-Saving Week

As I write we are in Energy-Saving Week, so it is timely to point out some of the oddities of the VAT legislation as it applies to the supply of energy-saving equipment.

Energy-saving materials for the home mainly consist of insulation for walls, floors, roofs etc, draught stripping, solar panels and wind and water turbines. If a homeowner engages a VAT-registered business to supply and install insulation, for example, the homeowner will only be charged VAT at 5% on the supply. Conversely, if the homeowner obtains the insulation and fits it himself, he will be charged VAT at 15% (17.5% from January 2010) by the supplier but would save on the cost of the fitting.

In addition, there are many types of goods that would commonly be regarded by the majority of people as energy-saving but which are excluded from the 5% reduced VAT rate. Examples are energy-efficient boilers, secondary or double glazing and low-emissivity glass. A homeowner engaging a contractor to supply and install these goods would be charged VAT at the full rate. Where businesses are concerned, if the decision was taken as part of its corporate respon-

Steve Hodgetts, of Baker Tilly, comments on some recent VAT news items which have caught his interest

sibility policy to have solar panels installed, even if the installation was carried out by the supplier of the goods, VAT would still be charged at the standard rate. This is because the 5% VAT rate is only available for residential accommodation. If the VAT is recoverable in full by the business, this will not be a cost to it but there are many businesses and organisations in the UK that cannot recover in full the VAT they are charged.

The UK Government is restricted by European VAT legislation in applying the reduced 5% VAT rate. However, it is within the European Council's power to grant derogations to the UK for a temporary period, although it is debatable whether such a derogation could be obtained for this, as there is no question of tax evasion or avoidance. The EC reviewed the extension of the reduced rate to the supply of all energy-saving materials as part of its review in 2008 of reduced VAT rates

in general, but chose not to include these in the final version.

As a considerable proportion of the housing stock in the UK requires some adaptation to make it more energy-efficient, reducing the VAT rate to 5% on all purchases of energy-saving equipment may encourage homeowners to take action. However, it has to be accepted that the tax saving is just a small part of the overall economic consideration for the homeowner.

Of course, if the UK did succeed in obtaining a derogation, the reduction would have to be passed on to the final consumer rather than be retained by the suppliers as additional profit. This is something which is difficult to achieve, as demonstrated by the recent failure of a large number of retailers to pass on the VAT cut to 15% directly to the customer through reduction of prices.

News from the Courts

John Wilkins (Motor Engineers) Ltd and others v HMRC

Upper Tribunal, 15 September 2009

The appellants had all overpaid VAT on bonus payments from car manufacturers and on demonstrator cars. HMRC made repayments, with simple interest under VAT Act 1994, s 78, between 2003 and 2005.

Following the *Sempre Metals* decision in 2007 the appellants all applied for compound instead of simple interest. HMRC refused and the appellants appealed.

The Tribunal held that the appellants' appeals were out of time. The decision they were appealing against was that of HMRC to pay them simple interest between 2003 and 2005, not the decision not to pay compound interest following the *Sempre Metals* case.

In any case, the legislation did not allow for compound interest. That was perhaps the appellants' entitlement under European law but the UK legislation could not be interpreted so as to give effect to the requirements of European law. The consequence was that the appellants would have to pursue their entitlements with an action for restitution.

Argyll House Developments Ltd

Court of Session, 24 September 2009

Argyll applied for judicial review of HMRC's decision not to allow it to recover pre-registration input tax beyond the six-month limit. HMRC had refused Argyll the benefit of an extra-statutory concession, on the ground that Argyll did not meet the conditions stated in the concession.

The concession Argyll relied upon was contained in Notice 742A, para 9.4, which stated:

'You may find that you become registered for VAT as a result of opting to tax. Special rules apply to all newly registered persons under which they may be entitled to claim relief for VAT incurred on supplies they obtained before registration. Relief is restricted on supplies of services to those received not more than six months before your registration. This restriction may lead to inequitable treatment compared with a business carrying out similar activities, but who was already VAT registered when the tax was incurred ...'

Argyll registered voluntarily for VAT from 1 August 2007 but did not opt to tax until 1 January 2008.

HMRC argued, and the Court agreed, that since Argyll did not 'become registered as a result of opting to tax', the concession did not apply.

The Court agreed that becoming registered 'as a result of opting to tax' was a condition for the concession to apply.

What the concession sought to achieve was equality between a trader who had been registered and then opted to tax, who might therefore recover input tax associated with the option for as long as he had been registered (subject to the usual time limits) and a trader who registered on opting to tax, whose recovery would be limited to six months.

The appellant was already registered on opting to tax but not for more than six months, so it fell between the two positions and was not eligible for assistance under the concession.

Chris Reece summarises two recent decisions, one on compound interest, the other on extra-statutory concessions

The 2009 Indirect Taxes Conference

The IIT's 2009 Conference on 15 September followed last year's successful format of a morning session separating the main specialisms of VAT and Customs Duty, allowing practitioners to focus in detail on relevant topics for discussion, coming together in the afternoon to discuss matters of mutual interest.

The Customs session in the morning was in theory nicely balanced, with speakers drawn from a wide spectrum of expertise. Rob Jenkins runs International Trade Solutions, an independent consulting practice in the Midlands, where his clients range from multinationals to SMEs. Dan Warren works with Ernst & Young, while Jeremy White is a barrister in Pump Court Tax Chambers, and a recognised Big Beast in the world of Customs Duties. As it turned out, Rob was struck down by illness on the day, and the Chair had to give his presentation. We hope that Rob will be able to do his work rather more justice by writing an article for *Indirect TaxVoice*.

Phil Challen reports back from the Customs Conference

Case law update

Jeremy kicked us off with an update on recent case law. He addressed the *Caterpillar/Terex* ECJ case, *Afton Chemicals* C-517/08, *Hueschen* C-375/07, *Haar Vaessen* C-07/08 and *Kloosterboer* C-173/08.

With regard to the *Caterpillar/Terex* case (familiar to many readers as the Weir pumps scenario), the discussion was both complex and interesting. As there was an ECJ hearing in September, however, I do not propose to rehearse the arguments here, but rather to alert readers to keep an eye out for the A-G's Opinion and the Court's decision.

Afton Chemicals was an excise duty case. The taxpayer produced fuel additives that were not fuels, and were neither marketed nor used as such. Rather, they protected the engine and perhaps made the fuel burn more efficiently. HMRC had levied excise duties on imports, which the tribunal had upheld. The ECJ found that such additives were indeed covered by the EU's harmonised excise provisions, even though the relevant Directive requires Member States to exempt mineral oils used for purposes other than as fuels. In so concluding, the ECJ determined (unconvincingly) that the exemption (though specific) could not include those goods that were deemed to be

fuels, as the EU legislature intended to assimilate motor fuels and their additives, whatever their nature. Jeremy pointed out the logical and practical flaws in this argument.

Hueschen explored the role of the National Court, in circumstances in which the Commission had already made factual or legal assessments in respect of the imports in question. A complex case, Jeremy drew from it a series of principles for practitioners to keep in mind when applying for repayment or remission of duty. These were:

- Articles 220 and 239 cannot be equated in all respects
- however, Article 220's concept of 'reasonable detectability' does equate to Article 239's concept of 'obvious negligence'
- when considering an Article 239 Special Situation, the Commission does not have to follow the national court's determinations regarding reasonable detectability
- by contrast, the Commission's findings of fact and law are binding on national courts, as is a Commission finding of obvious negligence
- the Commission's findings of fact and law on Article 871 cases are also binding on national courts.

Haar Vaessen was a satisfyingly compact case. The ECJ determined that a groupage consignment of numerous small parcels, individually falling within the Small Consignment Relief but too large to benefit from that relief when looked at together, could benefit from the relief.

Kloosterboer was a classification case in the fast-moving area of computer componentry, in which the question was the extent to which the antecedents of a particular product could be an 'objective characteristic' of the current product. The *Weiner* case determined that usage could be an objective characteristic; in this case, the ECJ has added a new factor to be considered, as it decided that the historical antecedents of a product, though unavailable to the customs officer on the examination bench at the port, could indeed be an objective characteristic of the product in question.

Senior Accounting Officer

Ernst & Young have been heavily involved in discussions with HMRC to determine the scope and impact of the SAO role. Dan Warren took the floor

to explain the role of the SAO, and the expectation that companies would exercise board-level control over the customs activity. Given that the SAO will in many cases be the Financial Director, and that he is directly and personally responsible for ensuring that the company has adequate controls over its customs activity, the SAO innovation effectively puts responsibility for the customs function of a business squarely into the arms of the Finance team. This in itself is revolutionary.

It is becoming a real challenge for the practitioner to keep up, and events such as this serve a vital role in maintaining the professionalism of the customs practitioner

Dan pointed out that the SAO provisions cover only those businesses under Large Business Control. A delegate asked whether the standards to which such businesses were to be held under SAO was likely to alter the way HMRC controls other businesses, and while it is impossible to predict at this point, it does seem possible that the SAO experiment could raise the bar for all importers and exporters.

The SAO of affected businesses will be required to attest annually to HMRC that, for the entire year in question, the company had effective management programs and controls that could be relied upon to produce accurate tax returns (import/export declarations in the international trade controls field). To the extent that any such statement cannot be justified, the SAO will have to explain the deficiency and provide a remediation plan.

SAOs will probably be unfamiliar with international trade matters initially, so it is as well that HMRC is to apply a light touch in year 1. As long as a detailed review of the business is undertaken, the SAO will have exercised due diligence for that year. However, if the review uncovers deficiencies, they still have to be reported and remediated during the first year, so that a second qualified report is unnecessary in year 2.

It will be interesting to see whether the SAO's direct responsibility leads to greater expenditure on international trade matters, because if not, it's hard to see any structural defects being corrected properly.

One requirement of the certification is that staff must be suitably trained for their roles, and third parties such as clearance agents must be appropriately qualified and experienced to undertake their assigned activities. This will again be a major change to existing practices, and there is a need for a structured training programme in this

arena – a programme the IIT is trying to address by introducing a Customs Diploma to run alongside the existing highly acclaimed VAT Diploma.

Dan gave the view that HMRC will expect the following in relation to all taxes – including customs and excise duties:

- a process for gathering and recording data in a systemic way
- an understanding of the key tax compliance risks of the business
- designing and implementing control activities to mitigate these risks – for example, the segregation of responsibilities and ensuring that people who undertake delegated activities have the right levels of skill and competency
- mechanisms for communicating roles and responsibilities
- monitoring activities to ensure that controls are operating effectively – the level of monitoring required will vary according to the level of risk present.

IIT members are urged to draw their Finance Director's attention to this matter, and make sure that they are involved when customs and excise matters are discussed.

Origin – where are we headed?

Rob Jenkins's slide deck looked at aspects of preferential and non-preferential origin, comparing the GSP aspect of the former (in particular) with the latter, and drawing attention to the complexity of both, and the particular differences between them.

In Rob's absence through illness, Chairman Phil Challen did his best to convey Rob's intended meaning from the slides, but there can be no doubt Rob would have done it better. Accordingly, this report will not compound the imperfect explanation given on the day, but rather assures readers that every effort will be made to persuade Rob to expound his point in his own words in the pages of this periodical.

Conclusion

Overall, the customs aspect of the conference was a success. Breaking into the smaller group allows issues to be discussed in greater depth, and with a greater assumption of existing knowledge, than would otherwise be the case. The group was large enough to be meaningful, and intimate enough to engender discussion. The topics were fascinating and highly relevant in a period that has seen more sustained change in the Customs field than at any time in the last 30 years.

It is becoming a real challenge for the practitioner to keep up, and events such as this serve a vital role in maintaining the professionalism of the customs practitioner.

This year I was delighted to be asked to write the report on the Institute's annual show-piece, which took place at the London Hilton, Park Lane. I follow some illustrious predecessors in the role in Chris Reece and Ian Fleming (with that name – how could he fail?), so I began the day with some trepidation. It certainly gave me an added incentive to listen carefully to the excellent speakers that always enlighten those of us lucky enough to attend.

Following the pattern of recent years, the morning was split into separate sessions for VAT and Customs Duties. Given my ignorance of the latter, I perhaps should have attended. On more familiar territory I chose to attend the VAT morning session, which was chaired by the Institute's President, Michael Conlon QC. It was good to hear that membership is up again this year, with more than 100 new students waiting in the wings.

VAT and property

David Goy QC of Gray's Inn Tax Chambers then opened proceedings with an update on Recent Developments in VAT and Property. David focussed his talk on case law, given that there have been relatively few legislative changes in the past 12 months. David's reassuring view of *Tellmer Property C-572/07* was that it is far less significant than it might at first appear. Perhaps more important was a decision of the new Tax Tribunal in *Lower Mill Estates TC00016*, which David used to highlight his view that even relatively simple tax planning could now be vulnerable to the allegation of 'abuse of rights' by HMRC.

David's explanation of the abolition of the concession (ESC 3.29) which allowed charities to benefit from zero-rating of new building projects, provided that business use did not exceed 10%, encouraged a useful debate from the floor, including one suggestion that 5% was not necessarily half of 10%. No doubt David will be able to explain this if you have any clients needing his advice!

David approached the themes of his talk with the skill of a light touch, which drilled through the complexities to understandable key issues.

Relevant establishment

The next speaker was Nick Warner of PKF. Nick was at the centre of one of the most important place of supply cases of recent years during his time with Zurich Insurance (*HMRC v Zurich Insurance Co* (CA) [2007] STC 1756). He was therefore ideally positioned to explain the difficulties likely to arise when trying to determine the 'relevant establishment' in the post-2010 era.

Nick's most important message to delegates related to the ongoing EU review of the exemption

for intermediary services in the financial sector. He warned that there was a real threat that the exemption would be narrowed, particularly in areas such as call-centre and web-based delivery, where the UK is potentially exposed. He urged all interested parties to continue to exert pressure on the decision-makers, because once completed, we will have to live with the outcome for at least another 25 years.

Michael Conlon extended an invitation to Nick to speak again at the conference when the review has been concluded – although whether this will be in two, five or 10 years, no-one could say.

Case law

Michael's traditional update on VAT Case Law is always one of the highlights of the conference, giving an excellent insight into the key decisions, but also highlighting those where litigation is likely to continue. In the latter category, Michael was able to give a personal insight into the ongoing saga of compound interest claims in the 'VICGLO' cases, where car dealers were defeated by the argument of statutory limitation. Michael looked forward to the Court of Appeal reconsidering this argument in the New Year.

Michael also highlighted the important comments made by the Court of Appeal in the widely reported 'Pringles' case (*Procter & Gamble UK v HMRC* (CA) [2009] STC 1990), where the Court emphasised the need to give deference and respect to the judgements of the specialist Tribunals. This may make it far more difficult for either side to overturn Tribunal decisions in future and Michael expects very few VAT cases to reach the new Supreme Court.

Sponsor's message

After a break for an excellent lunch, there was time for a quick word from Nicole Johnson from the event sponsors CCH, who I must mention for their support of this year's conference, not least because I work for them!

HMRC powers

David Southern of Temple Tax Chambers began the afternoon with a wide-ranging and thought-provoking analysis of HMRC's new powers. He lamented the extension of existing powers, the vagueness of the legislation and the removal of judicial safeguards. Unfortunately, he felt that even the Human Rights Act would be unlikely to protect the taxpayer, because the European Convention on Human Rights is 'taxation friendly': it qualifies rights such as privacy and protection of property with the rights of the authorities to collect taxes.

*Glyn Edwards
AIIT, of CCH
Taxation
Services,
summarises
the VAT
Conference
and the
combined
afternoon
session*

David also felt that the new two-tier tribunal fettered a taxpayer's rights to justice with features such as a requirement to ask permission to appeal from the very judge who found against you! He yearned nostalgically for the General Commissioners, who were quite prepared to reach seemingly perverse decisions in the interests of real justice.

It is a rare event for the conference to hear from a speaker who is even more critical of HMRC than Robert Maas (more of whom later), but Robert may have been trumped by David Southern on this occasion. I suspect that David's concerns will have most resonance with direct tax practitioners – in VAT most of us have grown up with the belief, rightly or not, that 'Customs have more power than the police'.

VAT Package

Peter Jenkins spoke next, on the implications of the impending VAT Package. Peter broadly welcomes the changes, but reported that the main obstacle to B2C changes was Luxembourg's reluctance to surrender large VAT revenues, which it derives from the migration of Internet service providers to its relatively low-tax regime.

Peter regarded the extension of ESL reporting as a black mark against the VAT package, describing it as a knee-jerk reaction against MTIC fraud without any likelihood that it will prove useful in that respect. He also warned delegates not to expect the proposed electronic 8th Directive refund scheme to be fully operational by 1 January 2010 – it seems likely that many Member States just will not be in a position to comply.

It was also interesting to hear Peter's comments on topics that had been raised by earlier speakers. On the subject of HMRC powers, he reminded us that the UK remains more benign 'by a country mile' than many other Member States. With regard to the *Zurich Insurance* case, Peter felt that the new introduction of the 'establishment most closely connected' with a supply in EU law brings Europe much closer into line with VAT Act 1994, s 9(4), although he conceded that jurisprudence will need to develop in the ECJ to answer the questions posed by the *Zurich* case.

Double act

Over recent years, the traditional curtain-call for the conference has been a double-header where a 'volunteer' from the Department pits his or her wits against Robert Maas of Blackstone Franks LLP. This time it was the turn of Juliet Roche to play Daniel to Robert's lions in a discussion on HMRC's new information and inspection powers. Juliet's background is in direct taxes with the Trust Office and more recently working on compliance

and anti-avoidance. Juliet was undaunted by David Southern's earlier lambasting of the changes. She reminded the conference that the recent changes were not restricted to powers, but had also aligned record-keeping requirements and assessment time limits.

Juliet addressed some of the concerns raised. For example, she reported that there had been a decline in the number of unannounced visits now that officers and inspectors know that they need to justify the plan to a manager. With regard to the new powers to demand bulk information from a taxpayer, Juliet argued that this was preferable to the old method, which would be to arrange a VAT visit as a pretext for the real motive.

I am always pleased to hear speakers from the Department, even if I sometimes disagree with what they have to say. Not only is it worthwhile to hear the other side of the argument, but it also enables the Institute to emphasise that we are an inclusive body which, unlike other organisations, welcomes members from both sides of the profession.

Robert Maas was then given an opportunity to respond and he admitted that he almost felt the need to defend HMRC after finding that David Southern was even more critical than Robert had intended to be. On a number of points, he argued that the changes were necessary – for example, the new right to examine records for the purpose of responding to queries from foreign governments was demanded by our obligations within the OECD.

With regard to the complaint about the difficulty in persuading a judge to grant the right of appeal against his own decision, Robert pointed out that this was very similar to the previous process in the High Court and this had not unduly curtailed taxpayers' rights.

Readers will be pleased to hear that Robert has not gone completely soft. He was concerned about the number of times 'reasonably' is used in the new legislation, which he felt places too much trust in the Department. The changes had also focussed on the needs of HMRC above the requirements of a fair tax system. He hoped that Juliet was right and that good training and careful management would keep maverick officers in check.

Finally

Finally, a word of thanks must go to the organisers. A number of delegates I spoke to told me that they regard this event as the one 'must-see' of the year and that is a surely a tribute to the quality of speakers and excellent all-round organisation, so thank you to the Institute's Secretary General – Terry Davies – and to Cindy Farmer for all their hard work.

The Rate Change and the Time of Supply Rules

When last year's pre-Budget statement announced that the standard rate of VAT was to be changed from 17.5% to 15%, from 1 December 2008, businesses had little time to prepare for the change and the whole process came as something of a shock both to businesses and to many advisers. Prior to this, we had not seen a change in the standard rate of VAT in over a decade, so one could understand the problems that businesses encountered in adapting to this – and, indeed, HMRC did seem to take a reasonably practical attitude to the whole process.

However, we have now known long in advance that, come 1 January 2010, the standard rate of VAT will go back up to 17.5%, so businesses should be well prepared for this change. Indeed, HMRC fears that some businesses might be too well prepared, and make prepayment or other similar arrangements to enjoy the 15% VAT rate for what might be viewed as supplies to be made after 31 December 2009. Anti-forestalling legislation has been introduced in an attempt to stop significant VAT advantages being achieved through such means, as further explained below.

It is also worth remembering that although there has not been a standard-rate change in many years, a change in VAT rate can happen in a number of different ways. For example, if there is a change in law or practice which means that an item or service line previously thought to be standard-rated is then either charged at a reduced rate, zero-rated, exempted, or moved out of the scope of VAT, this is a change in VAT rate for that particular item or service line. The legislation for how to deal with supplies spanning a rate change has been on the statute books well in advance of the current changes to the standard rate of VAT – it is only the anti-forestalling legislation that is additional law.

The time of supply rules

The starting point when considering the applicable rate of VAT at the time of the rate change is the time of supply rules. In principle, if a supply is deemed to be made prior to 1 January 2010 (and before the earlier rate change), the 15% VAT rate applies and if it is made on or after 1 January 2010, the 17.5% VAT rate applies. It is worth therefore briefly summarising these rules, as follows.

The basic tax point (for goods)

The starting point for goods is that the supply is treated as being at the earliest of the time of removal (that is, collection or delivery), the time the goods are made available, or the time of adoption.

The basic tax point (for services)

For services, it can be less obvious to see when these are regarded as delivered to or collected by a client. Instead, therefore, the starting point is to look at the time the services are regarded as 'performed'. It is the time of performance that then dictates the time of supply for VAT purposes.

Advance payment or advance invoicing

If, before the 'basic' tax point for goods or services occurs as described above, the trader issues a VAT invoice or receives payment for the supply (which generally includes deposits), to the extent that the supply is covered by the invoice or payment, it is treated as taking place at the time the invoice is issued or the payment is received (that is, so the time of supply is also brought forward). There are exceptions for goods sold on sale or return.

14-day rule for VAT invoices

If, within 14 days after the basic tax point for the supply of goods or services as described above, the trader issues a VAT invoice in respect of it, the date of the invoice will determine the time of supply (although this rule is overridden if payment has already been received, in which case the time of supply is still the date of payment, as described above). There is scope to ask HMRC to either ignore or extend this rule by agreement.

Continuous supplies of services

Continuous supplies of services generally occur where services are supplied both for a period and under terms that provide for the consideration to be determined, or payable, periodically or from time to time. The tax points are restricted to the issue of a VAT invoice or the receipt of a payment, whichever is the earlier. As a result there is no basic tax point in these circumstances.

There are exceptions for where services are supplied under an agreement which provides for successive payments, and a VAT invoice is issued up to a year in advance detailing the payment

Janet Paterson, of Charter Tax Consulting Ltd, takes a practical approach to the impending rate change

amounts and dates, in which case the payment dates as set out in the invoice can apply (or the date of payment will apply, if this is sooner). Note, though, that in the event of a change of VAT rate, such invoices become invalid and need to be reissued.

Other

Different rules can apply to self-billing invoices, asset disposals, certain land supplies, leases, construction services, supplies for a non-monetary value, royalties and services provided by barristers.

The rate change provisions

Although one might think that the time of supply provisions result in a sufficiently clear means of determining when a supply is made, and therefore what the applicable VAT rate is, exceptions are then made by the rules applicable at the time of a rate change. Under these rules traders may choose to apply the VAT rate that results from the basic tax point, rather than necessarily looking at when an invoice is raised or payment is received.

So, for example, if a discrete piece of advice is rendered on 30 December 2009 but not invoiced for until 5 January 2010, because the invoice was issued within 14 days of the time of supply the invoice date of 5 January 2010 would normally be regarded as the tax point (so VAT would be due based on the rate in force as at 5 January 2010). However, the supplier can if it wishes choose to apply the VAT rate in force as at the time of the basic tax point, 30 December 2009. Note that this is a choice to be made by the supplier, rather than the customer, or indeed HMRC, although one can imagine that where the customer is unable to recover its VAT, it will bring pressure to bear on the supplier to charge the lower rate of VAT.

For supplies of services, part of the work may take place before the date of a change in the tax rate or liability and part on, or after, that date. In such cases, provided that the supply can be apportioned either on the basis of measurable work, or in accordance with the trader's normal costing or pricing system (for example, timesheets), the trader can choose to charge VAT at the old rate on the part of the work which was performed before the date of the change and at the new rate on the part which was, or is to be, performed on or after that date.

If the trader has issued a VAT invoice before the date of the tax change and apportionment reduces the amount of tax due, the trader is able to raise a credit note for the VAT element, although any such credit note must be issued within 45 days of the rate change.

Note, also, that as a general principle, if a credit note is issued, the VAT element of that

credit note must always reflect the VAT charged on the original supply now being credit-noted.

Continuous supplies of services

Where a continuous supply spans a change in the tax rate or liability, the trader can account for the VAT at the old rate on that part of the supply made before the change, even though the VAT 'time of supply' point would occur after the change (for example, where a payment is received in arrears of the supply).

Alternatively, the trader can choose to account for VAT at the new rate on that part of the supply made after the change, even though the normal tax point occurred earlier (for example, where a payment is received in advance of the supply).

These rules may result in a credit note for part of the VAT element. Any such credit note must be issued within 45 days of the rate change.

However, there can of course be great difficulties in deciding what might be a continuous supply of services and what might be a discrete, non-continuous, piece of advice. Unfortunately, there is no statutory distinction to detail the difference between project work (non-continuous supplies) and continuous supplies of services. One must therefore rely on case law and HMRC interpretation.

HMRC has issued some specific interpretations in terms of whether a supply is 'continuous' in relation to particular industries, of which one is in relation to accountants' services.

HMRC's view is that the traditional accountancy activities, carried out on an ongoing basis for individual clients, can normally be accepted as representing a continuous supply of services. This includes such work as maintaining a client's accounting records, providing day-to-day accountancy advice, audit work and the submission of annual accounts to HMRC.

However, HMRC takes the view that certain categories of accountancy work must be treated as a discrete supply of services. This includes specific management projects, receivership, liquidation and other work essentially of a one-off nature (such as an accountant providing specialist advice to another firm of accountants).

Somewhere in between these two definitions, HMRC accepts that in some cases an accountant may make additional supplies to existing clients which in their own right are intrinsically one-off in nature. Nevertheless, provided that the rest of the accountant's supplies to that client are continuous, the additional supplies may be treated as an additional element of the overall continuous supply.

For solicitors, on the other hand, HMRC takes the view that the majority of supplies by a solicitor are single supplies, albeit that the supply may

involve work undertaken over an extended period of time. HMRC takes this view even in the case of litigation, which may be extended over a period of many years. However, HMRC also accepts that there are some types of legal work that are inherently continuous in nature: an example being the supply of the services of a solicitor acting as a trustee.

The anti-forestalling legislation

Customers who are unable to recover all of the VAT they incur may want to see if their suppliers can invoice them in advance of the 1 January 2010 rate change, in anticipation of being charged VAT at 15% rather than at 17.5%. This could be the case equally for discrete projects or supplies of goods and for services regarded as falling within the continuous supply of services rules. HMRC calls this 'forestalling' – where the VAT due is fixed at 15% even though the goods are not due to be delivered or services to be performed until on or after the date that the rate reverts to 17.5%.

Legislation has therefore been introduced to prevent forestalling, by introducing a supplementary charge to VAT on the supply of goods or services (or the grant of the right to receive goods or services) where the customer cannot recover all the VAT on the supply and one of the following conditions is met:

- the supplier is connected with the client for tax purposes or

- the supplier (or a party connected with it) funds the purchase of the goods or services or
- a VAT invoice is issued by the supplier where payment is not due for at least six months.

The supplementary charge to VAT is 2.5%, due on supplies of goods or services on which VAT of 15% has been declared. The supplementary charge will have to be accounted for on the date that the VAT rate reverts to 17.5%.

A supplementary charge will also apply where a prepayment of in excess of £100,000 is made before the rate rise in respect of goods or services (or in relation to the grant of the right to receive goods or services) to be provided on or after the date of the rate rise. However, this supplementary charge will not apply if the prepayment is in accordance with normal commercial practice in relation to such supplies when no VAT rate increase is expected.

And finally

Of course once you have fathomed the applicable time of supply rules and whether the anti-forestalling legislation will apply, it will remain for you to advise the client on the practicalities of how to capture these issues within its book-keeping or sales records. Some systems will accommodate the changes more easily than others, and for businesses that will be collecting revenues overnight on 31 December 2009 (including clubs and pubs), HMRC does seem to be trying to be practical.

Bulk and Specialist Information Powers

The Institute comments through Robert Maas on HMRC's consultation document of 9 July 2009 on bulk and specialist information powers

As far as we are aware, HMRC's current bulk information powers apply solely for direct tax purposes and the document seems to focus primarily on these. Accordingly, we have limited our comments to those questions that seem to us to have a bearing on indirect taxes.

Question 1: *Are these principles appropriate for bulk and specialist information powers? What other principles might be appropriate?*

The principles set out in the consultation document seem to us equally appropriate to bulk information powers. However, in addition we believe that the design and use of bulk information powers needs to recognise that the information being sought has no benefit to the provider. Accordingly, the powers ought to be used sparingly, not as a matter of routine, and it should be made as easy as possible for the provider to provide the infor-

mation. This suggests that there needs to be flexibility in how it should be provided. We also feel that bulk information powers should be used only where there is no reasonable alternative way for HMRC to obtain the information that it needs. We agree that there ought to be increased safeguards against disproportionate requests, as envisaged at para 2.7.

We find it hard to envisage any situation in which it would be appropriate to use bulk information powers in connection with indirect taxes. It would be extremely burdensome to ask most businesses to supply lists of suppliers with details of the purchases from each, which is the main possible use that we can envisage. We can also see that it might be attractive to HMRC to ask a VAT-registered trader for a list of all suppliers from whom it purchases goods or services where the amount in a year exceeds the VAT registration

limit, or even where it exceeds a lower figure, such as 20% of the VAT registration limit. It is highly unlikely that many traders would maintain records in such a way as to be able readily to provide such information.

We strongly oppose the use of third-party information powers that would require significant work and cost by the third party to collate the information. However, without knowing what, if any, use of bulk and specialist information powers HMRC might intend to use for indirect tax purposes, we cannot comment sensibly on the scope of such powers. Our comments need to be approached with this caveat in mind.

Question 2: *Should the law be changed so that the address to which bulk information must be sent may be any specified address, rather than that of an officer?*

This seems to be a pure direct tax question. However, we would reiterate that we believe that the mode of providing information should be as flexible as possible so as to minimise the burdens on the provider. We think it sensible for the provider to be able to deliver the information to any HMRC office.

Question 3: *HMRC welcomes views as to whether advance notice of bulk information requests would be helpful. How long a period before the start of the period in question would be appropriate?*

Advance notice is clearly helpful. Ideally such notice needs to be given well before the start of the third party's accounting year concerned, so that it can modify its accounting systems to facilitate the production of the information. In this context it needs to be borne in mind that it can take the best part of a year to change a computer program to enable it to produce specific information.

Question 4: *HMRC welcomes views on how it should specify the format in which bulk information should be provided. What could HMRC do to reduce the administration burden of providing information in a required format?*

As stated above we believe that the use of bulk information powers should be as flexible as possible. We therefore do not think that HMRC should specify the format in which information must be provided. We obviously have no objection to its telling providers what format would be most convenient to HMRC.

Question 5: *HMRC welcomes views as to whether bulk information powers should apply across taxes.*

We believe that HMRC should utilise all of the information in its possession to check any partic-

ular tax. One of the most common complaints from practitioners is the amount of time that is wasted in providing to HMRC information that has already been provided to it earlier, in relation to either the same or a different tax.

However, we do not think that bulk information requests should be designed with the possibility in mind that the information obtained might also be useful in relation to a different tax. For example, if a person is asked for details of commission paid in accordance with section 16, TMA 1970, we do not think that HMRC should ask the provider to supply the VAT registration numbers for each person just in case someone else in HMRC might want to check that a supplier has accounted for VAT on the commission. The extra burden imposed on the provider of providing information that may be of use in relation to a different tax seems to us an unreasonable imposition.

Question 6: *Should HMRC require providers of bulk information to obtain and verify people's identities, or should HMRC rely on other ways of matching data with individuals?*

We do not think it reasonable for HMRC to expect third parties to verify people's identities.

Question 7: *Would there be benefits to information providers in gathering identification numbers such as National Insurance or VAT numbers where relevant?*

We cannot see any benefit to information providers in gathering VAT registration numbers of people with whom they deal. Once the third party has satisfied itself that a registration number that it has been given is valid, all that it normally wants to know is that the invoices that it receives are VAT invoices. Indeed the biggest fear is that a valid VAT number might cease to be valid without this being apparent, so numbers received historically are of no ongoing interest.

Question 8: *HMRC welcomes views on including a declaration that a return is complete with bulk information returns.*

Where a business has several branches, it may be easier for it to provide information separately from each branch rather than collate the information centrally. Accordingly, a declaration that the aggregate of the separate returns is complete would be unduly burdensome.

Questions 9 and 10: *What would be the impact on data providers of any reduction in the amount of time allowed from the end of the tax year to provide data?*

To what extent could this be mitigated? For example, would impacts be reduced if HMRC specified what information it will ask for in advance, by saying before the start of the period

or tax year in question what information it will require and in what format?

These are not relevant for indirect tax.

Question 11: *HMRC welcomes views as to whether penalties should be applied by HMRC rather than the tribunal, retaining the right of appeal to the tribunal. Should penalty levels be fixed, or based on another factor such as the number of entries on a return? Should there also be a penalty at a level set by the tribunal for those who continue to fail to provide information?*

We can see merit in penalties being applied by HMRC, provided that these are subject to a right of appeal to the Tribunal. We would, however, be concerned about daily penalties being imposed by HMRC. The third party ought to be able to appeal to the Tribunal before it becomes liable to such penalties and should be liable to such penalties only if it does not comply with the Direction of the Tribunal. We do not think the penalties should be based on the number of entries on the return. This seems to us to be an irrelevant consideration. Failure to comply at all with the bulk information notice is a single behaviour; the submission of an incomplete reply does not indicate a behaviour that reflects the number of entries either that were made on the return actually submitted or that were omitted from the return (we are unclear which is envisaged).

We do not think there should be a penalty at a level set by the Tribunal. Paragraph 50, Schedule 56, FA 2008 was, so the Minister told Parliament, introduced to cover the position where the potential benefit of non-disclosure to a taxpayer would exceed even daily penalties. We cannot see any situation in which there would be a benefit to a third party that would outweigh the potential penalty of complying with the bulk information notice.

Question 12: *HMRC welcomes views on these proposals for new bulk information powers.*

We agree that there should not be a payment to the provider of bulk information. We would, however, point out that the need to make such a payment would concentrate the mind of the Officer within HMRC who decides to seek the information and would accordingly obviate requests for information that has little intelligence benefit to HMRC. We believe that HMRC should be conscious of this factor and should introduce an internal procedure that would reproduce such benefits.

We note the admission that HMRC when checking a company's VAT position also extract information from the company's records in relation to other taxpayers. We are not in favour of HMRC acting surreptitiously and believe that it ought to provide to a trader a copy of any information that it extracts from the trader's records,

particularly where this has no bearing on his tax affairs. Indeed we would question whether this current practice is in accordance with human rights. As indicated earlier, we would be strongly opposed to HMRC asking traders to themselves extract such information. This would be extremely burdensome in most cases.

Questions 13 and 14: *HMRC welcomes views on the level of safeguards attached to paragraph 5 of Schedule 36 to Finance Act 2008.*

HMRC welcomes views on whether a new appeal right for bulk information powers would be useful. In our view the only effective safeguard against the abuse of powers is for the third party to have a right of appeal on an inter partes basis to the Tribunal before he is required to comply with the information notice.

Question 15: *Should bulk information powers require the approval of an authorised officer?*

We believe that bulk information powers should require the approval of an authorised Officer. However, we would stress that we do not believe that this provides much protection to the taxpayer.

Questions 16 and 17: *Should these specialist powers be left as they are in legislation, or brought alongside other information powers at Schedule 36 to Finance Act 2008?*

Is the limited scope of specialist information powers safeguard enough, or should there also be a requirement for pre-authorisation by the tribunal or a right of appeal for the third party?

These appear to apply only to direct tax.

Question 18: *HMRC would be grateful for views on a power to seek the identities of those using a disclosable avoidance scheme. What would be the appropriate safeguards? Should the supplier have a right of appeal against the request, or should tribunal authorisation be required?*

We are unclear what the problem is. Our understanding is that the purpose of notifying a tax avoidance scheme is to provide the opportunity for HMRC to decide whether to enact legislation to counter the scheme.

We can see merit in a promoter being required to identify taxpayers who enter into a scheme after Parliament has sought to counter it by new legislation.

However, we cannot see any justification for breaching the basic human right of confidentiality to require promoters either to notify to HMRC the users of a scheme that the Government has chosen not to counter or to notify HMRC of users of a scheme that the Government has implicitly recognised may be effective by introducing new legislation to counter only its future use.