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Practical VAT Newsletter

Animals, Sports Facilities and Private Use

VAT on the supply of sporting facilities, grazing for horses, animal charities and private usage.

There seems to be some confusion among professionals and lack of clarity on the VAT position on horse livery, the supply of land, sporting facilities, the element of service and the interaction of private use. Matters have been complicated further by a campaign that promotes a VAT re-claim through the recent case of Conde Nast Publications Ltd, 2008 UKHL2, 23 January 2008, 1 WLR 195 [2008].

Livery yards for horses

Livery yards obtained a potential boost when VAT charged to clients with minimum service (Business Brief 21/2001) was deemed to be an exempt supply. However, the apparent advantage comes with the downside of the 'exempt' supply—not being able to claim back input VAT and possible complexities of partial exemption. A livery yard is essentially akin to a dog kennel for horses, most of the customers are 'private' and there is some input VAT to claim back. There can also be some inheritance tax (IHT) and capital gains tax (CGT) disadvantages of an exempt supply. Will the exempt supply impact on the definition of business use for Business Property Relief (BPR)? Under the new Entrepreneurs' Relief for CGT will the 'exempt supply' livery qualify as a letting?

'Schooling and breaking in'

VAT problems can arise in deciding whether 'schooling' and 'breaking in' are provided with the livery service. If the yard is mainly a specialist 'breaking yard', then any supply relating to breaking in will be standard-rated and the provision of livery services will be ancillary to this and therefore standard-rated. On the other hand if the main purpose of the yard is livery with schooling or breaking as an add on, then the entire supply will be exempt.

Where a horse is sent to a yard for the specific purpose of being broken or schooled rather than as somewhere to keep the horse, then the supply will be standard-rated.

Under the interpretation of the Business Brief, where there is a grant of a right or a supply over land, then the supply of livery will be exempt regardless of whether it is full livery or DIY livery, as the supply is somewhere for the horse to live.

Livery v the supply of land

This brief seems a contradiction to the basic principle of the grant of right over land or the supply of land is exempt as the 'full' livery by definition means that the service is not ancillary to the supply of land. Full means a horse being 'fully' looked after. The result is that there is a variance in the interpretation of 'full'. In many establishments DIY and part liveries are treated as an exempt supply but full liveries are charged standard-rated VAT as it is considered that by definition the volume of the services provided do not fulfill the basic principle of exemption criteria.

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All cases and Tribunals are commented on by **David Betton** of KPMG LLP Indirect Tax Legal Services

'Part livery' is where the horse owner for example rides the horse five days a week, but the livery provider rides and looks after it the other two days. It is likely that the livery provider will be responsible for mucking out and looking after the horse generally. Provision of hay and turnout may also be provided. This is the grey area of VAT definition – is 'part livery' an exempt or standard supply? It can be argued the VAT supply could be defined as either exempt or standard.

Trade or Letting

Part livery will generally be a trade/business for income tax, IHT and CGT (see above). The livery provider will generally be fully responsible for maintaining the premises and the grass under any livery service. The livery provider will often be responsible for feeding under part livery. See below for the impact of a recent Special Commissioners 'McClean' case on trading status.

However, full livery is where the livery provider is responsible for the complete care of the horse. The owner will come and go and the livery provider should act in accordance with the owner's wishes, but will be fully responsible for the complete care of the horse. Full livery will be a trade for income tax, IHT and CGT. The interpretation of the Business Brief can be subjective in this area.

The potential loss of valuable CGT and IHT reliefs

As mentioned above, finding out that their DIY livery operation is not trading income can be a shock for many land owners and farmers. Holdover relief from CGT on gifts may also be restricted if the asset being transferred is not classified as a business asset.

The VAT complexities on the supply of land are a clear example of how all tax planning surrounding farms and land has to be comprehensive and looked at in the round.

Zero-rating and grazing

Provision of grazing is zero-rated (as food) – if there is a significant degree of care involved with grazing then this is a standard-rated supply.

The advantage of zero-rating is that the input VAT can be reclaimed. The recent case of McClean (McCall and Anors – Personal Representatives of McClean Dec'd) v R & C Commrs (2008) SpC 678 has deemed grazing agreements not to be a trade in certain circumstances, e.g. not eligible for BPR. The Barrister for the personal representatives Mr Massey QC argued that the grazing agreement was 'akin to holiday accommodation' for cattle. If the provision of grazing included that degree of service would it become a standard-rated supply?

This case provides more evidence of the need to look at VAT advantages 'in the round' and in the context of other tax reliefs.

Polo Farm Sports Club (20105)

Is any direction gained from this fairly recent case?

It suited the Polo Farm Sports Club to make standard-rated supplies. This was on the basis that input VAT could then be claimed. It had not opted to tax the land in question. A dispute therefore arose with Revenue and Customs (HMRC), which said it was making a series of lettings which should therefore be exempt. In this case the lettings were daily for several hours each day and there was never a whole day between each letting. HMRC argued that this was nonetheless sufficient to fulfill the exemption criteria, since there was still 'a day' between each letting. But the Tribunal preferred the appellants view, which was that there had to be at least a clear day, or 24-hour period, in order for the rule to apply. It was decided that the Polo Club was therefore making standard-rated supplies.

Most providers of sports facilities would prefer the supply to be exempt. Consequently, the decision creates difficulties where a series of lettings arises, with less than a whole day in between, where it has been assumed they were exempt as long as there was no more than one letting per day. Are they now deemed to be a standard-rated supply?

General sports facilities

The letting of land is an exempt supply for VAT purposes. However, the letting of sports facilities and sporting rights are automatically standard-rated for VAT purposes. As explained earlier there are special rules for the use of sports facilities where there are lets in excess of 24 hours or for the hire of facilities to the same user for a regular series of events (both then become eligible for exemption but can be opted).

Within the definition of sports facilities for VAT purposes HMRC include swimming pools, tennis courts and croquet lawns and areas of land that have been specifically designed or adapted for sporting activities. However, if the sporting facilities are let for non-sporting purposes then the exemption will apply. An example of this will be the letting of a swimming pool for a fashion shoot which is an exempt supply.

Separate trade

If the livery is part of the farming operation will this lead to partial exemption? The provision of livery services is *not* farming/agriculture/husbandry and this will impact on farming tax reliefs, e.g. Agricultural Property Relief (APR), hobby farming rules, farmers averaging rules.

Is the livery a separate trade? The HMRC manual states as follows:

'... it is unusual for business activities carried on by the same person or body of persons to amount to more than one trade unless

- the two activities are so fundamentally different that they cannot constitute one trade, or
- the activities are not interconnected, interlaced not interdependent (Scales v George Thompson & Co Ltd [1927]).'

(BIM 70530)

The reality is that the whole area of the VAT status on liveries has to be looked at 'in the round'.

If the provision of livery service is *not* farming, i.e. it is not husbandry/agriculture, does it have to be a separate trade?

Private use

There is relatively new legislation that places a lot of pressure on the VAT position on the private use of goods. The complexities of the supply of sporting facilities provide an additional complication to this subject.

Section 99 repeals legislation that is

redundant following decisions in the ECJ (Charles v Staatssecretaris van Financien [2006] STC 1429) concerning the period over which VAT charges for non-business use of land and buildings are calculated.

HMRC are given powers to make new regulations regarding the calculation under Lennartz accounting.

The provision of sports facilities, including livery can have a 'lifestyle' angle and this therefore creates problems of definition between non-business and business use. Of all the industries in the UK it could be argued that it is the equine industry most likely to be affected by a change in VAT legislation which give clarity to an ECJ decision.

Effectively the change in legislation means that where goods, including land and buildings, are purchased partly for business purposes and partly for other purposes, it is possible now to rely on the Sixth Directive to treat all the input tax as recoverable but then account for output tax on the other use over the economic life of the asset. HMRC has power to make regulations in that area restricting this period to 10 years for land and buildings.

Animal rescue charities

Following the Gables Farm Dogs and Cats Home case, HMRC has confirmed that animal rescue charities should zero-rate their supplies—HMRC Brief 14/08, 4 March 2008.

The Tribunal found that the charity took steps to return lost animals to their owners. Those it offered for re-homing had been deliberately abandoned by the original owners. In the circumstances of the case the animals given to the charity by the local authority, the police and members of the public were donated and therefore zero-rated when sold. The problem had been that HMRC's view was that only animals given to the home by their original owners could be regarded as donated within the terms of the legislation. This is a positive victory for animal rescue charities, including those dealing with horses.

Re-claim of VAT

Various equine journals have promoted VAT rebates following the landmark legal case Conde Nast. It has been promoted that the window for making the new claim is March 2009 and livery yards are being urged to make the claim. There are a number of considerations, e.g. the European Court of Justice (ECJ) has agreed that unjust enrichment rules apply as much to payments and repayments.

Although current UK legislation provides this, that was not the case at the time when Marks & Spencer was making supplies of teacakes on the erroneous basis that they were subject to VAT. Revenue & Customs' refusal to repay more than 10% of the VAT in question on the basis that it would unjustly enrich M&S was held by the ECJ (Case C-309/06) to be discriminatory because a repayment trader would not, at that time, have been subject to that restriction. The Revenue's argument, that the zero rate was an entirely UK affair and did not involve directly enforceable EU rights, was rejected by the ECJ on the basis that this kind of discrimination is forbidden under EU law in any case.

Under the proposed change, the supply of livery is moving from standard to exempt. This will result in some partial exemption. Periods mentioned are 1973 to 2001. The problem is that the livery client who was erroneously charged with VAT may have disappeared and there could be some considerable input VAT to disallow. The suggestion must be treated with caution and professional respect.

Summary

Horses have to live on land of some description whether it be grazing or stabling. In addition, horses need looking after and might have some private use. Sadly horses might have to be rescued by a charity. The potential complexity of this situation has created an historic misinterpretation of VAT status re supply of services. Perhaps there is much need for greater clarity.

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COURT DECISIONS

Common law offence of conspiracy to cheat the public revenue

Customs formed the opinion that a Spanish company (T) had been involved in a series of carousel frauds in relation to the sale of mobile telephones from Spain to the UK. They took proceedings against T, claiming damages for conspiracy to cheat the public revenue. The QB gave judgment for Customs, and the HL upheld this decision (by a 3-2 majority, Lord Hope and Lord Neuberger dissenting). Lord Scott of Foscote described the transactions as a 'charade' and 'a fraudulent scheme designed to extract by deception money from the Revenue'. The statutory provisions relating to VAT did not 'provide protection against tort claims for those who by fraudulent schemes succeed in extracting money from the Commissioners'. Lord Walker of Gestingthorpe observed that the case concerned 'illegal, fraudulent tax evasion which is costing the Exchequer more than a billion pounds a year. Indeed it is worse than evasion: it is the fraudulent extraction of money from the Exchequer.' Lord Mance held that 'there would be an evident lacuna if the law did not respond to this situation by recognising a civil liability ... The wrongful extraction of the money from the Commissioners by deceit involved unlawful means and a sufficiently actionable wrong to justify a civil claim in conspiracy.' Customs were entitled 'to take common law action in respect of a successful conspiracy which abstracts monies en route to the Commissioners or which prevents the Commissioners from recovering from others what is due from such others to the Commissioners.' There was 'no incongruity in their and the public's interests being in this respect protected by a common law action for conspiracy. ... the claim is not for the VAT due or for repayment of the VAT credit, it is for damages in respect of