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Practical VAT Newsletter

Current farming and equine pitfalls and planning

There are a number of current VAT concerns facing rural industries which do need some consideration to both avoid pitfalls and to provide welcome VAT planning opportunities.

Smelly and Adapted Cars do not qualify as Vans

There has been a history of dispute over the VAT difference between the van and the car and what that can mean in terms of being able to reclaim input VAT. The resounding view following recent cases seems to be that there is greater clarity around the van and claims for input VAT and it is very much 'all or nothing'. An adapted car is not enough to claim input VAT on; it is not a van.

For the VAT registered trader it is possible to claim input VAT on vans and for the avoidance of doubt this does include 'twin cab pick-ups'. However, motor cars must have no private usage in order to qualify for the input VAT claim and the claim is all or nothing, no percentage or proportion. The problem is that it is difficult to move away from the 'available for private use' as opposed to 'used for private purposes'. There have been three fairly recent cases involving farmers, input VAT claims and cars and they all failed. The VAT planning point (linked to possible capital allowances advantages) has to be to advise farmers, and indeed all clients, on the clear VAT advantages of vans and distinct disadvantages of cars whether in the eyes of the VAT Inspector 'too smelly' to take away from the farm or not.

The smelly and functional car with appearance of a van

The first tribunal case we look at was the argument that the smell of the vehicle which had resulted from farm use made it obviously unavailable for private use. *John Andrew Thomas Faith*, the taxpayer claimed that the vehicle, although purchased as a motor car, had been adapted to give it the appearance and functionality of a van. The tribunal questioned both of the taxpayers' statements, saying that despite the alterations, the vehicle was still classified as a motor car for VAT purposes, and that the 'smell' of the vehicle was insufficient to put the vehicle beyond being 'available' for private use. The tribunal held the input VAT could not be claimed. However, the input VAT could have been claimed on a van. The VAT advantages of a van are clear to the farmer – with a move to 50% rate of income tax from 6 April 2010 the capital allowance advantage for the profitable farmer and indeed any 'van man' could be a useful planning point for

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clients looking to change their transport arrangements in the near future...

The available and the adapted Discovery

The second tribunal case shows that it is not enough that the motor car is unlikely to be used for private use – it was not incapable of being used privately. There were no physical or legal restrictions (not even the smell) to restrict private use. It would appear a car is capable of having no private use but nevertheless if the private use is available the input VAT claim is not allowed. In *Alex Paton & Son*, HMRC disallowed the taxpayer's claim to recover input VAT on a Land Rover Discovery. The taxpayer appealed to the tribunal on the grounds that the vehicle was used solely for a business purpose, and had been especially adapted to allow for the taxpayer's disability.

The main issue of the case was of availability. The relevant legislation, VAT (Input tax) Order SI 1992 No 3222, articles 7(2E)(a) and 7(2G)(b), demand that the vehicle is not only for the purpose of business use only, but is also incapable of private use. Article 7(2G)(b) says, 'A taxable person shall not be taken to intend to use a motor car exclusively for the purposes of a business...if he intends to... make it available otherwise than by letting it on hire to any person'. Most cases that try to claim input VAT on the motor car fail on the grounds that the vehicle is available, even if not intended, for private use and if this is proven that no input VAT can be claimed.

In this second case the tribunal decided that the farmer had not taken sufficient steps to ensure that the vehicle was incapable of private use. While the taxpayer had attempted to obtain business use only insurance, the insurance company in question declined to provide it. The input VAT claim on the Discovery was disallowed. Obviously input VAT could have been claimed on a Discovery van as opposed to a Discovery car.

'Available for private use' rather than used for private purposes

In the third tribunal case we look at Robert & Lillian Waddell where the taxpayer again tried to reclaim input VAT on his new vehicle. Once again, the tribunal refused the appeal on the grounds that the vehicle was available for private use. An Input claim is blocked simply if the vehicle is 'available for private use' rather than 'used for private purposes'.

For all those advisers who act for farmers they will be able to recall the farmers strongly held views on the subject of no private life, e.g. farming is a way of life, the hours are so long there is no private life, the work is hard, no VAT Inspector would want to travel in their vehicle in their grey suits... Presenting the argument in a loud voice does not make a stronger case. The Court of Appeal holds that no private use is unreal. There comes a point where the advice to farmers is that if their aim is to claim input VAT on the motor van play the game by the rules and correctly applied matters can work in the taxpayer's favour. Input VAT can be claimed on a van so buy a van if VAT planning is the 'driver' (please excuse the pun) to the decision making.

Reference can be found in the Court of Appeal in the case of *CCE v Upton (trading as Fagomatic)* [2002] STC 640, '...the concept of a taxpayer taking any positive action to make his own property available for his own private use is unreal'. If the vehicle is your own private property, the chances are the taxpayer will find it impossible to prove that it will not be used privately, and therefore the taxpayer cannot reclaim VAT on it.

Perhaps the summary is look to the benefits of the van and the twin cab for the farming business (and indeed a large number of businesses) – there are both input VAT and Capital Allowance advantages.

Racehorse Owners' VAT Scheme

How long will the scheme be with us? Will the advantage last past this government? In order to understand the concern there has to be an understanding of the Racehorse Owners' VAT Scheme. The 2006 Finance Act confirmed that the VAT registration scheme for racehorse owners will continue for the lifetime of the current parliament. But what happens at the end of this parliament?

Racehorse owners can try to ensure that input VAT claims are maximised using this scheme. The key emphasis to achieve the claim for input VAT is on a correctly drafted sponsorship and/or appearance money arrangement to show commercial compliance with the 'code of conduct' in order to qualify for the claim. This area of VAT planning can be taken a stage further to incorporate income tax or corporation tax relief from racehorse sponsorship with emphasis on marketing, advertising and PR. When looking at sponsorship, the March 2007 income tax case of *McQueen v Revenue & Customs* (2007) UKSPC SPC00601 has given great hope to those contemplating and reviewing sponsorship arrangements. Note to check: Are the sponsorship agreements compliant?

Accounting Treatment of Racing and Bloodstock Stud Movements

VAT planning is often not the dominant consideration when looking at moving horses from the bloodstock stud to the racehorse trainer and vice versa.

The adjustment for these racing and bloodstock movements is fairly complex from the angle of accounting and income tax treatment. If the occupier of a stud farm places horses bred by him into training:

- The bloodstock stud farm accounts should be credited when horses are transferred to training with the then market value of the transferred animals, as if they had been sold at that value (*Sharkey v Wernher 36* TC 275).
- When horses return to the stud farm after racing, the stud farm accounts should be debited with their market value, at the time of return, as if they had been purchased at that value.
- If a horse purchased and not bred on the stud farm is brought into the stud after racing by the occupier, the stud farm accounts should similarly be debited with the then market value of the horse, as if it had then been purchased at value.

In simple terms, horses are transferred between stud and training yard at market value.

In understanding the above, the complexities of the VAT position are often overlooked. When transfers are made as stated above, when all parties are VAT

registered AND have connected VAT registration the VAT treatment is often forgotten and no charge is made.

The problem is that when there are different VAT registration numbers between the stud operation and the ownership the VAT charge and claim should be clearly identified. The immediate answer might be that there is no net VAT to pay so why bother? However, with a VAT penalty system introduced from 1 April 2009 there could be substantially higher penalties. Often the paperwork surrounding the transfers including the agreed valuation has been dealt with in a tardy manner and, if nothing else, the VAT penalty regime should be a reminder to ensure that the correct stud paperwork is in place.

Shooting and the Members Club

The shooting industry has suffered from the current recession and there could be bleaker times ahead. Many of the customers of the large commercial shoots were bankers and 'corporate hospitality days'. It is currently considered politically incorrect (not PC) for business life to work in this way. The costs of a shoot are high and such expenditure might to some seem extravagant. Could there be a flurry of restructuring from commercial shoots to private members club in the months and years ahead?

The current economic climate does not mean that the passion for game shooting has in any way abated, it is just that there has to be restructuring. Shooting rights are standard rated for VAT and most of those 'consuming' the sport are private individuals and therefore not able to reclaim the input VAT.

The HMRC Shooting 'Campaign'

HMRC has looked closely at game shooting for a number of years and in 2005/06 made reference to the 'campaign' within the game shooting industry. There are many VAT teams continuing to look at the Members Club and all areas of farm diversification for possible opportunities to find irregularity and collect more VAT.

One problem had been the Court of Appeal's decision in *Messenger Leisure Developments Ltd v Revenue and Customs Commissioners* [2005]. Following this case HMRC publicised in Business Brief 22/05 its view that 'any company which is precluded from distributing profit, but whose function is nevertheless to create [sic] VAT exemption in the context of a wider commercial undertaking, is not a non-profit making body for VAT purposes.' However, this can be used to advantage with the concept of the Members Club.

Artificial Members Clubs need not apply

The pitfall therefore is if the shooting club/syndicate is functioning just to create VAT exemption. It could be argued that no-one would be driven by the VAT advantage alone. Further guidance is given via Extra Statutory Concession 3.35, HMRC allows non-profit making bodies to apportion members subscriptions between the value of standard rated, zero rated and exempt benefits and calculate VAT accordingly. However, it is often the recession and NOT the VAT advantage that is pushing shooting syndicates towards the Members Club. The supply of sporting facilities including shooting by a non-profit making club to its members is exempt from VAT and some shoots can correctly restructure to benefit from this.

The Private Shoot

The Members Club must be properly constituted - this will give a loss of control by the landowner, which is something some landowners might find a disadvantage. However, protection can be given to the landowner via the lease agreement. Artificial arrangements to ensure VAT exempt status are likely to be correctly attacked by HMRC. In order to be non-profit making there can be no commercial element. Guidance on the private structure is given via *Commissioners of Customs & Excise v Lord Fisher* [1981] STC 238.

It is considered that the shooting Members Club have received a boost from two fairly recent VAT Tribunal cases which emphasise the need that in order for subscriptions and fees to achieve exempt status they must be closely linked and essential to sport. That sport can be game shooting. The facts are that membership subscriptions charged by certain non-profit making bodies that provide access to sport are exempt from VAT. The problem arises that the exemption is not always clear in marginal situations. Some extra degree of clarity arises from the fairly recent cases (20739) of the British Association for Shooting & Conservation Limited (the BASC). The appellant argued that part of its subscriptions were exempt, and one of its grounds for this approach was that it was a sporting body that provided services closely linked with and essential to sport or physical education on which the individual is taking part. The Tribunal did not agree. Although the BASC provided services in protecting the members' ability to carry out their shooting activity, there were no actual shooting facilities provided, with no land or equipment offered to members for participation in the sport. This meant that the supply was insufficiently closely related to, nor essential for, participation in the sport of shooting. Other well argued grounds for exemption from VAT were also rejected by the Tribunal. This decision could cause difficultly for organisations that are heavily involved in sport, where a similar detachment from the specific facilities for the sport exists but helps where there is a heavy involvement in the sport.

The second tribunal case was Canterbury Hockey Club which comprises a number of different hockey teams. The clubs pay 'England Hockey' affiliation fees, and in return receive certain services from 'England Hockey', e.g. courses for officials, and advice on obtaining sponsorship. HMRC said that the affiliation fees received by England Hockey should be subject to VAT. The hockey clubs were not the persons playing the sport so the supplies of the services could not be exempt.

The Canterbury Hockey Club appealed. The High Court referred the matter to the European Court of Justice (ECJ) asking whether the term 'persons' in the context of playing sport, included corporate persons and unincorporated associations or whether it only included

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points of law

COURT DECISIONS

Whether evidence of French law admissible

Two companies reclaimed substantial amounts of input tax relating to purported transactions in mobile telephones. HMRC rejected the claims on the basis that the transactions formed part of a 'missing trader intra-Community fraud'. The companies appealed to the tribunal. At the hearing of their appeals, HMRC applied to introduce a witness statement from an accountant who was employed by a major accountancy firm. The companies objected to this witness statement, and applied to introduce evidence of French law, with regard to the French interpretation of the CJEC decision in *Kittel v Belgian State* (Case C–439/04) All ER(D) 69 (Jul). The tribunal chairman (Dr. Williams) rejected this application and admitted the witness statement from the accountant. The companies lodged an interlocutory application in the Ch D, objecting to both of the relevant decisions. The Ch D rejected this application and upheld Dr. Williams' decisions. Sir Andrew Park held that the tribunal had been entitled to treat the accountant as an expert witness, and to decline to admit the evidence of French law. He observed that it was clear that the companies 'wished to use the French law in support of arguments presented to the Tribunal in the United Kingdom that the French approach to the interpretation of Kittel is correct and that the approach of HMRC is wrong'. He held that 'where a tribunal in the United Kingdom is concerned to determine the ambit of the Kittel decision it should do so on the basis of the decision of the ECJ taking account, if it wishes to do so and if it is invited to do so, of the text of that decision not just in English but in other languages'. However, 'an opinion of the VAT administrative authority in another member state about the meaning of an ECJ decision is not material which can be

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human beings.

The ECJ ruled that the exemption applied to corporate persons and unincorporated associations, provided the organisation was 'closely related to the sport'. It was for the national court to decide that the services provided satisfied three conditions: they must be supplied by a non-profit making organisation; they must be closely linked and essential to sport; and the true beneficiaries of the services must be persons taking part in sport.

Canterbury Hockey Club and another v CRC (Case C-253/07), European Court of Justice, 16 October 2008

Closely Linked and Essential to the Sport of Shooting

The key technical point for standard rated VAT to be charged on memberships has to be the detachment from the specific facilities for the sport, i.e. not closely linked to the sport.

The advantage is that game shooting syndicates can claim the VAT exemption status and therefore do not have to charge output VAT on shooting services provided to club members. A shooting syndicate can now restructure as a non-profit making Members Club and be exempt from VAT where the right conditions are in place. There is generally very little input VAT involved in a shooting Members Club. Are the three conditions met for the Members Club – a non-profit making organisation, closely linked to sport and are the true beneficiaries and the services those involved in the shooting?

Temporary Members Club Members

Temporary membership means that guests can be invited. The recession might have changed the outlook of many involved in shooting and push many to consider the Members Club and the very private non-commercial structure of shooting and with that comes the ability to take advantage of VAT exemption as recently endorsed by these two VAT cases.

Interesting times are ahead for all those who are passionate about the sport of game shooting and the benefits to the rural habitat that this brings.

Furnished Holiday Lets (FHLs)

The changes to the income tax and capital gains tax (CGT) treatment of FHLs from 6 April 2010 has been in the headlines of the national press. In comparison the VAT treatment of holiday letting has been somewhat overlooked. It is understood that the supply of holiday letting accommodation will remain standard rated despite the loss of the various income tax and CGT advantages. There is no doubt there will be a lot of restructuring in the holiday cottage industry and VAT planning angles must not be overlooked.

The Farming and Diversification Complexity

There is no doubt that with the HMRC approach to look closely at farm diversification projects will continue to provide a lot of work for the VAT adviser and consultant. The complexities around farm diversification, i.e. alternative land use and the interaction of different VAT treatments can be a nightmare. For example, the zero-rated supply of agricultural products, the exempt supply of land (subject to conditions and elections) combined with the different VAT status of the various diversification activities provide a nightmare of possible pitfalls for the farmer and landowner and the huge planning opportunities for the VAT adviser.

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