

53. VAT and stabling

The Customs and Excise Business Brief 21/2001 issued on 21 December 2001 (Business Brief 21/2001) has given clarity to the *John Window* tribunal decision. It also gives an opportunity for clients to consider going back three years and claiming back output VAT charged, subject to the adjustment of any input VAT claimed in respect of the income. This change comes into force from 1 January 2002.

Where the supply of stabling and livery services are put together as a single supply then it can be exempt from VAT subject to the definition of livery services.

It is important to review what is included in livery services. These are services provided for horses in a stable that go beyond the right to occupy the stable. They may include feeding and watering, mucking out, turning out, worming, clipping, plaiting, exercising, cleaning tack, grooming, breaking in, schooling and arranging for vets. It does not include clearly identifiable separate supplies such as vets' services.

When is the supply of stabling exempt? If you rent out stabling to a horse owner then, the supply will be exempt provided you allow that owner exclusive use of the stabling, i.e. you allocate all or an identifiable part of the stabling for the sole use of their horse).

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Insolvency**54. Fallout from the *Brumark* case**

The Inland Revenue, Customs and Excise and the Redundancy Payments Service (who call themselves collectively the Crown Departments) have published a joint statement in relation to the *Brumark* case. Readers may recall that the *Brumark* decision of the Privy Council was a landmark case that arose from an appeal from the New Zealand Court of Appeal. The Privy Council decision is reported as *Agnew v CIR* [2001] All ER 21. (NB *Brumark* was the company in liquidation and Mr Agnew was one of the liquidators). Judgment was delivered on 5 June 2001 and can be downloaded from the Privy Council website at www.privy-council.org.uk. It was held that a charge over book debts, although stated in the relevant debenture to be a fixed charge, could not be so

in law if the debts were not under the lender's control and therefore it was a floating charge.

The statement below from the Crown departments reflects their view in light of the *Brumark* decision and is of particular importance to insolvency practitioners.

Distribution of proceeds of book debts subject to debentures where the Crown Departments are creditors.

*This statement is issued on behalf of the Crown Departments in light of the recent decision of the Privy Council in the *Brumark* case, and relates to the distinction between fixed and floating charges, and certain issues arising therefrom.*

Where an insolvency practitioner causes a company to make a distribution of book debt proceeds subject to a purported fixed charge, or proposes to do so, the Crown Departments as creditors reserve the right to challenge such a distribution or proposed distribution if they believe that the charge in question was actually a floating charge.

How many challenges of this nature are made to distributions or proposed distributions will be a matter for the discretion of the relevant department (subject to the state of the law) in light of the facts of the individual case. However, as general guidance, and by way of an example, the Crown Departments consider that where a charge has been operated so that the chargor has been allowed an unfettered right to draw on the proceeds of the book debts without the specific consent of the chargeholder, this does not constitute sufficient control to qualify as a 'fixed' charge over such book debts.

*Distributions made or proposed to be made to chargeholders after the date of the Privy Council decision in *Brumark* based on a charge such as described above and other types of purported fixed charges which in reality are floating charges are therefore liable to challenge from any of the Crown Departments.*

In addition, pre-insolvency VAT credits will be paid to companies subject to insolvency procedures in preference to other Crown creditors, only in cases where a debenture is provided and Customs & Excise are satisfied that the charge over book debts contained therein was actually a fixed charge.

The Crown Departments wish to make clear their view that insolvency practitioners have a duty to follow relevant law when causing companies to make distributions.

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