TAXREP 19/00

VAT: UK UNDISCLOSED AGENTS AND COMMISSIONAIRES

Text of a letter sent in April 2000 to Customs by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to a consultation paper issued in March 2000

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1.0 GENERAL

1.1 We welcome the opportunity to respond to the Consultation Paper published on 18 March 2000, particularly since we were one of the organisations which made representations to Customs (back in 1997) about the differing UK treatment of agents and commissionaires.

1.2 We consider there are three important issues in this area:

i) the method of VAT accounting for the supply of services by the agent (ie the VAT treatment of the commission), where the principal is established either elsewhere in the EC or in a third country

ii) the VAT liability of the supply of services by a UK agent acting for a non-EC principal, the remuneration for which is commonly regarded as the agent's commission, and

iii) the treatment of supplies of services via a UK agent where the principal is outside the UK, whether elsewhere in the EC or in a third country.

1.3 The Consultation Paper deals principally with issues (i), (ii) and (iii), but we consider (i) to be likely to affect most businesses in practice. We therefore comment on it first and at greater length.

2.0 THE UK METHOD OF VAT ACCOUNTING FOR THE SUPPLY OF SERVICES BY THE AGENT

Background

2.1 As you are aware, the VAT treatment in the UK is different from that in all the other EC Member States, including Ireland, which has similar moveable property law to the UK.

2.2 A commissionaire acts in his own name but for the account of his principal - in other words he is an undisclosed agent. For VAT purposes the commissionaire is deemed to buy and sell the goods (Article 5.4 Sixth Directive and sections 47(1), (2) and (2A), VATA 1994). This is so even though legal title to the goods will be transferred directly from the principal to the final customer, and the goods are transported directly from the principal to the customer.

2.3 Where a commissionaire acts for a principal in the sale of goods, there will for VAT purposes be a supply of goods by the principal to the commissionaire and a second supply by the commissionaire to the customer. The principal will invoice the commissionaire and the commissionaire will invoice the customer.

2.4 In all Member States <u>except</u> the UK, the commissionaire's fee is reflected in the price difference between the two invoices. Taking a typical example, the principal is in Member State A, and the commissionaire and the customer are in Member State B. The goods originate in Member State A and are sold to the final customer for 100, with a commission of 5% payable by the principal to the commissionaire.

2.5 For all Member States except where Member State B is the UK, the principal will make a zero-rated intra-Community supply of goods to the commissionaire for 95, the commissionaire will make an intra-Community acquisition for 95, and then make an onward domestic supply to the customer for 100, taxable at the standard or other rate as appropriate.

2.6 Where Member State B is the UK, the treatment of the commission is different, since historically Customs & Excise have taken the view that, since the commissionaire does not take title to the goods, the commission payable cannot be accounted for by netting-off the price paid. The principal must therefore invoice the commissionaire for the goods at the same value and at the same time as the commissionaire invoices the customer.

2.7 In the above example, the principal will therefore make a zero-rated intra-Community supply for 100 to his UK commissionaire, the commissionaire will make an intra-Community acquisition for 100, and then make an onward domestic UK supply to the customer for 100, taxable at the standard or other rate as appropriate. The commissionaire will then invoice the principal for his commission of 5, and that invoice will be zero-rated from the UK, and subject to the reverse charge in the hands of the principal in Member State A.

The Consultation Paper

2.8 The Consultation Paper analyses the problem (in paragraphs 2-3), but does not offer any solution. We were disappointed not to see any proposals in this area, particularly since the specific point had been under review by Customs for over 2½ years.

2.9 The UK's approach causes a considerable administrative burden and confusion for international businesses, particularly where (as is happening increasingly frequently in practice) a non-UK principal is supplying goods to customers through commissionaires in a number of Member States, including the UK. The different UK treatment means that separate accounting systems and software have to be set up purely to deal with UK transactions. In addition, where additional (ie ESL and Intrastat) reporting for intra-EC transactions is required, it makes it likely that the two parties will report different values, thereby building systematic mis-matches into the system.

2.10 Similar problems arise from an administrative and systems perspective where there is a UK principal with a commissionaire elsewhere in the EC.

2.11 We cannot see why (and the Consultation Paper does not state) it is not possible for the UK VAT treatment to be harmonised with the other 14 Member States. There are a number of areas in UK VAT Law where transactions are deemed to be treated in a certain way for VAT purposes, but where the civil law treatment is different. For example, a TOGC is not a supply for VAT, but is clearly a transaction in civil law. Other deeming provisions apply only for VAT purposes to VAT groups and aggregation.

The position in European law

2.12 The European Court of Justice has stated on many occasions that there can well be differences in the meaning of terms and/or the treatment of transactions between national civil law and EC VAT Law, and has ruled accordingly.

Emu Tabac

2.13 In a 1997 case involving the purchase of goods through an agent (*The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* (Case C-296/95, ECR [1998] I-1605)), Advocate General Colomer stated in his Opinion:

> "23 I shall first mention a point which, judging from the observations of some of the parties, does not seem to have been taken sufficiently into account: the directive of which interpretation is sought is a tax measure, intended to deal with matters of taxation, and to that end it uses tax-law classifications. By this I mean that the terms used in the directive, on the basis of the corresponding concepts in civil or mercantile law, may have a rather independent meaning which will not coincide in every respect with that of their counterparts in civil or mercantile law.
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> 24 In that light, it is possible that the private individual purchaser, as a subject of civil or mercantile law, may not be precisely the same as the person with which Article 8 of the directive is concerned. That applies to a specific aspect of the involvement of the private individual in the purchase contract referred to in the directive, where it envisages the possibility of his acting, in entering into the contract or giving effect to it, through a third party.
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> 25 A similar possibility is generally available in civil law for all types of acts-in-the-law by virtue of the principle that whoever does something for himself may also do it through someone else. However, from the taxation point of view, it may be appropriate to distinguish between purchases made by someone who acts for himself and those by someone who acts through an agent or attorney."

2.14 This approach was further explained and then confirmed by the Court in its Judgment:

> "27 The applicants in the main proceedings submit, first, that that provision should be applied in a situation such as this, where the purchase of the goods chargeable to excise duty was effected through an agent who also arranged for their transportation.
>
> 28 In support of their submission, the applicants in the main proceedings argue that the maxim of Roman law *qui facit per alium facit per se*, meaning that a person acting through an agent must be treated as if he himself were so acting, constitutes a general principle in a number of legal systems, in particular in English law, and must be applied in this case, *a fortiori* since neither the English version of the Directive nor the French, Italian, Spanish, German, Dutch or Portuguese versions exclude the possibility of using an agent.
>
> 29 That argument cannot be upheld.
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> 30 First, it is clear from the case-law of the Court that the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect (Case 64/81 *Corman* [1982] ECR 13, paragraph 8). The text of Article 8 of the Directive does not contain any express reference to national legal systems.
>
> 31 Secondly, even if the abovementioned principle were common to all the Member States, it must be noted that, as the Advocate General has observed, it is one which derives from civil law, and more specifically from the law of obligations, and it does not necessarily fall to be applied in the sphere of fiscal law, where the objectives are of a quite different nature."

Armbrecht

2.15 A similar approach was taken by the ECJ in its Judgment in the earlier case of *Finanzamt Uelzen v Dieter Armbrecht*, (Case C-291/92, ECR [1995] I-2775), where it stated:

> "12 The German Government stresses that Mr Armbrecht' s property forms a single item in German civil law and is entered as such in the land register. It should therefore be treated as a single item for the application of the Directive.
>
> 13 It is true that Article 5(1) of the Directive does not define the extent of the property rights transferred, which must be determined in accordance with the applicable national law, but the Court has held that the objective of the Directive, which is to base the common system of VAT on a uniform definition of taxable transactions, would be jeopardized if the preconditions for a supply of goods, which is one of the three taxable transactions, varied from one Member State to another (Case C-320/88 *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe* [1990] ECR I-285).
>
> 14 Consequently, the national law applicable in the main proceedings cannot provide the answer to the question raised, which concerns not the civil law applicable to supply but whether the transaction is subject to the tax."

Dutch Potato Storage

2.16 Where a term is used in a Directive, it can acquire a meaning separate from that in national law. This was set out classically by the ECJ *inter alia* in its 1981 Judgment in the 'Dutch Potato Storage' case (*Staatssecretaris van Financiën v Association Cooperative "Coöperatieve Aardappelenbewaarplaats GA"*, (Case 154/80, ECR [1981] 0445)), where, considering the meaning of the term 'consideration', the ECJ stated:

> "9. It should be noted in the first place that the expression in issue is part of a provision of Community law which does not refer to the law of the Member States for the determining of its meaning and its scope; it follows that the interpretation, in general terms, of the expression may not be left to the discretion of each Member State."

2.17 See also paragraph 10 of the Opinion and paragraph 19 of the Judgment in *Pieter de Jong v Staatssecretaris van Financiën*, (Case C-20/91, ECR [1992] I-2847).

Conclusion

2.18 The purpose of citing the above cases at such length is two-fold:

i) despite the position in English civil law, it is clearly possible for Customs to permit (or arguably even to require) the 95/100 treatment for VAT purposes. Not only would this be a welcome simplification for business, but it would also avoid the risks of unmatched reporting for cross-border transactions within the EC.

ii) since no VAT is at stake, a UK commissionaire acting for a principal in another EC Member State and using the 95/100 treatment for a supply of goods to a UK customer would be liable (following notification) to a regulatory penalty under UK law. But it

could well be difficult for Customs to sustain their policy that the 100/100 arrangement must be used. The term agent or intermediary is used explicitly on a number of occasions in the Sixth Directive, and implicitly in Articles 5.4(c) and 6.4. Although it is unlikely that any case would go that far, it appears to us from the above that, in the interests of the uniform application of the tax, it is unlikely that the ECJ would accept Customs' view.

2.19 Either way, the position is unsatisfactory. We recommend that further consideration be given to permitting the use of the 95/100 treatment.

3.0 THE VAT LIABILITY OF THE SUPPLY OF SERVICES BY A UK AGENT ACTING FOR A NON-EC PRINCIPAL

3.1 We welcome the ESSC proposed in Paragraph 8 of the paper. Although we have always considered that Article 14.1(i) of the Sixth Directive will apply (to exempt/zero-rate the agent's services) where the commission element is included in the value of the goods at import, we are aware that Customs do not accept this view. The ESSC would therefore clarify the position.

3.2 However, we suggest that there should be specific clarification where the non-EC principal is VAT registered in the UK, in particular as to what evidence the agent should obtain to demonstrate entitlement to the ESSC treatment.

4.0 THE TREATMENT OF SUPPLIES OF SERVICES VIA A UK AGENT WHERE THE PRINCIPAL IS OUTSIDE THE UK

4.1 The Consultation Document appears to assume that the place of supply of a service to a customer rendered through an agent/intermediary remains the place of supply of the principal. It is not immediately clear that this is in fact the case, either in EC or in UK law, and we tend to the view that the place of supply should rather be determined by reference to the intermediary.

4.2 The ECJ is considering this question more generally in *Commission v France* (Case C-429/97) on the sub-contracting of part of a waste disposal contract. The Advocate-General's Opinion was issued on 13 January 2000, and the Judgment when it appears later this year may provide some clarification.

4.3 The suggested introduction of a voluntary code with two alternative routes appears somewhat complex and open to confusion. We would suggest instead that the UK should implement Article 6(4), even though it is not mandatory. The result would be that the supply from the UK agent to the UK customer would fall within the charge to UK VAT. Any commission charged by the agent to his principal (assuming the 95/100 treatment did not apply) would normally be outside the scope of UK VAT.