

TAXREP 37/01

VAT: FINANCIAL SERVICES

*Text of a letter sent in December 2001 to Customs by the Tax Faculty of the
Institute of Chartered Accountants in England and Wales in response
to an invitation to comment issued in July 2001*

VAT: FINANCIAL SERVICES FOLLOWING FDR

1. Business Brief 10/01 dated 16 July 2001 announced that Customs will be using the Finance Sector Liaison Group, on which we are represented, to consult on changes to the legislation following the First Data Resources Ltd (FDR) Court of Appeal decision. As that group has not met, we take this opportunity to set out our views.
2. Customs have said that they intend to consult on how the UK national legislation should be amended to exempt services where payment transfers are the predominant or core element in the supply. We would suggest that that is not the problem. It is now established by the courts that FDR's core service was making payments and not managing credit. UK legislation already exempts "the issue, transfer or receipt of, or any dealing with money...".
3. Doubts have been expressed about the meaning of "the management of credit" in Note 2B and about one or two other matters in Group 5, Schedule 9, VAT Act 1994. What is described in Note 2B is not what the financial sector would regard as the management of credit. Most of the items listed are services that take place before credit is granted. There are reasonable doubts as to whether the ECJ would define it in the same way when interpreting the Directive.
4. A similar problem arises as to what amounts to negotiation and whether it is the same as intermediary services. Current UK legislation contains what appear to be matters of opinion on these two issues.
5. We are not convinced that it is necessary to define the negotiation of credit and the management of credit in UK legislation. It creates a difference between UK legislation and the Directive. Where the UK legislation grants an exemption but the Directive does not the taxpayer is able to enforce the exemption. There are always going to be questions about differences as long as differences exist between UK legislation and the exemptions in the Directive.
6. It is well established (since Becker - ECJ case No 8/81) that citizens of the EU can enforce the exemptions in the Directive where they are unconditional and sufficiently precise against national legislation which does not conform with the Directive. This case has encouraged the courts in the UK recently to ignore UK legislation and go straight to the Directive.
7. However, the Directive requires member states to exempt those matters listed in Article 13(B) "under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse". This has been taken by many Member States as an instruction to introduce legislation.
8. Member States must exempt the services listed but the means by which it is to be done is not specified. What is clear is that member states must lay down conditions with two purposes. First, the conditions must ensure the correct and straightforward application of the exemptions and secondly, they must be for the purpose of preventing any evasion, avoidance or abuse.

9. It would be acceptable to repeat the words used in the Directive in UK legislation in order to give effect to the Directive. Any conditions which are within the terms of the Directive could be added. Alternatively this could be done in an abbreviated form simply by saying in UK legislation that those supplies listed in Article 13(B)(d) of the Directive are exempt. This approach was endorsed in relation to Article 13(B)(a) by Jacob J in the Court of Appeal in *Century Life* [2001] STC 38-42 at paras 6 and 7.
10. With this approach there could be no arguments about differences between the Directive and national legislation and Customs would be free to state in public notices their interpretation of the law. This can be done in as much detail as Customs consider necessary. Matters such as the management of credit could be explained in more detail in public notices. At the same time the guidance given by the courts in cases such as *Card Protection Plan* and *Sparkassernes* could also be passed on to the public in the same way.
11. This solution may appear to be doing very little but this conclusion would be wrong. What it achieves is removing uncertainty. Customs may think that there is no reason to alter their views. It is a matter for them if they wish to maintain more or less the same views as hitherto. We are not at all convinced that there are major differences of interpretation between the profession and Customs or between the financial sector and Customs on these matters.

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