

TAXREP 2/02

VAT RULINGS

*Memorandum sent in January 2002 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 November 2001.*

CONTENTS

	Paragraph
GENERAL COMMENTS	1-14
DETAILED COMMENTS	15-23
OTHER MATTERS	24-25

VAT RULINGS

GENERAL COMMENTS

1. We welcome the opportunity to comment on the draft Notice issued in November 2001.
2. Much of the draft Notice summarises best practice and is unexceptionable. However, by seeking to extend the definition of ‘full facts’ to include matters which are not facts at all, Customs are proposing a significant change in practice which will create excessive and unnecessary burdens particularly, though not exclusively, for small businesses. It is difficult to reconcile this with the Department’s *High Level Public Service Agreement 2001-02 to 2003-04*, which states as its principal aim:

“To administer the indirect tax and customs control systems fairly and efficiently, and make it as easy as possible for individuals and businesses to understand and comply with their obligations”.
3. It also runs counter to the comments of John McPherson, Chairman of the Joint VAT Consultative Committee, as reported in the Minutes of the Meeting on 2 November 2001, where he stated how ‘Customs are striving to change public perception from one of a confrontational Department to one of a more helpful and supportive culture, which will provide lifetime support to compliant businesses’.
4. If the ‘extended full facts’ requirement remains, it can be expected to achieve the precise opposite of what is intended. In order to minimise additional costs, applications for rulings will be made only by those with the least technical VAT knowledge.
5. Our principal concern arises from some of the bullet points in paragraph 2.3 dealing with the definition of ‘full facts’. The concept of ‘full facts’ was introduced in the Sheldon Statement in 1978, is embodied in Concession 3.5 in Notice 48 and is confirmed in paragraph 3.4 of the draft Notice. Its words are plain. However, Para. 2.3 of the draft Notice redefines the term to include many matters which are not facts at all, but rather opinions and other information. The draft Notice seeks to include in the definition of ‘full facts’:
 - any possible alternative tax treatments;
 - the relevant legislation, case law and concessions;
 - details of Customs own guidance; and
 - details of any professional advice obtained.
6. None of these are facts. It is for the tax authority which has responsibility for a tax to provide a considered decision from first principles, without a specific requirement on the applicant to provide an analysis (however helpful the provision of such an analysis may be). The requirement to provide details of Customs’ own guidance must be unnecessary, and appears to cast unjustified doubt on the technical abilities of Customs’ own staff. Taken as a whole, the ‘extended full facts’ requirement amounts to an effective withdrawal of the Concession.

7. We do not think this is an acceptable approach for what was originally a considered Parliamentary Question and Answer. If Customs wish to withdraw the Concession, it should surely be done by a second Parliamentary Question and Answer, which would doubtless result in further involvement by Parliament as additional Questions would inevitably be put.
8. It is unreasonable to expect taxpayers seeking rulings to set out all possible alternative answers of which they are aware, together with case law and details of Customs own guidance, and/or say whether they have received professional advice on a particular point. Both should be irrelevant, as in principle should be the matter of how much money is at stake. Except at disproportionate expense, it makes it impossible for professional advisors to apply for rulings on behalf of clients.

Example

9. To give a common example, whether or not the sale of a business is a transfer of a going concern is not always easy to determine. Frequently, both seller and purchaser are (and will remain) fully taxable, and so whether or not VAT is charged is not important to the parties. In all cases all the parties want is certainty. Even at a basic level, *Tolley's VAT Cases 2001* lists 96 cases, and *Tolley's Value Added Tax 2001-2* summarises the issues in 7 pages, with frequent references elsewhere. Customs' own views in VAT Guidance Manual V.1-10 run to 33 pages, and need to be read in conjunction with Notice 700/9/96, a further 10 pages. Even though all aspects are unlikely to apply, it would be a lengthy and expensive task for someone familiar with the VAT law to set out all possible answers and the reasons for them, including the case law and Customs' own guidance.
10. On grounds of expense alone, an advisor would serve his client better by simply telling him that this is a complicated area, the client needs a ruling from Customs to be certain and should therefore send in the Purchase/Sale Agreement, asking for a ruling. This contrasts poorly with current best practice, where the advisor would write in explaining the transaction, highlighting important areas and enclosing a copy of the Agreement.

General Rulings by Customs

11. If the 'extended full facts' requirement is maintained, Customs would similarly be expected to "put all of their cards face up on the table" when issuing general rulings. This would mean that all Business Briefs, Press Releases, VAT Notes etc announcing a change in VAT treatment (since these are effectively general rulings) would need to set out not only all the legal issues and case law, legal advice obtained etc, but also the possible alternative tax treatments. This would presumably cause Customs similar difficulties, and illustrates the unreasonableness of the burden that the proposal is seeking to place on the taxpayer.

Purpose of Rulings

12. Rulings are sought because there are genuine uncertainties. The responsibility of an applicant for a ruling should extend only to disclosing the factual details of the

transaction truthfully, objectively and fully. While we can see that it will be helpful for Customs if applicants provide their own analyses of the position (where they have been able to make them), and this may speed up the procedure, it is unreasonable to require them to provide alternative analyses or draw attention to points of law in the Commissioners' own area of expertise. Whatever analysis the applicant might come up with is not a 'fact', and is therefore of no relevance under the concession that currently applies.

Summary

13. If the draft Notice is issued unamended, we are concerned that it will achieve the opposite effect to that intended. Businesses will not seek professional advice before requesting a ruling, or if they do, professional advisors will simply suggest that a ruling should be sought, but without outlining the issues. The result will be that less information will be provided in each case, leading to delay and expense for both Customs and the taxpayer.
14. We therefore recommend that the second and third bullet points in paragraph 2.3 should be deleted.

DETAILED COMMENTS

Section 2

Alternative tax treatments, et al (3rd bullet in para 2.3)

15. As we have stated, of particular objection is the third bullet within para 2.3 dealing with the definition of 'full facts' which states: 'if you are aware of possible alternative tax treatments, you should set these out, including relevant legislation, concessions, other Customs guidance and any tribunal or case law that may be relevant'.
16. This raises a number of concerns on which we would welcome clarification:
 - (a) Are Customs proposing that a taxpayer seeking a ruling has to outline all possible alternative analyses together with supporting case law? If so, this is akin to asking Customs to give details of all possible interpretations and tax treatments when issuing a Business Brief or tax law change in the Budget. Customs seem to be expecting a taxpayer to prepare a document similar to Instructions to Counsel or a Counsel's Opinion. This is an onerous, time-consuming and expensive job for a large business with resources. It is surely beyond the technical scope of most smaller businesses.
 - (b) What happens if an applicant for a ruling does not outline a possible alternative, however obscure? Will this mean that the ruling is not binding? How can a taxpayer subsequently prove a negative - ie that he was not aware of a particular analysis or alternative argument? In what circumstances will this invalidate the ruling?

- (c) Does the requirement for the taxpayer to set out all possible tax treatments known to him imply that Customs will not consider any other tax treatments not known to the applicant? This would reduce any ruling to little more than the response to a multiple choice question, and raise the fear (whether reasonable or not) that Customs would simply choose the answer that provided the most tax.

- 17. In their letter giving a ruling, will Customs similarly deal with the law, the case law and any possible alternative tax treatments known to them but not identified by the taxpayer?

Professional advice (2nd bullet in paragraph 2.3)

- 18. The second bullet point within paragraph 2.3 states: ‘where you have received professional advice in respect of the point(s), you must tell us the reason for uncertainty’. We would welcome clarification of the following:

- (a) As we have stated, the proposals if implemented make it more likely (principally on cost grounds) that requests for rulings will in future be made by taxpayers rather than their advisors. The wording of the second bullet point is unclear. Does it mean that in such a case the taxpayer will be required to inform Customs that he has sought professional advice ? If so, will he be required to provide a copy of that advice when making the ruling application?
- (b) If the answer to (a) is yes, will Customs similarly give details of any professional advice received by them (whether from the Solicitor’s Office or elsewhere) which they have taken into account in giving the ruling ?

Amount at stake (6th bullet in paragraph 2.3)

- 19. We can envisage cases where, if the amount were small, Customs might be prepared to take a pragmatic view in the applicant's favour. Equally, an adverse ruling could be given, since the applicant would be unlikely to appeal.
- 20. Where a significant amount is at stake, Customs may wish to give the matter more detailed attention, but in no case should the answer depend on the amount involved. In any event, other taxpayers, unknown to the applicant, may be carrying out similar transactions, and so the actual amount involved could be much greater.
- 21. We would have no objection to the amount being disclosed by the applicant if he so wished, but see no reason why the provision of such information should be a requirement.

Section 3 - Reliance on Rulings

- 22. Paragraph 3.2 of the draft deals with circumstances where a ruling may cease to apply. Generally, these seem unobjectionable. However, if changes in the law or in Customs' practice occur before a transaction has been irrevocably entered into, it will not always be the case that the applicant will be aware of this fact without being informed by Customs. Where a ruling has been given and such a change occurs, then it would help taxpayers to

comply with the law if Customs were to inform the applicant if changes occur within a reasonable time of a ruling being given.

23. We would however draw your attention to the current unsatisfactory position on Customs' website, where Notices and other documents are frequently added or amended, either with no indication of the date of change, or with an incorrect date. We have previously raised these concerns elsewhere within Customs and Excise.

OTHER MATTERS

Right of Appeal to VAT & Duties Tribunals

24. It would also be a great improvement to the present position if taxpayers had a clear right of appeal to the VAT Tribunal against a refusal to apply Concession 3.5. This is not suggesting a new right, in the strictest sense, since the judicial review procedure is already available and seems apt on the face of it to deal with matters of this sort. However, the judicial review procedure is notoriously costly and is not available in practice to those without deep pockets. There is a strong case for extending the matters which a VAT Tribunal may consider to cover the application of this concession and, more generally, matters concerning the reasonableness of Customs' operation of the tax which might otherwise be dealt with by judicial review.

Informal Guidance

25. There are many instances where VAT officers give informal guidance, whether on control visits or via brief telephone conversations. We hope that this will continue to be the case. Clearly there is a risk of informal comments being taken as a ruling (a problem which those in the professions, who might be sued in the case of negligent advice, also face). We suggest that officers asked for broad guidance, and not feeling that they have full facts, be advised to qualify their remarks by saying words to the effect of 'This is not a formal ruling ...'.

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