

TAXREP 3/99

VAT: LICENCE TO OCCUPY LAND

*Text of a letter submitted in January 1999 to HM Customs and Excise by the Tax Faculty
in response to a request for comments issued in November 1998.*

VAT: LICENCE TO OCCUPY LAND

1. We welcome the opportunity to comment on the proposal to provide a definition in VAT law of a licence to occupy land outlined in Business Brief 22/98.
2. The term 'licence to occupy land' is not used in the relevant European legislation, Article 13(B)(1)(b), (g) and (h).
3. The reason for its presence in UK VAT law is that the strategy adopted for the transposition of the Directive into national law has been to utilise existing terms of UK land law. Presumably the view was taken that the VAT exemption relating to land would be more readily operable on this basis.
4. We note that the declared reason for a further review of this matter is the need to provide clarity for businesses, and for Customs officers.
5. We are strongly of the view that, while the strategy of using existing terminology is pursued, the introduction of a special VAT definition of a common term of land law would be counter-productive and confusing. If the exemption contained in the Directive is to be implemented through the use of national terms, this should be done consistently.
6. If another objective of the review is to restrict the scope of the exemption, this should be done openly and explicitly by introducing a specific exception to the exemption, as permitted by Article 13(B)(1)(b) of the Directive.
7. If, on the other hand, there is doubt whether the UK legislation properly implements the exemption, the proper course of action is to review the whole of the exempting provision with a view to recasting it in terms of the substantive supplies, more closely reflecting the terms of the Directive. Clearly it is important that the exemption should be expressed in such a way as to reflect the true scope of the community provision and should not, as a matter of principle, depend on the way in which land law is implemented in any one member state (see *Staatsecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV*, Case C-320/88).
8. We would also comment that the greater difficulty concerning licences to occupy is the more common 'boundary' difficulty of identifying the substantive supply, as between:
 - * a 'land' supply which may have other elements, those other elements being ancillary to it;
 - * a non-land supply which may subsume within it an ancillary land supply, but which retains its non-land character; and
 - * separable supplies of land and of non-land elements each having their own liability.
9. Several of your questions seem to be directed at this sort of difficulty. The provision of a special VAT definition of a licence to occupy land would do nothing to resolve difficulties of this kind (which, in any case, are not restricted to cases concerning land, but necessarily occur at all liability boundaries). Rather, it would divert attention from what should be considered when analysing the VAT consequences of any transaction.

10. Turning to your four questions:

Should a 'licence to occupy land' be defined in the VAT legislation, and if so, how?

11. A 'licence to occupy land' should not be defined in VAT legislation. If UK land law terminology is to be retained as the basis for the exemption, it should also retain its normal meaning (subject to the obligation of the Courts to interpret it so as to conform to the Directive provisions). The judgment of the Courts should not be pre-empted.

What practical tests can be applied to identify a 'licence to occupy land'?

12. The practical tests to be applied are essentially those developed under UK land law, subject to the need for the Courts to ensure consistency with the EC legislation.

Is the concept of 'licence to occupy land' necessary or is there an alternative?

13. The alternative (essential if the UK terminology is considered not to comply with the Directive) is to recast the entire exemption provision in terms of the EC legislation.

What are the circumstances in which non-exclusive occupation of land can be regarded as the leasing or letting of immovable property and thus falling within the scope of the exemption in Article 13B(b) of the Sixth VAT Directive?

14. We consider that the effect of Article 13B(b) is to exempt any supply whose substance is the temporary use of land (ie for a period, long or short) subject to the exceptions mentioned and others specifically introduced by member states, but not to exempt supplies whose substance is of a different nature but which happen to include the use of land. We do not believe that the Article necessarily implies exclusivity of use, although exclusivity will generally be a feature of supplies whose substance is the use of the land. By way of examples:

- * the letting of parking facilities does not generally involve the letting of a specific parking bay (and some car parks do not even have marked bays). Although the motorist generally stays in one bay, and it is then impossible for anyone else to use it, there is no prohibition against moving to another. Certainly there is no exclusive occupation of the car park as a whole. The existence of the exception from exemption for the letting of sites for parking vehicles implies that these are included in the basic terms of the exemption;
- * the supply of a theatre ticket generally involves the right to exclusive occupation of an identified seat at the theatre. However, the substance of the supply is the right to watch the particular performance (*pace* the judgment in *C & E Commrs v Zinn & Anor*, which involved special circumstances), and the right to occupy, although exclusive, is merely ancillary to the substantive supply.

15. Finally, we note that Business Brief 1/99 has been issued concerning the treatment of sites for coin-operated machines. We are surprised that such a step should have been taken:

- * during the consultation period; and
- * when the *Sinclair Collis* case is going to further appeal, and is due to be heard in the near future. We are also surprised that the Business Brief does not mention the appeal.

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