

8<sup>th</sup> November 2011

# KS Weekly VAT update



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## Summary

This week there are three items. The first concerns an important ECJ case concerning the assignment of distressed debt. The second concerns the withdrawal of concessions to caravan park operators and the third is a case where under the new Tribunal regime costs were awarded against HMRC.

There has also been the Inter-Mark ECJ case which concerned a Polish exhibitor. As it predates changes in the VAT law on 1<sup>st</sup> January 2011 in connection with the exhibition industry we will not cover it in detail. Suffice it to say that it provides a useful analysis of different situations that organisers and contractors are involved with including hiring out of stands for moving from an exhibition in one state to one in another state.

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## Assignment of distressed debt

The ECJ has issued its decision in the case of GFKL Financial Services which concerns the assignment of non-performing loans. It is a case to note because the decision is different to that given in the case of MKG where the ECJ found that the purchaser of the debts supplied a VAT-able factoring service to the seller of the debt, and the judgement of the ECJ in GFKL does not follow all aspects of the preliminary opinion given by the Advocate General.

In this case GFKL entered into an agreement with a bank, under which it acquired a number of non-performing mortgages and debts with a face value of € 15.5m for which it paid € 8m. The only question, that in the end, the ECJ answered was whether GFKL – the buyer of the distressed debts, at a price below their face value effects a supply of service for consideration and carries out an economic activity. The ECJ stated that the difference between the face value and the purchase price was not consideration of a service provided by GFKL to the bank but a reflection of the actual economic value of the debts at the time of assignment, which reflects from the fact that the debts are doubtful and from the increased risk of default from the debtors, and that GFKL does not therefore carry out an economic activity.

As the purchaser is not carrying out an economic activity the consequence is that it will not be entitled to recover input tax on its related costs. This case is specific to the facts i.e. where the purchaser only pays the economic value, in a situation such as MKG or where the purchaser provides a service or where the assignee has recourse to the assignor it is unlikely that the same conclusion would be reached.

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## Withdrawal of concessions for caravan site owners

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HMRC have issued RCB 37/11 to remind caravan site owners about changes to the VAT treatment of certain charges they make that will come into affect from 1 January 2012. The changes involve recharges of business rates, utilities and connection to utilities. HMRC was forced to review all of its extra-statutory concessions (ESCs) designed to help businesses following the *Wilkinson* case. Certain ESCs are not allowed under EU law and must either be legislated for or withdrawn completely. The changes in question here are in respect of three ESCs that must be withdrawn completely.

The first relates to business rates. It is common for site owners to recharge a proportion of the business rates it pays to individual caravan owners. Historically, HMRC has allowed businesses to treat amounts received from the owners as being outside the scope of VAT (because the rates paid to the local authority by the site owner are outside the scope of VAT). From 1 January 2012 the amount charged to the customers will have the same VAT treatment as the pitch fees (normally standard rated in respect of holiday sites and exempt for residential sites).

The second ESC being withdrawn is in relation to recharges of non-metered water and sewage rates. Where a site owner can identify amounts actually consumed by an individual customer by metering at the pitch, the amounts charged are in respect of a separate zero-rated supply of water and sewage. HMRC have allowed site owners to apply the zero rate where it is not metered at the pitch provided their costs are apportioned on a 'fair and reasonable' basis. From 1 January 2012, the VAT treatment of charges that are not metered at the pitch will follow the VAT treatment of the pitch fee (standard rated or exempt as above).

The third is in respect of one-off charges for connection to the utilities. HMRC have allowed site owners to zero-rate charges for connection to water, gas and electricity. From 1 January 2012, the charges will have the same VAT treatment as the pitch fee (standard rated or exempt) except where consumption is identified by metering at the pitch, in which case the water will be zero-rated and the gas and electricity will be subject to the reduced rate of 5%.

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### **HMRC told to pay Appeal costs**

The First Tier Tribunal (FTT) has found for *Thomas Holdings Limited* (THL) in its costs claim against HMRC. THL overpaid VAT of approximately £500,000 but HMRC refused to repay it stating that the wrong entity had made the claim. HMRC withdrew their refusal to repay the VAT on the last working day before the hearing having delayed the proceedings and not having complied with various Directions. The FTT said that HMRC had acted unreasonably but not wholly unreasonably, and therefore it was a standard costs award and not an indemnity costs award that was appropriate. It is not known whether HMRC will Appeal or not, although it is probably unlikely.

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### **Questions**

If there are any areas that you would like covered in future updates please let us know.

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### **Summary**

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