Chartered Institute of Taxation
Excellence in Taxation

The Chartered Tax Adviser Examination

May 2019

Domestic Indirect Taxation

Suggested solutions

ANSWER 1

Find-a-Deal Ltd
Green Business Park
Leeds
LS6 8NM

F Comer
Tax Adviser
Station Road
London
SW1 9QP

6 May 2019

Dear Gordon

Find-a-Deal Ltd (FAD Ltd) - VAT & IPT treatment of supplies

Thank you for taking me through the supplies made by FAD Ltd on our call last week. My advice is set out below.

Insurance

In terms of potential reliefs, there is an exemption for insurance intermediary services which may apply to some of FAD Ltd's click through services. The exemption applies to the provision by an insurance agent of any of the services of an insurance intermediary in a case in which those services–

(a) are related (whether or not a contract of insurance is finally concluded) to an insurance transaction; and
(b) are provided by that broker or agent in the course of his acting in an intermediary capacity.

Acting in an intermediary capacity includes the bringing together, with a view to the insurance of risks, of–

(i) persons who are or may be seeking insurance, and
(ii) persons who provide insurance

The exemption would apply regardless of whether the click through is to a broker or insurer website.

There was an important case, *Insurancewide.com/Trader Media [2010] STC 1572,* which looked at click throughs and the application of the exemption, and HMRC released R&C Brief 31/10 following this case, setting out how the exemption can apply to click throughs. It was concluded that there is no need for intermediation, introduction is enough. From the information provided it appears that FAD Ltd is not acting as a mere conduit due to the active assessment of customers' needs, use of customer's information to offer click throughs to more suitable insurance products, and negotiation of special rates with insurers. An insurance agent is defined for the purposes of the VAT exemption by what they do and not by how they choose to describe themselves. I therefore conclude that FAD Ltd.'s revenue in relation to insurance click throughs is exempt for the purposes of VAT.

Credit Cards

There is also an exemption for finance intermediary services; however, this is different from that for insurance intermediary services. For most finance intermediary services to be exempt, they should bring together a prospective customer and a product provider with a view to entering a contract for the provision of financial services **and** carrying out work preparatory to the conclusion of those contracts. Consequently, FAD Ltd.'s services will not meet this requirement as it is not doing work preparatory to the conclusion of a contract for a credit card, i.e. it is not involved in the negotiation of the contract or setting the terms.

Utilities

There is no VAT relief for the intermediary services relating to utilities providers regardless of whether the product itself qualifies for the zero or reduced rate of VAT.

Recovering overpaid output tax

As all supplies have been treated as standard rated to date, it is possible to submit a Notice of Error Correction to HMRC to claim the over declared output tax on those insurance intermediary services which qualify for exemption. It will be possible to claim the over declared output tax going back to the start of business two years ago, although we should discuss FAD Ltd's pricing to determine whether there could be an unjust enrichment challenge, if HMRC can show that the economic burden of the over-declared VAT has been passed on to the customer.

Input tax

FAD Ltd. will be partly exempt due to these exempt supplies. After direct attribution FAD Ltd can use either the standard method or a special method (as no method has been applied previously) to calculate residual input tax recovery. This should be taken into account when making the claim to HMRC. It is worth considering whether the standard method produces a fair and reasonable result or whether a special partial exemption method would be appropriate.

IPT

FAD Ltd will not be required to register for IPT based on the facts presented as it is not charging a premium under a taxable insurance contract. FAD Ltd.'s charge is made to the insurer/broker rather than the insured, therefore FAD Ltd is not a taxable intermediary and the amount on which the insurer must account for IPT includes the commission paid to FAD Ltd as an intermediary.

I trust that this advice meets your needs. If you have any questions please contact me.

Yours sincerely

Finn

MARKING GUIDE

TOPIC	**MARKS**
Conditions for insurance intermediary exemption, and whether it matters if it's a broker/insurer website that customers are directed to	2
Consider *Insurancewide.com/Trader Media* case and HMRC R&C Brief 31/10 including no need for intermediation, introduction is enough, not acting as a mere conduit.	2
Conclusion on VAT liability of insurance click throughs	1
Credit card comparison: identify difference for FS exemption to apply i.e. work preparatory. Conclusion on VAT liability of credit card click throughs	2
No zero or reduced rate for utilities intermediary services	1
Notice of Error Correction to reclaim overpaid output tax including scope of claim	2
Consider impact on VAT recovery and whether PESM appropriate	2
Consideration of IPT registration as a taxable intermediary	2
Presentation and higher skills	1
TOTAL	**15**

ANSWER 2

Memo

To: Barbara Ralph, Head of Finance
From: Alison Moss, VAT Manager
RE: Introduction of finance plans for employee cars
Date: 6 May 2019

I have set out below the VAT treatment of the proposed introduction of a finance plan for employee cars.

VAT treatment of hire purchase agreements

As transfer of ownership is expressly contemplated in the proposed contract this is a hire purchase agreement. This is treated as a supply of goods so VAT is accounted for at the start of the finance plan, on the value of all 24 monthly instalments plus the option to purchase fee. However, recent EU case law (*Revenue and Customs Commissioners v Mercedes-Benz Financial Services UK Ltd (Case C-164/16)* implies that hire purchase agreements are not a supply of goods if it is contemplated, but not expected, that the hirer will pay the option to purchase fee at the end of the agreement. As it is not expected that employees will pay the option to purchase fee (due to the high lump sum) case law suggests this is not a supply of goods. Accordingly, there would be a cash flow benefit for the company as VAT would be accounted for each time an instalment is made, rather than upfront. VAT would only be accounted for on the option to purchase fee if the employee went ahead with the purchase of the car at the end of the term. Following the EU case law, HMRC announced changes to the treatment of such supplies in Revenue and Customs Brief 1 (2019), which apply to all new agreements from 1 June 2019. This sets out that where it is not expected that employees will pay the option to purchase fee, the agreement should be treated as a supply of services; thus confirming our treatment.

As the interest element is separately disclosed to the hiring employee this falls under the finance exemption (Group 2, Schedule 9, VAT Act 1994). This was considered in the recent case of *VW Financial Services Limited C-153/17*, and the CJEU decided that deferring payment for goods, in return for payment of interest, may be regarded as an exempt grant of credit, provided that it is not part of the consideration obtained for the supply of goods. In other words, the interest on HP is separable (in contrast to the AG's opinion). We should monitor the ruling of the national courts following this, to determine any impact on these transactions.

Input tax

The exempt interest will make us partly exempt. We should therefore consider whether the exempt income is incidental. Incidental supplies are not defined in EU or UK law, so reference should be made to case law. The concept of 'incidental' was considered in the cases of C H Beazer (Holdings) PLC, Regie Dauphinoise (C-306/94), EDM (C-77/01), and Floridienne and Berginvest SA (C-142/99). Based on case law my view is that the interest is not incidental as it is a separate supply in its own right, separately disclosed to the employee and set at a level with a view to make a profit.

A partial exemption calculation is required, unless the input tax attributable to exempt supplies is de minimis. To be de minimis the total exempt input tax must be less than or equal to £625 per month on average and less than 50% of total input tax. I can prepare a calculation to see if we meet this test.

VAT incurred on initial purchase of the cars is recoverable as this relates to the onward taxable supply of the car to an employee. This is business use of the vehicle by the company and the input tax is directly attributed to the onward taxable supply at a commercial rate. Input tax on the cost of repairs paid for by the company is also recoverable. VAT on the fuel element on the mileage claims should be deductible when supported by a fuel invoice.

Subsequent sale of cars

When we sell a vehicle to a third party after a finance plan has come to an end, it is necessary to account for VAT on this. The Value Added Tax (Cars) Order 1992 (which treats the disposal of a repossessed car as outside the scope of VAT) does not apply as the company is able to recover VAT on the initial purchase of the car (1992/3122 art 4 (1A)).

VAT incurred on work done to returned cars before onward sale will be recoverable in full as directly relating to the taxable onward sale.

A Moss

MARKING GUIDE

TOPIC	**MARKS**
HP being supply of goods if transfer of ownership contemplated in contract so account for VAT upfront (under UK law)	1
VAT calculated on instalments and option to purchase fee	2
Mercedes Benz case: not supply of goods as contemplated not expected to pay option to purchase fee at end of agreement	2
Conclude impact of case law for Office Master Direct UK Ltd	1
Exempt interest element if separate charge and disclosed, note potential impact of VWFS case	2
Whether exempt interest is incidental or de minimis for PE purposes, and impact on PE position	2
VAT recovery on initial purchase of cars, repairs and fuel	2
Sale of returned vehicles: account for VAT on subsequent sale	1
VAT recovery on work done to returned cars before onward sale e.g. servicing/cleaning	1
Presentation and higher skills	1
TOTAL	**15**

*Credit will be given to interpretation of EU case law without reference to Revenue and Customs Brief 1 (2019)

ANSWER 3

To: arthur.prince@weatherburn.co.uk
From: jbrown@sobakallp.co.uk
Date: 3 May 2019
Subject: Artomodini Ltd

Dear Arthur,

From a stamp duty perspective, buying the company rather than the trade and assets of the business would be less costly. Stamp Duty at 0.5% on the shares costing £10,000,000 would be £50,000, whereas Stamp Duty Land Tax on the transfer of the freehold property would be £189,500 (£229,500 if VAT is chargeable on the freehold) made up as follows:

Consideration £4,000,000 (or £4,800,000 if VAT is chargeable)	SDLT rate	SDLT £
First £150,000	0%	0
Next £100,000	2%	2,000
Either - remaining £3,750,000	5%	187,500
Or - remaining £4,550,000 (if VAT is chargeable on the sale)	5%	227,500
Total		189,500 (229,500 if VAT is chargeable on the sale)

If you buy the company, rather than its trade and assets, you will also acquire its VAT history (and any trading liabilities it might have). That could be more costly than the extra duty on an asset transfer. If the due diligence reveals that the potential liabilities of the company are less than £139,500 (£189,500 of SDLT less £50,000 of Stamp Duty) or £179,500 (£229,500 of SDLT less £50,000 of Stamp Duty) if VAT is chargeable on the land transfer, or if you, and your lawyers, are confident that the seller's warranties and indemnities cover such liabilities, I would suggest buying the company.

If you buy the trade and assets of the company, the transaction will almost certainly qualify as a VAT-free transfer of a business as a going concern. The purchasing entity would be required to register for VAT on (or before) the date of the transfer (if it is not VAT registered already) and should carry on the business without interruption. If Artomodini Ltd has opted to tax the property (something that it would be important to find out early in the due diligence process), Weatherburn plc (or any company set up to buy the business) would also need to opt to tax with effect from the earlier of the completion date, or the date any payment is made to the seller, and notify its election to HMRC by that date in order to avoid VAT being charged on the freehold transfer (some of which might be irrecoverable) and the extra SDLT cost mentioned above.

Adjusting the values of trade-in vehicles and those being sold can avoid situations where the trade-in vehicle is sold at a loss because its value has been inflated in order to close the deal on the replacement vehicle or to satisfy the minimum deposit requirements of a finance company. The tribunals and courts have consistently rejected arguments that the VAT accounting should be based on "economic reality" prices, rather than the higher figures shown on transaction documentation. This is something that you should consider closely in the due diligence. Even if you choose not to buy the company and leave any past VAT issues behind in it, practices carried on in the business may carry over with the staff concerned, who may need to be retrained.

Commission on sales of finance (HP, etc.,), insurance, and insured warranties is exempt from VAT and, in principle, the VAT on related costs cannot be reclaimed. HMRC may be challenging the method used to work out how much input tax can be reclaimed and this too is something that should be addressed in the due diligence. We will need to agree a new partial exemption method for the company that buys the business if you adopt that approach, and we may need to renegotiate the method that Artomodini Ltd uses if you buy the company.

We should also consider the treatment of sales of insured warranties. These can sometimes produce unexpected VAT (and even insurance premium tax) liabilities so it would be prudent to consider these carefully during the due diligence.

Other matters that merit consideration in the due diligence and for the future include:

1) The detailed rules around purchase and sales invoices for second-hand cars, and the strict records that must be maintained if the VAT accounting is to be based on the difference between the buying and selling priced of the cars;

2) The treatment of "qualifying" cars (e.g. vehicles bought from leasing companies) which normally should be dealt with outside the margin scheme;

3) VAT on "private use" of demonstrator cars where HMRC has agreed a simplified method for accounting for the VAT.

I would suggest that it would be useful for us to meet to discuss all this and I will call you in the next few days to arrange a suitable time.

Regards

Joan

MARKING GUIDE

TOPIC	**MARKS**
Calculation of stamp duty on share sale	1
Calculation of SDLT on freehold transfer	1
Calculation of extra SDLT if VAT due on freehold	1
Recognition that VAT history comes with company and may cost more than extra duty of TOGC	1
Recognition that purchase of trade and assets should be TOGC, discussion of TOGC conditions	1
Effect of option to tax and need for purchaser to opt before relevant date to avoid VAT on property.	1
Discussion of "bumping" and potential adverse consequences of it	2
Brief discussion of partial exemption	1
Treatment of insured warranties, VAT and IPT	2
Second-hand cars scheme records etc	1
Qualifying cars	1
Private use of demo cars	1
PHS	1
TOTAL	**15**

ANSWER 4

From arthursmith@anytownaccountants.co.uk
To ccooper@anytowndc.gov.uk
Date 3 May 2019
Subject Possible VAT refund claim

Dear Charles,

Following the CJEU decision in the London Borough of Ealing case, HMRC accept that local authorities can choose between applying UK law and accounting for VAT on charges for using sports facilities or applying the EU law and exempting such charges. When exemption is applied, in principle, the VAT on related costs will be irrecoverable (but recovery may still be possible if the amount involved is less than 5% of the total VAT reclaimed by the authority).

Subject to the usual 4 year limitation period, retrospective claims may be possible. In HMRC Brief 6/2017, HMRC insist that such claims are based on contemporaneous accounting records and are analysed by VAT period. Claims must take account of any input VAT restrictions flowing from treating the supplies as exempt and councils may not apply exemption in some periods and not in others.

HMRC have stated that the "unjust enrichment" defence might be used to deny claims. HMRC may refuse a claim if they can show that the "economic burden" of the VAT charge was passed to the customer. It would be for HMRC to establish that "unjust enrichment" would occur if a refund were made and HMRC acknowledge that it would be hard to invoke the defence where customers are mainly private individuals. I think it unlikely that users explicitly paid VAT on top of the admission charges, and as any refund will be used by the council in providing services to council tax payers, I would be optimistic that an "unjust enrichment" defence to any claim could be defeated.

Your figures for the last 4 years suggest that around £212,500 of output tax might be reclaimed over that period. This figure will reduce when we analyse the underlying information, as only charges to those participating in sports qualify for exemption and the figures provided include charges to spectators, which continue to be standard-rated.

If the council chooses to apply the EU law position, its exempt input tax would have been very close to the 5% de minimis threshold in the years to 31 March 2017, 2018 and 2019 and, potentially, well over it in 2016, as follows:

Year Ended	Total VAT reclaimed	x 5% (for VAT de minimis calculation)	VAT attributed to sports facilities	VAT attributed to other exempt business activities	Total Exempt Input tax for year
	£	£	£	£	£
31 March 2019	1,500,000	75,000	41,667	31,667	73,334
31 March 2018	1,280,000	64,000	33,333	30,000	63,333
31 March 2017	1,550,000	77,500	40,833	33,333	74,166
31 March 2016	2,000,000	100,000	250,000	35,000	285,000

Exceeding the 5% de-minimis threshold for exempt input tax would lead to a significant cost to the council (over £30,000 a year in VAT based on the figures provided) so before we reach a conclusion on a retrospective claim and change to exempting participant charges, we should consider future budget figures to see if the council might exceed the de minimis threshold. Doing so would trigger a requirement for more detailed analysis of VAT costs and may lead to a restriction of exempt input tax recovery (and adjustments to the input tax claimed on the new pool under the capital goods scheme) if that analysis confirms that the limit is exceeded.

It seems probable that by the time we have analysed the underlying records for 2015, claims for periods ending before 30 June 2015 will be out of time so sports participation charges will remain subject to VAT in that period. One consequence of this is that the new pool will have been used to make wholly taxable supplies (albeit only for the period **between** 25 June, when it opened, and 30 June 2015, if exemption applies from 1 July 2015). This means the partial exemption "clawback" rules will not apply to it and VAT claimed on its construction cannot be clawed back by HMRC. It also means that the exempt input tax for the year ending 31 March 2016 will be reduced significantly and will be below the 5% de minimis threshold for that year.

Although the new pool (and, perhaps, some other assets) will be a "capital item" for the purposes of the capital goods scheme adjustment rules, HMRC's published guidance confirms that provided that the council's exempt input tax remains less than 5% of its total VAT recovery, it will not have to make adjustments under the rules applicable to "capital items". Such adjustments might have meant that most of the input VAT claimed on the construction of the pool would have been repayable to HRMC over the 10 year capital goods scheme adjustment period.

Subject to confirming that the council's exempt input tax is expected to stay below the 5% de minimis limit, I would recommend applying the sports participation exemption at the council's venues and with the calculation of a retrospective claim for a refund of the output VAT accounted for since 1 July 2015. We will need to submit the details to HMRC since the amount of the claim will be more than the £50,000 threshold for adjustment on a VAT return. Making a separate claim will also permit a claim to be made for interest on the refund.

If it appears that the council might breach the 5% de minimis limit at some point, we should look at whether any of the activities currently treated as exempt should actually be viewed as "non-business", since that would reduce the amount of exempt input tax. We might also consider opting to tax properties that are let. That too should reduce the council's exempt input tax, albeit it would come with the prospect of a VAT cost for at least some users. Since the effect of opting to tax rents, etc., should be to preserve significant amounts of VAT recovery by the council, it might be possible for some of that saving to be used to relieve affected users of some or all of any extra VAT cost.

I would suggest we meet to discuss a further review of the historic records and budgets. As any claim for the period ending 30 September 2015 will go out of time shortly, I would suggest that we arrange this meeting soon.

Regards

Arthur

MARKING GUIDE

TOPIC	MARKS
Outline of consequences of “Ealing” claim (including impact on LA VAT recovery)	1
Opportunity for a “capped” retrospective claim	1
Conditions for a claim, including partial exemption and consistency of use of EU or UK law position	1
Consideration of issues around a possible “unjust enrichment” contention	3
Calculation of potential output tax claim based on figures provided	1
Acknowledgment that the possible claim may be overstated since the figures include spectator charges that remain standard-rated	1
Comment on level of exempt input tax and 5% de minimis threshold	1
Need to consider future budgets for impact on de minimis threshold	1
Impact of time limits on claim for period ended 30 June 2015	1
Advantageous consequences of treating income from new pool as taxable – taxable use sidesteps “clawback” regulation and reduced exempt input tax for year below 5% de minimis threshold	2
Capital goods scheme and the new pool – HMRC guidance on CGS if council stays under 5% de minimis exempt input tax threshold	1
Recommendation to change future treatment and to make a retrospective claim subject to considering future de minimis position	2
Mechanics of claiming, inability to adjust return and interest	1
Consideration of opting to tax, consequences for users and mitigation strategy	1
PHS	2
TOTAL	**20**

ANSWER 5

2 May 2019

Technical Memo to Mr D Hurrier, Partner regarding VAT and IPT queries from Windtunnel Ltd

Sports drink and "bottle for life"

The VAT liability of a sports drink contained in a "bottle for life" is likely to be considered as a standard rated supply. The liability is determined by the way in which the product is held out for sale (i.e. as a product designed to enhance physical performance, accelerate recovery or build bulk) and includes advertising and marketing which are determined by the packaging, target audience and the type of retail outlets that may stock the product. The only circumstances in which a sports drink could be liable at the zero rate would be if it was a beverage containing milk or a preparation of milk, which appears unlikely in the current circumstances.

The "bottle for life" is initially treated as packaging for the sale of a food product. Packaging for food products usually follows the VAT liability applicable to the product they contain, providing it is normal and necessary for that type of foodstuff. The fact that a "bottle for life" is intended to have an existence after the product it initially contained has been consumed would generally indicate more than normal and necessary packaging, and a standard rate supply of a bottle may result in a mixed supply if the sports drink was eligible for zero rating. However as this appears unlikely, the sale of the drink and "bottle for life" will be a standard rated single supply,

Insurance Premium Tax

Insurance intended to cover any unexpected costs associated with the "bottle for life" will be subject to Insurance Premium Tax (IPT) as the insured risk of the UK established business is located in the UK. A monetary loss is a UK risk if the company that will sustain the loss is established in the UK (DSG case). The standard rate of IPT at 12% will apply and will be included in the chargeable amount to determine the premium. As a premium is IPT inclusive, then Windtunnel Ltd will suffer 3/28 of the premium on IPT. This is irrecoverable. Any compensation payment made to Windtunnel will be outside the scope of VAT as it will not represent consideration for a supply. The free warranty given by Windtunnel Ltd is not an insurance contract for IPT purposes.

VAT aspects - Hot Drinks and contribution

The VAT treatment of the environmental contribution will be determined by the terms under which the contribution is made. If the payment is compulsory and a hot drink will not be supplied unless the payment is made, the "additional" payment will form part of the consideration for the drink and VAT will be due at the standard rate on the whole payment made. However, if the 15p payment is completely free of other obligations and a coffee will be provided whether or not it is paid by the customer it can be treated as a donation and will not attract a VAT liability because it is not the consideration for a supply, support for this interpretation can be found in the CJEU case of *Tolsma* C-16/93 which considered whether money passed to a street organ player was consideration in respect of a supply or a freely given donation. Since there was no obligation to make a payment the court found there was no supply.

When the business subsequently makes a payment to the charity, this will be a donation provided the charity is not supplying anything in return for the payment. However, unless the payment by the customer is entirely voluntary, the business will need to pass part of the payment to HMRC as output tax and unless it wishes to make a contribution to the charity from its own funds it should be advised to only pass the net "after VAT" amount to the charity.

The alternative option of providing a reward by offering a 25p credit on an electronic gift card to the customer would be more complicated. An electronic gift card would generally be treated as a gift voucher for VAT purposes, but HMRC are unlikely to accept that the crediting of 25p to a gift card represents the giving of consideration back to the customer until such time as the stored value on the gift card is actually "used" in a separate supply. This is particularly likely if the gift cards have a relatively low redemption rate and a low proportion of customers actually take up the opportunity to use

the credit. There is some support in the Kuwait case *Kuwait Petroleum (GB) Ltd v C &E Commrs, [1999]* that the goods or services provided as redemption goods, paid for by credits, are gifts which generally are not subject to VAT if the rules at para 5(2), Sch 4 VATA 1994 apply. It was held in the Kuwait case that no part of the consideration on the initial sale could be attributable to the voucher, or in this case, credit on the gift card. On balance it would be unlikely that the 25p discount credited to the gift voucher could be used to reduce the amount paid by the customer at the time the coffee is purchased, consequently the retailer should account for VAT on the full value taken from the customer at the time of the sale without making a deduction for the credit given on the gift card. The only circumstances in which the consideration for VAT could be discounted at the time of the coffee purchase would be if 25p discount was freely given to each customer who did not require a mug.

In the case of customers who receive gift card credits - subsequent supplies against redeemed credits should, if business gifts of goods, be treated as supplies on which no VAT is due, subject to the £50 cost and series or succession of gifts rules in para 5 (2), Sch 4, VATA 1994.

Free hot drinks to employees

There will be no VAT liability on the free hot drinks provided to employees as this is covered in para. 10 (1)(a) Sch. 6 VATA 1994 which allows for the supplies of catering provided by employers to employees to be valued at nil

I trust the above analysis is useful if enabling you to respond to the client and please advise me if you require anything further.

Regards

Charlie Starke

MARKING GUIDE

TOPIC		MARKS
1. Bottle for life liability	Sports drinks standard rated and liability determined by ingredients and how held out for sale.	1
	Difficulty in obtaining zero rated treatment unless qualifies as milk beverage or other item in Group1, Sch 8.	1
	"Bottle for life" goes beyond normal and necessary packaging for a drink and likely to be standard rated as separate supply - but since drink is also standard rate no difficulties with mixed supply treatment.	2
2. IPT	Liability to IPT if a contract of insurance exists and the risk is located in the UK – standard rate IPT (12%)	2
	Any compensation payment from the Insurer to Windtunnel will be outside the scope of VAT as it will not represent consideration for a supply	1/2
	The free warranty given to the customers is not an insurance contract and therefore no IPT is due on this	1
	The insurer may charge IPT on each payment or when the contract is written dependent on whether they use the special method to account for IPT. This may affect cashflow.	1/2
3. Payment for environmental contribution to charity.	Payment for charity is compulsory and drink will not be supplied without it - so it forms part of the consideration for the standard rate supply of the catering.	2
	Payment from retailer to charity – donation = no supply	1
	Net payment to be made to charity unless retailer wishes to additionally contribute from own funds	1
4. Reward option	Credit to gift card similar treatment to issue of face value voucher for later supply of redemption goods (or services).	1
	Kuwait case supports analysis that no part of initial consideration is attributable to voucher/credit to gift card. Only a true cash discount granted at the time of supply would allow a reduction in the value for VAT	1 1
	Gift rules apply to redemption goods if less than £50 cost and not series or succession to same person etc. Sch 4 VATA 1994	1
	Vat needs to be accounted for on full value of consideration for coffee without reduction for credit to voucher.	1
5. Free hot drinks to staff	Supplies of hot drinks to employees are not subject to VAT as they regarded as nil value providing they are freely given and no monetary consideration is provided. Authority for this is in a special valuation rule at Sch 6, para 10(1)(a) VAT 1994	1 1
PHS		1
TOTAL		**20**

ANSWER 6

To: comdirpdco@pdco.uk
From: tinhousevat@pdco.uk
Date: 2 May 2019
Subject: Tax issues – Project Broadsword

Dear Tim,

Thank you for your email concerning the above.

SDLT treatment of contingent consideration

The purchase by the group of land will be the transfer of an interest in land subject to consideration of an agreed amount, £35,000,000, and a future contingent consideration of £5,000,000 – which is payable dependent on the "overage" clauses within the sale/purchase contract.

Because potentially a maximum of £40,000,000 may be paid for the land we will need to make a land transaction return for SDLT on the £35,000,000 and at the same time make a request to defer SDLT to cover any future consideration that may become due under the contract. This is possible because one of the future payments is due more than 6 months after the effective date of the transaction.

The application to defer must be made before the due filing date of the land transaction return, which is normally 30 days from completion of the contract. If subsequently we are successful in gaining more than 20 commitments to lease and the overage payment becomes due in November 2020, we will need to amend the return and pay SDLT on the £5,000,000 deferred consideration.

Tenant inducements - VAT and SDLT treatment

The first option to offer cash incentives, or "reverse premiums", to potential tenants to enter leases longer than 10 years will, for VAT purposes, be largely dependent on the status of the lessee. If the potential tenant is regarded as an "anchor tenant", meaning that its presence in the development is likely to positively influence our marketing to encourage other tenants to enter into leases with us, the supply will be standard rated in accordance with the findings in the CJEU *Mirror Group Case C-409/98* and HMRC guidance at VATSC 46800 if the tenant can be shown to have agreed as such and allowed us to use their tenancy as a means of marketing the property. The tenant will charge us VAT on the inducement payment and we will be able to recover the VAT charged as input tax providing we have previously "opted to tax" the development – which I recommend we do at the earliest opportunity. If the prospective tenant can't be regarded as an anchor tenant, there will not be a supply from it as they will only be fulfilling its obligations under the lease and no VAT will be charged to us. Should any of them seek to charge VAT we should reject the invoice.

For SDLT purposes, a reverse premium is not liable to the tax as it is not chargeable consideration. In any event this would be an obligation on the tenant or purchaser and not on a group company. Paragraph 18, Sch 17A, FA 2003 defines a reverse premium for SDLT purposes.

The alternative treatment, for us to make payments to prospective tenants for specific fitting out costs, would for VAT purposes depend on which party had responsibility for the works. If they are the landlord's responsibility, any payment will be viewed as a payment for construction services with the tenant effectively becoming a sub-contractor to the landlord. Because the whole development is commercial the supply would be one of standard rated construction services. In contrast, payments made for items the tenant would normally be responsible for buying, such as carpeting and furnishing, will not normally attract VAT as there is no supply from the tenant to us and there will be no input tax for us to recover.

VAT Anti-avoidance legislation

In any circumstances in which the prospective tenant could be regarded as "financing" part of our development, we need to be particularly careful not to trigger the anti-avoidance rules which can disapply our "option to tax" resulting in us being unable to recover the VAT incurred on the construction

of the building. This applies in circumstances where the building is the landlord's capital asset (costing more than £250,000 net) and the tenant is unable to recover within the next 10 years at least 80% of the VAT charged to them on the opted supply (rent) and where they have in any way funded part of the development which would generally be expected to be funded by the developer (us) – for example by paying for parts of the fixtures in the building.

As you will appreciate this is a complex area in which small changes to detail can have a significant effect. I would be happy to consider draft contracts before finalising my advice on these matters.

Kind regards

Teresa Biggs
Indirect tax manager

MARKING GUIDE

TOPIC		MARKS
1. SDLT treatment of contingent consideration	Payment of £35m subject to SDLT upon completion of the purchase of land	1
	Deferment application required within 30 days of completion for the uncertain £5m "overage" payment dependent on 20 leases being signed before PC.	2
	Amended SDLT return required and additional payment due if overage applies – 30 day time limit from date of payment being triggered	1
2. Tenant inducement options	Cash incentives of "reverse premiums" to prospective tenants – generally not consideration for a supply. Reject any invoices seeking to add VAT.	1
	An "anchor tenant" who brings publicity to the location that may influence others to sign leases is treated as making standard rate supplies per CJEU *Mirror Group Case C-409/98.*	2
	Input tax thereon may be deducted by landlord as it relates to standard rate supply of rental - conditional on option to tax having been previously made.	1
	Exercising an option to tax may be to the detriment of any partially exempt tenants e.g the bank, but is likely overall to favour the Landlord's input tax recovery on construction and other related costs of the whole development.	1
3. Specified payment for fixtures	SDLT – Reverse premiums not subject to SDLT.	1
	VAT – If works for part of landlords interest in the building – standard rate supply of commercial construction services by tenant	1
	VAT – If for tenants fitting out costs such as carpeting etc. – no supply – no VAT chargeable	1
4. Anti-avoidance provisions	Need to be careful to avoid the anti-avoidance legislation based on tenant (or related party) funding part of development when unable to recover more than 80% input tax on rent and being classified as a "development financier".	2
PHS		1
TOTAL		**15**