



Markets and VAT

Ian M Harris BA(Hons) FIIT CTA MAAT

Leicester City Council

VAT & Taxation Advice Office

Background and disclaimer

- ❑ **First the Disclaimer!**
- ❑ **Having ‘run’ the VAT and Taxation Advice Office at Leicester City Council since 1997**
- ❑ **And served on the CIPFA VAT Committee, Local Authority National VAT Consultative Group, Midlands Unitary Authorities VAT and Tax Group and Leicestershire Local Authority VAT Group for many years**
- ❑ **The following is based on my expertise and experience**

Background and disclaimer

- **BUT**
- **What follows should not be taken to necessarily represent the views of Leicester City Council**
- **Or of the various Groups referred to**
- **Having got that out of the way let's get on with it...**

Markets and VAT

- ❑ **Markets and VAT...?**
- ❑ **So what's the issue?**
- ❑ **Historically HMRC saw market stalls as a licence to occupy land**
- ❑ **A licence to occupy land is exempt from VAT (unless you've opted to tax)**
- ❑ **But HMRC are now arguing market stalls are more than just a licence to occupy land**
- ❑ **So HMRC say they're VATable**

Markets stalls as a licence to occupy land

- ❑ That a market stall is a licence to occupy land was established by the VAT Tribunal in 1979 in *Tameside MBC ...*
- ❑ ‘Once the nature of stallage is understood [and] it is accepted... it is a payment made to the owner of the soil as consideration for a privileged position of special occupancy of a stall or for the use and occupation for the time being of that part of the soil on which the stall stands...’

Markets stalls as a licence to occupy land

- ❑ **But *Tameside* is only a First-Tier decision**
- ❑ **And in 2016 the Upper Tribunal in *Zombory-Moldovan (t/a 'Craft Carnival')* held stalls at a craft fair are the right to participate at a professionally organised event not a licence to occupy land**
- ❑ **HMRC say markets stalls are similar so not simply a licence to occupy land**

The dispute

- ❑ **Several local authorities have been ‘approached’ by HMRC**
- ❑ **At least one has ‘conceded’ and settled with HMRC**
- ❑ **But HMRC have accepted another’s counter-arguments**
- ❑ **Shrewsbury Town Council though are pursuing the matter to appeal**

The dispute

- **HMRC assert there has been no change of policy or practice**
- **That para.2.5 of Notice 742 ‘Land and Property’ still applies**

The dispute

- ❑ **Para.2.5 of Notice 742 says to be a licence to occupy land the occupier must:**
- ❑ **be granted a right of occupation**
- ❑ **over a defined area of land**
- ❑ **for an agreed period(s)**
- ❑ **as if owner of the defined land during the agreed period (including the right to exclude others therefrom)**
- ❑ **in return for payment**
- ❑ **without the inclusion of significant other ancillary supplies**

The dispute

- **HMRC seem to accept the first five conditions may be met**
- **But they argue market traders receive a raft of additional ancillary services**
- **Which means they are not being granted a licence to occupy land**

The dispute

- In Shrewsbury's case HMRC have raised eight arguments in detail

The dispute

- *‘The regulatory conditions imposed relate to the pitch rather than a licence to occupy’*
- **But it’s the facts as to what is actually supplied that determines not any regulatory conditions imposed**
- **And a shop lease may equally be constrained by regulatory conditions**

The dispute

- *‘The grant is a licence to trade not a licence to occupy land’*
- This seems to be the basis of HMRC challenging a number of analogous scenarios
- But it introduces a subjective test - what the occupier wishes to use the land for - to override the objective test of what is actually supplied

The dispute

- And HMRC's contention that conditions - such as what the trader can sell and/or when - mean there is a licence to trade not a licence to occupy land are fallacious.
- This was the upshot of the Court of Appeal's Judgment in *British Airports Authority* in 1976
- Which was relied on by the Tribunal in *Tameside*

The dispute

- *‘Where the market is indoors traders have access to all the indoor facilities of the market hall’*
- **But no specific additional facilities are provided that are not:**
 - **public facilities, eg toilets, café, etc**
 - **the sort of facilities provided with a licence to occupy land, eg heat and light**
 - **which traders would receive in connection with a licence to occupy land, eg storage facilities**
 - **and HMRC's guidance confirms storage facilities provided in conjunction with a licence to occupy land follow the VAT liability of that licence**

The dispute

- *‘Times of operation and therefore occupation are stipulated’*
- **But this is no different to any licence to occupy land**
- **Indeed the second condition in para.2.5 of Notice742 clearly refers to a licence to occupy land being for a defined period of time**

The dispute

- *‘Pitches can be moved’*
- This is the only argument with merit
- Applying *Sinclair Collis Ltd (C-275/01)* if the market authority retains the unilateral right to specify the stall occupied and the unilateral right to move the trader to another stall there is not a licence to occupy land

The dispute

- *'The licence is to participate at the market'*
- This is HMRC's attempt to apply '*Craft Carnival*'
- That the provision to stallholders of the right to trade at a professionally organised and advertised event does not amount to a licence to occupy land

The dispute

- ❑ **But a local authority market...**
- ❑ **... operated by the authority as a public service**
- ❑ **... whose existence and regular opening hours is drawn to the attention of the public**
- ❑ **... who have unrestricted free access thereto whilst in operation**
- ❑ **Is materially different to a commercially run craft fair**
- ❑ **... a professionally organised event actively promoted to draw customers to a specific one-off venue with customers often required to pay for admittance**

The dispute

- *‘Stalls are being provided’*
- It’s difficult to see how this is relevant
- A stall is useless without the licence to occupy land
- So the stall is ancillary to the licence to occupy land (applying *Card Protection Plan Ltd (C-349/96)*)
- And ancillary supplies follow the VAT liability of the principal supply

The dispute

- *‘There is no lease commitment’*
- **Which is why it’s a licence to occupy land!**

Where are we now?

- ❑ **Based on these arguments we've sought Counsel's Opinion which we'll come back to...**
- ❑ **We've also met with HMRC and Treasury**
- ❑ **But elicited little sympathy**
- ❑ **So we probably need to lobby Government on the impact of imposing VAT on markets**
- ❑ **Historically DCLG were concerned at the decline of local markets which VAT could exacerbate**
- ❑ **At the least we need a transition and no retrospection**

Where are we now?

- **In the meantime do nothing!**

Markets as a statutory function

- ❑ **Another argument is markets are a statutory function**
- ❑ **Statutory functions fall outside the scope of VAT**
- ❑ **Providing governed by a special legal regime**
- ❑ **And non-VATable treatment doesn't cause a significant distortion of competition**

Markets as a statutory function

- ❑ **HMRC dismiss market charters as a special legal regime!**
- ❑ **They argue these are of no more than historic interest**
- ❑ **HMRC also dismiss the Markets and Fairs Clauses Act 1847**
- ❑ **On the grounds this applies to both private sector and local authority markets**

Markets as a statutory function

- ❑ But Part III of the Food Act 1984 generally supersedes previous local authority markets legislation
- ❑ This is the special legal regime
- ❑ And Section 50 gives the market authority exclusive rights to hold a market within its area
- ❑ ... providing this would not ‘interfere with any rights, powers or privileges enjoyed within the authority's area in respect of a market by any [other] person, without that person's consent’
- ❑ So there's a statutory bar to competing markets

Markets as a statutory function

- HMRC don't accept this argument
- But it's never been tested...

Counsel's Opinion

- ❑ **Counsel agrees that a local authority market is materially different to a commercially run craft fair**
- ❑ **For the reasons advanced**
- ❑ **But he doesn't agree with the statutory function argument**
- ❑ **Primarily as he feels there would be a distortion of competition**
- ❑ **But perhaps this merits testing...**

On-street markets

- ❑ **HMRC had started to look at on-street markets too**
- ❑ **But they now accept these are street trading not ‘markets’**
- ❑ **Governed by Section 3 of and Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982**
- ❑ **Or Part III of the London Local Authorities Act 1990 in Greater London**
- ❑ **That’s a special legal regime**
- ❑ **And only the local authority can charge for occupying the public highway so there’s no distortion of competition**
- ❑ **But strictly on-street markets aren’t markets!**

The VAT & Taxation Advice Office

LEICESTER CITY COUNCIL

VAT & TAXATION ADVICE OFFICE

- 4th Floor, Granby Wing, City Hall**
- Direct dialling: 0116-454-4060**
- Mobile/Text: 077101-48748**
- E-Mail: vattax@leicester.gov.uk**