Land & Property Liaison Group (VAT) meeting – 24th January 2019, held at 10 South Colonnade, London, E14 4PU.

This document is purely intended to reflect the discussions that took place at this meeting. Any comments made by HMRC (in particular if they relate to a potential/likely change of HMRC policy) do not constitute HMRC policy or practice unless and until they are supported by published material (for example HMRC Notices, Revenue & Custom Briefs (RCBs) or Manuals)

Introductions/Housekeeping

1. Attending the meeting with HMRC were representatives from:

Association of Taxation Technicians

British Property Federation

Chartered Institute of Public Finance and Accountancy

Chartered Institute of Housing

Chartered Institute of Taxation

Country Land and Business Association

Institute of Chartered Accountants in England and Wales

Law Society of England and Wales

Law Society of Scotland

National Housing Federation

Royal Institution of Chartered Surveyors

VAT Practitioners' Group

Matters arising from previous meeting (19th September 2018)

2. Most of the actions arising from previous LPLG meetings had either been closed or were due to be discussed later in the meeting. Actions remaining open included:

a. HMRC to provide an outline of the legal analysis supporting the view that a building cannot be both a dwelling and RRP (from September 2018).

b. HMRC to provide clarification regarding the ability to impute an option to tax on non-UK land for the purposes of UK input tax recovery (from April 2018).

c. HMRC to consider whether its approach to the VAT treatment of farmhouses and recovery rates reflected actuality and to update guidance as necessary (from December 2017).

See Responses to these points at Annex A attached

ACTION: HMRC to complete outstanding actions from previous meetings

3. HMRC noted a number of cases where a Tribunal had not accepted that the signatory to a VAT 1614 form was duly authorised *Blythe Limited Partnership* (VTD 16011); *D S Talafair & Sons* (VTD 16144); *Coach House Property Management Ltd* (VTD 7564); *Windsor House Investments Ltd* (VTD 19666).

4. Industry representatives highlighted a case where the Tribunal had seen the notification as valid, *Rathbone Community Industry* (VTD 18200).

Memorandum of understanding (MoU)

5. HMRC welcomed the feedback received on the LPLG's MoU and confirmed that much of it had been incorporated into a revised version, which was circulated ahead of the meeting. Industry representatives noted the revisions and agreed that the MoU fairly represented the group's aspirations to work with HMRC on land and property VAT issues.

Authorised signatories – Option to Tax (OTT). - See also Annex B below.

6. HMRC reiterated the need for OTT notifications to be made by someone with sufficient authority within a taxpayer organisation. HMRC also noted the publication of additional guidance in Notice 742A setting out a list of types of entity that commonly make OTT notifications and for each entity, who would typically be considered an authorised signatory.

7. LPLG members highlighted that HMRC did not appear to have taken any account of extensive feedback provided by the LPLG on a draft version of the list of entities. In addition, the list did not cover situations in which one of the authorised persons was a non-natural person (e.g. where a director is another company). HMRC confirmed that in such instances, the relevant signature could be that of e.g. a director, company secretary or employee of the non-natural person (i.e. it is possible to 'look through' a corporate director). See Annex A attached.

8. HMRC noted that Notice 742A was due for a review and that this would represent another opportunity to revisit the list of authorised signatories. In the meantime, HMRC agreed to revisit additions to the list proposed by LPLG members and highlight where it did not agree with LPLG members' views.

ACTION: HMRC to revisit the published list of authorised signatures to reconsider adding further additions as to the published list and provide reasons why suggested additions not included in Notice 742A in October 2018. - See also Annex B below.

9. In response to a query from the BPF, HMRC stated that while anyone in a VAT group can notify an OTT, the signature on the VAT form needs to be an authorised signatory for the company that has an interest in the land being opted.

10. In subsequent discussion, industry representatives suggested that as a practical expedient, an OTT could be made by the representative member (or any other group company) on its own behalf, as it would then automatically apply to the company or companies holding the property, via the relevant associate rules. It would then be enough for the tax manager or whoever to be authorised by a director of the one company, rather than by directors of the individual companies in the group.

11. This approach would considerably reduce the administrative burden on real estate investors notifying OTTs and it was suggested by a representative from HMRC's operational team that it would also create time savings for HMRC's OTT unit.

ACTION: HMRC to provide their views on the suggestion to allow a representative member of a VAT group to make an OTT on behalf of group members as the option would apply to all members currently in the VAT Group and all those joining. - See also Annex B below.

Notice 742 update

12. HMRC confirmed that it had intended to publish an updated version of Notice 742 by the end of December 2018 and that while this had slipped somewhat, the updated Notice was close to being published.

ESC 3.18

13. The LPLG heard how Residential Management Companies (RMCs) were responding to the announcement by HMRC in September 2018 that ESC 3.18 was being widely misinterpreted and wrongly applied.

14. The main concern for many RMCs that do not own a relevant property interest is that this may require them to be registered for VAT, which in turn could affect their status under Company Law and their Corporation Tax treatment. There are also concerns that RMCs may struggle to convince leaseholders to become Directors, as they now face potentially greater legal exposures.

15. The Association of Residential Management Agents (ARMA) was in the process of preparing a Q&A sheet for RMCs and hoped that HMRC would 'vet' it before it is more widely published.

16. Additional issues can arise where a freeholder has obligations to provide services to leaseholders but a head-lessee sits between the freeholder and leaseholder (as can arise where a 'ground rent' interest is created).

17. It was also suggested that historical decisions in the case of *Canary Wharf* (VTD 14513) and *Nell Gwynn* should be considered if tripartite agreements existed.

18. HMRC referred to the direct link test, as indicated in several ECJ cases. (Field Fisher Waterhouse C-392/11, Tolsma C-16/93).

19. HMRC indicated that it was more than willing to work with the relevant bodies and associations to assist in producing clearer guidance for their members on this matter.

VAT and cladding

20. HMRC confirmed that:

- **a.** Remedial work to replace potentially unsafe cladding can be zero-rated where:
  - i. the original cladding (since found to have been defective) was installed as part of the original zero-rated construction;

ii. the remedial work is being commissioned by the person who commissioned the construction (i.e. they have 'person constructing' status, which can be transferred by way of a TOGC and potentially through a statutory transfer as with a reorganisation of public bodies); and

iii. the remedial work is carried out as soon as possible.

b. If, alternatively, the defective cladding was installed as part of reduced-rated conversion work, remedial work can also be reduced-rated if, again, it is being commissioned by the same person and is done as soon as possible.

c. If the defective work was to an RRP/RCP building, and the VAT on it was recoverable by the developer as attributable to the zero-rated grant of a major interest, VAT now incurred by the same developer on remedial work is also recoverable as attributable to the zero-rated grant.

21. HMRC confirmed that its non-statutory clearance team was receiving queries on this matter and that these were being dealt with on a case by case basis. The clearance team had been advised to forward such queries to the policy team.

22. HMRC also agreed that the cladding of existing walls could in theory be reduced-rated where it is designed and installed primarily because of its insulating qualities, however this would again need to be taken on a case by case basis, as cladding can also be installed for aesthetic purposes, in which case no VAT relief would apply.

23. HMRC indicated that it would not be publishing any guidance on this issue at present.

DIY claims – timing of submissions

24. LPLG members noted that HMRC appeared to have changed its interpretation of the time at which a building is deemed to be completed, in particular where the building is occupied before the certificate of practical completion has been issued. As a result, HMRC was rejecting claims on the grounds that they had been made more than three months after the date of occupation, leading to the denial of VAT refunds. The same approach was being taken where HMRC perceived the building was complete prior to the certificate date.

25. HMRC stated there had been no change of policy but acknowledged that the DIY claim form and relevant guidance could be clearer on the matter of when HMRC considers a property to be completed. HMRC noted that the form is in the process of being updated and that HMRC would take account of the LPLG's concern in the process.

26. HMRC also agreed to investigate whether there had recently been any changes to the practices and procedures being followed by the Unit responsible for processing DIY claims.

ACTION: HMRC to investigate whether any changes made to practices and procedures followed by DIY Housebuilding Team.

ACTION: LPLG members to provide HMRC with examples of situations where DIY claim form rejected on the grounds of timing of submission.

VAT treatment of "Jenkins v Brown" land pooling arrangements

27. As a result of the government's housing white paper, published in early 2017, land pooling arrangements are becoming more common among owners of rural/greenfield land.

However, it is not always clear how these arrangements should be registered and generally administered for VAT purposes.

28. HMRC referred to existing guidance on joint working in the construction industry (VATREG10010) and indicated that they'd see the same criteria applying to land pooling.

29. It was also suggested that further thought needs to be given to whether barter transactions may arise when a development partner contributes land to a pool with the expectation of a share of any development proceeds.

30. The CLA expressed an interest in discussing this issue with HMRC separately and it was agreed that a dedicated meeting should take place. In the meantime, the CLA would explain in writing why HMRC's current guidance does not address what the position should be in land pooling arrangements.

ACTION: CLA to set out why HMRC's existing guidance does not adequately cover certain types of land pooling arrangements.

AOB

31. *Notice 708:* HMRC confirmed that the revised Notice 708 had still not been published due to difficulties with applying the style guidelines mandated by the government's digital publishing team.

32. *Summit*: Following on from discussion at the last LPLG meeting in September 2018, HMRC agreed that a property could in theory at the same time qualify as a dwelling for VAT purposes and be used for a Relevant Residential Purpose (RRP).

However, HMRC considered that the developer/contractor had to decide on which basis it wished to develop the property. Where a developer issues a RRP certificate to its main contractor, then the work on the property is to an RRP building for VAT purposes, even if it may as a matter of fact ultimately qualify as both a dwelling and an RRP. However, the sub-contractor may choose to construct the building as a dwelling, provide the conditions are met, following the case of Summit.

HMRC also suggested that from a developer/contractor's perspective, there was no 'downside' to issuing an RRP certificate where there was any doubt as to whether the property would qualify as a dwelling for VAT purposes.

33. *Zero-rating of new build RRP/RCP property*: Industry representatives had been under the impression that HMRC would not be publishing any commentary or guidance as a result of the decision in the *Stephen Colchester* (UKUT 0083 TCC). However, HMRC confirmed that, in view of the - apparently contradictory – decision in that case and in *St Brendan's College* (UKFTT 128 TC), are in fact considering whether further guidance is needed.

ACTION: HMRC to publish online the written responses to policy templates from the previous three LPLG meetings.

Date of next meeting: 10.30am on Friday 17th May 2019

Annex A

Responses to matters arising from previous meeting (19th September 2018)

(a). See paragraph 2(a) above

The law provides for three ways in which reduced rating is available for conversions:

- a changed number of dwellings – involving single household dwellings (SHDs);
- houses in multiple occupancy (HMOs) - involving multiple occupancy dwellings (MODs); and
- special residential conversions – involving buildings used for an RRP.

The legislation intends for these three categories to be mutually exclusive, therefore it follows that a property cannot fall into more than one of the categories at any given time.

A copy of the Explanatory Memorandum for SI 2002/1100 to amend Group 6 following the case of Opal Carleton will be forwarded to members of the LPLG separately. On page three it states that '*It was felt desirable to take the opportunity to make this change because it has the effect of creating* ***three distinct types of residential premises****, such that a set of* ***premises cannot fall into more than one of the three categories*** *this Group is concerned with.'* (emphasis added).

We would therefore suggest that to identify the type of residential premises into which a residential property should fit, the appropriate question is "***For what purpose is the property being used***?"

(b) See paragraph 2(b) above

Clarification of the ability to impute an option to tax on non-UK land for the purposes of UK input tax recovery (outstanding query from April 2018) the response from the relevant policy team, with apologies for the delay, was –

> *"It is our view that the quoted legislation does not apply (nor was intended to apply) to an option to tax. It relates to specified supplies and it cannot be applied to an OTT. The option to tax rules and relevant legislation does not apply to non-UK situated land."*

(c) See paragraph 2(c) above

The input tax recovery rate on farmhouses where a business is a full time farming activity and one which is part-time is different as it is necessary to take into account the non-business use of the asset. Where a farmhouse provides domestic accommodation for the farmer and family 100% input tax recovery is not allowed.

Where i) the building is a typical working farmhouse,
ii) the business is a full time farming activity and
iii) the work done is in the nature of repair and maintenance,
the farming business should treat 70% of the VAT incurred as input tax.

The treatment will be different if the farming is only a part-time activity. Each case will be treated on its own merits by applying the test outlined in our guidance VIT61360. It is envisage that the business purpose proportion in such cases are unlikely to exceed 40%.

Annex B

HMRC further comments on Authorised Signatories for an Option to Tax.

HMRC acknowledge that not all suggestions put forward by LPLG members for inclusion in a table on "Authorised signatures" in paragraph 7.6 of Notice 742A *Opting to tax land and buildings* have been taken up.

The current published list is not intended to be exhaustive and authorised signatures for commonly occurring entities can be added too as necessary. HMRC did not think it helpful to provide a long definitive list that by its nature would appear cumbersome and not particularly user friendly. The published list is intended to convey the level of authority required to sign a notification on behalf of a particular type of business entity so that the particular business entity is bound by the actions of the authorised signatory.

Answers to Specific points raised -

1. VAT Groups

Ii has been suggested that we could accept the signature of "the representative company of a VAT group". This is not a problem where the representative member of a VAT Group notifies an option to tax on a property they own themselves. However, this is not possible in respect of properties owned by other VAT Group members, unless an authorised signature is obtained from the VAT Group member who owns the relevant property. It needs to be remembered that "the representative member of a VAT group member, is merely responsible for completing and rendering a single return on behalf of the group and paying the VAT or receiving any repayment due to the companies within the VAT Group, (para 2.1 of Notice 700/2 *Group and divisional registration*). In other words, the VAT Group representative member merely collates tax information from the other group members on supplies made out of the VAT Group and supplies received from outside the VAT group and submits a single combined return. It does not shoulder any responsibility for other matters. This means that an authorised signature from a VAT group member who wants to opt to tax is still required, or alternatively the group member wishing to opt their building can grant appropriate authority to the VAT Group representative member to opt to tax on its behalf.

2. Wet signatures

These are currently necessary, as they remain the best way of ensuring that the appropriate authority has been granted and that the authority is in respect of a specific and binding decision arising out of Part 1, Schedule 10 of the VATA. However, alternatives are being explored by the Making Tax Digital team but for the moment the requirement, for wet signatures to be provided, stands.

3. Extra Information on VAT Form 1614A

A suggestion was put forward that the provision of additional information on the Form 1614A could assist in clarifying the position when the title of an organisation does not always conform to its legal status. This point is noted and we will bear it in mind when the OTT Unit next reviews this form.

4. Does the table of authorised signatories apply to other 1614 forms including notification of a revocation of an OTT?

The answer is yes as does the suggested form of words to be used in an authorisation letter (see paragraph 7.6 of Notice 742A, - subheading "*suggested form of words for an authorisation letter*"). This wording states that the identified individual is authorised to "*act as our agent in all matters relating to the notification and submission of an option to tax on our behalf and in all matters covered in Part 1, Schedule 10 of the VAT Act 1994 unless otherwise specified in writing*".

5. Additional categories of authorised signatories

It is intended to add three further examples of authorised signatories to the list at paragraph 7.6 of Notice 742A Option to tax. They are –

i) A corporate body acting as a Director, Trustee or Company Secretary. In these cases, any office holder or employee who is so authorised by the corporate body will be accepted as being an authorised signatory. This also assumes that such a corporate body has itself acquired any necessary authorisation from the owner of the property in question.

ii) Overseas entities (e.g. Luxembourg SARLs) - Director/Manager

iii) Power of Attorney – Anyone who has been granted a power of attorney to administer/manage the tax affairs of the owner of a property.

Finally, HMRC would like to record their appreciation for the contributions and assistance provided by members of the LPLG in this matter and to assure the members that we have considered all responses carefully even though not all suggestions have been referred to in VAT Notice 742A.