Land & Property Liaison Group (VAT) meeting – 21st January 2020, held at 10 South Colonnade, 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

It was agreed that future LPLG meeting minutes would include a list of attendees and the organisations they represented, as happens with the minutes of the Joint VAT Consultative Committee. A list of attendees for this meeting is set out in Annex 2.

Matters arising from previous meeting (17th May 2019)

1. Authorised signatories – OTT notification: Following the previous meeting, HMRC had set out its position regarding the application of the relevant associate rules in the context of OTT notifications. Further clarification had been sought on this in advance of this meeting, in particular whether HMRC would accept as valid an option exercised by one member of a VAT group, such as the representative member, and notified by an authorised signatory of that member, in respect of property owned by any other member of the VAT group.

2. It was noted that if this were the case, there would be an operational benefit to HMRC's OTT unit, which currently expends considerable resource in maintaining records of the relationships between OTTs made by different members of a VAT group.

ACTION POINT 1a - HMRC to respond in writing to the further clarification sought on this matter by end of February 2020.

Please refer to our attached responses Annex 1.

ACTION POINT 1b- HMRC to consider amending the words 'Director or company secretary of the group member that owns the property' in the list of authorised signatories in Notice 742A para 7.6 to 'Director or company secretary of the group member that is exercising the option'

Please refer to our attached responses 1 and 2 in Annex 1.

3. *VAT on remedial works to cladding*: Referring to discussion at the last LPLG meeting, HMRC confirmed that 'person constructing' status is transferred in the context of statutory transfers of assets between local authorities. HMRC referred to RCB 27/14.

ACTION POINT 2: HMRC to circulate to LPLG email response provided to CIPFA representative on this point. Discharged. (Copy attached response 3 of Annex)

4. *Impact of Mydibel on CGS adjustments:* At the previous meeting HMRC had indicated that it was considering its position as regards the impact of the CJEU Mydibel decision. By way of update, HMRC noted that: "In respect of the CJEU decision Mydibel SA, which looked at a sale and leaseback of a building, the sale and leaseback having been entered into simply to 'raise capital'. The court OFFICIAL decided that the particular circumstances of the transaction in that case, did not require an adjustment for the purposes of the Capital Goods Scheme. Deductions and Financial services VAT Policy team have considered the decision and the present rules for adjustment in respect of the sale of a capital item in accordance with regulation 115 of the VAT regulations 1995, continue to apply"

5. In subsequent discussion greater clarity was sought on HMRC's position and whether HMRC were in effect disregarding the Mydibel decision or whether HMRC only considered the decision to apply in cases where the facts and circumstances very closely accorded with those in Mydibel.

ACTION POINT 3: HMRC to circulate in writing the update on Mydibel provided at this meeting Discharged.

ACTION POINT 4: NHF representative to reformulate request for clarity on HMRC's position, including illustrative examples.

6. Forfeit deposits – HMRC had circulated its written response to a BPF query on this matter and it was agreed as closed.

7. Melbourne – HMRC had circulated this decision, as agreed.

Template query – construction and DIY claims (timing of submission)

8. In response to a query raised by the ICAEW, HMRC confirmed that the production of a completion certificate is only one of several pieces of evidence that should be taken into account in determining whether a DIY dwelling had been completed and was ready for occupation. HMRC cited case law that supported this position. They did not agree with the decisions in Farquharson nor, to the extent that it concerned this issue, Swales.

9. LPLG members noted that the completion certificate was an objective measure and as such easy for taxpayers to understand. HMRC were aware that this was an area where uncertainty may exist for taxpayers and policy and operational teams were working closely to explore how the DIY claim process could be made more efficient. HMRC added that the purpose of the DIY scheme was to support VAT parity between those building their own houses and those who build houses as a trade.

10. In addition, HMRC were taking a sympathetic approach towards "reasonable excuses" provided by taxpayers who submitted DIY claim forms outside of the filing window. HMRC were also reviewing cases that had been put forward for litigation on this basis, with the aim of withdrawing them where taxpayers had provided a reasonable excuse.

11. HMRC were also exploring whether the relevant Regulations could be amended so as to deal with some of the problems and were soon to publish a new version of the DIY claim form.

ACTION POINT 5: HMRC to circulate draft of new DIY claim form and guidance for LPLG feedback prior to publication. Update given at point 5 of Annex 1

Template query – paragraph 4.3 of Notice 708

12. In response to a query from the BPF, HMRC agreed that the guidance on input tax at paragraph 4.3 of Notice 708 was unclear and that it would be changed.

ACTION POINT 6: HMRC to circulate written response to BPF template query.

(Please see attached copy at point 6 of Annex 1 below.)

ACTION POINT 7: HMRC to amend paragraph 4.3 of Notice 708 to provide a fuller explanation on input tax recovery. In progress. (Please see attached response at point 7 below)

Template query – assignment of call options

13. In response to a query from the BPF regarding the VAT treatment of the assignment of call options, HMRC noted that the guidance in paragraph 7.4 of Notice 742 remained applicable and applied to assignments as well as grants. However, HMRC was currently in litigation on this point and could therefore not provide any substantive response to the BPF's query. HMRC was unable to indicate whether, in the particular litigation, it was arguing for taxation or exemption.

14. It was noted that the VAT registration team and OTT unit often have to consider whether supplies are taxable, including, on a regular basis, the assignment of call options. Further guidance in this area would therefore be welcome.

15. The litigation referred to in paragraph 13 above was *Landlinx Estates Ltd*. The FTT found for the appellant, and HMRC is not appealing the decision.

ACTION POINT 8 – LPLG members to provide HMRC with any relevant examples.

Any other business

16. At the meeting it was noted that the Supreme Court was yet to decide whether it would allow an appeal in the case of *Fortyseven Park Street*. Following the meeting the Supreme Court rejected the traders request for leave to appeal stating that in effect the matter is beyond doubt and fully agreeing with the CoA. HMRC intends to update the Notice and Guidance as soon as possible to reflect the findings of the CoA.

17. The revised version of Notice 742 that had previously been circulated to the LPLG would not now been published, but work on the Notice was now resuming. LPLG members suggested that Notice 708 needed to be reviewed and updated to address a number of technical points, and issues with structure and cross-referencing. HMRC welcomes the LPLG's comments on the revised draft of Notice 708 and looks forward to

18. LPLG members reported that the tone of letters sent by HMRC to taxpayers when they sought to de-register having previously made an OTT, or request a VAT reclaim, was often perceived as aggressive and threatening by taxpayers. For instance, letters did not mention that there may be no VAT liability upon deregistration and focused very heavily on the potential for penalties if a VAT reclaim request was incorrectly made. HMRC agreed to review these.

ACTION POINT 9: LPLG members to send HMRC examples of communication perceived as aggressive and provide feedback on how these could be improved.

19. In response to a query from CIOT, HMRC reported that there were no plans to re-issue specific guidance on VAT issues frequently encountered by the social housing sector, although HMRC could reconsider this if there were strong demand from the sector.

20. The LPLG considered how the "golden brick" rules might apply in the context of dwellings built using modern methods of construction, such as modular building. It was felt that the point at which it could be determined that there was a residential building under construction would depend on the facts and circumstances of each case, but that the same basic principles would apply as for dwellings built using traditional building techniques.

21. HMRC indicated that, whilst 'person constructing' status generally required the building to have progressed beyond foundation stage, it might, in individual cases, be enough that there was substantial infrastructure in place.

22. HMRC confirmed that, in a development which included commercial elements as well as dwellings, 'person constructing' status did not require the dwellings to be under construction, but only the building. The BPF's VAT Committee was planning a visit to a modular housing factory later in the year and would extend the invitation to interested HMRC officials.

ACTION POINT 10 Action carried over from last LPLG meeting - HMRC to confirm whether 'person constructing' status is transferred in the context of statutory transfers of assets between local authorities. (Please see point 8 of annex 1)

Date of next meeting:

• The next meeting will take place virtually and a date and time will be confirmed as soon as possible (though LPLG members expressed a preference for the afternoon).

Annex 1.

1. HMRC to respond in writing to the further clarification sought on this matter by end of 2020. (See Action Point 1a above)

At the January and May 2019 meetings of the LPLG, discussion took place regarding who has the authority to notify options to tax (OTTs) in particular whether a VAT Group representative member could notify an option on a property owned by and supplies made by another VAT Group member. The LPLG members rightly considered that the "relevant associate" rules meant that an OTT exercised by one member of a VAT group would be binding on all other members of the group at any time the property transferred subsequently to another VAT Group member within the VAT Group or to member who has left the VAT Group. HMRC agreed with this view. However, the issue was whether notification of an option to tax on a VAT Group property made by a VAT Group representative member who was not an authorised signatory of the VAT Group member who owned and made supplies from that property, and for which the VAT Group representative member accounted for and claimed the relevant tax on behalf of all VAT Group members, could be seen as qualifying as an authorised signatory. HMRC agreed to consider the matter further.

HMRC can confirm that,

1. HMRC have not and are not seeking to change or apply relevant associate rules in a different manner to that which they already have.

2. Irrespective of whether the representative member of a VAT Group or a VAT group member notifies an option to tax, it still needs to be either –

a. signed by an authorised signatory of the entity owning and intending to or making supplies of the property or properties to third parties outside the VAT Group, or

b. has been duly authorised by the relevant VAT Group member to notify an option to tax on its behalf (See paragraph 7.6 of Notice 742A option to tax)

It follows that any member of a VAT Group notifying an option to tax and who is neither an authorised signatory or who has not so been authorised by the property owning VAT Group member, will not have made a valid notification of an option to tax.

2. HMRC will amend as soon as possible the list of authorised signatories at paragraph 7.6 of Notice 742A in order to provide clarity. If it transpires that an invalid option has been notified then this should be capable of being corrected either by means of a belated notification or a purported option.

3. HMRC response ACTION POINT HMRC to circulate to LPLG email response provided to CIPFA representative on this point. (See ACTION POINT 2 above).

RCB 27/2014 answers this enquiry. The Brief states

"Revision to guidance concerning TOGCs of new developments of dwellings, relevant residential and relevant charitable buildings.

The first grant of a major interest (freehold sale or long lease) in residential or relevant charitable property by the 'person constructing' is generally zero-rated (as explained in Notice 708 Buildings and construction and VCONST - Construction). The zero rate is designed to ensure that the development of such properties is ordinarily, largely VAT free. We have traditionally taken the view that 'person constructing' status does not move to a person acquiring a completed building that is transferred as a going concern - this position is published in our technical manual in VCONST03560. However, recent cases in this area have highlighted that such transactions could lead to inequality of VAT treatment that is contrary to the purpose of the zero rate and could be in breach of the EU Principle of Fiscal Neutrality. Having reviewed the position, we now accept that a person acquiring a completed residential or charitable development as part of a transfer of a going concern inherits 'person constructing' status and is capable of making a zero rated first major interest grant in that building or part of it as long as: a) a zero rated grant has not already been made of the completed building or relevant part by a previous owner (for this purpose, HMRC consider that the grant that gives rise to the TOGC should be disregarded) b) the person acquiring the building as a TOGC would suffer an unfair VAT disadvantage if its first major interest grants were treated as exempt (for example, a developer restructures its business. This entails the transfer (as a TOGC) of its entire property portfolio of newly constructed residential/charitable buildings to an associated company, which will make first major interest grants. If these were treated as exempt, the transferee might become liable to repay input tax recovered by the original owner on development costs under the Capital Goods Scheme or partial exemption "claw back" provisions and would incur input tax restrictions on selling fees that would not be suffered by businesses in similar circumstances - we would consider this to be an unfair disadvantage) c) that person would not obtain an unfair VAT advantage by being in a position to make zero rated supplies (for example, by recovering input tax on a refurbishment of an existing building) The above guidelines also apply in respect of 'person converting' status (for buildings converted from non-residential to residential use) and 'person substantially reconstructing' status (for substantially reconstructed listed buildings).

Although 'person constructing' status may now transfer as part of the TOGC of a property, the 'change of use provisions' would still need to be considered in the case of relevant residential and charitable buildings, i.e. the change in policy on person constructing does not dis-apply the change of use provisions. Businesses are entitled to claim retrospective effect of this policy (subject to capping) if they fit within the above criteria.

Therefore, provided that there has not been a first grant of a major interest by a previous local authority, the local authority who takes over another local authorities' interest in the property under statutory transfer will maintain person construction status. For information we will be updating VCONST03560 accordingly.

4. HMRC RESPONSE - ACTION POINT HMRC to circulate in writing the update on Mydibel provided at this meeting, issued to members 28/01/2020 (See Action point 3 above)

"In respect of the CJEU decision Mydibel SA, which looked at a sale and leaseback of a building, the sale and leaseback having been entered into simply to 'raise capital'. The court decided that the particular circumstances of the transaction in that case, did not require an adjustment for the purposes of the Capital Goods Scheme. Deductions and Financial services VAT Policy team have considered the decision and the present rules for adjustment in respect of the sale of a capital item in accordance with regulation 115 of the VAT regulations 1995, continue to apply"

5. HMRC Response ACTION POINT 5: HMRC to circulate draft of new DIY claim form and guidance for LPLG feedback prior to publication. (See Action Point 5 above)

In progress. The draft will be circulated once ready for comment.

6. HMRC Response ACTION POINT 6: HMRC to circulate written response to BPF template query.

Who can carry out the work: The original contractor does not need to carry out the replacement cladding. Any contractor can carry out the re-cladding, provided that the person who requests the cladding has person constructing status. This is to ensure that the works fall within the closely related work of the construction of a qualifying zero-rated new build. Remedial work must be connected to the original build: HMRC has not changed their position, for zero-rating to apply, the works must be closely linked to the construction of a new build as this is the only time zero-rate applies to the construction. Remedial works are fixing works that have been found as faulty. However, that being said if a property has been signed off as complete, it has been agreed that it has been completed to the appropriate standard and is no-longer in the state of construction, this would mean that any works found to be faulty at a later date cannot be seen as in the course of constructing a building as the building has been signed off. There is no link for the works to be 'in the course of construction' in order to qualify for zero-rating or reduced-rating within the terms of the legislation. In these instances, HMRC will accept that following the sign-off (if there is a term in the sign-off agreement to carry out remedial work/faulty work) we can tie this work back to the original construction of building to accept that it complies with the relevant legislation. The work of repair and maintenance has always been standard rated and we cannot extend the VAT relief to works to properties that are not in the course of construction. Definition of remedial: works to repair a property that is faulty, to ensure the work complies with the original planning consent.

7. ACTION POINT- HMRC to amend paragraph 4.3 of Notice 708 to provide a fuller explanation on input tax recovery. (Action Point 7 above).

Thank you for bringing this to our attention. We believe the PE guidance is clear but will review para 4.3 of VAT Notice 708 and if necessary, revise the suggested paragraph to ensure it accurately reflects the correct position.

8. ACTION: HMRC to confirm whether 'person constructing' status is transferred in the context of statutory transfers of assets between local authorities. (See Action Point 10 above)

The answer to this question is addressed in Annex 1 point 3.

9. In addition HMRC provided the following response regarding the DIY Scheme and the importance of completion evidence.

> "Policy do not agree with the decision in Farquharson or Swales. In Farquharson the Judge's decision in para 43 & 44, stated that the meaning of completion in Reg 201(a) means, that

the issue of a completion certificate is the primary source of completion and only if this is not available would HMRC accept other evidence. A Similar view was taken in the case in Swales. It is Policy's view that Reg 201 is not a hierarchical provision and other evidence of completion has just as much weight as the completion certificate, when determining the date of completion. Policy consider that provided there are no outstanding planning conditions to be complied with and the house is fully functional (i.e. having a bathroom, kitchen, heating, etc.), then the house is considered to be habitable and therefore complete. The reason policy did not argue the Reg 201(a) point in Farquharson, is that based on the facts of this case, the courts correctly identified that the completion certificate was the correct date of completion. Swales is a little bit more complicated, as it was not clear what part of the law HMRC refused the claim and there were a number of errors made by HMRC, so this is the reason why we did not defend. Policy have taken these cases seriously and we will be seeking SOLS advice regarding the prominence of the completion certificate following the decision in Swales and Farquharson. Following this advice HMRC will be making our guidance clearer."

10. ACTION: Tone of letters sent by HMRC to taxpayers when they sought to de-register

After a thorough review the tone of the letters and the wording itself have been changed, the letters should now act as reminders for customers as to their requirements, if there is any VAT liability at de-registration due to an OTT previously being made.

Annex 2 – list of meeting attendees

Attendees	
Ben Tennant	National Housing Federation
Colin Smith	British Property Federation
Dan Smith	Chartered Institute of Housing
Hugh Mitchell	Association of Tax Technicians
Ion Fletcher	British Property Federation
John Voyez	Chartered Institute of Taxation
Julie Towers	Institute of Chartered Accountants in England & Wales
Karen Regan	Chartered Institute of Public Finance & Accountancy
Martin Scammell	British Property Federation
Robert Plumbly	VAT Practitioners Group
Ronnie Brown	Law Society of Scotland

HMRC	
David Millar	
James Ormanczyk	
Keith Miller	
Lisa Allen	
Melanie Williams	
Phil Askew	
Rosie Brown	
Tracey Davies	