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Item 3.4a

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HMRC
3C/09 100 Parliament Street
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4 June 2018

Dear David,

Re: Car park income at country parks

I am writing in response to Marie Campbell's memo of 14 February 2018 on the VAT treatment of car park income at country parks. It seems an impasse has been reached between ourselves and HMRC on this issue, but I would like to respond to some of the assertions made in the memo of 14 February 2018.

Special legal regime
In Comune di Carpaneto Piacentino ad others (joined cases C-231/87 and C-129/88) the Court of Justice held that activities engaged in as a public authority are restricted to those that are governed by legislation which does not apply to non-public bodies. This is the generally accepted definition of a 'special legal regime'. This 'special legal regime' means that the relevant legal provision either compels a public body to carry out an activity or, if the provision is permissive, requires the public body to carry it out in a particular way that is different from that in which private sector providers might do so.

As detailed before, local authorities are specifically empowered, under Section 7(2)(b) of the Countryside Act 1968, to "provide facilities and services for the enjoyment or convenience of the public, including meals and refreshments, parking places for vehicles, shelters and lavatory accommodation" in connection with the provision of a country park.

In order to ensure that the local authority has recourse against motorists who do not pay for their parking at a country park, many local authorities have in fact used bye-laws and parking orders to enforce this.

In the memo it is stated that HMRC had compared the bye-laws and parking orders enacted by local authorities, with the terms and conditions of parking provided by private car park operators. It was stated that HMRC felt that these were similar.

I strongly disagree with your comments on this. Take for example, bye-laws. Bye-laws are a form of delegated or secondary legislation. If validly made, bye-laws have the force of law in the contexts and the areas to which they apply. Bye-laws are generally considered measures of last resort after a local authority has tried to address the local issue to which the bye-law applies through other means. Indeed a bye-law cannot be made where alternative legislative measures exist that could be used to address the issue. Bye-laws must always be proportionate and reasonable.

A local authority cannot just enact a bye-law. For a month beforehand, it has to publish the proposed bye-law in newspapers and in offices. It also has to provide a copy of the bye-law to any member of the public who requests it. The bye-law does not come into force of law until a month has passed. In the case of a bye-law enacted by a county council, once it is law, a copy must be sent to every district council in the county council's area.

I suggest that a private provider of car parking does not have to carry out the above procedures in order to charge for car parking at their sites and/or enforce payment, which rather is subject merely to the contract. I therefore feel that the comparison made by HMRC is not like with like, and that parking at country parks is provided under statutory powers that do not apply to private providers and so amounts to a special legal regime.

Parking orders

I believe that that the issue of parking orders has been discussed in the recent court case of Borough Council of King's Lynn and West Norfolk. Local authorities are the only bodies that can use parking orders; these prescribe the tariff in force at the car park. This impacts on cases where overpayments are made, as the driver is within his/her right to go to the relevant council and ask for his/her overpayment to be refunded. This does not apply to private providers of car parking.

Other activities in a country park

The memo states that if HMRC allow the treatment of the provision of car parking in country parks by local authorities to be non-business under the legislation covered by the Countryside Act 1968, this will open the floodgates for local authorities to request non-business treatment of fishing permits, filming rights etc.

While the real argument here should be that HMRC's remit is to ensure that the correct VAT liability is always applied to an activity, even where that is properly non-business treatment, I can also state that local authorities have never considered extending non-business treatment to all activities provided in country parks as suggested by HMRC. Therefore, HMRC need not be concerned that treating parking at country parks as non-business would mean that local authorities will then pursue non-business treatment across the board.

Distortion of competition

As discussed previously, country parks are set up under the Countryside Act 1968. When researching whether or not private providers can set up country parks under this Act, I could find no examples of parks that had been set up in this way.

Some country parks that appear to have been set up by private providers have actually been set up by the local authority under the legislation and then 'leased' to a private entity to run. This does not happen often but in my research I found this has happened in a number of cases where country parks are now being run by water companies and the National Trust. Therefore, these parks have been set up under the legislation by the local authority before they are leased, at a later date, to the private entity operator.

I note the examples that were provided in Annex A of the memo of the 14 February 2018. Please note my comments on these in the attached Annex A, which is based on research carried out on each site listed.

The last part of the memo mentions the ability of local authorities, as planning authorities, to dictate that any proposed development does not cause traffic congestion and that adequate parking is provided for the size of the potential development. It then states that this parking would be considered as part of the developers business and so VATable.

I fail to see how this impacts on the issue at hand. The example quoted above relates to parking provided by a private entity, which is not subject to legislation, parking orders or bye-laws. This is a totally different scenario from parking provided in country parks, the management of which is undertaken by local authorities as part of their role as a public body.

I feel that HMRC has been reluctant from the start to engage in a meaningful discussion on this issue, possibly because HMRC think that the 'Isle of Wight' case has impacted on all areas of parking provided by local authorities. However, I feel that it would be remiss of me not to explain why I feel this is neither correct nor the fairest approach and why I felt the need to respond to the memo of 14 February 2018.

I appreciate your continued patience in allowing me to voice my opinions on this issue.

Yours sincerely,

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