

Item 3.11a

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HMRC  
3C/09 100 Parliament Street  
London SW1A 2BQ

6 April 2018

Dear David,

**Re: Markets – liability of on-street market pitches**

I refer to Marie Campbell's memo of 14 February 2018 on the above, our brief discussion on the topic at the CIPFA VAT Committee meeting on 1 March 2018 and my brief e-mail reply dated 2 March 2018. Based on my research to date, I am now in a position to reply more fully and formally as follows.

It is understood from discussion at the CIPFA VAT Committee that the basis of your query is simply to understand the statutory rationale for the different VAT treatment of local authority on-street markets compared with local authority off-street markets. On that basis, it is important to agree that this reply is on the basis of no prejudice to other markets related issues that may be ongoing and is based purely on current custom and practice. To that end, I do not believe it appropriate to comment further on Annex A to the memo.

Regarding the question posed, notwithstanding your assertion that the query is not about street trading, this is precisely what most on-street markets are, it being necessary to distinguish at the outset between 'markets' and 'street trading'.

Markets are held under a variety of powers, including Royal Charter and legislation but most notably the modern statutory framework contained in Part III of the Food Act 1984. The use of such powers creates a variety of roles and responsibilities for the market operator or franchise holder as outlined below. Street trading, by contrast, is governed, outside London, by Section 3 of and Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1984 and is quite different; indeed paragraph 1 of Schedule 4 makes it clear that street trading is not 'anything done in a market or fair'. This distinction has caused some confusion in the past as street trading can look very like a market and be promoted as a 'market' but it is not a market in the legal sense.

There are, of course, some genuine markets that are held on-street but, in addition to using the markets powers cited, it is necessary in these cases to also invoke street trading powers in order to close the public highway or footway whilst the market is being held. In fact, given the need for planning approval to operate a market, some on-street markets are now operated solely under street trading powers as, once the local authority has designated a street subject to the street trading legislation (see below), it can then proceed with the granting of the requisite street trading licences and no other approvals are required.

For completeness, in London the vast majority of markets are operated under specific London street trading legislation, governing such famous markets as Petticoat Lane and Portobello, which, however, are not strictly 'markets' as they are governed by street trading legislation analogous to that applicable in the rest of the country.

These street trading provisions – which apply equally to highways, bridleways, footways and similar public rights of way – specify three categories of ‘street’ for the purposes of street trading: ‘licensed streets’, ‘prohibited streets’ and ‘consent streets’. Most local authorities running on-street markets, I understand, rely on the concept of ‘consent streets’ to regulate the market, these being streets in which trading is only permitted with the consent of the local authority (trading in licensed streets, I understand, is permitted without such express consent, while the concept of prohibited streets is, I suggest, self-explanatory).

As noted, therefore, once the local authority has designated a street under the street trading legislation, it can proceed with the granting of the requisite street trading licences for the on-street market without the necessity of obtaining other, often costly and lengthy, approvals.

As an alternative, however, the analogous grant of the right to erect tables and chairs on the public highway or footway in order to trade therefrom, as with ‘street cafes and bars’, is in Part VIIA of the Highways Act 1980, notably Sections 115B, 115E and 115F (the latter covering charging) which permit the local authority to grant the right to erect objects and structures on a public highway or footway, which, I suggest, would include market stalls.

For completeness, local authorities now operate markets almost exclusively under Part III of the Food Act 1984, treating the ‘stall rental’ as consideration for a licence to occupy land (as confirmed by the VAT and Duties Tribunal in *Tameside MBC [(1979) 93]*), though it is worth noting that such fees, in law, are actually ‘market tolls’.

I would add that another obvious differentiation between on-street and off-street markets is that, as a rule of thumb, the latter are often permanent or semi-permanent whereas the former inevitably require the closure to traffic of the public highway or footway and the temporary erection thereon of market stalls (which may be by the local authority or by the market traders themselves, which however, does not, I believe, alter the analysis).

Further, the assumption that off-street markets means indoor market halls is fallacious, as can readily be seen by visiting the outdoor (off-street) market in Leicester, generally felt to be the biggest in Western Europe and which comprises permanent stalls but which, while under cover, are open to the elements otherwise.

To conclude, given that your memo seems to perceive markets as simply retail trading, it is worthwhile commenting on the legal definition of a ‘market’, which – as alluded to above – is very specific, being a concourse of buyers and sellers brought together for mutual benefit: see the following taken from ‘Pease and Chitty’s Laws of Markets and Fairs’ (4th Edition edited by Edward F Cousins LL.M. BA and Robert Anthony M.Soc.SC LL.B), which I understand is something of a ‘bible’ on markets law:

*Definition of a market* – The franchise right to hold a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given (see *Chatterton VC in Devonshire v O’Brien* (1887)).

No-one can lawfully hold such a franchise without a grant from the Crown or authority of Parliament, i.e. an authorising statutory power.

The reason for the need for the grant to be by the Crown or statutory authority is to secure that trade is only carried out subject to proper regulation, for the enforcement of law and order and to ensure publicity of sales.

To take excessive tolls, however, is unlawful and grounds for the forfeiture of the franchise. The market must be freely open to all buyers and sellers subject only to duly authorised tolls.

Furthermore, a ‘concourse’ in this context means a coming together of buyers and sellers for common purpose, not a succession of persons coming together with the pre-determined object of buying and selling from or to particular individuals, as with retail trading (see *Scottish Co-operative Wholesale Society Ltd v Ulster Farmers Mart Ltd* (1960)).

I would add two final points from this definition.

As alluded to above, what we invariably refer to as market stall rentals are actually, under markets law, tolls not stall rentals. Applying this to the distinction between off-street and on-street markets,

while so-called stall rentals at the former are, as noted, strictly, market tolls, those levied in respect of on-street markets are actually statutory street trading licences.

And on the need for a market to be governed by law and regulation, this is very important due to the legal concept of 'market ouvert' (ie 'open market'), under which, where goods are sold in a market, subject to usage of the market to effect the transaction, the buyer always gains good title to the goods (providing bought in good faith) per Section 22(1) of the Sale of Goods Act 1979. As can readily be seen, this legal protection is lost where the 'market' is actually street trading.

I trust this answers your query.

Yours sincerely,

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