

Item 3.11c

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19 April 2018

Dear David,

Re: Markets – liability of on-street market pitches

Thank you for your response dated 6 April 2018 on the above topic, further to the query raised in Marie Campbell's memo of 14 February 2018 on the distinction between local authority on-street and off-street markets, and my reply thereto of 4 April 2018.

First I must defer to your superior knowledge on the concept of 'market ouvert' – it was indeed repealed (to the extent enacted by Section 22(1) of the Sale of Goods Act 1979) by Section 1 of the Sale of Goods (Amendment) Act 1994. I do not believe this particularly impacts on the definition of 'market', however, albeit it clearly does remove one 'advantage' of a market over retail trading.

For completeness, I do believe the very specific definition of 'market' – as exemplified by reference to 'Pease and Chitty's Laws of Markets and Fairs' – does remain important, that a 'market' is a concourse of buyers and sellers brought together for mutual benefit. Whether this has any impact for VAT purposes is, I suggest, a wider question for another day and does not address the distinction between on-street and off-street markets.

Second, I would explain that my previous reply was based both on my research and understanding, as undertaken in 2007 when the VAT treatment of local authority markets was previously raised at the CIPFA VAT Committee, and input from the National Association of British Market Authorities (NABMA – who incidentally did not spot the out-dated reference to 'market ouvert!').

Turning to the question at hand, I agree that the primary difference between local authority on-street and off-street markets is likely, in most cases, to be between street trading on the one hand and a genuine market on the other. I fear there is a danger, however, that we will become 'blinded' by this terminology and that the key difference to focus on for VAT purposes is under what statutory powers local authorities run markets, be that on-street or off-street.

As stated in my previous reply, my information and understanding is that the overwhelming majority of local authority on-street markets, while described as 'markets', are actually run under the street trading provisions in Section 3 of and Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1984 (or Part III of the London Local Authorities Act 1990 in Greater London). By contrast, local authorities generally now run off-street markets under Part III of the Food Act 1984 (whether or not historically provided for by Royal Charter or earlier legislation).

While that does not preclude some genuine markets – as provided for by Royal Charter and/or legislative provisions – being held on-street, as indicated in my previous reply, this generally requires the authority to also invoke the street trading powers in order to close the public highway or footway while the market is being held.

Although a definitive answer in each case must depend on the precise individual circumstances, legal powers relied upon and how, for the most part I believe that:

- local authority on-street markets actually amount to street trading with income from traders constituting street trading licences
- local authority off-street markets are genuinely markets under law with income from traders constituting market tolls, as held to amount to consideration for a licence to occupy land in 'Tameside MBC' [(1979) 93]).

While I recognise the ongoing dispute as to whether off-street 'market tolls' can be regarded as consideration for a licence to occupy land, I suggest it is beyond doubt that street trading licences amount to a statutory licence granted by the local authority acting as such, and any fee or charge levied therefore must fall outside the scope of VAT under Section 41A of the VAT Act 1994.

Indeed, I would see this as analogous to the differential VAT treatment of on-street and off-street parking, where it is generally recognised that only the local authority can legally impose a charge for occupying the public highway, which charge must consequently fall outside the scope of VAT under Section 41A, even though the undoubtedly similar provision of off-street parking by a local authority is a business activity subject to VAT (being excluded from exemption as a right over land by subparagraph (h) of Item 1 of Group 1 of Schedule 9 to the VAT Act 1994).

For completeness, I would add the further distinction between on-street and off-street markets that I referred to in my previous reply, that, as a rule of thumb, the latter are often permanent or semi-permanent, whereas the former invariably require the closure to traffic of the public highway or footway (under the street trading provisions) and the temporary erection thereon of market stalls.

I trust this now resolves your query.

Yours sincerely,

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