

VAT Agenda

Construction (White Goods)

Background

A number of VAT registered construction companies have used the opportunity afforded by the 'Fleming' case to submit claims for input tax that they had been prevented from recovering previously by the provisions of the *Value Added Tax (Input Tax) Order 1992* (the 'blocking order') and its predecessors.

The 'Fleming' claims in question are in respect of VAT incurred on finished and pre-fabricated furniture; materials for the construction of fitted furniture other than kitchen furniture; domestic electrical and gas appliances other than those designed to provide space heating or water heating or both; and carpets or carpeting material. These items were incorporated into new dwellings that were subsequently sold at the zero rate of VAT.

HMRC's view is that there is **no legal basis for these claims**.

The sole or main argument put forward by these companies is that the application of the 'blocking order' to the above 'building materials' is *ultra vires*. Their reasoning is that the 'blocking order' that was in place at 1 January 1979 was extended in 1984 and 1987 to include these items. That extension is *ultra vires* because *Article 176 of the Principal VAT Directive (formerly Article 17(6) of the 6th VAT Directive)*, which provides for the blocking of input tax deduction, states that 'Member States may retain all the exclusions provided for under their national laws at 1 January 1979'.

Some of the companies concerned had also put forward a secondary argument. They maintain that the 'builders' block' only affects 'goods other than building materials' that have been incorporated into a building. 'Goods other than building materials' that have been installed as fittings in a building have not been incorporated into a building. Such goods are not affected by the 'blocking order' and the companies are entitled to take credit for input tax in respect of them.

The companies appear to be basing their argument on the fact that the term 'incorporates' is not qualified for the purposes of the 'blocking order'. The companies contend that there can be no read across to *Note 23 of Group 5 of Schedule 8 to the VAT Act* which does qualify the term. Note 23 to the Group states that for the purposes of Note 22 to the Group, 'incorporation of goods in a building includes their installation as fittings'. However, given the context of Note 22, the goods referred to can only be 'building materials' and not 'goods other than building materials'.

The way forward

Whilst this case is not yet decided there are opportunities to submit protective claims to HMRC. These claims will initially be rejected and should be followed by Appeals to the VAT Tribunals. When a lead case is identified these claims will be stood behind the lead case to await a decision. Needless to say it will require the Courts to overturn the UK interpretation of EU legislation and this could take some time.

