Updated 6 March 2023

VAT on sporting fees - update

HMRC concede that charges for council sports facilities are non-business

HMRC's previous guidance was that local authority sports and leisure services may either be taxable or exempt from VAT. This has been challenged in the courts, with test cases for England, Scotland and Northern Ireland going on for several years.

In *Chelmsford City Council* [2020] UKFTT432(TC) the First Tier Tribunal determined that such services are provided under a 'special legal regime' and can be treated as 'non-business', providing that does not give rise to significant distortions of competition.

HMRC lost an appeal on the first part of that decision, where they did not accept the reasoning that local authority sports services are subject to a 'special legal regime'. The Upper Tier Tribunal [2022] UKUT149(TCC) dismissed that appeal in March 2022.

On 26 January 2023, HMRC advised Chelmsford City Council that they would NOT be pursuing the 'significant distortion of competition' argument and accepted that local authority sports services can be treated as non-business and outside the scope of VAT.

We suggest that councils consider the following steps in relation to sports facilities that they charge for, bearing in mind that HMRC might refuse some claims:

1) VAT registered councils charging VAT on the use of sports facilities or services by the public (including through their membership of sports teams) should:
    a. stop doing so as soon as possible and certainly before 1 April 2023, even if there is an option to tax in place on the facilities,
    b. compile and submit a claim to HMRC for a refund of such VAT declared for the past four years, and
    c. consider whether to refund that VAT to bodies/people charged for sports.

2) Any council not VAT registered that has have avoided reclaiming VAT on the cost of sports facilities because they were considered taxable supplies, should reclaim any such VAT incurred (but not reclaimed) over the last 4 years.

3) Any council that has treated sports services as VAT-exempt and including the VAT incurred on those activities in their partial exemption calculation should:
    a. Exclude that VAT from their 2022/23 calculation,
    b. Check if they had any irrecoverable VAT in their 2018/19 to 2021/22 calculations, and review the calculation to see if they can now reclaim it,
    c. if they have done a 7-year average calculation for any of those years or to forecast a future year, review it to see if they can recover any further VAT.

HMRC have issued brief guidance https://www.gov.uk/government/publications/revenue-and-customs-brief-3-2023-changes-to-vat-treatment-of-local-authority-leisure-services.

This confirms their analysis that there would be no significant distortion of competition and explaining the steps councils should take to reclaim any VAT.

Councils should email any claim for reimbursement to: lasector.mailbox@hmrc.gov.uk and include '2023 LA VAT non-business' in the subject line of the email. VAT returns and VAT126 claims should not be adjusted and the procedure above should be used.

Please note that VAT126 reclaims must be submitted within 4 years of the end of the month in which the supply of goods or services occurred, so a council can still claim for March 2019 until the end of this month.

For VAT-registered councils, adjustments cannot be made more than 4 years after the due date of the VAT return that is being amended, so the oldest return that can be claimed for is the one for the January to March 2019 quarter, unless a council submits monthly returns or has non-standard VAT quarters.

In reclaiming any VAT charged, councils must avoid "unjust enrichment", which might occur if they reclaim the VAT and keep it, rather than refunding it to customers. Where council facilities are subsidised and operate at a loss due to low charges, HMRC are unlikely to consider that unjust enrichment.

An option to tax only applies to business activity and no VAT is charged on non-business fees. However, the option to tax will still apply to any non-sporting hire and would apply if the site was sold, so councils with one in place shouldn't cancel their VAT registration.

HMRC have not specified how far their interpretation of "sport and leisure services to members of the public" extends, but the Chelmsford case referred to pitches for football, rugby, hockey, netball, cricket, tennis and bowls, as well as facilities for swimming, ice skating, squash, table-tennis and badminton.

It seems likely that the decision in *Canterbury Hockey Club* [2008] EUECJ C-253/07 applies, confirming that 'individuals taking part in sport' includes those doing so via membership of a not-for-profit sports club, but we don't yet think that non-business treatment applies to hire by private businesses selling services to their clients.

Please note that the tribunal decisions only relate to charges for sporting services and should not be applied to meeting room hire, the provision of catering or sale of goods alongside sports, or other taxable or exempt business activities at this point.

If you are in any doubt as to whether an activity is affected by this change, please consult your county association of local councils in the first instance.

Disclaimer

This bulletin is only intended as a brief guide about a developing situation and councils should ensure they follow the Regulations and guidance on www.gov.uk, read the tribunal decisions and seek professional advice from us or others if they are in any doubt.

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