



VAT Voice[®]

The bi-monthly newsletter of VAT Advisers Limited

March/April 2010

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HMRC REMINDER ON THE CLOSURE OF ITS OLD BANK ACCOUNTS

HMRC has put a reminder on its website that during 2010, it will be closing its accounts at the Bank of England.

All of HMRC's bank account details changed during 2009, when HMRC moved its banking services from the Bank of England to Citi and Royal Bank of Scotland.

If businesses continue using the old bank account details, payments may be returned, and could end up reaching HMRC late with a resultant late payment penalty, interest or surcharge.

Use the link below to access the page on HMRC's website containing detailed guidance and new account details for the various types of tax and payment methods:

<http://www.hmrc.gov.uk/payinghmrc/index.htm>

HMRC TO CHANGE ITS DEFINITION OF WHEN VAT CHEQUE PAYMENTS WILL BE TREATED AS 'RECEIVED'

HMRC have recently put an announcement on their website which says that, from 1 April 2010, there will be an important change in the Department's definition of when a VAT cheque payment by post will be treated as 'received'.

From that date, all such VAT cheque payments will be treated by HMRC as being 'received' on the date that cleared funds reach HMRC's bank account. Consequently, businesses will need to allow enough time for the payment to reach HMRC **and** clear into HMRC's bank account on or before the due date of the relevant VAT return (note that the change does not affect any cheque payments made by Bank Giro). The announcement goes on to advise that if a cheque payment does not clear by the due date, the business may be liable to a surcharge for late payment. There is then a recommendation to make VAT payments electronically as they are safe and secure and give up to seven extra calendar days to pay (or up to ten extra calendar days for payment by Direct Debit). The announcement closes with a reminder that if a business submits VAT returns online, it must pay electronically in any case.

It may just be a coincidence, but it is curious that this new definition will be coming in on the same day that online filing becomes compulsory for all new VAT registrations and existing VAT registrations with a turnover above £100,000. It is difficult to view it as anything other than a means of persuading those businesses with a turnover below £100,000, which can continue to use paper VAT returns for the time being if they so wish, to simply give up any such intention and register for online filing immediately.

The change of definition may well produce a flurry of surcharge appeal cases, with businesses arguing that the additional three working days needed for the cheques to clear is unreasonable. It might also be that the change has wider implications than perhaps was intended, as the date of payment can be a critical issue in other areas of the tax such as the cash accounting scheme. It remains to be seen whether this same 'cleared funds' definition will be applied to those things as well.



Latest VAT News

REVENUE & CUSTOMS BRIEF 02/10

VAT: Lennartz accounting – new policy following ECJ case

Announcement of a policy change by HMRC following the ECJ's decision in the VNLTO case (C-515/07).

The case considered whether Lennartz can be used by a taxpayer who engages in outside the scope activities. The VNLTO decision made it clear that EU law never gave a right to use Lennartz in such circumstances.

HMRC say that the revised position set on Lennartz in VAT Information Sheet 14/07 now only has limited application, and should be read in conjunction with this Brief. HMRC say the implications of the VNLTO case are that, from 22 January 2010, Lennartz can only be applied in the following circumstances:

(a) the goods are used partly for making supplies in the course of an economic activity with a right to input VAT deduction (i.e. UK taxable supplies, supplies that would be taxable if made in the UK, and certain financial and insurance supplies to non-EC customers); and

(b) the goods are also used partly for the private purposes of the trader or his staff, or for other uses wholly outside the purposes of the taxpayer's enterprise or undertaking.

In future, where Lennartz accounting is not available, and the goods are to be used for both economic and non-economic business activities, subject to transitional provisions, the input VAT must be apportioned between the different activities on the basis of use/intended use. The VAT attributed to the economic activities is recoverable to the extent that the economic activities give rise to supplies with

input VAT deduction. The VAT attributed to the non-economic business activities is not input tax and cannot be recovered. Businesses for whom Lennartz accounting has effectively never been available, would normally be expected to unravel any previous arrangements, and adjust both any input tax claimed and any output tax accounted for.

However, to ease the administrative and financial burden on businesses that have adopted Lennartz accounting under HMRC's pre-VNLTO policy, Lennartz accounting can continue to be used in respect of the assets concerned. HMRC say that businesses taking up this option must honour their commitment to account for the output tax imposed under Lennartz accounting. Those businesses not wishing to take up the option must unravel the Lennartz accounting by adjusting their output tax and input tax.

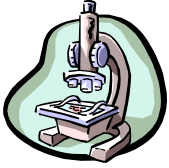
Businesses that are not permitted to use Lennartz accounting must apportion VAT incurred for both economic and non-economic activities on the basis of use and intended use from the date of the Brief. However, HMRC will consider claims from taxpayers who have already entered into binding commitments for projects on the understanding that Lennartz accounting will be available.

The Brief closes with a reference to Fleming claims submitted for Lennartz treatment for assets where VAT was incurred in accounting periods ending before 1 May 1997. HMRC will now review these claims and will reject those where the claimant had not taken up the option to use Lennartz accounting at the time the input tax was incurred and/or where the VNLTO decision means that the claimants were not entitled to use Lennartz accounting as there was no EU law right to do so.

*Latest VAT News (continued)***OTHER VAT NEWS****ISSUE OF ‘VAT NOTES 4/2009’**

At the turn of the year, HMRC issued VAT Notes 4/2009, which contains a very useful summary of recent and forthcoming changes in the VAT world. The subjects covered are as follows:

- **Changing the way HMRC check taxes** – from 1.4.10, HMRC will be making their compliance checks, also known as enquiries, visits, or inspections, simpler and more consistent.
- **Importers and exporters** – details of the requirement to have an Economic Operator Registration and Identification (EORI) number.
- **VAT and Excise wrongdoing penalty** – details of the new penalty coming in on 1.4.10 for unauthorised issues of VAT invoices, misusing a product so that a higher rate of excise duty is payable (e.g. putting red diesel in cars), and handling goods subject to unpaid excise duty
- **Failure to notify penalty** – the new penalty coming in 1.4.10 which is covered in the ‘In Focus’ section of this VAT Voice
- **Extension of the inaccuracy penalties** - from 1.4.10, the inaccuracy penalty regime will be extended to cover Excise Duty, Environmental Tax, Inheritance Tax, Insurance Premium Tax, and Stamp Duty
- **Flat rate scheme for small businesses** – a reminder about the 1.1.10 changes to the flat rate percentages to take account of the return to the 17.5% standard rate
- **VAT Margin Schemes** - note that Notice 718 has been split into three notices whereby the revised Notice 718 just covers the main Margin Scheme and Global Accounting, new Notice 718/1 covers the Second-hand Cars Scheme, and new Notice 718/2 covers the Auctioneer’s Scheme.
- **MLR registration of unsupervised advisers** – a reminder that business advisers such as accountants, auditors, tax advisers and bookkeepers who are not supervised by a designated professional body should have registered their business with HMRC.
- **Insurance introductory services** – reference to R&CB 59/09, which set out HMRC’s position following the High Court judgment in Insurance-wide/Trader Media Group case, which said insurance introductory services provided via the Internet are exempt. HMRC have appealed to the Court of Appeal.
- **Tour Operators’ Margin Scheme** – a reminder of the 1.1.10 removal of the long-standing ‘opt-in’ and ‘opt-out’ concessions from the TOMS.
- **New VAT numbers** – notice of a new series of VAT numbers due out in early 2010, which will be in the same basic format beginning with ‘100 XXXX XX’.
- **Online VAT returns** – notice that from 1.4.10, only existing VAT registrations with turnover below £100K will be able to submit paper returns. All other existing registrations, and businesses registering in future, will have to submit and pay their VAT returns online



In Focus

The new ‘failure to notify’ penalty

From 1 April 2010, there will be a new penalty regime in place for failing to register for VAT on time. Under Schedule 41 Finance Act 2008, the new penalty will be behaviour-based in line with the cross-tax penalties that were introduced from 1 April 2009 for ‘inaccuracies’ on VAT and other tax returns. The penalty bands will have maximum and minimum limits, with potential mitigation available depending on the degree of assistance provided to HMRC in establishing the net tax liability.

The outgoing regime

Under the current outgoing penalty scheme the penalty amounts are quite rigid in that there are fixed penalty amounts as follows:

- Reasonable excuse – 0% penalty
- Registering up to 9 months late - 5% penalty
- Registering up to 18 months late – 10% penalty
- Registering more than 18 months late – 15% penalty

For unprompted disclosures, HMRC give a minimum 25% discount off the penalty rate (e.g. a 10% penalty reduces to 7.5%, and a 15% penalty reduces to 11.25%).

The incoming regime

Under the new incoming regime, the penalty bands will be the same four categories introduced for the inaccuracy penalties last year; namely:

- ‘reasonable excuse’
- ‘not deliberate’
- ‘deliberate’
- ‘deliberate and concealed’

‘Reasonable excuse’

There is no penalty due where a reasonable excuse exists. This is the same basic position as with the outgoing regime.

HMRC give the following as examples of a reasonable excuse:

- the death of a partner or close relative
- you, your partner, or a close relative had a serious illness

‘Not deliberate’

Where notification is unprompted and made within 12 months of the registration date, there is a minimum penalty of 0%, and a maximum penalty of 30%, depending on the level of mitigation. If the notification is unprompted but more than 12 months late, the minimum penalty is 10% and the maximum penalty is 30%, depending on mitigation. Prompted disclosures made within 12 months carry a minimum penalty of 10%, and maximum penalty of 30%, again depending on mitigation. Prompted disclosures after 12 months have a minimum 20% penalty and maximum 30% penalty.

In Focus (continued)

‘Deliberate’

There is no 12-month dividing line for deliberate penalties. Quite simply, where the notification is unprompted, there is a minimum penalty of 20%, and a maximum penalty of 70%. Where prompted, there is a minimum penalty of 35%, and a maximum penalty of 70%, depending on the level of mitigation.

‘Deliberate and concealed’

Not surprisingly, there is no 12-month dividing line for deliberate and concealed penalties either. Where unprompted, there is a minimum penalty of 30%, and a maximum penalty of 100%. Where prompted, the minimum penalty is 50%, and the maximum penalty 100%, once again depending on the level of mitigation.

Mitigation

As mentioned earlier, the penalty amount can be reduced depending on the level of assistance given to HMRC in establishing the arrears. The following are quoted by HMRC as ways in which a mitigation reduction can be earned:

- telling HMRC everything about the failure and tax liability – *up to 30%*
- assisting HMRC in working out the net tax due – *up to 40%*
- giving HMRC access to your figures – *up to 30%*

Summary

On the plus side, the new regime is better than the outgoing one because there is scope for a 0% penalty for an unprompted disclosure within 12 months. On the downside, there is no longer a maximum penalty of 15% - depending on the type of behaviour involved, and whether the notification was prompted or not, we now have scope for a penalty of 100% of the net tax liability.

The other downside is that each case will arrive at its own penalty level, again depending on the behaviour and mitigation involved.

The table below gives a useful quick reference guide to the regime:

Reason for failure to notify	Disclosure	Minimum penalty	Maximum penalty
Reasonable excuse		No penalty	No penalty
Not deliberate	Unprompted	0% within 12 months, otherwise 10%	30%
	Prompted	10% within 12 months, otherwise 20%	30%
Deliberate	Unprompted	20%	70%
	Prompted	35%	70%
Deliberate and concealed	Unprompted	30%	100%
	Prompted	50%	100%

As is the case with all new cross-tax penalties being introduced by HMRC, there is a strong emphasis and incentive on making unprompted disclosures. This is consistent with the Department’s risk-based approach to collecting tax, which is intended to bring in the maximum amount of tax using the minimum amount of resources (i.e. staff).



VAT Cases

VAT Voice – March/April 2010

TRIBUNAL SAYS 'INFORMATION SECURITY' BODY CAN BE EXEMPT

This case considered whether the Appellant, a body which represents information security professionals, could qualify for exemption as a not-for-profit professional body.

The Tribunal established that there was no written examination required for entry into the profession (entry was by oral exam to test practical application of knowledge), and that information security can only be studied at two UK institutions. However the intention of the Appellant was to foster professional expertise amongst its members so that, in time, information security might become recognised as a profession. The Appellant existed to show that people were competent in the field, and also spoke to governmental and regulatory bodies.

The Tribunal came to the conclusion that information security was not a profession, but held that, as the exemption in Item 1c Group 9, Schedule 9, VATA 1994 mentioned both professions and employment, the exemption was wide enough to cover the Appellant. As such, it could be viewed as a non-profit making association fostering professional expertise, and could exempt its membership subscriptions.

Institute of Information Security Professionals (TC00303)

TRIBUNAL SAYS APPELLANT SOLD STANDARD-RATED 'HOT FOOD'

The Appellant delivers food to customers by motorcycle. Its menu includes salads, Italian, European, Japanese, Chinese, Thai and Indian dishes, and also puddings, wines and beers, and snacks. In July 2008, the Appellant submitted a £184,945 voluntary disclosure claim on the basis that some of its food items were zero-rated. HMRC rejected the claim.

Group 1, Schedule 8 of VATA 1994 provides for the zero rating of food, and is notoriously complex. However, one of the exceptions to zero rating is the supply of 'hot food', which is defined as:

- (i) food which has been heated for the purposes of enabling it to be consumed at a temperature above the ambient air temperature and*
- (ii) is above that temperature at the time it is provided to the customer*

The food items in dispute were aromatic crispy duck pancakes, spring rolls, samosas, falafels, sesame prawn toast, onion bhajis, and various types of bread.

The Tribunal quickly concluded that all the items were delivered to customers above ambient air temperature. The issue was the reason for the heating, and on this point, the Tribunal was divided. One panel member considered there were two purposes for the heating, with the dominant one being to provide freshly cooked food. The Chairman disagreed, finding that demonstrating the food was freshly cooked and enabling it to be consumed hot were different ways of describing the same thing.

The Chairman differentiated zero-rated heated chickens on the basis that nothing was provided to maintain heat, whereas here, food was stored and transported with the aim of maintaining heat. The Chairman added that the only way to prove the difference between whether the food is meant to be consumed hot or cold would be to supply the items cold. Of course, a roast chicken would still be palatable cold.

With the Chairman's casting vote, the Tribunal found the items were standard-rated hot food. The appeal was therefore dismissed.

Deliverance Ltd (TC00289)

VAT Cases (continued 1)**TRIBUNAL SAYS LOLLY-MAKING KITS ARE SINGLE ZERO-RATED SUPPLIES**

This case considered whether the supply of a chocolate lolly making kit was a single zero-rated supply. Both sides agreed that it was a single supply, but HMRC saw it as being standard-rated, and had issued an output tax assessment to the Appellant for £95,856 in September 2008.

The kit comprised white and milk chocolate *flavour* buttons (i.e. not real chocolate), edible icing, 12 sticks, and a plastic mould that would make six themed lollies by melting the buttons in the mould. The mould was designed to be used only twice, as it was plastic and quite fragile, needing to be heated to make the lollies, and then flexed to remove them once cool. The buttons (not being real chocolate) and icing would be zero-rated baking products if supplied on their own, and made up over 80% of the total cost.

HMRC argued that the shape of the moulds (which were of Scooby Doo and other cartoon or TV characters) and the theme of the kit and its packaging, was the essential feature of the supply. The Tribunal, however, found that the essential feature was to make a zero-rated food product. The sticks and mould were ancillary to the main element, and were a means of better enjoying it, so the principles of *Card Protection Plan* applied. The kits put the customers in the position to make a product that would be zero-rated if they bought it readymade, and so a different liability could not apply to the kit than would apply to the completed products. As such, although the kit and readymade lollies were not, on the face of it, the same supply, the Tribunal held that they should be taxed as if they were. The appeal was upheld.

Supercook UK LLP & Dr Oetker UK Ltd (TC00332)

TRIBUNAL SAYS GOLFING TUITION FROM A COMPANY IS NOT EXEMPT

The Appellant was a three-way partnership comprising a golf professional, his wife, and their related limited company. HMRC accepted that golfing tuition supplied by the golf professional as a partner was exempt, but said that tuition supplied by him as director of the limited company was standard-rated. HMRC also said that tuition supplied by a partnership employee was standard-rated.

The Appellant said fiscal neutrality demanded that golf tuition given in the capacity of a company director should be exempt, because the same tuition was exempt when provided as a partner in a partnership. The same argument was presented for the employee of the partnership, who was also self employed, and whose tuition income was only exempt when he acted in the latter capacity. The Appellant had submitted refund claims for VAT overpaid on the taxable tuition, and argued that the 3-year cap (now four-year) could not be applied as the claim arose from a failure to implement the VAT Directive.

The Tribunal said that as neither the golf professional nor the employee was a body covered by public law with education as its aim, the only exemption possibly available was tuition given privately by a teacher, covering school or university education. The term 'privately' was defined by the ECJ in *Haderer* (later supported by the Court of Session in *Empowerment Enterprises*) as requiring the teacher to provide the tuition on his own account and at his own risk, something an employee would not do. The term 'acting independently of an employer' in the UK exemption reflects that definition of 'privately'. The Directive had been correctly transposed and there was no claim. Even if there had been, the UK had transposed the VAT Directive correctly and could rely on the three-year cap.

VAT Cases (continued 2)

The principle of fiscal neutrality was overridden by the terms of the VAT Directive, which envisaged different liabilities applying to the same supply of tuition, depending on the status of the supplier.

Marcus Webb Golf Professional (TC00323)

TRIBUNAL SAYS SELF-BUILT LOG CABIN IS ELIGIBLE FOR DIY CLAIM

This case concerned whether the Appellant's construction of a log cabin was eligible for a VAT refund under the DIY Housebuilder's Scheme.

In November 2007, The Appellant arranged the construction of a log cabin, which was a 'dwelling' for the purposes of Group 5 of Schedule 8, VATA 1994. She paid builders to construct the cabin, but personally bought certain materials used in its construction which were incorporated into the cabin. The builders zero-rated their construction services, and the Appellant submitted an application for refund of the VAT on the materials under the DIY Housebuilder's scheme. The scheme is covered by s35 VATA 1994, which provides for refunds of VAT to persons constructing certain buildings. The log cabin itself was subject to a number of planning conditions, including one barring occupation throughout February, and limitations on its continuous occupation and use as a main residence.

HMRC refused to repay the DIY claim, arguing that the zero-rating provisions within Group 5 of Schedule 8 VATA 1994 excludes the first grant by a person where there are restrictions on use. Note 13 in Group 5 excludes dwellings on which the grantee is not entitled to reside throughout the year, or where use as a principal private residence is prevented. They argued that Note 13 must be read into s35 so that no repayment of VAT was due if the building was subject to those restrictions. The Appellant argued that this

was unfair. There were 34 other log cabins on the same site that had been built for the site owners by builders who had purchased the materials themselves, and had zero-rated their supplies. The other log cabins were subject to the same planning restrictions, and it could not be right that one person should bear a VAT cost merely because they bought the materials personally.

The Tribunal saw that Note 13 relates specifically to the first grant of an interest and that s35, the legislation providing for the refunds of such VAT, makes no reference to 'grant of an interest', or the relevant Item 1 of Group 5. The Tribunal concluded, therefore, that the note has no relation or impact on s35 claims. HMRC also argued that s35(4), which states "*The notes to Group 5 of Schedule 8 shall apply for construing this section as they apply for construing that Group*", introduces the purpose and effect of the operation of the whole of Group 5. In applying a consistent interpretation of Group 5, HMRC added that s35 should be interpreted as including the Note 13 restriction. However, the Tribunal also dismissed this argument, finding that there was no reason to construe s35 as not being intended to relieve the exact hardship of the VAT cost incurred in the present case. The appeal was therefore allowed.

Mrs Irene Susan Jennings (TC00362)



VAT Tips

VAT Voice – March/April 2010

Charities – Make Sure You Don't Pay VAT On Advertising Costs!

VAT is a perennial problem for charities, as it can often be a non-recoverable cost. As such, it pays to make sure that zero-rated VAT relief is obtained wherever possible, and one common example is the cost of advertising. In this article, we take a quick look at the conditions under which a charity can get these costs zero-rated.

First of all, zero-rated relief on advertising is available to all charities, regardless of whether they are VAT registered or not. If a charity is not registered with the Charities Commission, it should be able to demonstrate charitable status through its written constitution, but if need be, written approval can be sought from HMRC.

If VAT has been charged on past advertising, it'd be worth going back to the supplier to see if they will refund the VAT paid or issue a credit note (subject to the 4-year time limit).

What is the scope of the relief?

Provided the advertisement is in line with the charitable aims of the charity, it can be on any given subject, including the recruitment of new staff. Furthermore, the name or logo of the charity does not need to be included for relief to be allowed. Also, the relief does not override charity law or the need to comply with the British Codes of Advertising or any other relevant regulations.

Which types of media can be used?

The zero-rated relief applies to any medium which communicates with the public. This includes all the conventional media such as television, cinema, billboards, on sides of vehicles, newspapers etc.

The relief can also apply where space is sold to a charity for advertising on other items, such as

beer mats, calendars, or the reverse of till rolls. However, the sale of the items themselves will not be VAT free, unless they qualify in their own right for zero-rating, such as books or children's clothing.

The important factor to consider is whether or not the advertisement is placed on someone else's time or space. If it is not, zero-rating cannot apply. As such, the relief won't apply where a charity advertises through its own time or space, such as on its own website or through direct mail, and on its own goods, such as pens or adult clothing.

How is the relief claimed?

Where the relief is available, the charity can issue a declaration certificate to enable the supplier to zero-rate the supply. HMRC have a suggested format of the declaration, but charities can use their own versions provided all the key information is conveyed.

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Our experienced consultants are ex-Officers of HMRC that were previously employed by 'Big Four' accountancy firms. If you have a query about this leaflet or VAT in general, please contact Steve Allen per the contact details below:

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