

# Public Sector

## Tax Forum

### Summer Newsletter

7th August 2009

The forthcoming meetings of the Forum are:

- Thursday 22nd October 2009 at 10.30am at the London City Financial Solutions Centre. It is hoped that John Welsh, Head of the Public Bodies Unit of HMRC, will be attending this meeting.
- Thursday 11th February 2010 at 10.30am at the Leeds Financial Solutions Centre.

The meeting concludes with Lunch.

If you would like to attend [please contact us](#).

## Change to the VAT Treatment of Agency Staff to Go Ahead

Following representations made by the Forum to the Department of Health, a response has been received which confirms that a revised HMRC direction tightening definitions for the reclaim of VAT on the use of agency staff has been signed off by the Treasury.

This has not yet been published in the London Gazette and will not apply until then. In the meantime, the DH advises that no changes will be enforced, but Trusts should ensure that their financial plans include cover for these additional costs.

The new contracted-out services (COS) list amends eligibility under code 69 by removing the reference to agency staff, which means that VAT incurred on agency staff will no longer be recoverable. It also introduces a revised wording for code 52 which limits recovery for professional services to those relating to efficiency advice, internal audit and legal advice.

The Forum has sought to establish the cost to NHS Trusts of these changes and also of the removal of the Staff Hire Concession from 1st April 2009. Once this is established, the Forum will be seeking to ascertain what additional funding will be available to Trusts to cover these extra charges.

The DH claims that it is unable to state the cost because the information it collects does not allow this and a reply from HMRC is still awaited. Following representations by the Forum to MPs, Paul Burstow MP (Lib Dem; Sutton and Cheam and a former party spokesperson on health) tabled a parliamentary question and the answer stated that the cost to the NHS would be £26m.

At its most recent meeting, members of the Forum agreed that this figure could be higher and more work should be undertaken to ascertain the true cost. To establish this, an approach will be made to selected MPs or Peers to seek the answer from the Treasury. Additionally, a survey will be sent to all Forum members to ask them for the impact on their costs.

The Forum will also seek assurances that the change to the COS list will not come into effect until the end of this financial year, at the earliest, to enable Trusts to formulate a plan.

Voices have raised concern that further directions may include restricting VAT recovery on agency nurses.

## Consultation on Corporation Tax Due Imminently

Draft regulations for the introduction of Corporation Tax for Foundation Trusts are due to be issued this summer. After consultation, legislation is planned in the Finance Bill for 2010 with the first payment of tax due in January 2012.

It is still unclear exactly what the tax will cover, although HMRC is saying that it will be anything that is actually or potentially competing with the private sector. This is likely to include private

healthcare, laundry and catering services provided to businesses, drug manufacture, rental income (with the possible exception of staff and patients' family accommodation) but will probably exclude interest received and capital gains. It is unsure if parking income will be included, especially if it is mainly for patients and staff.

A minimum threshold is still being considered.

HMRC is now saying that the tax will only apply to FTs with no plans for it to include non-FTs. However, it is thought that with the delay in implementation, by the time of its introduction most Trusts will be FTs.

The Forum has made representations to HMRC by letter and discussions that it would be fairer if the tax were to be applied to all Trusts at the same time. It also wants the consultation on the revised proposals to be sent to all Trusts, not just FTs, as it is likely that they will all be affected at some stage and therefore should have input as to how it will operate. HMRC has acknowledged the Forum's interest and has encouraged all interested parties to make their views known.

## Members' Views Sought On Tax Regulations

As the NHS gains more commercial involvement, and increasingly Trusts find themselves in competition with private sector suppliers, so there may be moves to bring the VAT treatment of Trusts more into line with the private sector.

This may mean the introduction of penalties for late payment or VAT errors which apply in the private sector but also there may be benefits in creating a level playing field for tax treatment.

At the last meeting of the Forum, it was agreed that the views of members should be sought on what changes they would like to see to ensure that they are not at a disadvantage when competing with the private sector and to facilitate the operation of commercial operations.

The Forum will put together an on-line survey to obtain members' views on this, before preparing a paper on the subject to circulate and eventually to present to DH and HMRC.

## Confusion at HMRC over Construction Industry Scheme

Following further correspondence between a Forum member and HMRC's dedicated CIS Team in Northern Ireland, the member has received written confirmation that Foundation Trusts are exempt from operating the CIS. This, coupled with the same confirmation reported in our last newsletter from the NHS Section of HMRC's Public Bodies Team, now finally confirms that FTs are **not** required to operate the Scheme.

## Issue of Legal Responsibility Delaying VAT Claims (Fleming)

HMRC has still to pay any claims made by NHS Trusts for repayment of VAT paid on business activities between the introduction of the tax in 1973 and the application of a three-year cap introduced in 1996. According to HMRC this is partly because of uncertainty as to whether it is the

Strategic Health Authorities or the Trusts that are the legal owners of the claims. Legal advice is being sought and a Forum representative will be involved. A meeting was held with HMRC before the end of June to discuss both the ownership issue and payment of claims. Whilst consideration of the ownership issue is on-going, HMRC has just started a series of visits to Trusts that have made claims to try and obtain further information.

## **Court Rules that HMRC Must Pay More Interest**

A recent court judgement has directed that instead of just paying simple interest on sums owed by HMRC as a result of overpayment due to an HMRC error, they should instead be paying compound interest.

This case may now go to the High Court and the new Tax Tribunal, but if the ruling is upheld, this will have a significant impact, including on backdated claims. It is likely that there will be Forum members affected by this and further developments will be reported in the next newsletter.

## **Beware Agencies Offering VAT Free Agency Staff**

In a recent court case, a company had directly paid staff that were seconded to the company from a consultancy firm and so did not pay any VAT on the staff costs. HMRC ruled that the consultancy was actually providing a service to the company (as the staff were still employed by the consultancy) and tax should have been paid, and this was agreed by the court.

This case highlights that NHS Trusts need to be wary of attempts to avoid having to pay VAT on agency staff. Although the obligation to pay any VAT not charged by suppliers will fall on the companies concerned, they may, depending on their contract with a Trust, have grounds to require a Trust to retrospectively pay the VAT.

## **Out Of Hours Services**

Where, as is increasingly happening, GP out of hours services are contracted out to private providers, there should normally be no VAT charged by the companies supplying this service. Where it is charged, HMRC has ruled that it is not recoverable.

## **Planning for End of Lower Rate VAT**

Following the temporary reduction in the rate of VAT to 15%, HMRC has introduced anti-forestalling measures to prevent organisations bringing forward significant purchases before the year end to avoid paying the restored 17.5% rate. These rules are designed to prevent purchasers of goods and services from taking what HMRC considers to be unfair advantage of the rate change.

There are two situations where a supplementary VAT charge might apply.

### *Situation 1*

Where the following conditions are met, the supplier will have to make a supplementary charge of 2.5% VAT on 1 January 2010, if they have issued a VAT invoice with VAT of 15% prior to that date.

#### *Conditions:*

*The customer cannot reclaim the VAT it incurs, AND one of the following conditions applies:*

- The supplier and the customer are “connected” (e.g. associated companies) OR
- The supplier funds the purchase (e.g. by loaning money to the customer), OR
- A VAT invoice is issued and payment is not due for at least 6 months.

### *Situation 2*

Where the following condition is met, the supplier will have to make a supplementary charge of 2.5% VAT on 1 January 2010, if they have issued a VAT invoice with VAT of 15% prior to that date.

#### *Condition:*

*A pre-payment of more than £100,000 is made before the rate change (i.e. before 1 January 2010) for goods or services to be provided after the rate change.*

The above rule will not apply if the pre-payment is in accordance with normal commercial practice.

#### *Practical implications for NHS bodies*

If NHS bodies follow their normal practice in buying goods and services then it is unlikely that these rules will affect them, but care will need to be taken if any pre-payments are planned. It will also be important to ensure that invoicing for sales is as up to date as possible towards the end of December 2009, to avoid problems with determining the correct rate to apply for invoices raised from January 2010.

## **Social Enterprises and VAT**

Where PCTs transfer provider services to social enterprises there is often not a clear understanding of the VAT consequences. Social enterprises providing medical services are not likely to be able to register for VAT, but if their range of provision is more varied, they may be able to register. This will affect many PCTs and raises the question of whether there will be any compensation to make up for the inability of social enterprises to reclaim VAT.

The Forum will survey its PCT members to see how many are affected and the potential implications for them.

## The VAT Position When Establishing New Companies

Increasing numbers of Foundation Trusts are considering setting up new companies in partnership with the private sector. HMRC has advised that some are not accounting properly for VAT.

The VAT implications of establishing a business depend very much on what the company does.

- Where a new company provides wholly medical services then these are likely to be exempt supplies which means there is no scope to register for VAT and no recovery of VAT on costs.
- If non-medical services are provided then VAT registration is more likely to be required and where all services are VATable full recovery of VAT on costs should follow.
- Where a mix of services are provided, i.e. both exempt and taxable, then VAT registration may be required, but only a proportion of VAT on costs will be recoverable.

Each case will turn on its own facts and advice should be taken at the earliest stage to ensure the VAT implications are taken into account. In particular it is important to remember that the special VAT rules which apply to the NHS (i.e. the COS rules) will not be applicable to private businesses.

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