

# Three-year cap – *Fleming* – Section 121 of the Finance Act 2008

<b>1. BACKGROUND</b>	<b>6</b>
1.1 Introduction	6
1.2 Marks & Spencer	6
1.3 Administrative transitional regime	6
1.4 Pre-implementation periods – Input tax	6
1.5 Input tax – Date of deduction	6
1.6 Pre-implementation period – Output tax	7
1.7 Statutory transitional period	7
1.8 Claims for post-implementation periods	7
1.9 Output tax – Claims made before 26 May 2005	7
1.10 Output tax – Claims made on or after 26 May 2005	8
1.11 Output tax – Claims in relation to duplicate payments	8
<b>2. CLAIMS HANDLING</b>	<b>8</b>
2.1 General	8
2.2 Burden of proof	8
2.3 Standard of proof	9
2.4 Evidence	10
2.5 Estimated claims	11
2.6 Evidence and estimation – Kretztechnik claims	12
2.7 Undertakings	12
2.8 Has tax been overpaid?	13
2.9 Effective date of registration and deregistration	13
2.10 VAT rates	13
2.11 Calculation of claims	14
<b>3. DEFINITION OF A CLAIM – OUTPUT TAX</b>	<b>14</b>
3.1 What is a claim?	14

3.2	Burden of proof and verification.....	15
3.3	When is a claim a new claim? .....	15
<b>4.</b>	<b>QUANTIFICATION OF A CLAIM – OUTPUT TAX .....</b>	<b>16</b>
4.1	What amendments can be introduced into an open claim? .....	16
4.2	What is HMRC liable for on a claim? .....	17
4.3	Payment of claims .....	17
<b>5.</b>	<b>DEFINITION OF A CLAIM – INPUT TAX.....</b>	<b>18</b>
5.1	What is a claim?.....	18
5.2	Burden of proof and verification.....	19
5.3	When is a claim a new claim? .....	19
<b>6.</b>	<b>QUANTIFICATION OF A CLAIM – INPUT TAX .....</b>	<b>20</b>
6.1	What amendments cannot be introduced into an open claim?.....	20
6.2	What is HMRC liable for on a claim? .....	20
6.3	Payment of claims .....	21
<b>7.</b>	<b>WHO CAN CLAIM?.....</b>	<b>21</b>
7.1	General .....	21
7.2	VAT groups .....	22
7.3	Companies registered in divisions.....	22
7.4	English general partnerships .....	23
7.5	Scottish general partnerships.....	23
7.6	English limited partnerships .....	24
7.7	Scottish limited partnerships .....	24
7.8	Limited liability partnerships.....	25
7.9	Death, insolvency and incapacity.....	25
<b>8.</b>	<b>CLAIMS BY ASSIGNEES AND TRANSFEREES.....</b>	<b>26</b>
8.1	General .....	26
8.2	Rights to claim assigned on or after 25 June 2008.....	27
8.3	Rights to claim assigned before 25 June 2008.....	27

8.4	Rights to claim assigned before 26 May 2005 – What is assigned? .....	27
8.5	Rights to claim assigned between 26 May 2005 and 24 June 2008.....	27
8.6	Output tax claims – assignment of right to claim .....	28
8.7	Input tax claims – assignment of right to claim .....	28
<b>9.</b>	<b>WHAT CAN BE CLAIMED? .....</b>	<b>29</b>
9.1	General .....	29
9.2	Subsection (1) of section 80 of the VAT Act 1994.....	30
9.3	Subsection (1A) of section 80 of the VAT Act 1994 .....	30
9.4	Subsection (1B) of section 80 of the VAT Act 1994 .....	30
9.5	Failure to make regulation 38 adjustments .....	31
9.6	Claims by assignees and transferees .....	31
9.7	Late claims for input tax .....	31
<b>10.</b>	<b>HANDLING OF CLAIMS IN PARTICULAR CASES .....</b>	<b>32</b>
10.1	Transfers of businesses as going concerns .....	32
10.2	Claims by motor traders .....	32
<b>11.</b>	<b>RISKS.....</b>	<b>33</b>
11.1	Overtaken judgments .....	33
11.2	Liability of supplies .....	33
11.3	Duplicate claims .....	33
<b>12.</b>	<b>SET-OFF .....</b>	<b>33</b>
12.1	General .....	33
12.2	Set off and VAT groups.....	34
12.3	Claims by assignees and transferees .....	34
12.4	Claims by assignees – Statutory transfer of rights & assets .....	35
<b>13.</b>	<b>PAYMENT OF CLAIMS.....</b>	<b>35</b>
<b>14.</b>	<b>CLAIMS SUBJECT TO APPEAL.....</b>	<b>35</b>
<b>15.</b>	<b>PROTECTIVE CLAIMS .....</b>	<b>35</b>

<b>16. ABUSIVE CLAIMS .....</b>	<b>36</b>
<b>17. UNJUST ENRICHMENT.....</b>	<b>37</b>
17.1 Resubmission of pre-1997 claims .....	37
17.2 Repayment returns.....	37
17.3 Judgment of the House of Lords in Marks & Spencer Plc –v- CRC [2009] UKHL 8; [2009] STC 452; [2009] BVC 106.....	37
17.4 Retrospective application of the defence .....	37
<b>18. TIME LIMITS – EXPIRY OF TRANSITIONAL PERIOD .....</b>	<b>38</b>
18.1 All claims made on or after 1 April 2009 will be capped at four years.....	38
18.2 Date stamping of claims .....	38
18.3 What does this mean in practical terms? .....	38
18.4 What should I do if a claim looks to be out of time? .....	39
<b>19. TIME LIMITS – SCOTTISH EQUITABLE.....</b>	<b>39</b>
19.1 Order of the Inner House of the Court of Session .....	39
19.2 Current case law on the point .....	40
19.3 Status of the three-year cap .....	40
<b>20. STATUTORY INTEREST .....</b>	<b>41</b>
20.1 No entitlement.....	41
20.2 Entitlement .....	41
20.3 Start and end dates for payment of SI.....	42
20.4 Practical application of section 78(1)(d) .....	43
20.5 Recovery assessments.....	44
<b>21. COMPOUND INTEREST .....</b>	<b>44</b>
21.1 Claims for compound interest.....	44
<b>22. RECOVERY ASSESSMENTS.....</b>	<b>45</b>
22.1 Section 80(4A) assessments .....	45
22.2 Section 73(2) assessments.....	45
22.3 Assessments under section 73(2) of the VAT Act 1994 – Accounting period to assess .....	46

<b>23. FORM OF CLAIMS .....</b>	<b>47</b>
23.1 What do we want with the claims.....	47
23.2 Further information required.....	47
23.3 Processing Forms VAT642.....	47
<b>24. STATISTICAL INFORMATION .....</b>	<b>47</b>
24.1 Information to be compiled on receipt of claim .....	47
24.2 Information to be sent to the Fleming Claims Team (Leeds) by those verifying claims .....	48
<b>25. CONTACTS.....</b>	<b>48</b>
25.1 Fleming Claims Team.....	48
25.2 Further information .....	48

# 1. Background

## 1.1 Introduction

In 1996 and 1997, the Government introduced a three-year limitation period for repayment claims for overpaid VAT, the correction of errors and late claims for input tax.

The legislation had prospective effect in that it applied to all claims relating to accounting periods ending after the date of enactment (post-implementation periods).

It also had retrospective effect in that it applied to all claims in relation to accounting periods that ended before the date of enactment (pre-implementation periods). This applied regardless of whether the claim was made before or after the enactment of the time limit.

## 1.2 Marks & Spencer

In 2002 the European Court of Justice (ECJ) held, in *Marks & Spencer Plc –v- CCE* [2002] STC 1036; [2002] BVC 622 (*Marks & Spencer*), that the UK had breached principals of Community law because it had failed to provide an adequate transitional period to allow claims to be submitted for pre-implementation periods before the three-year time limit took effect.

## 1.3 Administrative transitional regime

In an attempt to comply with the judgment in Marks and Spencer, HMC&E (now HMRC) introduced an administrative transitional regime by the publication of Business Briefs (Business Briefs 22/02 and 27/02). They invited claims under section 80 of the VAT Act 1994 for output tax overpaid before the three-year cap was brought in.

The Business Briefs did not invite input tax claims for the same periods nor did they include claims for output tax overdeclared in accounting periods for which repayment returns had been rendered.

The exclusion of input tax claims and the rejection of output tax claims that did not meet the conditions of this administrative regime led to a number of appeals to the VAT & Duties Tribunals.

## 1.4 Pre-implementation periods – Input tax

In January 2008 the House of Lords, in *CRC –v- Michael Fleming (t/a Bodycraft) (Fleming)* [2008] UKHL 2; [2008] STC 324; [2008] BVC 221, held that the three-year cap must be disapplied in relation to pre-implementation periods until an adequate prospective transitional period has been provided.

On 20 February 2008, HMRC published Revenue & Customs Brief 07/08 (RCB 07/08). This RCB invited claims for input tax where the entitlement to claim deduction of that input tax arose in an accounting period ending before 1 May 1997.

## 1.5 Input tax – Date of deduction

The right to deduct input tax does not arise until a person has incurred the input tax on his purchases and he has received the VAT invoice that fixes his entitlement to deduct the it.

For example, if the input tax being claimed was incurred on 17 March 1997 and the invoice, or other alternative evidence, to support its deduction was only received on 20 June 1997, the input tax only becomes deductible on the return for the accounting period in which 20 June 1997 fell (see Case C-152/02, *Terra Baubedarf Handel GmbH –v- Finanzamt Osterholz-Scharmbeck* [2005] STC 525; [2006] BVC 672).

For the purposes of RCB 07/08, we take the claim to have arisen at the end of the prescribed accounting period in which the entitlement to deduct arose not on the due date of the return for that period as is provided in regulation 29(1A).

This is reflected in section 121(2) of the Finance Act 2008 which provides that the three-year cap shall not apply to claims made before 31 March 2009 where those claims relate to accounting periods that ended before 1 May 1997.

### **1.6 Pre-implementation period – Output tax**

With the publication of RCB 07/08, HMRC also announced that it considered that the terms of the judgment in *Fleming* meant that the administrative regime for output tax claims had been inadequate.

As a result, claims were also invited for output tax overpaid or overdeclared in pre-implementation periods.

### **1.7 Statutory transitional period**

On 18 March 2008, Parliament passed a resolution under the Provisional Collection of Taxes Act 1968 giving effect to section 121 of the Finance Act 2008 from 19 March 2008.

Under section 121 businesses were given a statutory transitional period running until 31 March 2009 during which they could make claims for:

- output tax overdeclared in accounting periods ending before 4 December 1996 (section 121(1) of the Finance Act 2008), and
- unclaimed input tax in respect of which the entitlement to claim deduction arose in accounting periods ending before 1 May 1997 (section 121(2)).

All claims made on or after 1 April 2009 are capped at four years or back to 1 April 2006, whichever is the shorter.

### **1.8 Claims for post-implementation periods**

Claims arising in accounting periods ending on or after the date of enactment of the new time limits are, and have always been, subject to the three-year cap (see *Local Authorities Mutual Investment Trust –v- CCE* [2003] EWHC 2766 (Ch); [2004] STC 246; [2004] BVC 379) and *CRC –v- Scottish Equitable Plc* (unreported) – see section 19 below.

### **1.9 Output tax – Claims made before 26 May 2005**

On 26 May 2005, section 80 was amended by section 3 of the Finance (No. 2) Act 2005. The result was

- that all claims for output tax were brought within the scope of section 80, and
- all such claims were brought within the range of the unjust enrichment defence.

Claims made before 26 May 2005 in respect of:

This version released on 6 August 2009

- Any amounts overpaid by way of VAT before 4 December 1996, whether following an assessment, a payment return or a disclosure;
- Any amounts overdeclared by way of output tax in repayment returns for accounting periods ending on or before 30 April 1997

can now be considered, and dealt with on the basis of the *Fleming* judgment and the pre-2005 section 80 legislation.

Claims made before 26 May 2005 will include, for example, claims made under Business Brief 22/02 which were rejected, where the claimant has appealed to the VAT & Duties Tribunal and where the appeal remains live.

### **1.10 Output tax – Claims made on or after 26 May 2005**

Claims made on or after 26 May 2005 can now be considered, and new claims made, in respect of amounts brought to account or paid by way of output tax (whether on payment or repayment returns, assessments or disclosures) in accounting periods ending before 4 December 1996.

### **1.11 Output tax – Claims in relation to duplicate payments**

The relevant date for a claim to recover amounts incorrectly paid "... by way of VAT that was not VAT due to us ..." (section 80(1B) of the VAT Act 1994), is the same whether the claim was made before or after 26 May 2005. The claim must be for an amount overpaid before 4 December 1996.

This subsection also covers claims for amounts that turn out to have been wrongly paid on an assessment made under section 73(2) of the VAT Act 1994 where the assessment was made on the basis that the trader had deducted input tax that he was not entitled to.

## **2. Claims handling**

### **2.1 General**

RCB 07/08 requires all businesses to submit claims to the Fleming Claims Team in Leeds subject to the criteria set out in this guidance.

The team in Leeds will decide whether a claim is valid in principle and send claims out to appropriate assurance staff for verification.

The Revenue & Customs Brief can be found on the HMRC website at <http://www.hmrc.gov.uk/briefs/vat/brief0708.htm>.

In this guidance, it is only where a claim is 'rejected' that a decision is being given that the claimant can ask to have reviewed or against which he has a right of appeal to the Tax Chamber of the First-Tier Tribunal.

### **2.2 Burden of proof**

The burden of proof is on the claimant to show that he has a claim. It is not on HMRC to prove that he doesn't.

This means that the claimant must be able to show that it is more likely than not that he made the mistake on which his claim is founded. The claimant must be able to produce some evidence – circumstantial or otherwise – to support his assertion that

a mistake was made which led to him overstating his output tax liability or understating his input tax entitlement.

You shouldn't need to refer to authorities for this proposition but, just in case you do, there is authority in *Dickinson –v- Minister of Pensions* [1952] 2 All ER 1031, in which Ormerod J held:

“It is axiomatic in the administration of our law that, if a person thinks that he has a claim against another person or against a Minister, the duty is on him to establish that claim. The mere fact that an Act of Parliament which establishes a right does not state that that duty is on him, must automatically establish the duty on him to prove what he thinks is his right before he can succeed in his claim.”

### 2.3 Standard of proof

The claimant has to prove his claim *on a balance of probabilities*. He has to convince us, or the courts, that it is more likely than not that he made the mistake that he says he made and that that mistake is grounds for the claim that he is trying to vindicate.

The nature of this standard of proof was summarised by Denning J in *Miller –v- Minister of Pensions* [1947] 2 All ER 372, at 374 where he said:

“In cases falling under art 4(2) and art 4(4) (which are generally cases where the man was fit on his discharge, but incapacitated later by a disease) there is no compelling presumption in his favour, and the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determine conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “We think it more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not.” [Emphasis added]

In discharging a burden of proof on a balance of probabilities, the claimant has to show, not that it is possible that the mistake was made but that it is probable. Moses J put it like this in his judgment in *Marks & Spencer Plc –v- CCE* [1999] STC 205 at 241:

“Marks and Spencer criticised the tribunal for failing to draw a distinction between proof to the satisfaction of the tribunal and questions of possibilities or probabilities. The standard of proof is the normal standard of proof in any civil case. The distinction is false. It is true that if a fact is merely a possibility then the commissioners would not have satisfied the tribunal on the balance of probability. But where the tribunal finds that a fact is probable it is finding that that fact is established. There is no true dichotomy. Once a fact is established as probable it is a fact upon which the tribunal may draw appropriate inferences.” [Emphasis added]

In *Leonard –v- Blanchard (Inspector of Taxes)* [1993] STC 259, Nourse LJ said:

“As to the first of those objections, Mr Goodfellow has pointed out, correctly, that the commissioners found that in each of the years of assessment the taxpayer's total flying hours were considerably less, in some years nearly 50% less, than the contract maximum. While accepting that this objection may not have been sound, I can see no answer at all to the judge's second objection, which can be expressed more generally by saying that it is impossible, without evidence, to infer that if the taxpayer had presented himself for work on any of his 147 days off he would have been found work outside the United Kingdom on those days. I can see that there might have been evidence to show that that would have been the case, at least in part. But it is impossible, on the balance of probabilities, to arrive at that conclusion on inference alone. The taxpayer has not proved his case.” [Emphasis added]

Neither of these things can be achieved if the claimant adduces no relevant evidence at all in support of his claim.

This standard of proof applies to the assertion that the claimant has a claim in the first place as well as to the amount being claimed.

## **2.4 Evidence**

If we have a judgment of the courts that holds that the supply of X-Type Widgets is exempt and the evidence is that a claimant has always treated his supplies of X-Type Widgets as taxable at the standard rate, e.g., because all of the records that he has show that to be the case, that may well constitute evidence to show that he made the same mistake in those years for which he doesn't hold records. Other evidence, such as Companies House accounts, may then help us come to some estimate of the extent of the claim.

Where a person is making claim on the basis of a one-off accounting error – he failed to adjust his output tax liability for cash-backs or bounced cheques, he blocked the input tax that he incurred in relation to a share issue, etc. – he must be able to produce evidence to support that assertion. In the above example, the judgment acts, in effect, as circumstantial evidence which, together with the behavioural evidence in the existing accounts and records, suggests that it is more likely than not that the mistake was made in the accounting periods for which the claim was submitted. In this example, there is no circumstantial evidence and we cannot infer, without other evidence, that the claimant did make the mistake that he says he made. If the claimant holds records in relation to other incidences of the same mistake, that constitutes behavioural evidence and should be taken into account.

Evidence going to the extent of the claim is just as important as evidence establishing the claim. If a claimant has evidence that establishes a mistake but has no evidence at all on the amount, the establishment of his mistake will not be sufficient grounds for making a payment.

If a claimant asserts that he failed to adjust his VAT account for bounced cheques between 1978 and 1996, he must be able to produce evidence to support that assertion; especially if the evidence is that he has made the necessary adjustments for the last six years (the period for which he is required, under paragraph 6 of Schedule 11 to the VAT Act 1994, to keep his records).

If a claimant is claiming output tax that he has wrongly declared on the sale of X-Type Widgets and he has made that error for the past six years, it is probably reasonable to conclude that it is more likely than not that he made the same mistake

beyond that date – subject to any evidence that there might be of changes in trading patterns, accounting software or practice, etc.

If the same claimant makes the same claim but his current records show that he has only treated his X-Type Widgets as taxable at the standard rate for the last two years, that rather suggests that his claim is baseless.

Motor trade claims made under the judgments in *Elida Gibbs* and *Italian Republic* are not unevidenced claims. In late 2002 and early 2003, the Motor Trade Unit of Expertise, in co-operation with the Retail Motor Industry Federation (RMIF) and the Society of Motor Manufacturers and Traders (SMMT) and PWC drew together all of the evidence available on how the various manufacturers treated the transactions in question. Knowing that the relationship between manufacturers and dealers is dictatorial – and absent any evidence to the contrary – we accepted that all dealers of a given manufacturer treated the relevant transactions in relation to that manufacturer's cars in a given way. In effect, we have sufficient evidence to enable us to calculate *Elida Gibbs* and *Italian Republic* claims by motor dealers. However, if a dealer or manufacturer wishes to step outside the guidance produced by the Motor Trade Unit of Expertise, they must produce their own evidence.

Evidence can be documentary and behavioural and, in an ideal world, one would hope to see a little of each. What must be stressed is that where a person simply writes to us saying that he overdeclared £500,000 on the sale of newspapers between 1973 and 1996 and provides no evidence at all (documentary or otherwise) to support that assertion, we should reject the claim. It is bare assertion. There is no reason (court judgments, etc.) why he would have treated newspapers as standard rated other than as the result of a 'personal' mistake.

A signed affidavit by the claimant is not evidence sufficient to support a claim. We rely, on this point, on the *dicta* of Moses J (as he then was) in *Marks & Spencer Plc – v- CCE* [1999] STC 205 at 245 where he said that expert evidence may be put before the court but it cannot be used on its own to support a claim. It can only be used in support of factual evidence.

## **2.5 Estimated claims**

Where, because of the passage of time, records have not been retained for periods before 1996/97, we will accept estimated claims provided that the assumptions on which the estimates have been based are reasonable and sustainable.

In any estimated claim, there are a number of things that you must look out for:

- There must be sufficient evidence to show that the overdeclaration of output tax liability or the understatement of input tax entitlement did occur. You cannot estimate the amount of a claim on the basis of no evidence at all;
- The claimant must be able to show, using the evidence referred to above, that it is more probable than not that the error that forms the basis of the claim did, in fact, occur;
- The claimant must have spelled out the assumptions that underlie the estimation. You should check and challenge all material assumptions. They must be sustainable. It is probably not reasonable, for example, to assume that the percentage of employees who are given company cars now is the same as the percentage who were given them in 1973;
- If a claimant is attempting to submit a new calculation of an old claim, the new calculation must be based on evidence and must be subject, at the very least,

- Claims based on estimates that are founded on a 'straight-line' calculation using, e.g., information from recent years must be challenged. A great deal has changed in the years between 1973 and now. Using current trading patterns to calculate claims for Fleming periods is almost certainly going to give a wrong result; and
- It is always worth consulting a departmental accountant for his or her views on the estimation.

A claimant who knowingly, or recklessly, overstates his claim could be committing an offence under section 72(3) of the VAT Act 1994 or 167 of the Customs & Excise Management Act 1979 and in appropriate cases you should follow normal referral procedures through your linked Evasion Referral Team (ERT).

It is worth remembering that there may be evidence in EF which supports, or refutes, some or all aspects of the trader's claim.

You should challenge all material assumptions on which estimated claims are founded. Ask the claimant to explain the assumption and why he thinks that it is reasonable. If you have doubts, seek advice; whether from CT&VAT, Central Policy or the relevant Unit of Expertise or Trade Sector Advisers (TSAs).

**Please remember that you are required to reject a claim that, following investigation, is not found to be supported by reasonable evidence.**

## **2.6 Evidence and estimation – *Kretztechnik* claims**

When you are dealing with *Kretztechnik* claims, it is worth discussing the claim with your local departmental accountant with a view to checking:

- The claimant's Share Premium Account;
- Whether the share issue in question was no more than a group re-structure – in which case the VAT on the the costs incurred is likely to have been negligible
- Whether the Company Secretariat retained 'The Bible' (all the papers relating to the share issue) which is often kept for many many years beyond the statutory 6 year requirement for business records. You should always ask the claimant to produce this when dealing with such claims.

## **2.7 Undertakings**

There is no longer any requirement for claimants to sign an undertaking as a condition of payment of their claims.

Furthermore, RCB 07/08 releases from the terms of the undertaking any claimants who have provided signed undertakings in relation to claims that have already been paid.

Traders who enquire about the status of the undertaking should be told that they are no longer enforceable.

## 2.8 Has tax been overpaid?

In the absence of business and VAT records, the question of whether the amount being claimed is properly claimable is tested 'on a balance of probabilities'.

That is, if a claimant can demonstrate that it is more likely than not that he did pay or declare output tax, for example, in respect of the demonstrator support bonuses that he received from a given motor manufacturer, we should treat it as a valid claim. That assumes, of course, that it meets the other parameters set out in this guidance.

However, if you are not satisfied that the claimant has demonstrated, as a question of fact, that he made the claimed overpayment or underclaim, you should reject the claim.

The burden of proof is on the claimant to show that he has a claim. There is no burden on HMRC to show that he has no claim.

## 2.9 Effective date of registration and deregistration

You must check that the claimant was registered for VAT in the accounting periods for which he is claiming.

A number of claims have been submitted for accounting periods going back to 1 April 1973 despite the fact that the claimant was not registered for VAT until many years later.

## 2.10 VAT rates

You must ensure that the claim is based on the correct VAT rates for the accounting periods in question for which see the table below.

Periods	Standard	Fraction	Higher	Fraction	Reduced	Fraction
1/4/73 28/7/74	10%	1/11	-	-	-	-
29/7/74 18/6/79	8%	2/27	-	-	-	-
18/11/74 12/4/76	-	-	25%	1/5	-	-
12/4/76 18/6/79	-	-	12.5%	1/9	-	-
18/6/79 31/3/91	15%	3/23	-	-	-	-
1/4/91 Present	17.5%	7/47	-	-	-	-
1/4/94 Present	-	-	-	-	8%	2/27
1/4/97 Present	-	-	-	-	5%	1/21

The higher rate was levied on petrol from 18 November 1974 and its scope was extended on 1 May 1975 to cover:

- Domestic electrical appliances;
- Radios;
- TV's;
- Hi-fi equipment;

This version released on 6 August 2009

- Pleasure boats;
- Aircraft;
- Towing caravans;
- Photographic equipment;
- Furs; and
- Jewellery.

## 2.11 Calculation of claims

Once a trader has made a claim and you are satisfied that it is a claim, e.g., within the meaning of regulation 37 of the VAT Regulations 1995, there are a number of things that must be taken into account when calculating the amount of the claim.

The claimant may introduce further overdeclarations if they're based on the same mistake that led to the first claim. For example, if a motor dealer makes an Elida Gibbs claim for all of his showrooms and, some months later, while the claim is still being calculated, discovers that he forgot to include all of his showrooms in Scotland, he is allowed to introduce that into the calculation.

Similarly, if we find out that he's double-counted all of his showrooms in Wales, we must factor that in to the calculation as well.

However, if he subsequently discovers that has not made any Italian Republic claim in relation to the sale of his demo vehicles, a claim to recover that overdeclared output tax will constitute a new claim. Of course, this may not make a difference in practical terms while the time limits are still open.

## 3. Definition of a claim – Output tax

### 3.1 What is a claim?

A claim made under section 80 of the VAT Act 1994 must meet the criteria set out in regulation 37 of the VAT Regulations 1995. It must set out **the basis of the error** and **the amount being claimed**, show **how that amount has been calculated** and the claimant **must refer to documentation or other evidence** used in the calculation of the claim (even if, in an estimation context for the period 1973-97, that is only company accounts and more recent business records confirming overpayment).

A letter simply stating that Company Alpha has overdeclared its output tax liability by such-and-such an amount and demanding payment of that amount does not constitute a claim. Similarly, a letter expressing an intention to claim does not protect the potential claimant's position in relation to the previous three years.

However, a letter that clearly sets out the basis of the claim, the amount and the method by which that amount has been calculated and does this all by reference to documents and other evidence in the possession of the claimant could reasonably be said to constitute a claim.

You should not, generally speaking, reject a claim as being invalid, simply because a trader submits a properly calculated gross claim.

In practice though we would expect any claim to show a full calculation of the amount due to the claimant (i.e. the overdeclared output tax) and a full calculation of amounts due to the Commissioners whether by way of assessment or by way of set-off under

sections 80(2A) and 81 of the VAT Act 1994 or section 130 of the Finance Act 2008 – see section 12 below on set-off.

If a claim is submitted without any calculation of outstanding liabilities, you should, where necessary, ask the claimant to provide it as soon as possible.

The payment or credit that is made against any claim will always be net of outstanding liabilities in accordance with section 81 of the VAT Act 1994 and section 130 of the Finance Act 2008.

### 3.2 Burden of proof and verification

It is important to note that it is for the claimant to satisfy us that he has made the overdeclaration of output tax that he is claiming. It is not for us to show that he has not. The law provides that HMRC will be liable to credit an amount to a claimant where he:

“...**has accounted** to the Commissioners for VAT ... and **has brought into account** as output tax **an amount** that was not output tax due ...” [emphasis added]

The law does not provide that HMRC shall be liable where it appears to them that a person might have brought an amount into account as output tax. It provides that we shall be liable where he **has** brought an amount into account, etc. Furthermore, the reference to ‘an amount’ is equally important. It requires, in effect, that the amount is exact, specific, accurate.

The burden of proof is on the claimant.

Thus an unsupported assertion by the claimant or his representative that an amount has been overdeclared as output tax will not be enough for us to pay the claim. We shall want to see real and credible evidence to show that the overdeclaration was, in fact, made.

We are entitled, when dealing with claims, to satisfy ourselves that the overdeclaration has been made and that the amount claimed is accurate and we are entitled to refuse to make a payment against the claim until we are so satisfied (see the judgment of the High Court in *R (on the application of UK Tradecorp Ltd) –v- CCE* [2004] EWHC 2515 (Admin); [2005] STC 138; [2005] BVC 128). This case related to a claim for input tax but the logic applies equally to any claim made against HMRC.

**Under no circumstances** should a claim be paid until (a) we are satisfied that the overdeclaration was, in fact, made and (b) the quantum of the claim has been properly verified.

### 3.3 When is a claim a new claim?

In its decision in University of Liverpool (VAT Tribunal decision 16769), the VAT & Duties Tribunal described a completed claim as:

“... a claim which:

(a) has been met in full by the Commissioners;

(b) has been met in part by the Commissioners and the time limit for appealing against the rejection of the remainder prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;

(c) has been met in part by the Commissioners, the taxpayer has appealed against the rejection of the remainder, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired or the appeal has been compromised;

(d) has been rejected in full by the Commissioners and the time limit for appealing against that rejection prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;

(e) has been rejected in full by the Commissioners, the taxpayer has appealed against that rejection, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired, or the appeal has been compromised.”

Any claim that follows a completed claim is a new claim. This is important where the ‘follow-up’ claim is made out-of-time.

It is also important to note that a claim made on one set of facts, mistake or judgment is a separate claim from one made on a different set of facts, mistake or judgment.

Thus if Company Alpha makes a claim on 17 March 2008 under judgment A going back to the accounting period ending on 31 March 2005, that is one claim. If it then makes a claim under judgment B on 12 July 2008, while the first claim is still being verified, that is a separate claim and can only go back to the accounting period ending on 30 September 2005 (assuming that the claimant is on stagger 1 of course).

The decision in *University of Liverpool* was later endorsed by the Tribunal in the decisions in *John Martin Group* (VAT Tribunal Decision 19257), *The London Institute (now known as the University of the Arts, London)* (VAT Tribunal decision 19362) and *The Medical House Plc* (VAT Tribunal decision 19859).

## **4. Quantification of a claim – Output tax**

### **4.1 What amendments can be introduced into an open claim?**

In quantifying a claim, you are only establishing the amount to which the claimant is entitled on the claim that he has made. Once the claim has been quantified, it will then be subject to set-off – see section 12 below on set-off for more details.

It is important to remember that while a claim remains uncompleted, it can be adjusted up or down, either by the claimant or by the Commissioners at any time.

Thus, in relation to a claim made by Company Alpha on 30 June 2007, during the course of the verification of the claim, the claimant discovers further overdeclarations of output tax in the same period that were not mentioned in his original claim. Those overdeclarations must be included in the claim but only if they are founded on, e.g., the same judgment as the principal claim – see paragraph 3.3.

If the amendment that the claimant is trying to introduce would normally constitute a late claim for input tax under regulation 29 of the VAT Regulations 1995, that cannot be treated as an adjustment to a claim under section 80 of the VAT Act 1994.

For example, Company Alpha makes a claim on 30 June 2007 for output tax overdeclared in the accounting period ending on 30 September 2004. On 12 July, the company discovers that it has not deducted enough input tax in that accounting period. They cannot treat that as an adjustment to their section 80 claim but they are still in time to make a claim under regulation 29 in any event. This is because they can make such a claim at any time within three years from the due date of the return for the accounting period in which the entitlement to deduct the input tax first arose – in this scenario, 31 October 2007.

If, on the other hand, they only discover the underdeduction on 5 November 2007, they are out-of-time to make the claim and they cannot treat it as an adjustment to the section 80 claim.

Remember that the entitlement to deduct input tax arises only when a person has both incurred the input tax and received the VAT invoice (or other alternative evidence) to allow him to deduct it. Thus if Company Alpha pays for a supply to it on 17 March 2006 and receives the invoice on 23 April 2006, the entitlement to deduct will have arisen in the accounting period ending on 30 June 2006 (see Case C-152/02, *Terra Baubedarf Handel GmbH –v- Finanzamt Osterholz-Scharmbeck* [2005] STC 525; [2006] BVC 672) – see V1-13 for further guidance on the deduction of input tax.

#### **4.2 What is HMRC liable for on a claim?**

HMRC is only liable for the net overdeclaration of output tax after all liabilities that can or must be set off have been taken into account.

As well as a calculation of the overdeclaration being claimed, claims must include a calculation of any underdeclarations that have not previously been declared regardless of whether they fall within the same accounting periods as those for which the claim was submitted.

Section 80(2A) makes it clear that we are not liable to pay or credit to the claimant any more than what remains after all underdeclarations and liabilities have been taken into account.

No claim should be paid until you are content either that all outstanding liabilities have been taken into account or that there are none.

A person who makes a gross claim and refuses to disclose, or calculate, underdeclarations that he knows or suspects he has made may well be committing an offence under section 72 of the VAT Act 1994 or section 167 of the Customs & Excise Management Act 1979 and in appropriate cases you should follow normal referral procedures through your linked Evasion Referral Team (ERT).

#### **4.3 Payment of claims**

You should check that there are no outstanding liabilities that should be set off against the claim before you authorise payment.

There are a number of elements that must be set off under sections 80(2A) and 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 before the claim is finally paid – see section 12 below on set-off for more details.

Payment must not be made where:

- The claimant has not succeeded in demonstrating that he made the overdeclaration of output tax for which he is claiming;
- The claimant has not been able to demonstrate that the amount being claimed is sustainable;
- You have not been able to establish the extent of the claimant's outstanding liabilities to your satisfaction.

## 5. Definition of a claim – Input tax

### 5.1 What is a claim?

We would expect that the claimant would **set out the basis of the error and the amount being claimed, show how that amount has been calculated** and do so **by reference to supporting documentation or other evidence**, in particular the relevant VAT invoices, used in the calculation of the claim.

Regulation 29 provides that late claims to input tax must be made “ ... as the Commissioners may otherwise allow or direct ...” and, generally speaking, they are directed to be made along the same lines as are required by regulation 37 for claims under section 80.

A late claim for input tax must meet the requirements of regulation 29(2). That is to say, the claimant must be able to demonstrate that he incurred the input tax, that it was incurred in the course and furtherance of taxable activities of his and that he is entitled to deduct it.

Consequently, a letter that simply states that the taxable person is entitled to make a late claim to input tax in such-and-such a sum will not be treated as a claim. Similarly, a letter stating an intention to make a claim will not be seen as a claim. On the other hand, a letter that clearly sets out the basis of the claim, the amount and the method by which that claim was calculated and does this all by reference to documents and other evidence in the possession of the claimant could reasonably be said to constitute a claim.

A late claim to input tax is one that is made in any accounting period after that in which the entitlement to deduct it first arose. The entitlement first arises when the taxable person has both incurred the input tax and received the VAT invoice (or other alternative evidence) to support its deduction see V1-13 for further guidance on deduction of input tax.

You should not, generally speaking, reject a claim as being invalid, simply because a trader submits a properly calculated gross claim.

In practice though we would expect any claim to show a full calculation of the amount due to the claimant (i.e. the unclaimed input tax) and a full calculation of amounts due to the Commissioners whether by way of assessment or by way of set-off under section 81 of the VAT Act 1994 or section 130 of the Finance Act 2008 – see section 12 below on set-off.

If a claim is submitted without any calculation of liabilities, you should, where necessary, ask the claimant to provide it as soon as possible.

The payment or credit that is made against any claim will always be net.

## 5.2 Burden of proof and verification

It is important to note that it is for the claimant to satisfy us that he has failed to deduct the input tax that he is now claiming and that he was entitled to deduct it. It is not for us to show that he has deducted it or that he wasn't entitled. The burden of proof is on the claimant.

Thus an unsupported assertion by the claimant or his representative that an amount has been incurred as input tax and has not been deducted will not be enough for us to pay the claim. We shall want to see real and credible evidence to show that the input tax was incurred and that it was not, in fact, deducted.

We are entitled, when dealing with these claims, to satisfy ourselves that the input tax was incurred, that it was not deducted and that the amount claimed is accurate. Furthermore, we are entitled to refuse to make any payment against the claim until we are so satisfied (see the judgment of the High Court in *R (on the application of UK Tradecorp Ltd) –v- CCE* [2004] EWHC 2515 (Admin); [2005] STC 138; [2005] BVC 128).

**Under no circumstances** should a claim be paid until (a) you are satisfied that the input tax was incurred and not, in fact, deducted and (b) the quantum of the claim has been properly verified.

## 5.3 When is a claim a new claim?

In its decision in *University of Liverpool* (VAT Tribunal decision 16769), the VAT & Duties Tribunal described a completed claim as:

“... a claim which:

- (a) has been met in full by the Commissioners;
- (b) has been met in part by the Commissioners and the time limit for appealing against the rejection of the remainder prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;
- (c) has been met in part by the Commissioners, the taxpayer has appealed against the rejection of the remainder, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired or the appeal has been compromised;
- (d) has been rejected in full by the Commissioners and the time limit for appealing against that rejection prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;
- (e) has been rejected in full by the Commissioners, the taxpayer has appealed against that rejection, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired, or the appeal has been compromised.”

Thus any claim that follows a completed claim is a new claim. This is important where the follow-up claim is made out-of-time.

For example, Company Alpha makes a claim on 30 June 2007 for input tax underclaimed in the accounting period ending 30 June 2005. The verification of the claim takes some time and it is finally paid on 30 March 2008. This is a completed claim.

It is also important to note that a claim made on one set of facts, mistake or judgment is a separate claim from one made on another set of facts, mistake or judgment.

For example, Company Alpha makes a claim on 12 August 2007 under judgment A going back to the accounting period ending on 30 September 2004. On 25 January 2008, while the first claim is still being verified, it makes a claim under judgment B. That is a second, separate claim and can only go back to the accounting period ending on 31 March 2005 (assuming that the claimant is on stagger 1).

The decision in *University of Liverpool* was later endorsed by the Tribunal in the decisions in *John Martin Group* (VAT Tribunal Decision 19257), *The London Institute (now known as the University of the Arts, London)* (VAT Tribunal decision 19362) and *The Medical House Plc* (VAT Tribunal decision 19859).

## **6. Quantification of a claim – Input tax**

### **6.1 What amendments cannot be introduced into an open claim?**

Essentially, if the amendment that the claimant is trying to make would normally constitute a claim for overdeclared output tax under section 80 of the VAT Act 1994, it cannot be treated as an adjustment to a claim under regulation 29 of the VAT Regulations 1995.

It is important to remember that while a claim remains uncompleted, it can be adjusted up or down, either by the claimant or by the Commissioners at any time.

Thus, in relation to a claim made by Company Alpha on 30 June 2007, during the course of the verification of the claim, the claimant discovers further underdeductions of input tax in the same period that were not mentioned in his original claim. Those underdeductions must be included in the claim but only if they are founded on, e.g., the same judgment as the principal claim – see paragraph 5.3.

Company Alpha makes a claim on 30 June 2007 for unclaimed input tax that was incurred in the accounting period ending on 30 September 2004. On 12 July, they discover that they have overdeclared their output tax liability in that same period. They cannot treat that as an adjustment to his regulation 29 claim but they are still in time to make a claim under section 80 in any event. That's because they can make such a claim at any time within three years from the end of the accounting period in which the output tax was overdeclared – in this scenario, 30 of September 2007.

If, on the other hand, they only discover the overdeclaration on 5 of October 2007, they are out of time to make the claim and cannot treat it as an adjustment to the regulation 29 claim.

### **6.2 What is HMRC liable for on a claim?**

HMRC is only liable for the net underdeduction of input tax after all liabilities have been taken into account.

This version released on 6 August 2009

As well as a calculation of the undeducted input tax being claimed, claims must include a calculation of any underdeclarations that have not previously been declared regardless of whether they fall within the same accounting periods as those for which the claim was submitted.

No claim should be paid until you are content either that all outstanding liabilities have been taken into account or that there are none.

If you are not content, you should write to the claimant refusing to pay the claim unless information is provided on countervailing errors that we are required, or entitled, to set off. You should explain that you are not rejecting the claim at this stage but refusing to make payment on the grounds that you cannot be satisfied that the amount being claimed is not excessive. If that further information is not forthcoming within 90 days of the date of your letter, you should reject the claim and inform the claimant of his rights.

A person who makes a gross claim and refuses to disclose, or calculate, underdeclarations that he knows or suspects he has made in the accounting periods for which he submitted the claim may well be committing an offence under section 72(3) of the VAT Act 1994 or section 167 of the Customs & Excise Management Act 1979 and in appropriate cases you should follow normal referral procedures through your linked Evasion Referral Team (ERT).

### **6.3 Payment of claims**

You should check that there are no outstanding liabilities that should be set off against the claim before you authorise payment.

There are a number of elements that must be set off under section 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 before the claim is finally paid – see section 12 below on set-off for more details.

Payment must not be made where:

- The claimant has not succeeded in demonstrating that he incurred the input tax that he is claiming and that he failed to deduct it;
- The claimant has not been able to demonstrate that the amount being claimed is sustainable;
- You have not been able to establish the extent of the claimant's outstanding liabilities to your satisfaction.

## **7. Who can claim?**

### **7.1 General**

The only person who is entitled to make a section 80 claim is:

- the person who made the overdeclaration of output tax; or
- the person to whom the right to make a claim has been assigned or transferred by the person who made the overdeclaration.

The only person who can make a late claim for input tax is the person who incurred the input tax in the course and furtherance of his taxable activities.

That does not mean, of course, that the claim may not be made by a person acting for the claimant, such as an accountant, solicitor or tax adviser. You should ensure however, that the person acting for the claimant has submitted a signed Agent Authority Form 64/8. **We cannot discuss a claimant's tax affairs with a tax adviser unless we have a signed Form 64/8 from the claimant authorising us to do so.**

## **7.2 VAT groups**

Where an overdeclaration of output tax or underdeclaration of input tax is made by a member of a VAT group, the entitlement to claim remains with that VAT group as long as the group remains in existence. This applies regardless of any changes in the composition of the VAT group. Thus the only person who can make a claim for output tax overdeclared or input tax underclaimed by a member of a VAT group is the company that is the representative member of the VAT group at the time when the claim is made.

For example, in a group consisting of Companies Alpha, Bravo, Charlie, Delta and Echo, Company Alpha is the representative member. Companies Bravo, Charlie, Delta and Echo are subsidiary members. Company Charlie overdeclares his output tax entitlement and that is reflected in the return rendered by Company Alpha in its capacity as representative member. Shortly afterwards, Companies Alpha and Charlie leave the VAT group and are replaced by Companies Foxtrot and Golf. Company Golf takes over as the representative member. A couple of years after the overdeclaration was made the group's tax adviser discovers the error. The person who should make the claim is Company Golf and the person to whom the claim should be paid is the company that is the representative member at the time when the claim is paid even if that has changed since the claim was made.

This is so because section 43 of the VAT Act 1994 deems the representative member to have carried on the business of all of the subsidiary members and to have made and received all supplies of goods and services made by or to them. Section 43 also holds the representative member responsible for the VAT affairs of every member of the group.

If a company that is now treated as a member of a VAT group discovers that it made an overdeclaration of its output tax liability before it became a member of the group, the claim should be made by that company using its previous VAT registration number and any payment arising out of the claim should be made to that company, not to the representative member of the VAT group.

However, once the VAT group has been disbanded, the legal fiction created by section 43 ceases to apply and the right to make the claim reverts to the company that actually made the overdeclaration 'in the real world'.

Please remember that all subsidiary members of a VAT group are liable jointly and severally with the representative member for the period during which they were members of the group.

## **7.3 Companies registered in divisions**

Where an overdeclaration of output tax or underclaim of input tax is made by a division of a company that is registered for VAT in the names of its divisions, the claim should be made by the division that made the overdeclaration or underclaim. That is because the VAT account that is in error is that of the division in question.

If the divisional registration is cancelled and the company is once again registered for VAT under a single number, overdeclarations or underclaims made by any divisions that were previously separately registered and now form part of the single registration can be claimed by the company.

Where an overdeclaration or underclaim is made by a company that was previously registered for VAT under a single number and is now registered in the names of its divisions, the claim should be made by the division which has the VAT registration number of the company before it registered in the names of its divisions or by the headquarters division.

#### **7.4 English general partnerships**

A partnership is an unincorporated association governed by the Partnership Act 1890 and comprises a number of partners.

Partnerships do not have legal personality. It is the partners jointly who carry on the business of the firm and they who bear the liability for the debts and obligations of the firm.

A partnership cannot sue or be sued in the name of the firm and all rights and obligations lie with the individual partners.

While the partnership continues in existence, claims must be made by one of the partners and repayments must be paid into the partnership's trading account.

One would normally expect the claim to be made in the name of the partnership, i.e. the firm name or the name which is shown on the VAT register for the claimant. However, a claim for overdeclared VAT under section 80 of the VAT Act 1994 by a partnership can be claimed by any person who has signed the Form VAT2 for that partnership and has not notified us in writing under regulation 5 of the VAT Regulations 1995 that he has ceased to be a partner.

Once the partnership has been dissolved, claims may be made by any person who acted as a partner in the firm, for any period during which he acted as a partner. For instance, if a partnership of Mr Alpha, Mrs Bravo and Miss Charlie overstates its output tax liability and, shortly thereafter, is dissolved, the claim may be made by Mr Alpha, Mrs Bravo or Miss Charlie either jointly or individually.

If output tax is overdeclared by a partnership comprising Mr Alpha, Mrs Bravo, Miss Charlie and Mr Delta and, after a year, Miss Charlie and Mr Delta leave so that there only remains a partnership of Mr Alpha and Mrs Bravo which is disbanded a year later, Mr Alpha and Mrs Bravo can claim for overdeclarations made during the entire life of the partnership whereas Miss Charlie and Mr Delta can only claim for the periods during which they were partners.

You should be very careful, when dealing with claims from partners of firms that have been dissolved or claims from ex-partners of existing firms, to ensure that claims are not duplicated. You should be able to find the names of all partners, past and present, and their periods of membership of the firm on the VAT2 forms on Electronic Folder.

#### **7.5 Scottish general partnerships**

Under section 4(2) of the Partnership Act 1890 "...In Scotland a firm is a legal person distinct from the partners of whom it is composed ...". As a result, it is in the firm that

any right to make a claim under section 80 vests and not in the partners as individuals.

Thus a claim may only be made under section 80 by the firm and payment may only be made to the firm.

Care should be taken when dealing with claims by partners of firms which have become dissolved in Scotland. Payment should be made to " the dissolved firm of ...". If objection is taken to this, for example because the bank account in the name of the firm has been closed, you should be satisfied that the partner making the claim has the authority of the other partners and that there is no duplication of claims.

## **7.6 English limited partnerships**

A limited partnership is a partnership constituted under the Limited Partnership Act 1907 and comprises a number of partners who are general partners and a number who are limited partners. Limited partnerships will be registered on the Register of Limited Partnerships kept by the Registrar of Companies. If it is not so registered it should be treated as a general partnership with all partners being treated as general partners.

As in the case of English general partnerships, limited partnerships do not have legal personality. It is the general partners who carry on the business of the firm and they who bear the liability for the debts and obligations of the firm. The limited partners are not involved in the running of the business and are only liable for debts to the extent of the capital that they have introduced into the partnership.

A limited partnership cannot sue or be sued in the name of the firm and all rights and obligations lie with the individual general partners – not the limited partners. While the partnership continues in existence, claims must be made by one of the general partners and repayments must be paid into the partnership's trading account.

However, once the partnership has been dissolved, claims may be made by any person who acted as a general partner in the firm, for any period during which he acted as such.

You should be very careful, when dealing with claims from partners of firms that have been dissolved or claims from ex-partners of existing firms, to ensure that claims are not duplicated. You should be able to find the names of all general partners, past and present, and their periods of membership of the firm on the VAT2 forms on Electronic Folder.

You should also ensure that any claim from a limited partnership is made by one of the general partners and not by any of the limited partners.

## **7.7 Scottish limited partnerships**

As with Scottish general partnerships, limited partnerships in Scotland have legal personality separate from the persons that comprise them (section 4(2) of the Partnership Act 1890 and section 3 of the Limited Partnership Act 1907).

As a result claims are to be made by, and are payable to, the firm.

Care should be taken when dealing with claims by partners of firms which have become dissolved in Scotland. Payment should be made to " the dissolved firm of ...". If objection is taken to this, for example because the bank account in the name

of the firm has been closed, you should be satisfied that the partner making the claim has the authority of the other partners and that there is no duplication of claims.

## **7.8 Limited liability partnerships**

Section 1(2) of the Limited Liability Partnership Act 2000 provides that:

“(2) A limited liability partnership is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated under this Act; and—

...

references to a limited liability partnership are to such a body corporate.”

The result is that claims under section 80 of the VAT Act 1994 or regulation 29 of the VAT Regulations 1995 may only be made by, or on behalf of, the limited liability partnership (LLP) and repayments can only be made to the partnership.

Ex-partners cannot make claims for amounts overdeclared by way of output tax by an LLP after it has been dissolved.

A limited liability partnership will be registered on the Register of Limited Liability Partnerships maintained by the Registrar of Companies. If they are not registered, they should be treated as general partnerships with all partners holding the rights and liabilities of general partners.

## **7.9 Death, insolvency and incapacity**

Where a natural person has died and the estate is still being wound up, any amounts overdeclared, overpaid or underclaimed by the deceased can be claimed by the executor on behalf of the estate. However, once the estate has been wound up, no further claim can be made.

Where a natural person has become incapacitated or bankrupt, the person acting on his behalf, for example, the person with power of attorney or the trustee in bankruptcy, will be allowed to make the claim on behalf of the incapacitated or bankrupt person.

Where a company goes into administration or into liquidation, it will be the administrator, liquidator, receiver or other insolvency practitioner who will be allowed to make the claim.

In none of the above cases is the claim payable to the representative in his personal capacity. The claim is payable only to the account of the person for whom he is acting.

Where a claim is submitted by a taxable person before he dies, becomes insolvent or incapacitated and, at the time of his dying, becoming insolvent or incapacitated that claim has still not been paid, it may only be pursued by the executor, trustee in bankruptcy, administrator, liquidator, etc. Furthermore, payment should only be made to the representative rather than to the taxable person himself directly. That is so notwithstanding the fact that it was the taxable person who initiated the claim.

## 8. Claims by assignees and transferees

### 8.1 General

Until the Court of Appeal handed down its judgment in *CRC –v- Midlands Co-operative Society Ltd* [2008] EWCA Civ 305; [2008] STC 1803; [2008] BVC 414, it was generally believed that the only person who could make a claim to recover any amount overdeclared by way of VAT was the person who actually made the overdeclaration or overpayment and this view was endorsed by the VAT & Duties Tribunal in its decision in *Shendish Manor Ltd* (VAT Tribunal Decision 18474).

In her judgment in *Midlands* Arden LJ concluded that a right to make a claim for overdeclared VAT is property for the purposes of the Law of Property Act 1925 and that, as such, it can be assigned, transferred or sold under section 136 of that Act. This judgment effectively restates and confirms for the purposes of UK law the judgment of the European Court of Human Rights in *SA Dangeville –v- France* [2002] ECHR 419; [2003] STC 771; [2005] BVC 630 in which the court concluded that the right to make a VAT claim was a 'possession' within the meaning of Art. 1 of Protocol 1 of the European Convention on Human Rights.

Because the right to make a claim is property it can be transferred, assigned or sold and, if it can be transferred, assigned or sold, it can be enforced by somebody other than the person who actually made the overdeclaration of output tax. The person who made the overdeclaration of output tax is known in the legislation (section 133 of the Finance Act 2008) as the original creditor and the person to whom the right to make the claim is assigned is referred to as the current creditor.

It is likely that the most common situation in which you will come up against assigned rights to claim will be where a person has transferred his entire business as a going concern.

You will need to establish, by reference to deeds of transfer, contracts, etc, exactly what it was that was transferred to the transferee. If there is no explicit provision for the transfer of rights to make claims under section 80 of the VAT Act 1994, you should proceed on the assumption that the right to claim remains with the transferor.

Whilst it is perfectly possible for the right to make a section 80 claim to be transferred, assigned or sold on its own as property **in its own right**, it will probably be quite rare.

If you get a claim from a person other than the person who made the overdeclaration of output tax, you must check that that person does, in fact, have the right to make the claim. If he can produce no evidence to show that the right to claim has been assigned to him, you should simply reject the claim.

The default position should be this. If there is no evidence that the right to make a claim has been transferred, you should assume that it has not.

That said, if you have a situation where Jacques operated as a sole proprietor for a few years before transferring the entire business to a partnership of Jacques and Jacqueline and they carried on business in partnership for another few years before transferring the entire business to an incorporated company called Jacques et Line Ltd, it will be reasonable to assume that the right to claim any output tax overdeclarations or overpayments made by the sole proprietor or by the partnership will now vest in the limited company.

This version released on 6 August 2009

The question of whether the right to claim has been transferred, assigned or sold will be a question of fact.

## **8.2 Rights to claim assigned on or after 25 June 2008**

Where a person assigns the right to make a claim under section 80 of the VAT Act 1994 on or after 25 June 2008, that claim, when it is finally exercised, will be subject to the set-off provisions in section 133 of the Finance Act 2008. See the section on set-off below for more detail.

## **8.3 Rights to claim assigned before 25 June 2008**

Rights to claim assigned before 25 June 2008 are not subject to the provisions of section 133 of the Finance Act 2008. The treatment of the claim will depend, however, on when the right to make the claim was assigned – see paragraphs 8.4 and 8.5.

## **8.4 Rights to claim assigned before 26 May 2005 – What is assigned?**

If the right to claim was assigned before section 80 was amended by section 3 of the Finance (No. 2) Act 2005 with effect from 26 May 2005, what the assignor (or original creditor) will have assigned to the assignee (or current creditor) is the right to make a net claim for the amount **paid** by way of VAT that wasn't VAT due. For example, if the original creditor had made the claim himself before 26 May 2005, he would have made a claim, for example, for the total overdeclared output tax, less any overclaimed input tax.

Verification of such claims, as with any claims by assignees, will necessitate the examination of the books and records of the original creditor.

If he assigns the right to make that claim to another person, it is the right to make the claim that he would have been able to make that he has assigned. The current creditor can only make a claim for the net overpayment. Once that has been calculated, by reference to the records of the original creditor, payment of the claim will be subject then to the set-off provided for in section 81 of the VAT Act 1994 and section 130 of the Finance Act 2008 so that all outstanding tax liabilities of the current creditor are set off against the amount due under the claim.

## **8.5 Rights to claim assigned between 26 May 2005 and 24 June 2008**

If the original creditor assigned the right to claim on or after 26 May 2005 but before 24 June 2008, he will have assigned the right to make a claim for the gross overdeclaration of output tax.

Section 80 as amended requires that a claim be made for the total amount of overdeclared output tax. Subsection (2) provides that the Commissioners are liable to credit to the claimant with whatever remains after subsection (2A) has been applied to set off against the amount claimed, all the liabilities that are required to be set off against the amount due under the claim.

However, subsections (2) and (2A) are references to the outstanding liabilities of the claimant. Where the person who makes the claim is not the person who overdeclared the VAT being claimed, the liabilities that we can deduct from the amount claimed are only those of the claimant. We cannot bring into account the outstanding liabilities of the person who made the overdeclaration.

For example, Company Alpha overdeclares output tax to the tune of £5,000,000 on supplies that ought to have been treated as exempt from VAT. He has deducted something like £3,000,000 in input tax in relation to those supplies. If he made the claim himself, that overclaimed input tax would be deducted from the amount claimed so that he would only receive £2,000,000 under the claim.

However, if the right to make the claim is assigned to Company Bravo, that all changes. Company Bravo now has a right to make a claim for £5,000,000 but when we go to deduct from the amount claimed any outstanding liabilities, we find a couple of unpaid VAT assessments for £100,000 each and that's it. Company Bravo will get £4,800,000 back on the claim.

In short, because the claim was assigned before 25 June 2008, when the current creditor finally makes his claim, it will not be subject to section 133 of the Finance Act 2008. The only outstanding liabilities that we shall be able to set off against the claim are those of the current creditor that are covered by section 81 of the VAT Act 1994 and section 130 of the Finance Act 2008.

### **8.6 Output tax claims – assignment of right to claim**

The right to claim amounts overdeclared as output tax can be transferred under section 136(1) of the Law of Property Act 1925.

The most common situation where a right to claim will be transferred from one person to another will be where a company has transferred its entire trading assets and liabilities to another person.

You should note, however, that the sale of shares in a company does not, of itself, lead to the transfer of the right to make a claim. If Able Ltd sells its share in Baker Ltd to Charlie Ltd, any rights that Baker Ltd has to claim overdeclared output tax will remain with Baker Ltd.

You should also note that the movement of a company into, or out of, a VAT group does not necessarily involve the transfer of any rights to claim from or to the representative member of that group. For example, Dog Ltd overdeclares its output tax liability and subsequently becomes a member of a VAT group of which Easy Ltd is the representative member. The right to claim the overdeclared output tax remains with Dog Ltd (under its old VAT registration number) unless Dog Ltd makes explicit provision for the right to claim to be assigned to Easy Ltd.

If, after leaving the VAT group Dog Ltd discovers that it overstated its output tax liability while it was treated as a member of Easy Ltd's VAT group, it cannot make a claim to recover that money. That claim vests in Easy Ltd as the company that accounted for the VAT in its capacity as representative member of the VAT group ... unless Easy Ltd makes explicit provision for the assignment of the right to claim to Dog Ltd.

### **8.7 Input tax claims – assignment of right to claim**

The default position is that the right to claim deduction of input tax vests in the person who made the supplies of goods or services to which the input tax was attributable.

The right to claim deduction of input tax may only be assigned in two situations.

The first is where a business is transferred as a going concern from a transferor to a transferee and the transferee adopts the VAT registration number of the transferor under the terms of regulations 6(3) of the VAT Regulations 1995.

The second is where the activities of a body are transferred by statute or by statutory instrument and provision is made that all rights, property and liabilities are transferred to the successor body. This might arise, for example, where functions were transferred from one local authority to another as part of the reorganisation of local government under the Local Government Act 1992 or where activities were transferred from a Regional Health Authority to one or more NHS Trusts under the National Health Service and Community Care Act 1990.

Claimants will need to produce the statutory provisions (e.g. Orders of the Secretary of State) transferring the activities to them and you will need to be satisfied that the right to claim the right to deduct input tax does vest in the person making the claim.

## **9. What can be claimed?**

### **9.1 General**

Any claim under section 80 of the VAT Act 1994 will be for the output tax overdeclared. That is to say, if, for a given prescribed accounting period a person has overdeclared output tax on product A to the tune of £100,000 and has underdeclared output tax of £50,000 on product B, his claim for that period under section 80(1) will be for the balance - £50,000.

However, section 81 of that Act requires that any amounts owing to HMRC by the claimant are set off against the amount of the claim and section 80(2A) makes it clear that we are only liable to credit to the claimant what remains after all the claimant's liabilities have been taken into account.

In practice, we would expect any claim submitted under section 80 to set out the total amount of output tax overdeclared and include a schedule of the liabilities that will be required to be set off under section 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008.

The liabilities that must be disclosed include:

- any unpaid assessments (whether for VAT, interest, surcharge or penalty) for any accounting periods;
- any unpaid VAT returns for any accounting periods;
- any overclaim of input tax, for whatever accounting period, that arose out of the same mistake that led to the claim;
- any underdeclaration of output tax, for whatever accounting period (this ought to have been taken into account in the calculation of the claim in the first place);
- any amount that could have been assessed as VAT, interest, surcharge or penalty (even if it's now out-of-time) for whatever accounting period provided that any assessment would have been founded on the same mistake that led to the claim;
- Any outstanding debts in relation to any of the other direct and indirect taxes.

You should not, generally speaking, reject a gross claim, if it meets the criteria in regulation 37, simply on the grounds that the claimant has not calculated and disclosed his liabilities. However, where the liabilities are not disclosed in the claim,

you should ask that the claimant provide the necessary disclosure as soon as possible.

At the end of the day, if the liabilities are not disclosed, the claim will not be paid.

### **9.2 Subsection (1) of section 80 of the VAT Act 1994**

Under section 80(1), claims may be made to recover amounts overdeclared as output tax on a VAT return. The most common generators of such claims are judgments of the courts holding, for example, that a given supply is not subject to VAT at the standard rate but at the zero rate. A claim by taxable persons under these circumstances would be a claim under section 80(1).

This subsection also covers claims for output tax overdeclared as a result of a failure to make an adjustment under regulation 38 of the VAT Regulations 1995 – see the decision of the VAT & Duties Tribunal in *General Motors Acceptance Corporation (UK) Plc* (VAT Tribunal Decision 19989 – paragraphs 75-77).

For example, Company Alpha supplied an E-Type Widget to Company Bravo for £100 plus VAT (£17.50). Six months later, Company Alpha reduced the price of the widget to £50 and issued a credit note to Company Bravo for £50 plus £8.75 VAT. Regulation 38 requires that Company Alpha reflects that adjustment in the next return after the change of consideration was entered in the business records. If that isn't done, the return is in error because it includes an amount declared as output tax that wasn't due as such. The result is that Company Alpha has a claim under section 80(1) of the VAT Act 1994.

### **9.3 Subsection (1A) of section 80 of the VAT Act 1994**

Subsection (1A) of section allows taxable persons to claim amounts paid pursuant to assessments for output tax where the assessment turned out to be for an amount that was not due as output tax.

For example, if a taxable person, who has been treating his supplies of widgets as exempt of VAT, is assessed for output tax on those supplies of widgets and it later turns out that he was treating them correctly in the first place, he can make a claim under section 80(1A) to recover the amount he paid pursuant to that assessment.

Claims made to recover amounts disclosed by a taxable person as being an underdeclaration of output tax where it later turns out that the disclosure was wrong are within the scope of this subsection.

### **9.4 Subsection (1B) of section 80 of the VAT Act 1994**

Subsection (1B) allows traders to recover amounts of output tax that have been overpaid, for example, as a result of invoices being counted twice or a return being paid twice.

This subsection also covers amounts paid on assessments for amounts thought to have been incorrectly deducted as input tax. For example, HMRC make an assessment against a taxable person on the grounds that he has deducted too much input tax and the taxable person pays that assessment. If, within the statutory time limits, it turns out that the assessment was wrong and that the taxable person ought not to have paid it, he can recover it under subsection (1B) of section 80.

This subsection essentially covers all overpayments of VAT that are not covered by subsections (1) and (1A) or by regulation 29 of the VAT Regulations 1995.

### **9.5 Failure to make regulation 38 adjustments**

Where a trader makes a supply and subsequently reduces the consideration for that supply he is required (under regulation 38 of the VAT Regulations 1995) to make an adjustment to his VAT account to reflect that in the next return due after the date on which the reduction was made in his business accounts.

If he does not make that adjustment, that next return will include an amount declared as output tax that is not output tax due and, as a result of that, he will have a right to make a claim under section 80.

Clearly, these claims would normally be capped at three years. However, like any other section 80 claim, they benefit from the judgment of the House of Lords in *Fleming*.

Before 1 January 1978, there was no provision in Community legislation or in national legislation for such adjustments to be made. The right was established when the Sixth VAT Directive (77/388/EEC) took effect at the beginning of 1978. The UK legislation was enacted, in the VAT (Accounting and Records) Regulations 1989 which took effect on 1 January 1990.

As a result, no claim under section 80 for amounts overdeclared as a result of a failure to make what is now an adjustment under regulation 38 can go back to any accounting period ending before 1 January 1978.

### **9.6 Claims by assignees and transferees**

Where a person who has overdeclared his output tax liability (the original creditor) has transferred the right to make that claim to another person (the current creditor), the current creditor is entitled to make the claim in exactly the same way as would be the case if the original creditor had retained the right to make the claim himself.

### **9.7 Late claims for input tax**

Under regulation 29 of the VAT Regulations 1995, a VAT registered person is entitled to deduct or claim any input tax that he has incurred in the course and furtherance of his taxable business activities – see the guidance in V1-13 for details on who can deduct input tax and under what circumstances.

In practice, we would expect any claim submitted under regulation 29 to set out the total amount of input tax underclaimed and include a schedule of the liabilities that will be required to be set off under section 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 – see section 12 below for more details.

The liabilities that must be disclosed include:

- any unpaid assessments (whether for VAT, interest, surcharge or penalty) for any accounting periods;
- any unpaid VAT returns for any accounting periods;
- any overclaim of input tax, for whatever accounting period, that arose out of the same mistake that led to the claim;
- any underdeclaration of output tax, for whatever accounting period, that arose out of the same mistake that led to the claim;

- any amount that could have been assessed as VAT, interest, surcharge or penalty (even if it's now out-of-time) for whatever accounting period provided that any assessment would have been founded on the same mistake that led to the claim;
- Any outstanding debts owed to HMRC in relation to any of the other direct and indirect taxes.

You should not reject a gross claim simply on the grounds that the claimant has not provided details of the above liabilities. However, where the liabilities are not disclosed in the claim, you should ask that the claimant provide the necessary disclosure as soon as possible.

At the end of the day, if the liabilities are not disclosed, the claim will be rejected.

## **10. Handling of claims in particular cases**

### **10.1 Transfers of businesses as going concerns**

Generally speaking, claims may only be made by, and paid to, the person who overaccounted for the tax.

For example, 'A' overpaid or overdeclared output tax between 1973 and 1996 and then transferred his business as a going concern to 'B' who made a claim on the back of the RCB 07/08 for the amounts overdeclared by 'A'.

However, where the TOGC is covered by a VAT68, the right to make a late claim to input tax is transferred.

For instance, 'A' underclaims input tax between 1973 and 1997 and then transfers his business to B as a going concern. If 'A' also transfers his VAT registration number to 'B', 'B' will be entitled to make a claim to recover the input tax not deducted by 'A' (see regulation 6(3) of the VAT Regulations 1995). If 'A' doesn't transfer his VAT registration number to 'B', 'B' cannot make a claim in respect of 'A's' undeducted input tax. The right to make the late claim to input tax rests with 'A' even if he is no longer registered for VAT.

The question of whether, and when, the right to make a claim under section 80 is transferred will be answered by the facts in each case. In its judgment in *CRC –v- Midlands Co-operative Society Ltd* [2008] EWCA Civ 305; [2008] STC 1803; [2008] BVC 414, the Court of Appeal held that the right to make a claim under section 80 is property and is assignable under section 136 of the Law of Property Act 1925.

The most common situation where you may find the right to make a claim transferred is where a business has been transferred as a going concern. You will need to check the terms of contracts, deeds of transfer and such like to establish exactly what was transferred to the transferee. In the absence of any explicit evidence that the right to claim has been transferred, you should assume that it has remained with the transferor.

### **10.2 Claims by motor traders**

Claims are likely to be made by motor dealers for overdeclarations made on bonuses given by the manufacturers to the dealers (see *Elida Gibbs Ltd –v- C&E Commrs*, CJEC Case C-317/94; [1996] STC 1387; [1997] BVC 80) and for output tax overdeclared on the sale of demonstrator vehicles under the second hand scheme

(see *EC Commission –v- Italian Republic* CJEC Case C-45/95; [1997] STC 1072; [1997] 1 ECR 3605; [1997] BVC 536).

Many of these will be claims which were not made at the time and most, if not all of them will be estimated. Unless the claimant has his own contemporary records, claims should be calculated in accordance with the guidance and tables published by the Motor Trade Unit of Expertise in consultation with the Society of Motor Manufacturers and Traders (SMMT) and the Retail Motor Industry Federation (RMIF). These tables can be obtained from the Motor Trade Unit of Expertise.

## **11. Risks**

### **11.1 Overturned judgments**

You should check that the claim is not based on a judgment that was found against HMRC in, for example, the High Court or Court of Appeal, but which was finally overturned in our favour. The judgment in Case C-34/99, *CCE –v- Primback Ltd* [2001] STC 803; [2001] BVC 315 is a good example of this. Clearly such claims should be rejected.

### **11.2 Liability of supplies**

If you are not sure whether the claimant's view of the liability of his supplies is correct, you should ask for copies of correspondence with HMRC giving the liability ruling or, in the absence of any such correspondence, check with the relevant policy team. Exemption of supplies by 'cultural bodies' could be a good example of a situation where this might be necessary.

### **11.3 Duplicate claims**

It is possible that the claim submitted under the RCB 07/08 is the second, or even third or fourth, etc., claim submitted since the ECJ delivered its judgment in *Marks & Spencer* on 11 July 2002. In other words, the claimant may have submitted one or more claims on the back of Business Briefs 22/02 and 27/02.

Those carrying out the initial vet of the claim should check on EF to see whether previous claims have been submitted and see that there is no obvious overlap between the claims. If this is a further claim, this fact should be brought to the attention of the officer who will be verifying the quantum of the claim so that he can check more closely to ensure that there is, in fact, no overlap.

## **12. Set-off**

### **12.1 General**

Once the claim has been quantified you must make sure that the claim is not paid before the required set-offs are made.

There are a number of elements that must be set off under section 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 before the claim is finally paid.

The liabilities that you should be looking to set off, and which ought to have been disclosed by the claimant when he made his claim include:

- any unpaid assessments (whether for VAT, interest, surcharge or penalty) for any accounting periods;

This version released on 6 August 2009

- any unpaid VAT returns for any accounting periods;
- any overclaim of input tax, for whatever accounting period, that arose out of the same mistake that led to the claim;
- any underdeclaration of output tax, (this should have been taken into account in the calculation of any claim under section 80 but not necessarily in an input tax claim);
- any amount that could have been assessed as VAT, interest, surcharge or penalty (even if it's now out-of-time) for whatever accounting period provided that any assessment would have been founded on the same mistake that led to the claim;
- Any outstanding debts in relation to any of the other direct and indirect taxes.

You should also check that no further liabilities have arisen since the claim was made. You will find further details on the policy on set-off and the mechanics of accounting for it in the Debt Management and Banking Manual at:

<http://home.inrev.gov.uk/dmbmanual/DMBM700000.htm>.

## **12.2 Set off and VAT groups**

Where a claim is made by a company that used to be a member of a VAT group that has since been disbanded, that company will continue to be liable, by way of set-off, for any outstanding debts of the VAT group, e.g., write-offs. Contact Debt Management & Banking or check the DMB Handbook.

## **12.3 Claims by assignees and transferees**

Where a claim is made by a person (the current creditor) other than the person who actually overdeclared his VAT liability (the original creditor), you will first have to establish from the claimant who made the overdeclaration that is being claimed.

If the claimant refuses to disclose the origin of the claim, it should be rejected outright. No claim will be paid until it has been verified and if you are unable to identify the person who made the VAT overdeclaration that is being claimed, you cannot verify it.

Once you have established the identity of the original creditor, you will need to go through his accounts to verify the extent of the overdeclaration. Any of the original creditor's accounts that were used to quantify the claim can be disclosed to the current creditor under the provisions of section 18(2)(a)(i) of the Commissioners of Revenue & Customs Act 2005.

As with any claim, it is for the claimant to show that the mistake that led to the claim was, in fact, made and that the amount claimed is accurate.

Under section 133 of the Finance Act 2008, the provisions of section 81(3) and (3A) of the VAT Act 1994 and section 130 of the 2008 Finance Act can be applied to the payment to be made to the current creditor as if it were being made to the original creditor.

If all of the outstanding liabilities of both the original and the current creditor exceed the amount due on the claim, you should simply pay nothing on the claim.

Please note that you cannot hold the current creditor liable for the outstanding liabilities of the original creditor.

## **12.4 Claims by assignees – Statutory transfer of rights & assets**

In some cases where 'business' activities are transferred from one person (the original creditor) to another (the current creditor), the transfer is governed by statute. Such transfers might be made, for example, under:

- The Local Government Act 1992 and;
- The National Health Service and Community Care Act 1990; and
- The Industrial and Provident Societies Act 1965.

The extent to which rights to make claims and liabilities for outstanding debts are transferred will be set out in the legislation, in some cases in Orders of the relevant Secretary of State made under the appropriate Act of Parliament.

Where a claim is made by an entity other than the one which made the overdeclaration being claimed, you should ask the claimant for the details of the legal provisions under which they took over their activities with a view to establishing that they are, in fact, entitled to make the claim.

## **13. Payment of claims**

No money should be paid until you are satisfied that the claim has been properly quantified and the required set-offs have been made.

Under no circumstances should any amounts be paid to claimants 'on account' unless you are satisfied that entitlement has been firmly established in relation to the amount to be repaid. Outstanding debts and liabilities and associated unassessed liabilities must be set off against the amount due under the claim before any payment or credit is made.

## **14. Claims subject to appeal**

It is very likely that many of the existing claims that you will have to deal with will be claims that have been rejected where the claimant has appealed to the VAT & Duties Tribunal. Many, if not all, of them will have been stood over pending the House of Lords' judgment in *Fleming*.

You should liaise with the Solicitor's Office staff to ensure that the original decision capping the claim is withdrawn. The Appellant should be told that the claim is being referred to the Fleming Claims Team for verification. The Appellant should be invited to withdraw the appeal.

You should also make it clear that the fact that we have withdrawn our original decision in principle does not, of itself, mean that they will be paid anything under the claim. It is entirely possible that, on verification, it turns out that there was no overdeclaration of output tax or underclaim of input tax.

However, if it does happen that we end up taking the view that nothing is payable under the claim, that will be a new decision and will be appealable under section 83(c) or (t) of the VAT Act 1994 as appropriate.

## **15. Protective claims**

In the run-up to 1 April 2009, a substantial number of 'protective claims' were submitted based on as yet unsettled litigation.

A person only has a claim, whether under section 80 of the VAT Act 1994 or regulation 29 of the VAT Regulations 1995, if we accept that he has overstated his output tax liability or understated his input tax entitlement. Where we are litigating a liability point and either there is no authoritative judgment or the standing judgment is in our favour, we will not have conceded that the claimant has a claim.

Claims made on a protective basis should be rejected. They should not be held on file.

If the claimant wishes to protect his position vis-à-vis the claim, he has the right to appeal to the Tax Tribunal.

## **16. Abusive claims**

There is a good deal of case law of the ECJ holding that:

It is ... settled case-law that Community law cannot be relied on for abusive or fraudulent ends – see, Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32, and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68.

This approach has been adopted by the House of Lords in *Pirelli Cable Holding NV – v- IRC & other appeals*, [2006] UKHL 4; [2006] STC 548; [2008] BTC 526.

On the one hand, a Member State may not rely on its failure to implement a provision of EU law. On the other, businesses and individuals who seek to rely on the direct effect of an EU provision cannot “cherry pick” in order to produce an advantageous result.

If a person relies on the direct effect of an EU provision, that provision must be given its full effect. A claim which relies on only one part of a provision to the unjustified advantage of the claimant is abusive.

The term ‘abusive claim’ as used here means that the claimant has sought to use EU legislation or the case law of the ECJ (or UK legislation and case law intended to implement the EU provisions) in order to obtain a result which is contrary to the intentions of the EU legislator and contrary to the intention of the ECJ. That result is an unjustified tax advantage.

A simple example of such a claim might be where, after a judgment that supplies of x are exempt rather than taxable, a trader makes a claim for the output tax that he overdeclared on his supplies of x but doesn’t declare the input tax that he deducted wrongly on the understanding that his supplies were taxable.

The rationale behind the claim is that the claimant has a Community law right to recover the overdeclared output tax and that HMRC are not entitled to recover the input tax because they cannot rely on their failure to implement Community law properly.

You will also find claims made on the reverse basis. Supplies that were thought to be exempt have been held to be liable to VAT at the standard rate. The claimant submits a claim for the input tax that he would have been entitled to deduct if he had treated his supplies as taxable but he takes no account of the countervailing liability for output tax. We have also seen claims made on that basis but stretching back to years for which the claimant wasn’t registered for VAT. Their logic, such as it is, is

that if they'd known that their supplies were taxable, they would have registered for VAT and, as a result, they would have been able to deduct their input tax.

Such claims should be rejected and brought to the attention of Anti-Avoidance Group.

## **17. Unjust enrichment**

### **17.1 Resubmission of pre-1997 claims**

If you are dealing with a claim **which was made on or after 26 May 2005** and was originally submitted back in 1996 or 1997 and capped, you ought to consider invoking the unjust enrichment defence, even if it was not considered at the time the original claim was dealt with.

If, when the original claim was made, we only repaid, for example, 50% of the uncapped amount on the grounds that payment of anything more than that would lead to the unjust enrichment of the claimant, that same percentage ought to be applied, in the absence of evidence to the contrary, to any claim for amounts which were withheld under the capping provisions.

If unjust enrichment was considered in relation to the original claim and it was decided that payment would not unjustly enrich the claimant, it is likely that that decision will also apply to the new claim.

### **17.2 Repayment returns**

Since 26 May 2005, the unjust enrichment defence can be invoked against all claims for output tax including those for output tax overdeclared on repayment returns.

### **17.3 Judgment of the House of Lords in *Marks & Spencer Plc –v- CRC* [2009] UKHL 8; [2009] STC 452; [2009] BVC 106**

Prior to 26 May 2005 (when the law was changed), the unjust enrichment defence could only be applied to payment traders and not repayment traders. In its judgment in Case C-309/06, *Marks & Spencer Plc –v- CRC* [2008] STC 1408; [2008] BVC 577, the European Court of Justice held that this was discriminatory. In light of the recent House of Lords judgment in *Marks and Spencer*, the unjust enrichment defence should no longer be used against any claim made before 26 May 2005, even where the claimant suffered no loss as a result of having made the overcharge of VAT.

In other words, claims that were made before 26 May 2005 and that are still open should not be subjected to the unjust enrichment defence.

However, the law was changed with effect from 26 May 2005. The unjust enrichment defence now applies to all claims made on or after that date. The ECJ has acknowledged that the amended legislation is no longer discriminatory. Any claim made under the amended section 80 can be rejected for unjust enrichment even if it relates to accounting periods ending before the enactment of the changes.

### **17.4 Retrospective application of the defence**

The defence can be invoked against claims made on or after 26 May 2005 even where the claim relates to accounting periods ending before that date. In his opinion in Case C-147/01, *Weber's Wine World Handel GmbH –v- Abgabenberufungskommission Wien*, the Advocate General addressed the retrospective application of the unjust enrichment defence and said:

This version released on 6 August 2009

“66. A national rule which does no more than preclude unjust enrichment is compatible with Community law.

67. Where such a rule applies to claims in respect of situations which arose before its enactment, that effect does not seem to me incompatible with Community law. On the one hand, in so far as it seeks to preclude unjust enrichment, it in fact precludes only enrichment which would have occurred after its enactment, provided that there is no provision for recovery of any amount already reimbursed. On the other hand, there can in any event be no legitimate expectation of any such enrichment, since the very concept of legitimacy cannot embrace what is unjust.”

## **18. Time limits – Expiry of transitional period**

### **18.1 All claims made on or after 1 April 2009 will be capped at four years**

The legislation states that claims must be made before 1 April 2009. This means that claims “made” after midnight on 31 March 2009 are out-of-time and should be rejected.

In this context “made” is to be interpreted in a way that is consistent with our published guidance on the submission of voluntary disclosures in V1 -35, section 17, paragraph 13, which states:

“The business must inform its local VAT office of the error/s [...] before 3 years have elapsed or the error cannot be corrected. You should always use your discretion and adopt a common-sense approach when deciding the date the business has informed its local office. In practice you should normally accept the date of the letter of notification or signature on the Form VAT 652 (i.e. not the date the voluntary disclosure is processed), unless you believe the voluntary disclosure procedures are being abused.”

### **18.2 Date stamping of claims**

In order to ensure that no in-time claims would erroneously be recorded as having been received late and to provide supporting evidence to help decision making on cases of possible abuse, all post rooms received guidance on the date-stamping of claims received by hand or through the public post to ensure the correct recording of the date a claim was received.

Claims in post boxes when first opened each morning were date stamped with the date of the day that box was last opened as the earliest possible time of receipt (i.e. post already in post boxes on Wednesday 1 April before the post was delivered should have been date stamped 31 March, post already in post boxes before the post was delivered on Monday 6 April should have been post marked as received 3 April).

### **18.3 What does this mean in practical terms?**

In practical terms this means you can immediately accept as being made in time:

- claims made by fax or email where the date and time of the communication indicates that it was received before midnight on the 31 Mar;

- claims made by hand which are date stamped as being received on 31 Mar or earlier;
- postal claims dated 31 Mar or earlier which are date stamped as being received on or before 6 April (to allow for delivery by public post)

#### **18.4 What should I do if a claim looks to be out of time?**

You should first contact the Fleming Team who will check their database to ensure that an identical in-time claim has not been recorded. This is because some claims were submitted by more than one channel (public post, fax, email) and an identical claim may have been recorded with an earlier date of receipt than indicated on the paperwork you are reviewing.

After confirming the absence of an identical claim with an earlier date you may reject as being out of time:-

- any claim dated and received on or after 1 April.
- any **emailed, faxed or hand delivered** claims with a date of receipt on or after 1 April.

If you are dealing with a **postal claim** dated before the 1 April 2009 but date stamped as being received later than 6 April then you should exercise your judgment as to whether it is likely that the letter was posted before 1 April and/or whether it is possible that the claim may have been backdated in an attempt to subvert the statutory deadline.

In making this judgment you should consider all the available evidence and in cases of doubt should consider asking the trader for alternative evidence (e.g. from their post-room or from any postal receipt obtained from The Royal Mail etc) that would support their case. Where you are satisfied that the claim is out-of-time it should be rejected.

Where you have evidence to suggest that claims have been backdated to subvert the statutory deadline you should contact the Fleming claims team for further advice.

### **19. Time limits – Scottish Equitable**

#### **19.1 Order of the Inner House of the Court of Session**

On 2 July 2009, the court gave its order in the litigation between HMRC and Scottish Equitable Plc. In that order, the court refused our application for a reference to the ECJ under Art. 234 EC but upheld our appeal against the decision of the VAT & Duties Tribunal of January 2006.

The court held that:

“...it was wrong for the Tribunal to hold that the absence of appropriate transitional provisions attached to the amendment to s 80 of VATA 1994 by s 47 of the FA 1997 required the Tribunal completely to disregard the provisions of the latter legislation and treat the previous, unamended provisions of VATA as continuing in force. ... It was well recognised that national legislation which was not in compatibility with EC law was not void or generally unenforceable. The supremacy of Community law simply meant that a right enjoyed under Community law prevailed, for its holder, over competing provisions of national law. The position was succinctly set out by Lord Walker

of Gestingthorpe in the opening paragraph of his opinion (paragraph [24] of the reports) in *Fleming v HMRC* (2008) UKHL 2; (2008) 1 WLR 195.

Secondly, the Tribunal had failed to recognise, in the context of the need for appropriate transitional provisions, the distinction between accrued rights and subsequently arising rights. The need to disapply arose only respecting accrued rights at the time of the legislative amendment. It could not be argued that the disapplication extended to rights to re-payment accruing in the future.”

## **19.2 Current case law on the point**

This means that the case law in Scotland and in England and Wales now agrees that the judgment of the ECJ in *Marks & Spencer Plc –v- CCE* [2002] STC 1036 does not have the effect of setting aside the time limit to the extent that it is applied to claims that arose after its enactment. Put another way, claims that accrued after the date on which the three-year cap was enacted are properly capped.

The two judgments are *CRC –v- Scottish Equitable* (unreported) and *Local Authorities Mutual Investment Trust –v- CCE* [2003] EWHC 2766 (Ch); [2004] STC 246 – the former relating to an output tax claim and the latter to an input tax claim.

## **19.3 Status of the three-year cap**

Claims for the Fleming periods (accounting periods ending between 1 April 1973 and 4 December 1996 for output tax claims and between 1 April 1973 and 1 May 1997 for input tax claims) made on or after 1 April 2009 (see section 18 above) should be refused as being out-of-time.

Similarly, claims for Scottish Equitable periods (accounting periods ending between 5 December 1996 and 31 March 2006 for output tax claims and between 1 May 1997 and 31 March 2006 for input tax claims) should also be refused as being out-of-time.

All claims made on or after 1 April 2009 are now capped at four years or to accounting periods ending on or after 1 April 2006 whichever is the shorter.

### **19.3.1 Output tax claims**

Claims for overdeclared output tax are capped at four under section 80(4) of the VAT Act 1994 as amended by Article 2 of the Finance Act 2008, Schedule 39 (Appointed Day, Savings and Transitional Provisions) Order 2009, SI 2009/403 and subject to transitional provisions of Article 6 of the Order – i.e. any accounting period ending on or before 31 March 2006 is out-of-time.

Thus, on 31 March 2009, the earliest accounting period for which a claim could be made under section 80(1) was that ending on 31 March 2006.

On 30 April 2009, the earliest accounting period for which a claim could be made under section 80(1) was that ending on 30 April 2006.

Similarly, on 31 October 2009, the earliest accounting period that can be claimed for will also be that ending on 30 April 2006.

However, by 30 April 2010, the four-year time limit will have come fully into effect so that a claim made on that date can go back to the quarter ending 30 April 2006.

### 19.3.2 Input tax claims

Late claims for undeducted input tax are capped at four years under regulation 29(1A) of the VAT Regulations 1995 as amended by regulation 3(c) of the VAT (Amendment) Regulations 2009, SI 2009/586 and subject to regulation 29(1B) (inserted by regulation 3(d) of those regulations) – any accounting period for which the return due date fell on or before 31 March 2006 is out-of-time.

Thus, on 31 March 2009, the earliest accounting period for which a claim could be made under regulation 29 of the VAT Regulations 1995 was that ending on 28 February 2006 (for which the due date of the return was 31 March 2006).

On 30 April 2009, the earliest accounting period for which a claim could be made under regulation 29 was that ending on 31 March 2006 (the due date of the return for that period being 30 April 2006).

Similarly, on 31 October 2009, the earliest accounting period that can be claimed for will also be that ending on 31 March 2006.

However, by 30 April 2010, the four-year time limit will have come fully into effect so that a claim made on that date can go back to the quarter ending 31 March 2006.

## 20. Statutory interest

### 20.1 No entitlement

Where the claim relates **solely to taxpayers errors** discovered after the House of Lords judgment in *Fleming* was released (23 January 2008), there will be **no entitlement to SI** irrespective of whether it relates to claims for periods pre or post 18 July 1996 (output tax) and 01 May 1997 (input tax). Although such a claim may be valid there has been no financial disadvantage to the taxpayer caused by the capping error.

However should there be an unreasonable delay in repaying the claim (e.g. after processing the claim payment is delayed, or the claim involves periods pre July 1996 or May 1997 and they are incorrectly capped) the taxpayer will be entitled to claim SI under VATA section 78(1)(d) for the delay suffered.

### 20.2 Entitlement

Was there or would there have been an entitlement to Statutory Interest (SI) on the original claim? Was SI paid on the amount of the claim that was repaid?

- **If yes** then that entitlement will still apply to the remainder of the original claim that wasn't paid due to the three-year cap, any part of a claim that wasn't submitted or a full claim that was never actually submitted due to the capping legislation.
- **If not** then there may now be an entitlement to SI due to the M&S ECJ capping judgment against the Department, which confirmed that the enactment of the three-year cap with retrospective effect constituted an official error. Theoretically the earliest effective date of the error would be 18 July 1996 (for output tax) and 01 May 1997 (for input tax); the unlawful enactment of the three-year cap without a transitional period. **However, when the errors were discovered will have a bearing on the start date of any entitlement to SI.**

### 20.3 Start and end dates for payment of SI

**Remember – Although the error occurred on 18 July 1996 or 01 May 1997 (depending on whether it's output tax or input tax) it does not necessarily mean that this will be used as the start date for calculating statutory interest. All cases must be treated individually and businesses can only be compensated for the time that they were financially disadvantaged due to HMRC's error.**

The applicable period for payment of SI is determined by subsections (4), (5), (6) or (7) of section 78. This depends on the legislation under which the entitlement arose, i.e. 78(1)(a), (b), (c) or (d). (See paragraph **A** for s78(1)(a) and (b))

**A. Where the entitlement to SI existed on the original wrongly capped claim i.e. pre claim official error**, the applicable period is easily determined. SI will be payable from the official error commencement date as already ascertained by the original claim, and extended up to the date payment of the remainder is authorised (these claims will have already taken account of the relevant legislation i.e. section 78(1)(a) or (b) VATA).

**B. Where there was no official error other than that of the 18 July 1996 (output tax) or 1 May 1997 (input tax), entitlement to SI arises solely from the delay in receiving the previously capped sum caused by the capping error.** SI in this instance will fall within section 78(1)(d) VATA – suffered delay in receiving payment of an amount due to him in connection with VAT.

**C. Where there is combination of capping errors as in B above and a liability error by HMRC which post dates the enactment of the three-year cap entitlement to SI will arise for two different reasons.** This may result in section 78(1)(d) applying to the capping errors and section 78(1)(a) (overdeclared output tax) or (1)(b) (failure to claim a VAT credit) applying to the subsequent liability errors.

#### Claims falling within paragraph C.

Care will be required in determining the start dates for the SI calculation. For the capping errors the guidance already outlined at **B** will apply. For the liability errors by HMRC in order for section 78(1)(a) to apply the claimant will need to confirm when he accounted for the output tax which was not output tax due; or in order for section 78(1)(b) to apply confirm when he failed to claim a VAT credit under section 25 VATA.

e.g. For a claim made in July 2008 involving both capping errors and a liability ruling against HMRC made in June 2008 SI will be payable as follows:

- the portion of the claim subject to the cap error only, as SI is due under section 78(1)(d), the guidance on the practical application of section 78(1)(d) outlined below should be followed,
- the portion of the claim which involves a liability ruling against HMRC made in June 2008; SI will be due under section 78(1)(a) output tax or section 78(1)(b) (input tax) and payable from the commencement date of the official error on a period by period basis. This could possibly be as far back as 1973 or be limited to shorter period (say periods 01/08 to 04/08) if liability law was found to be incorrect for a just a short period

## 20.4 Practical application of section 78(1)(d)

The applicable period for section 78(1)(d) cases is determined by subsection (7). It starts with the date on which, if not for the error we would reasonably have expected to authorise payment of the amount concerned and ends with the date the payment is authorised.

For those claims falling within paragraph **B** (tax payer errors subject to the three-year cap) in practice this will mean:

- Where the original claims were made and with hindsight wrongly capped, the error will have occurred when we failed to authorise the full payment. Therefore any SI now payable on the balance of the claim will run from the original “authorisation” date until the new date of **authorisation**.
- Where only part of a claim was submitted due to the capping legislation, SI will be payable from the original authorisation date. It will end with the date payment of the balance of the claim is **authorised**.
- Where no claim was submitted **because of the capping legislation**, following the House of Lords judgment in Fleming in January 2008, it is no longer necessary to evidence when a claim for the principal sum of tax would have been submitted. **However for SI purposes the situation is different.** It is necessary to determine the period the claimant was financially disadvantaged by the cap error, so in order to do this we need to know when the claimant discovered his errors (late claim to input tax or overdeclared output tax). This is because it is not logical (nor supported by section 78) to pay SI for a period starting before the claimant discovered his errors. (This is what would happen if the SI was automatically calculated from 18 July 1996 or 1 May 1997.)

SI will therefore be payable from a **deemed reasonable authorisation date**. This is because the law provides for the interest to commence from the date the claim would have reasonably have been expected to be authorised for payment if not for the error and in this scenario there isn't a date as a claim was never submitted, so it is necessary to judge when payment could have been made. It will end with the date payment of the amount is actually **authorised**. See examples 1 and 2 below.

**Example 1** A taxpayer was aware in 1998 that he had not claimed input tax credit on his returns in periods 02/95 and 05/95 but did not submit a claim because they were subject to the cap; he submits a claim prior to 31 March 2009, interest would be due from a deemed authorisation date in 1998. The date would be based on when we would have reasonably been expected to repay the claim if not for the cap. The taxpayer will need to confirm that he discovered his errors in 1998 and but couldn't claim because of the cap.

**Example 2** A taxpayer became aware in 2003 he had overdeclared output tax in periods 03/96 to 12/96 but did not submit a claim because it was “capped”; he submits the claim in 2009, interest would be due this time from a deemed authorisation date in 2003 As with example 1 the claimant would again need to confirm he discovered his errors in 2003.

## 20.5 Recovery assessments

Where repayments of previously recovered amounts are to be made because the recovery assessment is subsequently considered to have been wrong in law, the applicable period for payment of SI will depend on whether or not SI was paid on the original repayment before it was recovered and if it was recovered with the tax.

- If SI was paid on the original repayment and subsequently recovered at the time the tax was recovered the start date for SI will be the same as it was when it was originally paid, but will end with the date repayment of the recovered amount is **authorised**.
- If SI was not recovered with the tax, the start date for SI will be the date the recovery assessment was paid, and will end with the date repayment of the recovered amount is **authorised**.
- If SI was never paid the start date for SI will also be the date the recovery assessment was paid, and will end with the date payment is **authorised**.

An audit trail should be kept of all claims, on which SI was paid, including the 'decision making process' and the amount that was paid. The records should also be clearly noted with the OA reference number of the overdeclaration on which SI was paid.

Detailed guidance on Statutory Interest can be found at section 11 of V1-33. The Tax Administration Advice Team based in Queens Dock, Liverpool, has policy responsibility and you should contact them if you need further guidance on the statutory interest element of claims.

## 21. Compound interest

### 21.1 Claims for compound interest

Requests for payment of interest on a **compound** rather than simple basis should be met with the following response:

"HMRC takes the view that restitutionary claims for interest/compensation are excluded by section 78 and [section 80 of the VAT Act 1994] and/or [Regulation 29 of the VAT Regulations 1995.] Therefore [your client – name] if a tax adviser wrote in, or [name of the businesses] has no right to a payment of compound interest. It has received simple interest under section 78 at a rate calculated by a formula set down in statute in the Air Passenger Duty and Other Indirect Taxes (interest rate) Regulations 1998 and no further interest is due."

This statement is as agreed with the Solicitor's office following the House of Lords *Sempra Metals* decision in July 2007 **and must not be altered**. Please top and tail the letter as appropriate.

**ON NO ACCOUNT SHOULD BUSINESSES BE INVITED TO APPEAL TO A VAT AND DUTIES TRIBUNAL WITHIN 30 DAYS IF THEY DO NOT LIKE OUR REPLY.**

This is because it is arguable whether a Tribunal is the right forum to hear these requests for compound interest. Furthermore, as many of the requests for compound interest are in connection with claims for refunds made, paid together with statutory interest years ago, we might well decide to apply to strike out appeal applications on

the grounds that they are well out-of-time. If we invite businesses to appeal, they will then have some justification in complaining about strike out applications.

The same wording is to be used where claims for compound interest are made in connection with claims made under section 80 of the VAT Act 1994 or Regulation 29 of the VAT Regulations 1995. Please ensure that you check which section/regulations apply when replying to requests. If requests cover both over accounted for output tax and input tax, then both legal references should be quoted.

This response is not to be used if a taxpayer has already appealed to a VAT & Duties Tribunal. These appeals are already being dealt with by the Solicitor's Office.

If you have any queries about any of the above and/or receive further correspondence after sending out this letter please contact TAA.

## **22. Recovery assessments**

### **22.1 Section 80(4A) assessments**

Section 120 of the Finance Act 2008 has made amendments to the time limits in relation to recovery assessments made under section 80(4A) of the VAT Act 1994.

The effect of the amendment is that where you discover that a claim under section 80 has been paid and ought not to have been, you can make an assessment to recover it within two years after the later of:

- Two years after the end of the accounting period in which the mistaken payment was made; or
- Two years after the date on which the evidence of fact sufficient to justify the making of the assessment came to your knowledge.

This means that you can make an assessment within the first two years after the end of the accounting period in which the claim was paid regardless of whether the facts on which the payment was based have changed.

Where a claim is paid and it turns out that the facts upon which the claim was paid were wrong, you have two years from the date on which those new facts came to the 'Commissioners' knowledge' to make an assessment to recover it. If you are making an assessment under this time limit, it does not matter how long ago the payment was made.

These changes took effect in relation to any assessment made on or after the 19<sup>th</sup> of March 2008.

### **22.2 Section 73(2) assessments**

Section 120 of the Finance Act 2008 has amended the assessment time limits as they relate to assessments made under section 73(2) of the VAT Act 1994 by the insertion of a new subsection (6AA) into section 73.

The effect of the amendment is that where you discover that a late claim for input tax has been paid where it ought not to have been, you can assess to recover it within:

- Two years after the end of the prescribed accounting period in which the claim was wrongly paid; or

This version released on 6 August 2009

- One year after the evidence of facts sufficient to justify the making of the assessment came to our knowledge and three years from the end of the prescribed accounting period in which the mistaken payment was made.

As with assessments under section 80(4A), you can make a recovery assessment within two years after the end of the accounting period in which the money was wrongly paid, repaid or credited, regardless of whether the facts have changed since the payment was made.

Where a the amount has been paid, repaid or credited and it later turns out that the facts on which the payment were based were wrong – and that on the new facts, it would not have been paid, etc. – any recovery assessment must be made within one years after that new evidence came to the ‘Commissioners’ knowledge. Such assessments can only be made to recover amounts paid, repaid or credited in accounting periods that ended less than three years previously.

These changes took effect in relation to any assessment made on or after the 19<sup>th</sup> of March 2008.

### **22.3 Assessments under section 73(2) of the VAT Act 1994 – Accounting period to assess**

There are still three different views on which prescribed accounting period must be assessed when making an assessment under section 73(2) to recover an amount wrongly paid on a claim.

In its judgment in *CCE –v- Croydon Hotel & Leisure Co Ltd* [1996] STC 1105, the Court of Appeal held that assessments under section 73(2) must be made for the accounting period in which the claim for input tax was made. This was supported by the judgment of the Court of Appeal in *University of Sussex –v- CCE* [2001] STC 1495 in which Neuberger J, as he then was, concluded that a late claim for input tax belonged in the accounting period in which it was made.

However, in its judgment in *CCE –v- DFS Furniture Company Ltd* [2004] EWCA Civ 243; [2004] STC 559, the Court of Appeal took the view that such assessments should be made for the accounting period in which the claim for input tax was paid.

In view of this uncertainty, where you are issuing assessments under section 73(2) and the accounting period in which the claim was made and that in which the claim was paid are different, you should issue three assessments for the same amount.

The preferred assessment should be the one for the accounting period in which the claim was made. The assessment for the accounting period in which the claim was paid should be treated as an alternative assessment and should not be enforced.

A third assessment – and second alternative assessment – should also be made for the prescribed accounting period to which the claimant attributed the input tax when he made his claim. This assessment should not be enforced either.

You can use the standard letters in V1-35 in section 16, amended and adapted as appropriate.

## **23. Form of claims**

### **23.1 What do we want with the claims**

- Claims must be made in writing and must include:
- a statement of the amount being claimed;
- the method of calculation in as much detail as possible;
- the reason for the claim;
- the prescribed accounting periods in respect of which claims are being made, allocating amounts to periods;
- the dates on which any overpayments, such as assessments, were made;
- a copy of any original claim (where appropriate);
- copies of documents, schedules, etc. used in support of the claim;
- the reasons why the claimant will not be unjustly enriched, where appropriate, if a repayment is now made (since 26 May 2005, HMRC can invoke the unjust enrichment defence against all output tax claims. This defence cannot be invoked against late claims to input tax).

### **23.2 Further information required**

If a claim is submitted without some of the above and with no explanation for its absence, you should establish from the claimant why it is missing and, where possible, ask for it to be provided.

It is, of course, worth remembering that there may be evidence on EF which supports, or denies, the taxpayer's claim.

### **23.3 Processing Forms VAT642**

Where, as will always be the case with claims dealt with under this guidance, a claim contains periods which are more than six years old you should enter the 'period reference' as 00/00, the 'type code' as 0 and the 'attribution code' as 9. Officers will need to write the actual periods in respect of which the claims are made on the output document. Failure to follow these steps will lead to the system rejecting the form on the basis that it is out of time.

## **24. Statistical information**

### **24.1 Information to be compiled on receipt of claim**

It is very important that we record certain information centrally so that we can keep abreast of the potential cost to the revenue of the claims arising out of the Court of Appeal's judgments and our handling of it. To that end, on receipt of a claim at the 'Fleming Claims Team', the following information on the claimant should be recorded.

- the name;
- VAT registration number;
- the amount being claimed;
- date of claim;
- whether claimant is 'controlled' by the Large Business Service;
- trade sector of claimant;
- nature of claim (i.e. input tax or output tax);
- source of claim (for example the judgment on which it is founded, ruling from HMRC (with date), discovery of mistake in accounts (with date), etc.).

## **24.2 Information to be sent to the Fleming Claims Team (Leeds) by those verifying claims**

Once the claim has been processed and either approved or rejected, in part or in total, the following information must be sent to the Fleming Claims Team (Leeds):

Where it has been approved in total:-

- confirmation of the amount paid;
- the amount of statutory interest; and
- date on which the payment was authorised

Where it has been approved in whole or in part:-

- amount approved;
- amount rejected and reason for rejection (for example, unjust enrichment, wrong calculation, accounting periods after enactment of new time limit, etc.);
- the amount of statutory interest; and
- date on which the payment was authorised.

## **25. Contacts**

### **25.1 Fleming Claims Team**

Pauline Walsh (Walsh, Pauline {LC Eastern England} or pauline.walsh3@hmrc.gsi.gov.uk) will be playing the leading role in the 'Fleming Claims Team' which will be at the centre of the processing of claims made under Revenue & Customs Brief 07/08 and section 121 of the Finance Act 2008. She can be contacted by phone on 0114 253 7955.

Claims being transferred to the Fleming Claims Team should be sent to the EF in-tray '**Fleming Claims Team**', Ref. **FLEMING**.

### **25.2 Further information**

If you have any problems or questions in relation to claims made under Revenue & Customs Brief 07/08 or section 121 of the Finance Act 2008 you should contact Error Correction Policy Team, Central Policy, Tax Administration and Advice, 4th Floor South West, Queens Dock, Liverpool, L74 4AA. You should also forward copies of any appeals against the rejection of these claims to the Tax Tribunal to Error Correction Policy Team (at 'TAA, Support Unit (CenPOL TaxAdminAdvice)').