

HMRC policy on dealing with 'historic' (Flemming) VAT claims

This publication, entitled "Three-year cap - Fleming & Condé Nast - Section 121 of the Finance Act 2008", addresses a wide range of issues, some of which may only impact on 'Fleming' claims whilst others may have wider implications. Of particular interest to claimants will be HMRC's views on the need for 'hard evidence' to support claims. It remains to be seen whether HMRC will be able to maintain that policy, particularly given the length of time between the submission of claims and the VAT periods to which they relate.

HMRC has published its revised internal guidance on the three year cap and 'Fleming' claims made under s 121 Finance Act 2008, effective from 23 April 2009.

The main points of significance include:

Properly calculated 'gross' claims should not, generally speaking, be rejected on the basis that they do not take into account any adjustments in favour of HMRC. However, the claimant should be asked, as soon as possible, to calculate any amounts to be set-off against the 'gross' claim and the repayment should reflect the offset amount. A person who makes a gross claim and refuses to disclose or calculate under-declarations is said to be possibly committing an offence under s 72 VAT Act 1994.

That 'hard evidence' is required to show that the over-declaration of output tax giving rise to the claim was made and/or that the under-claimed input tax was incurred and not deducted. The quantum must also be verifiable and no payment should be issued until both requirements are satisfied.

Amendments of claims which remain 'open' (i.e. have not been 'settled') are, in HMRC's view, to be restricted to those arising for the same reason as the principal claim (e.g. from the same 'judgment'), i.e. the adjustment is to be made to the quantum of the original claim only. For example, output tax claims in 'open' periods cannot be amended to include late claims to additional input tax in those periods.

A claim under s 80 may be submitted by the person who made the over-declaration or a person to whom that right has been assigned (or their representative such as accountant or tax adviser). However, a claim to input VAT can only be made by the person who incurred the input VAT (or their representative). In this regard, HMRC appears to be drawing a distinction between output and input VAT, with input VAT claims not (in HMRC's view) being capable of being pursued by an assignee.

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HMRC also restates its policy that claims will only be paid to the representative member of a VAT group at the time when the claim was made, and not to a VAT group member or former representative member, save where the VAT group has been disbanded.

HMRC's policy publication is available on HMRC's website.

Comment

Businesses which have submitted 'gross' claims should be prepared for HMRC to request information regarding any amounts which may, in HMRC's view, have to be offset, e.g. partial exemption adjustments where the VAT liability of supplies has changed from taxable to exempt. However, care should be taken to ensure that such adjustments are, in fact, necessary.

It remains to be seen how HMRC will, in practice, define 'hard evidence'. It appears that insistence on detailed contemporaneous records (e.g. purchase and sales invoices) could be regarded as disproportionate in the context of retrospection over many years.

The apparent change of policy regarding 'open claims' is also something which remains to be tested.

Businesses which have submitted 'Fleming' claims, or are considering submitting subsequent claims for 'open' periods, will be interested in this publication. However, it is likely that certain aspects of the policy may be susceptible to challenge, and all businesses are urged to seek specialist VAT advice when engaging with HMRC on these matters.

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