

VATflash - March 2008

Companies and the cost of issuing shares

Have you lost VAT in the past on the costs of share issues?

Following our recent VATflashes concerning the House of Lords' decision to throw out the notorious three-year cap on back-dated VAT claims, this VATflash looks at on one particular issue that could affect any company that has issued shares in the past. If you are an affected company, we would advise you to review your VAT position immediately or risk losing the opportunity to make a substantial VAT claim.

What happened in the past?

In the past, the issuing of shares was regarded by HMRC as an exempt supply and, as a consequence, VAT incurred on costs of the share issue, typically professional fees, could not be reclaimed. This was over-turned in 2005 by a decision at the European Court involving an Austrian company, Kretztechnik. The case held that the issuing of shares was not a supply for VAT purposes, and associated input VAT was to be regarded as a normal overhead of the business.

As a result of this decision, many claims were submitted to HMRC for past input VAT but any such VAT more than three years old at the time of the claim would have been capped. However, now that the three-year cap has been thrown out by the Lords, you can not only re-visit past claims but you also now have an opportunity to make brand new claims for input VAT that was previously blocked.

Does this apply to all share issue costs?

Unfortunately, no. In the past, where some shares were issued to non-EU recipients, the input VAT fell to be apportioned anyway and, even earlier, such 'split' issues were treated as general overheads, so some businesses were able to reclaim their input VAT.

How far back can claims go?

Potentially, all the way back to 1973, as this was when VAT was introduced. Claims for under-claimed input VAT are now uncapped prior to 1 May 1997, although later claims might still be capped.

I haven't kept all of my old records. Can I still make a claim?

Having fought this issue for 11 years, the Courts have indicated that HMRC cannot use the lack of available records to refuse taxpayers who have legitimate claims. They must accept estimated claims based on available records – typically, annual accounts, old commercial documents or old tax records. Provided the claim is fundamentally valid, and is compiled on a reasonable basis from what information

is available, HMRC should accept it. However, you may be required to demonstrate that the VAT was not claimed in the past, perhaps by showing that the costs were posted to your accounts gross of VAT.

Can I expect to receive any interest on the money?

Where VAT was over-paid due to an error by HMRC, (incorrect VAT law for example) they are liable to pay interest on the claim where they have always tried to restrict this to simple interest. However, further recent cases before the UK and European Courts, have held that tax authorities are obliged to restore the taxpayer to the financial position he/ she would have been in had the VAT not have been overpaid, so that it reflects the actual loss to the taxpayer (ie. compound interest). HMRC is expected to resist claims for compound interest but the sums could be huge and some are already being paid out.

Following an earlier successful claim, I was paid only simple interest on top. Can this be looked at again?

Yes, absolutely. Having already had the claim approved in the past means you have already won half the battle. The claim can be submitted again to seek compound interest. Clearly, for some smaller or more recent claims, the difference between simple and compound interest may not be that great and it may not be economic to pursue a further claim. However, we will be pleased to review this for you and advise on your prospects.

What is my next step?

Contact us now. With some basic information we may be able to tell you, relatively quickly, whether or not you have a claim. If you do have a claim, we will then discuss with you how best to extract the information from whatever records you may have, and agree the arrangements for helping you compile your claim for submission to HMRC.

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