# HFMA VAT Technical Sub-Committee

Minutes

Thursday 26 September 2019, 11:00 – 14:00
110 Rochester Row, Victoria, SW1P 1JP

## Attendees

| | |
|---|---|
| Anthony Robson | Gateshead Health NHS Foundation Trust (Chair) |
| Mike Barlow | HMRC |
| Martin Ginnelly | NHS Shared Business Services |
| Michael John | London Ambulance Service NHS Trust |
| Paul Jones | Department of Health and Social Care |
| Gareth Lewis | Aneurin Bevan University Health Board |
| David Ogilvie | HMRC |
| Rachel Owen | NHS England |
| Debbie Paterson | HFMA |
| Gita Raja | University College London Hospitals NHS Foundation Trust |
| Amanda Randall | Newcastle Upon Tyne Hospitals NHS Foundation Trust |
| Di Roberts | Humber Teaching Hospitals NHS Trust |
| Michael Sheils | NHS Greater Glasgow and Clyde |
| Shelley St John | Guy's and St Thomas' NHS Foundation Trust |
| Alan Swanston | HMRC |
| Jane Wharton | Royal Liverpool and Broadgreen NHS Trust |

## Business

### 1. Welcome/apologies for absence/membership

- The committee welcomed Jane Wharton to her first meeting and introductions were made
- Apologies were received from Gary Mincher, Michael Creaton, Phil Simmons, Richard Lodge, Sally Wilson, Steve Rourke, David Smith and Stuart Grant
- It was noted that some members have not attended the committee for some time, and it is important that members either attend meetings or leave the committee so that someone else can join. DP will update the attendance list and AR will remind those members who have not attended for a while of their obligations.
- It was noted that Sally Wilson has said that she will step down from the committee after at least 17 years of membership. The committee's thanks for her support has been communicated.
- The application from Adam Marshall, taxation manager, Sheffield Teaching Hospital NHS Foundation Trust was discussed. The application was for the person holding the post of taxation manager at the NHS foundation trust, which is currently Adam while the post holder, Katy Battley, is on maternity leave. Some members of the committee were concerned that Adam is not an NHS employee but is on secondment from Ernst Young. The committee's terms of reference are clear that advisers are not allowed to be members of the committee so there was some concern that this requirement would be breached. It was therefore agreed that DP would go back to say that the committee is happy for the trust's tax manager join it as long as they are an NHS staff member rather than being on secondment.

**Action: DP to update the attendance list to help AR identify any committee members who should be asked to stand down**

**Action: DP to email Adam Marshall with the committee's decision**

## For discussion and approval

### 2. Minutes of the last meeting

The minutes of the meeting held on 23 May 2019 were reviewed and agreed – subject to the correction of the typo on page 8 of the papers, 3rd paragraph, 2nd sentence should say while not whole.

### 3. Matters arising from meeting held on 23 May 2019

#### 3.1 HM Treasury s41 review

DO met with HMT on Monday, so he was able to give an update. It is expected that there will be an announcement in the autumn budget followed by (or perhaps preceded by) the policy paper which will then be subject to a 3-month consultation period.

However, the structure and the content of the budget is still uncertain, so it is possible that this review may not be included in it given the fact that it was announced at the last Spring Statement.

Ideally, the sector would like the policy paper to be published now. However, the committee understands that it needs to wait for the budget which is expected to be in October or November but, as these are uncertain times, this may change.

There are no plans to make any change in this present Finance Bill. Time will be needed for consultation, and post-consultation analysis and any further discussion. This will determine what, if any, changes will be proposed. Any changes are likely to require space in a Finance Bill.

The issue will be kept on the committee's agenda for further updates from HMRC.

### 3.2 NHS healthcare income via commercial entities

Although he was not able to attend the meeting, Michael Creaton asked the committee to clarify this agenda item as it seems that perhaps there are two similar but different issues being discussed here.

The first is the issue of NHS bodies establishing subsidiary bodies. PJ reported that it has not been on the Department's radar in the past few months, although there are some new subsidiaries being set up. There are currently very few questions or concerns about new subsidiaries. MB reported that HMRC are looking at the numbers of subsidiary companies/ limited liability partnerships in the NHS – the first list looks far too long and includes Community Interest Companies and Social Interest Companies etc, so they are having another look at it.

There is an appetite for NHS bodies to increase their income through trading and there is no clear process for it to feed down to the HMRC. It may be that the s41 review has put a hold on new arrangements being set up. The commerciality of some arrangements may be reviewed by NHSE but, generally, they are happy with all of the arrangements.

There may be some new commercial organisations set up as a result of the new primary care network (PCN) arrangements. These will be included in the list that HMRC are developing.

The second issue is around NHSE or CCGs commissioning a commercial organisation to provide a service and this service is then sub-commissioned back to an NHS body. The example provided was a contract with Alliance to provide PET scans – NHSE contract directly with Alliance Healthcare, who then outsource the PET scans to an NHS body which has both the equipment and the consultants who diagnose the scan. As the money leaves the NHS, it is outside of the NHS divisional registration so VAT cannot be recovered under COS arrangements.

This issue was discussed by the committee some time ago and will depend on the terms of the contract and the outcome may be different whether the contract with the commercial organisation is a contract to commission services or whether it is a contract to provide healthcare services. HMRC are content that it is a commercial arrangement, but the VAT treatment will depend on the exact terms of the arrangement. It is the sort of issue that should be picked up at the contracting/procurement stage. However, it may be that the NHS provider cannot determine what the contract between the commissioner (NHE or a CCG) and the commercial organisation says as they do not have sight of it.

There are other examples with various commercial organisations, for example Virgincare, Vanguard Healthcare etc.

RO has agreed to find the contract from NHSE side as she will have to look at it as part of the IFRS 16 implementation anyway. This issue/ complication should have been picked up at the contracting stage – unintended consequence of the procurement arrangement.

**Action: RO will try to get hold of a contract with Alliance or Virgincare to see what services are being provided under that contract**

### 3.3 Agency staff

DO said that the guidance has been written, agreed internally and is currently with the joint VAT consultative committee. If they agree it, it will go for publishing and then it will be shared with this committee.

### 3.4 COS heading 33 - library services

SR, GL and PJ met a few months ago to try to push this forward which was a useful meeting – albeit slightly frustrating. PJ got back in touch with NICE who raised the issue in the first place – they have no appetite to reopen the issue.

GL is liaising with the NHS Wales Informatics Service who provide the service to the whole of Wales – they are working with advisers to look at the contract and the exact service they are providing and the terms of the contract.

NHS Education for Scotland (NES) do not have much of an appetite to pursue this issue either so it seems to just be the Welsh body which is really interested.

The committee agree that it would be kept on the agenda as a watching brief – the Welsh service need the committee's input then GL will raise it.

### 3.5 VAT impact of lead provider framework (LPF)

AS is now the customer compliance manager (CCM) for NHS England so he reported on this issue. As background, the issue first arose when some of the old CSU contracts were taken over by commercial organisations. CSUs used to be part of the divisional registration which meant that the arrangements became subject to VAT as the commercial organisations are not part of that divisional registration.

The main issue is that HMRC look at the contracts in question with commercial organisations as a single supply but NHSE think it is a multiple supply.

RO has been in touch with the affected CCGs, it is expected that HMRC will issue protective assessments which NHSE will consider and decide whether they will appeal against them. The key is NHSE convincing HMRC that it is a multiple supply – if they cannot then the issue goes away.

There was some discussion about whether CCGs are pulling out of the old CSU contracts and what the impact of this will be. At the moment, there is a lot of 'in-housing'. Because of the level of mergers being planned in the CCG sector this is not high on the agenda at the moment. It is not expected that the remaining CSU contracts will move to commercial organisations either.

NHSE are holding a CCG merger workshop on 15 October and mergers will also be covered in the November roadshow. Hopefully, after that, there will be some certainty about the number of mergers so HMRC can be involved at an early stage to set up appropriate arrangements.

MB offered HMRC's help at the workshops. RO will get in touch if they are needed.

**Action: RO to contact HMRC if they are needed to present or help with the November workshops**

### 3.6 P22 framework and COS heading 35

The ongoing s41 review means this work has been paused. Until we know what the new arrangements will look like, there won't be any action.

PJ reported that the P22 team want to know what the position is. PJ will pick this up with MB offline.

MB asked PJ to check whether Community Interest Companies (CICs) are allowed to access P22 – PJ to check

**Action: PJ and MB to discuss P22 offline**

### 3.7 COS heading 14 – computer services supplied to the specification of the recipient

DO conveyed a message from colleagues in HM Treasury (HMT).

HMT is very grateful for the work carried out by NHS bodies and government departments in relation to the proposal from the Tax Centre of excellence for the simplification of heading 14.

The proposal is still under review, but this is currently on hold while HMT undertake further analysis regarding the full simplification of the VAT refund scheme for NHS bodies and government departments.

HMT is always happy to receive representations from the NHS and from government departments on interim simplifications or changes to COS headings.

What this means is that while the wider review progresses, HMT officials are happy to receive any representations on specific areas of difficulty over the present rules for heading 14.

MB noted that HMRC paused their work in this area because of HMT's review but they are now going to recommence their work and will write to the affected NHS bodies within the next 21 days about their specific issues. This will restart HMRC's process in relation to those issues from the stage that they were paused. HMRC have also had a few clearance requests in relation to this are which have also been paused – they will go back to those customers too.

One of the areas which will be reconsidered is software that has to be designed for the software recipient. This does not preclude software that can be used outside of the NHS as long as the NHS is involved in the design. So, if the NHS body has designed and then sold some software to a non-NHS body then that would be recoverable but the opposite arrangement where software is commercially designed and then sold to the NHS would not be recoverable.

There are some precedents of 'off the shelf' software being used in the NHS but being altered substantially for use in the NHS. There is an argument around what the substantial amendments are and whether they are really substantial amendments – in the NHS there is often not an off the shelf solution. There is a discussion to be had and a decision to be made around the level of substantial amendment. Sometimes the package is unchanged, but the interface is substantially altered – that is not a substantial amendment but, having said that, there are cases where the amended package could not be used elsewhere.

HMT are interested in these tension areas – for example, whether a solution is capable of use outside of the NHS, rather than as a part of a larger review of the whole subject.

**Action: If anyone has any specific examples of either going to market and then making amendments or looking for bespoke solutions pass them PJ by the end of October, and he will put together the evidence for HMRC and HMT.**

This is a very live issue with arrangements such as artificial intelligence and will only become bigger. The market is very fluid and procurement arrangements are changing. HMRC will only get to find out about new arrangements after the fact. This committee will continue to look at this area as it develops.

### 3.8 Making tax digital (MTD)

#### Subsidiaries and non-GIANT organisations

For those NHS bodies who have had to implement MTD, the process has been relatively successful, and the necessary returns have been made. There are some difficulties with some of the bridging software as manual interventions still need to be made. It may be down to some NHS systems which are not, perhaps, as flexible as some commercial systems. It may be down to the complexity of NHS VAT COS rules which require manual review to ensure that it is coded properly.

The vast majority of what is needed can be taken from the ledger -but some areas such as acquisition tax have to be done manually. One of the positives of MTD is that it has meant that organisations have had to review their arrangements and identify areas where, perhaps, issues had not been dealt with properly.

Shared service providers have had to rely on the NHS bodies add the details/ information that is not available from the ledge to the bridging software manually. Shared service centres are looking for some flexibility and leeway to correct these areas over a reasonable time period. In some places, there have been reviews of coding to ensure the ledger is providing the appropriate information directly and accurately.

Shared services providers have had to put in place new arrangements to ensure that MTD is managed. The key issue is coding into the ledger and having accurate VAT control accounts. This cannot be done at the accounts payable (AP) clerk point due to the volume of transactions, so arrangements have been put in place to review the transactions a month in arrears. SBS have discussed their arrangements which have been discussed with Clare Williams (at the MTD team) to demonstrate why it has been set up in this manner.

The NHS VAT rules makes MTD harder due to the complexity of supplies and services, business, non- business, exempt activity and the COS rules which require manual review to ensure that they are coded properly. For shared service providers, there is added complexity as different NHS bodies use different coding even though they are using the same software.

There have been some issues raised with governance – one group could only make their submission by sharing their gateway login/ code with the shared service centre over the phone. The committee concluded that this is an issue around whether the shared service centre is acting as an agent and should have been set up in that way. The key consideration who is pressing the button to make the submission – it may be different depending on the shared service arrangement. If the shared service provider is acting as agent then there are other arrangements, such as anti-money laundering procedures that have to be put in place.

### NHS bodies (GIANT)

HMRC gave an update on the latest position on the GIANT deferral. In summer, HMRC wrote to all GIANT customers to say they would be deferred to a date to be confirmed. Letters are due to go out (snail mail) today to provide details of the dates that NHS bodies are deferred to. When the letters go out a blank letter will be sent to this committee and the shared service providers to get the second phase mobilised.

The committee expressed their frustration at the delay – because of the lack of information. Bodies such as NHSE have signed commercials and the open-ended deferral makes that contract hard to manage. The key is the lead time between the letter and the implementation date and whether there is enough time to get implementation right. It was expected that NHS bodies would have the same lead time as commercial organisations.

HMRC are getting some kick back from the commercial sector for delaying public sector implementation. However, feedback from the commercial sector is that implementation has gone reasonably well - it has helped lots of bodies tighten up on tax areas where they were missing detail, and there will be longer term savings as it is digital and effective.

### 3.9 NHS adjusting for bad debt relief

This agenda item was as a result of a query from NHS Wales which has been resolved. It can be removed from the agenda.

### 3.10 Public health services

HMRC has written to the committee in response to the committee's letter dated 8 November 2018- the letter was circulated on 20 September. DO and MB apologised for the delay, it was in part due to an ongoing case which they had hoped would provide some clarity on the legal regime. However, that clarification did not materialise.

HMRC's letter gives an overview of what NHS bodies/ the committee need to do to demonstrate that these services are non-business.

It seems that there is evidence that it is the supply of service for consideration so the NHS needs to demonstrate that the services are provided under a 'special legal regime' – this needs to be more specific than simply a reference to the NHS Act 2006 or the Health and Social Care act 2012.

It may be that this can be done for specific, individual services rather than public health services as a whole.

It was agreed that the committee needs to back at why this issue was raised and, in particular, needs to look at one particular area. RO volunteered to liaise with the public health policy team and. Committee members agreed to identify specific cases.

**Action: DP and AR to look back at this issue to identify specific areas**

**Action: committee members to try to identify specific areas to move this discussion forward**

### 3.11 GP federations setting up subsidiary companies

HMRC are not aware of any new arrangements being set up but there may be some scope for subsidiary setup within the new PCN arrangements. RO and PJ haven't heard of any, but it may be because the PCNs are still new. MB has met with NHSE – there are some difficulties giving general advice because they are all being developed locally so need to be looked at on a case by case basis.

Setting up a body corporate can cause problems for COS VAT recovery – these need to be considered at an early stage.

RO said that the main issue being raised at the moment is around the supply of staff – such as the social prescriber role, clinical director and clinical pharmacists.

This could also be an issue for NHS bodies that have taken over GP surgeries. The trust could be a partner in the PCN so could get involved through the supply of primary care services. The key question is what is being supplied to who by whom. It cannot be assumed that because the GPs are providing exempt services, the new arrangements are exempt – the different arrangements being developed mean that the answer could be different in different areas.

### 3.12 Implications of NHS Supply Chain leaving the VAT divisional registration

The committee agreed that the new arrangements are up and running so this item can be taken off the agenda.

### 3.13 Facilities management

There has been little change since the May meeting. HMRC have moved their enquiries forward with appropriate customers. They have identified one instance which aligned to COS heading 21 but another where the contract was so wide that it was refused as it did not align to any specific COS heading. This seems to be an issue in one geographic area where the contracts were set up in that particular way.

This item can be taken off the agenda.

### 3.14 Amenity beds

There has been no change. HMRC are still looking at the issue on a one to one basis with NHS bodies but a wider sector reach-out has still to be done.

### 3.15 VAT on staff seconded between NHS bodies and local authorities

The paper that the CIPFA VAT committee discussed in March 2018 was discussed

The guidance is relatively clear, but the merits of each case need to be considered especially what the secondment is actually is.

As joint working is the direction of travel, it would be helpful if there is scope for these secondments to be outside of the scope of VAT. It was agreed that the letter discussed under agenda item 3.10 would be a useful starting point – if these secondments are under a special legal regime then there may be a case. However, at the moment, no-one can point to one and HMRC can't identify one either. There may be a legal for directors but not for all of staff.

There was some discussion about whether if it is a supply then could the sector petition HMT for the NHS to get the VAT back? If the VAT is not funded, then HMT might give that concession.

PJ indicated that, in the short term, NHSE are recovering some VAT under COS 52 for the government commercial function pending a new heading. There was some debate about how staff working for NHSX were treated as details around current secondments are being processed.

This committee can make representation for a new COS heading – the representation goes to HMT via our HMRC contacts (DO and MB) to make sure it is a smooth process. The issue of VAT refunds relating to the government commercial function was raised by the committee. Strictly, the Crown is a

single indivisible body, but certain goods or services supplied by one government department to another are within the scope of VAT if HMT so directs and this is under current discussion in relation to that function. However, there is no direct read across to secondments of staff between local authorities and NHS bodies. Having said that, this is something to explore further given the current trend.

In the case of pooled budget arrangements there has been sufficient legislation to establish a 'special legal regime' within section 41A VAT Act 1994.

**Action: the committee is to look at representation, evidence and data.**

### 3.16 Milton Keynes tribunal decision

The decision is now available here.

There has been an application for leave to appeal but HMRC are waiting on a hearing date with no indication of when that might be at the moment.

There was also expected to be a direction hearing in October but that has not yet been confirmed with no indication of a date.

## 4. VAT briefs

Brief 3/ 2019 VAT zero-rating of transport of disabled passengers might be of interest to ambulance trusts and other NHS bodies providing passenger transport services. The brief provides clarifications following the Jigsaw case.

## 5. HMRC Consultations

There is a call for evidence on partial exemption on supply of goods that closes on 26 September.

The extension of Chapter 10 (off payroll arrangements) will extend to the private sector from next April. This does not have any VAT implications, but it would address the concerns around level playing fields.

## 6. Brexit

Nothing to add now but this is to be kept on the agenda.

# To note

## 7. Any other business

**7.1** DP asked for clarification as to which papers from the meeting should be published with the minutes. It was agreed that the letter from HMRC in relation to public health should be published with the minutes.

DP and AR will agree which other papers from previous meetings will be published.

**Action: DP and AR to agree the papers to be published**

**Action: DP to publish the appropriate papers once the minutes have been finalised**

**7.2** DP said that she had received comments on the VAT chapter of the HFMA charitable funds guide from David Smith. If any other members have comments, they were asked to send them to DP as soon as possible.

7.3 It was agreed that the September 2020 meeting would be on 17 September. **Post meeting note: 17 September is not available – suggest 24 September**

**Action: DP to book a meeting room and confirm the next meeting date.**

## 8. 2019 Meeting dates

All meetings will be held at 110 Rochester Row from 11am – 2pm:

- 23 January 2020
- 21 May 2020
- September 2020 TBC

## Actions

| Agenda item | Action | Who | Done? |
|---|---|---|---|
| 1 | DP to update the attendance list to help AR identify any committee members who should be asked to stand down | DP/AR | |
| 1 | DP to email Adam Marshall with the committee's decision | DP | |
| 3.2 | RO will try to get hold of a contract with Alliance or Virgin to see what services are being provided under that contract | RO | |
| 3.5 | RO to contact HMRC if they are needed to present or help with the November workshops | RO | |
| 3.6 | PJ and MB to discuss P22 offline | PJ/MB | |
| 3.7 | If anyone has any specific examples of either going to market and then making amendments or looking for bespoke solutions pass them PJ by the end of October, and he will put together the evidence for HMRC and HMT | All | |
| 3.10 | DP and AR to look back at this issue to identify specific areas | DP/AR | |
| 3.10 | Committee members to try to identify specific areas to move this discussion forward | All | |
| 3.15 | The committee is to look at representation, evidence and data | All | |
| 7.1 | DP and AR to agree the papers to be published | DP/AR | |
| 7.1 | DP to publish the appropriate papers once the minutes have been finalised | DP/AR | |
| 7.3 | DP to book a meeting room and confirm the next meeting date | DP | |

## Attendance

| Name | January 2019 | May 2019 | September 2019 |
|---|---|---|---|
| **Members** | | | |
| Anthony Robson | Y | Y | Y |
| Edward Andrews | | | |
| Michael Creaton | A | A | A |
| Martin Ginnelly | Y | Y | Y |
| Michael John | Y | A | Y |
| Paul Jones | Y | Y | Y |
| Gareth Lewis | Y | Y | Y |
| Richard Lodge | Y | Y | A |
| Gary Mincher | | | A |
| Rachel Owen | Y | Y | Y |
| Gita Raja | A | Y | Y |
| Amanda Randall | Y | Y | Y |
| Di Roberts | | A | Y |
| Steve Rourke | Y | Y | A |
| Michael Sheils | Y | A | Y |
| Phil Simmons | Y | Y | A |
| Shelly St John | Y | A | Y |
| Sally Wilson | YTC | A | A |
| Jane Wharton | | | Y |
| **HMRC/HFMA** | | | |
| Senaka Attygalle | YTC | YTC | |
| Mike Barlow | Y | Y | Y |
| Daniel Bell | | Y | A |
| Stuart Grant | YTC | A | A |
| David Ogilvie | Y | Y | Y |
| Lucy Parker | | Y | |
| Debbie Paterson | Y | Y | Y |
| Michele Rapier | | A | |
| David Smith | | A | A |

| Key | |
|---|---|
| Y | Attended |
| YTC | Via teleconference |
| YR | Representative |
| | Not a member |
| A | Sent apologies |
| | Did not attend |

HM Revenue & Customs

*Customs and Indirect Tax Directorate*

Anthony Robson
Chair – HFMA VAT Technical Sub-Committee

By email.

VAT Principles Team
3rd Floor,
100 Parliament Street
London SW1A 2BQ

**Tel** 03000 585990

**Fax**

**Email** David.Ogilvie@hmrc.gov.uk

**Internet** www.hmrc.gov.uk

**Date** 19 September 2019.

**Our ref** ITD/Subject areas/NHS/Public health

**Your ref**

Dear Anthony,

**Expenditure on public health**

I am extremely sorry for the lengthy delay in replying to your letter dated 8 November 2018.

The responsibility for public health is vested in the Secretary of State for Health, with national functions delegated to Public Health England. However, since 2012 a duty was introduced for upper-tier and unitary local authorities in England to take appropriate steps to improve the health of people who live in their area. This includes pulling together the work done by the NHS and an important number of local services. In some circumstances, local authorities and NHS England have become the commissioner of services previously commissioned by primary care trusts. Local authorities receive ring-fenced grant-in-aid to meet the cost of this duty.

At a local level, some of the services for which local authorities became responsible have continued to be provided by NHS bodies. The contracts between these NHS bodies and primary care trusts

have been novated to replace the primary care trust with the local authority. NHS bodies charge local authorities for the continuing provision of the relevant services, and the question asked is about the VAT treatment of the services. Your request is that the provision of these services is regarded as a non-business activity by the NHS bodies involved.

The first point to consider is whether the activity is an economic activity involving the supply of services made for consideration. For the activity not to be regarded as an economic activity, it should either not involve the provision of services in return for payment or it should be a public sector monopoly. The method of charging suggests that services are being provided for consideration, but we have no information about whether only the public sector can provide them. The Health and Social Care Act 2012 envisages competition, but this may not be in every area.

The next point to consider is if the activities are economic activities, they are provided under what the courts refer to as a "special legal regime". The test is whether the NHS bodies providing the relevant services are governed by a legal regime which differs from the legal regime governing private sector providers of the same, or similar, services. If they are, the services could be outside the scope of VAT unless this outcome would significantly distort competition with the private sector.

Local authorities are under a statutory duty to take appropriate steps to improve the health of people who live in their areas, and funding and governance requirements are outlined in the paper *Healthy Lives Healthy People: Update on Public Health Funding,* which you helpfully linked me to. This document suggests that local authorities are prohibited from charging for many of these services. The Secretary of State and Public Health England also have overarching statutory duties. What we cannot find in this document, and in the Health and Social Care Act 2012, is anything relating to the provision of public health services by NHS bodies to local authorities. Thus, there is nothing so far to suggest that they are governed by a special legal regime.

There are several possibilities to explore:

(i) Whether the services in question are, and can be, only provided by the NHS.
(ii) The legal provision governing the provision of the services by the NHS.
(iii) Whether in fact the relevant services (Best Start in Life, NHS Health Checks, sexual health etc) should be considered on an individual basis rather than considering public health as a whole.

We are, of course, happy to continue to work with VAT Technical Sub-Committee on this matter.

Yours sincerely,

David Ogilvie