



**ADSS Cymru**

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Leading Social Services in Wales

## **ASSOCIATION OF DIRECTORS OF SOCIAL SERVICES CYMRU**

### **Delivering Transformation Grant (DTG) Programme 2018-19**

#### **Advice Note 5 – Arrangements between NHS bodies and Local Authorities VAT considerations**

**April 2019**

## Summary

- This note looks at partnership arrangements established under Section 33 of the National Health Service (Wales) Act 2006.
- Partnerships must not be designed to gain a tax advantage but this should not prevent parties arranging their affairs in a legitimate VAT efficient manner.

### **Key Message – Always seek legal advice**

This and other advice notes in the series, together with any attachments, should not be used as an alternative to obtain independent legal advice as appropriate. The advice notes are intended as aids to the consideration of what might be required.

This guidance, along with the Department of Health's circular issued in 2003, is currently under review by HMRC's policy department and is subject to change.

## Background

### **Value Added Tax:**

It is important to note that Local Authorities and NHS bodies operate under different non-business VAT refund schemes.

As local authorities are locally funded, and in order to ensure their VAT costs are not passed on to local taxpayers, they are entitled to a refund of all their non-business VAT costs under Section 33 of the VAT Act 1994.

Conversely, as NHS bodies are funded by central government, they are only granted a VAT refund against certain services they contract out under section 41(3) of the VAT Act 1994. The purpose of this contracting-out direction is to remove the potential VAT barrier of an NHS body undertaking services inhouse or choosing to outsource the same services to an external provider.

In the case of partnership working between the NHS and local government, it is very important to understand which body is responsible for meeting relevant costs as this will ultimately determine the VAT recovery status of those costs.

### **Section 33 Partnership Arrangements:**

Under Section 33 and 34 of the National Health Service Wales Act 2006 ('the Act'), Welsh Health Boards and Welsh NHS Trusts can enter into formal joint arrangements with local authorities.

The Act allows exercise of NHS or local authority functions to be carried out by the other party where the arrangements are likely to lead to an improvement in the way in which those functions are exercised. An arrangement does not transfer legal or statutory responsibility of defined functions nor should it create a new legal partnership / person.

Under s33(2)(a) of the Act, the partners may choose to create a pooled fund.

In compliance with Statutory Instrument 2000/617 (the NHS Bodies and Local Authorities Partnership Arrangements Regulations), there should also be a nominated host partner (the 'Lead

Body'). The exercise of functions may be the delivery of health-related services or the commissioning of health-related services.

Alternatively, under s33(2)(b)(c) of the Act, the partners can choose not to create a formal pooled fund. One partner may act as lead but will not formally be the Lead Body as found under a pooled-fund arrangement. For the purposes of this guidance the phrase 'Lead Body' is used across both contexts.

It is not uncommon that one agreement might cover multiple partnerships and pooled fund arrangements with a different nominated Lead Body for each service. Each arrangement should be individually considered for the applicable VAT treatment.

## General VAT Treatment

Whether there is an agency relationship or not is a question of fact. There is no separate concept of an agent for VAT purposes only.

### **Establishment of a pooled fund:**

It is HMRC's view that where a pooled fund is established, the Lead Body is responsible for and will meet all costs associated with exercise of the health-related functions. There will not be an agency relationship and the Lead Body cannot hold-out that they are acting as agent for another partner.

Where the Lead Body commissions or procures taxable goods or services, their VAT costs are recoverable subject to the VAT refund scheme they operate under. For example, where a local authority is the Lead Body, their VAT costs are recoverable in full. Where the NHS body is the Lead Body then VAT recovery is dependent on whether those costs are eligible contracted out services.

### **Agency:**

It is HMRC's view that where a pooled fund is not established, each body remains responsible for the exercise of their own health-related functions. In this scenario, the Lead Body will be acting as agent for the other partner(s) when procuring or commissioning health-related goods and services on their behalf of and for their related functions.

For costs incurred in relation to the Lead Body's own functions, VAT will be recoverable subject to the Lead Body's own VAT regime.

For costs incurred by the Lead Body in relation to the functions of the other partners, as they are acting as agent, they may use the invoicing provisions defined under section 47(3) of VAT Act 1994 to treat the supply as to and by them. The agent will then recharge the procured goods or services to the other body, plus VAT where applicable.

Where this option is chosen, the agent may reclaim directly attributable VAT costs as input tax under section 25 of the VAT Act 1994. The VAT recharged on by the agent to the other partner will be recoverable for that partner subject to their applicable refund scheme.

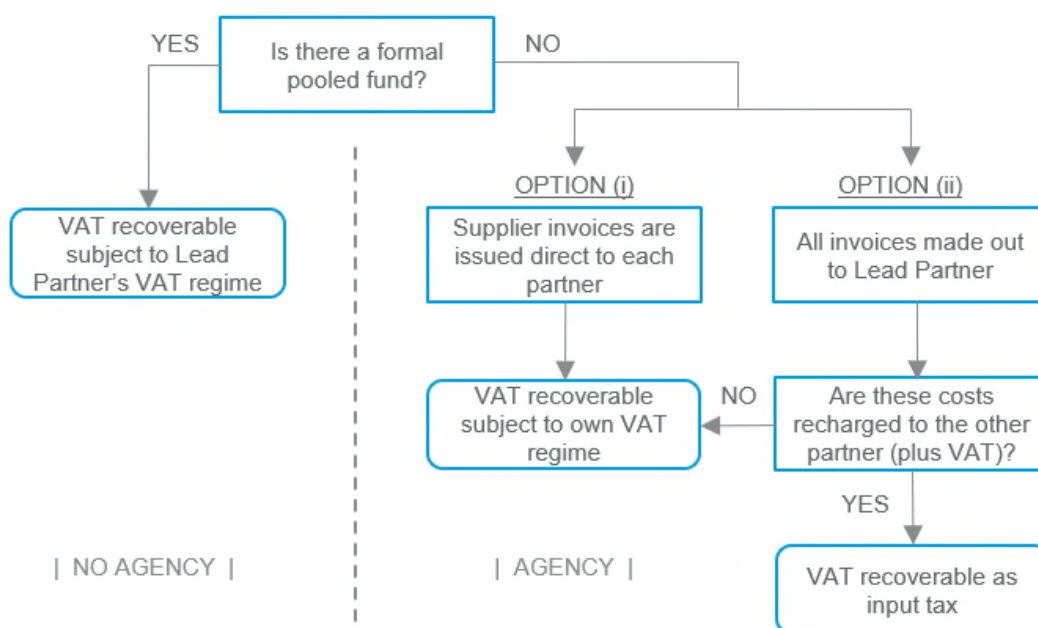
Alternatively, and as a separate option, the Lead Body may arrange for suppliers to invoice the other partner directly. The other partner will reclaim VAT charged subject to their own VAT regime.

Whether one of the bodies is actually acting as the other's agent should be a question of fact. It would not be correct to treat the arrangement as one of agency in order to gain any perceived VAT advantage.

### Flow-chart:

Where a formal and signed section 33 partnership agreement is in place, the below diagram can be used to identify whether VAT is recoverable.

Flow chart for Lead Partner's treatment of taxable supplier costs:



### Other supplies between the partners:

It is not uncommon that other supplies made outside of the formal arrangement can be made between the bodies. For example, there may be a pooled fund for the delivery of a community health service, but the NHS body may lend their staff to the local authority in relation to a similar community service not legally encompassed within the formal arrangement. In this scenario the NHS may be making a taxable supply of services to the authority.

Further complexity may occur where exercise of commissioning of functions are transferred from body A to body B, but body B then, subsequently, commissions services from body A. In this instance, it may be seen that body A has made a business supply which could fall as exempt or taxable depending on the nature of the services provided.

## Conclusion

Where a formal pooled fund is established, related VAT costs will be recoverable under the local authority's VAT regime and resultantly may afford a natural VAT saving. To reiterate, it is important that any partnership arrangements are not structured with the primary intention to gain a tax advantage.

Where there is no pooled fund, then whilst agency invoicing option (i) or option (ii) can be chosen, then VAT costs will ultimately work through as recoverable subject to each partner's own VAT regime.

It is highly recommended that the VAT treatment of any partnership arrangement is properly considered at the earliest stages. Where your own arrangements, or specific transactions, do not clearly fall within the above guidance then further advice should be sought from HMRC or your adviser.



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**Author:**

Scott Harwood  
Tax Director, RSM UK Tax and Accounting Ltd

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Charlotte Burnett  
Partner, DAC Beachcroft LLP