

Changes to the processing of Option to Tax forms

Comments from Saffery Champness LLP

28 November 2022

1. Executive summary

1.1 We welcome the opportunity to provide comments to HMRC's consultation on potential changes to the processing of VAT option to tax (OTT) notifications by the Option to tax National Unit.

1.2 In summary, we would like to highlight the following key points.

- HMRC's proposed changes are a cause for concern as they could result in disruption to the land and property transactions market, including the housebuilder market, during a time of government strategy to build more homes and make more affordable homes available.
- The reliance on generic automated emails is potentially problematic as stakeholders in land and property transactions, including the sale of businesses which qualify as a transfer of a going concern, may not accept those emails as sufficient evidence the opter has made and notified to HMRC a valid option to tax election.
- These emails are also a concern from a technology perspective as they are subject to the reliability and robustness of HMRC's systems. Taxpayers without access to emails and the associated technology may also be disadvantaged.
- We would suggest the ability of taxpayers to notify an OTT to HMRC through their business tax account, and to receive a specific and sufficiently detailed acknowledgement response from HMRC, is a better approach and would be in line with HMRC's Making Tax Digital strategy.
- HMRC may need to approve increased numbers of belated notifications of options to tax or to give their permission for a larger number of options to tax due to the proposed changes. This is likely to require a significant resource commitment by HMRC which may mean that the proposed cost savings do not materialise.

1.3 Section 2 below makes further comments on the proposals.

1.4 We would be happy to discuss the points raised here in further detail. If you have any questions, or would like any further information, please contact: Sean McGinness, VAT Partner, on 0131 221 3217 or email sean.mcginness@saffery.com or Nick Hart, VAT Director, on 0330 094 2093 or email nick.hart@saffery.com.

2. Specific consultation points

2.1 *Receipt of a Notification of an OTT*

2.1.1 HMRC is proposing to cease issuing an Option to Tax Notification Receipt letter. It is proposed by HMRC that if the *VAT1614A-notification of the option to tax* form is submitted by means other than an e-mail to HMRC's national option to tax unit the taxpayer will not receive a response. However, if the VAT1614A form is sent via email, an automated email response will still be provided with content similar to the letter style acknowledgements which at the time of writing, HMRC issues. The proposal states that the date on the automated response will provide confirmation of the date the option has been notified to HMRC.

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- 2.1.2 Whilst it is acknowledged the law requires the taxpayer to correctly notify a valid OTT to HMRC, HMRC has an important role to play in helping taxpayers who have opted to tax to have sufficient documentation on file to satisfy stakeholders in their supply chain that the OTT has been correctly notified, and from which date (the effective date). This is required to confirm that it is correct for the taxpayer, who as opted to tax, to charge VAT when a grant of an interest, right over, or licence in land or property is being made. HMRC issues VAT registration certificates to confirm the VAT status of the taxable person and we consider the option to tax process to be significant enough to warrant similar documentation being issued by HMRC to acknowledge OTTs. The potentially high value of many property transactions makes this a very important consideration. It is recognised that the current process is slow, and (it is assumed) time consuming for HMRC. However, see 2.1.16 below for a suggested approach, utilising the taxpayer's HMRC online business tax account.
- 2.1.3 Similarly, parties seeking to buy companies that own land and property will wish to confirm, with reference to HMRC correspondence that the company has correctly opted to tax. In the event the seller is not able to locate confirmation of an acknowledgement of their OTT from HMRC, HMRC will be approached to provide a duplicate copy and if this channel is not available, complications will arise with respect to the completion of such transactions.
- 2.1.4 We have concerns that an automated acknowledgement email from HMRC may not satisfy the counterparty to a transaction, and this could have a significant impact on the completion of land and property sales and leases.
- 2.1.5 Historically HMRC's acknowledgement letter has been the critical evidence that an OTT has been made and taxpayers regularly provide such a document to prospective buyers or tenants to demonstrate an effective option to tax election is in place. Prospective buyers or tenants are wary of incurring VAT which is incorrectly charged, and which would not be recoverable for them as input tax under those circumstances. They will also be calculating their stamp duty land tax (SDLT), or the equivalent in Wales and Scotland, based on a VAT inclusive amount so may not pay the correct amount of SDLT if there is any doubt regarding the option to tax status.
- 2.1.6 The completion of the sale of a business which qualifies as a transfer of a going concern (TOGC) where the assets being transferred include opted land and property, may become more protracted and both parties to the transaction are likely to incur increased costs as a result of discussions between them with respect to whether effective option to tax elections have been made. Transactions may be jeopardised should the buyer not be satisfied that the seller has opted, because of the lack of a credible HMRC acknowledgement. The automated email and its lack of specific details is likely to be insufficient here. Buyers should not have to opt to tax if they are not required to do so for the TOGC conditions to be met, but the lack of specific acknowledgements from HMRC may force them to do so unnecessarily.
- 2.1.7 Taxpayers need to be able to rely on having a credible and reliable acknowledgement from HMRC rather than a generic automated email which could conceivably have been sent out as a response to a blank email or an email which does not actually contain a completed VAT1614A or otherwise. HMRC would need to safeguard against this occurring otherwise the automated email will not carry any significance. In the short term we would suggest the resource needed to apply such safeguards would be better spent issuing acknowledgement letters of the type previously issued by HMRC.
- 2.1.8 An automated email response from HMRC may lack important details with respect to the OTT which has been submitted, making it difficult to unequivocally link the email to the OTT submitted to HMRC and therefore to evidence the notification of the option to tax when this is a requirement. Most notably, whilst the email may demonstrate when an option to tax election has been submitted by email, it would not show the effective date of that election. On that basis we would expect HMRC
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to issue guidance in VAT Notice 742a which would confirm that the issuance of the automated email would signal HMRC's acceptance of it. It is assumed that this will not be forthcoming as HMRC cannot commit to this due to the avoidance provision under para 12, schedule 10 VAT Act 1994 and the permission conditions under para 29 schedule 10 VAT Act 1994. The fact that there are scenarios where HMRC need to review and confirm the option to tax is indicative that a blanket auto-generated email is not going to be acceptable to a buyer in a transaction who takes a prudent approach to their tax risk.

- 2.1.9 By their very nature IT systems are prone to issues and periods of downtime. Government systems are not immune to this and therefore HMRC would need to implement safeguards in the event any system issues occurred on its side, to provide acknowledgement emails to opters or their agents, in the event they were not sent or received in the first instance due to IT issues. In this event we would expect HMRC to make a process available to opters by which they can request another acknowledgment email. Any such requests should be quick to action and simple for the opter to submit. Given issues experienced recently with HMRC's new VAT registration online service, and also its new telephone system which has been having issues with cutting callers off when being transferred to another HMRC department, it is important to ensure these systems are robust.
- 2.1.10 Not all taxpayers will have access to technology enabling them to submit an OTT notification to HMRC by email or to receive the automated email in response. HMRC needs to consider this point and indicate their solution to such circumstances. While taxpayers will have organised their affairs so that their VAT returns are submitted digitally, this does not always mean that they have full access to electronic communications systems or are familiar with using them.
- 2.1.11 It is acknowledged that HMRC should not be used as a depository for trader's records and that traders have a legal obligation to retain VAT records for a period of six years, and this would include copies of option to tax elections submitted to HMRC and any responses received. However, traders need to be able to rely on evidence from HMRC that option to tax elections have been received and have been filed on the appropriate HMRC system. This is why a coherent online record of OTTs made by a taxpayer should be retained within each taxpayer's HMRC business tax account.
- 2.1.12 Until it is possible to have an online record, accessible by a taxpayer, it is important for HMRC to provide assurances that emails submitted by taxpayers, and the attachments which are included with those emails, including completed VAT1614A forms, covering letters and plans of the land or property which has been opted to tax, are correctly saved to the taxpayer's VAT records within their business tax account database or on HMRC's Electronic Folder database. The taxpayer should then be able to contact HMRC through the VAT helpline service to ask questions and obtain copies of submissions and responses by HMRC on demand, without the need to be referred to the Option to Tax National Unit. In the event HMRC do not file such information correctly or do not retain it at all, we would expect HMRC to offer a clear and efficient line of escalation and resolution. We have experience of emails sent to HMRC for a variety of reasons, simply being deleted from the applicable inbox email account without appropriate actions being taken by HMRC. This includes VAT group registration applications, error correction notice submissions and correspondence sent to the general VAT registration unit. We would be interested to know HMRC's proposals regarding setting up a process for options to tax which would be robust enough for this not to happen.
- 2.1.13 HMRC should consider who will receive the acknowledgement email. OTT forms are often submitted by agents - will HMRC send the acknowledgement only to the email address from which it was received? If the signatory on the OTT was copied in on that email, would they also receive a copy? In our experience HMRC emails, whether automated or not are rarely sent on a "reply all" basis.

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- 2.1.14 If the acknowledgement emails will only be sent to the party who sent the OTT notification email, and if this party is an agent, or another part of the opter's organisation, the taxpayer will have to rely on them ensuring the acknowledgement email is appropriately filed and retained. Further, automated emails may be blocked by security software or may bounce back if the recipient's inbox is full and cannot accept any new emails for the time being.
- 2.1.15 The design of the current VAT 1614A form allows the opter to include up to 12 different land sites or properties on the same form and it would be impractical to list them all in the subject line of the email. It may therefore be difficult for an opter to demonstrate submission if the automatic email reply from HMRC does not indicate what has been received in this respect.
- 2.1.16 As indicated above, it is our suggestion that a preferred route is for HMRC to implement a process for taxpayers to complete the OTT through their business tax account. This could then be the permanent record of the OTT notification. In turn, it would then be useful for taxpayers to be given the ability to share specific parts of their business tax account with third parties so that advisers and potential purchasers can see what land and property has been opted and when, or for date stamped and authenticated documents to be available to download by the taxpayer to provide to third parties, as required.
- 2.2 *Confirming an existence of an Option to Tax*
- 2.2.1 HMRC propose to cease processing requests to confirm the existence of an OTT on a particular property. It is agreed that information such as the submission, and acknowledgement of an OTT, forms part of the business record and should be kept for 6 years as stated in HMRC's guidance.
- 2.2.2 Under the proposal HMRC will only confirm if it has received an OTT notification from a taxpayer in the following situations:
- 1) The effective date of the OTT is likely to be more than 6 years ago, or
 - 2) If a Land and Property Act Receiver, or an Insolvency Practitioner to administer the property, has been appointed.
- 2.2.3 HMRC should clarify how a request under 1) should be made and what information it would expect the taxpayer to provide. It should also provide a time frame for responding to such requests.
- 2.2.4 Ahead of any potential changes coming into effect, HMRC should perhaps expect a higher than usual level of requests for copies of acknowledgement letters. In a time of constrained resource for HMRC, these may be difficult to service.
- 2.2.5 Access to records which HMRC holds on VAT registered persons needs to be easier and HMRC has a duty under the Subject Access Rights and GDPR regulations which enable persons to request information from HMRC which includes VAT related records. HMRC should clarify how its proposal will fit in with the SAR rules and whether it is making it overly difficult for taxpayers to obtain option to tax information.
- 2.2.6 The instance of belated notifications of options to tax, requiring HMRC's agreement, is likely to increase, as taxpayers seek to protect and evidence their position if they have not received copies of previous acknowledgement letters.
- 2.2.7 When a seller or landlord is not able to satisfy a buyer or tenant that it has made an effective OTT, because it is unable to provide a copy of an acknowledgement letter from HMRC, then the seller/landlord would be advised to submit a belated notification request to HMRC with evidence
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of the date from which its option to tax election took effect. The counterparty to the transaction would not be acting unreasonably in requesting a copy of HMRC's option to tax acknowledgement to accept having to pay VAT. Transactions may not complete and with this in mind the course of action available to the seller/landlord is to make a belated notification in order to receive an HMRC acceptance letter to evidence to the buyer/tenant that the correct VAT will be charged.

- 2.2.8 It is very likely that HMRC time taken to process belated notifications and permission requests will exceed the time spent processing an acknowledgement letter.
- 2.2.9 The impact of the Covid pandemic should not be ignored. During the periods of national lockdown postal services were considerably impacted and we encountered issues with HMRC receiving, processing, and sending post. We have numerous examples of taxpayers never receiving acknowledgement letters during that period, and we would expect HMRC to support taxpayers by issuing acknowledgements to such taxpayers should a request be made for a duplicate acknowledgement despite this being within the last 6 years.
- 2.2.10 Businesses considering deregistering from VAT may need to obtain certainty from HMRC regarding OTTs prior to the deregistration process being started, as otherwise a VAT charge on the value of the property could arise upon deregistration. It would seem inequitable for HMRC not to honour requests for option to tax acknowledge letters where there is then a risk that HMRC would assess for output tax due on deregistration.

3. About Saffery Champness

- 3.1 Saffery Champness is the 15th largest UK accountancy firm by fee income. We have more than 80 UK partners and over 900 staff in nine offices in the UK and further offices in Guernsey, Geneva, Zurich, Dublin and Dubai.
- 3.2 We are a firm with a deliberate focus; we do not try to be all things to all people. Instead, we choose to specialise in specific sectors and areas of business where we have real in-depth expertise and experience. These include real estate development and investment, not-for-profit, private wealth, landed estates and rural businesses, professional and consultancy businesses, entrepreneurs, and sports and entertainment.