



Accountants, Tax & Legal Advisers

## TRUST ALERT

“Everything you always wanted to know about ‘tax and audit’, but were afraid to ask.”

(inspired by Woody Allen)

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## Place of establishment and cross-border services for VAT purposes

Value Added Tax (VAT) is charged on the supply of goods and services unless the goods and services are used for non-taxable purposes, for example, the sale of shareholdings. The entrepreneur who supplies such goods and services may deduct the VAT paid in relation to its taxable activities.

In the case of cross-border services, it is of great importance to determine which country may charge the VAT. This is called 'the place of supply of services'. Apart from a small number of exceptions regarding services concerning building properties, the 'place of supply of services' is considered to be the country in which the recipient/entrepreneur of the services is established or lives. This applies not only to entrepreneurs within the EU, but also to those from outside the EU. For this reason, liability for, and any possible deduction of VAT, it is important to determine where the business is established.

According to recent Dutch jurisprudence in the area of VAT, the place of establishment of a business is the actual place where the business is carried on. In this way, a "substance" requirement for VAT (just as for corporate tax) has been introduced.

In determining the place where the place of business is for a company, a great many factors need to be considered. The most important of these are the place where the business is incorporated, the place where the central management is based, the place where the board meets and the place where the overall policy of the company is determined. Other elements, such as where the board members live, the place where annual general meetings are held, where the administration and bookkeeping tasks are located and where the financial, and in particular, the banking affairs are located may also be relevant.

In our experience, the VAT position of clients of trust offices has all too frequently not been sufficiently closely examined. The opportunities to, for instance, claim back VAT which has been paid are frequently not used. If you require, we will be happy to examine the VAT position of your clients to check whether their VAT positions can be optimized.

## Legislative proposal for the simplification of the Dutch limited liability company

In December 2009, the Dutch parliament accepted the legislative proposal for the simplification of legislation concerning the Dutch limited liability company. This legislative proposal now remains to be accepted by the Dutch senate. Although the exact date of implementation is not yet known, it is expected to be around or after July 2010. The proposed legislation drastically changes the statutory provisions concerning the “Besloten Vennootschap”. One of these changes concerns the liability of directors in connection with distribution to shareholders.

The provisions concerning distributions to shareholders are included in article 2: 216 of the Dutch Civil Code. This article will be amended as follows: Resolutions to distribute payments to shareholders shall have no consequence until the board of directors approve the distribution. The board shall only refrain from approving the distribution if it knows, or should reasonably be aware, that the distribution will result in the company not being able to continue paying debts that are due and payable.

Each director will be personally liable to the extent of the deficit caused by the distribution, should the company be unable to pay debts that are due and payable. This deficit may extend beyond the amount that was distributed. This liability applies also to persons acting as a director.

A director is not liable if he can prove that the approval or the payment of the distribution was not due or attributable to him. However, liability can in such a case only be averted if the director can also prove to have taken all necessary measures to avert the adverse consequences of the distribution.

A shareholder, who knows or can reasonably foresee that the company will not be able to pay debts that are due and payable, has to return the distributed amount to the extent of the company's deficit which arose as a result of the distribution. The shareholder's repayment obligation is limited to the amount of distribution received. If the directors have already compensated the company for the deficit, the shareholder shall reimburse each director pro rata parte his share of compensation paid.

In view of the above, two concerns arise for a director: A director will need to keep himself properly informed about the financial situation of the company and the extent of debts due and payable at the time of a

distribution to shareholders, as well as the possible financial consequences of such a distribution to shareholders. A director's decision to refrain from approving a distribution to shareholders may have repercussions if the shareholders resolve to dismiss him in connection with this.

If you encounter a client situation that may be related to the above and you wish to have your opinion of the legal implications confirmed, please do not hesitate to contact us. We will be pleased to assist you in this matter.

## Audit engagement if the previous year's financial statements have not been audited

Dutch legal entities which have to comply with Book 2, Part 9 of the Netherlands Civil Code, must have their financial statements audited by a Dutch registeraccountant (“auditor”) unless the legal entity qualifies as “small” in accordance with the size criteria of 2:396 of the Netherlands Civil Code.

When the legal entity exceeds the criteria for small-sized entities on two consecutive balance sheet dates, it either becomes classified as medium-sized or large and as a result, the audit exemption can no longer be applied. In that case, the entity is required to have its financial statements audited. It is important that entity's management signals a potential change in classification early in the process and to discuss the effects of the change in classification with their auditor as soon as possible. If not considered in time, this may, in the end, result in a qualified auditor's report or disclaimer of opinion.

Why is it important to consider the classification early in the process?

The financial statements include both current and prior period (“comparative”) figures whereby the comparative figures provide the users of financial statements insight into trends and changes in the entity's performance.

When the comparative figures have not been audited, the auditor has to state this fact in the auditor's report. Nevertheless, the auditor still has the responsibility to obtain sufficient audit evidence to determine that the comparative figures comply with generally accepted accounting principles in the Netherlands (“NL GAAP”), that the correct classification is applied and that the comparative figures are similar to the previous year's unaudited financial statements. The appointed auditor is required to perform additional audit procedures to ensure that the opening balances (previous year's end balances) are correct and needs to determine whether or not he (or she) can take responsibility for such opening balances. This may entail audit procedures on the collectability of receivables, confirmations by third parties related to cash, investments, short- and long-term liabilities etc, inventory observation and roll-backward procedures (if possible), as well as other supporting documentation related to items in the prior year financial statements.

If the auditor concludes that insufficient audit evidence is or can be obtained with regard to the opening balances, a qualified auditor's report or disclaimer of opinion related to the financial statements will have to be issued. If material errors are identified related to the opening balances which have a material effect on the current year or when the previous year's financial statements have not been prepared in accordance with NL GAAP, the auditor will have to request the entity's management to revise the financial statements accordingly.

In the Netherlands, an auditor can also conduct an audit on the balance sheet only (in Dutch: "zelfstandig balansonderzoek"). Note that in that situation, the auditor only conducts an audit on the ending balances and not on the entire financial statements. However, such audit engagement is not in accordance with 2:393 of the Netherlands Civil Code when the legal entity is required to have an audit performed on its financial statements and the effects will be that the current financial statements can not be adopted by the entity's management and its shareholders.

At HLB, we are more than willing to assist your clients in this process to ensure a smooth transition from unaudited to audited financial statements.

## HLB International - Network news

As you know HLB Schippers is a member of HLB International, a worldwide network of independent accounting firms and business advisers. We would like to inform you about the recent developments within the network in Europe. In addition, the International Accounting Bulletin published its annual world survey of accounting networks and associations at the end of January 2010.

### *Italy*

Studio Associato De Vecchi, HLB's principal member firm for consultancy and tax advice, is very pleased to announce the newly formed entity HLB Consultants Italia. HLB Consultants Italia consists of the following newly appointed, firms based in Milan, Venice, Rimini and Catania:

Milan: Studio Associato De Vecchi / Studio Pagella

Venice: STB Sesani & Trevisanato

Rimini: Studio Associati Ragionieri

Catania: Studio Prof. Gaetano Siciliano

HLB Consultants Italia, with its headquarters located in the offices of Studio Associato de Vecchi in Milan, has 89 staff, including 26 partners, 14 professional staff, 11 graduates and 38 other staff. Through its members, HLB Consultants Italia is able to provide fully qualified professional services in northern, central and southern Italy.

### *Sweden*

HLB is pleased to announce the appointment of former Nexia firm Revisorsgruppen i Malmö as the HLB member firm in Sweden. Thomas Jönnsen, the firm's international contact partner, is in the process of developing further representation in Sweden.

### *France*

HLB France has recently appointed a new group covering the northwestern region of France. The new firm COGEP joined the HLB France network in March. It has 560 staff, 35 partners and 20 main offices as well as a number of smaller offices.

*International Ranking - IAB publishes World Survey 2010*

At the end of January, the International Accounting Bulletin released its annual world survey of accounting networks and associations. HLB International fared better than a lot of its competitors and was one of a very few networks which moved up in the rankings. On the whole, the majority of networks, including the Big 4, reported decreases in their annual fee income.

According to this ranking, HLB was placed at number 10 of worldwide accounting networks as recognized by the Forum of Firms.

When you need an introduction to one of our network partners worldwide, please do not hesitate to contact us and we will be more than happy to arrange an introduction for you.

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