



**Tax Directors Forum**  
**“Tax Directors Forum –**  
**Retail and Consumer sector ”**

**Session 1:**  
**“Discounts and Bonuses”**

14 October 2009

## Session 1: Discounts and Bonuses

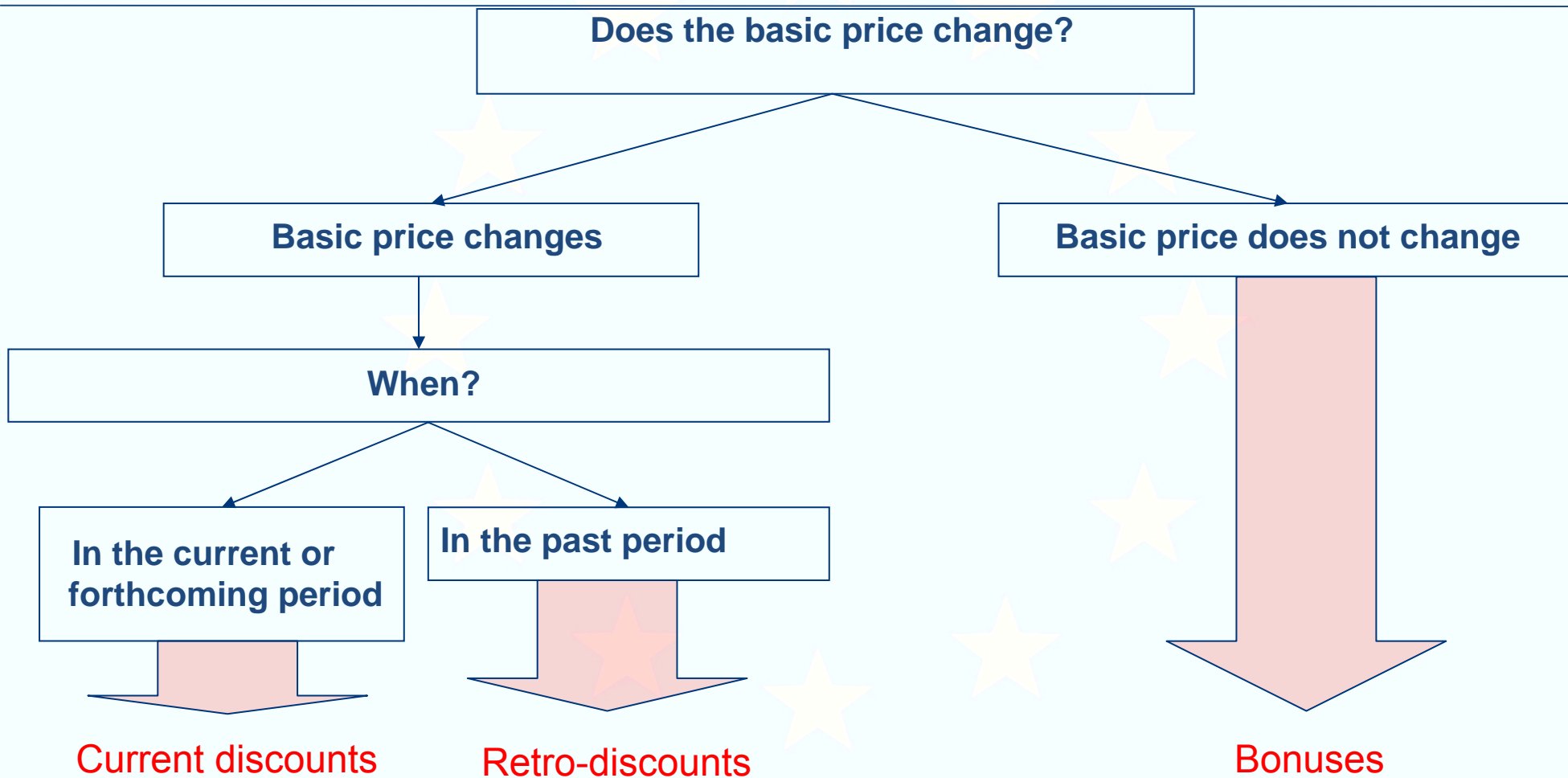
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- Application of discounts and bonuses
- Current discounts
- Retro-discounts
- Bonuses
- Credit-notes
- Relationship with 2<sup>nd</sup> tier partners

# Telling One from the Others

- **Variety of discounts and bonuses to be discussed today:**
  - On-invoice discount – simply adjusting the current price / no retro effect
  - Retrospective discount – adjusting the past sales price / monies may need to be repaid
  - Bonus – paying the purchaser for compliance with the contract criteria / no effect on the price / monies may need to be repaid
- **Credit note**
  - a form of settlement of retro-discount or bonus / substitutes the repayment / serve as a mechanism of offset against future payments

# Telling One from the Others





# Current Discounts

- **A pricing element**
  - Price is affected directly without retroactivity
  - Used for a variety of reasons (volume, payment terms, promotion push, etc.)
- **Transfer Pricing (Art. 40 RTC)**
  - Comparable conditions (Art. 40-9 RTC)
  - Valid reasons (Art. 40-3 RTC): seasonal effects, quality, short life goods, any marketing reasons (incl. new goods, new markets, trial sales), etc.
  - Can the reasons for discounts be challenged? Does the ban on practicability test apply?
  - Is it a maths (20% deviation) only exercise?



# Retro-Discounts

## VAT issues

- Adjustment of the tax base is required
- Period of the tax base adjustment?
  - ✓ Period of good's sale (correction of VAT invoices and accounting documents; filing of the amended tax return plus delay penalties for the buyer)
    - Approach of the Ministry of Finance
  - ✓ **Period of granting Retro-discount \***
    - No mistakes/distortions at the date of sale
    - Granting a discount may be viewed as a separate transaction
    - Issuance of a "minus" VAT invoice (corrected VAT invoice as an alternative\*\*)

\* *Unilever, No. KA-A40/5284-08; Nidan-Gross, No. KA-A41/8495-08-Π*

\*\* *Izh-Metal, No. Φ09-1468/05-AK*

# Retro-Discounts

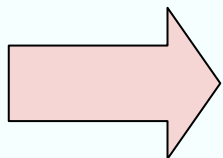
## Profits Tax Issues

- For the seller: income adjustment or non-sales expense?
  - ✓ Income adjustment as to the date of good's sale  
(According to MinFin Art. 265-1-19.1 RTC does not apply in case of price reduction)
  - ✓ **Income adjustment or recognition as non-sales expense at the time of granting the discount**
    - Art. 265-1-19.1 RTC sets no limits as to the forms or types of discounts (*KDV Group, No. 004-6332/2007(38166-A67-15)*)
    - Review of each unit price or consolidation into a lump sum should be a sellers' decision
- For the buyer: depends on the discount's conditions set by the seller

# Retro-Discounts

## Further issues to consider:

- Transfer pricing issues by more than 20% discounts
- Economical justifiability (more relevant in case of one-time recognition as a non-sales expense)



**Marketing policy is a must!**



# Bonuses

- Profits tax issues:
  - Deductibility criteria
    - meeting of specific conditions provided by sales-purchase agreement
    - economic justification
    - documentation support
    - substance over form approach
  - Types of conditions?
  - How to prove that conditions are met?
  - Bonus vs services?
- VAT treatment

# Credit-notes

## (1) Credit-notes in consideration of goods delivered (reduction of buyer's existing debt)

- Review of buyer's indebtedness with a price reduction as an inevitable consequence (tax base adjustments required)
- Partial release from an obligation to pay the purchase price, i.e. debt forgiveness (VAT considerations for the buyer and seller)
- **Type of bonus, that does not entail monetary transfer (not subject to VAT, deductible as non-sales expense under Art. 265-1-19.1 RTC):**
  - ✓ does not entail the price reduction and is deductible as non-sales expense (*Severo-Zapadnaya Prododvolstvenaja kompanija, No. A13-792/2008*)
  - ✓ Conditioned by fulfillment of certain requirements (*Nike, No. KA-A40/6444-09*)

# Credit-notes

## (2) Credit-notes in consideration of future supplies

- Combination of two transactions: Granting the bonus and offset against the prepayment
- Granting the bonus:
  - ✓ Non-sales expense for the seller and non-sales income for the buyer
  - ✓ Not subject to VAT
- Offset against the prepayment:
  - ✓ For the seller: VAT on prepayment
  - ✓ For the buyer: No deductions available
- Price reduction (discount) in regard to future supplies as an alternative



# Bonuses for Second-Tier Partners

- Cannot be treated as bonus as per Art. 265-1-19.1 RTC
- Effective structuring options?
  - Stimulation through distributors (incl. mirror-arrangements)
  - Direct service agreements with second-tier partners
  - Focus your business development efforts on distributors

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**Tax Directors Forum**  
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**Retail and Consumer sector ”**

**Session 2:**  
**“Relations between distributors and**  
**retailers”**

14 October 2009



## Session 2: Relationships between distributors and retailers

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- Merchandising
- Placing of shop equipment (“fixtures”)
- Placement of POSM in Retail outlets
- Advertising in Retailer’s leaflets
- Entrance / listing fees
- Draft Law on the principles of state regulation of trade activity in the Russian Federation
- Relevant court practice



# Merchandising

- No definition of “merchandising” in the legislation; in practice implies placement of goods in retail at best shelves and/or placement of advertising materials

## *Main issues to consider:*

- *Economical justification of charge – who benefits from merchandising?*
- *Substance of fees and documentary support - are services actually provided?*
- *Nature of arrangement – advertising, marketing or other services?*
- *Limitation of deduction for profits tax purposes of distributor – is it applicable?*
- *Legal risks of arrangement - are any arise for parties involved?*



# Merchandising

## **(1) Who benefits from merchandising?**

- Position of the tax authorities – merchandising is aimed at increasing sales of Retailer
- Court practice (direct and indirect) – Distributor is benefiting from merchandising

## **(2) Substance of charge/Documentary support:**

- Position of the tax authorities: fact of *provision* of services should be *documented*
- Court practice – mainly supports position of tax authorities

## **(3) Nature of arrangement/Limitation of deduction for Distributor:**

- Position of the tax authorities – merchandising means advertising, profits tax deduction is limited within 1% threshold
- Court practice: mainly supports position of tax authorities; though some cases support full deduction of merchandising costs

## **(4) Legal risks:**

- Arise mainly for Retailer - violation of antimonopoly legislation, commercial risks associated with conclusion and execution of distribution agreements

# Placing of shop equipment (“fixtures”)

## Structures for placing fixtures:

### 1. Distributor (rather than Retailer) uses fixtures:

- (a) value of placement of fixtures is included into price of goods supplied to Retailer
- (b) separate arrangement for lease of place for fixtures

### 2. Retailer uses fixtures on a chargeable basis:

- (a) value of use is included into price of goods supplied to Retailer
- (b) separate arrangement for lease of fixtures

### 3. Retailer uses fixtures on a free-of-charge basis

### 4. Display fixtures are sold by Distributor to Retailer

## ***Main issues to consider:***

- *Economical justification – who benefits? fixture: depreciable item?*
- *Documentary confirmation – which documents are needed?*
- *Free-of-charge relations: VAT/Profit tax?*
- *Profit tax limitations – applicable?*



# Placement of POSM in Retail outlets

## Structures for placing POSM in Retail outlets:

1. Placement of POSM by Distributor in Retail outlets
2. Provision of POSM to Retailer as a condition for supply of goods (value of POSM is included into sales price for goods)
3. Sale of POSM by Distributor to Retailer

## *Main issues to consider:*

- *When to deduct advertising costs?*
- *POSM distribution: subject to VAT?*
- *VAT incentive – applicable?*
- *Profit tax limitation – how to apply?*
- *Documentary confirmation – which documents are needed?*

**It is important to ensure consistency of approach to POSM placement with other arrangements with Retailer!**

# Advertising in Retailer's leaflets

## Structures for advertising in Retailer's leaflets:

1. **Separate service arrangement**
2. **Bonus condition**
3. **Advertising: condition for the supply of goods (value of advertising is included into sales price for goods)**

## *Main issues to consider:*

- *Economic justification – who benefits?*
- *Profit tax limitation – how to apply?*
- *VAT – applicable?*



# Entrance / listing fees

- No unified approach in practice (each Retailer use its own terminology) – as a result no unified court practice

## ***Main issues to consider:***

- *Profits tax treatment of fees for Distributor – is fee deductible?*
- *Antimonopoly rules violation by Retailer ?*
- *VAT on fees – applicable?*



# Draft Law on the principles of state regulation of trade activity in the Russian Federation

- Currently under consideration of Expert Counsel of Ministry of Industry and Trade
- The existing draft establishes legislative framework for regulation of trading activity by state authorities and relations between suppliers of goods and trading companies and a number of new restrictions which may have a significant impact on the existing practice of relations between Distributor and Retailer restrictions:
  - bonuses/discounts for food products - only volume bonuses/discounts are to be possible;
  - conditional charges under supply agreement - not to be allowed, additional charges (if any) should be made under a separate service agreement
  - entrance/listing fees – are to be deemed as prohibited
  - expansion of large food retail chains – is to be restricted

**It is time to assess the impact of proposed changes on your business activities!**

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# **Tax Directors Forum – Retail and Consumer sector**

**Session 3:**

**“Surpluses, shortages and  
losses of goods”**

14 October 2009





### Part I

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- Natural waste
- Technological losses
- Spoilage
- Expiration of shelf life
- Stealage
- VAT issues

# Natural waste

**Losses** due to shortage and/or impairment during storage and transportation within the limits of the norms of natural loss (art. 254.7.2 of the Tax Code)

**Natural loss:** loss or mass reduction of goods due to a change in their biological or physicochemical properties that do not change the required quality

### Whether the approved norms can be applied in self-service stores?

- Letter of the Russian Ministry of Finance No. 03-03-04/1/392 dated 29 November 2005: the USSR Ministry of Trade No. 75 dated 23 March 1984 “On Approval of Differentiated Amounts of Writing off Losses of Goods in Self-service Stores” may be applied
- Letter of the Russian Ministry of Finance No. 03-03-06/1/159 dated 19 March 2007: no requirements have been approved...
- Court practice (Federal Arbitration Court of Nord-West circuit of 01.11.2006 № A56-2227/2006, Federal Arbitration Court of Ural circuit of 11.03.2009 № A07-1768/2008-A-BET)

# Technological losses

**Reason:** technological features of production and/or transportation, and physicochemical properties of used raw materials

**NB:** May be applied only to production and transportation processes

## Procedures

- development of internal requirements (operating process chart, cost estimate of flow process, sectorial regulations, national standards)
- determination procedure to be defined in accounting policy
- to be revised from time to time

## Documenting

- write-off reports
- calculation of technological losses
- calculations, justification of technological losses in excess of the approved standard

# Spoilage

## No special rules

Can be qualified as other expenses associated with production and/or sales .  
(art. 264.1.49 of the Tax Code)

## Court practice: documentary proof

- Negative: Federal Arbitration Court of Moscow circuit N KA-A40/13938-07-2 of 21.01.2008...
- Positive: Federal Arbitration Court of Ural circuit N Φ09-8084/08-C3 of 31.10.2008

## Documenting

- Internal regulation that governs the procedure for writing off goods
- Company standards of quality
- Report on spoilage, breakage or scrappage of inventories (form TORG-15)
- Report on writing off inventories (form TORG-16)

## Whether the problems can be solved in legislation?



# Expiration of shelf life

**No special rules: other expenses associated with production and/or sales**  
(art.264.1.49 of the Tax Code)

## Russian Ministry of Finance

- Prohibited: letters dated 09 June 2009 No. 03-03-06/1/374, dated 28 July 2008 No. 03-03-06/1/434, dated 22 October 2006 No. 03-01-14/11-563
- Allowed: letter dated 16.07.2009 No. 3-2-09/139, letter of the Moscow Department of the Federal Tax Service dated 18 April 2008 No. 20-12/037680

## Procedures required (by the Ministry of Finance)

- expert review by state control authorities (Expert Review Regulations approved by the Government's Resolution No. 1263 of 29 September 1997)
- disposal (elimination)

## Court practice

- Nestle Food (Federal Arbitration Court of Moscow circuit N KA-A40/14839-07-2 of 01.02.2008);
- Kalinka-Stokman (Federal Arbitration Court of Nord-West circuit N A56-1114/2005 of 02.12.2005)

# Stealage (1)

**Expenses in the form of a shortage of inventories** in production and in storage and at trade enterprises in the absence of guilty persons, and losses due to stealage where the guilty persons have not been established (art. 265.2.5 of the Tax Code)

**Confirmation of the absence** of the guilty parties must be obtained from a competent state authority

### Procedures

- Taking an inventory of the assets
- Requiring written explanations from employees
- Producing a report
- Applying to law-enforcement agencies

### Documenting

- Inventory documents (the INV-24, INV-18, INV-19 and INV-26 forms)
- Written explanations from guilty employees
- CEO's instruction to recover the damage from the guilty party
- Judgment to recover (deny recovery of) the arrears from the employee
- Resolution to suspend pre-trial investigation as a result of failure to establish the person to be held as accused (if it is impossible to establish the guilty party)

# Stealage (2)

## Awkward condition

- It is necessary to obtain a resolution on the suspension of pre-trial investigation as a result of failure to establish the person to be held as accused / a resolution to dismiss the criminal case

(Letters of Minfin No. 03-03-04/1/412 dated 2 May 2006 and No. 03-03-04/1/52 dated 20 January 2006)

## Practice

- A resolution to deny opening a criminal case is not accepted by the taxation authorities as a supporting document

## Court practice

- Federal Arbitration Court of the Moscow Circuit No. KA-A40/13938-07-2 dated 21 January 2009, etc.

## Change in tax law is required

# VAT recovery

## Position of the Ministry of Finance

- Deductions shall be made for amounts of VAT paid in relation to goods which are purchased for carrying out VAT-able operations (art. 170.2 of the Tax Code). VAT previously deducted on goods for which a shortage is discovered (in connection with loss, damage, breakage, stealage, natural calamities, etc.) is to be restored

(Letters of the Ministry of Finance: No. 03-04-11/308 dated 18 November 2005 ; No. 03-07-15/120 dated 14 August 2007; No. 03-7-11/194 dated 15 May 2008)

## Court practice

- A taxpayer is not obliged to restore VAT previously deducted in relation to goods which were purchased for carrying out taxable operations but which were not subsequently used for that purpose as a result of their loss (art. 170.3 of the Tax Code).
- Goods which are written off may not be further used in any operations whatsoever

(Supreme Court decisions No.10652/06 dated 23 October 2006; No.16213/06 dated 18 January 2007; No. 16397/08 dated 24 December 2008; Federal Arbitration Court of Moscow Circuit dated 20 August 2008 No. KA-A40/5199-08-02, etc.)





### Part 2

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Inventory losses lead to tax losses:

- Practical aspects
- Perspective

# Inventory losses...

Spoilage of goods, losing of market condition and (or) consumer attributes under the storage, transportation, pre-sale actions are unavoidable

A lot of cases when occur, for example:

- Emergency at the warehouses
- Spontaneous damage under multilevel stock-keeping
- Packing damage
- Expiration of shelf life and (or) sale period
- Product and (or) packing design obsolescence
- Etc., etc., etc,

Obstacle to deduct related expenses for profit tax purposes

### ...lead to tax losses

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Lack of direct provision in the Tax code

Difficult to apply existing norms due to

- direct limitations OR
- granting to limited taxpayers (specific industry rules) OR
- allowable to be used mostly by manufactures as per existing practice

Disputed on economic justification

Controversial court practice

# Perspective

- Taxpayer has a right to deduct justified and properly documented expenses
- Expenses resulted from spoilage of goods, losing of market condition and (or) consumer attributes under the storage, transportation, pre-sale actions are unavoidable and, thus, justified
- Need for approach to evaluate the economic justification and rules of documentary support
- Need for changes into the tax legislation?
- Need for unification of court practice?



### Part 3

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#### Inventory Surpluses:

- Prehistory of the topic
- Current situation – Double taxation
- Proposal

# Prehistory

## Art.254.2 “Material Outlays” of the Tax Code

### Before January 2006

- “The cost of the inventory items included in the material outlays shall be defined proceeding from the prices of their acquisition (without account taken of value added tax and excise taxes, except for the cases envisaged by the present Code), including the commission fees paid to intermediary organizations, the import customs duties and collections, the outlays on transportation as well as other expenditures connected with the acquisition of inventory items”.

### Starting from January 2006 the article was amended

- **“The value of inventory items in the form of a surplus discovered in the course of stock-taking and/or assets obtained as the result of dismantling or disassembly of decommissioned fixed asset items shall be calculated as the sum of tax calculated on the income envisaged by items 13 and 20 of Part 2 of Article 250 of the present Code”.**

# Current situation – Double taxation

## Art.250.20 “Extra-Sale”, of the Tax Code

- Tax Code states the incomes derived as a non sale taxable income

**Observation of the requirements stipulated in the art.250 and 254 of the Tax Code leads to double taxation of inventory surpluses:**

- **First time** - at the moment of recognition
- **Second time** - at the moment of sales

# Current situation – Double taxation

**Sample Case** (without mark up, operational & administration costs, VAT, etc.,)

1. 100 rub – Recognition of the surplus  
20 rub – Profits tax on recognized surplus ( $100 \times 0.2$ )
  
2. 100 rub - Sales of the surplus  
20 rub - Cost Of Goods Sold (for the tax purposes)  
80 rub - Taxable income ( $100 - 20$ )  
16 rub - Profits tax on sales ( $80 \times 0.2$ )
  
- 100 rub – Real income (sales)  
36 rub - Profit tax ( $20 + 16$ ) - effective tax rate for this transaction is 36% instead of 20%  
64 rub – Net result after taxes



# Proposal

### To amend tax code as follows:

- The value of inventory items in the form of a surplus discovered in the course of stock-taking and/or assets obtained as the result of dismantling or disassembly of decommissioned fixed asset items shall be calculated as the ~~sum of tax calculated on the income envisaged by~~ value, appraised in accordance with

Art.250.13,20 Part 2 of the Tax Code

# Proposal

An updated Sample Case (without mark up, operational & administration costs, VAT, etc.,)

1. 100 rub – Recognition of the surplus  
20 rub – Profits tax on recognized surplus ( $100 \times 0.2$ )

2. 100 rub - Sales of the surplus  
100 rub - Cost Of Goods Sold (for the tax purposes)  
0 rub - Taxable income ( $100 - 100$ )  
0 rub - Profits tax on sales ( $0 \times 0.2$ )

100 rub – Real income (sales)

20 rub - Profit tax ( $20 + 0$ ) - effective tax rate for this transaction is 20%

80 rub – Net result after taxes

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**“Tax Directors Forum –  
Retail and Consumer sector”**

**Session 4:  
“Return of goods”**

14 October 2009

## Session 4: Return of goods



- ❖ Return of goods – domestic deals
- ❖ Return of goods – foreign trade deals
- ❖ Warranty services
- ❖ Relevant court practice

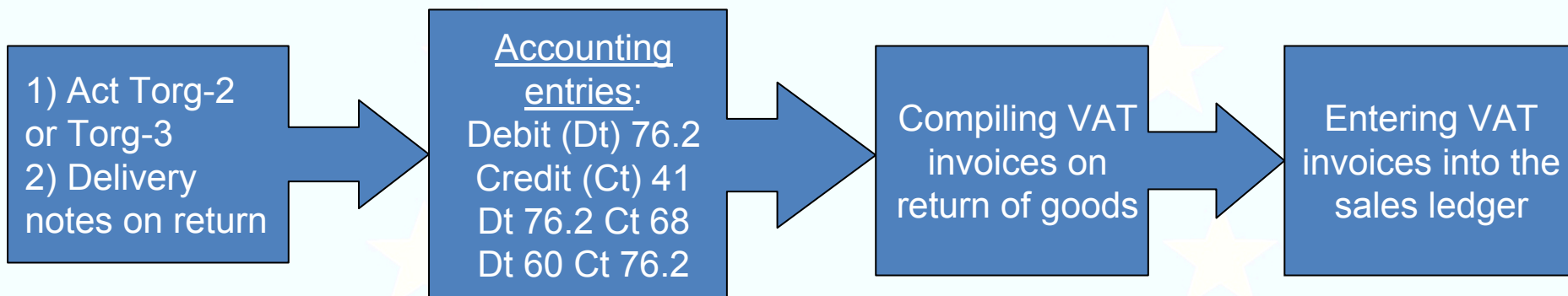
# Return or buyback?

Reason for the return		Position of MinFin and the Supreme Arbitration Court (SAC)	Position of consultants
Defected goods	Not entered in accounting records by the buyer	Return in connection with the termination of a sales contract	
	Entered in accounting records by the buyer	Buyback (Letter from the MinFin dated 07.03.2007 No. 03-07-15/29; Resolution of SAC dated 30.09.2008 No. 11461/08)	Return in connection with the termination of a sales contract (Article 450, 475.2 of the Civil Code)
Good of proper quality	Entered in accounting records by the buyer	Buyback (if provided for by the sales contract)	

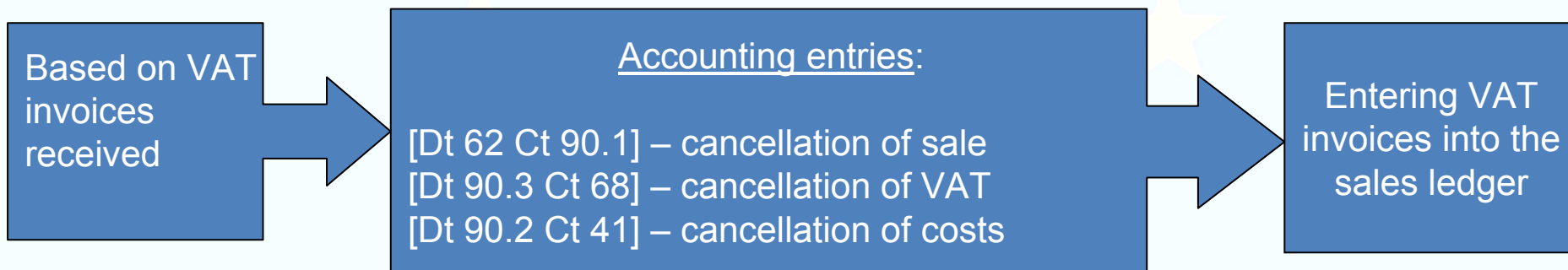
# Return of defected goods

(goods are accepted by the buyer)

## Buyer's accounting records



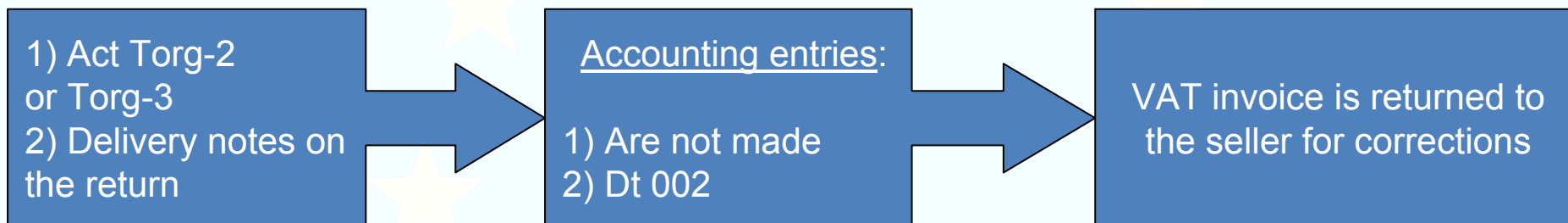
## Seller's accounting records



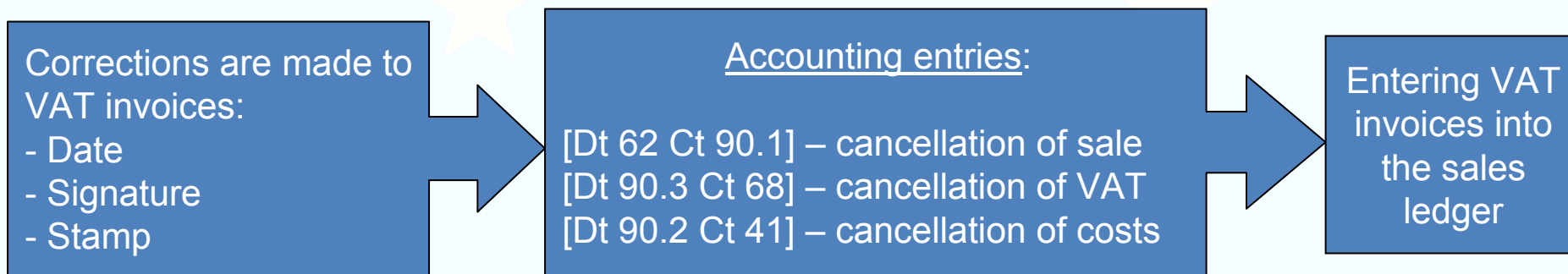
# Return of defected goods

(goods are not accepted by the buyer)

## Buyer's accounting records

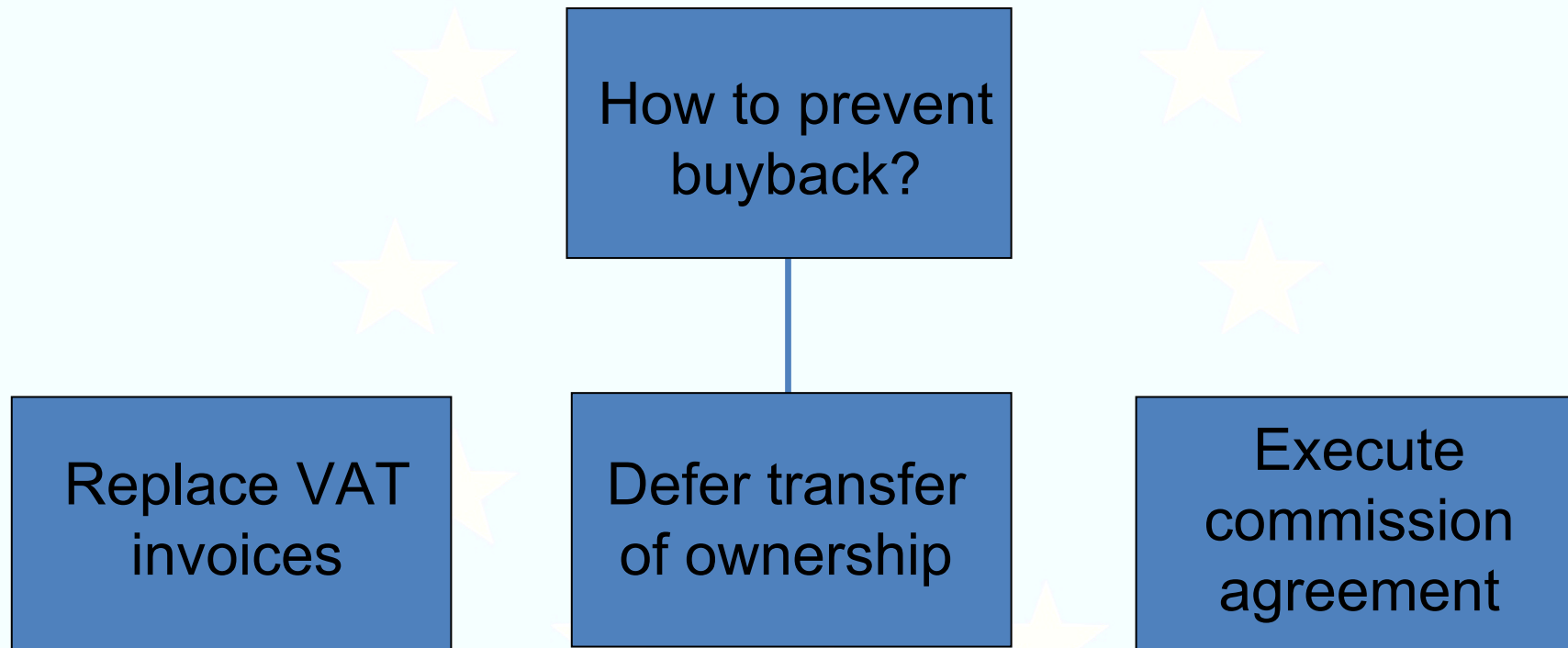


## Seller's accounting records





# «Circumventing» buyback



# Warranty Obligations and Services

- Types and Categories
  - Warranty obligations of the manufacturer / seller
  - Supplemental warranty obligations
  - Warranty certificates
  - Entities performing warranty services
- Documentation Requirements
- General VAT Treatment
- General Income Tax Treatment
  - Deductibility of expenses
  - Using reserves

# Warranty and Post-Warranty

- Specifics of VAT Treatment of Warranty Services
  - VAT exempt-status of warranty services with no markup (cannot be waived)
  - VAT on markups on warranty services
  - VAT on all post-warranty services
  - Separate accounting
- Post-Warranty Services
  - VAT implications
  - Corporate income tax implications
  - What if post-warranty services are provided for free?
- VAT Optimization Techniques

# Handling Specific Warranty Cases

- Sale of Goods with Different Warranty Terms
  - Regular warranty covered by the purchase price
  - Extended warranty covered by higher price
  - Option to extend the warranty term for extra fee
- Sale of Warranty Certificates
  - Civil law treatment (goods, services, or rights?)
    - Transferrable vis-à-vis non-transferrable
  - Tax implications
  - Accounting
  - Paperwork

# Replacement / Repair under Warranty

- Domestic Replacement / Repair
- Cross-Border Replacement / Repair (No Local Production)
  - Export of defective parts (for repair vis-à-vis replacement)
    - Fully export with subsequent import (double duty)
    - Re-export with subsequent import (no double duty, 6-month limit)
    - Processing outside the customs territory (requirements)
  - Practical Considerations
    - Dealing with customs
    - Maintaining stock of replacement parts

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