

More VAT rates on the rise



Among other developments this month, of particular importance to US multinationals is the continued shift from direct to indirect taxes, as evidenced by the recent VAT rate increases in the Czech Republic, Cyprus, Finland and the Dominican Republic. Other noteworthy developments include the revised filing deadlines in Germany, invoicing changes in the UK and Hungary, and the European Court of Justice (ECJ) request for the Advocate General to apply his opinion rendered against Ireland regarding the inclusion of non-taxable persons in VAT groups, to cases involving other Member States.

European Union

European Court of Justice

Further details of Advocate-General's opinion in VAT grouping cases

Further to last month's news item, we understand that the ECJ has now asked the Advocate General to apply his opinion in the *Commission v. Ireland* case (C-85/11) to all cases against the other EU Member States involved in the VAT group infringement proceedings, with the exception of Sweden.

By way of background, the EU commission previously initiated infringement proceedings against a number of EU Member States for allowing non taxable persons (e.g., holding companies, wholly exempt entities, etc.) to be part of a VAT group. When reviewing this challenge by the EU Commission, the Advocate General (AG) had supported Ireland's position and given his opinion that non-taxable persons should be permitted to join VAT groups.

When forming his opinion, the AG noted that art 11 of the EU VAT Directive 2006/112/EC made a conscious distinction between 'taxable person' and 'any persons', and in the case of VAT grouping had given Member States the option "not to consider as separate taxable persons, but as one single taxable person, persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial or organisational relationships". For this reason, the AG concluded that the legislature had intended grouping to be available to 'persons' rather than to 'taxable persons'.

AG holds that 'non-taxable' persons are allowed to form part of a VAT group

It is yet to be seen whether the AG will apply this same opinion to the UK, Denmark, Netherlands, Czech Republic and Finland. Nevertheless, US businesses with non-taxable subsidiaries in the EU (e.g., holding companies, exempt entities, etc.) should monitor the development of this case. In the event that the AG applies this opinion more widely, the benefit of grouping non-taxable entities with other group subsidiaries should be reviewed.

In Sweden, VAT grouping is permitted only for regulated businesses providing financial and insurance services or trading in stocks and shares, along with businesses whose main purpose is to supply them with goods and services, and their commission agents (i.e., the financial services sector).

The AG noted that, when a Member State elects to adopt an optional provision from the EU Directive, such as VAT grouping, any conditions it imposes must be in conformity with the VAT Directive. Art 11 of the EU Directive allows Member States to permit grouping for 'any persons' and, in the AG's opinion, the proper construction of 'any persons' was that it did not permit the Member State to select persons in particular economic sectors.

US multinationals with subsidiaries in Sweden should take note of this development. If the scope of VAT grouping expands to all sectors in Sweden, the benefits of VAT grouping may soon be available to many more businesses.

European Union

AG considers outsourced investment management services to be VAT-exempt

In a case which bears a strong resemblance to the earlier ECJ case of Abbey National plc on the definition of 'management of special investment funds', the Advocate General has supported the taxpayer's claim for exemption.

The taxpayer in this case made recommendations concerning the purchase and sale of securities to an investment fund management company (IMC). Typically, such recommendations were implemented by the IMC following certain regulatory checks. The tax authority considered that the services provided by the taxpayer did not constitute 'the management of special investment funds' and hence were outside of the relevant exemption, art 135(1)(g) Principal VAT Directive 2006/112/EC (formerly art 13B(d)(6) Sixth VAT Directive). The taxpayer appealed and the German court referred the case to the ECJ.

On the question regarding whether the relevant exemption embraced advisory and information services of the type provided by the taxpayer, the Advocate General considered the prior judgment of the Court in Abbey National(C-169/04) and concluded that the following tests should be used to determine whether the relevant service should be exempt from VAT:

1. the intrinsic connection of the service to the activity of the fund
2. the autonomy of the service vis-a-vis the fund
3. the continuity of the service
4. the irrelevance of the criterion of change in the legal and financial situation and
5. the strict interpretation of the exemption in article 13B(d)(6) of the Sixth VAT Directive.

Sweden's VAT grouping restriction for the financial services industry breaches EU law, AG opines

The AG provides further clarifications with regards to the scope of the EU financial services exemption

Clarification of tests to be considered to determine whether a service can fall under the financial services exemption

In respect of each of the above tests, the Advocate General considered that the taxpayer's services satisfied the relevant test such that exemption should be available.

While providing additional guidance, this case further demonstrates the complexity associated with the application of financial exemptions. Companies operating in this sector should carefully review the nature of their services to determine whether exemption may apply. Many VAT exempt customers are likely to benefit from services being re-classified as exempt; however, the wider impact on the supplier's business and own VAT recovery position should always be assessed.

Czech Republic

January 1, 2013 VAT rate increases

Following approval by the Chamber of Deputies, the Czech President has signed the VAT Act amendment that will come into force from January 1, 2013. The amendments include a 1% increase in VAT rates to 15% and 21% respectively.

Cyprus

VAT rate increase to 18% effective January 14, 2013

The standard VAT rate will increase from 17% to 18% for the period January 14, 2013 to January 12, 2014. From January 13, 2014 the standard VAT rate will increase again to 19%, at which point the 8% reduced rate also rises to 9%. However, the current reduced rates of 5% and 0% remain unchanged.

Finland

January 1, 2013 VAT rate changes approved

Following an earlier Government proposal, it has now been confirmed that the Finnish VAT rates will increase by one percentage point on January 1, 2013. The standard VAT rate will increase from 23% to 24% and the lower VAT rates from 9% to 10% and from 13% to 14%, respectively.

Germany

New 2013 VAT return forms and changes to permanent extension of time limits

With circular letter dated October 30, 2012, the Federal Ministry of Finance (FMoF) has published new forms and guidelines for the preliminary 2013 VAT returns, as well as new guidance with regards to the application for a permanent extension of time limits (FMoF 20121030). VAT registered businesses in Germany should familiarize themselves with the new rules to ensure compliance and timely filings.

The German Supreme Court rules that website operators should be considered the main supplier of the goods offered for sale

The German Supreme Tax Court has decided that the so-called shop jurisdiction principle is also applicable to goods sold over the internet.

In the case at hand, the Court held that the operator of a website on which taxable goods or services are offered for sale, is comparable to an entrepreneur who offers goods for sale in a shop. In such cases, under the 'shop jurisdiction', the store operator is by default considered to be the supplier for VAT purposes (i.e., the person obliged to report the sale for VAT purposes and charge German VAT as appropriate). In a similar manner, the Supreme Court considers that a website operator is the supplier of the goods or services offered on the relevant website, unless it is obvious that those goods and services are being offered in the name and on behalf of another person (BFH XIR1610 20120515).

Companies operating websites for the purposes of the sale of taxable goods and services in Germany by others should carefully review their position. In the event that the website operator does not wish to be classified as the supplier for VAT purposes, they should make sure that it is clear to the customer that they are not the seller of record. A review of website displays and associated terms and conditions may be recommended in this respect.

*VAT rate increases in 3 EU
Member States*

Tax payment by check may lead to late payment penalties

German taxpayers should be aware that if taxes are paid by means of a check, the payment is deemed to be made three days after the check is filed or handed over to the tax authorities. This time delay has the potential to create 'deemed late payment' penalties (BFH VIIR7111 20120828) and thus, increased time margins for check payments are likely to be required by taxpayers. It should be noted that late payment penalties can still apply even if the check is cashed immediately and the tax office therefore has instant power to dispose over the payment within the payment deadline.

Hungary

New VAT invoicing rules effective January 1, 2013

Bill No. T/8750 on the amendment of certain tax laws and related Acts introduces significant changes to VAT from January 1, 2013, including new VAT invoicing rules.

The Bill introduces a number of changes to the invoicing rules required to be compliant with the provisions of Council Directive 2010/45/EU (the Directive).

Bill changes

- In line with the Directive, the Bill clarifies which Member State's rules on invoicing should apply to cross-border transactions.
- In order to harmonize the Hungarian rules with those of other Member States, the Bill prescribes a final deadline for issuing invoices for intra-Community supplies of goods and cross-border services, and amends the rules on issuing summary invoices accordingly.
- If adopted, the Bill would introduce changes to the VAT Act's provisions on e-invoices and paper invoices such that for both types of invoices, the authenticity of the origin, the integrity of the content and the legibility of the invoice must be ensured from the time of issue until the end of the storage period.
- The mandatory invoice content would also be extended to include additional items in order to align the Hungarian rules more closely with the Directive, and to standardize invoice content across the EU.

Further changes have been made to the rules surrounding:

- reporting of temporary movements of goods for the purpose of valuation
- reporting for partial and advance payments related to intra-community supplies
- simplified invoices - the scope of such being expanded to a greater number of cases
- foreign exchange rate conversion - in addition to the exchange rates of the Hungarian National Bank (MNB), it should now also be possible to use the exchange rates published by the European Central Bank (ECB) when converting amounts of tax denominated in a foreign currency to Hungarian forint (HUF).

Italy

Financial Transaction Tax (FTT) takes shape

The Government has filed the long-awaited FTT amendment with the Senate Commission. While this amendment is theoretically still subject to change in the Senate and in the Chamber of Deputies, as a practical matter it should not be altered substantially. Industry concerns over the proposed start date of January 1, 2013 have been addressed and the start date has been deferred to March 1, 2013 in relation to transactions over equities, and to July 1, 2013, in relation to transactions over derivatives.

Key points to note

- Clearly the time remaining before the law takes effect is still tight, but this change should allow those institutions affected some additional time to prepare for the new regime.
- The tax on equity transactions is in many respects similar to the charge on equity transactions under the French FTT. Institutions should therefore be able to build upon some of the work done already in preparing for the French FTT. That said, the Italian FTT includes different tax rates for transactions executed on a recognized stock exchange and transactions executed OTC. This is likely to make compliance with the regime more complex than the French one.
- The Italian FTT is the first FTT regime to apply to a wide range of derivative transactions. In this respect, the Italian FTT could be seen as closer to the proposed EU FTT than the traditional 'stamp duty style' FTTs, such as the French FTT introduced in August 2012.
- The regime applies higher rates for equity transactions undertaken in 2013 than in future years to compensate for the loss of revenue resulting from the later start date.
- Bonds and fund units remain outside the scope of the regime.
- The regime provides for an exemption for market makers, which broadly mirrors the corresponding exemption under the French FTT.

New VAT cash accounting scheme effective December 1, 2012

Effective December 1, 2012, the current VAT cash accounting scheme established by Law-Decree 185/2008 has been replaced by a new scheme. The scheme is optional and intended for taxpayers whose turnover does not exceed 2 million Euros.

Main points to note under the new scheme

- A supplier of goods/services benefitting from the regime can account for VAT when its business customer pays for the supply. However, under the new scheme, if the customer is not compliant in terms of making payment, the supplier would still have to pay the VAT due within one year from the tax point, even if payment has not been received.
- A business customer benefitting from the regime is only entitled to recover input VAT when it has paid its purchases and expenses, instead of when the tax point occurred.

Certain transactions fall outside the scope of the new scheme. Examples of affected output transactions include:

- transactions made by suppliers subject to VAT special regimes (i.e. the special VAT regime for travel agencies)
- transactions with non taxable persons
- transactions which are subject to the reverse charge mechanism
- special transactions involving pharmaceutical products.

With regards to purchase transactions, the following transactions are exempt from the requirement to defer VAT recovery until payment has been made:

- purchases of goods or services subject to VAT under the reverse charge mechanism
- Intra-Community purchases of goods
- imports of goods
- withdrawal of goods from VAT warehouses.

The cash accounting scheme, once applied and notified to the Italian tax authorities in the annual VAT return, must be used for at least three years. As a general rule, VAT cash accounting will be applied to transactions carried out from January 1 of the year in which the supplier exercised the option.

Spain

New construction industry reverse charge effective January 1, 2013

Effective January 1, 2013, Spain has introduced a new reverse charge accounting provision in the construction industry. This newly implemented reverse charge will apply to certain construction works, and the supply of staff necessary for such works, under contracts signed between a contractor and promoter for the purposes of construction or refurbishment projects.

Companies providing and receiving construction services in Spain should review and update their VAT accounting systems and processes, to ensure VAT is accounted for correctly under the new rules.

United Kingdom

New regulation on temporary movements of goods

The Value Added Tax (Removal of Goods) (Amendment) Order 2012 (SI 2012/2953), came into force on January 1, 2013, concerning goods sent to other Member States to have work carried out on them or to be valued. The new Order seeks to harmonize the UK's VAT removal of goods rules with the provisions of the new Invoicing Directive (2010/45/EU) and the Principal VAT Directive (2006/112/EC).

The new Order removes some redundant provisions and makes clear that goods removed to another Member State for the purpose of delivering them to a person (other than the owner) who is to value or carry out work on them, have to be returned to the owner in the Member State of dispatch after the work in question has been carried out, to ensure there are no VAT reporting obligations due in relation to the movement of the goods.

Businesses engaging in temporary cross border movements of goods within the EU should review their processes to ensure that any VAT obligations associated with such movements are identified, particularly in cases where the goods are not returned to the Member State from which they were originally dispatched.

Tribunal favors floor area based pro-rata for storage company

The First Tier Tribunal in this case has held that a pro-rata partial exemption method based primarily on floor area was more fair and reasonable than UK's 'standard' turnover-based method (Lok'nStore Group Plc [2012] UKFTT 589 (TC)).

In the case in question, the appellant is a self storage business which had opted to tax its supplies of self storage. The business also makes other taxable supplies associated with its storage business, including van hire and packaging services. Its sole source of VAT-exempt income is supplies of insurance to its customers. The issue in this case was whether, as the tax authority (HMRC) argued, the partial exemption 'standard method' (based on taxable versus exempt turnover) for calculating the business' input VAT recovery ratio resulted in a fair and reasonable result.

The appellant argued that, even if the standard method was fair and reasonable, a partial exemption special method (PESM) featuring the following two steps would yield a more fair and reasonable result:

- the ratio of the floor area of its premises used solely for taxable purposes compared to the total floor area
- for floor area used to make both taxable and exempt supplies (essentially the reception areas), the ratio of taxable income to total income of the business could be used.

The standard method resulted in recovery of between 94% and 96% of the appellant's residual input VAT, whereas the PESH proposed by the appellant resulted in 99.98% recovery.

The FTT agreed with the appellant that the standard method assumption that each £1 of cost related proportionately to each £1 of taxable or exempt income could not be sustainable, finding that the overhead costs of the business were used 'almost

VAT recovery methods based on floorspace can be fairer in some cases

exclusively' for taxable purposes. The FTT therefore held that the PESM proposed by the appellant more accurately reflected the fact that the overhead costs were used 'almost exclusively' for taxable purposes and allowed the appeal.

Businesses are reminded that the UK VAT treatment of self storage services changed on October 1, 2012. Self storage businesses receiving exempt insurance income should address the issue of partial exemption and consider the implications of this judgment when assessing the appropriate method for determining their VAT recovery position.

Tax authority clarifies 2013 invoicing requirements

HMRC has published 'VAT: Changes to VAT invoice rules', which is a summary of responses to the consultation exercise on the January 1, 2013 VAT invoicing changes. The response document contains an important clarification on the reference required to be made on invoices in respect of intra-EU supplies.

The clarification was made after a number of respondents queried the use of the single reference (exempt) for all exempt supplies shown in HMRC's earlier technical note. In light of the queries, HMRC has now confirmed that its earlier technical note was incorrect and that the reference in respect of 'exempt supplies', i.e. exempt or zero rated intra-EU supplies, can be a reference to the relevant EU legislation, the relevant UK legislation, or some other reference that adequately explains the nature of the transaction. In technical terms, this means that regulation 14(2)(h) of the VAT General Regulations (1995/2518) is being retained and that in most cases, businesses will be able to continue to use existing terminology to describe intra-EU supplies.

The remaining question mark appears to be in respect of the separate requirement to indicate 'reverse charge' on invoices in respect of which the 'person supplied is liable to pay the tax'. While this requirement is clear in relation to supplies of services, there is some ambiguity as to whether this extends to supplies of goods, i.e. whether this means that there would be a further requirement to show 'reverse charge' on an invoice for an exempt/zero-rated intra-EU supply of goods in addition to the requirement to make a reference to the relevant EU legislation, the relevant UK legislation, or some other reference indicating that the supply is exempt or zero rated.

Businesses operating in the UK should continually monitor developments in this area to ensure compliant language is included on all UK VAT invoices.

Asia Pacific

Japan

Transitional rules for consumption tax increase

*Consumption tax increases
on the horizon*

The Consumption Tax Hike Legislation was approved on June 26, 2012 by the lower house and subsequently by the upper house of the Japanese Diet on August 10, 2012. The tax rate will increase gradually. The rate will remain 5% up to March 31, 2014; the rate will increase to 8% from April 1, 2014 through September 30, 2015 and will increase to 10% from October 1, 2015. The legislation also includes transitional rules applicable to specific industries and activities.

Transitional rules

- Construction contracts can in some cases be locked in to the 'old' 5% JCT rate, if entered into prior to September 30, 2013.
- Contracts for sales of assets entered into during the period from October 1, 2013 to March 31, 2015, should be subject to the 8% consumption tax rate, even if an actual transfer of taxable assets occurs on or after October 1, 2015.
- Leasing contracts can in some cases be subject to a 5% consumption tax rate (not 8% or 10%), provided the contract satisfies certain conditions.

Even though the consumption tax reform has introduced transitional rules to construction contracts and lease contracts as described above, implementation of the transitional rules will vary depending on the context and timing of contracts entered

into. Suppliers may also be required to notify the customer in writing where transitional rules are adopted.

Businesses operating in Japan should assess the impact of the upcoming rate increases, both from a pricing perspective and a transition process standpoint.

Americas

Columbia

Proposed simplification of VAT rates from January 1, 2013

Under a new Tax Bill approved by Congress on December 26, 2012, the current eight VAT rates have been reduced to three: the existing standard rate of 16%, a new single reduced rate of 5%, and a 0% rate (exempt with the right to VAT recovery). The new rates took effect from January 1, 2013.

Dominican Republic

VAT rate increase to 18% effective January 1, 2013

Further VAT rate increases

Under the recently enacted Tax Reform Law 253-12, the VAT rate increased from 16% to 18% effective January 1, 2013 for a two year period. The rate is expected to decrease to 16% in 2015, provided the government's tax goals are met.

In addition to the VAT rate increase, some previously exempt goods, such as dairy products, coffee, animal and vegetable fats, sugar, cocoa and chocolate, will become subject to VAT at progressive tax rates beginning at 8% for 2013, 11% for 2014, 13% for 2015 and 16% for 2016.

The Reform also eliminates an exemption applicable to imported and locally purchased raw materials, packaging materials, supplies, machinery, etc. related to the manufacture of medicines, fertilizers, chemicals and animal feeds.

Mexico

Clarity of the scope of VAT exemption for insurance agents

New guidance issued by the Tax Administration (TA) has clarified that payments made to businesses not qualifying as insurance agents are not exempt from VAT.

By way of background, Section IX of article 15 of the Mexican VAT Law provides that no VAT is payable on agents' commission for insurance services specified in that Section. The term 'insurance agent' is not defined in the VAT legislation, and may therefore be interpreted as provided for in the insurance legislation.

The insurance legislation provides that insurance agents are considered to be individuals or entities involved in brokering insurance by means of the exchange of proposals and acceptances and in advising the insured parties to keep or modify it, based on their best interests. However, the legislation also provides that the mediation of insurance contracts, qualifying as standard form agreements, may be conducted by insurance agents or through certain other entities specified in the law.

In essence, this means that the mediation of standard form insurance contracts may be conducted by an entity that is not an insurance agent, as per the Insurance Law.

Consideration received by entities not qualifying as insurance agents should not be exempt from VAT under Mexican VAT law. Businesses operating in Mexico and engaging in the sale of standard form insurance contracts should review their position immediately to determine whether VAT exemption applies as per the clarified position.



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Let's talk

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