VAT News / Issue 3 / March 2013

eCommerce, a continued focus

Digital products and eCommerce continue to be hot topics in the VAT world. Of note this month is the proposal by the South African National Treasury that foreign businesses selling digital products to South African customers be required to register for VAT purposes in South Africa. Other developments include new rules on the offshore processing zero-rating rules in South Korea and the amnesty program in Mexico, allowing for significant reductions of combined tax, interest and penalty liabilities owed by taxpayers through 2012.

European Union

European Court of Justice

ECJ reiterates the need for VAT due diligence checks

These joined Bulgarian cases concern the required VAT adjustments by suppliers and recipients in cases when the tax authority considers that VAT has been incorrectly shown on a tax invoice in connection with VAT fraud.

It was ruled in these cases that, even if the tax authority collects the VAT from the issuer of the invoice, this does not prove that a supply took place and, therefore, it is within the rights of the tax authority to refuse the customer's deduction of the VAT if the customer knew, or should have known, that the transaction was connected with Value Added Tax fraud (EOOD Stroy Trans: C-642/11 and LVK-56 EOOD: C-463/11).

In EOOD Stroy Trans, the taxpayer (Stroy) was a road freight transport business that deducted input VAT charged on a number of invoices issued by two third party suppliers for the purchase of diesel fuel. The tax authorities visited the relevant suppliers and took the view that the documents available did not produce an audit trail for the fuel sales, and thus, the actual supplies of fuel to Story could not be evidenced. As such, Stroy did not satisfy the conditions for deducting the VAT charged to it.

In LVK-56 EOOD, the taxpayer (LVK) was an agricultural business that deducted input VAT

on invoices for supplies of goods from two suppliers. The tax authority carried out checks on the two suppliers and requested details of the origin of the goods and their delivery. The suppliers did not reply within the prescribed time-limit and the tax authority, therefore, asked LVK to provide evidence that the supplies of goods at issue had actually been received. LVK produced delivery notes, weight certificates and consignment notes which contained mistakes and the tax authority concluded that LVK had not established that the supplies had been received. They, therefore, denied VK the input VAT deduction.

Both cases were referred to the ECJ.

In providing its ruling, the ECJ began by emphasizing that, where VAT was mentioned on an invoice, the issuer was obliged to pay it to the tax authority irrespective of whether there had been an actual supply. However, the entitlement to deduct VAT was conditional on an actual supply and VAT was not recoverable simply because it was mentioned on an invoice. The ECJ confirmed that, in respect of the output VAT declared by the supplier, there was no obligation on the tax authority to investigate whether a supply had taken place in reality. Therefore, acceptance by the tax authority of the amount invoiced as output VAT did not indicate that the supply had, in fact, taken place and did not support the deduction of the input VAT by the recipient.

Although the Member States were entitled to refuse the right of deduction in cases of fraud and abuse, the case law, in particular the ECJ in Mahagében Kft (C-80/11) and Péter Dávid (C-142/11), showed that the tax authority must not make deduction conditional, as a general rule, on carrying out due diligence checks and that refusal of deduction was permissible only if the national court determined that the taxpayer knew or should have known that the chain of supply involved evasion or avoidance.

In light of the above, the ECJ ruled that:

- the VAT entered by a person on an invoice is payable by him regardless of whether a taxable transaction actually exists
- it cannot be inferred from the mere fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, that those authorities have acknowledged that the invoice corresponded to an actual taxable transaction
- in order to refuse VAT recovery for the recipient of the invoice it must be established, on the basis of objective factors, and without requiring the recipient to conduct diligence checks which are not his responsibility, that the recipient knew or should have known that that transaction was connected with value added tax fraud.

The case is a timely reminder of the awareness level with the EU with regards to VAT fraud. Purchasers are required to be diligent in their activities and to ensure that reasonable checks as to the authenticity of purchases are made before taking an input VAT deduction. Internal controls with regards to supplier background, invoicing processing, and VAT recovery should form part of every business' fraud management strategy.

ECJ denies exemption in Wheels case

The ECJ judgment in Wheels Common Investment Fund Trustees and Others (C-424/11) concerns whether a defined benefit pension scheme (a scheme providing pensions based on final salary and length of service) falls within the scope of a 'special investment fund' as outlined in the EC VAT Directive, and, therefore, whether the investment management services of such schemes should be exempt from VAT.

It was ruled in this case that exemption should not be applicable to the investment of the Wheels defined benefit pension scheme for the following reasons:

- A pension scheme such as the Wheels scheme was not concerned with collective investment of capital raised from the public, but was only concerned with collective investment of capital raised from an employer's employees, so it

could not be regarded as identical to a 'special investment fund' within the EU Directive.

- The pension scheme in question was sufficiently different in substance from a special investment fund on the basis that (i) the members of the Wheels scheme bore no risk; their pensions were fixed by reference to final salary and length of service; and (ii) the employer was not in a comparable situation to an investor in a special investment fund because, although he bore risk, his payments into the scheme were made in order to discharge his legal obligation to his employees.

Given the nature and scope of this case, we recommend that affected businesses carefully consider the ruling in this case and seek guidance on the impact for their business.

European Commission

Commission presents new draft FTT proposal

As expected, the European Commission has presented its 'new' draft proposal for a Council Directive implementing a financial transaction tax (FTT) in 11 countries. The draft is largely the same as the original proposal released in September 2011 but contains some important changes and continues to have a very broad scope which will impact both EU and non-EU financial institutions.

The proposal retains the approach of applying the tax to transactions involving a financial institution and placing the liability for the tax on all financial institutions involved in a transaction. However, as expected, some changes were made to the September 2011 draft. The principal changes are:

- The 'FTT zone' is now limited to the participating Member States (currently Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain).
- For the purposes of determining where an entity is 'established' under the regime, the new Directive adds the 'issuance principle' to the definition of establishment. This means that a financial institution with no direct connection with the FTT zone can now be liable for the tax when it is involved in a transaction involving instruments issued by a company in the FTT zone. As with the prior draft, trading with a counter-party in the FTT zone is also sufficient to bring a financial institution within the scope of the tax. The scope for a non-FTT zone financial institution to be taxed is, therefore, wider under the new draft.
- The new draft confirms that depositary receipts issued outside of the FTT zone, but with underlying FTT zone securities, are within the scope of the FTT.
- New exemptions are included for the issuance of shares and units in Undertakings for Collective Investment in Transferable Securities (UCITS) funds and the exchanges of stock in mergers.

US companies entering into financial services anywhere in the EU, and particularly in the 11 EU Member States in question, should be aware of the proposals and the potential impact the FTT may have on their businesses.

Cyprus

New late payment interest scheme effective February 19, 2013

Among other recent VAT changes, effective February 19, 2013, taxpayers who make a VAT refund claim will be entitled to repayment of the principal sum together with interest (currently set at 5% p.a.) in the event that the repayment is delayed for a period exceeding four months from the date of submission of the claim.

It should be noted that the grace period for the tax authorities to repay such amounts is extended by four months (to eight months in total) in the event that the Commissioner is carrying out an investigation in relation to the submitted claim.

VAT rates

I n addition to the change in interest rates mentioned above, Cyprus also presented the following changes to its VAT rates:

- the reduced rate of 8% will increase to 9% as of January 13, 2014
- the standard rate of 18% will increase to 19% with effect from January 13, 2014
- the reduced rate of 5% now applies to the acquisition and/or construction of residences for use as primary and permanent place of residence
- the reduced rate of 5% will apply to contracts that have been concluded from October 1, 2011
- for contracts concluded up to September 30, 2011, the eligible person must apply for a grant
- effective June 8, 2012, eligible persons to use the reduced rate include residents of non EU Member States, provided that the residence will be used as their primary and permanent place of residence in the Republic.

Changes with regard to the place of supply of services

Cyprus has also introduced several changes with regards to its place of supply rule for services:

- Effective January 1, 2013, the long-term hiring of means of transport to non-taxable persons is subject to VAT at the place where the customer is established, has his permanent address or usually resides.
- In case the hiring refers to the hiring of a pleasure boat, the place of taxation is the place where the pleasure boat is actually put at the disposal of the customer.

Up to December 31, 2012, the above-mentioned services were subject to VAT where the supplier was established.

Denmark

VAT reclaim opportunity on portfolio management

Following the ECJ's judgment in the Deutsche Bank case (C-44/11), the Danish VAT provisions related to portfolio management services will change with effect from July 1, 2013.

On July 19, 2012, the European Court of Justice issued a judgment in case C-44/11, Deutsche Bank AG which concerned the VAT treatment of portfolio management services to client investors. Those client investors instructed Deutsche Bank to manage their securities, at its own discretion and without obtaining prior instruction from them, in accordance with the investment strategy variants chosen by the investors. The bank was thus entitled to dispose of the assets (securities) in the name and on behalf of the client investors. The ECJ concluded that these services, i.e. taking decisions on the purchase and sale of securities and implementing those decisions by buying and selling the securities, were to be regarded as a single taxable service.

In order to align the practice in Denmark with this ruling, provisions will be changed from July 1, 2013, such that the following services will be regarded as one single taxable service:

- where a company on behalf of a client at its own discretion makes a decision regarding the purchase and sale of securities
- where a company implements these decisions in the name and on the account of a client.

It should be noted, however, that the services in question may still be exempt from VAT when supplied to certain investment funds.

If the former tax authority practice has been unfavorable for a taxpayer, it is possible for taxpayers to request that the VAT and payroll tax liabilities for past periods be revisited. However, taxpayers should be aware that such a request would cover all tax

periods that can be reopened (3 years back from the announcement of the ECJ judgment in July 2009). Requests to reopen a prior tax period should be filed by June 19, 2013 at the latest.

Taxpayers that are affected by this ruling should carefully consider their position and determine whether the application for VAT periods to be reopened may be beneficial to their position.

Estonia

New VAT invoicing requirements effective January 1, 2013

Estonia has implemented changes to its VAT invoicing requirements, following the EU VAT invoicing changes which we previously have reported in the January and February VAT News.

The key changes made to the Estonian invoicing requirements are:

- A special rule has been introduced regarding the deadline for invoicing in respect of cross-border supplies. For intra-community supplies of goods or services subject to the reverse charge in another Member State, the invoice must be submitted on the 15th day following the month when the supply took place.
- Sellers having an Estonian VAT number should issue invoices which comply with the Estonian invoicing rules provided the supply takes place in Estonia, the invoice gives rise to a reverse charge liability in another Member State, or the supply takes place outside the EU.
- If the goods sold or services are subject to the reverse charge mechanism in Estonia or in another Member State, the invoice should include a reference to the 'reverse charge' and no other references to the Directive or VAT Act are required. For export of goods, no references are required.

Additionally, the requirements for the references on invoices have changed to align them with the new EU invoicing directive which took effect from January 1, 2013.

Germany

State of Hessen deadline for filing annual 2012 tax returns

The Supreme Fiscal Authorities of the other German Federal States had previously issued a decree regarding the filing deadline for 2012 annual tax returns, under which annual VAT returns for 2012 should generally be filed by May 31, 2013. However, the decree stated that, where the return is filed by a professional tax advisor, an extension to December 31, 2013 would be automatically granted in most cases.

The State of Hessen has now extended this latter deadline to February 28, 2014.

Bavarian Decree on late payment penalties

The Bavarian State Office for Taxes recently published a Decree concerning the assessment of penalties for late payments. The Decree summarizes the most important points concerning late payment penalties and includes guidance on applications for extensions to time limits and insignificant breaches of deadlines.

Under the Decree, an assessment of penalties for late payment is not to be imposed if the failure appears to be justifiable (for example, a severe illness or accident could be justifiable, whereas work overload of the taxpayer or his tax advisor would not typically be justifiable). An assessment should also not be imposed if the late filing is a first time failure and there are no definitive reasons (e.g. extremely late payment or extremely high tax amount involved) to justify a penalty assessment.

Latvia

VAT treatment of low value gifts and samples

In most EU countries, free of charge supplies of goods/services may be viewed as deemed supplies, subject to a deemed output VAT charge in cases where the supplier previously claimed an input tax credit for the related expenses.

As is already the case in some other countries, the recast VAT law in Latvia now states that the use of goods for business purposes as samples and also the provision of low-value gifts should not qualify as deemed supplies even if the VAT paid on the purchase was claimed as a credit.

For this purpose, a 'low-value gift' is considered to be a product or service which is supplied free of charge and whose value, excluding VAT, does not exceed 10 lats per person during a calendar year.

By removing the deemed output VAT costs, this Latvian change in position should be good news to any business providing business samples and low value gifts to customers in Latvia. However, as with any new provision, care should be taken to ensure that samples and low value gifts provided meet the relevant criteria.

Romania

Amendments to the Fiscal Code effective February 1, 2013

Government Decision no. 8/2013 amending the Fiscal Code was published on January 23, 2013 and took effect February 1, 2013. The amendments include a number of indirect tax administrative measures.

The main changes to the Fiscal Code concerning indirect taxes are:

- place of supply - new provisions have been introduced as regards the place of supply for transactions related to the maintenance, repair and crossing of the Calafat – Vidin Bridge
- valuation - market value will, in certain cases, be enforced for supplies between related parties
- VAT exempt operations - exemptions have been extended to new categories of operations such as the granting of right over immovable property for a certain period of time
- reporting and registration liabilities- non residents which have had their VAT registration cancelled will be able to ask for the registration to be reinstated, even if more than 180 days have passed since the cancellation.

Spain

Technical VAT changes for 2013

VAT changes were among a number of legal measures approved in late December 2012. The changes are technical in nature and aimed at bringing the domestic legislation in line with EU legislation and jurisprudence.

Among the changes are:

the introduction of an unconditional VAT exemption for certain activities carried out by non-profit entities

- new rules with regard to the time of supply for continuous supplies, such as leases
- increased flexibility with regards to the possibility of adjusting VAT where there is a default in payments by installment.

Changes have also been made to the Canary Islands Indirect tax system to ensure that the rules are analogous to those of the EU. Noteworthy changes include:

- amendments to the rules on the localization of the taxable event (i.e. place of supply rules), avoiding situations of no taxation or double taxation
- the time of supply rules are brought into line with the EU VAT rules for supplies of goods, provision of services and early payments

  the special rules on determining the tax base are brought into line with the EU VAT legislation.

Further details of new construction industry reverse charge

The General Directorate of Taxation has issued a tax ruling (V2583-12) clarifying the new reverse charge regime for construction services which became effective on

October 31, 2012, along with a number of other measures designed to prevent tax fraud.

As previously reported in the January and February VAT News, on October 30 2012, the Law 7/2012 was approved, introducing various tax measures, including, among others, the application of reverse charge to certain construction works and the supply of personnel that is necessary to carry out such works.

The new ruling lays out the following requirements for the reverse charge to apply:

- The recipient of the service must be an entrepreneur or professional.
- The purpose of the construction service must entail land development or zoning as well as the construction or restoration of buildings. The concept of building is very wide.
- The service may entail construction works as well as the supply of personnel to carry out such works. Construction works have also been defined broadly. There must be a contractual agreement between the contractor and promoter, although the reverse charge regime also applies where the main contractor subcontracts the service.
- The construction company and subcontractors, if any, must notify their suppliers that the service to be rendered is with respect to a main construction contract between a promoter and the contractor.

Businesses providing or receiving construction services in Spain should take note of this new guidance to ensure compliance with the reverse charge requirements.

United Kingdom

Taxpayer succeeds in principal vs. agent dispute

In this case, the First Tier Tribunal had to decide whether the appellant was acting as an agent or principal in the supply of services that were physically performed by other parties (Brian Ashley Hubbard [2013] UKFTT 78 (TC)).

The appellant in this case, a sole proprietor, personally provided driving services to haulage companies. In respect of these specific services there was no question that he acted as principal. However, when he was offered work, in addition to that which he could undertake in his own right, he made arrangements for other drivers to provide the driving services. He was also occasionally contacted by drivers who wanted work with haulage companies. All arrangements were informal and agreed verbally only and the invoicing for the other driver's services was conducted by the appellant.

The appellant contended that he was, in fact, acting as an agent in introducing other drivers to the hauliers, on the basis that he retained only a small commission (agreed between himself, the haulier and the driver), and passed the remaining amounts to the drivers in question. For this reason, the appellant argued that VAT should only be due in respect of the commission retained and not the full value of the services invoiced. In support of this VAT treatment, he stated that it was the customer's responsibility to vet the drivers and to instruct them as to their duties and that he had no responsibility for the drivers' work, did not provide insurance and was not required to provide a substitute if a driver failed to turn up for work.

In this case, the Tribunal found in favour of the appellant, citing that both the drivers and the hauliers knew and accepted the nature of the agency arrangement and that the haulage companies exercised control over the drivers in the performance of their duties. Furthermore, the Tribunal held that, while the invoicing arrangements might suggest that the appellant was supplying the drivers' services directly, they were also consistent with him performing the invoicing function for convenience, in circumstances where, as a matter of law, the drivers were supplying their services to the hauliers directly. The Tribunal summarized that Mr. Hubbard had issued invoices that did not reflect the true supply chain.

This case serves as a reminder of the ongoing subjectivity surrounding agency and principal arrangements. Businesses should be sure to clearly document and support

the legal nature of any sales arrangements to provide clarity over the form of the arrangement and the VAT accounting responsibilities of the parties involved.

Europe

Armenia

New Turnover tax introduced from January 2013

A new Turnover tax has been introduced in place of Value Added Tax (VAT) and (or) Corporate Income Tax (CIT) for Small and Middle Enterprises ("SME).

The new tax applies to certain smaller commercial organizations and individual entrepreneurs and aims to reduce the amount of data to be filed with the tax authority. The Turnover tax rate is dependent on the type of income as follows:

Type of Income	**Tax rate**
Trading activity	3.5%
Production activity	3.5%
Rental income, interest, royalties, assets' disposal	10%
Income from notary activity	12%
Income on other type of activities	5%

There are a number of criterion to be met to be able to enjoy the simplified compliance as a Turnover tax payer. Among other things, a taxpayer should not be subject to the new tax if turnover in the previous calendar year exceeded AMD 58.35 million (approx. USD 142,000).

Businesses operating in Armenia should assess the impact of the new tax on both their direct supplies and their associated purchases.

Asia Pacific

Australia

GST treatment of certain telecommunications supplies

On November 28, 2012, the Australian Taxation Office (ATO) issued four determinations on the GST treatment of the following telecommunications supplies made by Australian resident telecommunication suppliers (and in particular the circumstances in which those supplies may be GST-free):

- interconnection services (services that enable telecommunication suppliers to transfer calls or internet traffic between each other's networks) - GSTD 2012/7
- supplies made under arrangements for global roaming outside Australia GSTD 2012/8
- the supply of a right to capacity in an international telecommunication network GSTD 2012/9
- supplies made under arrangements for global roaming in Australia GSTD 2012/10.

Businesses supplying or receiving such supplies in Australia (or from Australian suppliers) should take note of the tax authority's position with regards to GST treatments to ensure compliance with the latest guidance.

China

Opportunity to utilize excess input VAT in asset restructuring transactions

An input VAT balance typically occurs when the amount of output VAT of a general VAT payer is less than the amount of input VAT in a given tax period. Under the VAT Law in China, such balance cannot be refunded as cash and may only be carried forward and credited against the taxpayer's future output VAT liabilities. However, if a taxpayer has an input VAT balance at the time of liquidation, such balance would generally not be refunded by the tax authorities and has to be treated as an expense of the taxpayer during the liquidation period.

The State Administration of Taxation (SAT) has issued a Public Notice entitled "Treatment on Input VAT Balance of a Taxpayer Entering into an Asset Restructuring Transaction'"(SAT Public Notice [2012] No. 55). The Notice clarifies that the input VAT balance of the transferor in an asset restructuring transaction may be transferred to and credited by the transferee if both of the following conditions are satisfied:

1. The transferor transfers all of its assets, liabilities and labor force to the transferee.
2. The transferor is liquidated after the asset restructuring transaction.

The new Notice took effect January 1, 2013.

Taxpayers undergoing or contemplating asset restructuring transactions should assess the impact of Public Notice 55 and determine the conditions necessary to leverage the beneficial treatment under the new Notice.

Indonesia

Natural gas no longer subject to VAT

Under Regulation No. 252 (PMK-252) issued by the Ministry of Finance on December 28, 2012, natural gas transported through pipelines, Liquefied Natural Gas (LNG) and Compressed Natural Gas (CNG) will no longer be subject to VAT, but instead will be treated as VAT exempt. However, the regulation confirms that Liquefied Petroleum Gas (LPG) in cylinders remains taxable.

The new regulation is likely to have an impact on un-integrated LNG plants, where companies will no longer be able to deduct input VAT related to the newly exempt sales. It is, however, unclear what will happen to companies that have previously obtained VAT refunds as the tax authorities have not yet clarified whether the new regulation will be retrospective.

Businesses operating in this industry should determine the impact of the changes on their output VAT liabilities and associated input VAT recovery position.

South Korea

Amendment to offshore processing zero rate rules

Under new rules on the offshore processing of goods, parts and raw materials supplied to an overseas buyer under a contract made at its place of business in Korea will be treated as an export of goods eligible for zero rating, irrespective of how these goods are delivered to the overseas buyer. Currently, such supplies qualify for zero rating only if they are shipped directly to the overseas buyer without being brought into Korea after manufacturing.

These new rules should provide more flexibility for the parties in terms of the available transportation options, while still enabling them to ensure that the relevant supplies can qualify for the beneficial zero rated treatment.

Africa

South Africa

Foreign businesses selling digital products in South Africa to be registered as VAT vendors

The National Treasury has proposed that foreign businesses selling digital products to South African customers should be required to register for VAT purposes in South Africa.

Currently, due to the lack of specific place of supply rules in South Africa, it is often difficult to determine whether a non-resident business not established in South Africa will be regarded as carrying on a VAT enterprise in South Africa. In practice, the view has always been that if the supplier has no presence or representation in South Africa and the digital product is supplied through a server located outside South Africa, the non-resident business should not be required to register for VAT and the services are treated as imports into South Africa. While the VAT payable on imported goods is managed and administered at border posts and through the postal system, VAT

payable on imported services is difficult to administer and monitor. As a result, South African consumers often buy imported digital goods or services without paying VAT.

Consequently, National Treasury has proposed in the 2013 Budget Review (which was released on February 27, 2013), that foreign businesses supplying ebooks, music and other digital goods and services in South Africa be required to register as VAT vendors in South Africa.

While no further details are available yet, it appears that supplies should be subject to VAT if the consumer resides in South Africa. As such, the rules may be similar to those applicable in the EU, Iceland, Norway, and Switzerland, where non-resident suppliers of digital goods or services to individual customers in these countries are required to register and account for VAT .

Americas

Mexico

Tax Amnesty Program

The 2013 Federal Revenue Law provides for an amnesty program allowing significant reductions to tax liabilities incurred by taxpayers in the period to 2012, corresponding to the tax owed, inflation adjustments, interest and penalties. More specific rules relating to the program were expected to be published during February 2013 but have not yet been issued.

In general terms, the benefits of the program include up to 100% reduction in surcharges and fines. Significant reductions in the overall tax liability for periods prior to 2007 may also be available.

Businesses operating in Mexico should consider whether they are in a position to take advantage of this new amnesty program.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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