VAT News / Issue 4 / April 2013

Continued focus on VAT in e-Commerce

Electronically supplied services remains a hot topic in the world of VAT. The European Commission has recently referred France and Luxembourg to the ECJ for applying reduced VAT rates to e-books. Other noteworthy developments include the Supreme Court ruling in the UK regarding loyalty schemes, a new domestic reverse charge for intergrated circuit devices, phones and computers in the Netherlands, and an update on the April 1, 2013 return to Provincial Sales Tax in British Columbia.

European Union

European Court of Justice

Outsourced investment management services can qualify for VAT exemption

In another case concerning the VAT exemption for the management of special investment funds , the ECJ has held that VAT exemption can extend to advisory services provided by a third party to an investment management company (GfBk Gesellschaft für Börsenkommunikation GmbH: C-275/11).

This decision provides further clarity on the scope of the VAT exemption and should mitigate the amount of irrecoverable VAT incurred by investment management funds on certain third party advisory costs. Businesses or investors operating in this sector should be aware of this decision and ensure VAT exemption is applied, when possible, in order to drive costs down and increase rates of return.

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The taxpayer in this case (GfBk) was a company which provided information and recommendations relating to the stock market, the provision of advice relating to investment in financial instruments and the marketing of financial investments.

In December 1999, GfBk concluded a contract with an investment management company (IMC) which managed a retail investment fund. GfBk undertook to advise the IMC "in the management of the fund" and, "constantly to monitor the fund and to make recommendations for the purchase or sale of assets". GfBk also undertook to "pay heed to the principle of risk diversification, to statutory investment restrictions ... and to investment conditions ...".

Pursuant to that contract, from 1999 to 2002, GfBk provided the IMC with recommendations concerning the purchase and sale of securities. After checking that it. did not infringe any statutory investment restriction applicable to special investment funds, the IMC implemented the recommendations, often within a few minutes of receiving them. Although the IMC made no selection of its own in the management of the investment fund, the final decision and final responsibility for the management lay with it. GfBk was informed of the action taken by the IMC following its recommendations and received daily statements of the composition of the investment fund for which it provided advice.

GfBk considered that its services qualified for the VAT exemption as investment management services for special investment funds. However, the tax authorities disagreed and assessed GfBk for undeclared output VAT. The case was subsequently referred to the ECJ, which was asked whether the VAT exemption for the managerment of special investment funds (within the meaning of Article 13B(d)(6) of Sixth Council Directive 77/388/EEC) could extend to GfBk's services.

In reaching its decision, the ECJ noted that advisory services provided by a third party to an IMC could fall within the concept of 'management of special investment funds'where those services are intrinsically connected to the activity of the IMC such that they are effectively performing the specific and essential functions of the management of a special investment fund.

Given the facts in question, the ECJ thus held that the relevant article of the EU VAT Directive must be interpreted as meaning that advisory services concerning investment in transferable securities, provided by a third party to an investment management company which is the manager of a special investment fund, fall within the concept of 'management of special investment funds' for the purposes of the exemption laid down in that provision, even if the third party has not acted on the basis of a mandate.

ECJ rules on when VAT registration can be refused

The ECJ has given judgment in a case concerning the circumstances in which a Member State can refuse VAT registration (Ablessio SIA: C-527/11). This case is important as it provides additional clarity as to when an intending trader may register for VAT. By registering for VAT, intending traders should be able to more quickly recover VAT incurred on set up costs directly through their local VAT return, creating cash flow savings.

In this case, the sole shareholder of the relevant taxpayer, a limited company (company in which the liability of members or subscribers of the company is limited to what they have invested or guaranteed to the company), had previously registered a number of companies for VAT in Latvia. However, following registration, the companies in question did not ultimately commence trading.

The shareholder subsequently applied to register a further company for VAT and the Latvian tax authorities refused to issue a VAT registration. In refusing the VAT registration, the Latvian tax authorities noted that the company did not have any of the assets, employees, etc., which it would require to carry on its purported business, construction.

The ECJ held that a tax authority is not entitled to refuse to register a person or business which intends to carry on an economic activity merely because, at the time of the application for registration, the person has not yet acquired the assets required to carry on its business. Furthermore, Member States cannot deprive the intending business of the right to recover input VAT before the economic activity commences. This applies even if the person has a tax history such as that of the taxpayer's shareholder. However, the ECJ did state that registration could be refused for the purposes of the prevention of fraud and evasion, which was a matter for the national courts to decide in this case.

European Commission

Commission refers France and Luxembourg to ECJ over their VAT treatment of e-books

As previously reported in the November 2012 newsletter, the European Commission took infringement action against France and Luxembourg over their application of the reduced VAT rate to e-books.

The European Commission has now decided to refer France and Luxembourg to the ECJ. The Commission considers that the EU law is very clear on which goods and services are eligible for a reduced VAT rate, and that the provision of e-books is an electronically provided service which cannot benefit from a reduced rate.

The Commission now considers that the failure to comply with the EU legislation by France and Luxembourg results in serious distortions of competition to the detriment of traders from other EU Member States that apply the local standard rate of VAT to the sale of e-books, and the effects of such unfair competition are felt in Member States that do not apply the reduced rates to e-books.

The outcome of this referral will be of particular interest to businesses operating in this sector. It is likely that the ECJ's decision will provide clarity on the application of reduced VAT rates to e-books and ensure harmonization across the EU.

Austria

VAT Guidelines: Highlights of the 2012 update

The 2012 update of the Austrian VAT Guidelines includes legislative amendments, statements from the VAT Committee, and current decisions of the Supreme Court.

Some of the key amendments and updates are summarized below:

- Magazine subscription with online access: Where a magazine subscription also includes online access to the magazine, the consideration is to be split into the supply of the magazine (reduced VAT rate of 10%) and the access to the online versions (VAT rate of 20%) according to the actual costs incurred.
- Services related to immovable property: The following services are defined as services in connection with immovable property and therefore taxable at the place where the immovable property is located:
    - intermediation in the sale or leasing or letting of immovable property
    - surveying and assessing of the risk and integrity of immovable property
    - the valuation of immovable property
    - the storage of goods- if a specific part of the property has been assigned to such storage for the exclusive use of the customer.
- Long-term hiring of means of transportation: Long-term hiring of means of transportation to a taxable or non-taxable person is taxable at the place where

the recipient is established. The place where the recipient is established has to be evidenced by the taxable person who provides this service (e.g. copy of passport, credit card or confirmation that the non-taxable person has no legal seat or fixed establishment in Austria).

- Invoicing: Austria has now implemented Directive 2010/45/EU into Austrian VAT law. Key changes in this respect relate to the equality of e-invoices and e-archiving. Additional form and language requirements have been implemented.
- Invoices in foreign currency: Since January 1, 2013, invoices issued in a foreign currency have had to show the Austrian VAT amount in euros. If the VAT is not shown in euros, input VAT deduction without amending the invoice is limited to the amount of input VAT that results from the conversion into euros.

Businesses operating in Austria should be aware of the changes to assess the impact of the updated provisions and ensure compliance.

Bulgaria

Summary of 2013 VAT Act amendments

Amendments to the Value Added Tax Act (VAT Act) have been implemented in 2013. Some of the key amendments and updates are summarized below:

- Simplified rules for electronic invoices: Businesses may now guarantee the authenticity of origin, integrity of content and legibility of the electronic invoice or the electronic credit/debit note through any means of business controls that provide trail between the invoice and the supply, and not only through qualified electronic signature or electronic data interchange.
- Invoicing changes: An aggregate invoice may be issued for supplies to a single customer when the VAT for these supplies is chargeable in the same tax period. Also, where the tax is chargeable by the recipient, the text "Reverse-charge" should be indicated on the invoice.
- Adjustment to input VAT credits: Adjustments to input VAT credits are no longer required in cases of destruction, shrinkage or scrapping of assets resulting from failures or accidents which were not caused by a fault of the taxpayer or the person using the goods.
- Increased input VAT credit for car leases, taxi and transport services: As of January 1, 2013, enterprises are entitled to input VAT credit for taxi and transport services carried out with cars and motorcycles. Furthermore, enterprises are entitled to input VAT credits for leases of cars and motorcycles used for taxable supplies as well as for any related maintenance expenses.
- Tax base for supplies in foreign currency: As of January 1, 2013, the tax base for transactions in foreign currency may be calculated by applying the official exchange rates of the European Central Bank (in addition to the official exchange rates of the Bulgarian National Bank).

Denmark

Government announces new 75% VAT recovery for hotel and conference costs

On February 26, 2013, the Danish government announced as part of a growth plan for the economy, that the permitted level of input VAT recovery on hotel costs will be increased from the current 50% to 75%. This new rule will affect not only businesses which are registered for VAT in Denmark, but also non-VAT registered businesses which are generally able to apply for an overseas refund of any local VAT incurred.

The purpose of the new measure is to ensure better trading conditions for Danish hotels and conference centers, and to improve the possibility of attracting both Danish and foreign customers. The government also expects that the measure will have a related impact on turnover and employment in shops, restaurants and other related business sectors as more companies decide to hold conferences in Denmark.

The government expects that increasing the VAT recovery on hotel costs will increase the revenues of the Danish tourism industry by 220 million DKK (approximately 40 million USD) per year from 2014.

No specific law proposal has yet been introduced or adopted and it is, therefore, unclear when the increased VAT recovery will come into effect. Businesses incurring VAT on hotel costs in Denmark should make sure that they take advantage of the increased recovery when the measure becomes effective.

Greece

Import VAT exemption for non-established suppliers effective March 1, 2013

Subject to certain conditions, effective March 1, 2013, import VAT is no longer payable by certain non-established suppliers when imported goods are either re-exported or transported to another EU Member State.

Under the new rules, import VAT will not be payable provided that the following conditions are satisfied:

- The importer of record should not be established or VAT registered in Greece.
- The imported goods should not be subject to excise duties.
- The statistical value of imports should exceed 300,000 euros per annum. However, for the first five years, it is sufficient if the value of the imports is no less than 120,000 euros per annum.
- 90% of the imported goods should be re-exported or transported to other Member States.
- The importer obtains a special license to apply the above suspension by the Ministry of Finance and satisfies the authorities of its creditworthiness, Customs compliance record, and provides any other information requested by the Customs authorities.

Companies importing goods into Greece should assess whether they may be eligible to take advantage of this import VAT relief. Doing so could result in a significant cash flow advantage as eligible companies would no longer have to pay the VAT at the time of importation.

Italy

Change in reverse charge accounting for local supplies

Effective January 1, 2013, the requirement for Italian VAT-registered businesses to issue a self invoice, in respect of supplies made to them by non-resident EU suppliers VAT-registered in Italy, has been replaced by the concept of integration of the invoice issued by the supplier.

As such, there is no longer a requirement for Italian VAT-registered businesses to issue a self-invoice in these cases. Instead, the customer is required to integrate the supplier invoices, meaning that it should insert a stamp or wording manually on the invoice received. The main requirements of this stamp/wording are to include the taxable basis and the Italian VAT amount in euros.

However, in respect of supplies made in Italy by a supplier established outside the EU, the customer is still required to issue a self invoice.

These latest changes follow a related change which occurred in 2012 in respect of accounting for intra-Community supplies of services, which was reported in the April 2012 newsletter. Italian established businesses should familiarize themselves with the new rules to ensure correct documentation is issued and retained in respect of supplies made to them by non-Italian businesses.

Tax authority guidance on procurement contract joint liability

The Italian tax authorities have issued new guidance in relation to the rules regarding joint liability for a contractor for payment of VAT and withholding taxes and, to a certain extent, for the final customer (with regards to penalties).

In short, the Italian tax authorities highlight that the new rules have introduced:

- a responsibility on the contractor for the payment of withholding tax on employment income and VAT due by the subcontractor in relation to the supply of goods/services provided within the contract and within the limits of the amount of the consideration due
- in the hands of the final customer, an administrative penalty - from 5,000 euros to 200,000 euros - where the final customer pays the consideration to the contractor without the latter having shown the documentation attesting that the relevant tax payments have been properly made. This responsibility, however, is limited to cases when, despite the absence of the submission of the documents, the tax payments in questions have not been made either by the contractor or subcontractor.

In addition, the Italian tax authorities have confirmed the application of the provision to procurement contracts (not only construction contracts), both in the case when there is a sub-contract and when the contractor directly carries out the work. In particular, the provision applies to:

- contracts related to a supply of goods
- works contracts
- transportation contracts
- subcontracting agreements
- services rendered within a consortium.

The tax authorities have also stated that any renewal of a contract is deemed to be a new contract, subject to the new rules if entered into after August 12, 2012.

This provision is likely to represent an increased administrative burden for businesses and also increases their responsibilities for tax payment in certain circumstances. Process and systems should be set up to manage the obligations and protect businesses' positions.

Luxembourg

Obligation to use SAF-T for VAT

The OECD has defined a standard file format (Standard Audit File for Tax- SAF-T) for tax audits and a standard set of tests to be performed during an audit. Many OECD countries are considering the feasibility of implementing SAF-T and some have already begun. There will be some variation in how each country implements SAF-T, such as the scope of data, file format, whether it is mandatory or not, and which taxpayers are in scope. However, companies in each jurisdiction will face a common set of challenges:

- how to extract and populate a SAF-T file from their systems
- how to verify that all requirements are met in terms of structure and format

- how to ensure that the file content is VAT compliant before submitting it to the tax authorities.

Luxembourg is one of the countries which have implemented the SAF-T. In Luxembourg, SAF-T is referred to as FAIA (Fichier Audit Informatise Administration de l'enregistrement et des domains) and is applicable to many business types (including local limited liability companies and local branches of non-Luxembourg entities).

In principle, the VAT authorities can request a FAIA compliant file for taxable years starting 2011 and every VAT inspector has the discretion to demand the file at the occasion of an audit. Businesses should familiarize themselves with the FAIA requirements to ensure that future audit information is available in line with tax authority expectations.

Netherlands

New domestic reverse charge for phones and computers effective April 1, 2013

Effective April 1, 2013, a reverse charge mechanism applies to local supplies of mobile phones, tablet PCs, laptops, game consoles, and integrated circuit devices, if the total value of the supply is 10,000 euros or more. This extension of the reverse charge aims to mitigate the risk of increasing VAT fraud.

Under the new rules, the application of the reverse charge is extended to local supplies of the aforementioned goods when both parties are established in the Netherlands, and also to situations when neither party is established in the Netherlands. Under the reverse charge mechanism, the purchaser has to account for the VAT due on the transaction on his own VAT return (as opposed to being charged VAT by the supplier). Typically, the customer can deduct this VAT on the same VAT return, subject to the normal rules for VAT recovery.

The invoicing rules have also been amended for reverse charge supplies, such that a reference must be made to this procedure on the face of the invoice, by mentioning either "btw verlegd" or "reverse charge mechanism applies".

This change is likely to have a significant impact on all businesses buying and selling affected goods in the Netherlands. Businesses should assess whether their supplies or purchases are affected by the new rules and, if so, consider how they will identify the relevant transactions, and what amendments are required to systems and invoicing templates to ensure compliance.

Poland

Confirmation of April 1 changes to VAT reverse charge

Under new legislation effective April 1, 2013, non-established suppliers of goods who are registered for VAT in Poland are now required to account for VAT on supplies made to Polish customers, i.e. the reverse charge procedure will no longer apply.

Under the previous rules, a Polish VAT-registered business purchasing goods or services from a VAT-registered business without an establishment in Poland was, as a general rule, required to self-account for the VAT due in respect of the transactions via the reverse charge mechanism.

Under the amended provisions, a Polish VAT-payer purchasing goods (but not services) from a non-established supplier will only be required to account for VAT on such transactions if the supplier of the goods is not VAT-registered in Poland.

The new rules represent a change for many US Polish VAT-registered, but non-established, businesses who will now need to ensure that their systems are configured to calculate and charge Polish VAT on affected supplies. The changes may also shift affected taxpayers from a VAT repayment position into a VAT payable position which may require additional controls and have an effect on cash flows.

United Kingdom

UK case clarifying single versus multiple supply

In a decision that could have wider implications, the First Tier Tribunal (FTT) has accepted that supplies of fuel and power in association with holiday park accommodation could benefit from the reduced VAT rate, even if they are part of a large supply of accommodation (Colaingrove Limited [2013] UKFTT 116 (TC)).

In this case, the appellant operated holiday parks around the UK. Since the early 1990s, the appellant offered promotional holidays on its parks through newspaper advertisements. The holiday advertisements made it clear to customers that, in addition to the cost of the holiday accommodation, they must pay separate additional charges for gas and electricity. The charge for accommodation was collected by the newspaper and the charge for power was a fixed charge, collected by the appellant.

Before 1995, the appellant accounted for VAT on the charges at the standard rate but then submitted claims to the tax authority, HMRC, for overpaid VAT on the basis that the supplies were for use in self-catering accommodation and zero-rated until March 31, 1994 and reduced-rated thereafter. The appellant's claims were refused by HMRC on the grounds that there was no separate supply of power to the newspaper holiday customers.

The FTT began by carefully reviewing the ECJ and UK case law on single and multiple supplies but turned then to the appellant's argument that the power supply was a concrete and specific element of the supply which should be taxed under its own rules, irrespective of whether the analysis indicated a single supply. The FTT agreed with the appellant and concluded that appellant's supplies of fuel and power, albeit part of a larger complex supply, constituted a concrete and specific element to be taxed at the reduced rate.

This case re-highlights the often difficult question of whether something is a single composite supply or a number of distinct individual supplies for VAT purposes, and raises the question as to what VAT rate(s) should apply to the constituent elements. Businesses should continue to take care when assessing the VAT liability of supplies involving multiple components.

Supreme Court rules in favor of taxpayer in 'customer loyalty program' case

In a significant judgment, the Supreme Court (SC), by a 3 - 2 majority, dismissed HMRC's appeal and ruled in favor of the taxpayer that input VAT can be recovered in a business promotion arrangement where a taxpayer pays a supplier to have goods or services provided to a third party: Aimia Coalition Loyalty UK Ltd (formerly LMUK) (Aimia Coalition Loyalty UK Ltd (formerly LMUK) [2015] UKSC 15).

In this case, LMUK is the operator of the 'Nectar' loyalty card regime and is paid by its sponsors (retailers) to operate the regime. Payments by the sponsors to LMUK are based on number of 'Nectar' points granted to the sponsor's customers (the loyalty card holders).

The points accrued by the loyalty card holders can be redeemed for free goods and services from various businesses (redeemers). LMUK makes payments to the redeemers in respect of the goods and services supplied to the loyalty card holders and incurs VAT on these charges. LMUK sought to recover the VAT charged to it by the redeemers.

HMRC considered the payments by LMUK to be third party consideration (i.e., payment made by a party other than the recipient of the supply) for the supplies of rewarded goods and services made to the loyalty card holders, and, therefore, that LMUK was not entitled to recover the VAT charged.

The ECJ had previously ruled on this matter and held (in the joined cases of Loyalty Management UK Ltd (LMUK) and Baxi Group Ltd (Baxi) (C-53/09 and C-55/09)) that taxpayers are not entitled to recover VAT paid in respect of 'loyalty rewards' supplied as part of a business promotion regime, but are only entitled to recover VAT in respect of services relating to the operation of the regime (e.g. marketing, advertising and administration) which benefit their own business activities. The ECJ stated that it was for the national court to determine whether such services were received by the taxpayer in this case.

In reaching its decision, the SC noted that the lower courts had refused to refer the case to the ECJ, holding that the case turned on the application of established law and that no new matter of law had been raised. In addition, the ECJ had not sought an Advocate-General's opinion, which indicated that it too saw no new issue of law. As such, the SC did not feel that it was bound to find that there was solely payment by the taxpayer of third party consideration for the reward goods and services.

The SC emphasized that the taxpayer was an unusual business and that the payments made by the taxpayer to the redeemers enabled the taxpayer to discharge its obligations to the loyalty card holders and were, in the SC's opinion, a cost of its business. The remuneration received by the redeemer represents the value to the taxpayer of the supply to it by the redeemer and, therefore, the taxpayer must be able to deduct the VAT on those costs in order to preserve the neutrality of the tax.

The taxpayer's success in this case will be significant for many UK businesses which are either in a similar position to the taxpayer or potentially would have faced higher promotional costs if the outcome had created irrecoverable VAT on rewards. Businesses operating in the sector of loyalty rewards should note the outcome of this case and review the impact on their VAT position.

Asia Pacific

China

Expansion of the Pilot Program

China plans to expand the VAT pilot program nationwide effective from August 1, 2013. Thus, all provinces which are not currently part of the pilot program (which transitions the taxability of certain services from Business Tax to VAT) should soon be covered by the pilot rules.

In addition, we understand that the Chinese Government has deemed the Pilot Program a success, and is, therefore, also seeking to expand the scope of the program to include further service industries. We understand that the postal, telecommunication, and railway services will be next to transition from Business Tax to VAT, however the formal date for such a transition has yet to be announced.

Consolidated VAT filing under Pilot Program

Following the roll-out of the Business Tax (BT) to Value Added Tax (VAT) Transformation Pilot Program (Pilot Program) from Shanghai to 10 other regions, the Ministry of Finance (MOF) and the State Administration of Taxation (SAT) jointly issued Circular Caishui [2012] No. 84 on December 31, 2012, setting out a framework for consolidated VAT filing for pilot taxpayers.

The consolidated VAT filing regime only apples to those pilot taxpayers with branches across pilot and non-pilot regions that have been specifically approved by the MOF and the SAT (qualified taxpayers), and only with respect to services falling under the VAT pilot program (Pilot Services).

Under the regime, qualified taxpayers will be required to consolidate and pay the VAT on the provision of Pilot Services at the headquarter level. Branches located in non-pilot regions will continue to file BT returns as usual, whereas branches located in pilot regions will file VAT returns using a provisional VAT rate applied only to turnover derived from the provision of Pilot Services (as opposed to using the general method of deducting input VAT from output VAT). As such, input VAT incurred in the provision of Pilot Services can only be credited on a consolidated basis at the headquarter level. This provisional VAT rate method may be beneficial for some branches located in pilot regions, as it may lighten the compliance burdens, compared to the regular VAT method.

Under the regime, if a pilot taxpayer provides both traditional VAT activities and Pilot Services, it will have to account for the two types of VAT-able activities separately for VAT filing purposes. This practice could result in more administrative works and risks/exposures relating to VAT reporting.

Businesses should consider whether it would be beneficial to be included as an approved taxpayer for the purposes of consolidated VAT filings under the pilot program. As of yet, the MOF and SAT has only issued one circular approving 11 designated airline companies as being allowed to perform the consolidated VAT filings under the Provisional Measures.

Africa

Namibia

Tax First Newsletter - VAT consultations

Several government committees have submitted recommendations to the Ministry of Finance in December last year on suggested VAT changes involving:

- import VAT accounts
- an increase in the VAT registration threshold
- the introduction of controls on voluntary VAT registration.

We understand that, subject to final approval by the Minister of Finance, amendments to the VAT Act to accommodate the recommendations will be drafted for discussion in the National Assembly shortly. We will continue to monitor these developments.

Americas

Canada

British Columbia set for April 1 return to Provincial Sales Tax

As previously reported in the December 2012 newsletter, on April 1, 2013, British Columbia revoked the Harmonized Sales Tax (HST) and returned to a 7% Provincial Sales Tax (PST) and 5% Goods and Services Tax (GST) tax regime. Certain improvements to the PST are intended to reduce the administrative and compliance requirements for businesses.

On February 28, 2013, the British Columbia legislature gave royal assent to The Provincial Sales Tax Transitional Provisions and Amendments Act, 2013, resulting in the release of:

- the unofficial consolidated Provincial Sales Tax Act (the PSTA)
- the Provincial Sales Tax Regulation (PST Regulation)
- the Provincial Sales Tax Exemption and Refund Regulation (Exemption and Refund Regulation).

The Exemption and Refund Regulation establishes exemptions and rebates for PST in various areas, including:

- health and medical products and equipment for individuals with a disability
- school supplies
- publications (magazines, newspapers, books etc.)
- tangible personal property entering or leaving British Columbia
- fuel, energy and energy conservation

- safety equipment and apparel
- custom software and prototypes
- services related to tangible personal property, accommodations, legal services and telecommunication services
- Production Machinery and Equipment Exemptions (PME Exemptions), including specific exemptions that extend to mining, forestry and petroleum or natural gas development activities.

Businesses should familiarize themselves with the scope and application of relevant exemptions/rebates in order to maximize PST efficiency.

Generally, PST will apply when tax becomes payable and is paid after March 31, 2013. However, various PST transitional rules will apply. These mirror the HST transitional rules, with specific PST transitional rules for certain transactions, such as when goods enter British Columbia.

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