VAT updates

This month's edition of VAT News highlights the CJEU judgment concerning the denial of an input VAT credit when VAT is incorrectly charged, an announcment from the European Commission that the cross border VAT ruling pilot project has been extended another year, a reminder of mandatory e-filing of VAT returns in the Netherlands and the release of draft regulations on the taxation of digital imports in South Africa.

Court of Justice of the European Union (CJEU)

VAT incorrectly charged not recoverable as input VAT

The CJEU held, in the matter of *SC Fatorie SRL*: (C-424/12) that VAT incorrectly charged and paid on an invoice, with respect to a VAT reverse charge supply, is not recoverable by the taxpayer on its VAT return.

The taxpayer, SC Factorie, commissioned a supplier to carry out building works. Under Romanian VAT law, building works are subject to VAT on a reverse charge basis (i.e., the supplier doesn't charge VAT on the supply and the recipient self-accounts for VAT on a reverse charge basis). The recipient should recover VAT as appropriate to its business.

The supplier sought advance payments from the taxpayer and initially issued invoices showing no VAT. However, after a review of the value of the works, the supplier issued an invoice in early 2008 for the revised value plus VAT. The supplier had become insolvent without paying any tax to the tax authority.

The taxpayer sought to recover the VAT in its VAT return. A VAT inspection was completed that covered the period in which the VAT was claimed. The tax authority repaid the taxpayer's claim.

In 2009, the tax authority performed a second VAT inspection and determined that, since the reverse charge procedure should have applied, the taxpayer should not have been repaid the VAT incorrectly charged by the supplier. The tax authority issued an assessment for the

VAT and default interest. Additionally, the supplier had become insolvent without paying the VAT to the tax authority.

The taxpayer appealed the assessment, arguing that it should not be prevented from deducting the VAT simply because it had not applied the reverse charge procedures correctly. The taxpayer also sought to invoke the principle of legal certainty, claiming that once the tax authority carried out its first inspection into the claim and made the refund, the matter should have been settled. Further, the taxpayer considered the imposition of default interest unfair.

The Romanian appellate court referred the following questions to the CJEU for a preliminary ruling:

1. Does the Principal VAT Directive allow the loss of a VAT deduction in the event:
   (a) the invoice, produced by the taxpayer for the purpose of exercising his right to deduct, is incorrectly written by a third party failing to apply the simplification measures
   (b) the taxpayer paid the VAT indicated on the invoice?
2. Does the European principle of legal certainty weigh against the Romanian tax authorities administrative practice of:
   (a) first, by irrevocable administrative decision, acknowledging the right to deduct VAT
   (b) then reversing that decision, and holding the taxpayer liable to (i) pay the VAT for which the right to deduct was originally exercised and (ii) pay default interest?
3. Does the principle of VAT fiscal neutrality permit a taxpayer to be deprived of the right to deduct VAT in the following circumstances:
   (a) the taxpayer paid VAT incorrectly indicated on the invoice by a third party
   (b) the tax authorities have taken no active steps to request the third party to amend the incorrectly worded invoice
   (c) as a result of the third party's insolvency, it is impossible for the invoice to be corrected?'

The CJEU held that the taxpayer, as recipient of a supply subject to VAT on a reverse charge basis, was responsible for its correct application. The taxpayer should have insisted that the supplier's purported VAT invoice be corrected and treated as being subject to the reverse charge procedures.

The taxpayer should not have paid the VAT to the supplier, but should have paid the reverse charge VAT to the tax authority. The CJEU held that this is the correct position, even when the supplier had become insolvent. The taxpayer had no right to deduct VAT that had been incorrectly charged.

The CJEU considered the principle of legal certainty not breached when a tax authority, within a reasonable time frame, reinvestigates a VAT refund, particularly when new evidence, or an error in the original investigation, took place. However, a taxpayer's affairs must not be open to reinvestigation indefinitely.

This case returns to the Romanian Court to determine whether the tax authority acted within the national limitation period, and whether the default interest charge was proportionate (i.e., not unreasonable in order to safeguard the tax). Businesses should consider this judgment a reminder of the importance of assessing VAT correctly, especially when a taxpayer receives supplies in which VAT may have been incorrectly charged.

European Union

Cross-border VAT ruling pilot project extended another year

As previously announced in June 2013, 13 Member States (the United Kingdom, Belgium, Estonia, Spain, France, Cyprus, Lithuania, Latvia, Malta, Hungary, Netherlands, Portugal, and Slovenia) agreed to conduct a trial of cross-border VAT rulings between June 1, 2013 and December 31, 2013. Taxpayers can request rulings on cross-border transactions and can express to the EU their views on the trial. The European Commission has announced that this pilot will be extended for an additional year and will also include Finland. A mid-term review of the experiment will be conducted in June 2014.

Businesses engaging in cross-border transactions involving the 13 participating Member States can seek a ruling by initiating a request in the participating Member State where they are registered for VAT. Tax authorities, after consulting with tax administrations of other Member States involved, will give businesses guidance on the appropriate VAT treatment and applicable obligations in all Member States concerned.

Denmark

Proposed change to B2C telecoms use and enjoyment

As part of a proposed new bill to change current VAT rules in Denmark (incorporating the EU Business to Consumer ('B2C') 2015 rules), telecom services to Danish resident customers would be subject to Danish VAT even if actual use of the telecom service takes place outside the EU. The proposed change would take effect January 1, 2015. Businesses providing B2C telecom services to Danish customers should be aware that such services would be subject to Danish VAT beginning January 1, 2015 if the bill is enacted.

Netherlands

January 1, 2014 VAT returns: e-filing reminder

Businesses are reminded that VAT returns must be electronically filed for taxable periods commencing January 1, 2014. A number of non-resident businesses have received a username and password from the Dutch tax authorities for the purpose of e-filing.

The digital VAT return form will be available in a secure part of the Dutch tax authorities' website by the end of each taxable period. An e-mail notification service regarding the deadline for filing (and payment) is available when an e-mail address has been provided to the tax authorities. Businesses should note that for all taxable periods ending on or before December 31, 2013, a paper VAT return should still be submitted.

Late or underpaid VAT now a criminal offense

Effective January 1, 2014, both the late submission of the Dutch VAT return and late payment of VAT are classified as a criminal offense. This classification is of utmost importance for businesses that may occasionally submit nil VAT returns when they do not have correct or complete information before the filing deadline. As of January 1, 2014, businesses should no longer apply this method since the lack of VAT payment, an underpayment, or a late payment, could be punished with imprisonment or a fine. The offense does not apply to declarations that result in a VAT refund.

To prevent committing a criminal offense, businesses lacking timely VAT information should submit the VAT return with an estimated amount (not too low) and file a timely request to the Tax Collector (i.e., not the Inspector) for postponement. The correct VAT return should be filed within six weeks after filing the estimated VAT return.

The regulations state that a person who requests timely postponement of payment from the Tax Collector is not punishable. The tax authority, however, may consider this method 'improper use of the postponement system' and refuse postponement. Timely filing of the request for postponement at least prevents punishment for failure to pay the VAT amount due within the statutory period. Businesses unable to meet their obligations with regard to filing VAT returns and making VAT payments should carefully consider the impact of these new provisions.

Europe

Russia

New VAT rules regarding financial operations due April 1, 2014

Draft legislation has recently been published in Russia that is likely to take effect on April 1, 2014. Among the proposed changes, the legislation includes a provision to relieve the taxpayer obligation to issue VAT invoices for transactions not subject to VAT in accordance with the Russian Tax Code.

The list of nontaxable operations in Article 149 of the Russian Tax Code has been expanded to include services for trust management of pension savings (and some other types of funds), a number of operations of clearing activity, and assignment (reassignment) of rights (claims) to obligations from nontaxable derivatives. We will keep you apprised of the progress of this draft legislation.

Africa

South Africa

Consultation on digital imports draft regulations

The South African Government has published draft regulations regarding the taxation of digital imports effective April 1, 2014.

The draft regulations define electronic services subject to local VAT under the new rules. The scope of 'electronic services' is broad and does not draw a distinction between Business-to-Business and Business-to-Consumer supplies. Therefore, international suppliers that provide any of the services outlined below to a resident of South Africa, or that receive any payment originating from a bank registered or authorized under South African law, will be required to register as a VAT vendor when their turnover in South Africa exceeds or has already exceeded the annual threshold of R50 000 (approximately US$4,500).

Under the draft regulations, the following services are considered 'electronic services' when such services are supplied, for consideration, by means of any electronic agent, electronic communication, or the internet:

- educational services including distance and web-based learning, in which the supplier of the educational services is not regulated by an educational authority in the export country
- internet-based gaming, including interactive and multiplayer role-player gaming
- certain electronic betting and wagering
- information system services that include the provision of connections, operation of facilities for information systems, provision of access to information systems, the transmission or routing of data messages between or among points, and the processing and storage of data
- maintenance services, including the administration, maintenance, and technical support of databases, websites, and information systems
- miscellaneous services, including the supply of e-books, films, images, music, and software

- subscription services, including blogs, databases, journals, magazines, newspapers, editorials, web-apps, and social networking services.

Businesses selling the above mentioned services into South Africa should be aware of this impending change and in particular the need to register for VAT in South Africa. Such businesses should ensure that they have the necessary systems in place to ensure compliance.

Asia-Pacific

Vietnam

Reinstatement of 'consumption' test for export services

A recent Decree was released in Vietnam reverting the VAT zero rating of exported services back to the old rules effective January 1, 2014. Please note that a Circular to implement the decree should be forthcoming.

Old Rule

In order to zero rate the export of services, the overseas customer could have no permanent establishment ('PE') in Vietnam. This replaced a previous condition that the services must be consumed outside of Vietnam. Despite replacing the old condition, the place of consumption was often still referred to when assessing eligibility for zero rating.

New Rule

The Decree provides for the reversion to the old condition whereby the zero rating of exported services should be determined based on the place of consumption. This new rule is not favorable to the taxpayer since the tax authorities will likely take the view that the majority of services sold to a customer overseas, when they are performed in Vietnam, are consumed in Vietnam and, as such, should be subject to Vietnamese VAT.

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Let's talk

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