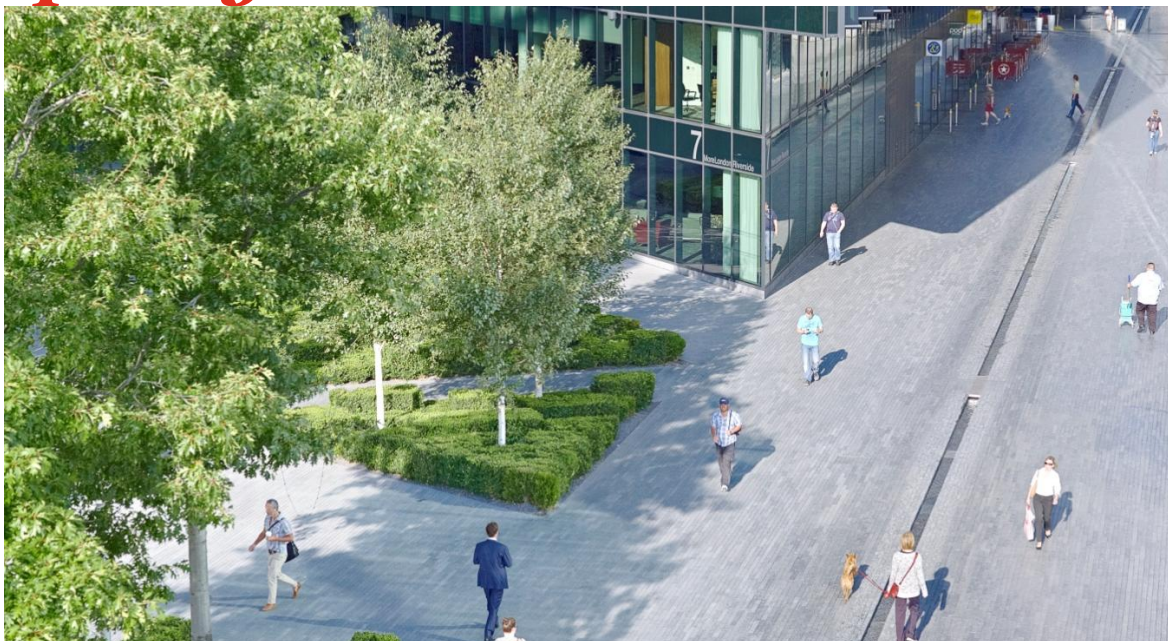


# EU 2015 B2C rules finalized and VAT penalties in the spotlight



Significant VAT highlights this month include the finalization of the rules governing the January 1, 2015 B2C changes for electronically supplied services to consumers within the EU and the implementation of a Quick Reaction Mechanism allowing EU countries to implement emergency measures in instances of VAT fraud. In other important news, the Bahamas introduces a VAT in 2014, and South Africa implements regulation around its plans to tax the import of e-services.

## European Union

### *CJEU holds that penalties for the late payment of VAT must be proportionate*

The CJEU held in the case of *RODOPI-M* 91 OOD: C-259/12 that a Member State may penalize a taxpayer for failing to adjust its input VAT in the period when a wrongly invoiced VAT invoice is cancelled. However, any such penalty must not go beyond what is necessary to prevent avoidance or abuse.

In this case, the taxpayer received a VAT invoice that was later determined to be issued

in error. The taxpayer recovered the VAT as input VAT. In October 2010, the invoice was cancelled. However, the taxpayer did not adjust the VAT amount until its December 2010 VAT return, when it repaid the full amount to the tax authority.

The Bulgarian VAT regime prescribes a penalty of 25% of the VAT underpaid if such an adjustment is made one month later than it should be. Thereafter, the penalty is increased to 100% of the underpaid amount. Given the two month delay in this case, the tax authority applied the penalty of 100%, c. 82,000 euros.

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The taxpayer challenged this fine, claiming a breach of the European Law principles of Fiscal neutrality and proportionality.

The Bulgarian court referred to the CJEU the question of whether the principle of neutrality permits a Member State to impose a fine for failure to show cancellation of an invoice on time, even though that cancellation is later shown in the accounts and the party concerned has paid the VAT resulting from cancellation plus applicable interest. The court also questioned whether a fine equal to the full amount of VAT in question contravenes the European principle of proportionality.

The CJEU held that the EU VAT Directive does not preclude the application of penalties in the circumstances in question. Furthermore, it held that a Member State is not precluded from levying a fine equal to the amount of the VAT not paid within that period, provided that such a penalty was intended to prevent avoidance or abuse of the VAT system and does not go beyond what is necessary to achieve this aim.

The CJEU held that the Bulgarian national court should determine whether the penalty of 100% of the VAT unpaid is proportionate in this case. As such, the matter will be referred back to the national court for a final decision.

While it is unknown whether the penalty in this case will be upheld, this case should serve as a reminder for businesses of the significant penalties that are frequently issued in respect of VAT compliance failures.

### *CJEU rules that theft of goods causes VAT to become chargeable*

The CJEU held in the case of *Harry Winston SARL* (C-273/12) that the theft of goods from a customs warehouse gave rise to a chargeable event resulting in import VAT and duties becoming due.

This case concerns an armed robbery that took place in 2007 involving jewelry placed under customs warehouse arrangements in France. After the theft, the French customs authority sought payment of customs duties and import VAT from the taxpayer, Harry Winston. Following an unsuccessful administrative appeal, the taxpayer commenced proceedings against the French customs authority, culminating in an appeal to the Court of cassation, the French appellate court of highest instance.

The Court of cassation asked the question whether a provision of the Customs Code could be interpreted to mean that the theft of goods held under customs warehousing arrangements constitutes the irretrievable loss of the goods, and a case of force majeure, (i.e., a chance or unavoidable occurrence that frees liability for an extraordinary event beyond the control of the party). In that case, no customs debt on importation would be created. The Court also questioned whether the theft of goods held under customs warehousing arrangements gives rise to a chargeable event, subject to VAT.

Citing previous case law and paying detailed attention to the wording of the Customs code and VAT Directive, the CJEU held that the theft of goods from a customs warehouse constitutes an unlawful removal, and thus gives rise to a customs debt and chargeable event, resulting in import VAT and duties becoming payable.

This case serves as a reminder of the strict regulatory requirements surrounding the use of customs procedures and warehouses. Businesses operating such arrangements should be aware of all circumstances giving rise to the payment of duties and VAT and ensure timely identification and payment of customs debts.

### *CJEU rules storage services place of supply can be where the property is stored*

The CJEU in *RR Donnelley Global Turnkey Solutions Poland Sp. z o.o.* (C-155/12) has held that when the storage of goods is connected with a right to use specific immovable property, it can be regarded as taking place where the property is located. Otherwise, the supply falls under the general business to business (B2B) service rules and will be considered taking place where the business customer belongs.

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The taxpayer in this case supplied a storage service to business customers. The services offered by the taxpayer included entering the goods into the warehouse, storing the goods, packaging, unloading and loading, and ultimately removing the goods from the warehouse. In some instances, the taxpayer also repackaged goods from collective packaging into individual sets and dispatched these on behalf of the customer.

The taxpayer sought a ruling from the Polish tax authority as to whether its services were liable for VAT in Poland on the basis that they were connected to immovable property in Poland or liable for VAT where the business customer was established in accordance with the general place of supply rules. The Polish tax authority ruled that the services were connected with immovable property and therefore subject to VAT in Poland. The taxpayer appealed and the Polish Court referred the question to the CJEU.

The CJEU, in referring the matter back to the Polish Court, held that the supply of a complex storage service can be regarded as being connected with immovable property. Therefore, the supply is subject to VAT where the property is located only if: 1) the storage constitutes the principal service and 2) the recipients of that service are given a right to use all of, or a specific part of, that immovable property. The CJEU further held that, although it was for the Polish Court to determine, it was likely that the mixture of services described would constitute a single supply, with the storage service being the principal aim of the customer.

Businesses supplying or receiving storage services in the EU should pay particular attention to this ruling. Based on the CJEU's answers, it is likely that contractual terms and overall practices of storage services will be key in determining the VAT liability. If businesses are given access to specific property, or areas of that property, local VAT may be due on the service which could result in irrecoverable VAT costs for the customer.

### *EC Council reaches agreement on rules for 2015 B2C changes*

The EC council has reached agreement on the Implementing Regulation for the 2015 changes that require a business making supplies of telecommunications, broadcasting and electronic services within the EU to a non-taxable consumer to account for VAT based on where the consumer is located.

As previously reported, the rules primarily deal with how to decide where the customer is located and where VAT will be due when the new place of supply rules take effect January 1, 2015.

The customer location rules include a number of rebuttable presumptions. For example, in respect of services supplied via mobile networks, it is presumed that the customer is located in the country identified by the mobile country code of the SIM card used for receiving those services. Further, services are taxable where customers are physically present (where the service is effectively 'used and enjoyed') at locations such as telephone kiosks, wifi hot spots, internet cafés etc. In most other cases the customer is presumed to be located at the place identified by the supplier using two pieces of non-contradictory evidence (such as billing address, bank details, IP address etc.). A supplier may also rebut any of the above presumptions when he has three pieces of non-contradictory evidence indicating that the customer is established, has his permanent address, or usually resides elsewhere. A tax authority may rebut any of the above presumptions when there are indications of misuse or abuse by the supplier.

Aside from customer location, one of the other main issues dealt with by the new rules is supplies made via an interface or portal (such as an app store). In many such circumstances, a taxable person taking part in a supply will be presumed to be acting as an undisclosed agent of the underlying service provider, unless the service provider is 'explicitly indicated' as the supplier in the contractual arrangements between the parties.

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In addition, amendments have also been made to the electronically supplied services (ESS) list. Certain telephone and web access services have been removed from the ESS list of excluded items. However, online ticketing and certain travel related services have been added to the list of excluded items.

Finally, in a move that will be welcomed by businesses, the transitional rules relating to supplies spanning January 1, 2015 have been simplified.

As the rules have now been finalized, businesses operating in this sector should promptly familiarize themselves with the regulations and determine the steps required to prepare for the changes.

### *EC Council implements reverse charge anti-fraud measures*

The EC council has agreed on the implementation of a Quick Reaction Mechanism (QRM), which allows EU Countries that are faced with a serious VAT fraud problem to implement certain emergency measures, including a domestic reverse charge for the supply of certain goods and services. The QRM has been introduced in response to the increasing levels of VAT fraud across the EU that started with mobile phones and has since moved onto computer chips and similar small high value items.

The QRM has been implemented despite business concerns regarding the potential for an increased compliance burden and costs associated with the updating of systems and processes in the event of rapidly introduced changes. Businesses should be aware of the existence of the QRM and the potential need to react quickly in the event of its utilization. Businesses operating in target industries (e.g., technology sectors) should also consider the potential effect that a domestic reverse charge may have on their VAT liabilities (e.g., VAT registration and accounting requirements) to be prepared for any prompt introduction.

### *Belgium*

#### *VAT exemption for lawyers repealed January 1, 2014*

Effective January 1, 2014, the Belgian VAT exemption for lawyers will be repealed; all lawyers' fees will become subject to the standard VAT rate of 21%.

Under the current rules, lawyers' services are exempt from VAT when provided by EU listed attorneys or by Belgian based law firms of which the majority of partners are EU listed lawyers. Belgium is the only EU Member State still applying this VAT exemption for lawyers' services. The changes should not impact services provided by non-EU listed lawyers or international law firms with a majority of non-EU listed partners since their services are already subject to 21% VAT in Belgium.

It should be noted that draft legislation and related administrative guidance has yet to be published. Nevertheless, law firms operating in Belgium and any business with significant legal costs in Belgium should assess the impact of the changes. Businesses with restricted input VAT recovery rights should particularly be aware that certain previously exempted legal fees may now be subject to an increased 21% VAT cost.

### *Greece*

#### *New VAT warehousing scheme implemented*

Along with many other EU countries, Greece has introduced a VAT warehousing scheme for non-EU goods imported into Greece. The scheme applies to goods supplied to vessels and aircraft. Under the scheme, an importer is able to release such goods into free circulation without the payment of import VAT.

This new scheme is a welcome step in eliminating the import VAT cash flow burden of affected businesses in Greece. Businesses operating in this industry and experiencing negative cash flow impact associated with obtaining refunds of import VAT should consider the use of a VAT warehouse in Greece.



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## Italy

### *VAT rate increase postponed to October 1, 2013*

The planned VAT rate increase from 21% to 22% on July 1, 2013 has been postponed to October 1, 2013. Given the recent deferments in the rate change date, businesses operating in Italy should stay informed of the planned change date and be prepared to implement the change when required.

## Slovenia

### *VAT rate increase from 20% to 22%*

Effective July 1, 2013, the standard VAT rate increased from 20% to 22% and the reduced rate from 8.5% to 9.5%.

## United Kingdom

### *Eyeglasses supplied via the internet and exempt medical care*

The UK First Tier Tax Tribunal (FTT) held in the matter of *Prescription Eyewear Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 357 (TC) that an Internet based business supplying corrective prescription eyeglasses is providing, in common with main street opticians, separate supplies of standard rated eyeglasses and exempt medical care.

The taxpayer in this case is an Internet based business which supplies corrective eyeglasses to its customers. Each of its customers is one of the 30% to 40% of people who have their eyes tested by an optician, receive a prescription, and then decide to purchase the eyeglasses from another source. The taxpayer sought to persuade the FTT that, in line with main street opticians, its supplies constituted a taxable supply of eyeglasses and a separate VAT-exempt supply of medical care for the prescription.

The FTT agreed with the taxpayer in this case, stating that its decision respected the principle of fiscal neutrality, since the taxpayer and main street opticians were making similar supplies in competition and should, therefore, be taxed in the same way.

This case serves as a reminder to businesses of the marginal difference that can exist between the classification of single supplies (subject to a single VAT treatment) and multiple supplies (subject to varying treatments).

### *HMRC to combat VAT fraud among online traders*

A recent UK National Audit Office report criticized HMRC's efforts in the area of VAT fraud in online trading. HMRC has yet to issue a formal response; however, it is expected that this report will encourage HMRC to increase efforts to combat fraud in this area.

The expected increase in tax authority scrutiny combined with the significant changes effective in 2015 should prompt businesses in this sector to review their processes and ensure the implementation of robust controls around VAT determination.

## Europe

### Montenegro

#### *Tougher VAT penalty regime and VAT rate increase*

Montenegro has introduced a tougher VAT penalty regime which, among other items, permits fixed amount fines for tax offences varying between 3,000 euros and 20,000 euros, depending on the gravity of the offence.

The regime also prohibits activities for certain time periods for failure to fulfil appropriate documentation requirements (e.g., failure to issue VAT invoices). The new regime is aimed to reduce the volume of grey economy (i.e., unauthorized trade) activity in Montenegro.

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In addition, effective July 1, 2013, the standard VAT rate has increased from 17% to 19%.

## **Norway**

### *Amended fiscal representative rules effective July 1, 2013*

As of July 1, 2013, fiscal representatives are no longer jointly and severally liable for VAT due by their non-established principals. Additionally, non-established businesses are no longer required to issue sales invoices via a fiscal representative.

Businesses utilizing fiscal representatives should be aware of the changes. The absence of joint liability and the revised invoices procedures may result in changes to the manner in which businesses and their fiscal representatives wish to operate and interact. In addition, the removal of the requirement to issue invoices through the fiscal representative is favorable to businesses and creates more efficient invoicing systems for affected businesses.

## **Africa**

### **South Africa**

#### *E-commerce suppliers required to register for VAT*

Effective January 2014, non-resident suppliers of e-commerce services will be required to register as VAT vendors in South Africa and account for output tax on supplies to South African residents.

Under the new rules, a non-resident supplier of e-commerce services (defined as any supply of services where the placing of the order and delivery of the service is made electronically) will be required to register for VAT in South Africa when a supply is made to a South-African resident, or payment is made from a South African bank. With no minimum threshold, even a small number of transactions can result in local compliance obligations.

Since the changes will be implemented in less than six months, businesses should ensure they have the relevant processes and controls in place to be able to identify transactions with a VAT liability in South Africa (i.e., those supplied to South African residents or paid for via a South African bank). Affected businesses need to develop procedures to meet compliance obligations such as the filing of VAT returns and VAT accounting/invoicing.

This new requirement shifts the taxation of many previously untaxed supplies. Therefore, businesses should review their contracts and pricing procedures, as well as legal documentation, and should consider the impact on margins and cash flow.

## **Asia Pacific**

### **Vietnam**

#### *New VAT regulations implemented effective July 1, 2013*

The Vietnam Ministry of Finance recently issued Circular 65 which provides multiple updates to VAT guidance. Notable developments effective July 1, 2013 include:

- Interest on loans made by non-credit institutions (e.g. loans provided by related parties) are not subject to VAT.
- The lease of factories to tenants in non-tariff zones and the provision of digitalization services to overseas customers are now subject to 0% VAT.
- A company can still claim an input VAT credit for VAT invoices in which the credit was disallowed in a tax audit, due to the lack of bank payment evidence, if the evidence is provided within six months of the tax audit minutes date.

The above changes have been implemented with certain retrospective transition rules dating back to March 1, 2012.

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Businesses operating in Vietnam should familiarize themselves with the latest guidance which covers a range of topics and industries. The changes are likely to affect multiple aspects of Vietnamese compliance obligations and the related business procedures.

## ***Americas***

### ***Bahamas***

#### ***VAT to be introduced July 1, 2014***

Beginning July 1, 2014, the Bahamas will implement a VAT system. The standard rate of VAT will be 15% and will apply to most goods and services. Certain supplies, such as those made by hotels, will be subject to VAT at a reduced rate of 10%, and certain industries, such as financial services and healthcare, will be exempt from VAT.

A government whitepaper was issued in February 2013 that addresses items such as the VAT compliance process and transitional measures. The VAT registration threshold has been announced as being 50,000 Bahamian Dollars (approximately US\$50,000) turnover per annum.

The introduction of VAT represents a significant change for the taxation landscape in the Bahamas. Businesses established in the Bahamas should consider how this affects their outputs and purchase profile. Multinationals with holding companies established in the Bahamas should assess the impact on their overall cost base and take steps to mitigate VAT costs.

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## ***Let's talk***

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



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