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VAT exemptions in the spotlight

This month's edition of VAT News highlights the CJEU judgment concerning the Tour Operators' Margin Scheme (TOMS), confirmation that the Council of the European Union (EC Council) formally adopts the 2015 implementing regulation regarding the amended place of supply of services rules for B2C supplies of telecommunications, broadcasting and electronic services within the EU, the German tax authority's finalized guidance regarding the new entry certificate requirement to treat intra-community shipments of goods free from German VAT, and China's clarification of rules relating to VAT exemptions.

Court of Justice of the European Union (CJEU)

CJEU upholds Advocate-General's opinion on tour operators' margin scheme infringement proceedings

The CJEU recently ruled in the European Commission's infringement proceedings against eight Member States in relation to their operation of the Tour Operators' Margin Scheme (TOMS). The proceedings are divided into two parts, the wholesale supply proceedings that apply to eight Member States (Spain, Portugal, France, Italy, Greece, Poland, Czech Republic, Finland) and the Spanish proceedings that apply only to Spain (*Commission v. France and others*: C-296/11 and *Commission v. Spain*: C-189/11).

TOMS is a special scheme that allows tour operators supplying services in their own name (or as undisclosed agents) to account for VAT only in the country of their establishment and only on the margin made on their services. The objective of TOMS is to simplify VAT accounting for tour operators, while ensuring that VAT revenues associated with the travel

services are allocated between the country where the travel service is enjoyed and the country in which the tour operator is established.

The wholesale supply proceedings

The eight Member States involved in the proceedings argued that TOMS applies equally to wholesale supplies, i.e. supplies between tour operators, as it does to supplies directly to consumers. The Commission and the remaining Member States consider that TOMS applies only when the travel services are supplied to a customer that uses the travel services. The Advocate General (AG) considered the ambiguity in the EU VAT Directive language sufficient to justify the interpretation of the 8 Member States in question, thus agreeing that TOMS should apply to wholesale supplies.

The CJEU accepted the significant differences between the various language versions of the VAT Directive, e.g. some using the term 'traveler' and/or the term 'customer' at various times. Additionally, the CJEU noted the varying use of those terms from one provision to another, and held that when such discrepancies exist, the provision in question should be interpreted by reference to the general scheme and purpose of the rules of which it forms part. In this respect, the CJEU considered that an approach consisting of applying TOMS to any type of customer would be the best way of achieving the aims of the scheme. The CJEU held that approach would enable travel agents to benefit from simplified rules regardless of the type of customer they provide services to, while encouraging a fair distribution of receipts between the Member States.

The CJEU dismissed the Commission's actions against the eight Member States on the wholesale supplies issue, on the basis that TOMS is not limited to retail sales of travel services.

The Spanish proceedings

In the Spanish proceedings, the AG considered the following three specific aspects of the Spanish TOMS:

- the exclusion of the supply of travel agent packages sold at retail that were purchased wholesale
- the partial availability, for certain TOMS invoices, of input VAT recovery options for business customers
- the use of a global calculation, including the carry forward of losses, to calculate the tour operators' VAT liability under TOMS.

The AG considered all three elements contrary to principles of the EU VAT Directive and, thus, Spanish legislation was incompatible with EU law, insofar as it excluded from TOMS sales by retail travel agents of packages purchased wholesale. The CJEU further held that the Spanish legislation was also incompatible since the amount shown on the invoice did not reflect the exact amount of VAT on the services obtained by the purchaser, but rather reflected an amount estimated on the basis of the total amount paid by him. In addition, the mention on the invoice of an amount corresponding to a percentage of the total price charged was not consistent with the VAT Directive's invoicing rules, nor with the rules relating to the right of deduction. The CJEU also ruled that by allowing the possibility of VAT deduction only when services were provided in Spain, the Spanish legislation discriminated on grounds of nationality, which is incompatible with the common system of VAT.

Finally, the CJEU held that the Spanish provisions allowing the TOMS margin to be calculated on a global basis have no legal basis under the VAT Directive, and that the taxable amount must be determined by reference to each single service supplied by the travel agent, rather than on an overall basis.

Businesses operating in this industry should expect the Spanish authorities to issue guidance on this matter. Businesses who have incurred a VAT liability that arose out

of Spanish law being incompatible with EU law should evaluate whether they may be entitled to any remedies or other recourse.

CJEU rules that Dutch VAT adjustment rules are not in line with EU law

The CJEU held, in *Pactor Vastgoed BV* Case C-622/11, that the Dutch tax authority could only pursue the taxpayer which originally recovered the input VAT in respect of a property and could not, therefore, pursue the latter party in the transaction.

In this case, the supplier delivered an immovable property to Pactor Vastgoed, that opted to tax the supply, in agreement with the supplier. The supplier had acquired the property several years previously, and had also opted to tax the acquisition and deduct the VAT charged to it. From April 2000, Pactor Vastgoed leased the property, exempt from VAT. Pactor Vastgoed subsequently sold the property and supplied it at the beginning of the month of July 2000, exempt from VAT.

Under EU VAT law, supplies of land and buildings, such as freehold sales, leasing or renting, are normally exempt from VAT. As such, no VAT is payable and the person making the supply cannot normally recover any of the VAT incurred in relation to the property expenses. EU law permits a person to opt to tax land with an election in which all the supplies made with respect to the person's interest in the land or buildings will normally be standard-rated. Thus, recovery of any VAT incurred in making those supplies is permitted. The Dutch tax authority issued a notice of additional assessment to Pactor Vastgoed for VAT during the period from January 1 to December 31, 2000, for an amount corresponding to the amount due following adjustment of the VAT deduction applied by the supplier, due to the acquisition of the immovable property by Pactor Vastgoed.

Following Pactor Vastgoed's success in the assessment by the Regional Court of Appeal, the Dutch tax authority appealed on a point of law. The Dutch Court then referred to the CJEU the question of whether the Sixth Directive allowed, where the VAT was initially deducted, the reimbursement of such deduction to a person other than the taxable person who applied the deduction in the past.

The CJEU held that the supplier and, subsequently, Pactor Vastgoed, as purchasers of the immovable property, could be liable for VAT regarding the acquisition in question. However, the CJEU could not justify making Pactor Vastgoed liable to pay the amounts due following the adjustment of the VAT deduction applied by the supplier in the context of a transaction to which Pactor Vastgoed was extraneous, i.e. the initial acquisition of the immovable property by the supplier. The CJEU, in referring the matter back to the Dutch referring court, held that amounts due following the adjustment of a VAT deduction may only be recovered by a taxable person who applied that deduction.

This important case clarifies that recovery of VAT in this scenario can only be sought from the person making the deduction. Furthermore, this case provides a timely reminder of the complex VAT rules that exist when dealing with property transactions. Businesses that deal with land and property transactions should, at the earliest opportunity, seek advice on any VAT implications that may arise.

European Union

Council formally adopts 2015 implementing regulation

The Council of the European Union (EC Council) has formally adopted an implementing regulation relating to the January 1, 2015, changes to the place of supply of service rules for B2C supplies of telecommunications, broadcasting, and electronic services within the EU. The adopted regulation is essentially unchanged from the originally proposed version, aside from a re-ordering of the new sections and revised wording in article 9a (supplies made via an interface or portal) to replace the term "sanctions the charge to the customer or the delivery of the services", with "authorizes the charge to the customer or the delivery of the services".

As previously reported, the regulation primarily addresses the determination of a customer's location, and thus where VAT will be due, when the new place of supply rules take effect January 1, 2015. The customer location rules contain a number of rebuttable presumptions. For example, the rules presume a telephone land lines customer will be established, have a permanent address, or usually reside at the place of installation of the fixed land line. For services supplied via mobile networks, the presumption will be that the customer is located in the country identified by the mobile country code of the SIM card used for receiving those services. For services that require transmission of a signal and a decoder or viewing card, the customer is presumed to be located where the device is physically present, or if that place is not known, the place where the viewing card is sent. When customers are physically present at locations such as telephone kiosks, Wi-Fi hot spots, internet cafés, etc., such services will be taxable at that location, i.e. where the service is effectively 'used and enjoyed'.

Supplies made on board passenger ships, aircraft, or trains during an intra-Community journey will be taxable in the Member State of departure, and services supplied as part of hotel or holiday accommodations will be taxable at those locations.

When services are supplied in circumstances other than those listed above, 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 with 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 if there are indications of misuse or abuse by the supplier.

Another main issue addressed in the new rules is the supply made via an interface or portal (such as an app store). In such circumstances, a taxable person taking part in a supply will be presumed to be acting as undisclosed agent of the underlying service provider unless the service provider is 'explicitly indicated' as the supplier and this is reflected in the contractual arrangements between the parties.

As previously reported, these represent some fairly significant changes in the VAT sphere. Businesses that are affected by the implementation of the 2015 B2C changes should take the necessary steps to begin to address VAT compliance.

Germany

Draft tax authority circular on entry certificate ('Gelangensbestätigung')

As previously reported in the September 2013 VAT alert a new entry certificate system is to be introduced in Germany effective October 1, 2013. The entry certificate will serve as the only means by which businesses can evidence that goods have been transported to another EU Member State for the purpose of making an exempt intra-community supply of goods.

The German Federal Ministry of Finance has recently provided official guidance and sample forms of the required entry certificate system ('Gelangensbestätigung') that took effect October 1, 2013. Although sample forms have been provided, the entry certificate may be in any form and may even be composed of several documents, provided all relevant information is certified.

The German Federal Ministry of Finance guidance states that the entry certificate must always be signed by the customer, his agent engaged to confirm the receipt of the goods supplied, or his representative, i.e. employee or warehouse keeper. The authority to act needs to be proven. Sufficient authority can be verified by an overall assessment of all documents, i.e. delivery orders or the use of a company stamp.

The guidance further provides that a signature is not required if the entry certificate is transmitted electronically, provided it is obvious that the transmission originates from within the customer's or the representative's domain. The respective email

account does not need to have previously been known to the supplier. The evidence is not put at risk simply because the domain of the e-mail account neither refers to the Member State of destination nor to the recipient's country of residence. When the entry certificate is submitted by e-mail, the entry certificate as well as the e-mail needs to be archived. A printout of the electronically submitted entry certificate (as well as, when applicable, the e-mail) is sufficient for the purpose of evidence. Evidence of multiple supplies to the same customer may be evidenced by an accumulative document, which may be issued for periods of up to a quarter.

The guidance states that it is not required that the entry certificate consists of a single document. Rather, it may be composed of several documents that do not necessarily need to be linked to each other. For example, an entry certificate may consist of a bill of lading along with a written confirmation about the receipt of the goods, if the concerned documents show all items mentioned in the VAT ordinance. The entry certificate or the accompanying documents may be written in German, English, or French. Evidence written in other languages requires a legally certified translation.

Businesses should be aware of these changes and the additional compliance required in Germany. In particular, businesses should be aware that noncompliance with these requirements may affect the ability to recover VAT.

Lithuania

Revised VAT guidance issued by the Lithuanian tax authority

The Lithuanian tax authority has issued revised VAT guidance on the sale or transfer of immovable property. The guidance provides new explanations and practical examples. For instance, the sale of an old building together with the land is considered a VAT taxable supply of building land if the seller has demolished the building or is committed to demolish it (the demolition of the building has to be commenced before the conclusion of the transaction).

Businesses that deal with land and property transactions in Lithuania should be aware of the new guidance and examples, noting that land and property transactions are typically subject to VAT based on the location of the property.

Netherlands

New Decree on the VAT treatment of real estate

The Dutch Government recently issued an updated version of the Decree on the VAT treatment of real estate. The updated decree clarifies, among other matters, the definition of building land; provides guidance on the rental of real estate and whether additional services apply; and, addresses the short term rental of conference, meeting and exhibition spaces. Affected businesses should be aware of the updated guidance and should consider the VAT implications.

Europe

Albania

Energy products to be placed in a fiscal warehouse

The Albanian Government has recently announced that energy products such as petroleum, oil, gasoline, coal oil, biodiesel, etc., imported for free circulation or purchased at fiscal production warehouses in Albania, for the purpose of selling them at a later date to retail stores, must be placed in a fiscal warehouse until the energy products are distributed for sale.

Russia

Government publishes list of 'directly related' VAT exempt financial services

The Russian Government has recently published a list of VAT exempt services that are directly related to a licensed financial sector activity. The guidance provides that the following services are exempt: processing of orders (documents) of clients; services

for the provision of information to customers in connection with the licensed activity; services of acknowledgement of a person as a qualified investor; services of providing customers with the software, and/or with the technical tools for remote access to respective financial services; and services of performing the functions of the certification. In addition, the following services are VAT exempt: specific services performed by certain market players, for example, services of brokers and dealers of maintaining quotations, supply, demand, and/or the volume of trade deals with securities, foreign currencies, commodities; services of maintaining of mortgage collateral registers, registers of holders of investment units, registers of creditor's claims; services of admission of commodities and/or foreign currency to the organized trading; and services of securities listing, etc.

As such, businesses that provide these services should ensure they are aware of the new list of services to determine whether a service being provided may be exempt from VAT.

Serbia

Eligibility criteria for non-resident VAT refunds

The Serbian tax administration has published details of the eligibility criteria for the non-resident VAT refund procedure.

In Serbia, foreign VAT payers are entitled to a refund of VAT charged on supplies of movable goods and services, provided that certain criteria are met. One of these criteria is that VAT incurred by the foreign taxpayer is eligible for refund under the reciprocity rule. As such, taxpayers from the following countries are eligible to apply for a VAT refund in Serbia, provided the remaining criteria are met: Austria, Belgium, Bosnia and Herzegovina, Croatia (only for fairs), Denmark, Germany, Macedonia, Montenegro, Netherlands, Slovakia, and Slovenia (only for fairs).

Asia Pacific

China

Clearer picture of VAT exemption on cross-border services

Currently, the Business Tax (BT) to VAT Transformation Pilot Programme (B2V Pilot Programme) in China provides zero-rated treatment or exemption from VAT for certain cross-border services. China's position regarding the zero-rating of services is relatively clear but is not clear regarding VAT exemptions.

Due to the lack of clarity, the Chinese tax authority issued a new Circular SAT Public Notice 52, which explains the qualifying criteria and required documentary evidence for cross-border services that are eligible for VAT exemption.

For example, Notice 52 states that certain support services, such as, airport ground handling services, harbour services, cargo and passenger handling services, etc., are considered auxiliary logistic services provided to foreign entities and can qualify for VAT exemption.

Notice 52 further states that services provided to entities located within special customs zones in China do not constitute cross-border services and are subject to VAT.

Notably, Notice 52 provides that the following mandatory criteria must be met before a VAT exemption may be applied:

- Taxpayers are required to conclude written cross-border services contracts.
- For cross-border services provided to foreign recipients, taxpayers are to receive income from outside China.

- Taxpayers must separately compute the sales amount of their cross-border services, accurately compute the non-creditable input VAT, and must not issue special VAT invoices for such exempt sales.

Notice 52 provides that no exemption is permitted unless all of the above criteria are met.

Finally, Notice 52 provides a list of documents that taxpayers are required to submit to the tax bureau for record-filing purposes before being eligible for a VAT exemption. The list of required documents includes a completed Record-Filing Form for Exemption of Cross-border Services, an original cross-border services contract and photocopy of the contract, and evidence showing that the services were performed outside China.

Companies in China should monitor the on-going changes to determine the impact on their business and to ensure compliance and efficiency. Good documentation is critical with the increasing and more stringent VAT investigations by both the state and local level tax authorities. Businesses should also consider strengthening their internal controls and building a stronger foundation geared towards more systematic VAT compliance.

Indonesia

Clarification of VAT base for freight forwarding services

In Indonesia, the VAT base on the delivery of freight forwarding services is 10% of the actual billing if it includes freight charges (a 1% effective VAT rate).

The Indonesian tax authority issued guidance that states the 10% base is applicable as long as the service bill includes freight charges, even if they are invoiced separately from other elements of the freight forwarding services, e.g. document handling and temporary storage. Input VAT paid by the freight forwarder company regarding this type of delivery cannot be credited against output VAT.

However, reimbursement of freight provided by a third party may be allowed and can be excluded from the VAT base of freight forwarding services if the following reimbursement criteria are satisfied:

- The invoice from the third party, including all payments to the government, is in the name of the customer.
- The reimbursement to be made by the freight forwarding company to the third party is reflected in the contract with the customer.
- No income or expense is recognized by the freight forwarding company on the reimbursement.

Under such an arrangement, the freight forwarding company should charge VAT on the service delivery using the normal tax base, i.e. 100% of the actual billing. The freight forwarder company should, in such a case, be entitled to claim the relevant input VAT.

Japan

Official decision on JCT increase to 8% from April, 1 2014

On October 1, 2013, the Japanese Prime Minister officially announced the final decision that the Japanese Consumption Tax (JCT) current rate of 5% will be increased to 8% effective April, 1 2014.

Businesses that are subject to levying JCT should be aware of the upcoming implementation of this increased rate and should take the necessary steps to ensure they are ready for this rate increase.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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