

European VAT Brief

Quarterly news for VAT in the European Economic Area

Issue 3 - 2001

Welcome to EVB's third edition of 2001.

Articles appear in this edition in alphabetical order by country - we hope this makes it easy for you to find the countries which are of special interest to you.

European Union

Draft invoicing directive - current issues

The proposed EU directive on invoicing contains a list of statements which will be required on invoices, assuming that the proposals are adopted in their current form. However, the ECOFIN Council has yet to reach an agreement on the proposal. At present, the discussion points seem to be:

- The necessity for an advanced electronic signature;
- Number of the invoice (sequential or not); and
- The requirement to show the basis of VAT exemption.

The proposed requirement to show "where an exemption is involved, reference to the provision of this Directive which justifies the exemption" has caused the following concerns among partly exempt business (notably in the finance sector):

- It is unclear how widely "exemption" will be interpreted by the individual Member States' tax authorities;
- The requirement to refer on the invoices to the relevant provision in the 6th Directive which provides for exemption may create compliance

problems for businesses unfamiliar with the 6th Directive; and

- The proposed directive is unclear as to whether invoices will now have to be issued for wholly exempt supplies.

Possible solutions to some of these concerns include the European Parliament's suggestion that businesses should be allowed to refer to their national provisions allowing exemption rather than to the 6th Directive. Additionally, it appears that the reference to exemption is not a point of principle for the Commission and may not appear in the final version of the directive.

At the time of going to press, the invoicing directive had still not been finalised.

Belgium

Fiscal representation

Since the adoption of the Council directive abolishing fiscal representation, Belgian VAT legislation will require amendment, as follows:

- A reverse charge mechanism will be introduced for supplies of goods and services in Belgium made by foreign businesses who were previously required to appoint a fiscal representative.

- It will no longer be compulsory for a foreign taxpayer to appoint a fiscal representative, providing certain conditions are met.
- Foreign businesses will be able to obtain a VAT number without appointing a fiscal representative.

Transitional measures

Transitional measures are applicable between 1 April and 31 December 2001 for businesses established in EU countries but not already VAT-registered in Belgium on 1 April 2001. If these businesses carry out transactions in Belgium which would previously have resulted in a requirement to register for VAT in Belgium using a fiscal representative, the transitional measures may be applied so that a fiscal representative is not required.

The foreign business must submit form 604A (declaration of commencement of activity for VAT purposes) together with the other requested documents and must meet all the conditions to benefit from direct VAT registration in Belgium with effect from 1 January 2002.

During the transitional period, the following procedures must be followed for sales and purchases:

Transitional procedures - sales

- The Belgian customer (who must be a VAT payer making periodic returns or a non-taxable legal entity submitting special quarterly VAT returns) is to account for VAT due on supplies in Belgium.

- If the Belgian customer is not VAT registered, the foreign business must transfer the VAT due by the 20th of the month following the calendar quarter to the account of the Central VAT Collection Office for foreign taxpayers.
- The foreign taxpayer is not to submit monthly VAT returns or ESLs during the transition. Instead, a quarterly summary should be submitted reporting taxable domestic supplies of goods and services (i.e., domestic supplies for which the foreign business must transfer the VAT due to the Central VAT Collection office), and exempt intra-Community supplies of goods.
- Limited bookkeeping records should also be kept during this period (a ledger of sales invoices and credit notes) and the normal invoicing requirements should be met.

Invoices issued by the foreign business should contain the following information:

- That a Belgian VAT number has been applied for according to decision No. ET 99.808 of 30 March 2001; and
- That the reverse charge applies (where appropriate), or that the VAT will be paid directly by the foreign business to the tax authorities (where applicable).

Transitional procedures - purchases

- Input tax can be recovered either on the first periodic VAT return after a VAT number is issued or by an 8th Directive refund claim.
- No deferral of import VAT is possible during the transitional period. At the time of importation a certificate should be issued confirming that the foreign taxpayer is registered under the transitional regime.
- A quarterly summary should be submitted detailing intra-Community acquisitions of goods, similar in scope to the sales summary described

above. Acquisitions reported in the quarterly summaries are not to be included in the first periodic VAT return.

- The foreign taxpayer must keep a ledger of local purchases, intra-Community acquisitions and imports.

Denmark

VAT Act to be made more consistent with EU regulations

A working group under the Danish Ministry of Taxation has recently proposed the following changes:

Group registration

The Danish customs and tax authorities do not allow pure holding companies to be included in a group registration. An amendment changing these rules is proposed.

Gifts

According to EU regulations, companies can make gifts of little value without VAT consequences if the gift is made in the company's interest. Thus, VAT is not payable on the gift and the company can deduct the VAT incurred in purchasing the gift. Danish rules have, up until now, described such gifts as promotional, with a requirement that *inter alia* the company's name or logo should be included on the promotional articles. It is proposed that the distinction be abandoned so that all gifts of little value are treated in the same way when the gift is made in the company's interest.

Information activities of tourist offices

The activities of tourist information offices are exempt from VAT according to the current Danish rules. A repeal of this exemption is proposed.

Place of supply for certain services

Minor adjustments have been proposed moving the place of supply out of Denmark to outside the EU if the service is actually used outside the EU, and moving the place of supply to

Denmark from outside the EU if the service is actually used in Denmark in all cases where the EU regulations allow this. This will mean *inter alia* that the place of taxation for means of transport leased outside the EU, but used in Denmark, will be moved to Denmark.

At the same time it is proposed that a peripheral or theoretical use in Denmark no longer be of any significance and that the place of supply of services/where the services are used be the deciding factors.

France

ECJ allows VAT recovery on cars for driving instruction

In a recent case, the European Court of Justice (ECJ) has allowed France to retain rules introduced in 1993 which permit the recovery of VAT incurred on cars purchased exclusively for use in driving instruction.

Generally, the 6th Directive allows restriction to VAT recovery only if the goods or services cannot be attributed to a taxable activity. However, Member States are allowed to retain blocks on input tax recovery which were in force when the 6th Directive was introduced in 1979, pending agreement between all Member States regarding VAT recovery on expenditure which is not strictly business expenditure. Such agreement has never been reached.

The European Commission was of the view that because France blocked the recovery of this VAT in 1979, the subsequent change in law was contrary to the 6th Directive.

However, the ECJ found that the change in legislation was merely a reduction in the scope of the exclusion of VAT recovery for vehicles which had been in force in 1979 when France had maintained a restriction on recovery of VAT on the purchase of vehicles for private use. ECJ case law states that Member States are allowed to maintain restrictions to European principles, but

changes are legal if they decrease the scope of the restriction. The Commission's case was therefore dismissed and the French are authorised to retain the 1993 rules.

Germany

Withholding procedure - possible repeal?

Many businesses will be familiar with Germany's withholding procedure. Briefly, when supply and install (*Werklieferung*) and other services subject to VAT in Germany are provided by a foreign business to a German business which cannot recover in full the VAT it incurs, the foreign business must show German VAT on its invoice, and the German business must withhold the VAT and pass it on to the tax authorities (less any input VAT). If the German customer is able to recover the VAT it incurs in full, then the foreign business does not have to show German VAT (this is known as the zero procedure or the *Nullregelung*).

Anybody who has ever had difficulty with the withholding procedure may be happy to know that, from 1 January 2002, it is planned that it will be replaced with a new system.

The proposed new arrangements will allow a foreign service provider to invoice its German customers without showing German VAT on its invoices, whatever the VAT recovery status of the German customer. The German customer will have to account for VAT on its preliminary VAT return, in a procedure similar to the "reverse charge" mechanism used elsewhere in the EU.

VAT restriction on travel costs and company cars - new ruling

The German *Bundesfinanzhof* (Federal Tax Court) has found that the restriction of input tax credit for expenditure such as travel expenses and meals which was introduced in April 1999 is contrary to the Sixth Directive.

As in the recent ECJ case mentioned above in the French section, restrictions on input tax recovery may only be retained if they were in force in 1979 when the 6th Directive took effect.

Therefore, VAT on the following expenses may now be deducted, subject to the normal rules:

- The cost of overnight accommodation; and
- Meal expenses incurred by the owner of a business or by employees who are reimbursed by the business or whose expenses are paid by the business. (VAT on "unreasonable" expenses such as bar bills is not recoverable.)

In all the above cases the invoices must be issued to the business; this rule applies in principle even where the invoice is DEM 200 or less. However, low-value invoices as defined in German VAT legislation can be claimed even if they are not made out to the business (no recipient is mentioned) and VAT is not separately stated (i.e., gross amount and the respective VAT rate are mentioned on the invoice).

Finally, it is important to note that the Federal Ministry of Finance explicitly states that the Federal Tax Court judgment has no impact on other exclusions in German legislation. However, in the light of decisions handed down by the Federal Tax Court and lower courts, and by the European Court of Justice, it is still recommended that taxpayers claim a full input tax credit with respect to expenses to promote business relationships, travel expenses, moving expenses, expenses for company cars with more than 5% private use and expenses for assets used less than 10% for business purposes. All input tax amounts deducted on monthly or annual VAT returns with respect to these sorts of expenditure (except under the new rules for meals and accommodation) should be disclosed to the tax authorities at the time of filing in order to avoid the risk

of criminal penalties. For instance, a separate attachment drawing express attention to the deduction can be included with the return.

Greece

Scope of 8% rate

The following are now subject to VAT at 8%:

- The repair and alteration of clothing;
- Fabric destined for domestic use; and
- The provision of domestic care services to children, elderly people, patients and people with special needs.

Electronic filing of returns

As of 20 February 2001 it has been possible to file all periodic VAT returns (except for VAT returns which amend previous returns) electronically at www.taxisnet.gr. In order to do this, taxpayers should apply for a username and password (from taxisnet).

Obligatory filing in Euros

During the period from 1 January 2001 to 31 December 2001 only businesses using the double-entry system of bookkeeping and which have elected to keep their accounts in Euros are also obliged to file their ESL and Intrastat forms in Euros. From 1 January 2002 onwards all businesses should file their ESL and Intrastat forms in Euros.

Ireland

Transfer of business rule

The Finance Act 2001 introduced changes in relation to the transfer of business reliefs applying in Ireland. In particular, anti-avoidance measures were introduced in relation to the transfer of property in connection with the transfer of a business.

Previously, the transfer of property which would otherwise have been taxable would be ignored if such transfers were made in connection with the transfer of a business or part thereof.

The new provisions provide that a transferee intending to use the property for a partially exempt purpose will be deemed to have self-supplied the property acquired and will therefore be obliged to self-account for VAT in relation to the acquisition of the property in accordance with a prescribed formula. The new provisions also provide that an element of retrospective VAT credit will be granted to a transferor who had only a partial VAT recovery entitlement on acquiring/developing a property.

Italy

Recovery of VAT on car hire

According to a Ministerial Circular issued on 18 June 2001, 10% of the VAT incurred on car hire in Italy may be recovered, even if the duration of the lease is only one day.

However, if the charge for hire includes petrol, VAT recovery will have to be apportioned, as VAT recovery is not possible on fuel.

Transmission of invoices via fax

Following a Ministerial Resolution of 4 July 2001 (No. 107), the Italian tax authorities allow the transmission of invoices via fax provided that specific requirements are met. In particular, the recipient's fax machine has to be connected to a computer system which guarantees for the integrity and non-alterability of the document received. Furthermore, all data concerning the invoiced transaction must be retained in paper format for record keeping purposes, as it is not possible to store documents in electronic format for VAT record keeping purposes in Italy.

It should be remembered that, according to Italian law, an invoice is considered to be issued only when the document is actually delivered or sent, merely completing the invoice is not sufficient.

In the past, the tax authorities had already specified that invoices could be transmitted via ordinary mail, or by

electronic mail and other electronic procedures, on condition that paper copies of the invoices are also retained.

Netherlands

Electronic transmission of invoices

On 26 April 2001 the Director-General of the Dutch Revenue approved the issue of invoices on paper or electronically. To this end, he has issued instructions for the electronic transmission of invoices. The proposed EU invoicing directive was used as one of the guiding principles in drafting this instruction. When invoices are transmitted electronically, the authenticity of origin and integrity of the invoice content must be guaranteed by a sophisticated electronic signature. In the event other methods are used to guarantee the authenticity and integrity of the electronically transmitted invoices, it is advisable to hold advance consultations with the Dutch Revenue.

Poland

VAT refunds to non-residents

The Polish government has introduced regulations enabling foreign businesses not registered for VAT in Poland to recover VAT incurred on purchases made in Poland. The Decree, which works under the reciprocity principle, came into force on 1 July 2001.

The claimant must be registered for VAT (or its equivalent) abroad and no activities should be performed which are subject to Polish VAT except:

- Transport and similar services in respect of imported goods;
- Imported services subject to the reverse charge procedure; and
- Other services, including transport, shipping, fishery and services rendered to diplomatic missions.

A refund is only allowed where a Polish registered VAT-payer would be entitled to recover input tax. Applications should be made to the second Warsaw Tax Office by 30 June of the year

following the year to which the application relates.

Spain

13th Directive reclaims

The Spanish tax authorities have officially accepted, under the reciprocity principle, the inclusion of Norway and Slovenia within the 13th Directive procedure for VAT reclaims. Spain will now therefore pay 13th Directive claims to Switzerland, Canada, Japan, Hungary, Norway and Slovenia.

Bad debt relief simplified

Spanish VAT regulations make provision for bad debt relief. However, one of the requirements is that the creditor has judicially claimed the debt, implying some costs for the creditor (the creditor must be legally represented to file a claim in the ordinary civil courts).

However, for debts not exceeding ESP 5,000,000 (around €30,000) a new procedure is applicable under which the creditor need not have legal representation.

Switzerland

Input tax risks for service providers

With the transition on 1 January 2001 from the VAT Ordinance (VATO) to the VAT Law (VATL), some new problems have arisen in Switzerland concerning the deductibility of input VAT. For example, the principle of defining the place of supply for intangible services changed, without having led to any significant adjustments in practice. Nevertheless, there is a risk that, if Swiss service companies do not properly observe the formalities, they will lose their entitlement to input tax deduction.

Under the VATO an intangible service supplied by a Swiss company was regularly deemed as having been supplied within Switzerland. The question as to whether the service was subject to VAT was, however,

determined on the basis of where the service was used or exploited.

A service which was used or exploited abroad was thus deemed to have been performed in Switzerland, but qualified as an export of services in accordance with the VATO and was therefore tax-exempt with input tax credit.

The new VAT Law brought the definition of place of supply closer to that used in the European Union, meaning that if the recipient of the services has his place of business outside Switzerland the service does not fall within the scope of Swiss VAT. The primary implication of this for businesses supplying services mainly performed outside Swiss territory under the new definition is that they might not achieve the registration threshold of CHF 75,000 or CHF 250,000. Not only would current claims for input tax deductions lapse but the taxation of private use would also be triggered as if the business were to be given up completely.

Companies must therefore submit an application for voluntary VAT registration. However, if a company was already subject to tax under the VATO the Tax Authorities will exercise a silent option to tax, thus retaining the company's VAT registration.

There is a possibility for start-ups to opt to tax, but, under the VATL, VAT repayments can be conditional upon the submission of plausible budgets and the provision of collateral.

It may also be the case that where incorrect registration applications have been submitted in the past (e.g., in the case of Swiss re-invoicing companies which regularly carry out transactions exclusively outside Switzerland) the silent option may not be exercised by the tax authorities. Businesses should therefore consider whether they need to make a new application to opt to tax in order to maintain their entitlement to input tax deductions.

United Kingdom

FDR - latest news

The House of Lords has refused Customs leave to appeal against the Court of Appeal's ruling that outsourced credit card processing operations should be exempt from VAT. Following this decision, Customs have issued Business Brief 10/01, indicating that they will amend UK law in due course. A consultation is to take place as to the form of the new legislation.

Essentially, the Court of Appeal found that FDR's services consist of the movement of money between Cardholder, Merchant, Issuer and Acquirer for the convenience and the profit of the other three parties, and as such, were exempt under Article 13(B)(d) of the Sixth Directive.

This decision could now prevent VAT from being a factor in commercial decisions regarding outsourcing. Following the decision, both providers of services similar to those supplied by FDR and the recipients of such services should review their existing contractual obligations to ascertain how closely their activities mirror those in the case. For example, a provider of FDR-type services who currently adds VAT to the fee for such services may wish to treat these services as exempt in the future.

Similarly, a recipient of such services will have been charged VAT and may wish to seek repayment of such VAT from the provider.

Primback - final decision

Primback, a furniture retailer, offering interest-free credit to customers, had an arrangement with a third-party finance company which funds payment and credit risk in exchange for a commission (equal to difference between cash price paid by the final customer and the price paid by the finance provider to Primback). Primback claimed that it was entitled to

account for VAT on the net amount received rather than the full cash price shown on the invoice to the final customer.

The ECJ has rejected this claim, finding that the subjective value agreed between the parties to the contract for the supply of goods is the full cash price, since the final customer is completely unaware of the arrangements between Primback and the finance provider. Further, it considers that the deduction of commission by the finance provider represents consideration for the supply to Primback of services, including guaranteed payment, and is therefore merely a cost of the overall business.

Once the House of Lords issues a formal judgment on this case, Customs will be in a position to recover all sums repaid following the Court of Appeal judgment (in which Primback was successful) and will also attempt to recover tax they believe to have been underpaid on returns rendered subsequently.

CSC Financial Services - AG's Opinion

CSC Financial Services may be more familiar to readers under its former name, Continuum.

CSC ran a call centre which processed applications for prospective investors in unit trusts, on behalf of the unit trust provider. CSC argued that its services were exempt as they were negotiations in securities.

The AG has found that the services were not exempt, because they did not involve a change in the legal position. Furthermore, when CSC provided information it could not negotiate with or give advice to those asking for information, and was therefore not able to shape the exempt activity.

It remains to be seen whether the ECJ's final decision will follow the Advocate General's recommendations in this case.

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