



VAT & Customs News

EDITORIAL

The economic crisis is still hitting countries around the world and especially EU. To face the crisis, several countries adopted proposals for new economic tax measures including increases of their VAT rates.

Greece did so in emergency on March 15th 2010 with an increase from 19% to 21%. Portugal announced an increase from 20% to 21%. The UK decided also an increase of the standard rate from 17.5% to 20% with effect on January 4th, 2011 .

The difficulties encountered by those European countries are reflected by a slowing down of the procedure of VAT refund. Therefore, the Greek Ministry of Economy announced few months ago a suspension of all claims for VAT refund. Furthermore we have noticed almost systematic full or part denials of reimbursement applications in certain countries.

We guess that the countries adopting this method strive to reduce their public expenses in becoming harder to please in the procedure of VAT refund.

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2009 Foreign VAT Refunds : Postponed ?

On July 15th, the EU Commission proposed to postpone the deadline for the submission of VAT refund claims via the new electronic web procedure instituted by Directive 2008/9/EC from September 30, 2010 to March 31, 2011.

In its arguments the Commission highlights late openings of some web portals and various technical problems with the operability and access to certain portals. Such delays are considered restricting to the fundamental right of VAT deduction as tax payers are losing time to learn how to run the portals and may face compatibility issues or even bugs and overloading.

To date, neither the EU Parliament, nor the EU Council have validated this proposal and this should be voted on around 22nd of September.

Considering the risk that this proposal is not accepted on time or even not accepted at all by the Council because of the application of the unanimity voting rule to tax questions, LowendalMasai reasserts that taxpayers should take all necessary measures in order to meet the September deadline so as to avoid the legal uncertainty surrounding the discussions of this proposal and that may follow the adoption of this measure.

Permanent establishment : which VAT refund procedure to choose ?

Which establishment benefits from the supply ?



Non EU Business with a PE in EU : 8th or 13th directive procedure ?



The new definition of the place of taxation of supplies of services defined in article 44 of Directive 2006/112/EC has led all VAT specialists to consider the questions of qualification of permanent establishments in a more detailed manner. The main query has now become which establishment is the effective beneficiary of the supply, and which establishment has the capacity to use the services supplied. While dealing with the same legal entity, VAT matters have led to consider each establishment separately, just as if they were different bodies for tax matters. The same considerations arise for VAT refund procedures, and discrepancies between Member States' interpretations are observed.

Whereas VAT refund claims have become electronically for EU established taxpayers (Directive 2008/9/EC), paper based procedure defined by the Directive 86/560/EEC (13th Directive) remains for non EU based taxpayers. Choosing the right procedure is therefore a key issue so as not to lose the right to recover VAT or be out of the time limits.

What happens then when an EU based company has a non-EU establishment purchasing goods or services as the effective beneficiary? Should that establishment submit a paper VAT refund claim or should we consider that the establishment belongs to a single legal entity that is established in the EU and who should therefore submit an electronic claim?

The question is not clearly answered yet. The majority of the member states questioned on this matter considers that the legal personality should be overtaken to consider the establishments separately as an independent tax body purchasing goods and services independently. Accordingly, in our example, the non-EU establishment should submit a paper refund claim for non-EU taxpayers (*according to the 13th Directive*).

Other Member States adopted a more literal interpretation of article 171, 2. of Directive 2006/112/EC that simply refers to "taxable persons who are not established within the territory of the Community". In our example, no consideration should be paid to the fact that the non-EU establishment is effectively purchasing the goods or services but only to the fact that the legal entity has an establishment within the EU. This very pragmatic interpretation has also been confirmed by the ECJ (C-244/08, Commission vs Italy) who very clearly stated that only the existence of an establishment must be considered, the purchase having been made by an establishment or another having no consequence.

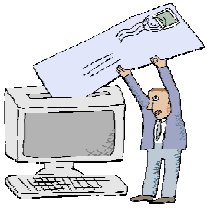
This simple example shows that taxpayers seeking for refund of their input VAT within the EU while having establishments inside and outside the EU are facing a real challenge in determining the right procedure to follow. Leading to rejections of refund claims, this situation challenges the application of the principle of neutrality and represents a barrier for the international trade considering the distortions of competition it leads to and the tax complexity for non-EU businesses.

This shows that there is still a real need for clarification and harmonisation on the use of the notion of permanent establishment. The VAT reasoning may also lack consistence when comparing the rules determining the place of taxation of service where we have to consider the effective beneficiary, and the rules determining the applicable VAT refund procedure where ECJ and some Member States consider entities as one single legal person without regards to their establishments' activity.

Additionally, we may raise similar queries on the discrepancies between direct and indirect approaches of permanent establishments. Indeed, to the differences already observed between OECD and national interpretations under direct tax definitions, companies also need to broaden their analysis to VAT qualifications of permanent establishment that focus on the independent and effective practice of a local business.

We advise that all taxpayers established both inside and outside the European Union should anticipate this issue by considering very carefully the local interpretations given by Member States. The rejection of a VAT refund claim can always be corrected by the submission of another VAT refund claim under the procedure required by the local administration if it is done within the legal procedures.

A larger implementation of the e-invoicing



On July 13, 2010 the Council formally adopted the new Invoicing Directive that has to be transposed by January 1, 2013. The main goals pursued are the simplification and the harmonization of the e-invoicing rules : paper invoices and e-invoices will have the same value. There will be two e-invoicing requirements to comply with: the agreement of the recipient to use e-invoicing and the guarantee by the seller of the authenticity, integrity and legibility of e-invoices. The new Directive only provides two technological means: the advanced electronic signatures or the EDI. Furthermore, Member States (MS) have the option to require the storage of invoices in their original form.

The changes give a large liberty to MS to act in their own way. Indeed, each MS has the option to have its own methods for the implementation of e-invoicing which are in contradiction with a standardised e-invoicing system. The application of the new Directive may be a great challenge for the businesses in order to comply with the rules adopted.

High consequences in case of failed triangular trades



In two recent ECJ cases, C-536/08 and C-539/08, a supply chain with 3 persons failed to be qualified as simplified triangular trade ruled by art 141 a-e EC VAT Directive and where input VAT on an intra-community acquisition became non-deductible. The ECJ reminds the general conditions, where the middleman must use a VAT number different from the countries of dispatch and destination. The final recipient has to be VAT registered in the country of arrival.

If the final customer does not comply with its registration duty in the MS of arrival, the middleman is considered as performing deemed intra-EU acquisitions in his country of registration. This is sanctioned by the exclusion of the VAT deduction right. The middleman bears the liability for negligence or non-compliance of his customer. Furthermore, if the country of arrival does not recognise a retrospective VAT registration of the middleman, the latter faces a great issue as he has no secondary possibility to correct his reporting duties and then for cannot cancel the self-assessment. Triangular trade should be properly set-up and checked on a regular basis.

TIME LIMIT FOR VAT RIGHT OF DEDUCTION — CHART (Sept.2010)

This chart shows by country the time limit to deduct VAT within the “6th directive” (i.e. 3y = 3 years). The right of deduction arises when the input tax is due for payment by the supplier. The time limit expires either the 31st of December following Xth year or the anniversary date of the tax point (*). The regulation depends on each European country rules.

The time limit in EU to deduct VAT can vary from 1 year in Bulgaria to 6 years in Sweden. NB : those time limits don't concern 8th and 13th directive for which deadlines are shorter.



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CUSTOMS

Centralised Clearance : public consultation

Since the Modernised Customs Code adopted in April 2008 favours the dissociation of the place where the declaration is lodged from the place where the goods are physically located, a reflection has to be made upon the implementation of what is called the "centralised customs clearance" in terms of declaration filling or submission of documents notably. But definitively, the main angle of reflection must concern import VAT within this new frame. In this respect, the EU Commission has launched this summer a public consultation (opened until 31 October 2010) in order to prepare a legislation proposal upon the simplification of import VAT collection. Of course, the working paper provides no solution. Nevertheless, the working paper raises important questions to be answered in order to guarantee the efficiency of centralised clearance, among which, paradoxically, the choice of the model of assessment and payment: centralised or decentralised? In other words, should the member state of authorisation transfer the import VAT information to the Member state in which goods are physically located? And which administration should collect import VAT (Customs or Tax administration)?

CUSTOMS

Simplified procedure : matching AEO Criteria

Following to Regulation n° 1192/2008 on 17 November 2008, amending certain implementation provisions of the Customs Code, French customs published a note in July aiming to review simplified procedures and align the conditions under which they can be granted on the Authorised Economic Operator, AEO Certificate criteria (although being AEO certified is not a condition in itself). This regulation therefore imposes a very high standard of compliance to companies that foresee to apply for accelerated procedures. The question is how small and middle companies, which do not plan to get the AEO Certificate, can manage with this obligation and benefit from customs advantages? Obviously the trend of EU Customs is to push companies of all kind to get themselves into the AEO program. Undoubtedly, lengths in the processing of application forms will occur from the implementation of this provision as all internal departments (Accounting, Logistics, Legal, Commercial, etc.) will have to be involved in this effort.

VAT CHART (September 2010) - Normal VAT rate applicable in EU

(* New VAT rates from 1st of July 2010)

