UNICE
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VAT - THE PLACE OF SUPPLY OF SERVICES

CONSULTATION PAPER OF THE EUROPEAN COMMISSION/TAXUD C3/MAY 200

UNICE COMMENTS

Introduction

UNICE welcomes the Consultation paper of the European Commission on VAT and the Place of Supply of Services. The place of supply of services is an important issue for enterprises in and outside the EU. The issue of the current legislation is that the main rule for determining the place of supply (the place where the supplier has established his business or has a fixed establishment from which the service is supplied) has many exceptions that are often interpreted in different ways. Different interpretation can lead to non or double taxation.

Furthermore, the globalisation of the market and the growth of the cross border activities increase the amount of cross border supply of services. As a consequence issues like the refund of foreign VAT and/or foreign VAT registrations increasingly occur.

At present, where VAT is charged on cross-border supplies, it is frequently regarded as part of the cost rather than as a refundable tax. This is because of uncertainty over whether and/or when the refund will be received, which arises from the failure of some Member States to process claims correctly.

UNICE is of the opinion that for cross border supplies to taxable persons the extended use/application of a reverse charge mechanism solves a lot of VAT issues and improves the operation of both the internal and external markets.

The general rule: the place where the taxable person is established

In the Consultation paper of the European Commission the general rule with respect to the place of supply of services to taxable persons is where the customer (i.e., the taxable person) is established. In the situation where supplier and customer are both established in the same Member State, local VAT will be applicable. In the case where supplier and customer are not established in the same Member State, the reverse charge mechanism will be applicable.

UNICE agrees with the Commission that with this approach issues like bundling of tangibles and or intangibles, non or double taxation, VAT registrations in other Member States, the refund of foreign VAT via the 8th and 13th Directive etc. are solved. The issues related to the 8th Directive can be solved via (1) the refund via the domestic VAT return or (2) adjustment of the place of supply.

Union of Industrial and Employers' Confederations of Europe – Union des Confédérations de l'Industrie et des Employeurs d'Europe
Rue Joseph II 40/Bte 4 - B-1000 Brussels - VAT BE 536.059.612 - Tel. +32(0)2 237.65.11 - Fax +32(0)2 231.14.45 - E-mail: main@unice.be - Website: //www.unice.org

The reverse charge mechanism: VAT id. nrs. and VIES

As mentioned before, UNICE is in favour of an extended use/application of the reverse charge mechanism for cross border supplies.

If supplier and customer are not established in the same Member State and the supplier wants to issue an invoice without VAT, the supplier should obtain reasonable assurance that at the time of the supply of the service the customer was a taxable person.

UNICE is of the opinion that the use of verified foreign VAT id. nr. (valid at the moment of the supply of services) is sufficient assurance that the customer at the time of the supply was a taxable person, and that the supply could safely be zero-rated . This implies also that with this assurance the supplier should be safeguarded from any VAT assessment if at any moment later on it becomes clear that the customer did not use the reverse charge mechanism and/or the customer purchased the service in its capacity of a private person or non-taxable person. The presence of a verified VAT id. nr. (like the current system for article 9-2-e) implies that one should be able to rely on VIES (system as well as content). This implies that VIES should be improved in amongst others the following areas:

- Updating (non active VAT id. numbers)
- The recognition as valid and legal proof for zero rating
- Search functions (identification information, date of start of registration, date of start of business, etc.)

If the tax authorities consider that additional information is needed, the VIES system must be upgraded to provide it.

UNICE acknowledges that there should be balance between the control needs for administrations and the administrative obligations for traders. However, UNICE questions whether the introduction of a new reporting obligation would be justified. UNICE is of the opinion that also current experiences and the actual threat of revenue loss for services should be taken in account. E.g. the application of the current article 9-2-e within the EU. Furthermore the experiences of the mandatory use of the reverse charge mechanism in Netherlands for (1) all non-resident suppliers and (2) resident suppliers in the clothing and building industry to avoid VAT fraud.

The exclusions to the general rule

In the Consultation paper of the European Commission it is mentioned that it would still be necessary to utilise certain exclusions to this general rule for both administrative and policy reasons. The following services are mentioned:

- Services connected with immovable property
- Passenger transport
- Cultural, artistic, sporting, entertainment or similar services
- Services physically carried out on movable property (excluding inward/outward processing)
- Services that are tangible in nature

UNICE understands that the third exclusion identified in the Consultation paper is not intended to cover services relating to the organisation of events such as exhibitions, conferences and meetings or ancillary services. If correct, this would be a welcome change. The treatment of these services under the existing rules imposes unreasonable compliance burdens on many businesses by requiring them to register in each Member State where the services are physically carried out, even where they relate only to a single

event. It is often necessary for the supplier to appoint an agent to deal with VAT matters in each country where the services are performed, thereby incurring additional costs. Substantial delays are frequently experienced in obtaining recovery of input VAT from the local tax authorities in these circumstances.

Clear detailed guidance is needed on the definition of the excluded services, not just for businesses but also for the tax authorities, to ensure that there is consistent interpretation of the rules. Recent experience of inconsistent decisions on the correct treatment of advertising highlights the need for this. Exclusions should be kept to the minimum necessary for the protection of revenue if the proposal is to achieve positive benefits.

UNICE recognises that services of tangible nature (restaurants, bars, cinema's, barbershop etc.) should be subject to VAT where the supplier is established. However, UNICE would like to raise the question why a (1) services connected with immovable property, (2) cultural, artistic, sporting, entertainment or similar services and (3) services physically carried out on movable property (excluding inward/outward processing) should be excluded from the general rule.

Referring to the exception of services carried out on movable property as proposed in the Consultation Paper, UNICE would like to remark that UNICE does not see why services physically carried out on movable goods should be treated differently from services physically carried out to moveable goods which fall under inward and outward process. UNICE questions whether the movement of goods justifies this different approach.

One has bear in mind that VAT is a consumption tax and in principle is forwarded to the end consumer (the private person). An important element of the VAT system is that a taxable person is in principle allowed to offset all input VAT incurred on expenses and investments against output VAT. Therefore the conclusion is that as long as supplies are made between taxable persons, the reverse charge can be applied in any country, e.g. the country where the customer is established. Article 21 should be amended to require use of the reverse charge where the place of supply is the same as the customer's location. Only in the situation where the customer (i.e. the taxable person) is not entitled to credit all input VAT, one could argue whether a part of the VAT should be allocated to the Member State in which "actual consumption" has taken place.

So the question is whether the allocation of VAT should be handled solely via the place of supply rules or whether a reverse charge mechanism should be combined with an allocation mechanism.

Fixed establishment

In the Consultation paper of the European Commission the question is raised whether "fixed establishment" be defined in article 9 of the Sixth Directive. UNICE believes that "fixed establishment" in principle already has been defined by the ECJ. Therefore UNICE questions whether a definition in article 9 is worthwhile. However, there are examples in some Member States of a move by the tax authorities to claim that the presence of equipment alone constitutes a fixed establishment. UNICE is of the opinion that the inconsistent treatment by different Member States should be coordinated/harmonised.

UNICE would support the introduction of criteria to determine which establishment actually makes or receives a supply, and a default rule, where the taxable person has more than one establishment, provided these do not override contractual arrangements between unconnected parties.

The issue of cross-border supplies within the same legal entity should be considered separately in consultation with all the affected business sectors, including the financial services sector.

Questions for consideration by Interested Parties

The European Commission raises questions in its Consultation Paper. Summarizing the above mentioned, UNICE would like to answer these questions as follows.

1. UNICE endorses the idea of shifting the place of supply to the place where customer (i.e. taxable person) is established. This rule should be the main rule. Exceptions should be limited to supplies of a tangible nature, such as restaurants. etc.

2. UNICE is of the opinion that "fixed establishment" is already defined by the ECJ. UNICE questions whether an additional definition in the Sixth Directive is necessary. Inconsistent treatment by different Member States should be coordinated/harmonised.

3. UNICE acknowledges that there should be balance between the control needs for administrations and the administrative obligations for traders. However, UNICE questions whether the introduction of a new reporting obligation would be justified.

UNICE is of the opinion that the use of verified foreign VAT id. nr. (valid at the moment of the supply of services) is sufficient assurance that the customer at the time of the supply was a taxable person, and that the supply could safely be zero-rated . This implies also that with this assurance the supplier should be safeguarded from any VAT assessment if at any moment later on it becomes clear that the customer did not use the reverse charge mechanism and/or the customer purchased the service in its capacity of a private person or non-taxable person

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