BUSINESSEUROPE

POSITION PAPER

17 March 2009

BUSINESSEUROPE POSITION ON THE PROPOSAL FOR A COUNCIL DIRECTIVE AMENDING DIRECTIVE 2006/112/EC ON THE COMMON SYSTEM OF VALUE ADDED TAX REGARDS TAX EVASION LINKED TO IMPORT AND OTHER CROSS- BORDER TRANSACTIONS.

Executive Summary

BUSINESSEUROPE fully endorses the fight against VAT fraud. VAT fraud, and any other kind of fraud, is distortive for competition and a threat for the internal market.

BUSINESSEUROPE strongly encourages the Commission and Member State to continue to enhance the exchange of information between Member States, to set up an efficient legal framework for cross-border investigations (Eurofisc) and to develop the use of appropriate risk management tools to combat VAT fraud.

In the context of the gravest economic crisis since Word War II and the objective to reduce administrative costs by 25% until 2010, we warn from further increasing VAT-related risks and reporting obligations for honest business.

The proposal for introducing EU-wide joint and several liability rules for intra-Community acquisition is not supported by BUSINESSEUROPE:

- It would create new obstacles to the establishment of the Internal Market by significantly enhancing the VAT-related risks for cross-border supplies.
- As long as there is no harmonized set up of VAT rules in Member States, there will be reporting mistakes. The assumption of guilt contained in the proposal is shifting the burden of proof to the supplier and could lead to significant litigation costs.
- If the aim is to improve the quality of reporting, other measures, such as penalties, could be used. The use of joint and several liability is not proportionate to this aim.

With regard to the new rules for VAT-exemption at importation, BUSINESSEUROPE recognizes the need for correct and timely information to secure the proper use of import exemptions and to avoid abuse.

However, businesses see a need for developing guidelines as to the documentation needed to prove the transport/dispatch of goods to another Member State.

THE CONFEDERATION OF EUROPEAN BUSINESS a.i.s.b.l.

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

Introduction

Recently the Commission has published a proposal for a Council Directive amending Directive 2006/112/ EC on the common system of value added tax (hereafter: the VAT directive) as regards tax evasion linked to import and other cross- border transactions (COM(2008)805 final of 1 December 2008).

This directive proposes to change amongst other article 143 and article 205 of the VAT directive. The change in article 143 of the VAT directive is to clarify the conditions for an already existing exemption at importation. The change in article 205 of the VAT directive relates to the introduction of joint and several liability in case of cross border transactions within the EU.

(1) VAT exemption at importation

According to article 143 of the VAT directive an import into the EU is exempt from VAT in case the import is followed by an intra-Community supply in the Member State of importation.

The Commission proposes that at the time of importation the importer has to indicate information like (1) the VAT identification number of the fiscal representative in the Member State of importation, (2) the VAT identification number of the customer to whom the goods are supplied in another Member State (or his own VAT identification in the Member State of arrival of the goods), and (3) the proof that the goods will be transported or dispatched to another Member State.

The reason for this change is to make sure that this scheme is not abused to start the carrousel fraud. BUSINESSEUROPE recognizes the need for correct and timely information to secure the proper use of import exemptions and to avoid abuse.

However, BUSINESSEUROPE would like to stress that the information to be provided should not be too burdensome. With regard to the proof that the goods will be transported or dispatched to another Member State, the current wording implies that documentation has to be presented (and send) prior to the shipment of the goods.

BUSINESSEUROPE would like the Commission to develop guidelines as to the documentation needed. These guidelines should build on information already available though the customs procedures (including information already available to the authorities in electronic form) and limit the amount of additional documentation to a minimum. Thus businesses could streamline documentation across the EU, which would improve the flow of documents.

(2) Joint and several liability for intra-Community supplies

According to article 205 in the current VAT Directive, Member State have the option to hold a “person other than the person liable for payment of VAT” jointly and severally liable on their territory. The Commission proposes to extend the scope of joint and several liability to cross border transactions. Accordingly, a person making an intra-Community supply of goods can be held jointly and several liable for the payment of

the VAT due in case he has not (fully) reported the intra community supply in its listing (or has not listed at all).

The joint and several liability is not applicable in case (1) the customer, for the period during which the tax became chargeable on the transaction concerned, has submitted the VAT returning including all the information of the transaction or (2) the supplier " can duly justify for the satisfaction of the competent authorities his shortcoming".

BUSINESSEUROPE would like to emphasise that the domestic concept of joint and several liability has already caused high legal uncertainty, as various ECJ cases on this topic clearly demonstrate. The translation of this concept into a cross-border context linked to reporting of intra-Community supplies in EC sales lists is not an easy undertaking and might violate constitutional law. The question arises how this payment must be categorised, as VAT or as penalty?

BUSINESSEUROPE also notices that the liability is merely based upon the fact that a transaction is not (fully) reported. There is no link at all to VAT fraud and/or the loss of VAT revenue. The current proposal implies that a bona fide supplier can be held liable upon formal mistake.[1] This puts at stake the neutrality of the VAT system. Eg. in case a cross-border transaction is not reported/not reported correctly for VAT by both the supplier and the business customer and the business customer does charge, collect and pay VAT upon a VAT return on the subsequent domestic supply of this good, there is no VAT fraud nor loss of VAT revenue. However according to the proposed art 205 the supplier will be held liable.

Furthermore, the burden of proof is shifted from the tax authority to the supplier in a way that creates by itself legal uncertainty:

- It is not clear whether the competent authority is situated in the Member State of supply (due to non-compliance with national reporting obligations) or the Member State of delivery (where VAT is due in case of a subsequent domestic supply).
- Whether a supplier is liable or not is completely subjective. This can become an administrative nightmare for both business and administration and involve considerable judicial costs.

There is also an issue with the protection of confidentiality as the Member State where VAT is due will need to disclose details of the "offending" customer to the supplier.

Finally, it is not clear how the legal protection works. In case a person is held jointly and several liable for payment of VAT, what kind of appeal is possible? Where should the appeal be made?

BUSINESSEUROPE's concludes that the current proposal is too broad and not precise enough. Liability should not be based upon a certain risk but upon guilt. Authorities have to prove that the mistake was done with a fraudulent intention in the first place.

BUSINESSEUROPE would like to refer to the Fiscalis Seminar of Friday, 23 January 2009 held in Amsterdam. The discussion between Commission, national tax

[1] See Annex for a list of possibilities of formal mistakes

administrations and companies showed that this article is interpreted in different ways. Adjustment and clarification is therefore needed.

Conclusion

BUSINESSEUROPE fully endorses the fight against VAT fraud, which creates unacceptable distortions of competition.

Rather than expanding the jurisdictional power of Member States in recovering VAT revenue lost in their territory, more emphasis should be placed on administrative cooperation and enhancing the exchange and the quality of information. As noted by the European Court of Auditors in 2008, “half of the information exchange upon request [between Member States] does not take place within the timeframe required” (p.8).

The new rules on cross-border joint and several liability might effectively represent a new way to raise revenue for governments and could further reduce incentives for cross-border cooperation. This is not the spirit of an Internal Market.

The scope is too broad, eg even without loss of VAT, suppliers can be held liable. Furthermore it is unclear how and where appeal can be made. As a result, companies in Member States with a large domestic market will remain focused on this market to reduce their risk exposure.

VAT legislation should not be a trade stopper. Therefore, BUSINESSEUROPE strongly urges the Commission, the European Parliament and the Council to further study the proposed measure and to undertake an impact assessment.

BUSINESSEUROPE

POSITION PAPER

23 March 2009

BUSINESSEUROPE POSITION ON THE PROPOSAL FOR A COUNCIL DIRECTIVE AMENDING DIRECTIVE 2006/112/EC ON THE COMMON SYSTEM OF VALUE ADDED TAX REGARDS TAX EVASION LINKED TO IMPORT AND OTHER CROSS- BORDER TRANSACTIONS.

Annex:

Examples of formal mistakes in reporting an intra-Community supply

1. Interpretation differences between member states as to the qualification of a transaction as a supply of goods or of a service

If the member state of the supplier qualifies a transaction as a service taxable in that member state, the supplier will declare it as such in his recapitulative statement (that he will be obliged to make as of 01.01.2010). As a result the customer will not have to declare an acquisition of goods in his member state.

If the member state of the customer qualifies the transaction as a supply of goods for which the customer has to declare an acquisition of goods they might hold the supplier liable for the unpaid VAT on the intercommunity acquisition of goods. According to the member state of the customer, the supplier has made a mistake in his recapitulative statement (although he respected the interpretation of his own member state) and the customer did not declare an acquisition.

The supplier will have to explain to the member state of his customer that he respected the interpretation of his own member state and can't be held liable. It is very unlikely that the member state of the customer will be prepared to back down since this will mean giving up its own qualification of a transaction.

This legal uncertainty and risk of double taxation is unacceptable for honest businesses.

2. Bankruptcy of customer and seizure of goods following intra-Community dispatching by haulier before arrival at customer

Goods are sold to a "known and trusted" customer in a far flung part of the EU on an Ex-Works basis. Due to system problems, the issue of the invoice is delayed until more than 15 days after the shipment. The invoice is issued in the VAT period following the month of despatch (An issue for those companies on monthly returns).

The seller's VAT declaration is made based on the invoice date (few systems can identify delivery dates for reporting purposes). The declaration is made on the VAT return following the true tax point and also declared on that second month's VIES.

THE CONFEDERATION OF EUROPEAN BUSINESS a.i.s.b.l.

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

The customer collapses due to financial problems and the goods are seized by the haulier in lieu of payment. The customer cannot accept / pay the invoice given that he did not receive the goods. No entry is made in his Intrastat or VAT return

Would the seller be faced with a demand for payment of the VAT due in the customer's country?

There are probably several other options which can be imagined - you might even find that the customer had merely overlooked the invoice when preparing his intra-EU declarations but the supplier would still be liable, even if the customer had then gone on to account correctly for the VAT on the sale.

What is objectionable is that these proposals seek to penalise the supplier for a customer's failings – will all of our EU suppliers be seeking to audit our accounting systems in order to protect themselves?

3. Definition of "installation or assembly"

The principle is that, in the case of goods being dispatched or transported, the place of supply is deemed to be the place where the dispatch or transport begins. (art. 31 VAT Directive)

However, where the goods dispatched or transported are installed or assembled by or on behalf of the supplier, the place of supply shall be deemed to be the place where the goods are installed or assembled. (art. 36 VAT Directive)

The Directive does not provide for a definition of "installation or assembly" so this is subject to interpretation differences between member states.

Example:

Company A in Member State X supplying goods to a customer B in Member State Y.

In correspondence to the administrative position of Member State A, supplier X considers the supply to be a supply of goods with installation or assembly and thus taxable in member state Y.

A will not declare an intra-community supply of goods and B will not declare an intra-community acquisition.

What if the tax administration of Member State Y rejects the qualification by saying there was no installation or assembly? Will they be able to hold A liable for the VAT due by B although VAT was already paid by A?

a. Definition of "installation or assembly" and "construction services"

It is not always easy to make a difference between "installation or assembly" and "construction services".

If one transaction is qualified differently in the two member states concerned this might lead to joint and several liability although both supplier and customer acted in good faith.

4. Article 40 and article 41 of the VAT directive.

According to article 40 the place of an intra community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods ends. However, according to article 41 VAT can also be due in Member State which issued the VAT identification number under which the acquisition has been made. In case VAT is due in two Member States, for sure in one of the Member States no acquisition has been reported. In case the supplier has made a mistake, the supplier can be held liable again.

5. Problems due to lack of information

a. Proof of intra-Community supply of goods

A supplier A established in Belgium makes a supply of goods to a customer B in France. This supply will normally be considered as an exempt intercommunity supply of goods and the supplier has to declare it in his recapitulative statement.

Imagine however that the goods will be transported by the customer. In this case it is often difficult for the supplier to deliver the proof that the goods have effectively been transported to another member state and that the supply is VAT exempt. In the absence of this proof, the transaction is considered to be a domestic transaction and Belgian VAT is due.
In case of doubt, the member states advise the suppliers to charge VAT. (The customer can than try to get a refund if he delivers the proof)

Consequence: the supplier will not declare the transaction in his recapitulative statement since it is considered as a domestic supply.

If the customer does not declare the acquisition of goods in France, then France might hold the Belgian supplier liable for the revenue loss in France. This would be unacceptable since A acted in good faith and only applied the recommendations of the member states themselves.

b. Exceeding of threshold for exemption of IC acquisition of goods

A non-taxable legal person, a taxable person only carrying out activities in respect of which VAT is not deductible or a taxable person subject to the flat-rate scheme for agricultural, forestry or fishery activities buys goods from a supplier established in another Member State.

What if the customer does not mention to the supplier the fact that he exceeded the threshold and that his IC acquisition is subject to VAT?

The supplier acting in good faith will charge VAT of the Member State of departure of the goods and will not declare the transaction in his recapitulative statement.

Will the supplier will be held jointly and severally liable for the VAT due by his customer although he acted in good faith?

6. Deemed intra-Community supplies and acquisitions

As the proposal is currently formulated it also applies to the transfer by a taxable person of goods forming part of his business assets to another member state. These transfers are treated as an (exempt) intra-Community supply of goods (that has to be declared in the recapitulative statement) followed by a (taxable) intra-Community acquisition (that has to be declared in the VAT return).

This makes no sense since the person supplying and acquiring are one and the same. A taxable person could be held jointly and severally liable for his own VAT debt.

This might not only lead to absurd situations under the actual transfer regime (art. 17, 1. Recast Directive) but also, due to interpretation differences, under the exceptions to the transfer regime (non-transfers) (article 17, 2. Recast Directive).

Example Toll manufacturing: not all member states require the goods to return to the member state from which they were initially dispatched or transported.

7. *Interpretation differences between member states as to the qualification of the zero-rated intra-community supply in chain transactions (the goods are directly shipped from the first party to the last party in the chain)*

There are different interpretations on which transaction in the chain is the intra-community transaction. In some Member States this is determined by which party is in charge for the transport.

This will lead to differences in reporting and the parties involved will have to explain these towards their tax authorities.

8. *Reporting errors through bad functioning of the VIES system*

Member States have e.g. a different approach on uploading and withdrawing VAT ID-Nr.´s from the VIES system, which can lead to reporting errors for the supplier. This will lead to reporting errors and the supplier will have to make evidence towards the local tax authorities that it was not his fault.

9. *Day to day mistakes that can happen*

VAT is a transaction-based tax with high volumes of transactions going through the system. It can happen that a transaction is inadvertently not included in the relevant EC Sales List reporting due to a simple human mistake which can happen on a day to day basis (e.g. change in personel, preparer is on holiday and his replacement leaves a transaction out).