Changes to EU VAT place of supply rules coming in 2015

The EU VAT place of supply rules for business-to-consumer (B2C) supplies of digital services will change significantly on 1 January 2015, as will the rules governing where VAT is collected and paid for such services. The revised rules specifically target the VAT treatment of supplies where the consumer is based in a different EU member state than the member state in which the supplier is established. The place of taxation will be determined by the location of the consumer, and the digital supplies will be taxed at the VAT rate applicable in the member state of the consumer. The changes aim to eliminate certain inconsistencies in the current VAT rules and bring the taxation of supplies made by EU businesses in line with the VAT treatment applicable for non-EU businesses. The 2015 changes do not affect business-to-business (B2B) supplies.

In conjunction with the changes to the place of supply rules, the “mini one-stop shop” (MOSS) VAT registration is being introduced, which will allow both EU and non-EU businesses to account for the different EU VAT rates through a single VAT registration, rather than having up to 28 VAT registrations in different member states.

The new rules represent the final phase of the EU VAT package that introduced changes to the place of supply rules in 2010 and has made further modifications over the past four years. The overall objective of the VAT package was to tax supplies of services in the place where they are consumed, i.e. with a focus on where the customer is receiving the supply, rather than where the supplier is located. EU member states are required to implement this final piece of the VAT package into their domestic legislation before 1 January 2015.

Recent media reports have focused on situations where it may seem that tax in general (not only VAT) is not being accounted for in the right place (e.g. where there are inconsistencies in taxation based on where the supplier is established). For EU VAT and, more generally, for certain other VAT systems, there has been an increasing shift in moving the country of taxation from the place where the supplier is established to the place where the goods or services are consumed – changes that will apply in the EU from 1 January 2015 are the final step in achieving this shift for certain B2C digital sales.

Currently, an EU supplier of music downloads can legitimately choose to establish its business in Luxembourg (which has the lowest VAT rate in the EU) and account for VAT at the standard rate of 15% (proposed to be increased to 17% in 2015) on its supplies to private consumers in the EU, regardless of where in the EU those consumers are located. If the same business were established in Denmark or the UK, it would account for VAT at a 25% or a 20% rate, respectively, on the same supplies. This is a significant discrepancy that may encourage VAT rate shopping for both suppliers and consumers. Moreover, this option is not available to non-EU suppliers of the same services to EU consumers – instead, their supplies already are taxed based on where the consumer is located.

Background

In the EU, the place of supply rules govern where a particular supply takes place for VAT purposes and, therefore, determine which member state and which party must collect the VAT due on the supply.
As from 1 January 2015, EU businesses supplying digital services, i.e. broadcasting, telecommunications and electronic services (e.g. fixed and mobile telephone and internet services, television and radio programs, video on demand, music downloads, etc.), to nonbusiness consumers will be taxed in the place where the customer usually resides or is established. This is a significant departure from the current rules where such supplies are subject to VAT in the place where the supplier “belongs,” i.e. is established.

The new rules will have ramifications for all EU businesses supplying broadcasting, telecommunications and electronic services to EU consumers (i.e. to all nonbusiness customers, such as private individuals and organizations that are not engaged in business). Suppliers of such services will have to determine where their customers are established or usually reside and will have to account for VAT at the applicable rate in that member state, regardless of where the supplier itself is established or registered for VAT. Therefore, suppliers may need to register for VAT in all EU member states where they have customers (but see MOSS discussion below). No minimum thresholds will apply, so making supplies to just one customer in one member state will trigger a VAT registration requirement in that country. For example, an EU business supplying B2C downloads from its establishment in Luxembourg currently would account for Luxembourg VAT on its supplies to consumers located throughout the EU. From 2015, that same business will be required to account for VAT at the rates applicable in the 28 EU member states, based on where each customer usually resides or is established. Accordingly, the current VAT benefit for businesses supplying these services that are established in member states that enjoy a low VAT rate will be eliminated; the applicable VAT rate will depend, not on where the supplier is established, but rather on where its customer is located.

The following chart compares the current place of supply rules for B2C supplies with the rules that will apply as from 2015.

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<tr>
<th>Supply</th>
<th>Pre-2015 taxation</th>
<th>Post-2015 taxation</th>
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<tbody>
<tr>
<td>EU business to EU consumer</td>
<td>Where the supplier is established</td>
<td>Where the customer usually resides or is established**</td>
</tr>
<tr>
<td>EU business to non-EU consumer</td>
<td>Outside the scope of VAT</td>
<td>Outside the scope of VAT</td>
</tr>
<tr>
<td>Non-EU business to EU consumer</td>
<td>Where the customer belongs*</td>
<td>Where the customer belongs**</td>
</tr>
<tr>
<td>Non-EU business to non-EU consumer</td>
<td>Outside the scope of VAT</td>
<td>Outside the scope of VAT</td>
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*“Use and enjoyment” provisions may apply to supplies of broadcasting and telecommunications services (not electronic services), depending on the member state. This means that if services are effectively used and enjoyed within or outside the EU, the member state may elect to bring these supplies into or outside of (respectively) the scope of EU VAT through a use and enjoyment provision.
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** Again, use and enjoyment provisions may apply, depending on the member state. There may be additional complexities due to the interaction of the applicable presumptions for determining the customer’s location under the new rules and any applicable use and enjoyment provisions. In many cases, the applicable presumption of where the customer resides will be where the customer is using and enjoying the services. However, there will be complexities in some circumstances – for example, the presumption for SIM cards is that the customer resides in the location of the country code of the SIM card, but the country code also may be valid in areas outside the EU VAT territory (e.g. the Spain country code is valid in the Canary Islands).

**Pricing considerations:** The revised place of supply rules for B2C transactions have led many businesses to consider their pricing and margin strategy. Currently, an eBook retailing on a Luxembourg website for EUR 8.99 will include EUR 1.17 of Luxembourg VAT (at 15%) when sold to customers in the EU. Beginning in 2015, if a single pricing model is maintained (as seems likely to be the case on websites where supplies are priced in a single currency), the same sale made, for example, to a Swedish customer will include EUR 1.80 of VAT (at Sweden’s 25% standard rate). The changes have the potential to significantly affect the margins generated.

**Determining location of customers:** Clearly, one of the challenges for businesses supplying services subject to the new rules in 2015 and beyond will be how to accurately identify where their customer usually resides/is established so they can apply the correct VAT rate. In some cases, it may be possible for the tax authorities in two member states to consider that a supply is subject to VAT in their country. To address this issue, the implementing regulation sets out a number of rules for determining where the customer belongs for each type of supply, including presumptions that a supplier may make and how it may rebut those presumptions based on certain evidence. For example, electronic services supplied via a wi-fi hot spot will be subject to VAT based on where the wi-fi hot spot is located (i.e. the supplier may presume that its customer belongs in that location). However, this presumption can be rebutted if the supplier holds three pieces of alternative, noncontradictory evidence that indicate the customer belongs elsewhere. In these circumstances, three pieces of evidence could be the billing address, IP address and bank details.

**MOSS scheme**

As noted above, the VAT MOSS also comes into effect on 1 January 2015. The MOSS will allow taxable persons making B2C supplies of broadcasting, telecommunications and electronic services in EU member states in which they do not have an establishment to submit returns and pay VAT due through the web portal of one member state. Otherwise, due to the change in the place of supply rules for B2C supplies (i.e. taxation at the place of consumption), the business would be required to register and submit VAT returns in each member state in which it makes such supplies.

The MOSS is an optional regime, but once an election is made to register for the MOSS, the taxable person must apply it in all relevant member states. The MOSS will be available to EU businesses ("EU scheme") and non-EU businesses ("non-EU scheme"). The non-EU scheme is similar to the VAT on e-services (VOES) registration scheme that currently is available,
albeit with a broader scope in that it will apply to telecommunications and broadcasting services.

**Registration:** VAT MOSS registration, which is optional, is intended to simplify the administrative burden of accounting for VAT in each member state in which a supply is made.

A taxable person that opts to use MOSS can register from October 2014 (the exact date will depend on the country in which it has its business establishment or head office) and will be identified for MOSS purposes with the same VAT identification number that it uses for its domestic VAT returns. (A VAT group can be registered under MOSS as one taxable person.) A taxable person that is not established in the EU can choose any member state in which to register.

A taxable person, however, can only have one MOSS registration throughout the EU.

**MOSS returns:** A taxable person using the EU or non-EU scheme will be required to submit an electronic MOSS VAT return for each calendar quarter, which will have to include details of the supplies of telecommunications, broadcasting and electronic services to nontaxable persons in other member states. (If there have not been any supplies in a period, a nil return must be submitted.) The MOSS return and accompanying VAT payment will be filed in the business’ member state of “identification” (typically, the member state in which the business has its business establishment) within 20 days of the end of the period covered by the return; the return and the VAT payable will then be transmitted to the relevant member state of consumption via a secure communications network.

The MOSS VAT return must be filed in addition to the normal VAT return a business files with the member state in which it is established. While the aim of MOSS is to reduce administrative burdens for businesses making B2C supplies of digital services, MOSS does entail an additional administrative burden because the business will have to file an extra VAT return, and it will have to be able to separate within its accounting system the different types of supplies it makes. Nevertheless, the benefit of a single VAT registration in the EU, as opposed to up to 28 separate registrations, would seem to outweigh the burden of filing an additional VAT return.

Notably, if a business is established in a member state for VAT purposes, it must report B2C sales of broadcasting, telecommunications or electronically supplied services through a local VAT registration in that state, and not through a MOSS registration. Although the MOSS system does not permit recovery of any input tax (which must be recovered through a local VAT registration), this may not be an issue in many cases, as a business making supplies of only these types of services in a member state where it is not established would be unlikely to be incur local VAT in that country.

**Comments**

In the time remaining before 1 January 2015, there are a number of actions that affected businesses may take, including the following:
• Determine whether sales are impacted by the changes.
• Non-EU businesses making digital supplies to customers within the EU that currently are not VOES-registered should take steps to organize their VAT affairs in the EU and ensure they are fully compliant with the new rules.
• Evaluate the customer information that currently is collected to ensure that it is possible to determine where customers belong/where services are used and enjoyed (if applicable).
• Prepare accounting systems so that VAT can be accounted for directly and determine if pricing needs to vary depending on where the customer belongs or whether, for commercial reasons, the business wants to maintain a single price point across the EU and account for VAT from this VAT-inclusive amount.
• Determine whether MOSS or individual VAT registrations are preferable.
• Register for MOSS (if desired).

The 2015 changes will have a significant impact on affected businesses. However, they conform to a wider policy trend among tax authorities aimed at ensuring that tax revenues accrue to the jurisdiction in which goods or services are consumed. The exponential increase of supplies of e-services over the last two decades has been unprecedented, and has occurred over too short a time period for tax authorities to incrementally adjust legislation in response.

Although the principles underlying the changes are clear, the application of the correct rules in practice may well be more of a challenge for businesses. The introduction of the MOSS VAT registration to help simplify the VAT compliance process and ease the administrative burden on businesses is a practical and welcome step. If successful, this is an approach that also could benefit other business sectors – for example, online retailers making distance sales of goods (B2C supplies of delivered goods), where the retailer typically is required to register in a number of EU member states to account for local VAT on its supplies.

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