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I. Normativa

1. Real Decreto-ley 35/2020, de 22 de diciembre, de medidas urgentes de apoyo al sector turístico, la hostelería y el comercio y en materia tributaria.

Con fecha 23 de diciembre de 2020 se ha publicado en el Boletín Oficial del Estado el Real Decreto-ley 35/2020, de 22 de diciembre, de medidas urgentes de apoyo al sector turístico, la hostelería y el comercio y en materia tributaria, que entró en vigor el 24 de diciembre de 2020.

En relación con el Impuesto sobre el Valor Añadido las modificaciones realizadas son las siguientes:

A) Tipos impositivos:

Se establece, desde la entrada en vigor del Real Decreto-ley hasta el 31 de diciembre de 2022, la aplicación del tipo del cero por ciento a:

- las entregas, importaciones y adquisiciones intracomunitarias de productos sanitarios para diagnóstico in vitro del SARS-CoV-2 (kits de pruebas), que sean conformes con lo previsto en la normativa comunitaria relativa a los mismos.

- las entregas de vacunas contra el SARS-CoV-2, autorizadas por la Comisión Europea.

- las prestaciones de servicios de transporte, almacenamiento y distribución relacionados con las operaciones anteriores.

Estas operaciones se documentarán en factura como operaciones exentas. No obstante, la aplicación de un tipo impositivo del cero por ciento no determinará la limitación del derecho a la deducción del IVA soportado por el sujeto pasivo que realice la operación.

Por último, también se establece que el tipo del recargo de equivalencia aplicable, durante el ámbito temporal anterior, a las entregas de los bienes citados, será el cero por ciento.

B) Regímenes especiales:

- Los sujetos pasivos de IVA que desarrollen actividades empresariales o profesionales incluidas en el Anexo II de la Orden HAC/1164/2019, de 22 de noviembre, y estén acogidos al régimen especial simplificado de IVA, para el cálculo de la cuota anual del citado régimen especial en el año 2020, podrán reducir en un 20 por ciento el importe de las cuotas devengadas por operaciones corrientes correspondientes a tales actividades. Dicho porcentaje será de un 35 por ciento para determinadas actividades de comercio, hostelería y transporte.

- Los empresarios o profesionales citados en el párrafo anterior podrán reducir en un 20 o 35 por ciento los porcentajes señalados en el número 3 de las Instrucciones para la aplicación de los índices y módulos en el Impuesto sobre el Valor Añadido del anexo II de la Orden HAC/1155/2020, de 25 de noviembre, para el cálculo del ingreso a cuenta correspondiente a la primera cuota trimestral del ejercicio 2021.

- Se elimina la vinculación obligatoria que durante tres años se establece legalmente para la renuncia al método de estimación objetiva del Impuesto sobre la Renta de las Personas Físicas, del régimen simplificado y del régimen especial de la agricultura, ganadería y pesca del Impuesto sobre el Valor Añadido.

- En concreto, se establece que la renuncia a la aplicación del método de estimación objetiva para el ejercicio 2021, no impedirá volver a determinar con arreglo a dicho método el rendimiento de la actividad económica en 2022. Igualmente, para aquellos contribuyentes que renunciaron a dicho método en el ejercicio 2020, de forma tácita mediante la presentación del pago fraccionado correspondiente al primer trimestre del ejercicio, o con posterioridad, de forma expresa o tácita, se permite que puedan volver a aplicar el método de estimación objetiva en los ejercicios 2021 o 2022. Dicha renuncia, y la posterior revocación de la misma, tendrá los mismos efectos en los regímenes especiales simplificado y de la agricultura, ganadería y pesca del IVA.

- A los efectos del cálculo de la cuota devengada por operaciones corrientes del régimen simplificado del Impuesto sobre el Valor Añadido para el año 2020, conforme a los números 8 y 9 de las Instrucciones para la aplicación de los índices y módulos en el Impuesto sobre el Valor Añadido del anexo II de la Orden HAC/1164/2019, de 22 de noviembre, no se computarán, en ningún caso, como período en el que se hubiera ejercido la actividad, tanto los días en que estuvo declarado el estado de alarma en el primer semestre de 2020, como los días del segundo semestre de 2020 en los que, estando declarado o no el estado de alarma, el ejercicio efectivo de la actividad económica se hubiera visto suspendido como consecuencia de las medidas adoptadas por la autoridad competente para corregir la evolución de la situación epidemiológica derivada del SARS-CoV-2.

- Por último, como consecuencia de las modificaciones anteriores, se fija un nuevo plazo, desde el 24 de diciembre de 2020 hasta el 31 de enero de 2021, para presentar las renuncias o revocaciones a los regímenes especiales simplificado y de la agricultura, ganadería y pesca.

2. Ley 11/2020, de 30 de diciembre, de Presupuestos Generales del Estado para el año 2021.

Con fecha 31 de diciembre de 2020 se ha publicado en el Boletín Oficial del Estado la Ley 11/2020, de 30 de diciembre de Presupuestos Generales del Estado para el año 2021.

En relación con el Impuesto sobre el Valor Añadido, en los artículos 68, 69 y 70 de dicha Ley, se realizan las siguientes modificaciones en la Ley 37/1992, del IVA, que entrarán en vigor el día 1 de enero de 2021:

A) Lugar de realización: regla de cierre del uso efectivo.

Se modifica el artículo 70.Dos de la Ley del IVA para excluir de su aplicación a los servicios respectivos que, conforme a las reglas que resulten aplicables, se entiendan realizados en las Islas Canarias, Ceuta y Melilla, aunque su utilización o explotación efectiva se realice en el territorio de aplicación del IVA.

B) Tipos impositivos.

Se incrementa el tipo impositivo -del 10 al 21 por ciento- para las entregas, adquisiciones intracomunitarias e importaciones de las bebidas refrescantes, zumos y gaseosas con azúcares o edulcorantes añadidos.

Lo anterior implicará, además, que también se incremente el tipo impositivo -del 10 al 21 por ciento- para las entregas, adquisiciones intracomunitarias e importaciones de los productos susceptibles de ser utilizados habitual e idóneamente en la obtención de los bienes incluidos en el párrafo anterior, directamente o mezclados con otros.

Por otro lado, se mantiene el tipo impositivo reducido del 10 por ciento cuando el consumo de esas bebidas se produzca en el marco de las prestaciones de servicios de hostelería o de restaurantes.

C) Regímenes especiales.

Se contempla el mantenimiento para el año 2021 de los mismos límites o magnitudes, tanto de volumen de ingresos como de volumen de compras y servicios, que delimitan la aplicación del régimen especial simplificado y el régimen especial de la agricultura, ganadería y pesca en el IVA, al igual que en los ejercicios 2016, 2017, 2018, 2019 y 2020, es decir, dichos límites quedan fijados en 250.000 euros para 2021.

3. Orden HAC/1155/2020, de 25 de noviembre, por la que se desarrollan para el año 2021 el método de estimación objetiva del Impuesto sobre la Renta de las Personas Físicas y el régimen simplificado del Impuesto sobre el Valor Añadido.

Esta Orden, en lo relativo al IVA y respecto del año 2021, mantiene el mismo contenido, en cuanto al importe de los módulos y las instrucciones para su aplicación, que el previsto en la Orden HAC/1164/2019, de 22 de noviembre, por la que se desarrollan para el año 2020 el método de estimación objetiva del IRPF y el régimen simplificado del IVA.

4. Orden HAC/1274/2020, de 28 de diciembre, por la que se modifica la Orden EHA/3434/2007, de 23 de noviembre, por la que se aprueban los modelos 322 de autoliquidación mensual, modelo individual, y 353 de autoliquidación mensual, modelo agregado, y el modelo 039 de Comunicación de datos, correspondientes al Régimen especial del Grupo de Entidades en el Impuesto sobre el Valor Añadido, la Orden EHA/3786/2008, de 29 de diciembre, por la que se aprueba el modelo 303 Impuesto sobre el Valor Añadido, Autoliquidación y la Orden EHA/769/2010, de 18 de marzo, por la que se aprueba el modelo 349 de declaración recapitulativa de operaciones intracomunitarias.

Esta Orden realiza determinadas modificaciones, de carácter técnico, en las declaraciones-liquidaciones, modelos 303, 322 y 353, y en la declaración recapitulativa de operaciones intracomunitarias, modelo 349.

Dichas modificaciones serán aplicables por primera vez a las autoliquidaciones del IVA, modelos 303, 322 y 353, correspondientes a los periodos de liquidación que se inicien a partir del 1 de enero de 2021 y a las declaraciones recapitulativas de operaciones intracomunitarias, modelo 349, correspondientes a 2021, y podemos concretarlas de la siguiente forma:

A) Modelo 303. Autoliquidación.

- Se modifica el formato de las casillas del apartado «Identificación», transformando el diseño de cumplimentación de las mismas mediante dos casillas excluyentes en un diseño basado en una única casilla. Al mismo tiempo, se adapta la denominación de las casillas al nuevo diseño.

- En el apartado «Resultado», la casilla 67, que hasta ahora mostraba las cuotas pendientes de compensación aplicadas en la autoliquidación, se desglosa en tres nuevas casillas que facilitarán al contribuyente conocer los saldos de las cuotas a compensar aplicados y pendientes en cada período.

- Se da nueva denominación a la casilla 93 para que su contenido coincida con el de la casilla 59 de dicho modelo.

B) Modelo 322. Grupo de entidades. Modelo individual. Autoliquidación mensual.

- Se modifica el formato de las casillas del apartado «Identificación», transformando el diseño de cumplimentación de las mismas mediante dos casillas excluyentes en un diseño basado en una única casilla. Al mismo tiempo, se adapta la denominación de las casillas al nuevo diseño.

- Se da nueva denominación a la casilla 93 para que su contenido coincida con el de la casilla 71 de dicho modelo.

C) Modelo 353. Grupo de entidades. Modelo agregado. Autoliquidación mensual.

- En el apartado «Resultado», la casilla 02, que hasta ahora mostraba las cuotas pendientes de compensación aplicadas en la autoliquidación, se desglosa en tres nuevas casillas que facilitarán al contribuyente conocer los saldos de las cuotas a compensar aplicados y pendientes en cada período.

- Se introduce una casilla para identificar a los grupos de entidades sometidos a normativa foral.

D) Modelo 349. Declaración recapitulativa de operaciones intracomunitarias.

Se introducen modificaciones en la codificación del NIF/IVA para posibilitar la correcta declaración de operaciones intracomunitarias en los términos que resulten del Acuerdo relativo a la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Unión Europea.

5. Directiva (UE) 2020/2020 del Consejo de 7 de diciembre de 2020 por la que se modifica la Directiva 2006/112/CE del Consejo en lo relativo a medidas temporales en relación con el impuesto sobre el valor añadido para las vacunas contra la COVID-19 y los productos sanitarios para diagnóstico in vitro de esta enfermedad en respuesta a la pandemia de COVID-19.

Esta Directiva modifica la Directiva 2006/112/CE (Directiva del IVA) para establecer unas medidas temporales en relación con el IVA.

Con esta modificación, desde el 12 de diciembre de 2020 hasta el 31 de diciembre de 2022, se permite a los Estados miembros:

- conceder una exención con derecho a deducción del IVA pagado en la fase anterior (tipo cero) a las entregas de vacunas contra la COVID-19 y de productos sanitarios para diagnóstico in vitro (kits de pruebas) de esta enfermedad, incluidas las prestaciones de servicios directamente relacionadas con tales vacunas y productos, y/o

- aplicar un tipo reducido del IVA a los productos sanitarios para diagnóstico in vitro (kits de pruebas) de la COVID-19 y a las prestaciones de servicios directamente relacionadas con tales productos.

Solo los productos sanitarios para diagnóstico in vitro (kits de pruebas) de la COVID-19 en los que puede colocarse el marcado CE y las vacunas contra la COVID-19 autorizadas por la Comisión o por los Estados miembros tendrán derecho a un tipo cero (y a un tipo reducido en el caso de los productos sanitarios para diagnóstico in vitro -kits de pruebas-). Por «marcado CE» se entiende el marcado por el que el fabricante indica que un producto es conforme con los requisitos aplicables establecidos en la legislación de armonización de la Unión que dispone su colocación.

6. Propuesta de Directiva del Consejo por la que se modifica la Directiva 2006/112/CE en lo relativo a la atribución de competencias de ejecución a la Comisión para determinar el significado de los términos utilizados en determinadas disposiciones de dicha Directiva.

Esta Propuesta de Directiva establece una modificación de la Directiva 2006/112/CE (Directiva del IVA), con la finalidad de crear un comité que supervise la adopción de actos de ejecución en determinados ámbitos del IVA por parte de la Comisión.

A tal efecto, los procedimientos de comitología solo se aplicarían en relación con un conjunto limitado de normas de ejecución de las disposiciones de la Directiva del IVA, para las que se requiere una interpretación común. Cualquier cambio en la Directiva del IVA requerirá, como es el caso hoy, un acuerdo unánime en el Consejo.

II. Jurisprudencia

1. Tribunal de Justicia de la Unión Europea. Sentencia de 10 de diciembre de 2020. Asunto C-488/18 (Golfclub Schloss Igling).

Directiva 2006/112/CE — Artículo 132, apartado 1, letra m) — Exención de "determinadas prestaciones de servicios directamente relacionadas con la práctica del deporte o de la educación física" — Efecto directo — Concepto de "organismos sin fin lucrativo".

Se plantea al TJUE si el artículo 132, apartado 1, letra m), de la Directiva del IVA tiene efecto directo, de modo que, si un Estado miembro no traspone a su ordenamiento interno esa disposición sobre actividades deportivas, la misma puede ser invocada directamente ante los órganos jurisdiccionales. Además, también se cuestiona si el concepto de «organismo sin fin lucrativo», a efectos de esa disposición, exige que, en caso de disolución de tal organismo, este no pueda distribuir a sus miembros los beneficios que haya obtenido y que excedan del valor de las participaciones en el capital desembolsadas por dichos miembros y del valor de mercado de las aportaciones en especie realizadas por estos últimos.

Concluye el Tribunal que no se puede afirmar que dicho artículo sea lo suficientemente preciso e incondicional como para tener efecto directo, ya que concede a los Estados miembro una cierta discrecionalidad para determinar, de entre todas las prestaciones de servicios posibles relacionadas con la práctica del deporte o la educación física, cuáles desean eximir del IVA, siendo esa la razón por la que se usa el término «determinadas prestaciones de servicios».

De otra parte, respecto del concepto «organismo sin fin lucrativo», establece el Tribunal que dichos organismos no deben aspirar a obtener beneficios para sus miembros y, de obtenerlos, no pueden ser distribuidos, ni siquiera cuando se disuelven, sino que deberán destinarse al mantenimiento o mejora de los servicios que se prestan.

2. Tribunal de Justicia de la Unión Europea. Sentencia de 17 de diciembre de 2020. Asunto C-656/19 (BAKATI PLUS).

Directiva 2006/112/CE — Exenciones relativas a las exportaciones — Artículo 146, apartado 1, letra b) — Bienes expedidos o transportados fuera de la Unión Europea por un adquirente que no se halle establecido en el territorio del Estado miembro afectado — Artículo 147 — "Bienes que vayan a transportarse en el equipaje personal de viajeros" no establecidos en la Unión — Concepto — Bienes que hayan abandonado efectivamente el territorio de la Unión — Prueba — Denegación de la exención relativa a la exportación — Principios de neutralidad fiscal y de proporcionalidad — Fraude.

Se plantea al TJUE si la exención prevista en el artículo 147, apartado 1, de la Directiva del IVA respecto de los «bienes que vayan a transportarse en el equipaje personal de viajeros» debe interpretarse en el sentido de que están comprendidos en ella los bienes que un particular, que no está establecido en la UE, lleva con él fuera de la UE con fines comerciales para su reventa en un tercer Estado. A este respecto, concluye el TJUE que los elementos que figuran en dicho artículo establecen que el beneficiario potencial de la exención prevista en dicho artículo es una persona física que no actúa en calidad de operador económico, por lo que excluye que sea aplicable la exención a exportaciones de carácter comercial.

Por otro lado, el Tribunal interpreta que una jurisprudencia nacional no es contraria a los artículos 146, apartado 1, letra b), y 147 de la Directiva del IVA al disponer que la Administración tributaria está obligada a examinar si la exención por exportación en régimen de viajeros puede aplicarse pese a que no se hayan realizado las formalidades aduaneras aplicables. En concreto, considera el TJUE que si una entrega de bienes cumple los criterios objetivos y, por tanto, tiene la consideración de «entrega para la exportación», no puede depender del cumplimiento de las formalidades aduaneras, que no están previstas en dicho artículo de la Directiva del IVA para que sea aplicable la exención del IVA o no.

Finalmente, concluye el TJUE que es contraria a los artículos 146, apartado 1, letra b), y 147 de la Directiva del IVA y a los principios de neutralidad fiscal y de proporcionalidad, una práctica en virtud de la cual la Administración tributaria deniega automáticamente a un sujeto pasivo la exención del IVA cuando comprueba que dicho sujeto pasivo ha emitido de mala fe el formulario a través del cual se ha acogido a la exención del IVA, pese a que se haya acreditado que los bienes de que se trata abandonaron el territorio de la Unión. Lo anterior sin perjuicio de que puedan aplicarse sanciones administrativas, dado que el incumplimiento de un requisito formal solo puede conllevar la pérdida del derecho a la exención del IVA si (i) se busca impedir la aportación de la prueba cierta de que se han cumplido los requisitos materiales o (ii) cuando un sujeto pasivo que ha participado deliberadamente en un fraude fiscal.

3. Tribunal de Justicia de la Unión Europea. Sentencia de 17 de diciembre de 2020. Asunto C-346/19 (Y-GmbH).

Directiva 2008/9/CE — Artículo 8, apartado 2, letra d) — Artículo 15 — Indicación del número de la factura — Solicitud de devolución.

Se plantea al TJUE si los artículos 8, apartado 2, letra d), y 15, apartado 1, de la Directiva 2008/9 deben interpretarse en el sentido de que, cuando una solicitud de devolución del IVA no contenga un número secuencial de la factura, pero contenga otro número que permita identificar dicha factura y, de este modo, el bien o el servicio de que se trate, la Administración tributaria del Estado miembro de devolución está obligada a considerar dicha solicitud como «presentada», en el sentido del artículo 15, apartado 1, de la Directiva 2008/9, y proceder a su examen.

Establece el Tribunal que, conforme al artículo 20 de dicha Directiva, los Estados miembros pueden requerir información adicional cuando entiendan que no se ha recibido toda la necesaria para examinar la solicitud de devolución. No obstante, pese a que dicha solicitud no contenga el número secuencial de la factura pero incluya otro número que permita identificarla, así como la operación realizada a efectos del IVA, se debe considerar como «presentada» y proceder a su examen.

Todo ello sin perjuicio de que la Administración tributaria pueda instar al solicitante (salvo que dicha Administración ya tenga una copia o el original de la factura) a que comunique el número de factura y, si esta petición no es atendida en el plazo de 1 mes, tenga derecho a denegar la solicitud de devolución.

4. Tribunal de Justicia de la Unión Europea. Sentencia de 17 de diciembre de 2020. Asunto C-801/19 (Franck).

Directiva 2006/112/CE —Exenciones — Artículo 135, apartado 1, letras b) y d) — Conceptos de "concesión de créditos" y "otros efectos comerciales" — Operaciones complejas — Prestación principal — Puesta a disposición de fondos a cambio de remuneración — Transmisión de un pagaré a una sociedad de factoring y transferencia del dinero obtenido al emisor del pagaré.

Se plantea al TJUE si el artículo 135, apartado 1, letras b) y d), de la Directiva IVA debe interpretarse en el sentido de que la exención del IVA para la concesión de créditos y para las operaciones relativas a otros efectos comerciales, respectivamente, se aplica a una operación en la que el sujeto pasivo, (i) por una parte, pone a disposición de otro sujeto pasivo, a cambio de una remuneración, los fondos obtenidos de una sociedad de *factoring* a raíz de la transmisión a esta de un pagaré emitido por el segundo sujeto pasivo y (ii), por otra, garantiza a la citada sociedad de *factoring* la devolución de dicho pagaré a su vencimiento.

Considera el TJUE que resulta aplicable la exención prevista en el artículo 135, apartado 1, letra b) (exención relativa concesión y la negociación de créditos, así como la gestión de créditos efectuada por quienes los concedieron), toda

vez que la concesión de créditos en el sentido de dicho artículo consiste, en particular, en la puesta a disposición de un capital a cambio de remuneración y que, aunque tal remuneración se garantiza especialmente mediante el abono de intereses, no cabe excluir otras formas de contrapartida.

Corresponde no obstante al tribunal remitente verificar, a efectos de la citada exención, que la remuneración percibida era la contrapartida a la puesta a disposición de esta última de los fondos controvertidos.

Señala asimismo el Tribunal que se debe considerar que los pagarés emitidos por el segundo sujeto pasivo son efectos comerciales en el sentido del citado precepto, resultando de aplicación la exención del IVA prevista en el artículo 135, apartado 1, letra d), dado que forman parte un conjunto diferenciado que tiene por objeto cumplir las funciones específicas y esenciales de tal operación. Asimismo, la prestación objeto de análisis (puesta a disposición de fondos) estaba intrínsecamente vinculada a la emisión de los pagarés, puesto que, mediante su transmisión a las sociedades de *factoring*, se obtuvo de estas los importes que había puesto a disposición del segundo sujeto pasivo; por lo que sería de aplicación la exención del artículo 135.

5. Tribunal de Justicia de la Unión Europea. Sentencia de 17 de diciembre de 2020. Asunto C-449/19 (WEG Tevesstraße).

Directiva 2006/112/CE — Exención de las operaciones de arrendamiento y alquiler de bienes inmuebles —Normativa nacional que exime del IVA el suministro de calor por parte de una comunidad de propietarios de viviendas a los propietarios que forman parte de esta comunidad.

Se plantea al TJUE si el artículo 135, apartado 1, letra l), de la Directiva del IVA (que permite eximir de gravamen el arrendamiento y el alquiler de bienes inmuebles) se opone a una normativa nacional que exonera del IVA el suministro de calor por parte de una comunidad de propietarios de viviendas a esos mismos propietarios. En particular, teniendo en cuenta que dicha comunidad construyó una central de cogeneración, a partir de la cual se suministra el calor a los propietarios.

Establece el Tribunal que dicho artículo no ampara una norma interna que establezca que el suministro de calor constituye una entrega de bienes exenta. De una parte, basándose en la definición dada de arrendamiento de bien inmueble: derecho que el propietario cede al arrendatario a cambio de una retribución y por un plazo pactado a ocupar este inmueble, y a impedir que cualquier otra persona disfrute del tal derecho. De otra, de acuerdo con el principio de interpretación estricta de las exenciones, puesto que el suministro de calor para su consumo es simplemente una venta de un bien corporal, pese a que resulte de la explotación de otro bien corporal inmueble (la central de cogeneración); y en el presente caso, no se cede el derecho a los propietarios a ocupar ese inmueble.

6. Tribunal Supremo. Sala de lo Contencioso-administrativo, Sección 2ª. Sentencia de 10 de septiembre de 2020, número de recurso 3301/2018.

Impuesto sobre el Valor Añadido – Supuestos de no sujeción. Transmisión de unidad patrimonial. Sucesión empresarial o profesional en la actividad de auto-taxi.

En el presente supuesto, el recurrente se dedica a la actividad de auto-taxi, y debido a su cese de actividad por jubilación, transmitió a un tercero su licencia de taxi junto a su vehículo, con el propósito por parte de este último de continuar desarrollando la actividad del auto-taxi. El recurrente hizo constar en factura que dicha transmisión se encontraba no sujeta al IVA a tenor de lo dispuesto en el artículo 7.1º LIVA.

Tanto la Inspección como el TEAC, posteriormente, consideraron en primera instancia que esta transmisión no cumplía con los requisitos para la no sujeción al Impuesto puesto que, según la legislación sectorial, el vehículo transmitido (con una antigüedad superior a los cinco años) no cumplía con los requisitos para poder ejercer la actividad de auto-taxi. Por consiguiente, la totalidad de los elementos transmitidos no podían constituir una unidad económica independiente en tanto en cuanto el vehículo transmitido no es apto para desarrollar la actividad, siendo insuficiente la transmisión de la propia licencia.

Por el contrario, el TS falla a favor del recurrente al considerar que lo esencial es la transmisión de la licencia, siendo irrelevante que el vehículo no sea apto para la actividad, pues es con la posesión de aquélla con la que el taxista es capaz de realizar su actividad, siendo el vehículo un elemento patrimonial fácilmente reemplazable para la realización de esta actividad.

Por consiguiente, considera este Tribunal que la parte recurrente realiza una interpretación adecuada del supuesto de no sujeción del artículo 7.1º LIVA y, por tanto, la transmisión de la licencia para ejercer la actividad de auto-taxi es suficiente para considerar esta transmisión como no sujeta a efectos del Impuesto.

7. Tribunal Supremo. Sala de lo Contencioso-administrativo, Sección 2ª. Sentencia de 11 de noviembre de 2020, número de recurso 3013/2018.

Impuesto sobre el Valor Añadido – Consideración de una filial como establecimiento permanente de una entidad no residente en la realización de entregas de bienes.

En el presente supuesto, la Sociedad recurrente es una entidad suiza que realiza entregas de bienes en el TIVA-ES a través de su filial española ubicada en Tarragona, la cual lleva a cabo labores de fabricación, almacenaje y envío de productos químicos por cuenta de la entidad suiza. En particular, los contratos firmados entre la entidad suiza y la española establecen que las labores de fabricación y venta de los productos son dirigidas desde Suiza por la recurrente, quien impone cómo han de actuar los medios humanos y materiales situados en España en sede de la filial.

Tanto la Inspección como el TEAC posteriormente consideraron que la entidad suiza realizaba entregas de bienes en el TIVA-ES a través de su filial que constituía su establecimiento permanente.

En consecuencia, la mercantil presentó recurso de casación alegando que (i) el concepto de establecimiento permanente en el IVA quedaba reservado a los lugares fijos de negocios que llevan a cabo prestaciones de servicios y, (ii) que la filial española de la entidad suiza no cumplía con el concepto de establecimiento permanente.

El TS, con arreglo a los criterios interpretativos señalados por el TJUE, señala que:

a) De acuerdo con la normativa nacional y comunitaria, así como la jurisprudencia comunitaria y del propio TS, el concepto de establecimiento resulta aplicable igualmente a las entregas de bienes.

b) La entidad suiza actúa en el TIVA-ES a través de un establecimiento permanente en cuanto:

   i. Opera en unas instalaciones con un elevado grado de permanencia en Tarragona.

   ii. Ejerce sus actividades por su propia cuenta y riesgo, en tanto en cuanto la filial española carece totalmente de autonomía ejerciendo su actividad por cuenta ajena, limitándose a gestionar, siguiendo las órdenes de la entidad suiza, los medios de producción de que dispone al servicio de la entidad suiza y, en ningún momento, siendo independiente en el proceso productivo.

8. Audiencia Nacional. Sala de lo Contencioso-Administrativo. Sentencia de 16 de octubre de 2020, nº recurso 808/2018.

Modificación a la baja de la base imponible del IVA - Concurso de acreedores "Express".

La parte recurrente facturó a su cliente determinadas cantidades más el importe del IVA correspondiente. No obstante, dicha compañía no cobró la deuda a su vencimiento y posteriormente la entidad deudora presentó Concurso de Acreedores, dictándose el Auto de Declaración y Conclusión del concurso en fecha 13 de diciembre del 2013, publicado en el Boletín Oficial del Estado el día 13 de enero del 2014.

El Concurso de acreedores fue de los denominados "Concurso Express" por inexistencia de bienes. Por ello, el mismo Auto invoca dos pronunciamientos, el propio de declaración del concurso y a la vez el de la Conclusión.

La entidad recurrente comunicó a la Agencia Tributaria la modificación de la base imponible por Declaración de Concurso de su cliente el 29 de mayo del 2014, siendo la solicitud de reducción de la base imponible rechazada por haberse presentado fuera de plazo.

Argumenta la recurrente que el plazo de un mes previsto en el artículo 80.Tres de la Ley del IVA, que se remite al artículo 21.1.5º de la Ley Concursal, persigue evitar que el pasivo común del concurso que haya sido ya fijado pueda

verse alterado posteriormente incidiendo en decisiones ya adoptadas y, en suma, que existan alteraciones en los créditos después del plazo máximo para la fijación de la masa pasiva del concurso.

El plazo del mes para comunicar la modificación de la base imponible al Organismo tributario que corresponda, se corresponde con el plazo que tiene el Administrador concursal para llamar a los acreedores para que comuniquen sus créditos, pero en los denominados "Concurso Express" la situación es diferente porque no se nombra Administrador Concursal, los acreedores no son llamados y el mismo Auto que sirve para declarar la compañía en concurso de acreedores, también sirve para Decretar su liquidación. En consecuencia, entiende la parte recurrente que la reducción de la base imponible del IVA practicada no debió ser rechazada.

Concluye el Tribunal que, al afectar la liquidación recurrida al principio de neutralidad del IVA sin otra justificación que el no haber acreditado la actora la observancia de un plazo que no tiene el carácter de verdadero requisito material en la dinámica del IVA, debe ser anulada, puesto que en ningún momento se ha invocado que el incumplimiento del plazo origine perjuicio a la hacienda pública. Tal perjuicio en este caso no puede producirse porque el auto que declara a la empresa deudora en concurso de acreedores por insuficiencia de masa acuerda su liquidación sin necesidad de llamar a los acreedores, por lo que no existe el riesgo que pretende evitar la fijación del plazo, esto es que el pasivo común del concurso fijado en el auto pueda verse alterado con posterioridad.

III. Doctrina Administrativa

1. Tribunal Económico-Administrativo Central. Resolución 1255/2017 de 19 de noviembre de 2020.

Pago de una indemnización por la compañía Tipo impositivo – Análisis del requisito subjetivo para determinar el tipo aplicable a las obras de reparación de viviendas según la titularidad sea de una persona física o la compañía aseguradora.

En la presente resolución, el TEAC analiza la aplicación del tipo reducido (10%) a aquellas ejecuciones de obra de reparación de viviendas propiedad de personas físicas (no empresarios ni profesionales) derivadas de siniestros asegurados por sus propietarios.

En particular, se analiza el cumplimiento del requisito subjetivo establecido en el artículo 91.Uno.2.10º de la Ley del IVA en función de si el destinatario de dichas obras es la persona física o, en su defecto, la propia compañía aseguradora.

En este sentido, el TEAC entiende básico determinar el destinatario real de dichos servicios (i.e. obras de reparación) para lo que analiza los posibles escenarios existentes asociados a los mecanismos de resarcimiento utilizados:

- Aseguradora al titular de la vivienda una vez realizadas las peritaciones oportunas.

- Sustitución de la indemnización por la reparación o reposición directa del objeto siniestrado, siempre que el asegurado consienta.

En cuanto a la primera de las opciones, para el Tribunal no plantea dudas la aplicación del tipo reducido, dado que el destinatario es la persona física titular de la vivienda. Es decir, el asegurado, con la indemnización derivada de la póliza, contrata a la empresa de reparación para restituir el siniestro, reflejándose así en la factura.

No obstante, en la segunda opción, es la compañía aseguradora la que contrata efectivamente con la empresa de reparaciones y quién la satisface por los servicios prestados en el domicilio del asegurado. Es decir, deviene acreedor de la obligación (relación jurídica) y, por ende, la destinataria de los servicios de reparación, debiéndose identificar como tal en la factura que lo documente.

En consecuencia, el TEAC considera que el tipo impositivo aplicable a dicho segundo supuesto es el general (21%), por no entenderse cumplido el requisito subjetivo recogido en el artículo 91.Uno.2.10º de la Ley del IVA en virtud del cual, el tipo reducido (10%) únicamente podrá ser aplicado en la medida en que "*el destinatario sea persona física, no actúe como empresario o profesional y utilice la vivienda a la que se refieren las obras para su uso particular*".

2. Tribunal Económico-Administrativo Central. Resolución de 19 noviembre de 2020, Recurso 6730/2017.

Supuestos de no sujeción al IVA - Servicios prestados en virtud de encomiendas de gestión por medios propios instrumentales de la Administración pública.

La presente controversia surge a raíz de la presentación de una solicitud de rectificación de autoliquidaciones presentada por una empresa de capital íntegramente público que presta servicios de depuración de agua y limpieza de calles y playas al Ayuntamiento de la que depende.

En síntesis, la reclamante alega que:

a) los servicios que presta están sujetos al IVA;

b) que, sin perjuicio de lo anterior, la base imponible del IVA es 0 porque las subvenciones que recibe del ayuntamiento no forman parte de la base imponible del Impuesto; y

c) que a pesar de no tributar por IVA puede deducirse el IVA soportado al estar sus operaciones sujetas al Impuesto.

Por el contrario, la Administración tributaria considera que la reclamante realiza operaciones no sujetas al IVA y que, por ende, no tiene el derecho a deducir el IVA soportado en la adquisición de los bienes y servicios necesarios para prestarlos.

En el marco de este litigio, el TEAC analiza por un lado, la sujeción al IVA de las actividades de esta sociedad municipal y, por el otro, la deducibilidad del IVA soportado.

En cuanto a la sujeción de las operaciones, tras un largo repaso a la doctrina del TJUE, el TEAC entiende que resulta de aplicación la no sujeción prevista en el artículo 7.8.º de la Ley de IVA. Todo ello porque puede entenderse que, en el presente caso, la sociedad municipal y el organismo público del que depende forman un sujeto pasivo único.

Siento esto así, el TEAC considera que las transferencias efectuadas por este organismo a la sociedad municipal no son contraprestación de una actividad sujeta y por ende, tampoco son base imponible del IVA.

Por último, en cuanto a la deducibilidad de las cuotas del IVA soportadas, el TEAC confirma la no deducibilidad de las mismas en la medida en que estén exclusivamente destinadas a la realización de la actividad no sujeta.

3. Dirección General de Tributos. Contestación nº V3295-20, de 6 de noviembre de 2020.

Aclaración a la consulta vinculante de 21 de enero de 2020, V0162-20, en relación con las consecuencias de la incorrecta emisión de una factura.

La entidad consultante, es un empresario español establecido en el TAI que, en el ejercicio de su actividad empresarial, vende sus productos a través de una plataforma de ventas en Internet. La plataforma cobra un importe en concepto de comisión por venta.

La entidad solicita a este Centro directivo la aclaración de la consulta vinculante de 21 de enero de 2020, V0162-20. En concreto, se plantea qué ocurre cuando un empresario luxemburgués (i.e. la plataforma de venta) ha expedido erróneamente la factura por la prestación de sus servicios repercutiendo IVA de Luxemburgo y no está dispuesto a rectificar la factura, teniendo en cuenta de que se trata de una factura de servicios emitida por un empresario o profesional establecido en la Unión Europea a un empresario o profesional establecido en el TAI y que, de acuerdo con la regla general del lugar de realización de una prestación de servicios, ésta debe entenderse localizada en el TAI.

A este respecto, la DGT aclara que en caso de discrepancia sobre la procedencia de la repercusión del Impuesto por parte del empresario luxemburgués, tal situación se considerará de naturaleza tributaria a efectos de la correspondiente reclamación económico-administrativa conforme con lo establecido en el artículo 88 de la Ley del IVA.

Por lo que respecta al derecho a la deducción de la consultante de las operaciones en cuestión, la DGT concluye que al tratarse de un supuesto de inversión del sujeto pasivo, solo cabe derecho a la deducción cuando el consultante esté en posesión de la factura original expedida por el empresario luxemburgués y ésta cumpla con los requisitos previstos en el artículo 226 de la

Directiva 2006/112/CE y de acuerdo con la normativa luxemburguesa. En particular, dicho documento deberá indicar que procede la inversión del sujeto pasivo.

Por tanto, la factura emitida por el empresario luxemburgués con el correspondiente IVA luxemburgués no es un documento válido para que el consultante ejercite su derecho a la deducción y sería necesaria su rectificación en aras de proceder con dicha deducción dentro de las limitaciones previstas en los artículos 100 y 114 de la Ley del IVA.

4. Dirección General de Tributos. Contestación nº V3298-20, de 6 de noviembre de 2020.

Donativos. Sujeción al Impuesto sobre el Valor Añadido y posible aplicación de la exención prevista en el artículo 20. Uno.12º de la Ley del Impuesto. Devengo.

La entidad consultante es una sociedad mercantil cuyo objeto social es la comercialización de energía eléctrica, destinando sus beneficios a Organizaciones no gubernamentales, Fundaciones, entidades y empresas con proyectos solidarios. Dicha actividad social atrae (i) donaciones de particulares y empresas sin relación comercial con la consultante y (ii) donativos de sus clientes, particulares o empresas a los que se les ofrece la posibilidad de realizar una donación de una cuantía fija a cambio de un derecho a un descuento en la facturación del suministro de energía eléctrica.

La entidad cuestiona la sujeción a efectos del Impuesto sobre el Valor Añadido de los donativos descritos y, en su caso, posible aplicación a los mismos de la exención prevista en el artículo 20.Uno.12º de la Ley 37/1992.

En este sentido, este Centro directivo establece una diferenciación esencial entre los dos donativos objeto de consulta. En primer lugar, los donativos que pueden efectuar los particulares y empresarios que no gozan de ningún tipo de relación jurídico-comercial con la consultante, no se configuran como una contraprestación específica e individualizable y, por tanto, no constituyen una operación sujeta al IVA.

En segundo lugar, la entrega de donativos por los particulares y empresas que tienen la condición de cliente de la consultante constituye una operación sujeta al impuesto, en la medida en que, se produce una remuneración por parte de la consultante consistente en una cesión de un derecho a la obtención de condiciones comerciales ventajosas frente a terceros.

En lo relativo a la aplicación del artículo 20. Uno 12º de la ley 37/1992, se establece que los donativos voluntarios que dan derecho a condiciones comerciales ventajosas no pueden incluirse dentro del concepto de

"cotizaciones fijadas por los estatutos" al no poder ser considerados actividades o prestaciones para la defensa del interés colectivo de los miembros de la entidad consultante. Por lo tanto, la DGT determina que no les resultará de aplicación la exención prevista en el mencionado precepto.

Finalmente, respecto al devengo del Impuesto en relación al derecho de obtención de las condiciones comerciales ventajosas anteriormente citadas, este tiene lugar en el momento de constitución de dicho derecho.

5. Dirección General de Tributos. Contestación nº V3303-20, de 6 de noviembre de 2020.

Exención del IVA en la actividad de un agente consistente en la comercialización de préstamos hipotecarios y venta de seguros.

La consultante es una entidad de crédito que se dedica a la comercialización de préstamos hipotecarios. En el desarrollo de esta actividad, ha creado un nuevo procedimiento de contratación en el que un agente acompañará al potencial cliente en todo el proceso de contratación facilitando la interlocución y la resolución de los posibles problemas. En paralelo, el agente gestionará de forma activa la venta de productos de seguros combinados a la hipoteca.

La sociedad interesada plantea a la DGT:

1. Si la actividad del agente en el proceso de comercialización del préstamo queda exenta del IVA y,

2. Si la venta de seguros por parte del agente es una actividad sujeta y exenta del IVA.

En lo relativo a las actividades de comercialización del préstamo hipotecario realizadas por el agente, la DGT señala que las operaciones de mediación objeto de consulta estarán sujetas y exentas del IVA conforme con lo dispuesto en el artículo 20.Uno.18º de la Ley del IVA cuando concurran los dos siguientes requisitos:

1. Que el prestador del servicio de intermediación sea un tercero distinto del comprador y del vendedor en la operación principal;

2. Que las funciones que realice vayan más allá del mero suministro de información y recepción de solicitudes, haciendo lo necesario para que se formalice la operación principal.

Sin perjuicio de lo anterior, de acuerdo con la doctrina reiterada por la DGT y a la luz de la jurisprudencia del Tribunal de Justicia Europeo, es necesario determinar si la prestación de servicios puede tener naturaleza de servicios publicitarios o si, por el contrario, de servicios de mediación.

Así pues, puede entenderse que existe intermediación cuando el agente preste al menos uno de los siguientes servicios:

1. El mediador concluye un contrato como agente de la entidad;

2. El mediador asesora y negocia los términos del contrato en nombre y por cuenta del cliente para la conclusión del contrato.

De acuerdo con lo anterior, en la medida que la labor del agente suponga negociar y asesorar las cláusulas del contrato de forma activa, tales prestaciones estarán sujetas y exentas del IVA. Por otra parte, cuando el agente ponga en contacto al cliente con la entidad para la formalización del contrato y su actividad se limite a un suministro de información, no cabe la aplicación de dicha exención.

Por lo que respecta a las operaciones de venta de seguros, la DGT establece que para determinar la aplicación de la exención contenida el artículo 20.Uno.16º de la Ley del IVA será necesario analizar si la actividad realizada por el agente cumple los siguientes requisitos:

- el prestador de servicios debe mantener una relación con el asegurador y con el asegurado;

- su actividad debe cubrir aspectos esenciales de la función del agente de seguros, como buscar clientes o poner a éstos en relación con el asegurador;

De lo anterior, resulta que las operaciones objeto de consulta estarán exentas del Impuesto cuando tengan por objeto alguno de los siguientes servicios:

1º El asesoramiento, la presentación, propuesta o realización de trabajos previos a la celebración del contrato de seguro o de reaseguro, y ello aunque el contrato de seguro presentado, analizado o propuesto no llegase finalmente a celebrarse.

   No obstante, el mero suministro de datos y de información sobre tomadores o productos de seguro o reaseguro, quedará sujeto y no exento del IVA.

2º Los consistentes en la celebración de contratos de seguro o de reaseguro.

3º Los consistentes en asistir a la entidad aseguradora en la ejecución o gestión del contrato de seguro o de reaseguro cuando previamente hubiera captado a dicho cliente o en atender, asesorar o asistir al tomador, asegurado o beneficiario, en particular en caso de siniestro.

4º La aportación de la información relativa a uno o varios contratos de seguro de acuerdo con los criterios elegidos por los clientes a través de un sitio web o de otros medios, y la elaboración de una clasificación de productos de seguro, incluidos precios y comparaciones de productos, o un descuento sobre el precio de un contrato de seguro, siempre y cuando el cliente pueda celebrar un contrato de seguro directa o indirectamente al final del proceso en el propio sitio web o medio empleado. Si por el contrario, no tienen por objeto la celebración de contrato alguno y se limiten a comparar los productos de seguro disponibles, dichos servicios quedarán sujetos y no exentos.

6. Dirección General de Tributos. Contestación nº V3346-20, de 12 de noviembre de 2020.

Modificación de la base imponible – Cuotas de IVA impagadas por declaración de concurso de entidad residente en otro Estado miembro.

La entidad consultante, establecida en TIVA-ES, y dedicada al alojamiento hotelero, prestó una serie de servicios en favor de una entidad alemana que resultaron impagados. Dicha sociedad alemana fue declarada en concurso por un juzgado alemán con posterioridad al devengo de dichas prestaciones de servicios.

La entidad consulta a este Centro Directivo si resulta procedente la modificación de la base imponible relativa a estos servicios impagados a tenor del artículo 80. Tres de la Ley del IVA.

En cuanto a la aplicabilidad del procedimiento de modificación de la base imponible recogido en el artículo anteriormente mencionado, la DGT, siguiendo el criterio de otras contestaciones vinculantes, como la V0027-20, de 9 de enero de 2020, confirma que la consultante debería atenerse al plazo de los dos meses siguientes al fin del plazo del que disponen los acreedores para comunicar sus créditos a la administración concursal para emitir la correspondiente factura rectificativa según lo dispuesto por el artículo 15 del Reglamento de facturación, que según la normativa nacional es un mes desde la publicación en el BOE del auto de declaración de concurso.

No obstante, la DGT señala que, dicha modificación debe atenerse a lo dispuesto en el artículo 80. Cinco, y en particular, en su apartado 2º, que no procederá cuando el destinatario de las operaciones no esté establecido en TIVA-ES, ni en Canarias, Ceuta o Melilla.

Sin embargo, en la presente respuesta a la Consulta planteada por el contribuyente, el Centro Directivo acoge el criterio del TJUE, en su reciente asunto C-756/19, *Ramada Storax*, que dictamina que resultaría de aplicación la modificación de la base imponible en los supuestos de créditos incobrables como consecuencia de un proceso de insolvencia declarado por un órgano jurisdiccional de otro Estado miembro cuando se trate de procedimientos de insolvencia a los que resulte de aplicación el Reglamento (UE) 2015/848 del Parlamento Europeo y del Consejo, de 20 de mayo de 2015, sobre procedimientos de insolvencia.

Consecuentemente, la DGT considera que la modificación de la base imponible será procedente en los casos en los que el destinatario de las operaciones se encuentre establecido en cualquier otro Estado miembro y se cumplan el resto de los requisitos dispuestos en el artículo 80. Tres y Cinco de la Ley del IVA.

7. Dirección General de Tributos. Contestación nº V3388-20, de 19 de noviembre de 2020.

Servicios prestados por vía electrónica – puesta a disposición de libros en formato digital a través de suscripción a biblioteca digital.

La entidad consultante, dedicada a la formación a distancia en línea, adquiere diversos libros, acompañados de guías didácticas y actividades complementarias, en formato digital a través de una suscripción de un año a una biblioteca de libros digitales. La entidad que suministra a la consultante el acceso se encuentra establecida en Panamá.

La entidad consulta a este Centro Directivo el tratamiento a efectos del IVA de la operación descrita anteriormente prestada por la entidad panameña.

A este respecto, la DGT considera, en primera instancia, que estos servicios tendrán la naturaleza de servicios prestados por vía electrónica a tenor del artículo 69. Tres de la Ley del IVA.

Asimismo, y ateniéndose a la regla general de localización de servicios del artículo 69. Uno.1º de la Ley del IVA, los mismos se entenderán localizados en sede del adquirente, esto es TIVA-ES, y será este el sujeto pasivo de la operación por la inversión del sujeto pasivo preceptuada en el artículo 84.Uno.2º de la Ley del IVA, al ser el prestador del servicio una entidad establecida en Panamá.

Por último, en lo que respecta al tipo impositivo aplicable, este Centro Directivo considera que atendiendo a su vez a la definición legal de "libro" provista en la Ley 10/2007, aplicará el tipo reducido del 4% según lo dispuesto por el artículo 91, apartado dos.1, 2º, de la Ley del IVA a las entregas de libros, periódicos y revistas, incluso cuando tengan la consideración de servicios prestados por vía electrónica, siempre y cuando no contengan única o fundamentalmente publicidad y no consistan íntegra o predominantemente en contenidos de vídeo o música audible, así como los elementos complementarios que se entreguen conjuntamente con aquellos mediante precio único.

8. Dirección General de Tributos. Contestación nº V3398-20, de 23 de noviembre de 2020.

Tipo impositivo – Bases de datos y libros electrónicos.

La consultante es una empresa que desarrolla, produce y comercializa bases de datos de texto completo y de referencia de diferente naturaleza y desea conocer el tipo impositivo del IVA aplicable a su comercialización.

Para dar contestación a la cuestión planteada, en primer lugar, la DGT recuerda que la Directiva 2018/1713, modifica la Directiva 2006/112/CE, estableciendo la posibilidad de que los Estados miembros apliquen el tipo reducido a los libros, periódicos y revistas suministrados por vía electrónica.

Por otra parte, trae a colación el concepto de prestación de servicios por vía electrónica establecido por el artículo 69.Tres de la Ley del IVA, y complementado con el artículo 7 y el anexo I del Reglamento (UE) 282/2011 del Consejo, y reitera el criterio expresado previamente en la consulta V3234-20, según el cual una prestación de servicios por vía electrónica consistente en la puesta a disposición de bases de datos relativa a información financiera y de carácter comercial debe tributar al tipo general del 21%.

Asimismo, este Centro Directivo reitera su pronunciamiento en la contestación vinculante de 12 de marzo de 2014,número V0677-14, para concluir que los servicios prestados por el consultante a través de una aplicación que denomina "base de datos" que darían acceso al contenido íntegro de publicaciones digitales como libros y revistas, tendría naturaleza asimilable al propio servicio de las bibliotecas virtuales, por lo que sería aplicable el tipo reducido del 4% según lo dispuesto por el artículo 91 de la Ley del IVA.

No obstante, resultaría de aplicación el tipo general del 21% a los siguientes servicios:

- Acceso a bases de datos que no garantizan fundamentalmente el acceso a libros o revistas electrónicas, sino que ofrecen al usuario acceso a un conjunto heterogéneo de información como estudio de casos, perfiles de industria, incluso material audiovisual, y en su caso, también acceso a revistas y libros a texto completo, pero que no pueden asimilarse al servicio prestado por bibliotecas virtuales.

- Acceso a bases de datos de "resumen e indización", por cuanto permiten el acceso a reseñas bibliográficas y, en su caso, extractos de obras, pero que no parece que tengan por finalidad el propio suministro de libros, periódicos o revistas electrónicas.

9. Dirección General de Tributos. Contestación nº V3439-20, de 27 de noviembre de 2020.

Establecimiento permanente – Exención– Deducibilidad del IVA.

La consultante es una entidad mercantil residente en Alemania que va a adquirir una nave industrial de segunda mano en el TIVA-ES para arrendársela a otra entidad mercantil establecida en el mismo. Para llevar a cabo dicho arrendamiento la consultante no dispondrá en el TIVA-ES de otros medios materiales o humanos distintos de la propia nave.

Primeramente, este Centro Directivo comienza afirmando que, a priori, la consultante tendrá la consideración de sujeto pasivo del IVA por su condición de arrendadora de la nave. Del mismo modo, respecto a la entrega de la nave, la vendedora podría renunciar a la exención dispuesta en el artículo 20.Uno.22º de la LIVA a tenor de lo recogido en el artículo 20. Dos de dicha Ley, lo cual supondría que la consultante ostentaría por inversión, la condición de sujeto pasivo tras lo dispuesto en el artículo 84. Uno. 2º, letra e) de la LIVA.

En otro orden de cosas, la DGT continúa analizando si la entidad consultante dispone de un establecimiento permanente en el TIVA-ES en lo referente al artículo 69. Tres de la Ley del Impuesto. En este sentido, y a tenor de la jurisprudencia asentada del TJUE (consagrada en el Reglamento 282/2011, del Consejo) este Centro Directivo afirma que, pese a que pudiera considerarse que la mera explotación de un bien corporal pudiera conferir al que lo explota la condición de empresario o profesional a efectos del IVA y disponer de un establecimiento permanente en el TIVA-ES (al disponer de un grado suficiente de permanencia y estructura adecuada en términos humanos y técnicos), la Resolución del TEAC de 20 de octubre de 2016, así como posteriores contestaciones vinculantes, dictaminan, entre otros puntos, que la mera titularidad del inmueble arrendado no permite considerar que concurra un establecimiento permanente. De esta forma, y a pesar de que la consultante realice una actividad económica a efectos del Impuesto, no dispondrá de un establecimiento permanente en el TIVA-ES.

En lo que respecta a la deducibilidad de las cuotas del IVA soportadas por la consultante en el TIVA-ES, la misma deberá seguir el procedimiento general regulado en el artículo 115 de la LIVA, en la medida en la que consultante sería sujeto pasivo del impuesto en la adquisición de la nave, en virtud de lo dispuesto en el 84. Uno. 2º, letra e) de la LIVA.

Finalmente, en relación con los requisitos de facturación aplicables, la DGT afirma que la factura correspondiente se ajustará a las normas establecidas en el Reglamento alemán y por ende este Centro Directivo no es competente para pronunciarse en dicha cuestión.

IV. Country Summaries

Featured articles

European Union

EU implements supplemental tariffs on goods of US origin

On 10 November 2020—following a World Trade Organization (WTO) arbitrator's decision issued on 13 October 2020 authorizing the EU to implement retaliatory tariffs on US origin goods due to US subsidies of US aircraft production—the EU implemented supplemental tariffs on an estimated trade value of USD 4 billion per annum of US-origin goods imported into the EU.

The impacted US-origin goods are subject to two levels of supplemental tariffs, as follows:

- Certain US-origin aircraft of an unladen weight exceeding 15 tons are subject to supplemental tariffs of 15%; and

- A large variety of other US-origin goods are subject to supplemental tariffs of 25%, including certain fish, cheese, nuts, wheat, certain types of vegetable oils, chocolate and products containing cocoa, frozen orange juice, rum, vodka, tobacco, leather handbags, heavy machinery, tractors, and video game consoles.

Supplemental tariffs will not apply to the identified products if an import license with an exemption from or a reduction of duty had been issued prior to the entry into force date, or if an importer can prove that the identified products were exported from the US and destined to the EU prior to the date the supplemental tariffs went into effect.

Australia

Customs classification rules changing following court wins for importers

On 3 December 2020, Australia's federal government introduced proposed changes to the Customs Tariff Act 1995 (the Act) in response to several tariff classification proceedings determined against the Comptroller of Customs in recent years [i].

Those decisions variously resulted in nil or reduced customs duty (and in two cases, also nil dumping duty) being payable on the goods in question. The proposed changes seek to ensure that goods of the same kind are classified differently in the future, with a corresponding liability on importers to pay customs duty (unless a specific concession applies), along with any applicable dumping duty.

The explanatory memorandum (EM) accompanying the amending bill states that the proposed amendments are to address the "departures from international classification practice" caused by the relevant decisions of the Federal Court, High Court and the Administrative Appeals Tribunal (AAT).

The bill achieves this by proposing the insertion of new notes in the principal customs tariff (i.e., schedule 3 to the act) in order to alter the tariff classification of goods of the kind the subject of each of the above decisions.

Imported goods are classified by reference to the headings and sub-headings contained in the various sections and chapters of schedule 3, having regard to any relevant section or chapter notes. The text in schedule 3 is based on the wording in the Harmonized Commodity Description and Coding System[ii][2] (HS), with the intention that goods are classified in accordance with the rules and guidance on tariff classification that are formulated in the context of the World Customs Organization (WCO). Schedule 3 also specifies the rate of customs duty applicable to each tariff heading and subheading.

The goods affected by the proposed changes in the bill are:

Vitamin products and food supplements

The previous proceedings concerned vitamin and mineral products, in the form of sugar-based pastilles and weight loss gummies containing garcinia cambogia. In January 2020,

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[i] Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd [2020] HCA 2; Sulo MGB Australia Pty Ltd and Comptroller-General of Customs [2018] AATA 1324; Solu Pty Ltd and Comptroller-General of Customs [2019] AATA 2584; Smoothflow Australia Pty Ltd and Comptroller-General of Customs [2020] AATA 1890

[ii] Per the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on 14 June 1983.

the High Court affirmed a decision of the AAT that the goods should be classified to heading 3004 in chapter 30 of schedule 3, as medicaments for therapeutic or prophylactic uses. Goods classified to heading 3004 are subject to import duty at the "free" rate.

According to the EM to the bill, the WCO requires that medicaments of chapter 30 must be medicines that treat or prevent specific diseases, and has consistently classified goods containing low doses of vitamins, minerals, and/or plant extracts as "food supplements" which are expressly excluded from chapter 30 by a HS chapter note. Accordingly, such products are classified by the WCO and internationally as foods, not as medicaments of chapter 30.

The bill proposes inserting three additional notes into schedule 3 to realign classification of vitamin products and other supplements in general, with international classification practice. This will impact importers of vitamins and other supplements – specifically, such importers will be required to ensure this change in classification (and its consequent effect on customs duty liability) is taken into account in its supply chain planning, and to consider whether any previous classification rulings from the ABF are still valid.

Wheelie bins and parts for wheelie bins

The previous proceedings concerned wheels imported for use with wheelie bins, with the AAT relevantly determining that the wheelie bins should be classified as "vehicles, not mechanically propelled" under heading 8716 and accordingly that the wheels were correctly "parts" for such vehicles under subheading 8716.90.00. As a result, the importer was able to rely on a tariff concession order keyed to that subheading to import the wheels free of duty.

The bill proposes inserting a new additional note under chapter 87 to provide that heading 8716 does not cover wheelie bins and similar mobile garbage bins, preventing them being classified as nonmotorized "vehicles". The additional note will have the effect that such bins are classified instead to headings in section XV (in the case of metal bins) or chapter 39 (in the case of plastic bins).

Metal profiles and pipes

Two previous proceedings resulted in the AAT determining that:

- Imported goods that are metal profiles, and that require further modification such as cutting or bending before being used as parts in furniture or other goods, should be classified as "parts" of that final good; and

- Metal pipes, produced to convey water as part of a sprinkler system inside buildings, should be classified as "parts" of a steel structure.

In both proceedings, the AAT's classification determination resulted in a favorable outcome for each importer in relation to the amount of customs duty and dumping duty that was otherwise payable.

The bill proposes inserting new additional notes into chapters 73, 76, 83, and 94 of schedule 3, with a combined effect that plates, rods, angles, shapes, sections, tubes, pipes, and similar goods that require further modification cannot be classified to heading 7308

(structures…and parts of structures….of iron or steel; plates, rods, angles, shapes, sections, tubes, and the like, prepared for use in structures, of iron or steel); heading 7610 (aluminium structures…and parts of structures…aluminium plates, rods, profiles, tubes, and the like, prepared for use in structures); heading 8302 (base metal mountings, fittings…etc.); or heading 9403 (other furniture and parts thereof), while also excluding tubes and pipes for the conveyance of fluids inside buildings from classification to heading 7308.

Timing

The bill is unlikely to be progressed until the autumn sittings of parliament in 2021.

The new rules will start applying 28 days after the bill receives royal assent (commencement date). They will affect imports of vitamins and food supplements, wheelie bins and parts, and metal profiles and pipes, that are imported into Australia either:

- On or after the commencement date; or

- Before the commencement date, if the time for working out the rate of import duty on the goods has not occurred before the commencement date.

Other measures in the bill

The bill also provides for amendments to the Customs Tariff Act 1995 to:

- Provide for a free rate of customs duty for prescribed COVID-19 medical or hygiene goods between 1 February and 31 December 2020;

- Remove the AUD 12,000 special customs duty for used and second-hand motor vehicles that are Peruvian originating goods or that are Trans-Pacific Partnership originating goods;

- Separately identify specifically formulated caffeinated beverages, formulated supplementary sports foods and formulated supplementary foods in schedule 3 to improve the inspection/monitoring of such goods; and

- Repeal redundant provisions specifying phasing rates of customs duty under various free trade agreements.

Canada

Sales tax and the digital economy: Summary of recent changes

The Department of Finance Canada proposes to extend the collection obligation for GST/HST purposes to foreign-based suppliers and digital platforms.

Following the acceleration in the shift towards digitalization, notably due to COVID-19, the Department of Finance Canada (Finance) proposed new rules on 1 December 2020 that may force foreign-based suppliers and digital platforms that facilitate supplies of tangible personal property (TPP), services, intangible personal property (IPP), or short-term

accommodation to register to collect the Goods and Services Tax/Harmonized Sales Tax (GST/HST). In light of these newest announcements from Finance, Deloitte has prepared the following summary to track these changes.

Current rules

Subject to a few exceptions, a person that is not resident in Canada and that makes a taxable supply in Canada is not required to register for GST/HST purposes, unless the person is carrying on a business in Canada.

While the GST/HST regime has historically relied on the above-mentioned rule to require nonresident suppliers to register, various other Canadian sales tax regimes have adapted their legislation to cover nonrresident suppliers with no presence in Canada. The 4 October 2018 and 17 September 2020 editions of our Canadian Indirect Tax News alert include more details on these regimes.

Proposed legislative changes

Changes proposed by Finance contemplate that a nonresident of Canada may be required to register for GST/HST purposes to the extent that such person either:

- Makes supplies of IPP or services to Canadians not registered for GST/HST purposes;

- Makes supplies of booking/administration services in connection with a supply of short-term accommodation situated in Canada to recipients not registered for GST/HST purposes, or

- Makes supplies of TPP.

Furthermore, the changes also contemplate that platform operators may be required to register and/or collect GST/HST for supplies of TPP, IPP, services, and short-term accommodation made in Canada through their platform.

Application date

The proposed new rules for foreign-based suppliers, distribution platform operators, and accommodation platform operators are set to apply as from 1 July 2021.

Foreign-based suppliers: Cross-border digital products and services

Finance proposes to apply a specified GST/HST regime for cross-border digital products and services. This specified regime would have mechanics similar to the specified Québec Sales Tax (QST) regime introduced in January 2019 for suppliers located outside Québec (however, arguably, these two regimes are far from harmonized).

Registration required

Every specified nonresident supplier (i.e., a nonresident of Canada that does not carry on a business in Canada and is not registered for the GST/HST (i.e., the "regular GST/HST regime" (Subdivision D of Division V of the Excise Tax Act)) is required to be registered under the specified GST/HST regime if the threshold amount of this supplier for any period of 12 months exceeds CAD 30,000. Referring to the definition of several key concepts is necessary to untangle these proposed rules.

Registration threshold

The proposal would require the registration of nonresident vendors making supplies of digital products and services to Canadians, if their total taxable supplies of digital products or services made to consumers in Canada exceed, or are expected to exceed, CAD 30,000 over a 12-month period. In determining if they meet this threshold, a nonresident vendor would not include supplies that are facilitated by a distribution platform operator that is registered for the GST/HST (under either the normal or simplified registration system) and that is deemed to have made the supply (see "Distribution platform operators and accommodation platform operators" below).

For the 1 July 2021 date of application, the expected sales for the next 12 months should be used to calculate this threshold amount.

Specified supply

A specified supply is proposed to be defined as a taxable supply of IPP or a service other than:

- A supply of IPP that
    - May not be used in Canada;
    - Relates to real property situated outside Canada; or
    - Relates to TPP ordinarily situated outside Canada; or
- A supply of a service that
    - May only be consumed or used outside Canada; or
    - Is in relation to real property situated outside Canada.

Usual place of residence

In order to determine the usual place of residence of a person, a supplier or a platform operator needs to rely on a number of pre-defined residency “indicators.” More precisely, a supplier or platform operator will be allowed to consider that a person resides in Canada if it obtains, in the ordinary course of its operations, two or more Canadian indicators for this person and has not obtained more than one foreign indicator.

The following are the indicators that a supplier or platform operator will need to use when determining the usual place of residence of a recipient of a supply:

- The home address of the recipient;
- The business address of the recipient;
- The billing address of the recipient;
- The Internet Protocol address of the device used by the recipient or similar data obtained through a geolocation method;

- Payment-related information of the recipient or other information used by the payment system;

- The information from a subscriber identity module, or other similar module, used by the recipient;

- The place at which a landline communication service is supplied to the recipient; and

- Any other relevant information that the Minister may specify.

Note that there are also rules to establish the usual place of residence between the various provinces of Canada. As of today, Finance has not specified any other relevant information.

No input tax credits (ITCs)

A person registered under the specified GST/HST regime would not be eligible to claim ITCs for the GST/HST paid on its expenses in Canada.

Simplified compliance

In order to promote compliance with this new regime, Finance proposes to simplify the administrative burden related thereto by notably:

- Implementing a simplified registration process;

- Allowing for simplified quarterly returns and payments; and

- Allowing, under certain conditions, payments in foreign currencies.

Furthermore, the Canada Revenue Agency (CRA) will publish a list of all registrants under this new regime.

Distribution platform operators and accommodation platform operators

Registration required

As indicated above, the proposed new regime would apply not only to nonresident suppliers, but also to platform operators. Indeed, the proposed rules include several deeming provisions under which a supply will be deemed to be made by a platform operator rather than by the actual supplier.

Every distribution platform operator of a specified distribution platform and every accommodation platform operator would be required to register under the specified GST/HST regime if their threshold amount for any period of 12 months exceeds CAD 30,000. Again, several new key concepts need to be defined.

Definitions

A specified distribution platform is proposed to be defined as a digital platform through which a person facilitates either:

- The making of specified supplies by a specified nonresident supplier; or

- The making of qualifying TPP supplies (see "Tangible personal property (TPP)" below) by another person that is not registered under the regular GST/HST regime, irrespective of whether or not the supplier resides in Canada.

An accommodation platform is proposed to be defined as a digital platform through which a person facilitates the making of supplies of short-term accommodations in Canada by another person that is not registered under the regular GST/HST regime.

A digital platform is proposed to include a website, an electronic portal, a gateway, a store or a distribution platform, or any other similar electronic interface but would not include (1) an electronic interface that solely processes payments; or (2) a prescribed platform or interface (none specified at this time).

Registration threshold

If a distribution platform's total taxable supplies of digital products or services made to consumers in Canada (including the supplies of digital products or services of nonresident suppliers to consumers in Canada that the operator facilitates) exceed, or are expected to exceed, CAD 30,000 over a 12-month period, in absence of the distribution platform operator being registered or required to register for GST/HST purposes under the regular GST/HST regime, the distribution platform operator is proposed to be required to register under the specified GST/HST regime.

Furthermore, if an accommodation platform's total taxable supplies of short-term accommodation situated in Canada made by anyone not registered for GST/HST purposes under the regular GST/HST regime to recipients not registered under that same regime, exceed, or are expected to exceed, CAD 30,000 over a 12-month period, in absence of the accommodation platform operator being registered or required to register for GST/HST purposes under the regular GST/HST regime, the accommodation platform operator would be required to register under the specified GST/HST regime.

Distribution platform operator precisions

A specified supply will be deemed to be made by the distribution platform operator rather than by the specified nonresident supplier if a specified nonresident supplier makes a specified supply:

- To a specified Canadian recipient through a specified distribution platform and the operator is registered under the specified GST/HST regime; or

- To any type of recipient if the platform operator is registered under the regular GST/HST regime.

Accommodation platform operator precisions

According to the proposed changes, where:

- A particular person that is not registered under the regular GST/HST regime makes a taxable supply of short-term accommodation situated in Canada through an accommodation platform,

- The accommodation platform operator is registered under the specified GST/HST regime, and

- The recipient has not provided to the accommodation platform operator evidence that it is registered under the regular GST/HST regime,

the supply of short-term accommodation in Canada is proposed to be deemed to have been made by the accommodation platform operator and not by the particular person.

However, if the accommodation platform operator is registered under the regular GST/HST regime or carrying on business in Canada, the evidence of GST/HST registration of the recipient would not be required, all other conditions as mentioned above being equal.

Information return: Accommodation platform operators

Accommodation platform operators will be required to file with the CRA an information return for the calendar year.

Tangible personal property (TPP)

In addition to the existing GST/HST registration requirements, every nonresident of Canada or distribution platform operator will be required to register under the regular GST/HST regime if, for any period of 12 months, the sum of the following amounts is greater than CAD 30,000:

- The total amount of the value of the consideration for a taxable supply that is or is reasonably expected to be a qualifying tangible personal property supply made by the person to a specified recipient (i.e., a person not registered under the regular GST/HST regime (other than a nonresident of Canada that is not a consumer of the property)); and

- If the person is a distribution platform operator, the total amount of the value of the consideration for a supply that is or is reasonably expected to be a qualifying tangible personal property supply made through the specified distribution platform to a specified recipient.

For the 1 July 2021 date of application, the amount expected for the next 12 months should be used in calculating this threshold amount.

Qualifying tangible personal property supply

A "qualifying tangible personal property supply" is a supply made by way of sale of TPP that is, under the agreement for the supply, to be delivered or made available to the recipient in Canada other than:

- An exempt or zero-rated supply;

- A supply of TPP to be sent by mail or courier to the recipient at an address in Canada from an address outside Canada by the supplier or by another person acting on behalf of the supplier, if the supplier maintains evidence satisfactory to the Minister that the property was so sent; or

- A prescribed supply (none specified at this time).

Distribution platform operator precisions

If a qualifying TPP supply is made through a specified distribution platform by a particular person (whether resident or not) that is not registered under the regular GST/HST regime and if the distribution platform operator (whether resident or not) with respect to this supply is registered under the regular GST/HST regime, the qualifying TPP supply is proposed to be deemed to have been made by the distribution platform operator and not by the particular person.

Input tax credits (ITCs)

Since the above registration would be under the regular GST/HST regime, the nonresident of Canada or the distribution platform operator, as applicable, would be eligible to claim ITCs for any GST/HST paid on their expenses in Canada.

Furthermore, under certain circumstances, the GST paid on importation by an unregistered supplier may be claimed by the distribution platform operator.

Information return: Operators and warehouses

A distribution platform operator in respect of qualifying TPP supplies made in a calendar year will be required to file an annual information return with the CRA.

Furthermore, a person that provides a service of storing TPP in Canada (other than a service that is incidental to the supply by the person of a freight transportation service) offered for sale by a nonresident person will be required to notify the CRA of this fact and maintain records containing information specified by the CRA.

New drop-shipment rule

Drop-shipment rules are an essential component of the GST/HST framework for supplies of goods made by nonresidents. In order to ensure that the proposed rules would not conflict with the existing drop-shipment rules, the proposal included a new GST/HST relief under the drop-shipment rules where a non-registered nonresident provides a certificate to a service provider or vendor of goods acknowledging that a registered distribution platform operator was deemed to sell the goods and required to collect tax.

Additional changes: Face masks and face shields

In addition to the above, note that Finance proposed that the *Excise Tax Act* be amended to zero-rate the supply of face masks and face shields provided for specific use (e.g., medical use and use in preventing the transmission of infectious agents such as respiratory viruses), if supplied after 6 December 2020.

United Kingdom

Transition period following UK's departure from EU comes to an end

With only days left before the end of the transition period following the UK's departure from the EU, the EU and the UK on 24 December 2020 agreed the terms of a future economic

partnership in the EU-UK Trade and Cooperation Agreement. Detailed commentary on and analysis of the implications of the agreement for UK businesses is available from Deloitte's dedicated Brexit Deal Alerts webpage.

The UK on 17 December 2020 enacted the Taxation (Post-transition Period) Act 2020, the European Union (Future Relationship) Act 2020, and the United Kingdom Internal Market Act 2020. Appointed Day Orders brought parts of Taxation (Cross-border Trade) Act 2018 into effect, as well as a number of statutory instruments (for customs, VAT, and excise duty).

Other news

OECD

New reports address topics including COVID-19, tax challenges of digitalization

On 22 and 23 November 2020, the OECD announced three reports that have been released or that will be released in the near future that address topics including the response to the coronavirus (COVID-19), the tax challenges of the digitalization of the economy, and taxation and philanthropy:

- New horizons: Structural policies for a strong recovery and a sustainable, inclusive and resilient future, is a report requested by the G20 to support its action plan in response to COVID-19. The report identifies a need for stronger cooperation between governments in a variety of areas, including the taxation of multinationals in an increasingly digitalized economy (report | related announcement).

- The OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors – October 2020 contains two parts. Part I covers the G20's international tax agenda, including developments relating to addressing the tax challenges of the digitalization of the economy, other G20 tax deliverables, and tax certainty. Part II is a progress report from the Global Forum on Transparency and Exchange of Information for Tax Purposes. Regarding the tax challenges of the digitalization of the economy, the report notes that COVID-19 "has exacerbated these tax challenges even further by accelerating the digitalisation of the economy, increasing pressures on public finances and decreasing public tolerance for profitable [multinational enterprises] not paying their fair share of taxes." The report indicates that although political agreement has not yet been reached on a solution to the tax challenges arising from digitalization, progress is being made and the G20/OECD Inclusive Framework on BEPS has "agreed to continue working to resolve the remaining issues quickly with a view to bringing the process to a successful conclusion by mid-2021."

- Taxation and Philanthropy, which will be released on 26 November 2020, covers the tax treatment of philanthropic entities and donations in 40 jurisdictions and identifies a range of potential tax policy options for governments to consider. The OECD announcement notes that "[t]he work of philanthropic organisations is especially evident in the current context of the COVID-19 crisis" and that the report is "the most exhaustive review of the tax treatment of the philanthropic sector undertaken to date" (report | related announcement).

Additional information and materials relating to COVID-19 are available through the OECD's digital content hub.

Belgium

Overview of new VAT rules for supplies of goods from the EU into Great Britain

After the end on 31 December 2020 of the transition period following the UK's departure from the EU, Belgian and EU businesses supplying goods within or to Great Britain (GB) are subject to new UK VAT rules as from 1 January 2021.

The VAT treatment of supplies of goods from the EU to Northern Ireland will, in principle, not change as from 1 January 2021. As far as supplies of goods are concerned, Northern Ireland will remain subject to the intra-EU VAT rules, including the e-commerce changes on 1 July 2021.

Belgian VAT treatment of sales to GB

Until 31 December 2020, business-to-business (B2B) supplies of goods from Belgium to GB are considered VAT exempt intra-Community supplies. For business-to-consumer (B2C) sales of goods from Belgium to GB, the supplier must apply Belgian or UK VAT, depending on whether B2C sales into the UK exceed the annual distance selling threshold of GBP 70,000.

As from 1 January 2021, supplies from Belgium to GB will, subject to specific requirements, qualify as VAT exempt exports from a Belgian perspective, regardless of whether the customer is a business or end consumer. However, suppliers also need to be aware of potential obligations in GB.

Introduction of new UK VAT obligations

As from 1 January 2021, new rules apply for the VAT treatment of goods arriving into GB. Businesses supplying goods from Belgium or the EU into GB may need to apply for a UK VAT number, as they potentially may have to account for UK VAT on imports and/or local supplies to their customers in GB.

The new rules are complex and the UK VAT treatment will depend on the consignment's value (with different rules for consignments worth GBP 135 or less), the customer's VAT status (i.e., UK VAT registered business or consumer), the location of the goods at the time of supply (i.e., inside or outside GB), and the possible involvement of an online marketplace (OMP).

Goods already in GB at the time of supply

When a Belgian or EU supplier has goods already in GB at the point of sale, the supply will continue to be deemed a local one. The supplier will need to account for UK VAT on the supply, regardless of whether the supply is made to a business or end consumer. There is no UK VAT registration threshold for an overseas company without a UK establishment, and the supplier will, therefore, be required to apply for a UK VAT number from the first effective sale.

UK VAT registration may not be required for Belgian or EU suppliers that make only B2C sales in GB via an OMP that facilitates the supplies. In such cases, the OMP will be deemed to be the supplier and liable to account for UK VAT on the consumer sale. The supplier will make a zero-rated supply to the OMP.

OMP liability will not apply where the customer provides a valid UK VAT registration number. The OMP should notify the supplier and provide them with the customer's UK VAT number. The supplier will need to invoice the customer directly and account for UK VAT.

Goods shipped from outside GB at the time of supply

When goods are located outside GB at the time of their supply, but ultimately destined for the GB market, the overseas (Belgian) supplier may, subject to the nature of the transaction and the terms and conditions of the sale, need to import the products into GB before supplying these to its customers.

A specific VAT regime will apply to consignments with a value of GBP 135 or less qualifying for customs duty relief. No UK VAT will be payable on such consignments on importation but customs declarations will still be required. UK VAT will be accounted for on these goods at the point of sale, which will depend on the type of customer:

- Where the customer is not a taxable person, or does not provide the supplier with a valid UK VAT registration number upon purchase, the supplier must account for UK VAT on the supply; or

- Where the supplier is provided with the customer's UK VAT registration number, the customer will be required to account for the VAT liability via the reverse charge mechanism. The invoice issued by the supplier to the UK business customer must make it clear that the customer needs to account for VAT (e.g., by including the words "reverse charge").

Where an OMP facilitates supplies of imported consignments not exceeding GBP 135 in value, the OMP will be deemed to make the supply to the UK customer and must comply with the obligations described above, instead of the foreign supplier.

For consignments imported into GB with a value exceeding GBP 135, a UK VAT registered business will be able to use the postponed VAT accounting procedure to account for import VAT. This means that the business will be able to declare and recover import VAT in the same VAT return, subject to normal VAT recovery rules.

Conclusion

Companies conducting business with GB need to understand and prepare for the new UK VAT rules as from 1 January 2021. They may be required to apply for a UK VAT number, or collect additional data from their customers. Businesses may wish to undertake an analysis of the new VAT treatments and their effect on business transactions to mitigate any potential issues following the end of the Brexit transition period.

Cambodia

Draft 2021 Financial Management Law amends indirect tax rules

Amendment to article 72 (new) of the Law on Taxation (LOT)

The tax administration would refund the input VAT credit for the following persons:

1. Taxable persons whose primary business activity is exportation and who have an excess of monthly VAT credits, provided they have shown proper export documentation and maintained proper accounting records and documents.

2. Foreign tourists who purchase any goods from a taxable person for consumption outside Cambodia.

Rules and procedures for these refunds will be provided in a separate Prakas of the Minister of Economy and Finance.

Amendment to stamp tax (ST) rules under article 12 of 2013 LFM

The 2021 LFM would modify the ST rules as follows:

LFM 2013	LFM 2021	ST rates
Transfer of title or ownership of immovable property (land and/or buildings) or contribution of immovable property as share capital of a company	No change	4%
Transfer of title or ownership of all means of transportation or vehicle	No change	4%
Transfer of shares in part or in full	No change	0.1%
Public procurement contract for the supply of goods and services	No change	0.1%
Legal documents, primarily letters for entity incorporations, business mergers, and business de-registrations	Legal documents, primarily letters for business mergers and business de-registrations. Letters for entity incorporations would be deleted from the definition.	KHR 1 million (~ USD 250)

The 2021 LFM is expected to pass and should be effective as from 1 January 2021.

China

Legislature passes export control law

On 17 October 2020 the Standing Committee of the National People's Congress, China's top legislature, passed the "Export Control Law of the People's Republic of China" (new law). The new law is effective from 1 December 2020 and provides the basic legal framework for China's export control affairs.

Export control is not new in China as certain laws and regulations historically have been in place to control the export of dual-use and nuclear/military-related items. However, these laws and regulations are not cohesive and, in some cases, have not been updated in almost ten years. The new law consolidates the various measures and introduces amendments and new provisions.

Scope of export control

Controlled items

The following items are subject to export controls (i.e., controlled items):

- Dual-use items;
- Nuclear items;
- Military items; and
- Other items to protect national safety and interests or fulfil obligations under international agreements.

The term "items" refers to goods, services, technology, and relevant data. Furthermore, "dual-use items" are defined as items that can be used for civil applications as well as military applications or military potential enhancement, particularly those that can be used for the design, development, manufacture, or enablement of weapons of mass destruction (including vehicles to transport such weapons for the intended use).

Export activities

The following activities are subject to export controls:

- The transfer of controlled items from China to foreign jurisdictions; and
- The provision of controlled items to foreign parties by Chinese entities or individuals.

With respect to the transfer of controlled items from China to a foreign jurisdiction, the transferor can be a Chinese or foreign entity or individual.

The provision of controlled items to foreign parties includes deemed export activities. For example, controlled items provided by a Chinese entity or individual to Chinese representatives of a foreign entity or a foreign individual physically present in China could be considered an export activity subject to controls.

The new law also provides that "re-exports" of controlled items fall within the scope of export activities subject to controls; however, as yet there has not been clarification about the activities that constitute re-exports.

Miscellaneous provisions

The new law also introduces new provisions including the following:

- If a foreign entity or individual violates the new law and endangers China or its interests, such entity or individual will be dealt with according to the new law (although it remains to be seen how this will be enforced);

- For any foreign jurisdiction that implements export control measures that endanger China's national safety and interests, China may implement reciprocal measures against the jurisdiction; and

- Service providers may not provide agency, freight forwarding, courier, customs declaration, e-commerce platform, or financial services in connection with export activities that are not compliant with the export control laws, otherwise such providers may be subject to penalties.

Export license requirements

The government (through relevant government departments) will continue to maintain a list specifying controlled items, which are subject to an export license requirement. Currently for example, the list of controlled dual-use items is prepared by the Ministry of Commerce (MOFCOM) and the General Administration of Customs (GAC) and updated annually. The relevant government departments, such as MOFCOM for dual-use items, administer the licenses, including approvals and compliance matters.

The relevant government departments also may introduce a temporary license requirement for the export of certain items not yet on the list if such department determines that a license control is necessary, subject to the following rules:

- An announcement must be made in respect of such items indicating that a temporary license is required but that the items are not on the list of controlled items;

- The term of the temporary control measure may be up to two years (although renewals are permitted); and

- Before the expiration of the term, the department must determine whether a license is no longer required for such items, to renew the control measure, or to move the items to the list of controlled items.

For export of items that are not on the list of controlled items or subject to a temporary license requirement, the exporter must still obtain approval to export such items from the relevant government department if it either receives a notice to that effect from the department or knows (or should know) such exports may give rise to the following risks:

- The exports may endanger China's national safety or interests;

- The items may be used for the design, development, manufacture, or enablement of weapons of mass destruction (including vehicles to transport such weapons for the intended use); or

- The items may be used for terrorism purposes.

If the exporter is unable to determine whether it must obtain approval to export a specific item, the exporter may consult with the relevant government department.

End use of controlled items

A key factor that the government departments consider when deciding whether to grant a license is the end use or end user of the controlled item. Any change to the end use or end user of the controlled item must be reported by the exporter or (foreign) importer in a timely manner to the relevant government department.

The government also maintains a deny list of importers and end users that are prohibited from trading in controlled items. Exporters generally are not allowed to trade with such importers and end users unless special approval is granted.

Importers and end users may be added to the list if they are involved in:

- Activities that are not in compliance with the new law as to the management of the end users or end use of the controlled items (e.g., the items being actually used for purposes different from the end use previously reported to obtain the export license, without such change being reported);

- Activities that may endanger China's national safety or interests; or

- Terrorism activities.

Importers and end users placed on the deny list may apply for removal from the list after they have taken remedial action and the relevant government department has approved their removal from the list.

Investigations

The government departments may initiate an investigation against an entity or individual that is suspected of noncompliance with the export control laws. The investigator may take the following actions:

- Inspect business premises or other relevant places;

- Question the relevant parties and request statements;

- Review and copy documents, accounting records, mail, and other correspondence;

- Inspect transportation vehicles used for exports, issue orders to cease loading and/or return the relevant goods;

- Detain the relevant goods; and

- Obtain bank account information.

Where exports are suspected to be controlled items without an export license, the customs authorities may hold the goods and question the exporter. Unlike the previous rules where only the exporter could apply to MOFCOM for certification about whether the concerned goods are controlled items, the new law authorizes customs authorities to request the relevant government department to make such a determination.

Penalties

The new law increases the penalties for noncompliant activities. Under the previous rules, the fine for exporting controlled items without a license could not be higher than CNY 1 million or 30% of the value of the goods. Under the new law, the fine can range from CNY 500,000 to ten times the export revenue (i.e., the amount paid for the goods). In addition, the export revenue may be confiscated, and the business permanently prohibited from engaging in the export of relevant items in serious cases.

Penalties have been added for certain noncompliant activities, which include:

- Trading with deny listed importers or end users. This activity may subject the exporter to warnings, orders to cease trading, confiscation of relevant income, monetary penalties of up to 20 times the relevant income, with the business potentially being prohibited from engaging in the export of the relevant items in serious cases; and

- Providing services (e.g., agency, freight forwarding) with respect to certain exports that the service provider knows are noncompliant. This activity may subject the service provider to warnings, orders to cease business, confiscation of relevant income, and other penalties.

Voluntary compliance

The new law states that the government may issue guidance encouraging exporters to establish internal control systems for compliance purposes. Exporters with sound and effective internal control systems may benefit from less scrutiny from government departments and being granted a license permitting multiple exports of controlled items within a set period. Normally, an export license can only be applied on a single transaction basis.

Comments

The new law signals the Chinese government's intention to improve trade policy from the perspective of national safety and interest. The introduction of new rules (e.g., the deny list of importers and end users) and the increased penalties for noncompliance clearly present more risks to exporters.

Affected businesses should consider establishing sound and effective internal control procedures to ensure compliance with the various export control requirements. MOFCOM issued guidance in 2007 addressing company policy, organizational support, internal review procedures, internal guidance, training, and documentation to guide businesses in establishing such procedures. This guidance is expected to be updated now that the new law has come into effect.

Affected businesses should take the following steps as early as possible:

- Identify areas where export control measures apply and compliance procedures should be in place;

- Review current internal control systems and update as necessary, along with considering automated solutions;

- Provide trade compliance training to employees; and

- Analyze the overall impact of the new law on current products, business models, and company strategies, and determine whether any changes should be made.

Finland

Tax Administration updates guidance on right to recover input VAT

On 24 November 2020, the Finnish Tax Administration issued an updated version of its written guidance on the right to recover input VAT. The most significant updates concern the recovery of input VAT related to the sale of real estate or shares of a real estate company, the sale of shares in a subsidiary, and the acquisition of securities.

Sale of real estate or shares of a real estate company

The guidance describes the case-by-case criteria for considering the purpose of the use of the real estate before the sale as grounds for an input VAT deduction right for costs related to the sale. As a rule, the sale of real estate is VAT exempt and, consequently, no input VAT deduction right for sale-related costs exists. However, if the real estate has been used for taxable business purposes prior to the sale, the input VAT on the sale-related costs might, under certain strict conditions, be deductible as overhead costs. Nevertheless, according to the guidance, if the real estate was not used for VATable purposes before the sale, or the connection to those activities has ceased to exist, the incurred input VAT is not recoverable.

Sale of shares in a subsidiary

According to the guidance, input VAT on costs related to the sale of shares in a subsidiary to which the parent company has supplied services may be recoverable as overhead costs with the prerequisite that the acquired funds will be used for the benefit of the VATable activities of the parent (such as the termination of the activities of the group or to fund loans taken for carrying out such activities). Note that to recover the input VAT, the parent company must have supplied VATable services to the subsidiary for consideration before the sale took place.

Acquisition of securities

The recovery right is determined based on the use of the securities as follows:

- Active trading of securities or passive investment activities, for which a recovery right does not exist; or

- Acquisition of shares in a subsidiary, for which a recovery right may exist if the parent company supplies or intends to supply VATable services to the subsidiary for consideration.

Comments

The guidance highlights that the recoverability of the input VAT on costs related to a VAT exempt sales transaction depends on several factors. We strongly recommend a case by case analysis where real estate is sold, or securities are bought or sold, to determine whether related costs might be deductible.

France

Statute of limitations for bringing tax cases before a court clarified

In a decision issued on 21 October 2020, the French Administrative Supreme court (*Conseil d'Etat*) clarified the statute of limitations for bringing tax cases before a court.

According to French law, taxpayers wishing to dispute a tax position must file a claim with the tax authorities before being allowed to present their case to a court of law.

If the tax authorities reject the claim (explicit rejection decision) or fail to respond within six months (implied rejection decision), the taxpayer may bring the case before the administrative court of first instance or the civil court of first instance.

Generally, a taxpayer has two months to bring the case before the competent court if the claim is explicitly rejected by the tax authorities.

In its ruling, the Administrative Supreme Court clarified when cases may be brought to a court in situations involving (i) irregular explicit rejection decisions and (ii) implicit rejection decisions.

- Irregular explicit rejection decisions: If the tax authorities explicitly reject a taxpayer's claim but fail to provide certain information, such as the deadline to challenge their decision, the taxpayer is not bound by the two-month statute of limitations. However, the taxpayer must bring a case before the competent court "within a reasonable time," which cannot be longer than one year as from the day the taxpayer received the rejection decision.

- Implicit rejection decisions: If the tax authorities fail to reply to the taxpayer's claim within six months, the taxpayer may bring a case before the competent court at any time (i.e., no time limitation applies).

France

2021 finance law adopted by Parliament

The French parliament adopted on 17 November 2020 the 2021 finance law. The bill is final and, except for a constitutionality review by the French Constitutional Council, it is expected to be published without modification by 31 December 2020.

This article summarizes some of the law's key provisions applicable to companies, some of which are the same as those included in the draft bill released in September.

Corporate income tax

Revaluation of fixed assets and neutralization of tax consequences (article 31)

Under French accounting rules, companies are allowed to revalue their fixed assets at will (only tangible and financial assets are eligible). This practice allows companies to show a more accurate picture of their patrimony and financial wealth. The resulting improvement in their balance sheet should increase their borrowing capacity. However, capital gains that may arise from the revaluation of fixed assets are treated as an immediate taxable profit subject to corporate income tax (CIT).

Due to the economic effects of COVID-19, the 2021 finance law proposes to neutralize temporarily the tax consequences of asset revaluations, as follows:

- **Depreciable assets:** It is possible to spread the revaluation differences over a period of five or 15 years depending on the nature of the assets (resulting in tranches added back to taxable income over multiple years). In such a case, depreciation is calculated using the revalued basis as from the fiscal year following the year of the revaluation. Any disposal of the assets triggers the immediate taxation of the fraction of the gain that has not yet been recaptured in taxable income at the time of sale.

- **Non-depreciable assets:** The revaluation gains are deferred until the disposal of the assets. Write-downs are calculated using the value immediately before revaluation.

This favorable tax treatment is at the election of the company. A loss-making company may prefer to include any latent capital gains in taxable income immediately.

This tax treatment is available for the first revaluation realized in fiscal years ending on or after 31 December 2020 and no later than 31 December 2022.

Spreading the capital gains from sale-leaseback transactions (article 33)

Under a sale-leaseback transaction, a company that owns real property can dispose of it (sale transaction) and continue to use it under a lease arrangement (leaseback with an option to repurchase).

The main benefit of the transaction is to allow the seller, who has become the lessee, to still use the same real property while improving immediately its cash flow position.

According to the provisions of the 2021 finance law, sale-leaseback arrangements can be tax neutral for the company disposing of its real property since the latter is allowed to spread the realized capital gain over the period of the lease agreement. In other words, the company may deduct accrued rents during the period over which it adds back portions of the capital gain in its taxable income. The spreading of the capital gain is optional and based on the lower of either the duration of the leaseback agreement or 15 years.

This measure was already applicable to arrangements entered into between 23 April 2009 and 31 December 2012, as part of provisions pushed by the French government after the 2008 financial crisis. Contrary to the former mechanism, the 2021 finance law provides that the new mechanism is limited to real properties used for commercial, industrial, craftsmanship, liberal, or agricultural activities. It seems, therefore, to exclude real properties held for pure investment purposes.

The benefit of this regime is also applicable in the context of a sublease agreement signed with an affiliate—within the meaning of article 39,12 of the French tax code (FTC)—as long as the related company dedicates the relevant building to its own commercial, industrial, craftsmanship, liberal, or agricultural activity.

This measure applies to disposals of real properties to leasing companies for which the sale occurs between 1 January 2021 and 30 June 2023. A funding agreement accepted by the lessee between 28 September 2020 and 31 December 2022 must precede the sale.

These provisions complement the existing preferential real estate transfer tax treatment currently applicable to sale-leasebacks (reduced registration duties under article 1594 F quinquies H of the FTC).

Reduced CIT rate for SMEs: Increase in turnover cap to EUR 10 million (article 18)

According to French law, small and medium-sized enterprises (SMEs) whose annual turnover does not exceed EUR 7.63 million currently can benefit from a reduced CIT rate of 15% on the first EUR 38,200 of taxable income. SMEs must have entirely released their capital and must be at least 75% held by an individual—or an entity meeting the same requirements—in order to benefit from this reduced rate.

If the entity is the parent company of a tax consolidated group, the turnover threshold is assessed at the group level by adding the turnover of each member company.

According to the provisions of the 2021 finance law, the reduced CIT rate of 15% is extended to companies whose annual turnover does not exceed EUR 10 million (increased from EUR 7.63 million).

Extension to companies under conciliation procedure of (i) the normality presumption applicable to certain commercial debt waivers and (ii) the election for early refund of carry-back receivables (article 19)

The new finance law extends to companies under the conciliation procedure two favorable measures that only apply to collective proceedings listed in the law.

As a reminder, companies involved in a conciliation procedure are entities facing legal, economic, or financial difficulties, proven or predictable, but that have not missed payments for more than 45 days.

i. Normality presumption applicable to commercial waivers

According to French rules, commercial debt waivers are deductible if they cannot be considered an abnormal act of management (i.e., if they are in the company's interest and have a real and adequate counterpart).

However, commercial debt waivers granted in the context of a safeguard plan or recovery plan are always deductible—they are presumed to be a normal act of management.

This exception is extended to commercial debt waivers granted as from 1 January 2021 in the context of a conciliation procedure that meets the conditions of article L 611-8 of the commercial code, i.e., these commercial debt waivers will always be deductible.

ii. Election for early refund of carry-back receivables

The French loss carryback mechanism allows tax losses incurred during a given fiscal year to be allocated to the previous fiscal year's profits, up to the amount of that year's retained earnings. This creates a receivable from the French Tax authorities (FTA) equal to the tax surplus previously remitted. Tax losses can only be carried back to the previous fiscal year's profits and are capped at EUR 1 million.

The receivable can be used to offset CIT incurred during the five following fiscal years. After the five-year period, the fraction of receivables that was not used against the payment of CIT is refunded to the taxpayer.

However, this five-year period can be reduced. Companies that are involved in a safeguard procedure, recovery procedure, or in the process of liquidation can ask for the early refund of their carry-back receivables, as early as the opening judgment date of one of these procedures.

For carry-back receivables arising as from 1 January 2021, the early refund election will be available to companies involved in a conciliation procedure (i.e., companies with carry-back receivables arising as from 2021 will be able to ask for a refund as early as the day of the judgment opening their conciliation procedure).

New tax credit for rents waived by landlords (article 20)

The 2021 finance law introduces a new tax credit for individual or corporate landlords (owners of immovable property located in France) who decide to definitely waive part or all of the rent due by their tenant businesses.

The measure is aimed at supporting businesses that are heavily impacted by governmental health measures (movement restrictions). Tenants must fulfill the following conditions:

- They rent premises located in France that are subject to a public access ban;

- Or their main activity is directly affected by the economic crisis related to the COVID-19 pandemic (listed in Annex 1 of Decree 2020-371 dated 30 March 2020), such as hotels, restaurants, gyms, cinemas, etc.;

- They have less than 5,000 employees;

- They were not "facing difficulties" within the meaning of Commission Regulation (EU) No 651/2014 as of 31 December 2019;

- They were not under judicial liquidation as of 1 March 2020; and

- They did not benefit from EU rescue or restructuring aid.

The tax credit is equal to 50% of the rental amount waived. However, for tenants that have 250 employees or more, only two-thirds of the waived rents may be credited (the tax credit is effectively limited to 33.3% of the waived amounts).

In order to benefit from the new tax credit, the waiver must be granted in relation to rent due on November 2020 and must be granted no later than 31 December 2021.

The tax credit can be allocated to the 2020 individual income tax or to the CIT due for fiscal years ending as from 31 December 2020.

Finally, the new law also extends for six months the deduction for rent waivers granted by landlords from 15 April 2020 through 31 December 2020 (introduced by the second amending finance law for 2020). The measure is applicable provided that the tenant is a company (i.e., not an individual) that is not related to the landlord. The tax deduction is now available to landlords granting rent waivers through 30 June 2021.

R&D tax credit (article 35)

French tax law provides for a 30% R&D tax credit on qualifying research expenses up to EUR 100 million and a 5% credit above this limit if certain criteria are met.

To date, the expenses incurred on R&D works subcontracted to state-funded service providers may be double counted when calculating the R&D tax credit. This mechanism will be abolished.

Moreover, the EUR 2 million increase in the EUR 10 million threshold for all subcontracted expenses related to R&D conducted by state-funded providers will be abolished as well.

As a result, R&D operations conducted by state service providers and accredited private providers will be treated similarly. This measure will apply to expenses incurred as from 1 January 2022.

The law also repeals the possibility to file administrative ruling applications regarding the R&D tax credit to agencies in charge of supporting innovation. As from 1 January 2021, companies can only apply for an administrative ruling regarding the R&D tax credit with the French tax administration (FTA) or the Ministry of Research.

Local taxes/Business taxes

Please also refer to the "Other measures" section, below, under "Conditional right to benefit from French recovery plan."

Reduction in the CVAE rate (article 8)

The CVAE applies at a single rate of 1.5 % to the added value produced by a company. However, a digressive allowance is available depending on the company's turnover, impacting the CVAE's effective tax rates (ETRs). The 2021 finance law divides these ETRs by two, as illustrated in the table below:

Turnover (excluding taxes)	ETR (current)	ETR (2021 finance law)
< EUR 500,000	0%	0%
EUR 500,000 ≤ turnover ≤ EUR 3 million	0.5% x ((turnover - EUR 500,000) / EUR 2,500,000)	0.25% x ((turnover - EUR 500,000) / EUR 2,500,000)
EUR 3 million < turnover ≤ EUR 10 million	0.5% + 0.9% x ((turnover - EUR 3,000,000) / EUR 7,000,000)	0.25% + 0.45% x ((turnover - EUR 3,000,000) / EUR 7,000,000)
EUR 10 million < turnover ≤ EUR 50 million	1.4% + 0.1% x ((turnover - EUR 10,000,000) / EUR 40,000,000)	0.7% + 0.05% x ((turnover - EUR 10,000,000) / EUR 40,000,000)
> EUR 50 million	1.5%	0.75%

These changes apply for the computation of the CVAE due as from 2021.

A reduction in the rate (from 1.5% to 0.75%), even if only applicable on CVAE due in 2021, may impact the consolidated financial statements for the fiscal year ended on 31 December 2020 if enacted before 31 December 2020. Because CVAE is considered an income tax (optional under IFRS but mandatory under US GAAP), the associated deferred tax will have to be adjusted as soon as the change in the tax rate is enacted.

Territorial Economic Contribution (CET tax) and cap mechanism (article 8)

The CET consists of two different taxes: the real estate contribution for enterprises (CFE) and the CVAE. The CET is capped at 3% of the added value generated by an enterprise (cap mechanism).

The new law lowers this cap to 2% for CET due as from 2021.

CET exemption for the creation/extension of an establishment (article 120)

The creation or extension of an establishment as from 1 January 2021 may be exempted from CET, by municipal decision, for three years from the year following the establishment's creation or from the second year following the year an extension was completed.

Value added tax (VAT)

VAT group regime (article 162)

The 2021 finance law provides for the implementation of the VAT group option provided to EU member states in article 11 of the EU VAT directive (Council Directive 2006/112/EC).

Accordingly, entities established in France will have the option to set up a VAT group if, while legally independent, those entities are closely bound to one another by financial, economic, and organizational links. Companies included in the VAT group will then be treated as a single VAT taxable person.

The representative of the group will elect VAT grouping by filing a statement containing all relevant information and the election will be binding for three years.

The representative of the VAT group will be responsible for ensuring VAT compliance (such as filing the annual VAT return and making VAT payments) but all the members will remain jointly and severally liable for VAT debts.

The new regime will apply as from 1 January 2022 and the first French VAT groups can be created as from 1 January 2023 with the group election being made no later than 31 October 2022.

Clarification of VAT rules regarding composite offers (article 44)

The 2021 finance law implements into French law the principles set out by the European Court of Justice regarding complex/unique services including several elements subject to different VAT regimes. The stated objective is to tackle optimization practices by operators providing composite offers to their clients.

According to the new measures, transactions including different (non-accessory) elements subject to different VAT rates on a standalone basis will be subject to the highest applicable rate.

The law also recognizes the various travel services provided by travel agencies and tour operators as a unique service delivery subject to its own regime.

Postponement of the rules amending the e-commerce VAT regime (article 51)

The new law postpones the entry into force of the VAT rules applicable to e-commerce until 1 July 2021 (instead of 1 January 2021).

These rules were adopted by the European Council, upon a proposal from the European Commission, by a decision dated 22 July 2020 ((UE) 2020/1109).

The law also excludes certain deliveries (such as of second-hand goods, works of art, collectors' items, or antiques) subject to VAT on margin from the territoriality rules applicable to distance sales of goods inside the EU and distance sales of imported goods.

Finally, it limits the application of the EUR 10,000 turnover threshold below which intra-EU distance sales are treated as domestic transactions to taxpayers established in a single EU member state.

Application of 0% VAT rate on COVID-19 vaccines and in vitro diagnostic medical devices (article 46)

France has decided exceptionally to apply a 0% VAT rate to the delivery of goods and services closely related to COVID-19 vaccines and to *in vitro* diagnostic medical devices. This VAT rate only applies to vaccines that have received a marketing authorization by an EU member State or the EU and to medical devices that are in conformity with the conditions provided in the relevant EU healthcare legislation (EU Directive 98/79/CE; Regulation (UE) 2017/746).

These special measures apply to transactions for which the triggering event occurs on or after 15 October 2020. They will be repealed on 1 January 2023.

Other measures

Conditional right to benefit from French recovery plan (article 244)

In order to overcome the economic crisis related to the COVID-19 pandemic, France launched its economic recovery plan on 3 September 2020. The "France relance" plan centers around three major axes: ecology, business competitiveness, and social cohesion.

From a tax standpoint, the plan provides for the reduction of local/business taxes (measures provided for by the 2021 finance law: in particular, the reduction of the CVAE rate, the reduction in the CET tax cap, and the CET exemption for the creation or extension of an establishment).

Companies employing more than 50 people and benefitting from the recovery plan measures provided for by the 2021 finance law will have to make significant progress by 31 December 2022 regarding the following three areas:

- Transparency regarding their ecological transition;

- Gender equality; and

- Corporate governance.

Extension of the reduced rate applicable to late payment interest and default interest (article 68)

Currently, a monthly 0.20% rate applies to late payment interest and default interest according to the 2017 amended Finance Law, which reduced the rate from 0.40% to 0.20% until 31 December 2020.

The 2021 finance law makes the reduction permanent, i.e., the monthly rate remains 0.20% (or 2.4% annually).

Greece

Amendments to VAT rates aim to mitigate continued impact of COVID-19 (updated)

Recent indirect tax developments in Greece include the extension of the application of special reduced VAT rates for certain islands, the application of reduced VAT rates to certain goods and services, and a VAT suspension regime for businesses affected by COVID-19.

Extension of special reduced VAT rates for the islands of Leros, Lesvos, Kos, Samos, and Chios

Pursuant to Ministerial Decision 1272/2020, which was published in the government gazette on 21 December 2020 (FEK B' 5597/21.12.2020), the application of the special reduced VAT rates (i.e., 17%, 9%, and 4%) for the islands of Leros, Lesvos, Kos, Samos, and Chios is further extended for six months, from 1 January 2021 through 30 June 2021. For the Greek mainland and all other islands, the VAT rates are 24% (standard rate), 13%, and 6% (reduced rates).

Application of reduced VAT rates to certain goods and services

- Law 4764/2020, which was published in the government gazette on 23 December 2020 (FEK A' 256/23.12.2020), amends paragraphs 45, 46, and 47 of Annex III of the Greek VAT Code (Law 2859/2000) and reclassifies the goods listed below to qualify for the super-reduced 6% VAT rate instead of the reduced 13% VAT rate that applied previously, with effect as from 23 December 2020:

    - Products for the support of disabled persons with vision problems, including:

        - PC programs (jaws, supernova, hall, fine reader) (tariff class code CN EX 8523), Braille printers (CN EX 8443), hand watches (Braille) (CN EX 9102), writing plates (Braille), meters (Braille) (CN EX 9017). electronic sticks (CN EX 6602), sound recording apparatus with four tracks (Braille) (CN EX 8519), Braille displays (CN EX 8528), scanners (CN EX 8471), Braille note takers (CN EX 8472), programs for cell phones in Greek and English (mobile speak, speaking phone) (CN EX 8523), and writing frames for persons with limited sight (Braille) (CN EX 3926).

        - Note, however, that the 6% VAT rate already applied to white walking sticks (CN EX 6602) and writing machines (Braille) (CN EX 8472).

    - Glucose testing strips (CN EX 3822), light warning systems (CN EX 8531), and light signal receivers (CN EX 8517) for the support of disabled persons.

- Law 4758/2020, which was published in the government gazette on 4 December 2020 (FEK A' 242/04.12.2020), reclassifies the goods listed below to qualify for the reduced 13% VAT rate instead of the standard 24% rate, with effect as from 4 December 2020:

    - Prepared mustard (CN EX 2103); and

    - Food preparations that are not specified or included elsewhere, with the exception of food supplements in any form and of compound alcohol preparations other than those prepared on the basis of fragrant substances, of the types used for the production of beverages (tariff class code CN EX 2106.)

      A detailed and extensive description of products falling under CN code EX 2106, which may or may not benefit from the reduced VAT rate, is provided in Circular E. 2008/2021. However, since the issue is rather complex due to the large volume of products falling under this tariff class code, a case-by-case analysis should be made.

- Article 39 of Law 4753/2020, published in the government gazette on 18 November 2020 (FEK A' 227/18.11.2020), extends until 30 April 2021 the application of the super-reduced 6% VAT rate to the goods listed below, which are related to the treatment of COVID-19:

    - Surgeons' masks and gloves (tariff class codes CN EX 3926, EX 4015, EX 4818, and EX 6307);

        - Note that the guidelines in Circular no. E. 2152/2020 clarify that the 6% VAT rate only applies to these masks if they are used to protect against viruses and prevent the transmission of diseases, especially in the circumstances of COVID-

19 (and not for other uses) and only if they comply with the safety standards set by EU legislation and bear the CE mark. If these conditions are met, the 6% VAT rate will apply in all stages of the supply chain, from importation to local supply within the Greek territory.

- Soap and other preparations for personal hygiene (tariff class codes CN EX 3401 and EX 3402);

- Antiseptic solutions, antiseptic wipes, and other antiseptic preparations (tariff class codes CN EX 3307, EX 3401, EX 2828, EX 3402, EX 3808, and EX 3824);

- Denatured ethyl alcohol (tariff class code CN EX 2207) that is destined to be used as raw material for the production of antiseptic solutions; and

- Pure undenatured ethyl alcohol of agricultural origin and of an alcoholic strength by volume of 95% vol., packaged for retail sale (tariff class code CN EX 2207).

  Note that these goods were reclassified in March 2020 to qualify for the super-reduced VAT rate of 6% instead of the 24% standard rate through an act of legislative content, with effect from 20 March 2020 through 31 December 2020; however, as stated above, this has been extended until 30 April 2021.

- Ministerial Decision no. DEFK E 1123676 EX 2020 (15 October 2020) further extends until 30 April 2021 the application of the reduced 13% VAT rate to the supply of the following goods and services:

  - Non-alcoholic beverages that do not add alcohol in any proportion (CN EX 2202) and aerated waters classified under tariff class code CN EX2201;

  - Passenger and luggage transportation services;

  - The supply of non-alcoholic beverages, juices, and drinks for on-site consumption in cafeterias, restaurants, and similar establishments; and

  - Cinema tickets. The super-reduced 6% VAT rate continues to apply to theater and concert tickets.

    Note that these goods and services were reclassified in May 2020 to qualify for the reduced 13% VAT rate instead of the standard 24% rate by Law 4690/2020, which was published in the government gazette on 30 May 2020 (FEK A' 104/30-05-2020), with effect from 1 June 2020 through 31 October 2020; however, as stated above, this has been extended until 30 April 2021.

- Law 4714/2020, published in the government gazette on 31 July 2020 (FEK A' 148/31.07.2020), modifies the VAT rates for the promotion of music education and the sale of tickets to sporting events, as follows:

  - Handwritten or printed sheet music, whether or not illustrated or bound (CN code 4904) has been reclassified to qualify for the super-reduced 6% VAT rate instead of the 24% standard rate as from 31 July 2020.

- Prior to this change, the 6% VAT rate applied only to books and illustrated books for children (CN codes EX 4901, EX 4903) as well as print newspapers and periodicals, whether illustrated or with advertisements (CN code 4902).

- Tickets to sporting events have been reclassified to be subject to the reduced 13% VAT rate instead of the standard 24% rate with effect from 1 September 2020 through 30 June 2021.

Suspension of VAT payments for businesses affected by COVID-19

- Ministerial Decision no. A.1255/2020 (government gazette no. B' 5223/25-11-2020), released on 26 November 2020, suspends until 30 April 2021 the payment of VAT liabilities arising from VAT returns due in November 2020 for businesses with an activity code number included in the list of affected businesses that are within the scope of the measure and whose operations have been suspended pursuant to a state order.

- A similar suspension until 30 April 2021 applies to VAT liabilities arising from VAT returns due in October 2020 for businesses with an activity code number included in the list of affected businesses (Ministerial Decision no. A. 1236/2020, government gazette no. B’ 4751/27.10.2020).

- Because VAT suspension measures are important to all businesses affected by COVID-19, please also note that:

  - Payment deadlines for assessed amounts based on debit VAT returns, which expired during the period from 11 March 2020 through 30 April 2020, were suspended until 31 August 2020.

  - The payment of assessed and outstanding VAT liabilities from debit VAT returns as at 1 May 2020 was suspended until 30 September 2020.

  - Ministerial Decision no. A.1200/2020 (government gazette no. B’ 3612/31.08.2020) extends until 30 April 2021 the deadline to pay and to suspend the collection of assessed liabilities (including VAT) owed by individuals and legal entities affected by COVID-19.

Guatemala

Electronic forms required for certain exporters requesting VAT credit refunds

Guatemala’s Superintendency for Tax Administration (SAT) released an official statement on 3 December 2020 providing that, as from 7 December 2020, exporters must use electronic form SAT-2125 to request a value added tax (VAT) credit refund under the general regime; the statement is based on the SAT’s authority under the VAT regulations to specify the form for requesting a VAT credit refund. The change is part of the SAT's general plan to digitalize tax administration. The paper version of the form (SAT-2123) may continue to be used only for VAT credit refund requests made by taxpayers that carry out transactions with VAT-exempt entities.

The SAT made electronic form SAT-2125 available to taxpayers through its online tax portal in late December 2019, and exporters requesting a VAT credit refund under the general regime have been able to use the electronic form since January 2020; however, the use of the paper form SAT-2123 was still an option for VAT credit refund requests before 7 December 2020.

Electronic form SAT-2125 requires taxpayers to provide the following information:

- General information on the taxpayer;
- Information on the taxpayer's legal representative;
- Information on the taxpayer's accountant;
- Details of the refund request; and
- Calculation of the amount of the VAT credit refund being requested.

Additionally, taxpayers must attach their book of purchases and book of sales for the period to which the refund request relates, in the format provided by the SAT in its online tax portal.

Hungary

Autumn 2020 tax package, reduced VAT rate on residential property enacted

The Hungarian parliament in November and December 2020 passed legislation to enact the autumn 2020 tax package and a temporary preferential VAT rate for newly constructed residential property.

Autumn 2020 tax package

The autumn 2020 tax package was enacted on 26 November 2020. Key VAT measures include:

- Implementation of the new EU e-commerce and distance sales regime as from 1 July 2021;
- Several modifications in relation to VAT groups, allowing taxpayers to specify a future date for establishing, terminating, joining, or leaving a VAT group;
- Introduction of e-VAT returns as from 1 July 2021;
- Specification of the transactions in respect of which VAT refunds are available for nonestablished taxpayers as from 1 January 2021; and
- Extension of the real-time invoice data-reporting obligation as from 4 January 2021.

Temporary preferential VAT rate for newly constructed residential property proposed

The Hungarian parliament also passed a bill temporarily reintroducing a preferential 5% VAT rate (reduced from the standard rate of 27%) on certain newly constructed residential properties as from 1 January 2021 through 31 December 2022. The bill became law on 11 December 2020.

Ireland

Clarification on VAT treatment of short-term hire of passenger vehicles

On 16 November 2020, Irish Revenue updated the VAT Tax and Duty Manual to include additional information on the short-term hire of passenger vehicles.

Under paragraph 19(a), Schedule 3, of the VAT Consolidation Act 2010, the hiring of a vehicle designed and constructed, or adapted, for the conveyance of persons by road to the same person for a period of less than five weeks (in total) in any 12-month period is subject to a reduced VAT rate of 13.5%.

The update clarifies that vehicles designed and constructed, or adapted, for the carriage of goods by road, with or without passenger capacity, are not passenger vehicles for purposes of the reduced rate of VAT applicable to such short-term hires. This form of vehicle hire would be considered a hire of a goods vehicle, which is subject to the standard rate of VAT.

Italy

Official list of reasons permitting rejection of B2G e-invoices published

Italy's Ministry of Economy and Finance, in cooperation with the Ministry of Public Administration, set forth an official list of reasons for which public authorities (PAs) may reject electronic invoices ("e-invoices") they receive, through a decree (No. 132/2020) that was published in the official gazette on 22 October 2020 and is effective as from 6 November 2020. Under the framework for mandatory business-to-government (B2G) e-invoicing, PAs can accept or reject invoices received through the interchange system (SDI) on a discretionary basis if they identify an error or missing information in the content of the XML file, and the decree aims to prevent unjustified rejections of XML files by PAs.

By amending the previous ministerial decree (No. 55/2013), Decree No. 132/2020 provides that PAs may reject e-invoices received through the SDI in only the following cases:

- The e-invoice refers to a transaction not actually carried out by the recipient of the XML file;

- The "CIG code" or the "CUP code" required to be reported on e-invoices to PAs (pursuant to article 25 of Law Decree No. 66/2014) to ensure the traceability of payments is omitted or incorrect;

- The "repertory code" required to be reported on invoices concerning medical devices purchased by PAs of the National Health Service (based on the Ministerial Decree of 21 December 2009) is omitted or incorrect;

- The "AIC code" required to be reported on e-invoices (pursuant to the Ministerial Decree of 20 December 2017) to allow more efficient monitoring of public expenses for products sold to the National Health Service is omitted or incorrect; or

- The number and date of the "expenditure commitment" required to be reported on e-invoices to regional and local authorities is omitted or incorrect.

In addition, it should be noted that:

- The rejection of e-invoices by PAs will no longer be allowed in cases where the data reported in the XML files can be amended through the issuance of proper credit notes (pursuant to article 26 of the Italian VAT Code); and

- PA are now required to communicate to the supplier the specific reason for rejecting an invoice; before the publication of Decree No. 132/2020, PAs were allowed to reject invoices without any obligation to communicate the underlying reason for the rejection to the supplier.

Italy

VAT payments postponed for certain taxpayers

On 30 November 2020, the Italian government issued Law Decree 157/2020 to postpone certain VAT payments to 16 March 2021 for specific categories of VAT taxpayers due to the COVID-19 emergency. These VAT payments include:

- The payment for the VAT due for the month of November 2020 (which would have been due by 16 December 2020 without the postponement); and

- The advance payment for the VAT due for the month of December 2020 (which would have been due by 28 December 2020 without the postponement). It is important to note that the Law Decree does not expressly refer to the advance payment for December 2020 as eligible for postponement but in the absence of any further communications from the Italian tax authorities, our understanding is that the postponement applies to this advance payment.

According to the Law Decree, the postponed payments may be spread over a maximum of four installments, with the first installment due by 16 March 2021, and no penalty or interest will be imposed.

With respect to the VAT advance payment, as a matter of principle, the taxpayer is allowed to determine the advanced amount due according to one of the following three methods:

- The historic method, according to which the advance payment for December 2020 is equal to 88% of the VAT payment made or that should have been made for the month of December 2019;

- The provisional method, according to which the advance payment is equal to 88% of the VAT payment due for the month of December 2020; or

- The analytic method, according to which the advance payment is equal to the total amount of VAT due for transactions carried out from 1 December to 20 December 2020, regardless of whether the transactions were booked or should have been booked, net of:

    - The input VAT relating to the purchases registered in the same period (i.e., from 1 December to 20 December 2020); and

    - The November VAT credit carried forward.

The postponement applies only to the following categories of VAT taxpayers:

- VAT taxpayers that have suffered a decrease in earnings in the month of November 2020 that is equal to or greater than 33% of the earnings accrued in the month of November 2019 (and on the condition that the total amount of earnings accrued during fiscal year 2019 was lower than EUR 50 million);

- VAT taxpayers that carry out business activities included in the list of suspended business activities provided under art. 1 of DPCM 3 November 2020 (e.g., gyms); and

- VAT taxpayers that carry out specific business activities (e.g., restaurant services, tourist accommodations, etc.) and whose legal seat/operating offices are located in Italian territories with medium to high risk of contagion (i.e., "zone arancioni" and "zone rosse").

Japan

Tax impacts of offering digital services to customers post-COVID

COVID-19 has had a profound impact on businesses, effecting everything from revenues to the way companies operate to carry out their day-to-day working functions. As a result, many companies that have historically held meetings and seminars in-person are now shifting to holding such events online. Transitioning meetings and seminars to an online setting may have unexpected Japanese tax consequences, particularly in a cross-border context with a new focus on digital services. This newsletter discusses such issues from a Japanese consumption tax ("JCT") perspective, and provides a case study to demonstrate the effect the issues may have on businesses looking to conduct online events for customers located in Japan.

Overview of JCT digital services

Under JCT law, digital services are generally defined as services provided via a telecommunications network and include, among other things, intercompany IT services, online databases, and online seminars/training. Since 2015, the place of supply for digital services is the location of the service recipient. Thus, digital services supplied to Japanese customers would generally be subject to JCT, regardless of whether the supplier is a Japanese or foreign company.

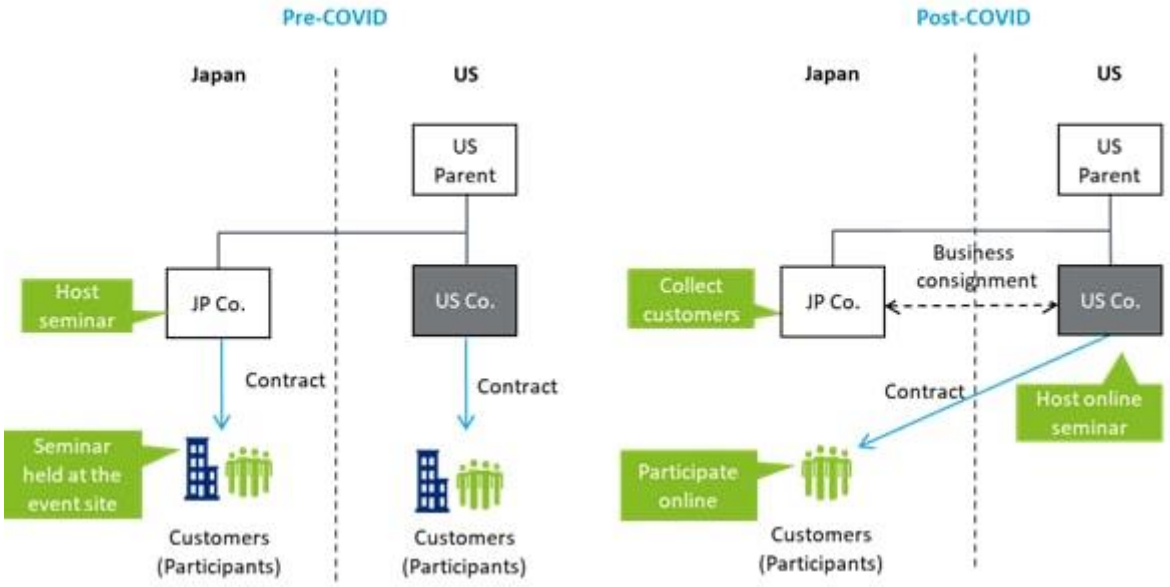
The JCT treatment of the supply of digital services by foreign companies differs depending on whether the transaction is categorized as business-to-business ("B2B") or business-to-consumer ("B2C"). Whether a service should be classified as B2B or B2C generally depends on the nature of the service or its terms rather than the recipient's status as a business or

individual, and an analysis of contractual terms is typically required to make the determination. However, some services are generally viewed as clearly for businesses (i.e., B2B), such as online advertising and intercompany IT services, while online purchases of items such as music, e-books, games, etc. are generally viewed as clearly for individuals (i.e., B2C).

Digital services classified as B2B are subject to a reverse-charge mechanism, and the recipient (rather than the supplier) would be required to account for both input and output JCT on the transaction. The only obligation for foreign suppliers with respect to the supply of B2B services is notifying their Japanese customers beforehand that the transaction is subject to the reverse-charge. On the other hand, if a digital service is classified as B2C, foreign suppliers must charge JCT or treat the amount charged to Japanese customers as inclusive of JCT and account for output JCT. Foreign suppliers of B2C services would also need to appoint a JCT representative in Japan and file/remit JCT through the representative if they meet the requirements to become a JCT taxpayer based on volume of taxable sales, or elect for JCT taxpayer status.

Case study

One example of how JCT rules may impact companies forced to change the way they operate due to COVID restrictions can be seen in the following example. Prior to COVID-19, JP Co., a subsidiary of US Parent, hosted in-person seminars for Japanese customers. However, as a result of COVID, events could no longer be held in-person. Thus, for business reasons US Parent decided to have its US subsidiary, US Co., host a virtual seminar, with JP Co. collecting customers in Japan for the event. Tickets to the event would be sold online and customers in Japan would be able to obtain a pass, view content/webinars, participate in streamed sessions, etc. The chart below provides an illustration of the pre and post-COVID transaction structures of US Parent.



Pre-COVID the US entities were not impacted by JCT, as the events were hosted solely by JP Co. However, the virtual seminars held by US Co. post-COVID would be seen as the supply of cross-border digital services and may result in JCT filing/payment obligations for US Co. if classified as B2C and US Co. meets the requirements for JCT taxpayer status.

Comments

Restrictions on public gatherings, travel, etc. as a result of COVID-19 have forced many business to rethink the way they operate and interact both internally with employees and externally with customers. Changes such as hosting events virtually rather than in-person are often the best alternative for continuing operation in the current climate. However, companies choosing to go virtual should be aware of the potential tax implications that may arise in doing so and consult with their tax advisor to plan accordingly and avoid any adverse consequences.

For example, foreign companies holding events online for customers located in Japan may result in unforeseen JCT impacts. Whether JCT will apply depends on a number of factors, such as whether the service is considered a "digital service" for JCT purposes, whether the service is B2B or B2C, and whether the foreign business qualifies as a JCT taxpayer. Determination of such factors is not always straightforward, so businesses should make sure to perform a detailed analysis to help ensure the correct treatment.

Additionally, changes in operations as a result of COVID-19 may have other consequences outside the realm of JCT (e.g., potential permanent establishment risks resulting from employees of foreign companies working remotely from Japan). Companies should be aware of such risks as well when making operational changes to cope with the current situation and consult with their tax advisors to avoid any potential pitfalls.

Luxembourg

2021 budget law enacted

On 19 December 2020, Luxembourg's 2021 budget law was adopted by the Chamber of Deputies and it was published in the Official Journal on 23 December 2020.

Due to the COVID-19 pandemic, the minister announced that the main focus of the measures is to contain the economic effects of the virus; therefore, there will not be a general tax reform for the 2021 budget year. Instead, the measures include various corporate, individual, and indirect tax changes and administrative simplifications.

The budget law will enter into force on 1 January 2021 and apply as from that date, except for certain tax measures, as further discussed below.

Corporate tax measures

The budget law introduces the following new corporate tax measures:

- Measures regarding the ownership of real estate located in Luxembourg by some Luxembourg investment vehicles;

- An amendment to the fiscal unity regime to change from a vertical to a horizontal consolidation regime; and

- A modification of the accelerated depreciation rules.

Measures regarding the ownership of real estate located in Luxembourg by some Luxembourg investment vehicles

The 2018-2023 coalition agreement for the formation of a new government stated that the government would introduce measures to counter tax abuses in the real estate sector. The 2021 budget law introduces a new real estate levy that will apply to a select number of Luxembourg investment vehicles owning real estate located in Luxembourg in some limited situations. Therefore, the holding of pan-European (other than Luxembourg) or pan-Asian real estate by Luxembourg investment vehicles, for example, will not be impacted.

The newly introduced levy, which enters into force on 1 January 2021, will apply only to the following Luxembourg investment vehicles:

- Alternative investment funds (AIFs) falling under part II of the amended law of 17 December 2010 concerning undertakings for collective investment (UCIs);

- Specialized investment funds (SIFs) referred to in the amended law of 13 February 2007; and

- Reserved alternative investment funds (RAIFs) referred to in article 1 of the amended law of 23 July 2016.

- The real estate levy will not apply when a vehicle is organized as a tax transparent legal entity, such as a Luxembourg SCS/SCSp (limited partnership) or a contractual fund regime such as a Luxembourg *Fond Commun de Placemen*t (FCP). This limitation is intended to continue allowing the use of legal forms or contractual fund regimes that provide transparency between the investment and investor.

- The real estate levy will apply at a rate of 20% on rental income (excluding VAT), capital gains resulting from the alienation of the real estate assets, and capital gains resulting from the alienation of units in certain types of entities (under certain conditions). This will apply if (i) all income is sourced from real estate assets located in the Grand-Duchy of Luxembourg and (ii) the income is received or realized directly from the real estate asset or indirectly through any other interposed tax transparent entity (such as a Luxembourg *société civile immobilière* (SCI), SCS, SCSp, etc.) or an FCP.

- The 2021 budget law further states that such a levy will not be deductible from overall taxable real estate revenue. Furthermore, it will not be available as a deduction nor creditable by any corporate or individual investor.

- The measure aims to target very specific cases while maintaining the current tax regime for Luxembourg investment vehicles; therefore, it will only impact a very limited number of players.

- Additionally, according to the 2021 budget law, a Luxembourg private wealth management company (SPF, *société de gestion de patrimoine familial*), governed by the Law of 11 May 2007, will no longer be authorized to indirectly hold real estate assets through one or more partnerships (established in Luxembourg or abroad), FCPs, or foreign undertakings benefiting from an equivalent tax and legal regime as a Luxembourg FCP. However, SPFs indirectly holding real estate through joint-stock

companies will still be allowed to do so. Further clarification would be welcome to understand the measure's exact scope and further assess whether and when existing SPFs in this situation may want to restructure.

- This measure will apply as from 1 July 2021.

Amendment to the fiscal unity regime to change from a vertical to a horizontal consolidation regime

The budget law introduces a temporary measure related to the fiscal unity regime to align it with a 2020 decision of the Court of Justice of the European Union (CJEU) (C-749/18).

In 2015, Luxembourgish legislation was amended to be aligned with CJEU case law allowing a group whose parent company is based in another European Economic Area (EEA) state or who has a permanent establishment there to form a "horizontal tax consolidation" with its resident (first- or lower-tier) subsidiaries.

The purpose of this measure is to allow vertically consolidated groups to convert to a horizontal form without the consequences flowing from the tax dissolution of the tax group. If the conversion happens during the minimum period of five fiscal years, it will not result in a tax rectification of the group's members. Instead, the tax authorities will treat the transaction as if the conversion had not taken place.

The temporary measure will be subject to the following conditions:

- The integrating parent of the previous integrated group will become the integrating subsidiary of the new integrated group;

- The change will increase the scope of the new integrated group compared to the previous integrated group; and

- The entities will have to be bound for at least five fiscal years before benefitting from the tax consolidation regime, unless they were already part of the previous integrated group.

This regime change, upon a joint request by all group members, will apply as from the 2020 tax year and until the 2022 tax year.

Modification of the accelerated depreciation rules

The budget law modifies article 32ter of the income tax law (LIR) as from the 2021 tax year. The allowed accelerated depreciation rate for renovated rental real property will be reduced to 4% (from 6% currently). The 4% rate will only apply if the renovation is completed within five instead of six years as from the beginning of the operating year.

Likewise, a 4% rate will apply to capital expenditures incurred when renovating an old building (provided they exceed 20% of the building's purchase price) if the renovation is completed within five years as from the beginning of the operating year.

A definition of the concept of "sustainable energy renovation" is added. Under certain conditions, a 6% depreciation rate will be allowed for capital expenditures relating to a sustainable energy renovation of rental real property.

A grandfathering rule will allow a taxpayer who acquired or incorporated rental real property prior to 1 January 2021 to take advantage of the current 6% accelerated depreciation rate if all conditions are met. Similarly, regarding the renovation of an old building completed before 1 January 2021, the taxpayer will still be able to benefit from the 6% rate on capital expenditures if all conditions are met.

These measures will apply as from the 2021 tax year.

Individual tax measures

The budget law introduces several changes to the individual income tax rules aimed at increasing tax fairness while keeping the country competitive to attract and retain key talent. More specifically, the budget law includes the following individual income tax measures:

- Abolition of the current "stock option" regime, which represents a substantial change from the current remuneration models in Luxembourg;

- Introduction of a profit-sharing bonus (*prime participative*) for some employees based on an employer's profits;

- Modernization of the current tax system for "inpatriates;"

- Measures for rental real estate: modification of the accelerated depreciation rates and introduction of a depreciation rate for energy-related renovations;

- Introduction of multi-year electronic withholding tax cards for wages and salaries; and

- Other measures.

Abolition of the current "stock option" regime

In its 2018 coalition agreement, the Luxembourg government announced the creation of a future legal framework allowing employees to participate in their employer's value creation. However, the long-term existing stock option regime was intended to be abolished gradually.

In line with this announcement, the Luxembourg tax authorities completely repealed, on 14 December 2020, tax circular LIR No. 104/2 dated 29 November 2017 relating to stock option plans with effect from tax year 2021.

This repeal requires affected Luxembourg employers to rethink their remuneration strategy and to refocus on the fundamental elements of the Luxembourg individual income tax law.

Introduction of a profit-sharing bonus (*prime participative*)

To help attract and retain key employees (as announced in the coalition agreement), the Luxembourg government introduced a tax measure allowing employees to participate in corporate profits. The measure will allow employers to grant a profit-sharing bonus to some of their employees, based on the employer's financial results (i.e., profits).

This discretionary bonus will (i) be considered a corporate tax deductible operating expense at the level of the employer, (ii) qualify as employment income at the employee level, and (iii) benefit from a 50% individual income tax exemption (applicable on the amount subject to the 25% limit mentioned below under "Employee level criteria").

The granting of the bonus will be subject to certain criteria at both the employer and employee levels, as follows:

- Employer level criteria:

    - The employer will have to make a profit (from commercial, agricultural, or forestry operations, or from the practice of a liberal profession) in the relevant tax year.

    - The employer will have to keep regular accounts during the tax year the bonus is granted (i.e., 2021 at the earliest), as well as during the year immediately preceding the tax year the bonus is granted (i.e., 2020).

    - The total amount of bonus that may be granted to employees will be limited to 5% of the employer's profits for the fiscal year immediately preceding the fiscal year in which the bonuses are granted (i.e., 2020 profits in case of a bonus granted in 2021). It is implied that the employer will only be able to grant a bonus to employees if the financial year results are positive in the immediately preceding fiscal year. Moreover, for companies with activities in EU member states other than Luxembourg, the bonus will not be determined based on global commercial profits (i.e., at the group level) but will be limited to profits made in Luxembourg by a company that employs workers in Luxembourg.

- Employee level criteria:

    - The bonus will not exceed 25% of the employee's gross ordinary annual remuneration (i.e., excluding any cash, and/or in-kind benefits, bonuses, premiums, etc.) for any given tax year. This percentage should be assessed for each beneficiary on a case-by-case basis. When determining an employee's gross ordinary annual remuneration, the employer will have to take into account the deemed gross annual salary based on all facts and data available, as well as potential deviations likely to affect the amount during the year. No remuneration other than the ordinary remuneration of the employee should be taken into account in determining this 25% limit.

    - The employee will have to be affiliated either with the Luxembourg social security system or a foreign social security scheme covered by a bi- or multilateral social security agreement.

- The bonus will enable employers to share some of their profits with select employees at the employer's sole discretion.

- Employers wishing to use this new regime will have to send a detailed communication to the appropriate wage tax office (i.e., RTS) responsible for verifying payroll tax deductions at the time the bonus is granted to the chosen employees. Communications will have to be made in the form prescribed by the tax authorities.

- These provisions will apply as from the 2021 tax year. Therefore, it is important to note that an employer can consider implementing the new regime as early as 2021, based on the closing of its accounts for the 2020 calendar year, to the extent all conditions are met.

Modernization of the current tax system for inpatriates

The current inpatriate regime, based on a 2014 circular, will be codified with a few adjustments. The main difference will be a change to the lump sum allowance for recurring expenses related to the cost-of-living differential between the home and host member states. The new rule will take into account certain moving expenses, both the one-time move to Luxembourg and costs associated with moving to Luxembourg, for inpatriates and their families covered by the 2014 circular.

In particular, the addition of an inpatriation premium will modernize the current regime, which sets the lump sum allowance at 8% of executives' fixed monthly remuneration and caps it at EUR 1,500 per month (although this may be doubled when inpatriates share a common home or residence with a spouse or partner, provided that the spouse or partner does not carry out a specific professional activity).

Up to 50% of the inpatriation premium will be exempt from individual income tax as long as the premium amount does not exceed 30% of the inpatriate's annual remuneration.

In addition, recurring costs incurred as a result of moving to Luxembourg (e.g., housing, tuition, etc.) and that are paid by the employer also will be exempt from Luxembourg individual income tax, up to a limit of EUR 50,000 (or EUR 80,000 for a couple).

Inpatriates will benefit from these tax exemptions for a period of up to eight consecutive years following the year they move to and start to work in Luxembourg, instead of a maximum of five years currently, provided that all conditions are met. In particular, inpatriates will have to never have been tax domiciled in the Grand Duchy, nor been subject to Luxembourg individual income tax on their professional income, nor have lived less than 150 kilometers from the Luxembourg border, during the previous five tax years.

The new legal framework will omit some of the conditions required by the 2014 circular, such as the company having to employ 20 or more full-time equivalent employees in the medium-term, or the inpatriate possessing special know-how to benefit the company's staff or being recruited from a sector or profession deemed difficult to recruit for in Luxembourg.

However, to qualify for the premium exemption, each inpatriate will have to derive a minimum annual remuneration of EUR 100,000 (currently EUR 50,000).

This measure will apply as from the 2021 tax year. To that end, the Luxembourg tax authorities already repealed the 2014 Circular on 14 December 2020 with effect from tax year 2021. However, they specified that the tax regime described in the circular continues to apply to inpatriate workers who started their activity in Luxembourg during tax years 2016 through 2020 (within the limits and under the conditions stated in the circular and provided that the employees concerned do not benefit from the provisions of article 115, number 13b of the individual income tax law (LITL)). This does not apply to inpatriate workers whose tax regime ended, for one reason or another, during the same period covering tax years 2016 through 2020.

Rental real property measures

Individual taxpayers eligible for the accelerated depreciation regime will be entitled to an annual individual income tax allowance classified as a special property allowance.

To obtain this benefit, they will have to derive net profits and/or income within the meaning of article 10, numbers 1, 2, 3, or 7 of the LITL (i.e., income from commercial, agricultural, or forestry activities, income from the practice of a liberal profession, and/or rental income) taxable in the Grand Duchy. They will determine their allowance based on the accelerated depreciation applicable to a building (or part of a building) purchased after 31 December 2020, rented out, and less than five years old as at 1 January of the tax year.

In the case of joint taxation, each spouse or partner will receive the special property allowance under the conditions discussed above.

Furthermore, to promote a sustainable housing policy designed to combat climate change, and to encourage owners of rental accommodations to carry out sustainable renovations of their existing property, the budget law introduces an accelerated depreciation rate of 6% for 10 years for capital expenditure incurred for such renovations.

These measures will apply as from the 2021 tax year.

Introduction of multi-year electronic withholding tax cards for wages and salaries

The budget law gives employers direct access to the electronic tax cards of their employees (tax cards are issued to employees by the tax authorities and are remitted to and used by employers for wage tax withholding purposes).

The relevant platform will first be made available to employers sometime in 2021 on an optional testing basis. As from 1 January 2022, employers will be required to use the new tool and to consult the files electronically.

Employers will be required at least once a month to access the wage tax forms and consult all the forms not yet reviewed at the time of access. In case of non-compliance, the tax office responsible for verifying an employer's payroll and wage tax deductions could request that the employer consult the unchecked records. It is important to note that employers will be subject to potential financial sanctions in such cases.

Other measures

- Landlords who have reduced the rent on their commercial leases in the 2020 calendar year will be eligible for a tax allowance equal to twice the amount of the rent reduction, up to EUR 15,000 per building (or part of a building) and per commercial lease agreement. This measure will apply as from the 2020 tax year.

- The budget law also repeals a special tax regime for venture capital investment certificates introduced some time ago to revive investment in the interest of economic development, due to the scheme's limited take-up.

Indirect tax measures

The budget law introduces the following indirect tax measures.

Substantial increase of duties applicable to the contribution of a Luxembourg property to a company

The registration and transcription duties due on the contribution of a Luxembourg property to a civil or joint-stock company will substantially increase, i.e., around three times more than currently due. The measure aims to partly align the tax treatment of a contribution of Luxembourg property to the tax treatment of a sale of Luxembourg property.

In practice, the registration duty will increase from 0.6% (i.e., 0.5% + 2/10) to 2.4% (i.e., 2% + 2/10) and the transcription duty from 0.5% to 1%. Therefore, the combined duties will increase from 1.1% to 3.4%.

For a nonresidential property located in Luxembourg City, the 50% surcharge that applies to registration duties should be taken into account. The registration duty will increase from 0.9% (i.e., 0.6% + 0.3%) to 3.6% (i.e., 2.4% + 1.2%). Therefore, the combined duties will increase from 1.4% to 4.6%.

This should be compared with the duties due for the direct sale of a property, which are 7% (i.e., 6% registration duty + 1% transcription duty) or 10% (i.e., 9% registration duty + 1% transcription duty) for a nonresidential property located in Luxembourg City.

Other measures

- **Attribution of a property to a partner of a company:** The budget law amends the anti-abuse measure under which registration and transcription duties are due when a Luxembourg property is attributed to a partner of a company other than the one who contributed the property to the company as a result of the dissolution, liquidation, or reduction in capital of a civil or joint-stock company. The time limit for this measure to apply will increase from five to 10 years. As mentioned above, the registration duty is 6% or 9% for a nonresidential property located in Luxembourg City and the transcription duty is 1%. Therefore, the total combined duties will be 7% or 10%.

- **Reduction of the subscription tax rate for funds investing in sustainable investments:** The subscription tax rate to be paid by Luxembourg investment funds will be reduced for sustainable investments (as defined by the EU taxonomy) made by these funds. This rate depends on the level of sustainable investments made. In principle, the

annual basic subscription tax rate amounts to 0.05% of net assets under management. Sustainable investments will benefit from a 0.04% rate when the fund invests at least 5% of its total net assets in sustainable investments. The rate applicable to sustainable investments will be reduced to 0.03%, 0.02%, or 0.01% when sustainable investments exceed, respectively, 20%, 35%, or 50% of the total assets of the fund.

- **VAT - Renovation work:** The Luxembourg VAT law provides that the renovation of a main dwelling could, under some conditions, benefit from the super-reduced rate of 3% instead of the standard VAT rate of 17%. To encourage homeowners to perform a sustainable energy retrofit, the building's minimum age to qualify for the 3% VAT rate will be reduced from 20 to 10 years.

- **VAT - Small businesses:** The Luxembourg VAT law provides that transactions performed by small businesses can benefit from a franchise (non-application of VAT) if their turnover does not exceed a certain threshold. This threshold, which is currently EUR 30,000 per year and ex-VAT, will be raised to EUR 35,000.

- **CO2 tax:** Luxembourg will introduce, as from 1 January 2021, a CO_2 tax of EUR 20 per ton of CO_2 emitted. The tax will gradually increase over the next few years, i.e., EUR 25 per ton of CO_2 emitted in 2022 and EUR 30 per ton of CO_2 emitted in 2023. In practical terms, the government anticipates that retail prices (prices at the pump) should increase by about EUR 0.05 per liter of gasoline or diesel. Some social compensation measures will be implemented—some tax credits will increase from EUR 600 to EUR 696 and the allocation for expensive living will be increased by 10%.

- **Tax on insurance premiums:** Electronic filing will become mandatory for the different taxes that apply to insurance premiums (insurance tax, fire department taxes, and emergency service taxes).

Mexico

Legislation modifying subcontracting regime postponed

On 9 December 2020, Mexico's Chamber of Representatives postponed discussions about a proposed bill that would significantly modify the regime for the subcontracting of services (i.e., outsourcing arrangements) between Mexican entities until the next ordinary period, which starts in February 2021.

The bill, which was signed by Mexico's president on 12 November 2020, would modify article 13 of the Mexican Labor Law and specifically would prohibit the use of subcontracting schemes, except in the case of "specialized services" and staffing and training agencies. The bill also would modify the tax legislation to treat prohibited subcontracting arrangements as tax evasion or avoidance and to disallow tax deductions and VAT credits relating to payments made as a result of such arrangements.

In the meantime, leaders from the business sector (led by the Consejo Coordinador Empresarial (CCE) with leaders from 10 labor organizations, including the Confederación de Trabajadores de México (CTM)), the President of Mexico, and the Secretary of Labor and Social Security signed a tripartite agreement on 9 December establishing several commitments, including the following:

1. The parties agree and undertake to resolve the problem of abuse of staff and subcontracting schemes.

2. With respect to profit-sharing (PTU) structures potentially affected by the legislation, additional time is needed for an open discussion between various sectors to determine what would be a fair and equitable utility-sharing system.

3. Given the scale of the reform and its operational impacts, companies request a period of transition to implement the necessary changes.

4. Payroll companies are called on to immediately stop developing irregular practices that are harmful to employees.

Papua New Guinea

Budget 2021: Consolidation for Growth

On 17 November 2020, Papua New Guinea's government presented Budget 2021 with the theme "Consolidation for Growth" that focuses on fiscal consolidation and stimulating economic growth with a view to rebuilding the living standards for Papua New Guineans. The budget offers support for key capital programs and increased expenditure to stimulate sectors that have been most affected by the COVID-19 pandemic, such as agriculture, tourism, and small and medium-sized enterprises (SMEs).

A publication that provides detailed coverage of Budget 2021 along with tax-related budget measures is available on the Deloitte Papua New Guinea website. Highlights of the tax proposals include the following:

- The seven-year corporate tax loss carry forward period provisions have been clarified to apply from 1 January 2019, such that losses available at that date may be carried forward up to seven years from 1 January 2019;

- Provisional tax payment dates have been amended to coordinate with varying fiscal year ends;

- Anti-avoidances measures have been introduced to discourage employees and employers from converting employment relationships into independent contractor arrangements and thereby falling within the small business tax regime (rather than salary and wages tax); and

- The small business tax regime has been amended with changes to thresholds and tax amounts.

These changes will become effective once published in the National Gazette.

Poland

SLIM VAT package will simplify VAT reporting

Poland's Ministry of Finance introduced on 27 November 2020 a draft bill amending the Polish VAT law. The "SLIM VAT package" (abbreviated for Simple, Local, and Modern VAT) was approved by Parliament and signed by the President, and the changes will apply as from 1 January 2021.

The legislation will simplify VAT reporting. The principal amendments are as follows:

- The reporting of correction invoices due to a reduction in the tax basis of local sales will be modified for both the supplier and the purchaser:

    - The supplier will be allowed to correct the amount of output VAT on the invoice during the settlement period when the invoice is issued provided that (i) the supplier has documentation confirming that the conditions for the reduction in taxable basis have been agreed with the purchaser, (ii) these conditions have been met, and (iii) the correction invoice properly reflects these conditions.

    - The purchaser will be required to report the correction invoice in the reporting period during which the conditions for the reduction in taxable basis have been met.

      The current rules will apply to the local sales correction invoices issued before 31 December 2020 as well as, in certain cases, those issued after this date, provided that the supplier and the purchaser agreed to this in writing before the first correction invoice in 2021 is issued, but not later than 31 December 2021.

- Suppliers no longer will be required to hold documentation confirming that the purchaser received a correction invoice. However, some form of documentation will still be needed to substantiate any reduction in output VAT. Also, this will help alleviate any doubts on the purchaser side regarding the timing of the reduction in input VAT as it no longer will be linked to receipt of the correction invoice. It is expected that, until practice is developed, the issue of correction invoice reporting will be the subject of discussions with the tax authorities.

- Regarding the reporting by sellers of correction invoices for increases in the tax basis of local sales, the amended provisions will implement the Polish tax authorities' practice of determining the date of reporting based on the reasons for the correction.

- Taxpayers will have the option to convert foreign currency amounts into PLN based on the income tax rules, provided that taxpayers apply this option consistently at least during the following 12 months. However, this option will not be applicable to transactions where VAT is settled by the purchaser, such as intra-community acquisitions.

- For transactions subject to the mandatory split payment mechanism, taxpayers may be allowed to deduct receivables (currently, this is only allowed for deductions referred to in the Civil Code, i.e., situations where both receivables are due and there is no netting). In addition, taxpayers will be able to transfer funds to a customs agency from a VAT account for VAT amounts due on imports or for customs dues.

- The period to deduct input VAT resulting from local purchase invoices will be extended from two months to three months for VAT payers subject to a monthly VAT reporting period.

- The deadline for shipping goods outside of the EU after receiving an advanced payment in export transactions, which must be met for the 0% VAT rate to apply, will be extended from two months to six months.

- The threshold for donated goods to be treated as gifts of low value will be increased from PLN 10 to PLN 20.

- Taxpayers will be allowed to deduct VAT for properly invoiced accommodation services if they are subject to further sale (re-invoicing).

- According to Appendix 15 to the Polish VAT Act, goods and services subject to the mandatory split payment mechanism will be recognized for VAT based on Polish statistical classification PKWiU 2015.

- Binding rate information (WIS) will only be valid for five years and will be more similar to individual tax rulings or binding tariff Information (and WIS no longer will be issued in cases of ongoing tax proceedings or tax inspections, or in situations where tax proceedings have resulted in a decision).

- Poland's TAX FREE system for tourists will be modified. Among other changes, an electronic documentation system will be implemented, which will be used to document repayment amounts and confirm the shipment of goods outside the EU.

Portugal

Government introduces new levies on digital services

On 19 November 2020, the Portuguese government published Law no. 74/2020, which transposes the provisions of Council Directive (EU) 2018/1808 into Portuguese law.

Law no. 74/2020 introduces two new levies relating to cinematographic and audiovisual activities:

1. **Exhibition levy of 4% on the price paid for audiovisual commercial communication included in video-sharing platforms**

   The law provides that the exhibition levy will be due by advertisers on income realized in Portugal and will be included in the invoice issued by the video-sharing platform, but does not clarify the criteria for calculating such amounts. This is expected to be clarified in regulations still to be prepared and published.

   In addition, the exhibition levy must be included in the taxable amount for VAT purposes.

2. **Annual levy of 1% on income of providers of subscription video-on-demand services**

   The 1% levy will be due by service providers on relevant income realized in Portugal associated with subscriptions or occasional transactions for video-on-demand services. An exception is provided for service providers with low turnover (less than EUR 200,000 of annual relevant income) or with low audience (less than 0.5% of active subscribers).

   Under terms and conditions yet to be published, the service provider must file certified accounting documents with the *"Instituto do Cinema e do Audiovisual, IP"* that prove the amount of its relevant income.

If it is not possible to determine the value of the relevant income of the service provider, the annual levy will be EUR 1 million.

The Law will enter into force 90 days after the date it was published, i.e., on 17 February 2021.

Russia

Update on VAT developments (November 2020)

This article provides an overview of key VAT developments in Russia as at November 2020, including proposed revised criteria for VAT exemption for certain software and databases, amendments to VAT legislation generally as from 1 January 2021, and a draft bill on the taxation of digital currency transactions.

Criteria for VAT exemption for software and databases in the Unified Register of Russian Software and Databases under discussion

As from 1 January 2021, software and databases included in the Unified Register of Russian Software and Databases will be exempt from VAT (subject to certain conditions) as part of the "tax maneuver" in the IT industry. The implementing legislation is provided in Federal Law No. 374-FZ, published on 23 November 2020 (see below). The Internet Initiatives Development Fund in a 28 October 2020 newspaper article suggested imposing separate criteria to determine the software and databases eligible for the VAT exemption; while the requirements for software and databases to receive preferential treatment during the public procurement process would remain unchanged. The splitting of the criteria stems from the need to comply with the requirements of the World Trade Organization for equal competitive conditions for imported and domestic products.

The suggested amendments would ease the requirements for Russian legal entities with foreign beneficiaries to have software and databases included in the register and benefit from the VAT exemption. This would necessitate adding a separate section in the register where the requirements for software and databases eligible for the VAT exemption would be specified.

The initiative is supported by the Ministry of Digital Development, Communications and Mass Media of the Russian Federation.

Amendments to VAT legislation published

Federal Law No. 374-FZ amending certain VAT regulations was published on 23 November 2020, and introduces the following changes to the Russian Tax Code as from 1 January 2021, unless otherwise stated:

- Services provided by financial platform operators intended to identify the participants of the platform and to ensure interaction between participants will be exempt from VAT;

- Input VAT related to the acquisition of marketing and advertising services used in connection with the export of Russian software and databases included in the Unified Register of Russian Software and Databases (considered as transactions outside the scope of Russian VAT), may be reclaimed;

- The reduced 10% VAT rate for domestic flights is extended through 31 December 2021. The reduced rate first was announced in 2015 as a temporary measure but has subsequently been extended on several occasions;

- The transfer of emission reduction units and rights to emission reduction units obtained within the framework of projects aimed at reducing emissions resulting from human activity or increasing the absorption of greenhouse gases by sinks is subject to VAT where the buyer has a place of activity in Russia. The reference to article 6 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change which was a prerequisite under the previous version of the law is excluded from the amended text. Clarification is awaited of whether the amendment will come into force as from 1 January 2021, or is effective as from the date of publication of the legislation on 23 November 2020; and

- The place of supply rules for aquatic biological resources are clarified. The sale of aquatic biological resources extracted in an exclusive economic zone in Russia and/or products manufactured from such resources are deemed to have taken place in Russia where the goods are located in the exclusive economic zone in Russia prior to shipment and transportation.

Draft bill on taxation of digital currency transactions published

A draft bill published on 2 October 2020, proposes that digital currency would be recognized as property rather than property rights for tax purposes. As expected, digital currency transactions would be exempt from VAT, and digital currency would not be recognized as a depreciable asset for corporate income tax purposes. The bill also suggests the introduction of an obligation for taxpayers to inform the tax authorities of rights to dispose of digital currency, and to submit reports on digital currency transactions and balances. If adopted, the bill would apply as from 1 January 2021, with the first reporting obligation for digital currency transactions for 2021 due by 30 April 2022.

Spain

Recent developments relevant to indirect tax include passage of 2021 budget law

Recent developments in Spain as at the beginning of January 2021 that are relevant for indirect tax purposes include the passage of the budget law for 2021, the implementation of an EU directive (Council Directive (EU) 2020/2020) regarding temporary VAT measures in response to the coronavirus (COVID-19), and a Supreme Court decision providing clarification on when a Spanish subsidiary may be considered to be a permanent establishment of a nonresident in Spain for VAT purposes.

Budget law for 2021

On 3 December 2020, the Spanish Congress of Deputies approved the draft budget law published by the Spanish government in October 2020. The law subsequently was approved by the Senate without any amendments to its content, and entered into force on 1 January 2021. Indirect tax measures in the law include the following:

- The elimination of the application of a special location rule for services rendered to recipients established in the territories of the Canary Islands, Ceuta, and Melilla, meaning that services within the scope of the rule that are rendered for recipients established within these territories will not be subject to Spanish VAT; and

- The exclusion of certain supplies of sweetened beverages from the application of the reduced VAT rate of 10%.

Council Directive (EU) 2020/2020

On 23 December 2020, the Spanish government approved Royal Decree 35/2020, dated 22 December 2020, to implement the measures included in the directive. A VAT exemption that provides the right to deduct the input VAT paid at the preceding stage of the supply will apply to the following transactions from 23 December 2020 to 31 December 2022:

- Imports, intracommunity acquisitions, and supplies of goods involving specific medical goods related to a SARS-CoV-2 diagnosis;

- Supplies of SARS-CoV-2 vaccines; and

- Transportation, storage, and distribution services related to the transactions mentioned above.

Supreme Court decision 1500/2020 of 11 November 2020

In its decision, the Supreme Court considered whether a Spanish subsidiary of a nonresident company (a Swiss-based entity) could be considered as a permanent establishment in Spain for VAT purposes.

The Supreme Court determined that the nonresident entity was carrying out transactions in Spain through a fixed establishment, using the factory, warehouse, and premises of the Spanish subsidiary. The court also noted that the Swiss entity was using the human and technical resources of the Spanish subsidiary, and even providing instructions to the subsidiary's employees. In addition, the Swiss entity assumed all the risks of the activities conducted in Spain. Accordingly, the court concluded that the Spanish subsidiary was a permanent establishment in Spain for VAT purposes and was required to charge Spanish VAT on its sales in Spain.

Switzerland

VAT consequences of COVID-19 measures

On 10 December 2020, the Swiss Federal Tax Administration (SFTA) published several updated VAT guidelines ("VAT infos") to clarify the VAT impact of measures taken to help businesses in the context of COVID-19.

Among the different measures, the SFTA confirmed that compensation for short-term work and self-employment should not have any VAT consequences and should not impact the input VAT deduction right of taxpayers receiving such compensation.

In addition, the SFTA confirmed that COVID loans granted by banks (at 0% interest) and guaranteed by the Confederation constitute a subsidy for the banks, requiring them to correct their input VAT deduction (if they are VAT registered). However, the SFTA also confirmed that the difference between the 0% interest rate and the market rate should not be treated as a subsidy in the borrowers' hands because the Confederation has no involvement there such that borrowers are not required to correct their input VAT.

A grey area remains regarding amounts that might have been granted in the context of COVID-19 by the different Swiss cantonal authorities, which are not discussed in any of the updated guidelines. In several recent seminars, the SFTA indicated that a case-by-case assessment is required to confirm if the measures taken at the cantonal level have a VAT impact and it recommended that taxpayers file ruling requests in that respect.

Switzerland

New structure set for radio-television fee

Switzerland's Federal Council decided on 16 April 2020 to refine the radio-television (RTV) fee structure for businesses by setting a range of 18 different fees (increased from six) that will apply as from 1 January 2021, ranging from CHF 160 to CHF 49,925. The decision was based on a recommendation of the Federal Administrative Court, who considered the current structure too schematic and unfair.

Since 1 January 2019, the RTV fee is no longer dependent on whether the taxpayer possesses a broadcasting device. As from that date, all VAT-registered companies established in Switzerland with an annual global turnover in excess of CHF 500,000 have had to pay the RTV fee. The six current fees range from CHF 365 to CHF 35,590.

In addition, bank and insurance companies no longer will have to report their VAT-exempt "without credit" turnover in their VAT returns if they elect to pay the highest RTV fee (i.e., CHF 49,925 as from 1 January 2021). However, to benefit from this new rule, banks and insurance companies will have to make the election online on the SuisseTax portal no later than 15 January of the relevant year. Once made, the election will apply until it is revoked.

Finally, as from 2021, simple partnerships will no longer be subject to the RTV fee.

Switzerland

E-filing of VAT returns becomes standard as from 1 January 2021

As from 1 January 2021, VAT-registered taxpayers in Switzerland will have to file their VAT returns online. Paper filing, which was still available until the Q3 2020 reporting period, will only be available upon a taxpayer's formal request.

In order to ease the shift to e-filing, the Swiss Federal Tax Administration (SFTA) created a new service, TVA easy, that will complete the current e-filing process via the SuisseTax portal, which requires the creation of an individual account.

The new "TVA easy" option itself does not require the creation of an individual account. First, a unique code will be sent via mail to each taxpayer or their representative (if not established in Switzerland) for Q4 2020, allowing access to the e-filing platform. A code for

the subsequent reporting period will be made available online upon access to the platform using the code for the current reporting period (e.g., the Q3 2021 code to access the platform will be made available online upon access to the platform with the code used for Q2 2021). A Swiss phone number also will be needed to secure access to the platform. Fiscal representatives will be able to have the VAT return approved by the taxpayer by generating a document online that will need to be signed and returned by mail to the SFTA.

Although welcomed as an easy way to e-file Swiss VAT returns, the new option may still require some paper exchanges (such as when mailing a taxpayer's approval) and will be limited to filing original VAT returns.

To benefit from all digital functionalities (e.g., to request a deadline extension, file a corrective VAT return, etc.), taxpayers will have to use the SuisseTax portal.

Switzerland

VAT liability succession: Change of practice by the SFTA

The Swiss Federal Tax Administration announced in several seminars in the fourth quarter of 2020 that it will start auditing retroactively asset transfers at the level of the acquirer. This follows a court decision dated 21 February 2020 in which the transfer of *part* of a business's assets was deemed sufficient to trigger the succession of tax liability based on article 16 of the Swiss VAT Law and the acquirer of the assets was deemed liable for the VAT debts of the transferor with respect to the assets.

The liability of the acquirer for assets purchased extends to all open periods until the date of assessment, i.e., the five calendar years preceding the date of assessment. The seller remains jointly liable for three calendar years following the transfer.

Based on this change of practice, we recommend that taxpayers carefully consider, including in (partial) asset deals, the VAT history and future use of transferred assets together with any available supporting documentation, and include a safeguarding clause in asset deal agreements, where relevant.

United Kingdom

Guidance on post-transition period indirect taxation issues released

The UK government has published draft legislation and other guidance on various indirect tax issues to be addressed as from 1 January 2021, after the end of the transition period following the UK's departure from the EU.

Taxation (Post-transition Period) Bill

The Taxation (Post-transition Period) Bill was published on 8 December 2020, together with explanatory notes. The bill would introduce changes to the Value Added Tax Act 1994 and the Taxation (Cross-border Trade) Act 2018 to reflect the operation of indirect taxes under the Northern Ireland Protocol. It therefore sets out (for example) how Northern Ireland (NI) businesses will account for acquisition VAT on supplies of goods from the EU, and introduces a customs duty charge where goods moved from Great Britain (GB) to NI

are at risk of being moved into the EU, or where goods which are not Qualifying Northern Ireland Goods are moved from NI to GB. HM Treasury has published supporting documents which include tax information and impact notes for VAT and customs.

There are also measures not related to NI, including on the VAT treatment of online sales by overseas persons and low value importations, insurance premium tax anti-avoidance, and powers enabling HM Revenue & Customs to issue charging notices for the purposes of recovering state aid amounts. The state aid measure relates to the European Commission's decision of 2 April 2019 that the group financing exemption within the UK's controlled foreign company rules constituted unlawful state aid received by some UK companies for periods from 1 January 2013 to 31 December 2018. The UK is challenging the Commission's decision via the European courts.

The bill also would introduce a new model for the VAT treatment of goods arriving into the UK from 1 January 2021. This would include the abolition of low value consignment relief (LVCR) for goods arriving in GB (LVCR will continue to apply to an extent in NI), moving VAT collection away from the border for consignments not exceeding GBP 135, placing the responsibility to pay VAT onto either an overseas seller or an online marketplace, and making online marketplaces liable for VAT on goods which are in GB at the point of sale. A tax information and impact note also is available.

The House of Commons Library on 10 December 2020 published a research briefing on the bill. The bll had its second reading and Committee stage in the House of Commons on 9 December 2020. It will have its final stages in the Commons on 15 December 2020.

Draft decision of Withdrawal Agreement Joint Committee

A Command Paper published on 10 December 2020 provides further details of the agreement in principle by the Withdrawal Agreement Joint Committee over the operation of the Northern Ireland Protocol from 1 January 2021. It confirms that, as a general rule, export or exit declarations will not be required for NI to GB movements of goods. Movements into NI will be "at risk" of entering the EU (and therefore subject to EU tariffs) if they are subject to commercial processing, unless they are moved directly by businesses in the food, construction, healthcare, or nonprofit sectors (or by small businesses). If goods from GB are not being processed, then they will not be "at risk" if they are duty-free in the UK, or if a business with a good compliance record is authorized to undertake that they are to be sold to end consumers. The paper also refers to a UK Trader Scheme which would allow goods to be routed from GB to NI through ports in the Republic of Ireland under transit procedures, confirms that there will be no separate VAT registration for NI, and recognizes concerns about margin scheme sales by GB businesses to NI customers.

VAT at the end of the transition period

Statutory Instrument 2020/1495 issued on 10 December 2020 makes a number of amendments to VAT rules that are expected to come into force on 1 January 2021, including:

- A requirement for businesses delaying full customs declarations for imports from the EU until the end of June 2021 to include import VAT on their VAT return (Postponed Import VAT Accounting);

- Recovery of UK VAT incurred before the end of the transition period by EU businesses;

- Winding down the UK Mini One Stop Shop; and

- Where "Exit day" is referred to in Brexit-related Statutory Instruments, it should now be taken as a reference to the end of the Brexit transition period.

United Kingdom

Details of Trader Scheme published

The UK tax authorities have published details of the UK Trader Scheme, which will allow authorized businesses to self-declare that goods are not "at risk" of moving on to the EU after moving from Great Britain to Northern Ireland, and consequently should not be subject to EU duty.

Businesses that do not sign up may have to pay tariffs on their goods. Affected businesses should therefore apply for authorization before 31 December 2020, as authorization needs to be obtained before goods are moved. If applications are made in 2021, but before 28 February 2021, a provisional authorization may be granted for up to four months, but otherwise the tax authorities expect that it could take a month to process an application.

United States

State Tax Matters (4 December 2020)

The 4 December 2020 edition of US State Tax Matters includes coverage of the following administrative tax developments:

- **Oklahoma:** Appellate court holds in taxpayer's favor on timeframe for filing refund claim.

The newsletter also includes coverage of the following income/franchise tax developments:

- **Oregon:** Tax Court holds for taxpayer on some apportionment and income classification issues.

- **Oregon:** Department of Revenue adopts new and amended corporate activity tax rules on unitary groups, sourcing, exclusions.

- **Pennsylvania:** Philadelphia announces potential refunds for businesses amending business income and receipts tax estimated (BIRT ES) payments.

- **Rhode Island:** Duration of emergency withholding rules for pandemic-related telecommuting extended.

- **South Carolina:** Department of Revenue extends COVID-19 pandemic-related telecommuting relief through to 30 June 2021.

- **Texas:** Comptroller proposes changes to its franchise tax economic nexus rule.

- **Vermont:** Updated guidance on effect of COVID-19 pandemic-related telecommuting on withholding.

In addition, the newsletter includes coverage of the following indirect tax developments:

- **Illinois:** City of Chicago Council passes tax rate increase on computer and cloud service leases.

- **Illinois:** Department of Revenue posts revisions to proposed retailers' occupation tax rules on remote retailers.

- **Washington:** Department of Revenue issues guidance on marketplace facilitator collection and reporting.

Finally, the newsletter features a recent Multistate Tax Alert: "Ohio Supreme Court upholds centralized collection system for net-profits taxes"

United States

State Tax Matters (11 December 2020)

The 11 December 2020 edition of US State Tax Matters includes coverage of the following tax amnesty developments:

- **Nevada:** Department of Taxation mentions upcoming amnesty program offering some taxpayer relief.

The newsletter also includes coverage of the following income/franchise tax developments:

- **Massachusetts:** Department of Revenue extends duration of nexus and sourcing rules on pandemic-related telecommuting.

- **New Jersey:** State high court affirms insurance premium tax (IPT) decision in taxpayer's favor.

- **New York:** Metropolitan Transportation Authority (MTA) surcharge rate for article 9-A taxpayers is increased under emergency rule.

- **Pennsylvania:** Philadelphia Department of Revenue addresses pandemic-related telecommuting on business nexus and apportionment.

- **Tennessee:** Department of Revenue says statutory nexus thresholds involving marketplaces do not apply to franchise tax.

- **West Virginia:** Tax Department explains state conformity to Internal Revenue Code and conformity prospects for 2021.

In addition, the newsletter includes coverage of the following tax credits/incentives developments:

- **Wisconsin:** Department of Revenue summarizes state benefits for investments in federal qualified opportunity zones.

Finally, the newsletter includes coverage of the following indirect tax developments:

- **Colorado:** Department of Revenue adopts administrative rule changes that clarify taxation of digital goods.

- **Tennessee:** Department of Revenue issues guidance on USD 100,000 nexus thresholds for marketplace sellers and facilitators.

- **Washington:** Local business group files suit seeking to declare Seattle payroll tax invalid.

United States

State Tax Matters (18 December 2020)

The 18 December 2020 edition of US State Tax Matters includes coverage of the following income/franchise tax developments:

- **Alabama:** Governor directs Department of Revenue to exclude some federal CARES Act benefits from taxation.

- **Kansas:** Department of Revenue offers some penalty waivers associated with pandemic-related employee telecommuting.

- **New Jersey:** Bulleting summarizes combined reporting technical corrections and clarifications bill.

- **New Jersey:** US Supreme Court denies request to review case mandating alternative apportionment.

- **Oregon:** Department of Revenue provides corporate activity tax (CAT) update and posts 2020 forms and instructions.

The newsletter also includes coverage of the following indirect tax developments:

- **Iowa:** Department of Revenue updates guidance on online and marketplace sales including local taxation.

- **Massachusetts:** Newly signed budget bill includes accelerated sales tax remittance provisions.

- **New Mexico:** Reminder—Gross receipts tax regime will move to destination-based sourcing on 1 July 2021.

Uruguay

Government introduces temporary VAT rate reduction to promote local tourism

On 13 and 16 November 2020, Uruguay's Ministry of Finance issued two decrees (Nos. 304/020 and 305/020, respectively) introducing a series of fiscal incentives with the aim of promoting local tourism, taking into account the state of emergency created by COVID-19.

VAT rate reduction

The VAT rate is reduced by 9% (i.e., from 22% to 13%) during the period from 16 November 2020 to 4 April 2021 on certain services (when paid electronically), including:

- Meals provided by restaurants, bars, canteens, coffee shops, tea rooms, or by hotels, motels, apart-hotels, hostels, and rural tourism establishments, provided that said meals are not included with any lodging;

- Vehicle rentals (without a chauffeur); and

- Real estate agency leasing services for tourism purposes.

For such services purchased from taxpayers subject to the VAT regime for small businesses, the VAT rate is determined by discounting the total transaction amount by 7.38%.

Extension of zero-rating to residents on certain lodging

The zero-rating for VAT purposes on certain lodging provided to nonresidents has been extended to residents when provided by hotels, motels, apart-hotels, hostels, and rural tourism establishments, during the period from 16 November 2020 to 4 April 2021.

Tax exemption proposal on certain rental income

A bill was sent to parliament with a proposal to exempt income derived from the temporary leasing of real estate for tourism purposes from income tax during the period 16 November 2020 to 4 April 2020.

Esperamos que esta información le sea de utilidad y, como de costumbre, quedamos a su disposición para aclarar o ampliar cualquier cuestión derivada del contenido de esta nota. A tal fin pueden comunicarse con su persona de contacto habitual en Deloitte, o enviar un correo electrónico a la siguiente dirección: deloitteabogados@deloitte.es

Sin otro particular, aprovechamos la ocasión para enviarle un cordial saludo.

Atentamente,
Deloitte Legal