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I. Normativa

1. Real Decreto-ley 7/2021, de 27 de abril, de transposición de directivas de la Unión Europea en las materias de competencia, prevención del blanqueo de capitales, entidades de crédito, telecomunicaciones, medidas tributarias, prevención y reparación de daños medioambientales, desplazamiento de trabajadores en la prestación de servicios transnacionales y defensa de los consumidores.

Con fecha 28 de abril de 2021 se publicó en el Boletín Oficial del Estado el Real Decreto-ley 7/2021, de 27 de abril, de transposición de directivas de la Unión Europea en las materias de competencia, prevención del blanqueo de capitales, entidades de crédito, telecomunicaciones, medidas tributarias, prevención y reparación de daños medioambientales, desplazamiento de trabajadores en la prestación de servicios transnacionales y defensa de los consumidores.

En relación con el IVA, el artículo 10 de dicho Real Decreto-ley contempla modificaciones en la Ley del IVA para concluir la regulación del IVA del comercio electrónico y, por otra parte, la disposición adicional primera del citado Real Decreto-ley prorroga, desde el 1 de mayo de 2021 hasta el 31 de diciembre de 2021, la aplicación del tipo del cero por ciento a las operaciones relativas a determinado material sanitario.

Las modificaciones relativas al comercio electrónico tienen como finalidad la incorporación del Derecho de la Unión Europea al ordenamiento interno, en concreto, de la Directiva (UE) 2017/2455 del Consejo, de 5 de diciembre de 2017, por la que se modifican la Directiva 2006/112/CE y la Directiva 2009/132/CE en lo referente a determinadas obligaciones respecto del impuesto sobre el valor añadido para las prestaciones de servicios y las ventas a distancia de bienes, con excepción de su artículo 1 que fue objeto de transposición por la Ley 6/2018, de 3 de julio, de Presupuestos Generales del Estado para el año 2018, y de la Directiva (UE) 2019/1995 del Consejo de 21 de noviembre de 2019 por la que se modifica la Directiva 2006/112/CE en lo que respecta a las disposiciones relativas a las ventas a distancia de bienes y a ciertas entregas nacionales de bienes.

Exponemos a continuación dichas modificaciones que son de aplicación, salvo en el supuesto de la letra B), a partir de 1 de julio de 2021.

A) Modificaciones relativas al comercio electrónico transfronterizo entre empresas y consumidores.

a) Normas generales:

- Se definen los conceptos de ventas a distancia intracomunitarias de bienes y de ventas a distancia de bienes importados de terceros países o terceros territorios, para delimitar el ámbito de aplicación de las normas que se apliquen a las mismas.

  Se incluyen en ambos conceptos las ventas de mercancías que se transporten o expidan por cuenta del proveedor, incluso cuando el proveedor intervenga indirectamente en el transporte o expedición de aquellas.

- Dado que en muchos casos las ventas a distancia de bienes se realizan mediante el uso de interfaces electrónicas (mercados, plataformas, portales o medios similares), se implica a los empresarios o profesionales titulares de ellas, que facilitan la venta a distancia, en la percepción del IVA en esas ventas, disponiendo que, en determinadas circunstancias, se considera a dichos empresarios o profesionales titulares de la interfaz digital como las personas que efectúan dichas ventas. Para las ventas a distancia de bienes importados a la Comunidad desde terceros países, queda limitado a las ventas de bienes que se expidan o transporten en envíos cuyo valor intrínseco no exceda de 150 euros, valor a partir del cual es exigible una declaración completa en aduana en el momento de la importación. El valor intrínseco se determinará en los términos previstos en la normativa aduanera -Reglamento Delegado (UE) 2015/2446, artículo 1, punto 48, según la redacción dada por el Reglamento Delegado (UE) 2020/877, de 3 de abril de 2020-.

- Se establece la obligación para los titulares de interfaces electrónicas de conservar por un período de al menos 10 años los registros relativos a las ventas de empresarios o profesionales facilitadas a través de aquellas.

- Se establece un umbral común de 10.000 € para las ventas a distancia intracomunitarias de bienes y para los servicios intracomunitarios de telecomunicaciones, de radiodifusión o televisión y electrónicos prestados a consumidores finales en toda la Comunidad, por debajo del cual estas operaciones tributan en origen, salvo opción por la tributación en destino.

b) Normas relativas a los regímenes especiales:

- El régimen especial aplicable a los servicios de telecomunicaciones, de radiodifusión y televisión o electrónicos prestados por empresarios o profesionales no establecidos en la UE se amplía a cualesquiera servicios prestados por un empresario de fuera de la UE a consumidores finales de la UE, siempre que tales servicios estén sujetos al IVA en la UE (Régimen exterior de la Unión).

- El régimen especial aplicable a los servicios de telecomunicaciones, de radiodifusión y televisión o electrónicos prestados por empresarios o profesionales establecidos en la UE pero no en el Estado miembro de consumo, se amplía a las ventas a distancia intracomunitarias de bienes, a todos los servicios prestados por dichos empresarios o profesionales a consumidores finales de la UE y a determinadas entregas interiores de bienes realizadas en ciertas condiciones (Régimen de la Unión).

- Se crea un nuevo régimen especial para las ventas a distancia de bienes importados desde fuera de la UE (se exceptúan los bienes objeto de impuestos especiales), en envíos cuyo valor intrínseco no exceda de 150 €, que implicará que la importación esté exenta del IVA y el empresario o profesional acogido al régimen especial deba declarar mensualmente en un único Estado miembro (Estado miembro de identificación) el IVA correspondiente a todas las entregas de estos bienes efectuadas en la UE (Régimen de importación).

Este régimen es optativo y se aplica tanto a empresarios establecidos en la UE, como a los no establecidos en la UE, siempre que en este último caso estén (i) representados por un intermediario establecido en la UE; ó (ii) hayan sido autorizados por el Estado miembro de identificación, si cumplen ciertas condiciones; ó (iii) estén establecidos en un país tercero con acuerdos de cooperación fiscal con la UE.

- Se crea una modalidad especial opcional para la declaración y pago del IVA a la importación de bienes en envíos cuyo valor intrínseco no exceda de 150 €, para los supuestos en que los empresarios o profesionales no hayan utilizado el régimen especial del punto anterior. Esta modalidad especial permite a la persona que presenta los bienes ante la Aduana efectuar el pago del IVA a la importación a través de una declaración mensual.

c) Otras normas:

- Se suprime la exención prevista en el artículo 34 de la Ley del IVA, para las importaciones de bienes de escaso valor.

- Se señala que los procedimientos específicos previstos en los artículos 119 y 119 bis de la Ley del IVA se ajustarán a lo establecido en la normativa comunitaria, sin que deban adicionarse trámites que no estén expresamente regulados en dicha normativa.

B) Tipo impositivo.

Desde el día 1 de mayo de 2021 hasta el 31 de diciembre de 2021, se aplicará el tipo 0 por ciento a las entregas, adquisiciones intracomunitarias e importaciones de los bienes establecidos en el Anexo de este Real Decreto-ley destinados a la lucha contra la Covid-19 y efectuados a favor de entidades de Derecho Público, clínicas o centros hospitalarios, o entidades privadas de carácter social (art.º 20.Tres de la Ley del IVA).

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.

Este Real Decreto-ley también incluye en su Anexo la relación de bienes a los que es de aplicación esta medida.

2. Decisión (UE) 2021/660 de la Comisión de 19 de abril de 2021, por la que se modifica la Decisión (UE) 2020/491, relativa a la concesión de una franquicia de derechos de importación y de una exención del IVA respecto de la importación de las mercancías necesarias para combatir los efectos del brote de COVID-19 durante el año 2020.

Con fecha de 23 de abril de 2021 se ha publicado en el Diario Oficial de la Unión Europea la Decisión (UE) 2021/660 de la Comisión de 19 de abril de 2021 por la que se modifica la Decisión (UE) 2020/491, relativa a la concesión de una franquicia de derechos de importación y de una exención del IVA respecto de la importación de las mercancías necesarias para combatir los efectos del brote de COVID-19 durante el año 2020.

Esta Decisión viene a prorrogar hasta el 31 de diciembre de 2021 las disposiciones previstas en la citada Decisión (UE) 2020/491 que, en relación con la exención del Impuesto sobre el Valor Añadido (IVA), será aplicable el artículo 46 de la Ley 37/1992 (Ley del IVA) y el artículo 17 del Reglamento del IVA.

Los beneficiarios de esta exención en el IVA son:

- Entidades públicas.

- Organismos privados de carácter caritativo o filantrópico que hayan sido autorizados.

También podrán beneficiarse de esta medida, otros operadores que importen por cuenta de un ente público o de un organismo privado autorizado. Se deberá justificar que se actúa por cuenta de estas entidades y que la destinataria de las mercancías disponga de una autorización administrativa en caso de ser un organismo privado de carácter benéfico o caritativo.

Del mismo modo, también se aplica lo anterior cuando el operador importe para la posterior donación del material adquirido a un ente público o a un organismo privado autorizado. Se deberá justificar la donación y recepción de los bienes por la entidad donataria y que ésta cuente con una autorización administrativa en caso de ser un organismo privado de carácter benéfico o caritativo.

Pueden beneficiarse de la exención del IVA las importaciones realizadas entre el 30 de enero de 2020 y el 31 de diciembre de 2021.

La Decisión exige, además, que se cumplan los requisitos establecidos en los artículos 52, 55, 56 y 57 de la Directiva 2009/132/CE, de 19 de octubre de 2009, que delimita el ámbito de aplicación del artículo 143, letras b) y c), de la Directiva 2006/112/CE (Directiva del IVA) en lo referente a la exención del impuesto sobre el valor añadido de algunas importaciones definitivas de bienes.

3. Propuesta de Directiva del Consejo por la que se modifica la Directiva 2006/112/CE en lo que respecta a las exenciones relativas a las importaciones y a determinados suministros, por lo que se refiere a las medidas de la Unión de interés público.

Esta propuesta de Directiva prevé una exención del IVA para los bienes o servicios suministrados a la Comisión o una agencia u organismo de la UE, así como a los bienes importados por estos, cuando la Comisión o cualquier agencia u organismo de este tipo adquiera o importe dichos bienes o servicios en cumplimiento de un mandato conferido por el Derecho de la Unión en aras del interés público.

A tal efecto, se propone introducir un formulario electrónico. Este formulario tiene por objeto confirmar que la operación - en el supuesto de bienes o servicios suministrados a aquellas entidades- puede acogerse a la exención prevista en el artículo 151, apartado 1, párrafo primero, de la Directiva sobre el IVA. Se faculta a la Comisión para adoptar, mediante actos de ejecución, los detalles técnicos de dicho formulario, incluido un mensaje electrónico común mediante el cual deba transmitirse la información, en consulta con el

Comité Permanente de Cooperación Administrativa creado por el artículo 58 del Reglamento (UE) n.º 904/2010 del Consejo, aplicando el procedimiento de examen a que se refiere el artículo 5 del Reglamento (UE) n.º 182/2011.

La propuesta contempla que estas modificaciones se aplicarían retroactivamente desde el 1 de enero de 2021.

II. Jurisprudencia

1. Tribunal de Justicia de la Unión Europea. Sentencia de 15 de abril de 2021. Asunto C-935/19, Grupa Warzywna Sp. z o.o.

Directiva 2006/112/CE — Artículo 273 — Sobrevaloración, en la declaración tributaria, del importe de la devolución de IVA — Error de apreciación del sujeto pasivo respecto a la sujeción al impuesto de la operación — Rectificación de la declaración tributaria a raíz de una inspección — Sanción por un importe correspondiente al 20 % del importe de la sobrevaloración del importe de la devolución de IVA — Principio de proporcionalidad.

Se plantea al TJUE si el artículo 273 de la Directiva del IVA y los principios de proporcionalidad y de neutralidad del Impuesto deben interpretarse en el sentido de que se oponen a una normativa nacional que impone a un sujeto pasivo, que ha calificado erróneamente una operación exenta del IVA como operación sujeta a ese impuesto, una sanción correspondiente al 20 % del importe de la sobrevaloración de la cuantía de la devolución del IVA indebidamente reclamada, sin tomar en consideración la naturaleza y gravedad de la irregularidad de que adolece la declaración tributaria, la falta de indicios de que dicho error constituya un fraude y la inexistencia de pérdida de ingresos para la Hacienda Pública.

Establece el Tribunal que la sanción analizada no viola lo previsto en el citado artículo 273 la Directiva del IVA, en la medida en que tiene por objeto inducir a los sujetos pasivos a regularizar lo antes posible las situaciones en que la cantidad ingresada sea inferior a la efectivamente adeudada y, en último término, garantizar la correcta recaudación del impuesto. No obstante, considera que el método para la determinación del importe de la sanción sí que sería contrario a dicho artículo y al principio de proporcionalidad, puesto que dicha sanción se aplica indistintamente a una situación en que la irregularidad resulta de un error de apreciación cometido por las partes de la operación respecto a la sujeción al impuesto de esta, que se caracteriza por la inexistencia de indicios de fraude y de pérdida de ingresos para la Hacienda Pública, y a una situación en la que no concurren tales circunstancias.

2. Tribunal de Justicia de la Unión Europea. Sentencia de 15 de abril de 2021. Asunto C-593/19, SK Telecom Co. Ltd.

Directiva 2006/112/CE — Determinación del lugar de prestación de los servicios de telecomunicaciones — Itinerancia de nacionales de países terceros en las redes de comunicación móvil dentro de la Unión Europea — Artículo 59 bis, párrafo primero, letra b) — Posibilidad de que los Estados miembros trasladen el lugar de prestación de los servicios de telecomunicaciones a su territorio.

Se plantea al TJUE si el artículo 59 bis, párrafo primero, letra b), de la Directiva del IVA debe interpretarse en el sentido de que los servicios de itinerancia prestados por un operador de telefonía móvil establecido en un país tercero a sus clientes, que también están establecidos o tienen su domicilio o residencia habitual en ese país tercero, y que les permiten utilizar la red nacional de comunicación móvil del Estado miembro en el que se encuentran temporalmente, deben considerarse objeto de una «utilización o explotación efectivas» en el territorio de ese Estado miembro, de modo que este puede considerar que el lugar de prestación de esos servicios de itinerancia está situado en su territorio cuando tales servicios no son objeto de un tratamiento fiscal comparable a una tributación en concepto del IVA en el país tercero.

Establece el Tribunal que deben darse dos requisitos para poder aplicar dicho artículo de la Directiva: (i) la utilización o la explotación efectivas» de los servicios debe llevarse a cabo en el territorio del Estado miembro de que trate y (ii) los Estados miembros pueden hacer uso de esta facultad «a fin de evitar los casos de doble imposición, de no imposición o de distorsiones de la competencia.

Sobre el primero, considera el TJUE que los servicios de itinerancia, prestados a las personas que efectúan una estancia temporal en el territorio de un Estado miembro, son distintos e independientes de los demás servicios de comunicación móvil de los que esas personas son beneficiarias y que la utilización o explotación efectivas de dichos servicios de itinerancia se llevan a cabo necesariamente en el territorio del Estado miembro en cuestión durante las estancias temporales de los clientes de SK Telecom.

Por otro lado, señala el Tribunal que los eventuales casos de doble imposición, de no imposición o de distorsiones de la competencia han de apreciarse en función del tratamiento fiscal dispensado a los servicios en cuestión en los Estados miembros, sin que proceda tener en cuenta el régimen fiscal al que están sometidos dichos servicios en el país tercero de que se trate.

3. Tribunal de Justicia de la Unión Europea. Sentencia de 15 de abril de 2021. Asunto C-846/19, EQ.

Directiva 2006/112/CE — Actividad económica — Prestaciones de servicios realizadas a título oneroso — Artículos 2, apartado 1, letra c), y 9, apartado 1 — Exenciones — Artículo 132, apartado 1, letra g) — Prestaciones de servicios directamente relacionadas con la asistencia social y con la seguridad social — Prestaciones realizadas por un abogado en el marco de mandatos de protección de personas mayores de edad incapacitadas legalmente — Organismo al que se reconozca su carácter social.

En primer lugar, concluye el TJUE que, de acuerdo con el artículo 9, apartado 1, de la Directiva del IVA, puede considerarse que constituye una actividad profesional sujeta al Impuesto aquella consistente en prestaciones de servicios realizadas por un abogado en beneficio de personas mayores de edad incapacitadas legalmente y orientadas a protegerlas en los actos de la vida civil, cuya realización se le confía por una autoridad judicial en virtud de la ley y cuya remuneración se fija por dicha autoridad mediante una cantidad a tanto alzado o sobre la base de una apreciación caso por caso, teniendo en cuenta en particular la situación económica de la persona incapacitada; remuneración que puede además ser asumida por el Estado en caso de indigencia de la persona incapacitada.

Analiza a continuación el TJUE si dichas prestaciones constituyen «prestaciones de servicios directamente relacionadas con la asistencia social y con la Seguridad Social», exentas del IVA de acuerdo con lo previsto en el artículo 132, apartado 1, letra g), de la Directiva, y si el abogado puede disfrutar del reconocimiento de «organismo de carácter social», tal y como exige dicho precepto. Concluye el Tribunal que (i) constituyen «prestaciones de servicios directamente relacionadas con la asistencia social y con la Seguridad Social» los servicios prestados en beneficio de personas mayores de edad incapacitadas legalmente y cuyo objetivo es protegerlas en los actos de la vida civil y, (ii) que no se excluye que un abogado que preste tales servicios de carácter social pueda disfrutar, a efectos de la actividad que desarrolla y dentro de los límites de esas prestaciones, del reconocimiento como organismo de carácter social, si bien dicho reconocimiento solo deberá concederse obligatoriamente mediante la intervención de una autoridad judicial cuando el Estado miembro de que se trate, al negar dicho reconocimiento, haya excedido los límites de la facultad de apreciación de la que dispone a este respecto.

Finalmente, el TJUE entiende que la mera aceptación, incluso durante varios años, por parte de la Administración tributaria luxemburguesa de las declaraciones del IVA presentadas por el abogado que no incluían los importes relativos a las operaciones controvertidas, no supone una garantía concreta

dada por dicha Administración sobre la no aplicación del IVA a dichas operaciones y no puede, por tanto, generar una confianza legítima de ese sujeto pasivo en el carácter no imponible de las operaciones en cuestión.

4. Tribunal de Justicia de la Unión Europea. Sentencia de 22 de abril de 2021. Asunto C-703/19, J.K.

Directiva 2006/112/CE — Artículo 98, apartado 2 — Facultad de los Estados miembros de aplicar uno o dos tipos reducidos de IVA a determinadas entregas de bienes y prestaciones de servicios — Calificación de una actividad comercial de "prestación de servicios" — Anexo III, punto 12 bis — Reglamento de Ejecución (UE) n.o 282/2011 — Artículo 6 — Concepto de "servicios de restauración y catering" — Comidas listas para su consumo inmediato in situ en las instalaciones del vendedor o en un área de restauración — Comidas listas para su consumo inmediato para llevar.

Se plantea al TJUE si la actividad de un sujeto pasivo consistente en la venta, de acuerdo con diversas modalidades, de platos y comidas preparados para su consumo está comprendida en la categoría de «servicios de restauración y catering», a los que puede aplicarse un tipo reducido de IVA en virtud del artículo 98, apartado 2, de la Directiva del IVA, en relación con el anexo III, punto 12 bis, de esa Directiva y con el artículo 6 del Reglamento de Ejecución n.o 282/2011.

Establece el Tribunal que está comprendido en el concepto de «servicios de restauración y catering» el suministro de alimentos acompañado de servicios auxiliares suficientes, destinados a permitir el consumo inmediato de esos alimentos por el cliente final, extremo que corresponde verificar al órgano jurisdiccional remitente.

Cuando el cliente final opte por no hacer uso de los medios materiales y humanos puestos a su disposición por el sujeto pasivo para acompañar el consumo de los alimentos suministrados, se considerará que ningún servicio auxiliar acompaña el suministro de esos alimentos.

III. Doctrina Administrativa

1. Tribunal Económico-Administrativo Central, Resolución de 17 Mar. 2021, Rec. 749/2018.

Facturas rectificativas – Análisis sobre la procedencia de rectificación del impuesto por una entidad que no repercutió las cuotas de IVA, por ser de aplicación la inversión del sujeto pasivo.

En la presente resolución, el TEAC analiza la expedición de facturas rectificativas en virtud de los descuentos que se deben aplicar a los medicamentos de acuerdo con lo establecido en el Real Decreto-Ley 8/2010, de 20 de mayo, por el que se adoptan medidas extraordinarias para la reducción del déficit público.

La entidad recurrente es un laboratorio farmacéutico residente en Italia, sin establecimiento permanente en España, que vende sus productos a distribuidores mayoristas en el territorio de aplicación del impuesto (España). La entidad emite sus facturas sin IVA, aplicando los clientes el mecanismo de la inversión del sujeto pasivo.

La entidad considera que el descuento en el precio de los medicamentos que fabrica, le sitúa en una posición desfavorable con respecto a los laboratorios farmacéuticos establecidos en el territorio de aplicación del impuesto, puesto que éstos recuperan el IVA en su día ingresado por la parte rebajada en el precio de venta de los medicamentos producidos, mientras que el interesado no recupera las cuotas del IVA rectificadas en autoliquidaciones.

En este sentido, el TEAC entiende en el presente supuesto la entrega de los medicamentos al destinatario en el territorio de aplicación del impuesto no dio lugar a la repercusión del IVA por parte del transmitente, pues se aplicó la regla de inversión del sujeto pasivo, siendo el adquirente el que, por el mecanismo de autorrepercusión, devengó e ingresó el correspondiente IVA. Por tanto, correspondería a este la rectificación del impuesto pues, en definitiva, él fue el sujeto pasivo en las compraventas, de lo contrario, la neutralidad del IVA, alegada por la reclamante, no operaría para quienes lo hubieran soportado y satisfecho.

En consecuencia, entiende el TEAC que no procede la rectificación del Impuesto por la entidad, pues ésta no repercutió el impuesto al no ser sujeto pasivo, por lo que no se puede rectificar una cuota de IVA que nunca se repercutió.

Por último, respecto a la solicitud de planteamiento de una cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea, el TEAC señala que de conformidad criterios interpretativos señalados por el TJUE, los Tribunales económico- administrativos no son "órganos jurisdiccionales" a efectos del artículo 267 TFUE. Por lo tanto, no cabe la posibilidad de elevar cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea.

2. Tribunal Económico-Administrativo Central, Resolución de 17 Mar. 2021, Rec. 4267/2018.

Exenciones- Operaciones de seguro y de mediación en su distribución. Cesión de la cartera de pólizas de seguro de decesos.

En la presente resolución, el TEAC analiza la posibilidad de aplicar la exención del IVA recogida en el artículo 20.Uno.16º LIVA y/o la no sujeción al Impuesto, al convenio suscrito por dos entidades en virtud del que una entidad le cede a la segunda una parte de las pólizas que integran la cartera de seguros del ramo de decesos.

Respecto a la posible aplicación de la exención, el TEAC reitera la jurisprudencia europea acerca de lo que cabe considerar como seguro a los efectos de su exención en el IVA: se trata de contratos en los que la entidad que presta el servicio se compromete a proporcionar una prestación en caso de que se produzca el acontecimiento o riesgo que se cubre de este modo, cobrando a cambio una prima que es precisamente la contraprestación de la operación. En ausencia de dicha asunción de riesgo, no cabe la consideración de la operación de que se trate como de seguro a estos efectos ni su exención.

El recurrente, por su parte, alega que la DGT ha evacuado diferentes contestaciones vinculantes en las que ha interpretado que las cesiones de carteras de contratos de seguro y/o de reaseguro constituían operaciones de seguro y/o reaseguro respectivamente, aceptando que dichas operaciones quedaran exentas. A este respecto, el Tribunal destaca que todas las contestaciones emitidas por la Dirección General de tributos a las que se refiere el recurrente son previas a la jurisprudencia del TJUE y por lo tanto ya no tienen efecto.

Por otro lado, en relación con la potencial aplicación de la no sujeción al Impuesto, el recurrente manifiesta que la operación de cesión de carteras de seguro constituye una operación no sujeta al IVA en virtud de lo dispuesto en el art 7.1º de la Ley del IVA, al considerar que la cartera cedida supone un conjunto de elementos intangibles necesarios para el desarrollo de una actividad económica y constituyen una estructura organizativa de factores de producción.

El TEAC entiende que para que una operación quede al margen de su sujeción al tributo basta la transmisión de un conjunto de activos, y pasivos en su caso, de una división de una sociedad que constituyen, desde el punto de vista de la organización una explotación autónoma, es decir, un conjunto capaz de funcionar por sus propios medios. Sin embargo, en el presente caso, se transmite un conjunto de contratos de seguros de decesos que no cabe considerar como una mera cesión de bienes por cuanto, los elementos transmitidos no son capaces de funcionar autónomamente.

De ese modo, se desestiman todas las pretensiones del recurrente.

3. Tribunal Económico-Administrativo Central. Resolución 5820/2018 de 17 de marzo de 2021.

Deducciones – Imposibilidad de deducir las cuotas soportadas en la adquisición de material para la hostelería en cuanto merecen la consideración de atenciones a clientes.

En la presente resolución, el TEAC analiza si las cuotas soportadas por una empresa de bebidas en la adquisición de elementos auxiliares -que entrega, posteriormente, a sus clientes- son deducibles o si, por el contrario, su deducción debe excluirse en virtud del artículo 96.Uno.5º de la Ley del IVA.

Para ello, el Tribunal efectúa un análisis en dos partes: por un lado, contrasta la onerosidad de las entregas realizadas por la recurrente a sus clientes y, por otro, analiza la posible calificación del material como objetos publicitarios de escaso valor.

En relación con el primer punto, la recurrente alega que, tanto las entregas de mobiliario de terraza (PLV grande), como las de PLV pequeño (copas, jarras, etc.) a los establecimientos de hostelería, son accesorias de la venta de bebidas, por lo que se incluyen en el precio de ésta. El Tribunal discrepa de este extremo, entendiendo que dichas entregas constituyen un fin en sí mismas para la clientela y no un medio para mejorar el disfrute del servicio principal. Asimismo, al no llevar aparejada la asunción de compromisos de exclusividad, ni presentar equivalencia alguna con el volumen de ventas, entiende el TEAC que se trata de entregas gratuitas.

La recurrente añade que el mobiliario de terraza no publicitario es objeto de una cesión de uso y no de una entrega de bienes. No obstante, ante la falta de control de la recurrente sobre el material entregado, dicha pretensión es desestimada por el Tribunal.

En relación con el segundo punto, considera la recurrente que el PLV pequeño merece la calificación de objeto de carácter publicitario de escaso valor *ex* artículo 7.4 LIVA. En este sentido, sostiene el TEAC que deben cumplirse dos requisitos: (i) que incorporen una mención indeleble de la marca y (ii) que carezcan de valor comercial intrínseco. Pese al cumplimiento del primer requisito, el Tribunal sostiene que los elementos entregados cubren necesidades de los clientes y, en caso de no ser entregados por la recurrente, deberían adquirirse otros similares para el ejercicio de la actividad.

Consecuentemente, el TEAC concluye que las entregas de material auxiliar a los establecimientos de hostelería merecen la consideración de atenciones a clientes a título gratuito; y, adicionalmente, tampoco pueden ser consideradas como objetos publicitarios de escaso valor. Por todo lo anterior, no resulta posible deducir las cuotas de IVA soportado en su adquisición.

4. Dirección General de Tributos. Contestación nº V0476-21, de 4 de marzo de 2021.

Servicios de gestión y asesoramiento inmobiliario - Destinatario de los servicios – Accesoriedad de los servicios – Sujeción al IVA.

La consultante es una sociedad española residente en el TIVA-ES que se dedica a la inversión en activos logísticos inmobiliarios situados en dicho territorio.

En el ejercicio de esta actividad, es propietaria de diversas sociedades (Propcos). Cada sociedad (Propco) es titular de un activo logístico inmobiliario que se arrendará a terceros.

La consultante ha suscrito un contrato con una sociedad especializada en la gestión y administración de propiedades inmobiliarias. En virtud de este contrato, la consultante y las sociedades titulares de los activos logísticos (Propcos) recibirán servicios globales de gestión y asesoramiento. Por la prestación de tales servicios de gestión, la entidad consultante y las Propcos abonarán las siguientes comisiones:

- Una comisión de gestión (*management fee*): que se calcula sobre la valoración de los activos de las Propcos, neto de deuda y que se abonará por las propias Propcos.

- Una comisión de desarrollo (*developer fee*): sobre los costes incurridos por las Propcos, correspondientes a la construcción del activo logístico.

- Una comisión de rentabilidad (*performance fee*): como retribución variable por el valor generado en los activos inmobiliarios y el negocio subyacente. Esta comisión será abonada por la entidad consultante.

La consultante desea conocer:

- Quién es el destinatario del servicio de asesoramiento retribuido por la comisión de rentabilidad (*performance fee).*

- Si los servicios recibidos son independientes o si se pueden considerar como un único servicio complejo a efectos del IVA.

- Sujeción al IVA de las comisiones cobradas a la consultante por el asesoramiento y gestión de las inversiones.

La DGT concluye que:

- Sin perjuicio del examen detenido de las cláusulas contractuales, parece deducirse que el destinatario del contrato de servicios analizado será la entidad consultante. Para ello, la DGT recuerda que para definir quién es el destinatario de los servicios se debe seguir un criterio de destinatario jurídico de la prestación. Asimismo, cuando no resulte con claridad de los contratos suscritos, se considerará que las operaciones gravadas se realizan para quienes, con arreglo a derecho, están obligados frente al sujeto pasivo a efectuar el pago de la contraprestación.

- Los servicios prestados a la consultante parecen estar destinados a quienes buscan un servicio único desde la perspectiva de un consumidor medio. Por ello, en aplicación de la jurisprudencia del TJUE, la DGT concluye que se trata de un servicio único y complejo.

- De acuerdo con la jurisprudencia del TJUE y del TS, un servicio único y complejo, como el analizado en la consulta, consistente en la gestión inmobiliaria de los activos logísticos de las Propcos y con un sistema de distintas formas de retribución, debe estar sujeto y no exento del IVA, al no poderse considerar que exista “mediación” en los términos de la letra m) del artículo 20.Uno.18º de la LIVA.

5. Dirección General de Tributos. Contestación nº V0477-21, de 4 de marzo de 2021.

Tipo impositivo aplicable a la venta de los distintos productos/servicios.

La entidad consultante en una entidad mercantil especializada en la didáctica de matemáticas y, en concreto, en el desarrollo de productos para la enseñanza de la asignatura dentro de los colegios.

Va a comercializar una guía para el profesor en formato físico, que dispone de ISBN, junto con formación al profesorado sobre la metodología contenida en la propia guía.

Además, está desarrollando una plataforma educativa para el suministro de la misma guía anterior en formato digital, si bien puede facilitarse también contenido digital complementario para facilitar las explicaciones como videos o archivos de audio. En esta modalidad también se imparte la formación al profesorado anterior.

Comercializa, asimismo, cuadernos de ejercicios para que los alumnos puedan poner en práctica sus conocimientos, que disponen de ISBN, bien de forma independiente en formato físico o bien facturados conjuntamente con el suministro de la guía del profesor en formato digital en cuyo caso se facilitan dichos cuadernos, asimismo, en formato digital.

La formación en clase se puede complementar con el acceso a una aplicación desarrollada por la consultante para que los alumnos puedan acceder a contenidos complementarios y practicar ejercicios matemáticos.

Finalmente, la consultante vende de forma independiente una caja de material manipulativo que contiene diverso material para que el alumno lo utilice en las clases.

En la presente contestación vinculante, la DGT hace referencia a la definición del concepto de libro, material de educación y servicios prestados por vía electrónica así como al criterio reiterado derivado de la jurisprudencia del Tribunal de Justicia de la Unión Europea para concluir lo siguiente:

- El suministro de libros electrónicos, constituye una prestación de servicios por vía electrónica que debe tributar al tipo del 4 por ciento en virtud del artículo 91.Dos.1, número 2º de la Ley del IVA, siempre y cuando no sean íntegra o predominantemente publicaciones destinadas a la publicidad y que no consistan íntegra o predominantemente en contenidos de vídeo o música audible.

  Dicho tipo reducido también sería de aplicación en caso de que el suministro de los citados libros electrónicos, como operación principal, se acompañase, de forma accesoria, del acceso en línea de los adquirentes de dichas publicaciones a determinadas herramientas de la plataforma de aprendizaje que no configuren un producto distinto e independiente.

- Respecto a los servicios de formación prestados con el objetivo de ilustrar al profesorado sobre la metodología contenida en el propio manual, parece desprenderse que dicho servicio formativo no constituiría un fin en sí mismo para el destinatario, sino el medio para disfrutar en mejores condiciones de la operación principal, permitiendo el necesario conocimiento sobre la metodología a seguir para su puesta en práctica por el profesorado.

Bajo estas circunstancias, y acudiendo a doctrina reiterada, la DGT aun reconociendo que los servicios de enseñanza sobre determinadas materias pudieran resultar exentos en aplicación del artículo 20 de la Ley del IVA, determina que no será de aplicación tal exención cuando dichos servicios tengan la condición servicios accesorios, en cuyo caso seguirán el régimen jurídico que corresponda a la prestación principal, en este caso, el suministro de guías para el profesor, ya sea en formato físico o electrónico.

- Por el contrario, y en relación con la posibilidad de que pueda considerarse como accesorio, igualmente, el suministro por vía electrónica de los cuadernos de ejercicios, que tienen como destinatario último a los alumnos para que pongan en práctica los conocimientos explicados en clase por el profesor a través del manual o guía a que se refiere el escrito de consulta, entiende este Centro directivo que los mismos constituyen un fin en sí mismo para el propio alumno, motivo por el cual, debe considerarse como una operación independiente.

- Finalmente, el acceso a la aplicación desarrollada por la consultante para que el alumno pueda practicar ejercicios de matemáticas se configuraría como un producto distinto e independiente del eventual formato físico del libro electrónico y distinto igualmente a la plataforma electrónica en la que se accede al propio contenido de la guía y diverso material accesorio. En consecuencia, este servicio prestado por el consultante relacionado con la aplicación informática para practicar ejercicios de matemáticas debería tributar al tipo general del Impuesto del 21 por ciento.

- El tipo general será igualmente aplicable al suministro del material manipulativo a que se refiere el escrito de consulta, al no ser de aplicación ningún tipo reducido previsto en la normativa del Impuesto.

6. Dirección General de Tributos. Contestación nº V0484-21, de 4 de marzo de 2021.

Importaciones - Sujeto pasivo – Depósito temporal – Deducibilidad.

La consultante es una sociedad mercantil que, en el desarrollo de su actividad, utiliza los servicios de una entidad titular de un depósito temporal en donde, en ocasiones, el titular de dicho depósito realiza la recepción, en nombre propio, de bienes propiedad de la consultante que son importados en el TIVA-ES.

Las autoridades aduaneras liquidan a la entidad titular del depósito tanto el arancel aduanero como el importe del IVA devengado con ocasión de la importación. Dichos conceptos son posteriormente facturados a la entidad consultante junto con la totalidad de los servicios prestados.

La consultante desea conocer quien ostenta la condición de sujeto pasivo del IVA en las operaciones de importación descritas y el derecho a ejercitar la deducción de dichas cuotas.

Este criterio reiterado de este Centro directivo, analizar la condición de sujeto pasivo en las importaciones de acuerdo con la Ley del IVA y las disposiciones del Código Aduanero de la Unión, estableciendo una vez más, que tendrá la consideración de sujeto pasivo del IVA quien ostente la condición de importador, es decir, el destinatario de los bienes importados, sea este adquirente, cesionario o propietario de los bienes.

Asimismo, se considera importador al consignatario de los bienes importados cuando actúe en nombre propio en dicha importación, así como también, en defecto de los anteriores, el propietario de los bienes. A estos efectos, el consignatario es aquella persona mencionada en el título de transporte que ampara la introducción de las mercancías en el TIVA-ES y es designada para recibir en consigna los bienes en cuestión.

Por ello, la DGT concluye que:

- A pesar de que la propiedad de los bienes nunca es transmitida al titular del depósito temporal, cuando éste actúe como consignatario en nombre propio, deberá considerarse como sujeto pasivo de la importación a la entidad titular de dicho depósito. A efectos del Impuesto no es relevante la posterior repercusión del coste total de los servicios prestados por la entidad depositaria, incluido el arancel aduanero y las correspondientes cuotas del IVA a la importación.

- Por el contrario, en aquellos supuestos en que la entidad titular del depósito temporal actúe como representante directo según la normativa aduanera, será la consultante la que tenga la consideración de declarante a efectos aduaneros y de sujeto pasivo del impuesto.

  En relación con la deducibilidad del IVA, la DGT recuerda que las cuotas devengadas con ocasión de la importación podrán ser únicamente deducidas por la entidad que goce de la condición de sujeto pasivo del IVA a la importación y cumpla con el resto de las condiciones establecidas reglamentariamente.

7. Dirección General de Tributos. Contestación nº V0495-21, de 4 de marzo de 2021.

Sujeción al IVA del importe percibido por un Ayuntamiento, como asimilable a la trasmisión de un excedente de aprovechamiento de titularidad municipal.

El Ayuntamiento consultante ha decretado la venta forzosa en subasta pública de un inmueble, con motivo del incumplimiento de la obligación de edificar y del sometimiento del citado inmueble al régimen de edificación forzosa. Del precio obtenido en la subasta, una parte corresponde a los integrantes de la comunidad de propietarios del edificio, y otra parte corresponde al Ayuntamiento como consecuencia del mencionado incumplimiento de la obligación de edificar, en virtud del artículo 103.4 de la Ley 5/2014.

Comienza la DGT indicando que el Ayuntamiento consultante tendrá la condición de empresario o profesional a efectos del IVA cuando ordene un conjunto de medios personales y materiales, para desarrollar una actividad empresarial o profesional, mediante la realización continuada de entregas de bienes o prestaciones de servicios, siempre que las mismas se realizasen a título oneroso.

En el caso objeto de consulta se especifica que el Ayuntamiento consultante, previa declaración de incumplimiento de la obligación de edificar, acordó la venta forzosa en pública subasta de una edificación en curso, estableciendo que corresponde a dicho Ayuntamiento el 50 por ciento del aprovechamiento del suelo, de conformidad con lo previsto en el artículo 103.4 de la Ley 5/2014 de Ordenación del Territorio, Urbanismo y Paisaje, de la Comunitat Valenciana, que es la que resulta de aplicación a la consulta planteada.

Así pues, de acuerdo con lo establecido en el artículo 187 bis de la mencionada Ley, nos hallamos ante un supuesto de venta forzosa, en el que, según establece el apartado 8 de dicho precepto, el precio obtenido en la subasta pública se entregará a los propietarios habiendo deducido el importe de la sanción impuesta por incumplimiento.

En este sentido, conviene señalar que el artículo 8, apartado dos, número 3º, de la Ley del IVA establece que tienen la consideración de entrega de bienes "las transmisiones de bienes en virtud de una norma o de una resolución administrativa o jurisdiccional, incluida la expropiación forzosa".

Por lo tanto, concluye la DGT que la entrega por el transmitente del inmueble, a través de venta forzosa en pública subasta tendrá la consideración de entrega de bienes sujeta al IVA, al no poder encuadrarse en ninguna de las exenciones previstas en el artículo 20.Uno de la Ley del IVA, ya que se trata de una edificación en curso.

Por otra parte, la DGT dictamina que el pago del importe previsto en el apartado 5 del artículo 103 de la Ley 5/2014, por parte del transmitente al municipio por tratarse de una sanción satisfecha al Ayuntamiento como consecuencia del incumplimiento de su obligación de edificar, debe considerarse como un pago de naturaleza indemnizatoria no sujeto al Impuesto acorde con lo dispuesto en el artículo 78 de la Ley del IVA.

8. Dirección General de Tributos. Contestación nº V0719-21, de 26 de marzo de 2021.

Operaciones de seguros. Servicios de arrendamientos de vehículos en la modalidad de renting junto con la facturación de la parte correspondiente al seguro del vehículo.

La entidad consultante es una entidad dedicada al arrendamiento de vehículos en modalidad de renting, facturando además la parte correspondiente al seguro del vehículo contratado con una entidad aseguradora, así como el mantenimiento y reparación de daños.

Sus clientes no tienen facultad alguna para modular el alcance de estas coberturas ni las condiciones del contrato de seguro suscrito, siendo de exclusiva competencia de la consultante. Se prevé además que la renta mensual del contrato pueda incrementarse o disminuirse en determinadas circunstancias.

Esta consultante plantea a la DGT la tributación de esta operación a los efectos del IVA.

La DGT, tras confirmar que la exención prevista en el artículo 20.Uno.16º de la Ley del IVA puede ser de aplicación pese a que los servicios de seguros sean prestados por entidades diferentes a las aseguradoras, continua analizando la necesidad de determinar si tales servicios puedan ser considerados como una prestación única, o si por el contrario se trata de operaciones independientes para así apreciarse de forma individual a los efectos del IVA.

En este sentido, y en virtud de la jurisprudencia asentada por parte del TJUE, y siguiendo el criterio de otras contestaciones vinculantes, como la V0475-19 de 6 de marzo de 2019,concluye la DGT que el hecho de que el arrendatario no pueda decidir libremente la compañía de seguros con la que van a contratar dicho servicio, junto con la ausencia de

poder de negociación sobre las coberturas objeto de contratación, ni pueda éste ser contratado de forma independiente, corroboran que los servicios de seguros no puedan calificarse como independientes del resto de servicios prestados por la consultante.

Por tanto, estos servicios de seguros deberán incluirse en el ámbito de un servicio único de arrendamiento de vehículos sujeto y no exento de IVA, cuyo devengo se determinará en virtud de las reglas establecidas para las operaciones de tracto sucesivo del artículo 75.Uno.7º de la Ley del IVA.

Por último, la DGT dictamina que, en el caso de aumentos o reducciones de la renta mensual, deberá atenerse a lo dispuesto en el artículo 78.Tres.2º de la Ley del IVA, y consecuentemente, en caso de que la reducción o aumento del precio se produzca antes del devengo de la operación se podrá proceder a la minoración o aumento de la base imponible de la operación, ajustándola al nuevo precio. En caso contrario, si dicha reducción o incremento se produce con posterioridad al devengo de la operación, deberá acudirse al procedimiento de modificación de la base imponible de acuerdo con el artículo 89 de la Ley del IVA.

IV. Country Summaries

Featured articles

US-EU

US and EU tariffs related to large civil aircraft dispute suspended for four months

On 5 March 2021, the US and the EU agreed to suspend all supplemental tariffs between them resulting from the large civil aircraft dispute for four months effective as soon as internal procedures on both sides are completed. This announcement came a day after the US and the UK released a joint statement announcing a four-month suspension of US tariffs on the UK related to the ongoing large civil aircraft dispute effective 4 March 2021. The UK had already stopped imposing tariffs on US-origin goods when it left the EU on 1 January 2021.

According to the parties, these decisions represent a step towards resolving two of the longest running disputes at the World Trade Organization (WTO), and the four-month suspension will allow time for the parties to negotiate a balanced settlement to the disputes and begin addressing the challenges posed by new entrants to the civil aviation market from non-market economies.

Background

In October 2019, the US imposed approximately USD 7.5 billion per annum in supplemental tariffs on EU-origin products as a result of an arbitrator's favorable decision received in the WTO large civil aircraft dispute between the US and the EU. This included 15% tariffs on certain EU aircraft and aircraft parts, and 25% tariffs on a variety of EU-origin goods, such as wine, cheese, chocolate, and other luxury goods. In January 2021, the US narrowed the 25% tariffs to include goods of just French and German origins, but also expanded them to include additional goods.

In November 2020, following another WTO arbitrator's decision that, this time, favored the EU in the large civil aircraft dispute between the EU and the US, the EU imposed supplemental tariffs on US-origin goods covering an estimated trade value of USD 4 billion per annum. These included 15% tariffs on

certain US aircraft, and 25% tariffs on a variety of imports of goods of US origin, including rum, cheese, chocolate, and other luxury goods. On 1 January 2021, which coincided with Brexit, the UK stopped applying these tariffs, stating that it was done in the interest of deescalating its trade relationship with the US and encouraging negotiations.

EU

CJEU confirms VAT on intraentity supplies across EU member states if VAT group exists

On 11 March 2021, the Court of Justice of the European Union (CJEU) issued its ruling in Danske Bank (C-812/19) concerning supplies of services from a head office of a company that was part of a VAT group in one EU member state to its branch in another member state. The court confirmed that its previous jurisprudence in Skandia (C-7/13), concerning a branch that joined a VAT group and received services from its overseas head office, has a broad application and that the principles established applied also to the current case. Following the ruling, all situations where one or more establishments enter a VAT group will lead to VAT on recharges for services between the establishments. The case has particular relevance for financial services and insurance businesses that often operate through branch structures and, in certain countries, are obliged to enter into a VAT grouping with affiliated companies.

Background and facts of the case

Danske Bank A/S is headquartered in Denmark and has set up a branch in Sweden to provide banking services in Sweden. In Denmark, the head office of Danske Bank is a member of a VAT group together with other affiliated entities established in Denmark.

The bank uses an IT platform to run its banking operations across the different countries in which it is established. The costs related to the platform are recharged by the bank's headquarters in Denmark to its foreign branches, including the Swedish branch.

As part of a ruling request in Sweden, Danske Bank sought to obtain confirmation that the recharge was not subject to VAT. The Swedish tax authorities considered that, owing to the Danish headquarters' membership of the VAT group, the Swedish branch must be considered as a separate taxable person for VAT purposes and, therefore, the recharges were subject to VAT.

Decision of the CJEU

This case sought to establish whether the outcome of the Skandia case, decided by the CJEU in 2014, also would apply to different fact patterns involving VAT groups and branch structures.

The Skandia case concerned a US entity with a Swedish branch that was a member of a VAT group in Sweden together with other Skandia affiliates. In its 2014 ruling, the CJEU stated that, where a branch of an overseas entity is part of a VAT group, any supplies of services made by the overseas head office to the branch are considered to be made to the VAT group as a whole and hence subject to VAT. The VAT group was required to account for VAT on the supplies via the reverse charge mechanism.

In its Danske Bank ruling, the CJEU confirmed that where a head office and a branch are located in different EU member states and one of them is part of a VAT group, the head office and the branch are considered as separate taxable persons, with the result that supplies between them are within the scope of VAT. The presence of the VAT group creates a separate taxable person and, due to the territorial limitations embedded in the EU VAT directive rules on VAT grouping, foreign establishments of VAT group members cannot be considered part of the VAT group.

Implications of the ruling

With its ruling, the CJEU has dismissed the arguments that sought to limit the application of the Skandia case to a specific fact pattern, namely where the branch receiving the services enters a VAT group. As a result of the broad application adopted by the CJEU, the presence of a VAT group, that in principle should only affect taxation within a single EU member state due to the strict territorial limitation, may have VAT consequences in other member states.

The CJEU's ruling confirms the position advocated previously by the European Commission and formally adopted as from 1 July 2015 in Belgium, followed by a number of other EU member states. As a result, the ruling likely will not lead to a change in the position of the Belgian VAT authorities. Nevertheless, the broad application of VAT in relationships between establishments of the same legal entity has significant implications for business with multiple establishments, particularly in the financial services industry where VAT is an absolute cost. Businesses should therefore consider carefully how they structure their operations, both within a single EU member state and across the EU, to avoid unexpected VAT costs in their internal relations at either the national or EU level.

Indonesia

Implementing regulation on tax facilities in special economic zones issued

On 20 February 2020, the Indonesian government issued Regulation Number 12 of 2020 (PP-12) to replace Regulation Number 96 of 2015 (PP-96) regarding the tax facilities available in special economic zones (SEZs). The detailed arrangements for the facilities were to be specified in an implementing regulation to be issued by the Minister of Finance (MoF). The MoF issued the required regulation on 30 December 2020 through Regulation Number 237/PMK.010/2020 (PMK-237). PMK-237, which came into effect on 29 January 2021, and replaces MoF Regulation Number 104/PMK.010/2016 (PMK-104).

This article outlines some of the key tax features of PMK-237.

General

Taxpayers in an SEZ can be classified as either a:

- Business entity (*badan usaha*): A legal entity that manages an SEZ; or
- Business player (*pelaku usaha*): An enterprise that carries out business in an SEZ.

PMK-237 provides income tax, VAT, import tax and import duty, and excise tax facilities to business entities and business players in an SEZ.

To be eligible for the facilities under PMK-237 a business entity must meet the following criteria:

Be a domestic taxpayer that conducts business in an SEZ, including a branch;

- Be registered as business entity;
- Have clear "boundaries" following the stage of SEZ development; and
- Hold the necessary license to conduct its business/activities.

A business player must:

- Be a domestic taxpayer that conducts business in an SEZ, including a branch; and
- Hold the necessary license to conduct its business/activities.

Income tax

Under PP-12, both business entities and business players may choose to apply for a tax holiday or tax allowance provided that they fulfil the criteria for the selected income tax facility; however, under PMK-237, tax allowances are not available to a business entity.

The following table sets out the income tax facilities and the specific criteria that must be met:

ç	**Business entity**	**Business player**	
	Tax holiday	**Tax holiday**	**Tax allowance**
Facility	Corporate income tax (CIT) rate reduction of 100% for 10 years for a minimum investment of IDR 100 billion Income eligible for the relief includes: • Income from the sale of land and/or buildings; • Rental income from land and/or buildings; and • Income from "main business activities," excluding the sale or rental of land and/or buildings. (Main business activities refer to business activities and the type of production that are mentioned in the business license) CIT reduction of 50% for two years following the end of the 10-year tax holiday period Eligible income is not subject to withholding tax (WHT) for a business entity that carries out an SEZ "main activity." (An SEZ main activity refers to the business activity and associated chain of production that is the main focus of the SEZ)	CIT rate reduction of 100% for a period depending on the amount of the investment: • 10 years for an investment of at least IDR 100 billion but less than IDR 500 billion; • 15 years for an investment of at least IDR 500 billion but less than IDR 1 trillion; and • 20 years for investments of IDR 1 trillion and above CIT reduction of 50% for two years following the end of the tax holiday period Eligible income is not subject to WHT for a business player that carries out an SEZ main activity	An investment allowance in the form of a reduction of net income equivalent to 30% of the cost of tangible fixed assets including land Accelerated depreciation and amortization A maximum 10% WHT rate on dividends paid to foreign shareholders An extension of the tax loss carryforward period to 10 years (normally five years) Available to business players that carry out either an SEZ main activity or a non SEZ main activity
	A domestic taxpayer conducting an SEZ main activity with a minimum investment of IDR 100 billion		

ç	Business entity	Business player	
	Tax holiday	Tax holiday	Tax allowance
Qualifying criteria	Incorporated in Indonesia Making an investment in respect of which the MoF has not issued a decision on granting or rejecting a tax holiday or tax allowance facility Committed to realizing the planned investment of at least IDR 100 billion within four years after the commencement of commercial production	A domestic taxpayer conducting an SEZ main activity with a minimum investment of IDR 100 billion Incorporated in Indonesia Making an investment in respect of which the MoF has not issued a decision on granting or rejecting the following income tax facilities: • Tax holiday or tax allowance facilities under an SEZ arrangement or a regular business arrangement; • Income tax facility provided for companies on industrial estates; or • Super deduction facility for labor intensive industries For the SEZs located in Banten, Central Java, East Java, Jakarta, West Jakarta, and Yogyakarta provinces, the planned investment must be realized within five years after the issuance of the decision granting the tax holiday facility	A domestic taxpayer in an SEZ who conducts either an SEZ main activity or a non SEZ main activity Incorporated in Indonesia Making an investment in respect of which the MoF has not issued a decision on granting or rejecting the following income tax facilities: • Tax holiday or tax allowance facilities under an SEZ arrangement or a regular business arrangement; • Income tax facilities provided for companies on industrial estates; or • Super deduction facility for labor intensive industries

To apply for the tax holiday or tax allowance facilities under PMK-104, taxpayers must follow the prescribed procedures. PMK-237 has streamlined and simplified the application process. Key features of the application procedure include:

- The taxpayer self-verifies using the Online Submission System (OSS) whether it is eligible for the facilities; if eligible, the taxpayer may proceed with the application by submitting the required documentation.
- The application is passed via the OSS to the relevant ministry and the taxpayer will be informed that the application is being processed.
- The application must be submitted before entering commercial production either:
    - Together with the application for a business identification number (Nomor Induk Berusaha) (for a new business entity/business player); or
    - At the latest one year after the business license for the SEZ is issued by the OSS.
- Where the OSS is not available, applications may be submitted manually through the Investment Coordinating Board (Badan Koordinasi Penanaman Modal (BKPM)).
- The BKPM will issue the decision letter to grant or reject the tax facility on behalf of the MoF within five working days after submission of a completed application.

In line with PP-12, PMK-237 does not require a taxpayer to be a "new" taxpayer to qualify for the facility. It also abolishes the requirement to deposit at least 10% of the total investment amount in an Indonesian bank that was required under PMK-104.

A taxpayer that has successfully applied for a tax holiday facility may benefit from the relief from the fiscal year in which the taxpayer commences commercial production.

A taxpayer that has been granted the tax allowance facility may start utilizing the facility as follows:

Type of facility	Commencement date
Investment allowance	Fiscal year in which the taxpayer commences commercial production
Accelerated depreciation and amortization	Month of issuance of the tax allowance decision letter
Maximum 10% dividend WHT rate	Month of issuance of the tax allowance decision letter. (The benefit ceases to apply when the business player no longer meets the qualifying criteria)
Tax loss carry forward of 10 years	Fiscal year of issuance of the tax allowance decision letter. The tax losses cannot be carried forward beyond the end of the investment allowance utilization period

To determine the start of commercial production, the tax authority will carry out a field audit. The audit will be conducted within 45 working days after the audit notification is sent following the taxpayer's request to the tax authority to determine the start of commercial production and will review:

- Fulfilment of requirements when the application for the facility is made;
- When commercial production commences;
- The documentation submitted during the application;
- The fulfilment of the eligibility criteria for the facility;
- Realized versus planned investment; and
- The value of the investment. If the actual amount invested is different from the planned amount, the tax holiday period may be adjusted.

After the taxpayer obtains the tax benefit, it must submit the appropriate annual report(s) to the Directorate General of Taxes in the prescribed format by 30 January of the following fiscal year, as shown in table below:

Type of taxpayer	Report	Report submission
Business entity	Investment realization report	Report is required from the fiscal year in which the business entity commences commercial production through the end of the 10-year tax holiday period
Business player	Investment realization report	Report is required from when the tax facility is granted until the business player commences commercial production
	Production realization report	Report is required from the fiscal year in which the business player commences commercial production through the end of the tax holiday/tax allowance utilization period

There are restrictions on the purchase or utilization of capital goods that fulfil the agreed investment plan that is granted with the tax holiday or tax allowance. With some exceptions, the purchase or import of secondhand capital goods, or the transfer of capital goods during the facility period is not permitted. Capital goods may be replaced by following certain procedures as set out in PMK-237. The replacement of fixed assets may affect the income tax reliefs granted, e.g., the tax holiday period may be adjusted or the new fixed assets may not enjoy accelerated depreciation. A serious breach of the restrictions or other requirements under PMK-237 may result in the approval being revoked, which requires all benefits obtained to date to be repaid, together with the payment of tax penalties. The taxpayer also will be barred from obtaining an income tax facility in the SEZ in the future.

VAT

Business entities and business players in an SEZ that are entrepreneurs registered for VAT (*Pengusaha Kena Pajak*) must charge VAT and issue VAT invoices on the delivery of taxable goods and/or taxable services.

PMK-237 provides for a "VAT not collected" facility very similar to that in PP-12. Where the taxable goods eligible for the VAT not collected facility on purchase or import are being delivered outside the SEZ, the VAT subject to the facility must be repaid, unless the capital goods are (i) used directly for at least two years for the production of taxable goods and/or taxable services during the course of the SEZ development, and (ii) were imported at least four years previously. PMK-237 provides a detailed administrative procedure related to the application for the facility as well as the settlement of VAT when the taxable goods and/or taxable services are transferred outside an SEZ.

VAT collected and accounted for that should have been subject to the VAT not collected facility as from 24 April 2020 through 29 January 2021 (when PMK-237 became effective) may be refunded under certain conditions.

Import taxes

A business entity may enjoy an exemption from import duties and benefit from import taxes not collected facilities for five years starting from the effective date of import taxes and duty exemption letter. If the period of SEZ development is extended, the import taxes and duty facilities may be extended in line with the updated SEZ development deadline. If the deadline expires before the importation has been fully realized, the facilities may be extended for a further year.

A business player may enjoy import duty exemption and import taxes not collected facilities for a maximum of five years from the start of the industry's development or expansion. If the deadline expires before the importation has been fully realized, the facilities may be extended for a further year.

Facilities for tourism SEZ

Under PMK-237, some facilities specific to SEZs in the tourism industry are as follows:

- The purchase of houses is exempt from luxury goods sales tax and income tax on sales of very luxury-goods where this becomes the main business activity in a tourism SEZ;
- Stores in the SEZ may participate in the VAT refund scheme for foreign passport holders; and
- The importation of capital goods and materials for certain activities is eligible for import duty and excise facilities.

Transitional provisions

Existing business entities and business players may apply for the facilities available under PMK-237 as follows:

Situation	Transitional provision
Business entity or business player has obtained facility under PP-96	The facility continues to apply until the utilization period is finished
Recommendation for granting facility based on PP-96 has been submitted by the BKPM to the relevant ministry before PP-12 became effective (i.e., 24 February 2020)	The application may be processed under PMK-237 provided all the supporting documentation required for the application is submitted
Business entity is established before 24 February 2020	An application for a tax holiday facility under PMK-237 may be made if: • The criteria for the tax holiday facility are met; and • The application is made: - Within six months after PMK-237 becomes effective. (If the entity commences commercial production within 60 days after PMK-237 becomes effective (i.e., by 30 March 2021), the requirement to apply for the facility before commercial production commences is waived); and - All the supporting documentation required for the application is submitted
Business entity is established as from 24 February 2020 through 30 March 2021	An application for a tax holiday facility under PMK-237 may be made if: • The criteria for the tax holiday facility are met; and • The application is made: - Within one year after the relevant license is issued. (If the entity commences commercial production by 30 March 2021, the requirement to apply for the facility before commercial production commences is waived); and - All the supporting documentation required for the application is submitted
Business player whose principal license, investment license, investment registration, or business license is issued before 24 February 2020	An application for a tax facility under PMK-237 may be made if: • Commercial production has not commenced; • No other income tax facilities have been granted in respect of the investment; • The relevant qualifying criteria are met; and

Situation	Transitional provision
	• The application is made: - Within six months after PMK-237 becomes effective; - Before the player commences commercial production; and - All the supporting documentation required for the application is submitted
Business player whose business license is issued from 24 February 2020 through 30 March 2021	An application for a tax facility under PMK-237 may be made if: • No other income tax facilities have been granted in respect of the investment; • The relevant qualifying criteria are met; • The application is made: - Within one year after the relevant license is issued; - Before commercial production commences; and - All the supporting documentation required for the application is submitted

Comments

PMK-237 has been long awaited by both existing business entities and business players in SEZs. The timeline for applying for the tax facility under PMK-237 is tight and taxpayers in SEZs who wish to apply for the facility should review the regulation thoroughly and plan appropriate action immediately.

Singapore

Tax highlights of Budget 2021 for companies

Singapore's Deputy Prime Minister and Minister for Finance, Mr Heng Swee Keat, delivered the Budget 2021 speech on 16 February 2021, with the theme "Emerging stronger together."

In contrast to last year's budget aimed at addressing immediate short-term business needs, Budget 2021 puts greater focus on Singapore's longer-term priorities, as evidenced by a range of initiatives designed to promote innovation, global partnerships, and digital transformation among businesses, and to reinforce Singapore's role as a global Asia node. There is also strong recognition that COVID-19 has disrupted global supply chains and business models, and accelerated digitalization; which represents an opportunity for new areas of growth to which Singapore must respond appropriately.

This article outlines some of the key tax highlights of the budget for companies, including the extension of various COVID-19 support measures announced in the 2020 budgets.

For detailed coverage and comment on the budget, visit Deloitte's dedicated Budget 2021 page.

Corporate income tax

- The corporate income tax rate remains at 17% with a partial tax exemption on the first SGD 200,000 of a company's normal chargeable income. No corporate income tax rebate is proposed for the year of assessment (YA) 2021;

- Extension of a number of Budget 2020 measures, including:
    - The enhanced carry-back scheme allowing current year unabsorbed capital allowances and trade losses, capped at SGD 100,000 and subject to certain conditions, to be carried back to the three immediately preceding YAs is extended to YA 2021;
    - The option to accelerate capital allowances to write-off the cost of acquisition of plant and machinery (P&M) over two years is extended to P&M acquired in the basis period for YA 2022 (i.e., financial year (FY) 2021); and
    - The option to claim accelerated deduction of expenses incurred on renovation and refurbishment in one year is extended to YA 2022 (i.e., expenditure incurred in FY 2021), subject to the same qualifying conditions;
- Enhancement of the double tax deduction for internationalization (DTDi) scheme providing a deduction for 200% of qualifying market expansion and investment development expenses to cover a broader range of expenses and qualifying activities; and
- Extension or enhancement of various other schemes including withholding tax exemptions for the financial sector, 100% investment allowance, and investment allowance (energy efficiency) schemes.

Measures to sustain and support businesses

- Extension of the Jobs Support Scheme as follows:
    - Tier 1 sectors (aviation, aerospace, and tourism): 30% for wages paid as from April 2021 through June 2021, and 10% for wages paid as from July 2021 through September 2021; and
    - Tier 2 sectors (retail, arts and culture, food services, and built environment): 10% for wages paid as from April 2021 through June 2021;
- Extension and enhancement of enterprise financial schemes, including a venture debt program to increase the cap on the amount of loans to SGD 8 million (from SGD 5 million);
- Extension of the enhanced 80% support for various enterprise schemes as from the end of September 2021 through the end of March 2022; and
- Extension of the wage credit scheme by one year, with 15% co-funding.

Goods and services tax (GST)

- The GST rate remains 7% for 2021 but may increase sometime between 2022 and 2025; and
- As from 1 January 2023, GST will be extended to (i) low-value goods imported via air or post and (ii) business-to-consumer imported non-digital services.

Other measures

The budget also provides targeted sectoral support particularly for industries that are severely affected by the COVID-19 pandemic and a range of incentives and initiatives to promote business transformation, climate change, and sustainability.

Budget 2021/22 outlines revenue trends and tax proposals

On 24 February 2021, South Africa's finance minister, Tito Mboweni, presented a budget that reflects an improved outlook compared to the October Medium-Term Budget Policy Statement (MTBPS); however, the fiscal crisis facing South Africa remains grave. The tax announcements, described further below, include a reduction in the corporate income tax rate to 27% (from 28%) for years of assessment commencing on or after 1 April 2022.

Overview of national budget

The Minister of Finance ("Minister") outlined aspects that give him hope in these trying times, which include:

- A fiscal framework that supports the economy and public health services while ensuring the sustainability of public finances in the medium term;
- A much-improved economic outlook both globally and in South Africa;
- Meaningful progress in the implementation of structural economic reforms, including a ZAR 791.2 billion infrastructure investment drive; and
- A budget that specifically supports economic transformation and job creation.

Despite the message of hope projected by the Minister, South Africa faces a consolidated budget deficit of 14% of GDP, with gross debt at about 80% of GDP for the 2021 fiscal year. Against this background, the Minister emphasized in his budget speech that the path to fiscal consolidation is difficult and that it is necessary to be resolute and adamant regarding fiscal prudence. The debt trajectory is troubling and urgently needs to be addressed. Gross loan debt will increase from ZAR 3.95 trillion in the current year to ZAR 5.2 trillion in 2023/24.

South Africa's economy is expected to grow 3.3% in 2021 and average 1.9% in the next two years. The National Treasury of South Africa has developed a ZAR 6.2 trillion spending plan over the next three years to implement the Economic Reconstruction and Recovery Plan. The main drivers of the more positive outlook are better than expected household spending and increased value of commodity exports. However, the COVID-19 path remains unknown and uncertain and may remain a threat to the projected growth in the economy.

The government now expects to collect ZAR 1.21 trillion in taxes during 2020/21, ZAR 213 billion less than expected at the start of the year. While better than anticipated at mid-year (by almost ZAR 100 billion) this is nevertheless the largest tax shortfall on record. South Africa has a tax-to-GDP ratio of 24.6% in the 2021 fiscal year. Although lower than the OECD average, South Africa's ratio is still relatively high compared with other developing countries.

Tax announcements

There are no tax increases except for excise duties (above inflation) and fuel levies (in line with inflation). The Minister has elected to put on hold the tax measures to generate additional tax revenue of ZAR 40 billion over four years that initially were proposed in the October MTBPS. Personal income tax brackets

have been adjusted by 5%—above inflation—for ZAR 2.5 billion in tax relief. The corporate income tax rate will be lowered to 27% for companies for years of assessment commencing on or after 1 April 2022. Further rate decreases are being considered.

It is encouraging that the Minister has chosen to bolster capacity at the South African Revenue Service (SARS) rather than increase taxes, by:

- Deepening technology, data, and machine learning capability;
- Expanding specialized audit and investigative skills in the tax and customs areas to renew its focus on base erosion and profit shifting and tax crime; and
- Establishing a dedicated unit to improve compliance of wealthy individuals with complex financial affairs.

To support the above, SARS has been allocated additional spending of ZAR 3 billion over the medium term.

The Minister emphasized that this is not an austerity budget. However, it is essential to narrow the public finance deficit and invest in the future.

Detailed commentary on some of the tax announcements in the budget, including tax policy proposals, is provided in a publication available on Deloitte South Africa's dedicated 2021/22 budget website.

Thailand

VAT to be imposed on electronic services provided from abroad

The Thai Revenue Department has amended the tax legislation to impose VAT on electronic services ("e-services") provided from abroad that are used in Thailand by service recipients that are not VAT-registered in Thailand, through the Act to Amend the Revenue Code (No. 53) that was published in the government gazette on 10 February 2021. The provisions of the act in relation to the imposition of VAT will apply to income received or expenses paid as from 1 September 2021; these provisions are summarized below.

Amendment of definitions

"Goods" will mean tangible and intangible property that is capable of being valued and owned, whether it is held for sale, for use, or for another purpose, including all imported property. The definition will not include intangible property delivered via the internet or any network platform.

"Electronic services" will mean services including the delivery of intangible property provided via the internet or any network platform, if a substantial portion of the services is rendered automatically and such services would not be possible in the absence of the information technology.

"Electronic platform" will mean a marketplace, channel, or any other platform used by service providers to provide electronic services to the recipients.

VAT requirements for e-service providers and platform operators

1. Service providers supplying electronic services from abroad that are used in Thailand by service recipients that are not VAT registrants in Thailand will be liable to remit VAT to the Revenue Department. No input VAT deduction may offset the output VAT.

2. In the case of service providers supplying electronic services from abroad through an electronic platform, the operator of the electronic platform will be liable for remitting VAT on behalf of all service providers operating through the electronic platform on an aggregate basis, without providing separate details of the services supplied by each service provider. The electronic platform operators in this case will be subject to requirements and liabilities that are similar to those of service providers.

VAT requirements for payers of e-service fees

In the following cases, the payer of service fees (generally, the recipient of the services) to a supplier that provides electronic services from abroad that are used in Thailand is required to remit VAT to the Revenue Department under a reverse-charge mechanism:

- Where the payer of the service fees for electronic services is a VAT registrant in Thailand; or

- Where the supplier is providing any kind of services other than electronic services, regardless of whether the payer of the service fees is a VAT registrant in Thailand.

Exemption from VAT registration requirements

Business operators providing services from abroad that are used in Thailand will not be required to register for VAT if the following requirements are met:

- The operator provides electronic services only to users that are VAT registrants in Thailand; or

- The operator provides a type of services that does not fall within the definition of electronic services, regardless of whether the user is a VAT registrant in Thailand

Prohibition on issuance of tax invoices

Business operators providing electronic services from abroad that are used in Thailand by users that are not VAT registrants in Thailand will be prohibited from issuing tax invoices.

Other news

OECD

International tax update presented to G20 finance ministers

On 26 February 2021, the OECD Secretary-General presented a tax report to the G20 Finance Ministers and Central Bank Governors, which contains two parts. Part I covers the OECD's international tax agenda, including updates relating to addressing the tax challenges arising from digitalization, the response to COVID-19, taxation and the environment, implementation of the BEPS measures and work on tax certainty, tax transparency developments, and supporting developing countries in building their capacity. Part II is a progress report from the Global Forum on Transparency and Exchange of Information for Tax Purposes.

ATO publishes GST administration annual performance report

On 25 February 2021, the Australian Taxation Office (ATO) published the GST administration annual performance report 2019-2020. Among the many aspects of performance addressed in the report, specific areas of goods and services tax (GST) compliance activity are apparent and should be noted by taxpayers, particularly as they have ongoing relevance in 2020-21.

Justified trust and GST assurance

With more than 40 GST assurance reviews completed for taxpayers in the Top 100 and Top 1,000 cohorts by 30 June 2020, the report reveals that:

- Most of those taxpayers reached an overall "medium" level of assurance, meaning that the ATO did not obtain assurance in all areas reviewed, with further attention likely to follow;
- One of the main GST risks identified by the reviews is incorrect GST reporting due to inadvertent errors by taxpayers; and
- Among large taxpayers, most amended assessments arose from voluntary disclosures arising from GST systems or processing errors.

With the more recent introduction of integrated income tax and GST assurance reviews for Top 1,000 taxpayers, the ATO expects to be looking at many more of that cohort from a GST perspective, so as to better identify the higher GST risk taxpayers requiring a full GST assurance review.

With that in mind, large taxpayers yet to be subject to ATO review should be preparing for that possibility - by undertaking a self-review of their GST systems, processes and governance, documenting the outcomes, and addressing any gaps and areas of GST risk identified.

Continued compliance focus on the property sector

The report outlines how the ATO continued to apply compliance resources in 2019-20 to address a range of GST issues and risks that have emerged in the property and construction sector, with a particular focus on:

- Retirement villages and the complex and rapidly changing arrangements associated with them;
- Build-to-rent developments, which have different input and output GST consequences for developers compared to traditional build-to-sell developments;
- Development leases and the potential for GST leakage in arrangements which involve the supply of unimproved land;
- Tax law partnerships being used to obtain a significant GST timing advantage by avoiding the joint and several liability of partners and effectively delaying GST liability; and
- Property developers trying to overcome the impact of the GST withholding measure for sales of new residential property in various ways.

The complexity and high value of many real property developments means that the ATO can be expected to continue to focus GST resources on identifying risks and ensuring compliance well into the future. Taxpayers operating in the property sector should ensure that the GST outcomes of property projects are carefully identified and considered from the earliest planning stage, and further reviewed whenever a relevant change to the project is proposed.

Offshore suppliers who should be registered for GST

The report indicates that the ATO is using a range of methods to identify offshore businesses making supplies of goods, services, or intangibles into Australia that have failed to meet their statutory obligation to become registered for, and participate in, Australia's GST system. These methods include:

- Using third-party financial transactions data supplemented with data from other government agencies such as the Australian Border Force;
- Increasing the information exchanged with tax authorities in other jurisdictions - to enable comparison of business taxpayer registrations in other jurisdictions with the list of offshore businesses registered for GST in Australia – as well as enlisting the help of those foreign tax authorities to support ATO international cross-border GST compliance activity; and
- Assessing information provided by community members against third party data, to check for GST risks.

Offshore businesses making cross-border sales to Australian customers should seek specialist advice on whether they have an obligation to register for GST and remit GST to the ATO, and when that obligation arose. Self-disclosure and payment of outstanding GST obligations may result in reduced or waived penalties and less interest than if the failure to register and remit GST is identified by the ATO.

Belgium

Guidance issued on extension of reduced VAT rate for demolition and reconstruction

On 25 February 2021 the Belgian tax authorities published administrative guidelines (Circular 2021/C/18) providing additional guidance on the temporary extension of the reduced VAT rate of 6% for the demolition of property and subsequent reconstruction of residential property in Belgium as from 1 January 2021 through 31 December 2022.

Initial guidance on the extended scope of the reduction was provided by the tax authorities via a series of frequently asked questions (FAQs) published on the tax authorities' website on 23 December 2020. Although the circular is broadly in line with the FAQs, confirmation of some additional specific elements is provided.

This alert provides an overview of the qualifying conditions and procedural requirements for the temporary extension.

Conditions relating to the building

The administrative guidelines stipulate that the entire building must be demolished; where certain floors only of an existing building are demolished and reconstructed, the reduced rate does not apply.

On a sale, the portion of the price pertaining to the construction of paths, flowerbeds, gardens, and fences that are sold together with the land on which the building is located may benefit from the reduced VAT rate. This also is the case for the supply and installation of a kitchen with built-in cupboards and appliances that are included in the taxable amount of the supply.

Following the demolition of an existing building(s), where a new building is constructed at least 50% on the previously developed land, the entire building is, in principle, eligible for the reduced 6% VAT rate. To assess the 50% rule, only the area of the ground floor is taken into account.

The circular confirms that the new regime does not apply to collective social housing.

Conditions relating to the buyer

To determine whether the reconstructed building is occupied by the owner (who must be a private individual) as their sole private residence, it is necessary to take into account all dwellings, including domestic and foreign buildings and holiday homes. In the case of bare ownership, the reduced rate does not apply.

Additional conditions apply to inherited private dwellings.

Unity of project

In principle, the temporary measure concerns only projects carried out by the same builder/constructor, from the demolition of the existing building through to the completion of the new building. Where the demolition works were carried out prior to 1 January 2021, an administrative tolerance is granted where the project can be demonstrated to be a single project (e.g., through an environmental permit) and the landowner and the constructor are related parties.

The circular letter has clarified that to qualify as related parties, the definition of affiliated corporations in article 1:20 of the Companies and Associations Code may be used.

Formalities

There is no tolerance for late filing (i.e., after 31 March 2021) of the declarations for ongoing projects, except in cases of force majeure or clerical error.

Before VAT becomes due on transactions for which the constructor/promotor intends to apply the 6% VAT rate, the constructor/promotor must submit the required declaration. If the constructor/promotor fails to submit on a timely basis, the reduced rate is not applicable, except in cases of force majeure or clerical error.

Brazil

Supreme Court decides software licensing is not subject to ICMS

On 24 February 2021, the Brazilian Supreme Court held that state value-added tax (ICMS) does not apply to the licensing of software or the right to use software, and state laws that apply the ICMS to such licensing and use are unconstitutional. The court based its decision on the fact that the municipal tax on services (ISS) expressly applies to such transactions.

The court also set forth various modifications to their holding in order to address dual taxation effects that taxpayers may encounter.

Background

The relevant cases before the court contained constitutional challenges to laws enacted by the State of Mato Grosso and the State of Minas Gerais, which levied ICMS on certain software transactions. The taxpayers in the lawsuits argued that ISS, and not ICMS, should apply to the licensing of software and the right to use software.

In a previous hearing, Justice Dias Toffoli agreed and stated that ISS legislation (Complementary Law No. 116/2003) expressly subjects software licensing and software use rights to ISS, which removes any possibility of ICMS taxation. Justice Toffoli further explained that, at time the ICMS was established, it was not possible to determine all situations to which the ICMS should apply, especially as new ways of commercialization continually arise.

Supreme Court decision

After the final hearing, the Supreme Court held that the states' laws applying ICMS to the licensing of software and the right to use software were unconstitutional, because ISS, rather than ICMS, applied to such transactions pursuant to Complementary Law No. 116/2003.

The court acknowledged that it needed to modify the decision in order to address any dual taxation issues and ordered the following:

- Taxpayers that collected ICMS on a transaction prior to the date of the decision will not be able to recover such ICMS; however, municipalities will not be allowed to levy ISS on the same transaction;
- States may not levy ICMS on a transaction where the taxpayer had collected ISS on such transaction;
- Taxpayers that did not collect ICMS or ISS on a transaction prior to the date of the decision will be subject only to ISS on such transaction;
- Taxpayers that collected ICMS and ISS on a transaction prior to the date of the decision will be allowed to seek recovery of the ICMS based on unjust enrichment (without the need to file a legal action); and
- Pending lawsuits and judgments against taxpayers or the states, as the case may be, must be adjudicated in accordance with the decision (taking into consideration facts and circumstances that occurred prior to the date of the decision).

Comments

This decision represents an important development in the taxation of software in Brazil. However, new forms to commercialize software are constantly evolving, which will likely lead to many more issues surrounding taxing jurisdiction.

Brazil

Supreme Court declares ICMS regulation unconstitutional

On 24 February 2021, the Brazilian Supreme Court held that ICMS Convention No. 93 enacted by the National Finance Policy Council (CONFAZ) is unconstitutional. The Convention regulates the levy of ICMS (i.e., state value-added tax) on interstate purchases between ICMS taxpayers and their end consumers that are not ICMS taxpayers, as set forth in Constitutional Amendment No. 87/2015.

Background

ICMS rates differ according to whether interstate or intrastate operations are involved:

- For interstate operations, federal tax legislation sets the rate at 4% for goods with import content over 40%, and 7% or 12% on all other goods (depending on the origin and destination state of the goods).

- For intrastate operations, the rate varies depending on each state's tax legislation.

Constitutional Amendment No. 87/2015 requires that where an end consumer is not an ICMS taxpayer and the state where the end consumer is located has an ICMS rate that is higher than the interstate ICMS rate, the supplier must collect the difference in the ICMS due to the end consumer's state (the interstate amount also is collected by the supplier but paid to the supplier's state). Subsequently, CONFAZ (made up of representatives from each state) passed ICMS Convention No. 93 to begin the levy by suppliers of the ICMS due to the end consumer's state.

A lawsuit was filed with the Supreme Court where taxpayers (i.e., suppliers) argued that a supplementary law was not passed by the National Congress to implement ICMS Convention No. 93 (i.e., the collection of the ICMS amount differential due in the end consumer's state) as required by article 146, item III, of the Constitution, which requires such supplementary laws. Thus, the taxpayers asserted that the subsequent issuance by CONFAZ of ICMS Convention No. 93 was unconstitutional since no such supplementary law was issued. The taxpayers sought to recover the ICMS amounts that were mandated to be collected pursuant to the Convention.

Supreme Court decision

In a close (6-5) decision, the Supreme Court declared ICMS Covenant No. 93/2015 unconstitutional, in agreement with the taxpayers. The court, however, stated that the decision would not have legal effect for general taxpayers until 1 January 2022; as such, ICMS amounts already paid by general taxpayers prior to that date may not be recovered. Taxpayers that are classified as small or mid-sized businesses under the "Simples Nacional" regime may recover ICMS amounts already paid due to a prior injunction in the case granting them that right.

The Supreme court adopted this understanding in order to avoid additional economic impact to the states, which have been already affected by the COVID-19 pandemic. The court further maintained that the states now have until the end of 2021 to decide on a course of

action. As such, the states are encouraging the National Congress to pass the supplementary law for Constitutional Amendment No. 87/2015 in order to continue the levy on the ICMS amount differential due in the end consumer's state.

Comments

Although general taxpayers were successful in obtaining a judgment that ICMS Covenant No. 93/2015 was unconstitutional, they do not have the opportunity to recover the ICMS amounts already paid.

The states have until the end of this year to have a supplementary law passed in order to avoid the interruption of the levy of the ICMS amount differential due in the end consumer's state. In fact, a bill is already under discussion and on the voting agenda before the National Congress on this issue (PLP-325/2016). In order to be approved, an absolute majority of the Chamber of Deputies and Federal Senate must vote in favor of the bill.

Canada

BC's expanded PST requirements will apply as from 1 April 2021

As from 1 April 2021:

- All Canadian businesses that sell taxable goods to anyone in British Columbia (BC) (business or consumer) will have to register and collect BC provincial sales tax (PST) effective 1 April 2021 (subject to some minimum thresholds).

- All non-Canadian resident businesses who sell software or telecommunications to anyone in BC (business or consumer) will have to register for PST effective 1 April 2021 (subject to some minimum thresholds).

- Soda beverages will be subject to PST effective 1 April 2021. This applies to retail sales of these beverages as well as restaurants, cafeterias, coffee shops, food trucks, food kiosks, movie theaters, and other eating or drinking establishments that now will have to be registered for PST.

- In addition, businesses who sell vapor products (including parts and accessories) to BC customers will have to register to collect and remit PST even if the minimum BC revenue threshold is not met.

On 2 September 2020, the government of BC announced that 1 April 2021 would be the effective date for implementation of the expanded PST registration requirements introduced by the 2020 BC Budget on 18 February 2020. The original implementation date was 1 July 2020; however, the date was postponed as part of the COVID-19 relief measures.

Under the new registration requirements, Canadian providers of goods, along with Canadian and foreign providers of software and telecommunication services, will be required to register as tax collectors and collect PST at 7% from customers located in BC if their BC gross annual revenue exceeds the set threshold of CAD 10,000.

The expanded registration requirements will apply to both business-to-business (B2B) and business-to-consumer (B2C) sales of software and telecommunication services.

Also, under the new registration requirements, anyone (regardless of where they are located) who sells software or telecommunication services to a person in BC will be required to register and comply with BC PST legislation if their annual revenue from BC residents exceeds CAD 10,000.

In addition, anyone located in Canada but outside of BC who accepts orders for PST-taxable goods from persons in BC and delivers the goods in BC also will have to be registered for, and charge and collect, BC PST on such sales if their annual revenue from BC residents exceeds CAD 10,000.

The new provisions added to the PST Act require out-of-province vendors who remotely sell digital products and services into BC to register and collect the BC PST at 7% on those sales if they do all of the following:

1. Accept orders originating in BC for the purchase of software for use on or with electronic devices ordinarily situated in BC or for the purchase of telecommunication services;

2. In response to the acceptance of the orders set out in 1), sell or provide software or telecommunication services for amounts meeting the minimum revenue threshold of CAD 10,000 in the preceding 12 months, or their reasonable estimate of their gross revenue from all sales and provisions of software and telecommunications is expected to exceed CAD 10,000 in the next 12 months; and

3. Sell or provide software for use on or with an electronic device ordinarily situated in BC or sell or provide a telecommunication service to a person in BC.

Location of stationary electronic devices (such as desktop computers, televisions, etc.) will be determined based on the billing address or IP address. Similarly, the location of mobile electronic devices (such as smartphones) will be determined based on their assigned area code (BC area codes being 250, 604, 778, and 236).

These new registration requirements will broadly apply to both B2B and B2C retail sales of software and telecommunication services made in BC.

Based on the broad definitions of "software" and "telecommunication service" under the PST Act, the province is of the view that, not only will nonresident vendors of traditional types of software be covered by these new requirements to collect and remit BC PST on their sales into BC, but so will sellers of digital products and services such as software as a service (SaaS), infrastructure as a service (IaaS), and platform as a service (PaaS) if they provide these services to BC customers. However, there are appeal applications and cases pending before the BC courts challenging the province's broad interpretation of its legislation, particularly with respect to IaaS and PaaS.

Businesses can register online using eTaxBC, or by fax or mail, by completing Form FIN 418, Application for Registration for PST, available on the BC government website. All businesses that must be registered to collect and remit PST will be considered to be collectors whether or not they are actually registered.

As of the date of publication, the BC government had not provided further clarification on the liability to collect tax for supplies made through digital platforms so it is unclear whether the digital platform or the actual seller of the digital supply will be required to be registered.

Businesses that are required to register will have to charge and collect tax, unless a specific exemption applies to the sale or lease. BC PST registrants will have to report and remit to the government any tax charged, whether or not they have actually collected the tax from the customer. BC PST registrants will have to remit all taxes charged within a reporting period no later than the last day of the month following the end of the reporting period.

Cyprus

Installment option announced for VAT periods ended 31 December 2020, 31 January 2021

On 9 February 2021, an amendment to the VAT Law was published in Cyprus' official gazette allowing the VAT due for the VAT return periods ending 31 December 2020 and 31 January 2021 to be settled in three equal monthly installments without the imposition of penalties and interest.

The VAT liability on these returns may be settled in three equal monthly installments payable by 10 April 2021, 10 May 2021, and 10 June 2021.

The installment option is only available where the taxpayer submits the VAT returns on time and the taxpayer's economic activity does not fall within one of the following categories:

Description	Economic activity code
Supermarkets and grocery stores (with the exception of Famagusta and Paphos provinces)	47.11.1
Mines and quarries	05.-09.
Forestry and logging	02.
Satellite and other telecommunications services	61.
Electricity generation	35.
Production of chemical substances and chemical products, metals, and other non-metallic products	20./23./25.
Production of pharmaceutical products and pharmaceutical preparations	21.
Manufacture of electrical equipment, machinery, and electronic medical and therapeutic machinery	27./28./26.6
Repair and installation of machinery and equipment	33.
Supply of water, waste water treatment, and waste management and related activities	36./37./38./39.
Financial services and insurance activities, including licensed credit institutions and related activities	64./65./66.
Doctors	86.
Construction sector and related enterprises in the construction sector	41./42./43.
Wholesale trade related to the construction sector	46.63/46.73/46.74
Wholesale trade in motor vehicles and motorcycles, maintenance, manufacture and repair of motor vehicles and similar activities, and related undertakings	45.
Trade representatives	46.11-46.19
Wholesale trade in tobacco, perfumes and cosmetics, furniture, carpets, electronic and telecommunications equipment and accessories, electrical household appliances, radios and televisions, computers, peripheral computer equipment and software, porcelain articles, glassware, and cleaning materials and related activities	46.21/46.35/46.43/46.44/46.45/46.47/46.51/46.52
Nonspecialized wholesale trade in food, beverages, and tobacco	46.39
Computer programing and related activities	62.
Hospital activities	86.1
Nursing homes	87.30.1
Pharmacies	47.73.1
Trade in medical, orthopedic, and pharmaceutical products	47.74
Retailers of lottery tickets and newspapers	47.99.5/47.99.6
Land and water transport services, storage services, and postal services	49./50./52./53.
Private healthcare companies and clinical laboratories	86.10.2/86.21.2/86.22.1/86.22.2/86.23.2/86.90.1

Description	Economic activity code
Household assistance activities and household activities as employers of domestic staff	87./97.
Film production and related activities	59.
Funeral home and related activities	96.03
Veterinary activities	75.
Head office activities, management advice, and related activities	70.
Legal, accounting, and architectural activities	69./71.
Dry cleaners (with the exception of Famagusta and Paphos provinces)	96.01
Petrol stations	47.3
Services in relation to immovable property	68.
Security and research activities, and internal and external buildings services (with the exception of Famagusta and Paphos provinces)	80./81.
Rental and lease of personal or household items, machinery, and equipment	77.

Cyprus

Time of supply for barter transactions in construction industry clarified

On 17 February 2021, the Cyprus Tax Department issued a new implementing guideline (IG 11/2021) (Greek) to clarify the time of supply for VAT purposes for barter transactions in the construction industry and, therefore, the point at which the obligation to account for VAT arises.

Based on the provisions of the VAT Law, VAT is accounted for on the supply of undeveloped building land by a person carrying on an economic activity on the earliest of the following three events:

- All or part of the land is made available to the customer;
- Issuance of the invoice; or
- Payment is made.

The above provisions also apply where a landowner exchanges undeveloped building land for other goods or services and must charge VAT to the person to whom the land is transferred.

The guideline clarifies that the time when all or part of the land is made available to the customer may be the date of submission of the relevant documents to the Department of Lands and Surveys, unless there is other evidence to prove that the land had been made available to the buyer at an earlier date, e.g., the commencement of work on the plot by the developer.

Cyprus

UK companies not obliged to appoint VAT fiscal representative in Cyprus

On 15 February 2021, the Cyprus Tax Department issued a new implementing guideline (IG 10/2021) to clarify that there is no obligation for a UK established taxable person who carries out or will carry out taxable transactions in Cyprus to appoint a fiscal representative for VAT purposes or provide a bank guarantee to the tax department.

As from 1 January 2021, the UK is no longer considered part of the European Union (EU) following the end of the Brexit transition period on 31 December 2020 and it is therefore regarded as a third country for VAT purposes.

The EU-UK Trade and Cooperation Agreement signed on 24 December 2020 includes a protocol on administrative cooperation and combating fraud in the field of VAT and on mutual assistance for the recovery of claims relating to taxes and duties that has been provisionally implemented, subject to final ratification by the relevant EU institutions.

The Cyprus Tax Department's clarification of the position is based on this provisional implementation but the department also has clarified that if the protocol does not receive the required ratification, Cyprus will allow reasonable time for appointment of a VAT fiscal representative or placement of a bank guarantee if necessary.

Czech Republic

Decision issued on VAT remission for respirators

The Czech Minister of Finance issued a decision on 1 February 2021 providing a VAT remission/waiver for supplies of certain respirators (e.g., of the FFP2 type) that are delivered in the period from 3 February 2021 to 3 April 2021, in response to the coronavirus (COVID-19). However, some aspects of the decision are surprising, and some issues are unclear.

One aspect of the decision that is somewhat controversial is that it describes the remission/waiver as mandatorily applicable and that no VAT deduction is possible for customers that receive deliveries from their suppliers of respirators including VAT during the specified period. Another controversial aspect of the decision is that it indicates that VAT charged on advance payments for remitted supplies of respirators that were paid before 3 February 2021 (i.e., supplies that were legitimately subject to VAT at the time of the payment) must be corrected (i.e., reversed). These aspects of the decision are surprising because the wording of the decision is similar to the wording of previous VAT remission decisions issued by the Minister of Finance; however, the controversial aspects of the current decision reflect principles that were not applicable for previous remission decisions issued in 2020 (such as VAT remission in the case of coronavirus vaccinations, where the General Financial Directorate stated on its website that the remission can be applied voluntarily).

Egypt

E-invoicing system: Phase 3 to be effective as from 15 May 2021

On 22 February 2021, the head of the Egyptian Tax Authority (ETA) issued a decree requiring that taxpayers registered with the Large Taxpayers Centre register on the ETA's e-invoicing system (decree no. 85 of 2021). This will validate the application of phase 3 of the e-invoicing system, which will be effective as from 15 May 2021.

Pursuant to the decree, all registered companies should upload their invoices electronically on the ETA's online portal and ensure that their systems are integrated with the ETA's e-invoicing system.

In addition, the Minister of Finance has announced on the ministry's official website that, in accordance with the Prime Minister's decree, effective 1 July 2021, all governmental authorities, public sector companies, and entities affiliated with, or 50% owned by, the government will not enter into any transactions with any vendor, contractor, or service provider that is not registered on the e-invoicing system.

Egypt

E-invoices to be required for VAT deductions and refunds

On 8 March 2021, Egypt's Minister of Finance issued a decree amending article no. 38 of the value-added tax (VAT) law's executive regulations (decree no. 125 of 2021).

The amendment states that, as from 1 January 2022, paper invoices no longer will be accepted and e-invoices will be required when claiming a VAT deduction or refund.

There will be an exception for paper invoices issued by companies before the e-invoice requirement went into effect.

Finland

Central Tax Board issues ruling on right to deduct VAT relating to share acquisition

The Central Tax Board (CTB) of Finland issued an advance ruling on 18 December 2020 (decision number 46/2020), in which it concluded that an acquirer had the right to deduct VAT included in the purchase price of services to acquire shares in a company to which the acquirer intended to sell management services.

In the fact pattern described in the ruling, a limited partnership (Ky) intended to establish a limited liability company ("Company A"), which, in turn, would establish another limited liability company "Company B," in which Company A would be the sole shareholder. Company B would acquire all the shares in a third company ("Company C") carrying on business activities. The Ky applied for an advance ruling on behalf of Company B. The question put forward in the advance ruling request was whether Company B was entitled to deduct the VAT included in the purchase price of services supplied in relation to the acquisition of shares in Company C.

Company B intended to start selling management services to Company C immediately after the acquisition of the shares in Company C, and to account for VAT on the sale of the services. The plan was for Company B to sell management services to its subsidiaries (including Company C) on a continual basis and, therefore, the CTB considered that Company B qualified as a taxable person under the Finnish VAT Act and the EU VAT directive (2006/112/EC). This meant that the costs relating to the acquisition of Company C's shares should be considered Company B's overhead costs, as they were directly linked to Company B's business activities. Since Company B did not intend to carry out business activities that would not entitle it to a VAT deduction, the CTB concluded that Company B should have the right to deduct the VAT included in the purchase price of the services to acquire Company C.

The CTB noted that according to the Court of Justice of the European Union, even preparatory activities should be regarded as an economic activity. The CTB considered that if the services to acquire Company C were invoiced to Company B after its VAT registration, it was irrelevant to Company B's right to deduct VAT whether Company B signed the service agreements itself, whether they were signed on behalf of Company B before it was entered in the trade register, or whether the services were provided before

Company B registered for VAT. Nor was it relevant whether Company B provided the management services to Company C through its own staff or whether it subcontracted the management services to third parties. Company B, therefore, was entitled to deduct in full the VAT included in the purchase price of services relating to the acquisition of Company C's shares.

The CTB's decision confirms that subcontracting the provision of administrative services to a third party in a case where the services are further invoiced to a subsidiary does not necessarily mean that the party subcontracting and re-invoicing the services would not be considered to carry out taxable business activities for VAT purposes.

Finland

Central Tax Board issues ruling on deductibility of bad debts from VAT taxable base

The Central Tax Board (CTB) of Finland issued an advance ruling on 18 December 2020 (decision number KVL 2020/45) concerning credit losses incurred on supplies of electricity network services. The ruling involved a situation where a sales company supplied electricity and also recharged for electricity network services provided by an electricity distribution network operator on the sales company's invoices, in addition to the electricity supplied. According to the ruling, the sales company supplying electricity was entitled to deduct bad debts from the taxable base for VAT related to the electricity network services, considering that the sales company had to cover the bad debts alone in the event of the end customer's insolvency.

According to the terms of the contract concluded between the sales company supplying electricity and the distribution network operator, the latter had a legal relationship with the end customer regarding electricity network services. The sales company was allowed to recharge the electricity network services based on written consent from the end customer.

The CTB considered that the sales company supplied the electricity network services in the form of a commission sale, i.e., in the sales company's name but on behalf of the distribution network operator. The fact that the sales company's invoices also mentioned the distribution network operator's name and that the distribution network operator was liable to pay potential standard compensation to the customer based on the contract (e.g., for an interruption in the supply of electricity) did not change the outcome.

Consequently, although the inclusion of the distribution network operator's name on the invoice and the fact that the distribution network operator was liable for the standard compensation to customers may have indicated that the sales company would only be recharging the electricity network service fees, i.e., invoicing the services in the name of and on behalf of the electricity network operator, the CTB decided otherwise after considering all of the relevant facts and circumstances. As a result, the sales company was able to deduct the bad debts from the VAT taxable base, which would not have been allowed if it had been considered to be merely recharging the network service fees in the name of and on behalf of the electricity network operator.

France

List of non-EU countries exempt from fiscal representative requirement updated

A 16 February 2021 decree published by the French government on 26 February updated the list of non-EU countries that are exempt from the requirement to appoint a fiscal representative in France.

As a reminder, in accordance with article 289 A of the French Tax Code, taxable persons established outside of the EU and subject to VAT or with VAT liabilities in France must appoint a fiscal representative.

However, this article provides an exception for taxable persons established in a non-EU country that has entered into a mutual assistance agreement with France similar in scope to Directive 2010/24/EU and Council Regulation (EU) 904/2010.

A 15 May 2013 decree listed the following exempted non-EU countries: Argentina, Australia, Azerbaijan, Georgia, Iceland, India, Mexico, Moldova, Norway, Republic of Korea, and Saint-Barthelemy.

The 16 February 2021 decree added the following non-EU countries: Antigua and Barbuda, Armenia, Bosnia-Herzegovina, Cape Verde, Dominica, Ecuador, Grenada, Cook Islands, Jamaica, Kenya, Kuwait, Nauru, Niue, Northern Macedonia, Pakistan, Turkey, United Kingdom of Great Britain and Northern Ireland, Vanuatu.

Taxable persons established in these countries are no longer required to appoint a fiscal representative in France.

Hungary

CJEU holds that Hungarian advertisement tax does not infringe EU state aid rules

On 16 March 2021, the Court of Justice of the European Union (CJEU) delivered its judgement in a state aid case involving the Hungarian tax on revenue from advertisements (C-596/19 P), confirming the 2019 judgement of the General Court of the European Union that the progressive tax system is not a form of state aid prohibited under article 107(1) TFEU. On the same date, the CJEU delivered its judgement on similar principles in a case concerning Poland's tax on retail sales (C-562/19 P).

Background

Hungary had introduced, via legislation enacted in 2014, a domestic progressive tax on revenue linked to the publication and broadcasting of advertisements. The tax was based on the net turnover of persons who broadcast or publish advertisements in the form of print media, audio-visual media, or billposters in Hungary and initially included a scale of six progressive rate brackets based on turnover. This was later adapted to include only two rate brackets, accompanied by the option for taxable persons whose profits before tax in 2013 were zero or negative to deduct from their 2014 tax base 50% of the losses carried forward from previous years.

The European Commission in a 4 November 2016 decision concluded that the measure constituted state aid that was incompatible with the internal market, both on account of its progressive structure and the possibility of deducting the carried forward losses. The Commission ordered the immediate and effective recovery of the aid from the beneficiaries.

The General Court in its 27 June 2019 judgement annulled the Commission's decision, holding that the Commission had erred in finding that the tax measure at issue and the mechanism for the partial deductibility of losses carried forward constituted selective advantages.

Decision of the CJEU

The CJEU, sitting as the Grand Chamber, dismissed the appeal brought by the Commission against the judgment of the General Court. One of the claims made by the Commission in support of its appeal was that the General Court had infringed article 107(1) TFEU in holding that the progressive nature of the tax on turnover did not lead to a selective advantage.

The CJEU reaffirmed that in the area of state aid and having regard to the current state of harmonization of EU tax law, the established principles of the fundamental freedoms mean that member states are free to establish the system of taxation which they deem most appropriate. The application of progressive taxation falls within the discretion of each member state, provided that the characteristics of the measure do not entail any manifest discriminatory element.

The CJEU recalled its established case law that, for the purpose of classifying a measure that is of general scope as state aid within the meaning of article 107(1), the condition relating to the selectivity of the advantage provided by the measure requires the determination of whether it favors "certain undertakings or the production of certain goods" over others which, having regard to the objective of article 107(1), are in a comparable factual and legal situation and which, accordingly, suffer different treatment that can be classified as discriminatory. In particular, when considering a national tax measure, it is for the Commission, after having identified the reference system (i.e., the "normal" tax regime applicable in the relevant member state), to demonstrate that the tax measure in question deviates from that reference system by differentiating between operators who, in the light of the objective pursued by the measure, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question.

Based on these considerations the CJEU examined whether the General Court was right to find that the Commission had not demonstrated that the progressive nature of the tax measure conferred a selective advantage on certain undertakings or the production of certain goods. The CJEU upheld the General Court's analysis that the progressivity of the rates provided for by the tax measure formed an integral part of the reference system having regard to which it was necessary to assess whether the existence of a selective advantage could be established.

The CJEU decided that individual member states may establish the system of taxation which they deem most appropriate, including progressive taxation. In particular, EU state aid law does not preclude member states from adopting progressive tax rates intended to take account of the ability to pay of taxable persons, nor does it require member states to reserve the application of progressive rates for taxes based on profits to the exclusion of those based on turnover. In such circumstances, the characteristics of the tax, including progressive tax rates, are part of the reference system for the purposes of analyzing the condition of selectivity.

It is for the Commission to demonstrate that the characteristics of a national tax measure are designed in a way that is manifestly discriminatory, with the result that the characteristics should be excluded from the reference system. The CJEU, however, found that in the current case the Commission had not established that the characteristics of the measure adopted by Hungary had been designed in a manifestly discriminatory manner with the aim of circumventing the requirements of EU state aid law. The General Court was, therefore, justified in holding that the Commission had incorrectly relied on an incomplete and notional tax system in considering that the progressive scale of tax measures at issue did not form part of the reference system with regard to which the selective nature of the measures had to be assessed.

Finally, the CJEU also ruled that the General Court was correct in considering that the transitional measure of the partial deductibility of losses carried forward did not lead to a selective advantage. The establishment of a transitional measure taking into account profits is, according to the CJEU, not inconsistent in the light of the redistribution objective pursued by the Hungarian tax measure. The CJEU highlighted that the criteria concerning the lack of profits recorded in the financial year preceding the entry into force of the tax was objective in nature, since the undertakings benefiting from the transitional loss relief had a lesser ability to pay than others.

Hungary

Scope of application of VAT reverse charge mechanism for supplies of staff reduced

The Hungarian parliament on 2 March 2021 approved amendments to the VAT Act that would limit the scope of the application of the VAT reverse charge mechanism on supplies of staff to the provision of employees involved in construction work related to immovable properties as from 1 April 2021.

In 2014, Hungary obtained authorization from the European Council to introduce a special measure derogating from the provisions of the EU VAT directive and apply VAT to supplies of staff via the reverse charge mechanism. The authorization subsequently was renewed in 2017 but expired on 31 December 2020.

On 17 June 2020, the Hungarian government requested authorization to continue to apply the reverse charge mechanism to supplies of staff in general. However, on the recommendation of the European Commission, the European Parliament rejected the request and limited the scope of the application of the reverse charge mechanism to supplies of staff relating to specific construction activities as from 1 April 2021.

Hungary

Grace period for real-time invoice data reporting for distance sales extended

Guidelines issued by the Hungarian tax authority on 3 March 2021 extend for a further three months through 30 June 2021 the grace period allowed for compliance with the extended real-time invoice data reporting obligation applicable to certain supplies as from 4 January 2021.

The new EU VAT e-commerce package will enter into force in Hungary as from 1 July 2021. As a consequence, business-to-consumer (B2C) distance sales will be covered by the Union “One Stop Shop” reporting system (OSS) and the related VAT reporting and payment obligations may be fulfilled within the framework of the new system where the taxpayer is not established in the same EU member state as the customer. The advantage of the new regime is that the VAT obligations may be fulfilled in the member state in which the taxpayer is registered with the OSS, so that the taxpayer is not required to register for VAT purposes in the customer’s member state.

Where a taxpayer registers with the OSS in a member state other than Hungary, it is not obliged to provide invoice data to the Hungarian tax authority within the framework of the real-time invoice data reporting obligation regarding its intra-Community distance sales to Hungary, since the rules of the member state of OSS registration would apply to the invoicing.

However, this simplification will apply only as from 1 July 2021; until that date, according to the new legislation regarding real-time invoice data reporting obligations that entered into force on 4 January 2021, taxpayers carrying out distance sales to Hungary and therefore making or opting for Hungarian domestic sales are required to provide invoice data to the Hungarian tax authority relating to their domestic sales invoices. As a result of the previously announced grace period from 4 January 2021 through 31 March 2021, such taxpayers would only be required to make the necessary changes to their IT systems to be able to provide invoice data to the tax authorities for a quarterly period. The guidelines issued by the tax authorities therefore extend the grace period through 30 June 2021 for taxpayers who:

- Register for the OSS system in one of the EU member states by 1 July 2021; and
- Would be obliged to register for VAT in Hungary or obtain a tax identification number for VAT purposes only due to distance sales to Hungarian customers.

Indonesia

Tax incentives granted in response to COVID-19 pandemic reintroduced

Indonesia's Ministry of Finance (MoF) on 1 February 2021 issued Regulation Number 9/PMK.03/2021 (PMK-9), reintroducing various tax incentives in response to the COVID-19 pandemic. PMK-9 came into effect as from 2 February 2021 and generally provides for the reliefs to apply as from fiscal period January 2021 through June 2021.

Background

In early 2020, to support Indonesian businesses and individuals affected by the COVID-19 pandemic, the Minister of Finance (MoF) provided tax reliefs through the issuance of Regulation Number 23/PMK.03/2020 (PMK-23). PMK-23 was updated several times with regulations 44/PMK.03/2020, 86/PMK.03/2020, and PMK-110/PMK.03/2020 (previous MoF regulations). The tax reliefs provided were:

- Article 21 employee income tax (EIT) to be borne by the government for employees of certain employers, where the annualized fixed and regular gross employment income for the month is not more than IDR 200 million;
- 0.5% final tax for small and medium enterprises (SMEs) to be borne by the government;
- Article 4(2) income tax on certain construction activities to be borne by the government;
- Exemption from Article 22 income tax on imports for eligible taxpayers;
- 50% reduction in Article 25 income tax (monthly tax installments) for eligible taxpayers; and
- Preliminary refund of Value Added Tax (VAT) overpayments for eligible VATable entrepreneurs (PKP), where the overpayment shown on the VAT return does not exceed IDR 5 billion.

The previous MoF regulations expired on 31 December 2020. Since the pandemic has not subsided and the reliefs are still necessary, the MoF issued Regulation Number 9/PMK.03/2021 (PMK-9) on 1 February 2021 to reintroduce the tax reliefs above.

Key features of PMK-9

PMK-9 came into effect from 2 February 2021 and, unless noted below, generally provides for the reliefs to apply as from fiscal period January 2021 through June 2021.

The content of PMK-9 is broadly similar to the previous MoF regulations with a number of updates:

- Taxpayers must have submitted the annual income tax return for fiscal year 2019 before applying for the tax reliefs under PMK-9. An exception applies for taxpayers not required to submit the return;
- The reliefs on Article 22 income tax can be utilized from the date the tax exemption letter is issued through 30 June 2021;
- Taxpayers that have benefitted from the reliefs under previous MoF regulations must renotify/reapply to the tax office to utilize the reliefs under PMK-9;
- Under the previous MoF regulations, the tax office would issue notification letters only where taxpayers did not qualify for the reliefs for which they applied/notified. However, the tax office now will issue notification letters to taxpayers confirming their eligibility for the reliefs, either qualifying or not qualifying. This provides more certainty to taxpayers;
- The number of business classifications (*Klasifikasi Lapangan Usaha* (KLU)) eligible for the reliefs are updated as follows: 1,189 KLUs for EIT, 730 KLUs for Article 22 income tax, 1,018 KLUs for monthly tax installments, and 725 KLUs for VAT;
- PMK-9 allows taxpayers that utilize reliefs under previous MoF regulations to submit realization reports for the fiscal year 2020 by 28 February 2021. Otherwise, the tax reliefs will become invalid for that period and the unpaid tax must be paid;
- The relief utilization report for EIT, final tax for SMEs, and Article 4(2) income tax on certain construction activities must be submitted to the tax office by the 20th of the following month. Failure to comply will mean that the relief cannot be utilized for that fiscal period and the unpaid tax must be settled. Utilization reports may be amended at the latest by the end of the month following the initial deadline for the realization report;
- PMK-9 provides the following transitional provisions for taxpayers that have utilized the relief for monthly tax installments under PMK-86 or PMK-110:
    - The monthly tax installment (after taking account of the relief) of the last period of fiscal year 2020 applies until the taxpayer submits the annual income tax return for fiscal year 2020 (2020 annual ITR); and
    - The relief for the monthly tax installments for the subsequent months (calculated from the amount stated in the 2020 annual ITR) applies from:
        - The month when the 2020 annual ITR is submitted if the notification is submitted before or together with the 2020 annual ITR; or
        - The fiscal period when the notification is submitted if the notification is submitted after 2020 annual ITR; and

- Taxpayers may start utilizing the reliefs for EIT and monthly tax installments as from January 2021 where the notification to utilize the relief is submitted by 15 February 2021.

Ireland

Brexit Developments - February 2021

Indirect Tax Matters February 2021

We comment below on some of the main VAT Brexit issues that may affect businesses in Ireland. As the main impact of Brexit is to supplies of goods, businesses should review their supply chain from a VAT perspective.

Intra-Community Supplies

Sales of goods to GB can no longer be treated as intra- Community supplies and should not be included on VAT, VIES or Intrastat returns. Also the requirement to include the customer's VAT registration number on a sales invoice is eliminated. Furthermore, the VAT simplifications that apply to intra-Community supplies (Triangulation and Call Off Stock) should not apply where goods move to or from GB, or in the case of triangulation where a non EU VAT registered British trader is involved.

Exports

Any goods going to GB that are to be transported directly by or on behalf of the person making the supply or by or on behalf of a non-established business should qualify as exports and liable to VAT at the 0% rate.

Importing Goods

Goods imported into Ireland from GB will generally give rise to import VAT at the point of entry into Ireland. Similarly goods that go from Ireland to the UK will be imports and liable to UK import VAT.

Businesses that are registered for VAT and Customs in Ireland may avail of postponed accounting to deal with VAT on imports from all non-EU countries. Under postponed accounting importers account for import VAT by self-accounting, in their VAT returns, for the VAT due and can claim a VAT input credit subject to the normal rules for VAT deductibility. This results in no VAT having to be paid over to Revenue on imports. Revenue have amended VAT returns and the value of imported goods subject to postponed accounting should also be included in a new box PA1 in the returns.

VAT Refunds

The deadline to submit claims for recovery of VAT incurred in the UK during 2020 has changed and claims must be submitted by the 31 March 2021.

There is scope for Irish and other EU businesses to recover VAT incurred in the UK in 2021 and future years again subject to rules governing VAT recovery.

Taxing the Digital Economy – VAT Changes in 2021

Indirect Tax Matters February 2021

In a previous edition of Indirect Tax Matters we looked at some of the VAT changes announced by the European Commission which were aimed at Taxing the Digital Economy from a VAT perspective. The European Commission had planned to introduce three new VAT measures on 1 January 2021 to tax the digital economy but due to difficulties caused by the pandemic the implementation of these new roles has been delayed until 1 July 2021.

The three new VAT measures being implemented on 1 July can be summarised under the following headings which we will investigate further in this article:

1. The One Stop Shop – For Distance Sales
2. The One Stop Shop – For Electronic Interfaces.
3. The Import One Stop Shop

These new rules are an extension of the Mini One Stop Shop "MOSS" which came into effect in 2015. "MOSS" was introduced with the aim of reducing the administrative burden for businesses engaged in the supply of telecommunications, broadcasting and electronically supplied (TBE) services to non-taxable customers. Prior to MOSS a business could have had a VAT registration obligation in multiple jurisdictions, by opting to use MOSS a business can report sales for all EU jurisdictions via a return made to one Member State. There are currently two types of MOSS scheme, one for businesses established within the EU (the EU Scheme) and the second for those established elsewhere (the Non-EU Scheme), both relate to supplies made to consumers within the EU and are very similar. Businesses do have to follow certain rules, such as sourcing and retaining pieces of evidence regarding where the customer is located to determine the country where tax is due.

1. The One Stop Shop – For Distance Sales

Following the success of the MOSS system for taxpayers in reducing their filing obligation in many jurisdictions the new rules coming into force from 1 July 2021 will significantly expand the scope of the MOSS scheme which is now being renamed the One Stop Shop (OSS) with the Mini being dropped for both the EU and NON EU schemes.

a) EU OSS Scheme

The scope of transactions that will have to be reported through the EU OSS scheme will be increased to include not just TBE services, but also other B2C services and B2C supplies of goods.

Currently, supplies of goods sold and dispatched from a business in one Member State to a customer who is not registered for VAT and is located in another Member State are treated as being supplied in the country from which they are dispatched unless the supplier has breached the 'distance sales threshold' in the customers country. Many countries, including Ireland, had adopted the lowest threshold available of €35,000, whereas some countries, such as Germany, The Netherlands and Luxembourg have applied the maximum threshold of €100,000.

From July 2021 EU based suppliers will report these supplies, which were referred to as 'distance sales' but will now be defined as 'Intra-Community distance sales of goods', under the revised 'One Stop Shop' which will eliminate the requirement for multiple VAT registrations in different jurisdictions. The principle of taxing in the country of destination will also apply to all other services supplied B2C (as well as TBE services currently taxed this way), which will all be reported through the OSS. A threshold of €10,000 will apply to the total value of both services and 'distance sales' of goods so that if your cumulative annual sales of these types of supply exceed that threshold you must register for OSS and report your sales in every country to which you makes such supplies.

b) Non - EU OSS Scheme

The non EU MOSS scheme will also be extended to include all B2C supplies of services and with effect from 1 July 2021 the supply of all B2C services into the EU will also have to be reported by non-EU businesses under the OSS.

The subtle difference between the changes for the EU and Non-EU scheme is that the B2C sales of goods is not being covered under the OSS for the Non-Union Scheme.

2. The Import One Stop Shop (IOSS).

EU

The reason for the subtle difference between the Union and Non-Union scheme for OSS on distance sales is due to the implementation of the Import One Stop Shop (IOSS).

With respect to the supply of goods B2C, from outside the EU to non-taxable persons (generally consumers) within the EU, any Customs Duty or VAT is generally collected as the goods are imported. The current exemption from declaring import VAT on goods of negligible value (less than €22) will be abolished from 1 July 2021. Customs Duty exemption (where applicable) for goods valued less than €150 will still be applicable.

Due to the removal of low value consignment stock there will be a significant increase in the number of transactions where VAT will be due on imports. Such goods will fall under a new category of 'distance sales of goods imported from third territories or third countries' and these will be dealt with by way of the new scheme – Import OSS (IOSS) which is available to both EU and Non-EU established traders.

The purpose of the IOSS is that suppliers importing goods into the EU can declare and pay the VAT due on those goods through the IOSS in the member state where they have registered for the scheme. Where IOSS is used the supplier will charge VAT to the customer at the time of the supply and the goods will not be subject to VAT at the time of importation.

From 1 July 2021 the B2C supply of goods from outside the EU to a customer in the EU, where the value of the goods does not exceed €150, will be chargeable to VAT which is payable and reported through the IOSS in the member state of identification.

UK

A similar scheme to the IOSS was introduced in the UK on 1 January 2021 where UK VAT becomes due at the point of sale instead of on importation on both B2B and B2C sale of goods if the consignment is valued at less than £135 the VAT on these supplies is paid and declared to HMRC through a similar portal to IOSS in the EU.

From a UK perspective some of the difficulties our clients have been noticing in this area is knowing precisely what the £135 valuation includes. For example is it the customs valuation, should the VAT valuation include shipping/delivery costs, or, is it just the value of the goods supplied?

The EU IOSS has a valuation of under €150 and given the issues that have arisen for clients in the UK determining the valuation further guidance needs to be provided by the EU or Revenue before implementation.

3. The One Stop Shop – For Electronic Interfaces.

From 1 July 2021 if an Electronic Interface (effectively an Online Marketplace) facilities the sale of goods by a Non-EU established trader to an EU customer then the electronic interface is considered to be the seller and is liable for the payment of VAT. The payment and declaration of this VAT will be made by the Electronic Interface through the OSS for Electronic Interfaces.

The effect of OSS for Electronic interfaces is that the Electronic interface is deemed to have made the supply for VAT purposes. A supply of goods from an underlying supplier into the EU through an Electronic interface is effectively split into two transactions

- A supply from the Underlying supplier to the Electronic Interface
- A supply from the Electronic Interface to the customer.

IOSS will also apply to supplies made on an Electronic Interface where the Electronic interface facilities the importations of goods from outside the EU by an underlying supplier. The Electronic Interface will be deemed to have made the supply and will be liable for the VAT through the IOSS

Conclusion

These new rules are a fundamental shift towards the principles of taxing at destination.

These rules will reduce the filing obligations required by taxpayers as there will no longer be a requirement to have multiple VAT registrations across Europe in turn reducing the VAT compliance cost for taxpayers.

Irish Revenue have provided some guidance on these new rules coming into force on 1 July 2021 on the Revenue website here. However limited guidance has been provided on the registration process for businesses that wish to prepare in advance but it is our understanding that the registration process will be available in April 2021.

Guidance has also not been provided on the deregistration process for businesses that have multiple VAT registrations across the EU that wish to reduce their compliance costs. With only four months until these measures take affect businesses should be considering these new rules now and how it might affect their business.

This article provides only a high level overview of some of the implications involved. We are happy to discuss how this impacts your business more specifically.

VAT Rate Change, Postponed Accounting on Import and Annual Return updates

Indirect Tax Matters February 2021

VAT Rate Change

Our previous article "6 month temporary reduction to the standard rate of VAT" outlined that the Irish standard rate of VAT was being reduced from 23% to 21% effective 1 September 2020 until 1 March 2021. There had been some speculation that this would be extended however the Minister for Finance has recently confirmed that the rate will revert to 23% as planned on 1 March 2021.

If you have restricted or limited VAT recovery then to take maximum advantage of the time left with the lower rate you may wish to:

i. Encourage suppliers to bill by way of the issue of valid VAT invoices no later than 28 February 2021;

ii. Settle any 'proforma' or other 'non-VAT invoices' a few days before 28 February 2021 to allow time for a February 2021 dated invoice @ 21% to issue; and

iii. Settle any overseas fees for reverse charge services no later than 28 February 2021 to align the 21% VAT rate with both the invoice date and the date of payment.

From 1 March 2021, the issue of domestic invoices, the payment of 'proforma' or other non-VAT invoices, or the payment of overseas VATable services could see the 23% VAT rate applied.

The rate change also means that from a supplier perspective any domestic invoices issued on or after 1st March 2021 for standard rated supplies businesses will need to revert to the 23% rate.

Update on Postponed Accounting for Irish Import VAT

Our article 'Postponed accounting for Irish VAT on imports' gave an overview of the new arrangements for postponed accounting for VAT due on imports. When that article was published the measure was awaiting a Ministerial commencement order which is now in place and the new procedure took effect from 1st January 2021.

Postponed accounting, when it is permitted by the Revenue Commissioners, means that VAT no longer needs to be paid at the time of import. Instead the VAT due is accounted for when filing the VAT return for the period. A simultaneous input deduction can be claimed in the same VAT return thus it is VAT cash neutral (subject to normal rules on VAT deductibility). VAT is therefore accounted for under the reverse charge procedure in the same way that it is for goods moving between EU Member States.

Postponed Accounting arrangements may be applied to all imports from all third countries including Great Britain, i.e. the UK (not including Northern Ireland). Goods coming from Northern Ireland are still classified as Intra Community Supplies and not 'imports'. The use of postponed accounting for imports from outside the EU must be approved by the Revenue Commissioners therefore VAT may still need be accounted for at the time of import or through a deferred payment arrangement if that permission has not been granted.

Entitlement to use postponed accounting

Accountable persons who had existing registrations for both Irish VAT and Customs & Excise (C&E) at 11:00pm on 31 December 2020 were given automatic entitlement to use Postponed Accounting. Irish VAT registered traders who did not have a registration for C&E (i.e. hold an EORI number) at that time and now wish to import goods into Ireland should register for C&E and once done, they will be given automatic entitlement to Postponed Accounting. Until they do make such an application they will not qualify for postponed accounting and will have to pay import VAT and claim deduction in their VAT returns subject to the rules of VAT deduction.

New Irish VAT registrations & postponed accounting

Ireland currently uses a two tier VAT registration system, one for domestic only traders and the second for those involved in Intra EU trade. For new Intra EU traders, to avail of postponed accounting an Irish VAT and C&E registration must first be in place and then a request for access to the postponed accounting scheme can be submitted to Revenue.

For new 'domestic only' Irish VAT registrations an application to avail of postponed accounting can be submitted at the same time as the VAT and C&E applications. Supporting documentation will be required by Revenue and postponed accounting can only be used once Revenue confirm the application has been processed successfully.

Using postponed accounting

The following details should be used on the import declarations being filed;

If using AIS, code '1A05' is inserted in Data Element (DE) 2/3 followed by text IEPOSTPONED. The system will check if authorised (or not) for postponed accounting, if valid, the declaration will progress as normal. VAT is calculated and indicated with tax type 1B2 in the message back to the declarant. The amount of VAT under 1B2 is not included in the total liability for collection and should be included in the VAT return.

Where using AEP, code '1A01' is inserted into SAD Box 44 followed by text IEPOSTPONED. The system will check if postponed accounting is authorised and if so the SAD will progress as normal. AEP will calculate the correct VAT liability but the VAT amount will not be collected. The VAT amount will not be included in the message back to the declarant – it should be declared in the VAT return.

For Section 56 holders (13B Authorisations) the use of code 1A01 is unchanged. The relevant authorisation number should still be declared in both AIS and AEP.

VAT returns have been amended to include an additional field/box 'PA1' which is to capture the value of goods imported under Postponed Accounting (net plus carriage, insurance and freight). The VAT is then accounted for at Sales (T1) and input deduction claimed in Purchases (T2) subject to the usual rules of deductibility. The VAT Annual Return of Trading Details (ARTD) has also been amended to include additional fields/boxes PA2, PA3 & PA4 to capture the value of goods imported under Postponed Accounting.

Annual Return of Trading Details

All VAT registered persons are required to file a Return of Trading Details (RTD) following the end of their accounting period (which is usually aligned to the financial year). The RTD is a statistical return summarising the net values of the actual sales and purchase figures, the VAT on which was included in the less detailed periodic VAT returns during the accounting period.

The RTD should be filed on the 23rd of the month following the end of the accounting period. Therefore, if you have an accounting period which ended on the 31st of December 2020, your RTD was due to be filed by the 23rd of January 2021. However, the RTD on ROS only had boxes for including details of transactions at the 23% VAT rate and not at the temporary 21% rate. On 22nd January 2021, Revenue issued a guidance note stating that they were granting an extension to the filing date as they were updating ROS for revised VAT Return of Trading Details (RTD).

The revised RTD became available on 10 February 2021 and the filing date of the RTD was extended to 10 March 2021. The only change to the RTD is that the boxes previously labelled '23%' are now called 'Standard Rate' and therefore all transactions either at the 21% or 23% rates should be included in the same boxes called 'standard rate'.

As the RTD is a statistical return it does not of itself carry an obligation to pay any VAT liability. Essentially, the RTD is used as an audit tool to assist Revenue in verifying the accuracy of your periodic VAT returns filled during the accounting period. Failure to file an RTD can affect the cash flow of your business as tax refunds, under any tax head, can be withheld until the RTD has been filled. Also, Revenue may refuse to issue tax clearance certificates or Section 56 Authorisations until such time as the RTD has been filed.

Italy

Changes to B2B e-invoicing rules to apply as from 2022 for certain transactions

The Italian budget law (No. 178) dated 30 December 2020 provides for certain changes to the mandatory business-to-business (B2B) electronic invoicing ("e-invoicing") rules for transactions carried out with foreign business partners (i.e., taxpayers that are not resident or established in Italy and that do not have an Italian VAT number), effective as from 1 January 2022:

- Taxpayers resident or established in Italy must submit the e-invoice data through the interchange system (SDI) in an XML format documenting the transactions carried out with foreign business partners; and
- Consequently, the obligation to submit the "Esterometro" return (sales and purchases report) in respect of such transactions will be abolished.

Input e-invoices documenting purchases from foreign business suppliers must be submitted through the SDI portal by the 15th day of the month following the month in which:

- A paper invoice/documentation issued by the foreign supplier is received; or
- The transaction took place from a VAT perspective (i.e., the "tax point," in principle, the time of delivery for supplies of goods or the time of payment for supplies of services).

E-invoices issued to foreign business customers must be submitted through the SDI portal by the standard deadline provided by the Italian law for the issuance of e-invoices (i.e., within 12 days from the date on which the transaction took place from a VAT perspective).

In the case of noncompliance with the new rules, administrative penalties equal to EUR 2 per invoice will apply, up to a maximum of EUR 400 per month. The penalty will be reduced by half in the case of a late submission of the e-invoice through the SDI that is made within 15 days following the deadline.

New Zealand

COVID-19 government support: Tax obligations and new support available

Businesses around the country have been in receipt of a range of different support packages from the New Zealand government over the last year. Almost 760,000 businesses and sole traders have claimed wage subsidies or claimed under the leave support scheme; 18,225 have since made repayments of the wage subsidy. The week of 23 February 2021, applications have opened for the new "Resurgence Support Payment."

While many businesses are focused on survival, it's important that businesses that have claimed support understand the obligations on them in relation to both income tax and GST; to ensure they're not under-paying or over-paying tax by taking an incorrect position in an income tax or GST return.

Wage subsidy/Leave support scheme/Short-term absence payment

The government's wage subsidy, leave support, and short-term absence payments are paid to employers in order to be passed on to employees. Other than self-employed recipients, which are covered below, the receipt of assistance through any of these schemes is treated as "excluded income" for the employer (albeit is taxed in the hands of the employees when they are then paid their salary and wages). What this means is fairly simple, the amount is not subject to income tax in the hands of the employer but, on the flipside, a tax deduction cannot be claimed for salary and wage costs to the extent they were funded by the payment from the government.

For example: MacDonalds Motors Limited (MML) claimed NZD 250,000 in wage subsidies in the year ended 31 March 2021. MML also spent NZD 1,000,000 on salary and wages. MML does not include the NZD 250,000 wage subsidy as income in its tax return, but it also can only claim NZD 750,000 as a tax deduction for its salary and wage expense.

For self-employed persons, the receipt of one of these payments is taxable and needs to be included as income in the individual's IR 3 tax return. This is because they are the end beneficiary of the payment, which is different from an employer that is acting as an intermediary step between the government and the employee.

From a GST perspective, all payments granted under the wage subsidy, leave support, and short-term absence payment schemes are all specifically excluded from GST. No GST output tax should have been returned for any wage subsidies, leave support scheme payments, or short-term absence payments.

Wage subsidy repayments

Employers that have elected to make repayments of any government assistance need to ensure that the reversal is also treated correctly from a tax perspective. An important point to note is that if a repayment has been made, this is treated as a reversal of the government grant, and as such, a tax deduction is now

able to be claimed for the salary and wage costs at the time they were paid. If a business has made a repayment in the year after the payment was originally received, the salary and wage costs still need to be adjusted in the year they were paid rather than the year the repayment was made.

For example: MacDonalds Motors Limited (from the previous example) has recovered well from COVID-19 and its shareholder Hugo decides in May 2021 that the company is in a financial position that it wants to voluntarily repay NZD 100,000 of the wage subsidy previously received. MML should now claim a tax deduction for a total of NZD 850,000 as salary and wage costs in its tax return for the year ended 31 March 2021.

Resurgence Support Payment

From 23 February 2021, businesses (including the self-employed) will be able to apply for the Resurgence Support Payment if they have suffered a 30% or greater loss of income as a consequence of the elevated COVID-19 alert levels that were in place from 11:59 p.m. 14 February to 11:59 p.m. 22 February 2021. This payment is designed to assist businesses with cashflow and there is no requirement for businesses to pass this payment through to employees, rather, it can be used to meet any business expenses. The payment includes a

core per business rate of NZD 1,500 plus NZD 400 per employee up to a total of 50 full time-equivalent (FTE) employees. The maximum payment available is NZD 21,500. More details about the Resurgence Support Payment are available from Inland Revenue.

The Resurgence Support Payment is not subject to income tax. Consequently, tax deductions cannot be claimed for expenses to the extent they are funded by the Resurgence Support Payment.

The Resurgence Support Payment does, however, differ in relation to GST. Any recipient of the payment that is registered for GST is required to include the GST portion (3/23rd) of the payment received as GST in their next GST return. The business will then also be able to claim back GST when the money is spent.

For example, MacDonalds Motors Limited has met the eligibility criteria to claim the Resurgence Support Payment. As MML has 20 employees, it receives NZD 9,500 on 25 February 2021. MML includes NZD 1,239 as GST output tax in its next GST return due on 28 March 2021. MML spends the payment on additional personal protective equipment for staff and uses the balance to help fund its car yard rental charge. Provided it holds tax invoices, MML can claim back GST on all these expenses.

New Zealand

Snapshot of recent developments

Tax legislation and policy announcements

COVID-19 resurgence support for businesses

The Taxation (COVID-19 Resurgence Support Payments and Other Matters) Act 2021 received Royal Assent on 18 February 2021. It contains the details of New Zealand's COVID-19 resurgence support payments scheme and sets the minimum family tax credit threshold for the 2021–22 and later tax years. The minimum family tax credit threshold for the 2021–22 and later tax years is increased from NZD 29,432 to NZD 30,576 per annum.

Budget Policy Statement 2021

On 9 February 2021, Finance Minister Grant Robertson delivered the Budget Policy Statement for 2021 which sets out the high-level priorities in line with the government's objectives for this term. Included in the priorities is a focus on housing. While acknowledging the supply side is "critical," they will address the demand side particularly of those who are speculating with such measures coming in shortly.

Inland Revenue statements and guidance

Employees' working from home

On 16 February 2021, Inland Revenue released determination EE002B – Variation to Determination EE002A – Payments to employees for working from home costs. This determination is to vary and extend the timeframe of Determination EE002A. It applies to reimbursement payments made by employers from 18 March 2021 to 30 September 2021. This variation will ensure that, for this extended period, the determination will continue to apply to any employee who works from home and that qualifying payments continue to be treated as exempt income under section CW 17 of the Income Tax Act 2007. The new determination does not change the outcomes under Determination EE002A (explained here).

Small Business Cashflow Loan updates

A reminder the new eligibility criteria for the Small Business Cashflow Loan scheme (SBLS) came into effect on 28 January 2021. IR has updated its website to reflect this. In addition, the terms and conditions of the loan have been refreshed to include the changes, including extending the interest-free period from one year to two years and broadening the use of the loan to cover capital expenditure. IR unilaterally changed the terms and conditions of existing loan contracts at the end of 2020.

Facilitation payments to farmers and forgiveness of debts

On 18 February 2021, Inland Revenue issued Commissioner's Statement CS 21/01 – Income tax treatment of facilitation payments to farmers and debt remission on settlement of a loan. The Commissioner's view is that facilitation payments will be taxable income to the recipient under the financial arrangement rules in the Income Tax Act 2007. Any debt forgiveness or remission under the settlement with the lender will also be income to the borrower under the financial arrangement rules.

2021 national standard costs for specified livestock

On 28 January 2021, Inland Revenue published national standard costs for specified livestock determination 2021. This determination is made in terms of section EC 23 of the Income Tax Act 2007. It shall apply to any specified livestock on hand at the end of the 2020-2021 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

Fair dividend rate determination

On 12 February 2021, Inland Revenue issued determination FDR 2020/01 – A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (HSBC Global Liquidity Funds plc: HSBC US Dollar Liquidity Fund – Class H (Distributing) Shares). This determination states that such investment is a type of attributing interest for which the investor may not use the fair dividend rate method to calculate foreign investment fund income from the interest. This determination applies for the 2021 and subsequent income years. However, under section 91AAO(3B) of the Tax

Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Monthly retirement payments from the United Nations Joint Staff

On 29 January 2021, Inland Revenue published finalised Questions We've Been Asked QB 21/01 – Income tax – monthly retirement payments from the United Nations Joint Staff Pension Fund (UNJSPF). The conclusion has remained the same as the consultation document, whereby the tax exemption in section CW 64 of the Income Tax Act 2007, the Diplomatic Privileges and Immunities Act 1968, and Orders in Council for the United Nations

and its agencies do not apply to monthly retirement benefits from the UNJSPF. In general, monthly retirement payments received by retired United Nations staff members are taxed as pensions under section CF 1(g).

Consultation documents

The following documents have recently been published for public consultation:

Shifting GST liability to the purchase of land

On 16 February 2021, Inland Revenue released draft Questions We've Been Asked PUB00256 – When does section 5(23) of the Goods and Services Tax Act 1985 apply to shift GST liability to the purchaser of land? This consultation item explains how section 5(23) may apply to shift GST liability to the purchase of land if the supply has been incorrectly zero-rated. Submissions close on 31 March 2021.

GST: Registration of nonresidents

On 29 January 2021, Inland Revenue released consultation document PUB00354 – GST – Registration of non-residents under section 54B. This draft interpretation statement provides guidance on whether a nonresident is eligible to register for GST under section 54B of the GST Act 1985. Section 54B allows nonresident businesses that do not make supplies to end consumers in New Zealand to recover GST input tax on goods and services acquired in New Zealand. Since section 54B was introduced, there have been legislative changes that treat certain supplies by nonresidents as being made in New Zealand. These changes include the supply of remote services and low value goods. This means a greater number of nonresidents must register under the standard registration provision and fewer nonresidents are eligible to register under section 54B. There are a number of requirements that must be met and commentators have indicated that these have not been well understood. The item steps through the requirements and provides examples of their application. Submissions close on 12 March 2021.

New Zealand

GST and agency: Are you doing it right or is there a hidden cost?

Do you have someone selling your products or incurring costs on your behalf? New Zealand's Inland Revenue has identified that taxpayers have been facing difficulties understanding and applying the agency rules in the Goods and Service Tax Act 1985 (GST Act). In a bid to provide some clarity, Inland Revenue has released an interpretation statement that dives into all the details of when you may be a party to an agency relationship and what this means for GST purposes.

From a GST perspective, it is important to be certain whether an agency relationship exists to ensure all parties involved have a clear understanding of who has to return or claim GST. Getting this wrong can be costly. Sometimes the position can look to be GST neutral, but without proper documentation, technical issues can arise. In other areas, an outright cash cost can occur.

While considering your current agency relationships you may want to ask yourself:

Do you have someone selling products on your behalf? How much GST should you return?

Where you have someone else selling your products on your behalf, it is important that you know whether they are a re-seller, or acting as your agent. Where they are acting as your agent, the responsibility to return and pay the GST on the full gross sale price will normally fall on you. The agent would be required to return GST on the commission charged and you (as the principal) would be able to claim the corresponding input credits, provided you have a valid tax invoice from the agent. Therefore, you will ultimately be paying GST on the net cash (after commission) you receive – however, you can't short-cut this in your GST return, the full gross sale needs to be included as a sale (and output tax) and the commission claimed as an expense (and input tax).

Further, Inland Revenue has confirmed that it is your responsibility to ensure you have the correct processes in place to be returning GST at the right time. For example, if your agent receives a deposit or issues an invoice, this will trigger the GST obligation for you as the principal. As a result, you may have a liability to return the GST on the sale well before you actually receive the cash.

Do you have someone who incurs costs on your behalf? What GST can you claim?

Similar to the above, an agent can incur costs on your behalf and still give you the ability to claim the input tax credits. One of the most common examples we see is when an employee will incur business costs that are subsequently reimbursed by their employer. The statement confirms that an employee can act as agent for their employer and incur costs for which the business is able to claim the GST portion even when the invoice or receipt is in the employee's name. It is important, however, to remember to keep all supporting documentation and invoices to meet standard record keeping requirements.

What if you have an overseas agent? Is there a risk of real GST cash costs?

If you have an overseas agent (such as an overseas web-based sales platform) who is taking a commission from sales made in New Zealand, we recommend you review your processes to ensure that the correct amount of GST is being returned to Inland Revenue. The commission being charged by the nonresident does not generally have any GST on it, so the commission cannot be offset for GST purposes against the gross selling price.

For example, an overseas agent that is not registered for New Zealand GST will make a supply of hotel accommodation on behalf of the New Zealand-based principal and take a commission on the payment. The principal needs to ensure that the GST is being returned on the full price of the hotel accommodation (not the net amount after commission).

Can the agent be responsible to return GST? Overrides to the default rules

There may be instances where it is more practical for the agent to be the deemed supplier and therefore be responsible for returning the GST on the supply. This could be due to accounting system constraints or because the underlying supplier is situated outside New Zealand.

In these situations, it is possible to make an election to split the underlying supply into two separate supplies (one being from the principal to the agent, and another from the agent to the third party). It is important if this election is made that the appropriate steps are taken such as a written agreement between the agent and principal that the supplies will be split and that two separate invoices will be raised.

If you are not sure whether an agency relationship exists

If you're unsure whether an agency relationship exists, we recommend taking the time to read through Inland Revenue's interpretation statement. The document provides useful guidance on how to step through determining whether an agency relationship exists, and how this overlays with the GST rules.

Inland Revenue has confirmed that the following need to exist before any legal agency relationship can be created:

- Authority: The agent must be authorised to act on behalf of the principal to create or affect the legal relations between the principal and a third party, for the relevant supply; and
- Consent: The agent and the principal must both have consented to the conferral of such authority on the agent.

Therefore, the crucial aspect to determine whether an agency relationship exists is that an agent must have the ability to create the legal relationship between the principal and the third party. It is important to understand that the written contractual terms are not definitive. It could be possible for a contract to have a clause that purports to remove any agency relationship. However, if the actions taken by each party evidence that an agency relationship exists (such as the transfer of ownership not flowing through the agent and the agent receiving a commission), then the common law definition could prevail and deem an agency relationship to exist.

Oman

VAT executive regulations issued

The Oman Tax Authority (OTA) has issued the anticipated executive regulations providing implementing guidelines for the Value Added Tax (VAT) Law that will come into effect as from 16 April 2021 introducing VAT in Oman at 5%. The regulations were issued via Ministerial Decision 53/2021 and published in Arabic in the official gazette on 14 March 2021.

The VAT registration process for businesses with a taxable supply turnover exceeding OMR 1 million opened on 1 February 2021 and is expected to stay open through the VAT go-live date of 16 April 2021. The second tranche of registrations for businesses with a taxable supply turnover exceeding OMR 500,000 will start on 1 April 2021 and run through 31 May 2021.

Overview of the regulations

The regulations provide further guidance on several key areas and outline the rules, procedures, and conditions of various aspects of the VAT Law, including:

- Supplies, deemed supplies, composite supplies, and multiple supplies;

- Place of supply provisions, including for real estate services, telecommunication services, and electronically supplied services;
- VAT tax point for the supply of goods and services including vouchers and consignment sales;
- Determination of the value of supplies (including market value for related party transactions);
- Partial exemption and capital goods adjustment rules;
- Details of transactions that qualify as exempt or zero-rated supplies;
- VAT applicability on custom duty suspension and special zones provisions;
- Registration, tax grouping, and deregistration;
- Tax invoices, return filing, and record keeping;
- Tax oversight, inspection, collection, and refund of VAT; and
- Key administrative matters, including penalty provisions.

Key features of the regulations

VAT exemption and zero-rating

The regulations provide details and clarification of the scope, conditions, limitations, and extent of VAT zero-rating and exemption from VAT.

VAT zero-rating will apply to certain transactions within the following areas: supplies of and transactions related to supplies of oil, oil derivatives, and gas; exports of goods and services; supplies of certain food items; international goods and passenger transport; supplies of investment gold, silver, and platinum; supplies to customs duty suspension and special zones; and supplies of certain medicines and medical equipment.

VAT exemption will apply to certain supplies including financial services (incorporating insurance and Takaful), education services, healthcare services, and real estate transactions relating to residential properties.

VAT compliance

The regulations specify certain compliance requirements applicable to all VAT taxable persons. A taxable person who does not comply with the requirements could be subject to administrative penalties prescribed under the law and regulations.

Tax invoices

The regulations require every taxable person to issue a tax invoice for every taxable supply including deemed supplies and against receipt of advances. A complete tax invoice must contain:

- The term "tax invoice;"
- The date of issuance of the invoice, the date of the supply, and the date of payment;

- The serial number of the invoice;
- The supplier's full name, address, and tax identification number;
- The customer's full name, address, and tax identification number (if any);
- A description of the goods and services;
- The quantity of goods;
- The date of advance payment, if any;
- The total consideration excluding VAT;
- The applicable VAT rate;
- Any price discounts, reductions granted to the customer, or subsidies granted by the state that were not included in the value of the consideration excluding VAT;
- The taxable value of the supply; and
- The amount of VAT due.

Simplified tax invoice

The regulations also provide the option to issue a simplified tax invoice with less information than a full tax invoice. This is subject to prior approval by the OTA and the satisfaction of certain conditions.

Tax period and filing of VAT returns

VAT returns for all taxpayers will be based on the calendar quarters ended 31 March, 30 June, 30 September, and 31 December (tax period). The taxable person will be required to file a VAT return electronically via the online portal within 30 days from the end of the tax period in the form to be prescribed by the OTA. Any VAT due will be payable at the same time.

VAT refunds

The regulations also set out the process for obtaining a refund of VAT. The refund application must be submitted in the form to be prescribed by the OTA, stating the amount of the refund requested, the reason for the refund, and the tax period to which it relates. A taxable person may claim a VAT refund where the VAT paid exceeds the VAT due, or in respect of VAT paid by:

- Persons who are not resident in Oman;
- Foreign governments, military personnel, or diplomats, etc.;
- Tourists on goods purchased in Oman and carried in their personal luggage; or
- Other cases to be prescribed by the OTA via an executive decision.

Refund claims must be submitted within five years from the end of the tax period in which the refund becomes due.

Maintenance of records

The regulations specify the records required to be maintained by a taxable person, including but not limited to:

- Daily transaction records in a chronological and sequential manner;
- Inventory record of stock items, the budget, and the total amount of stock;
- Records and documents related to supplies of imported and exported goods and services;
- Records and documents related to intra Gulf Cooperation Council supplies of goods and services;
- Records and documents related to all customs transactions;
- All tax invoices and other documents issued by the taxable person;
- All tax invoices and other documents received by the taxable person; and
- Any other records that include information necessary to determine the correct tax treatment.

Appeals and administrative penalties

The regulations define the process for a taxable person to object to a tax assessment, tax return adjustment, or registration decision made by the OTA. Objections must be submitted in Arabic.

Administrative penalties of OMR 500 to OMR 5,000 are specified for certain offenses, including failure to:

- Submit VAT returns within the specified time period;
- Display a VAT registration certificate in a visible place as required by the regulations; and
- Keep records, accounting books, and documents in accordance with the regulations.

For offenses including the following the administrative penalties range from OMR 1,000 to OMR 10,000:

- Obtaining a VAT refund based on incorrect documents or details;
- Failure to submit a request to cancel the registration where this is compulsory under the law and regulations;
- Failure to repay incorrectly recovered VAT after becoming aware of the error; and
- Failure to quote prices of goods and services inclusive of VAT.

Comment

The release of the regulations is an important milestone for VAT in Oman. Many aspects of VAT are clarified but there are inevitably gray areas and some issues likely will require further guidance and clarification.

It is essential that businesses read carefully and familiarize themselves with the VAT Law, executive regulations, and other guidelines issued by the OTA to ensure that they are fully compliant with their VAT obligations from day one.

CJEU holds that Polish tax on retail sector does not infringe EU state aid rules

On 16 March 2021, the Court of Justice of the European Union (CJEU) delivered its judgment in the state aid case involving the Polish tax on turnover within the retail sector (C-562/19 P), confirming a 2019 judgement of the General Court of the European Union holding that the progressive tax system is not a form of state aid prohibited under article 107(1) TFEU. On the same date, the CJEU delivered its judgement on similar principles in a case concerning Hungary's tax on tax on revenue from advertisements (C-596/19 P) and issued a joint press release.

Background

Poland originally introduced a tax on the retail sector as from 1 September 2016. The law provided for a progressive system of taxation for retailers involved in the sale of goods to consumers whose monthly turnover from such sales exceeded PLN 17 million (around EUR 3.75 million). A rate of 0.8% applied to turnover between PLN 17 million and PLN 170 million (around EUR 37.5 million) and a rate of 1.4% applied on the excess of turnover over PLN 170 million. Monthly turnover of PLN 17 million or less was tax exempt.

Collection of the tax was, however, suspended following the initiation of proceedings by the European Commission concerning the possible noncompliance of the tax with EU law. On 30 June 2017, the Commission announced its decision that that progressive tax constituted state aid incompatible with the internal market and required Poland to cancel all the suspended payments with effect from that date.

The General Court in its 16 May 2019 judgement annulled the Commission's decision and held that the Commission was wrong to consider that the establishment of a progressive tax on turnover generated by the retail sale of goods would lead to a selective advantage in favor of undertakings with low turnover linked to that activity.

Decision of the CJEU

The CJEU, sitting as the Grand Chamber, dismissed the appeal brought by the Commission against the judgment of the General Court. One of the claims made by the Commission in support of its appeal was that the General Court had infringed article 107(1) TFEU, in holding that the progressive nature of the tax on turnover at issue did not lead to a selective advantage.

The CJEU reaffirmed that in the area of state aid and having regard to the current state of harmonization of EU tax law, the established principles of the fundamental mean that member states are free to establish the system of taxation which they deem most appropriate. The application of progressive taxation falls within the discretion of each member state, provided that the characteristics constituting the measure do not entail any manifest discriminatory element.

The CJEU recalled its established case law that, for the purpose of classifying a measure that is of general scope as state aid within the meaning of article 107(1), the condition relating to the selectivity of the advantage provided by the measure requires the determination of whether it favors "certain undertakings or the production of certain goods" over others which, having regard to the objective of article 107(1), are in a comparable factual and legal situation and which, accordingly, suffer different treatment that can be classified as discriminatory. In particular, when considering a national tax measure, it is for the Commission, after having identified the reference system (i.e., the "normal" tax regime

applicable in the relevant member state), to demonstrate that the tax measure in question deviates from that reference system by differentiating between operators who, in the light of the objective pursued by the measure, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question.

Based on these considerations the CJEU examined whether the General Court was right to find that the Commission had not demonstrated that the progressive nature of the tax measure conferred a selective advantage on certain undertakings or the production of certain goods. The CJEU upheld the General Court's analysis that the progressivity of the rates provided for by the tax measure formed an integral part of the reference system having regard to which it was necessary to assess whether the existence of a selective advantage could be established.

The CJEU decided that individual member states may establish the system of taxation which they deem most appropriate, including progressive taxation. In particular, EU state aid law does not preclude member states from adopting progressive tax rates intended to take account of the ability to pay of taxable persons, nor does it require member states to reserve the application of progressive rates for taxes based on profits to the exclusion of those based on turnover. In such circumstances, the characteristics of the tax, including progressive tax rates, are part of the reference system for the purposes of analyzing the condition of selectivity.

It is for the Commission to demonstrate that the characteristics of a national tax measure are designed in a way that is manifestly discriminatory, with the result that the characteristics should be excluded from the reference system. The CJEU, however, found that in the current case the Commission had not established that the characteristics of the measure adopted by Poland had been designed in a manifestly discriminatory manner with the aim of circumventing the requirements of EU state aid law. The General Court was, therefore, justified in holding that the Commission had incorrectly relied on an incomplete and notional tax system in considering that the progressive scale of tax measures at issue did not form part of the reference system with regard to which the selective nature of those measures had to be assessed.

Poland

UK and Norway entities not required to appoint VAT fiscal representative

The Polish Ministry of Finance published a decree on 25 February 2021 providing that non-EU entities with a fixed establishment for VAT purposes in the UK and Norway are not required to appoint a fiscal representative in Poland based on article 204 of the EU VAT Directive. The decree is binding as from the day following its publication, with retroactive effect as from 1 January 2021.

In particular, the requirement is no longer necessary because these countries have concluded agreements on mutual administrative assistance, anti-fraud, and debt recovery in the field of VAT, or contracts of a similar nature.

Consequently, all Norwegian and UK-based entities now are allowed to operate in Poland under direct VAT registration and there is no need to appoint a fiscal representative in Poland during the VAT registration process.

Poland

Ruling clarifies when input VAT may be recovered for fuel card purchases

On 16 February 2021, Poland's Ministry of Finance published a general tax ruling regarding the right to recover input VAT for goods and services purchased using fuel cards. The general tax ruling was issued in the aftermath of the judgment of the Court of Justice of the European Union in the Polish case of Vega International (C-235/18).

The general tax ruling explains when a transaction between the entity providing the fuel cards and the final purchaser of fuel (the fuel cardholder) should be considered a provision of services. The transaction should be treated as a service, and thus be VAT exempt as it is similar to a financial service (i.e., no right to recover input VAT), when all of the following conditions are met:

- The fuel cardholder purchases fuel using the fuel card directly from a supplier operating a fuel station;
- The fuel cardholder has sole control over the means of fuel purchase (choice of place of purchase), the quantity and quality of the fuel, the time of purchase, and the use of the fuel;
- The entire fuel acquisition cost is borne by the recipient (the intermediary does not bear any of the costs of purchase); and
- The intermediary's role is limited to making available to the recipient the financial instrument (fuel card) enabling the acquisition of goods.

If any of the above conditions is not met, the transaction should be considered a supply of goods, qualifying for a VAT deduction, between the initial supplier and the intermediary (i.e., the entity providing fuel cards to its clients), as well as between the intermediary and the recipient (fuel cardholder).

Bearing the above in mind, fuel card recipients should compare the provisions in their card issuers' agreements to the four conditions listed in the ruling. This will help them to confirm whether using a particular fuel card should be treated as a financial service (no right to recover input VAT) or as a delivery of goods (input VAT deduction allowed).

Portugal

Ruling issued on acceptance of PDF invoices

On 10 March 2021, the Portuguese government released a ruling similar to rulings released in 2020, which provides that invoices in PDF format are to be accepted as electronic invoices (even if they are not in compliance with the electronic invoicing rules) until 30 June 2021 (extended from 31 March 2021). The extension is in response to the continuing effects of COVID-19.

Russia

Update on VAT developments as at January 2021

This article provides an overview of key VAT developments in Russia as at January 2021, including clarification of the VAT treatment of certain software user rights under the new system applicable as from 1 January 2021 and the VAT zero-rating for civilian aircraft, and proposals to clarify the application of the reverse charge mechanism.

VAT treatment of software

Various letters issued by the Ministry of Finance in December 2020 clarify aspects of the changes to the VAT treatment of the transfer of rights to use software as from 1 January 2021. The provisions of the Russian Tax Code applicable before 1 January 2021 specified a VAT exemption for the transfer of exclusive rights to use software and the transfer of rights to use software under license agreements. As from 1 January 2021, the rules changed significantly and the exemption is available only for software included in the Unified Register of Russian Software and Databases.

Foreign entities granting rights over software being used remotely

Letter No. 03-07-08/107116 dated 8 December 2020 addresses how the changes affect foreign companies transferring the rights to use software over the internet. By way of background, the provision of remote access to software is considered as an electronically supplied service. When foreign suppliers provide such services, they must register with the Russian tax authorities and account for Russian VAT in respect of services deemed to have been supplied on Russian territory. The tax base for VAT purposes for electronically supplied services is determined on the last day of the tax period in which the payment is received.

The Ministry of Finance confirmed that when determining the taxable value of a license agreement concluded by a foreign company for the provision of remote access to software that is not included in the register, no additional VAT liabilities arise where either:

- The agreement is concluded in 2021 and the foreign company received an advance payment in 2020; or
- The license agreement is concluded in 2020 but the foreign company does not receive payment until 2021.

Transfer of rights to use software involved in remote sale of goods

Letter No. 03-07-07/112469 dated 22 December 2020 clarifies that as from 1 January 2021 the VAT exemption does not apply to “advertising” software used to distribute advertisements; place offers for the purchase or sale of goods, work, or services; search for information on potential buyers or sellers; and/or conclude contracts. Consequently, the VAT exemption for the provision of rights to use software involved in the remote sale of goods no longer applies as from that date.

Transfer of rights to components of software products

Letter No. 03-07-08/109687 dated 15 December 2020 confirms that for the purposes of the VAT exemption, software included in the unified register is understood to be a unified software package and its components (modules), identified by the registration number in the unified register.

Confirmation of VAT zero-rating for civilian aircraft

As from 1 January 2020, the lease of an aircraft registered in the State Register of Civil Aircraft (SRCA) is zero-rated for VAT purposes. In letters No. 03-07-11/93078 dated 23 October 2020 and No. 03-07-11/104690 dated 1 December 2020, the Ministry of Finance clarified certain aspects of the application of the provisions as follows:

- The transfer of an aircraft for lease under contracts concluded before 1 January 2020 is zero-rated, provided that the relevant documents are submitted to the tax authorities;
- The input VAT related to the lease can be claimed for recovery as at the date of the supply;
- It is not necessary to reinstate VAT for which a repayment has been claimed under the procedure that applied prior to 1 January 2020;
- VAT accounted for on advance payments received before 1 January 2020 may not be recovered; likewise, the buyer has no obligation to reinstate VAT that has previously been subject to a repayment claim on the payment; and
- VAT on advance payments received before 1 January 2020 may be reclaimed where lease/rental agreements concluded prior to 1 January 2020 subsequently were amended to reduce the rent by the amount of the VAT and a corresponding amount of VAT from the advance payments returned to the lessee.

Also as from 1 January 2020, the sale or construction of an aircraft registered in the SRCA is zero-rated, subject to submission of the required documentation. In its letters No. 03-07-11/1423 dated 15 January 2021 and No. 03-07-11/105434 dated 3 December 2020, the Ministry of Finance noted that improvement (modernization) of an aircraft is not equivalent to the manufacture of an aircraft and is subject to VAT at 20%.

Draft law clarifies application of reverse charge mechanism

Draft law No. 02/04/01-21/00112412 published on 19 January 2021 on the federal portal of draft legislative acts clarifies the procedure for the application of the reverse charge mechanism.

Based on the current provisions of the Russian Tax Code, where a foreign company is registered with the Russian tax authorities for any reason, the foreign company must fulfill its VAT obligations with respect to all its supplies subject to Russian VAT; the Russian customer acts as a tax agent for VAT purposes only where the foreign company is not registered with the Russian tax authorities. This position is supported by letter No. 03-07-08/55205 issued by the Russian Ministry of Finance on 26 June 2020, a ruling of the Supreme Court in case No. A40-198775/2014 dated 19 April 2016, and ruling No. 2518-O issued by the Constitutional Court on 24 November 2016.

The draft law proposes that VAT should be accounted for and paid by the Russian customer acting as a tax agent where services or work are purchased by a Russian customer from a foreign company registered with the Russian tax authorities for one of the following reasons: (i) the presence of a permanent establishment (PE) of the foreign entity in Russia provided that the services/work are not related to the activities of the PE; (ii) the presence on Russian territory of immovable property and/or vehicles belonging to a foreign company; or (iii) the foreign company opening a bank account with a Russian bank.

Thailand

Rules issued relating to blockchain networks and electronic tax invoices or receipts

The Director-General of the Thai Revenue Department issued a notification (No. 30) on 20 January 2021 to prescribe rules, procedures, and conditions for producing, delivering, receiving, and maintaining

electronic tax invoices or electronic receipts on a blockchain network. The rules, procedures, and conditions are effective for the specific period from 1 February 2021 to 31 July 2021, and the details are summarized below.

Qualification of blockchain network service providers

Entities wishing to register as a blockchain service provider must have certain qualifications and are subject to certain rules and conditions:

- They must be a participant in the Revenue Department's "Tax Sandbox" campaign (under which technology is applied to improve tax collection);
- They must have a blockchain network infrastructure that is certified and approved by the Electronic Transactions Development Agency (ETDA);
- Their blockchain network must have a sufficient level of security and reliability from both a hardware and a software perspective, and there must be measures to control the access to data; and
- They must file a blockchain operator application form (as specified by the Revenue Department) with the Director-General of the Revenue Department by 28 February 2021, together with the certificate from the ETDA, for the Revenue Department's consideration and approval.

Issuance of electronic tax invoices or receipts via a blockchain network

Issuers of electronic tax invoices or electronic receipts that are customers of blockchain network service providers must follow the rules set out below:

1. They must issue electronic tax invoices or electronic receipts that contain the essential information required under the Revenue Code (sections 86/4, 86/9, 86/10, and 105 bis, depending on the circumstances).
2. They must generate the electronic tax invoices or electronic receipts referred to above in item 1 in one of the following ways:
    - Through an electronic form produced in an Excel file format and imported into the blockchain network;
    - Through procedures set forth in a previous notification regarding the production of electronic tax invoices and electronic receipts (Director-General Notification No. 15, dated 18 October 2019), and an import into the blockchain network; or
    - Through the blockchain network, based on the formats and procedures specified by the service provider.
3. They must deliver the electronic tax invoices to the purchasers of goods or recipients of services as required under section 86 of the Revenue Code, or deliver the electronic receipts to purchasers, hire-purchasers, or payers as required under section 105 of the Revenue Code, via the blockchain network that is the network system specified by the recipients of the electronic tax invoices or electronic receipts pursuant to the electronic transactions laws.

4. In a case where electronic tax invoices and electronic receipts are delivered from the service provider to the service recipients, the issuers of the electronic tax invoices and electronic receipts will no longer be required to deliver the electronic tax invoices and electronic receipts to the Revenue Department under the provisions of Director-General Notification No. 15 dated 18 October 2019.

Storage and maintenance of electronic tax invoices or electronic receipts

Registered VAT operators that issue electronic tax invoices or electronic receipts via blockchain network service providers, and purchasers of goods or recipients of services receiving the electronic tax invoices and electronic receipts from such registered operators, are required to store and maintain the electronic tax invoices and electronic receipts, in any of the following manners:

1. In any electronic format, as long as the data from the original format has not been changed;

2. In the original format of the documents; or

3. In a printed format, pursuant to the electronic transactions laws for blockchain networks. The printed electronic tax invoices or electronic receipts must include the following message (produced electronically): "This document has been produced and data has been delivered electronically to the Revenue Department" and, in this case, the printed electronic tax invoices or electronic receipts may be relied upon as the originals.

Cancellation of original electronic tax invoice to issue new electronic tax invoice

To cancel an original electronic tax invoice to issue a new electronic tax invoice, the issuer must prepare the new tax invoice in electronic form, with the new electronic tax invoice number and the new date (day/month/year) when the new electronic tax invoice is issued. The following wording must be included in the new electronic tax invoice: "Issuing the new electronic tax invoice to cancel and replace the original electronic tax invoice no. …, dated (day/month/year of the original tax invoice)." The cancellation also must be recorded in the output tax report in the month in which the new electronic tax invoice is produced.

Similar rules apply for the cancellation of electronic receipts to issue new electronic receipts.

Thailand

Additional tax measures introduced in response to COVID-19

Thailand's government has introduced the following tax measures in response to COVID-19 that are relevant as of February 2021:

- A reduction of the land and building tax for tax year 2021;

- A reduction of the fee for registration of rights and juristic acts for residential property;

- An extension of certain deadlines for electronically filed personal income tax, withholding tax, and VAT returns; and

- An extension of the withholding tax rate reduction for the e-withholding tax.

Reduction of land and building tax for tax year 2021

Royal Decree (No. 2) was issued on 31 January 2021 regarding a reduction of the tax on specified land and buildings for tax year 2021. The decree includes the particulars summarized below:

- A 90% tax reduction will apply to the amount of tax calculated under the Land and Building Tax Act 2019 (section 42 or section 95, depending on the circumstances) that is payable for tax year 2021 for the following land and buildings:
    - Land or buildings used for agricultural purposes;
    - Land or buildings used for residential purposes;
    - Land or buildings used for purposes other than agricultural or residential purposes; and
    - Vacant or unused land or buildings.
- The tax reduction will not affect the existing tax relief that is available under sections 96 and 97 of the Land and Building Tax Act 2019.

Reduction of fee for registration of rights and juristic acts for residential property

On 26 January 2021, the Thai Cabinet approved a measure on the reduction of the fee for the registration of rights and juristic acts ("registration fee") relating to certain residential real property, containing the particulars summarized below:

- A reduction of the registration fee from 2% to 0.01% and from 1% to 0.01% will apply for the transfer of real property and the mortgage of real property, respectively, for the following types of property:
    - Land with a detached house, semi-detached house, townhouse, or commercial building acquired from a land developer under the law governing land development; and
    - A condominium acquired from a registered condominium business operator with a value not exceeding THB 3 million per unit, in a case where the registration of the transfer and the mortgage of the unit take place at the same time.
- The reductions will be effective from the date following the date of publication in the government gazette of a notification from the Ministry of Interior, until 31 December 2021.

Extension of deadlines for electronically filed personal income tax, withholding tax, and VAT returns

On 26 January 2021, the Thai Cabinet approved the following extensions of the deadlines for filings and payments relating to withholding tax and VAT:

- For withholding tax returns (PND.1, PND.2, PND.3, PND.53, and PND.54) that are due in the months of February 2021 to June 2021, which normally are due within seven days from the end of the month in which the payment is made, the deadline is extended to the last day of the month in which the tax return is required to be filed. The extension applies only for returns submitted via the online platform.

- For VAT returns (P.P.30 and P.P.36) that are due in the months of February 2021 to June 2021, which normally are due by the 15th day and the seventh day, respectively, of the relevant month, the deadline is extended to the last day of the month in which the tax returns are required to be filed. The extension applies only for returns submitted via the online platform.

The Ministry of Finance issued a notification dated 28 January 2021 to extend the deadline for the filing of personal income tax returns (PND.90 and PND.91) for tax year 2020, which normally would be due in March 2021, to 30 June 2021. The extension applies only for returns submitted via the online platform.

Extension of withholding tax rate reduction for the e-withholding tax

On 12 January 2021, the Thai Cabinet approved a draft ministerial regulation to extend the period during which the withholding tax rates are reduced (from 5% and 3% to 2%) for certain payments made via the e-withholding tax. The rate originally was reduced from 1 October 2020 to 31 December 2021, and the reduction has been extended to 31 December 2022.

United Kingdom

Further tax policy announcements made and new consultations issued on "Tax Day"

On 23 March 2021 ("Tax Day"), the UK Treasury and HM Revenue & Customs (HMRC) published Tax policies and consultations Spring 2021, providing a useful roadmap of future UK tax changes that may be expected. Although mainly a "spring clean" exercise to conclude or continue existing consultations, there were a number of new proposals as well as announcements of further consultations on tackling tax avoidance.

In the 2021 Spring Budget delivered on 3 March 2021, the government set out a three-part plan to "do whatever it takes" to support people and business in crisis, to fix the public finances, and to start the work to build the future economy of the UK. Only a small number of consultations were published in the budget, including those which would have a fiscal impact in the short term, with the government deferring until Tax Day further tax policy announcements, the issuance of new consultations, and publication of previous responses.

Publications issued on 23 March 2021 include:

- A new consultation on whether to update the requirements for transfer pricing documentation to bring them in line with OECD standards on master file and local file, and potentially to introduce an "international dealings schedule" to be included with tax return filings.

- Publication of a second consultation on the proposed notification of uncertain tax treatment rules for large businesses, including the definition of "uncertain," together with a summary of responses to the first consultation.

- A continued commitment to the Making Tax Digital program for income tax, which had largely stalled since HMRC consulted on it in 2016. This includes the introduction of quarterly digital reporting obligations for income tax for all self-employed individuals and landlords with turnover/rents exceeding GBP 10,000 as from April 2023 and investing in technology to enable taxpayers to manage their tax affairs via a single digital account.

- A call for evidence on potentially accelerating income tax payments for those outside Pay As You Earn and corporation tax payments for companies outside the quarterly installment payment regime.

- Two environmental consultations covering aviation taxes (air passenger duty) to support the commitment to net-zero emissions by 2050, and further consultation on the aggregates levy. Future consultation was signalled on landfill tax.

- Publication of the responses to the carbon emissions tax consultation, along with confirmation that this will not be pursued, with the implementation of a UK emissions trading system instead.

- A new policy to simplify inheritance tax reporting requirements, removing 90% of estates from the need to file inheritance tax returns. This is a sensible and welcome move which will reduce an administrative burden for thousands of estates and should enable probate to be issued more quickly.

- Confirmation that while responses to the call for evidence on VAT grouping will be published in due course, the government has decided not to proceed with this measure.

Prior to today's announcements, there had been a focus on investment incentives in the budget and the immediate publication of a consultation on research and development (R&D) tax reliefs, with the stated objectives of ensuring that the UK remains a competitive location for cutting edge research, that the reliefs are fit for purpose, and that taxpayer money is effectively targeted. The next steps from the recent consultation on the scope of qualifying expenditure for R&D tax credits will be considered making this a wide-ranging review. The government also previously announced its consultation on the banking sector to ensure that the combined rate of tax on banks' profits are competitive with major competitors in the EU and US, and that the UK tax system is supportive of competition in the UK banking sector.

The consultations announced have a closing date of between 1 June and 13 July 2021, with the expectation of a number of concrete proposals in the summer and legislation potentially by the autumn – leading to a fuller than expected budget.

Tax policy has a big part to play in the future of the UK economy, influencing individual and business behavior. Specific fiscal measures are always higher profile, but the administration and compliance aspects of tax announced today are equally important for the efficient management of the tax system and ease of doing business. Businesses and individuals need to engage with these consultations if they want to see a UK tax regime that reflects their needs.

United States

State Tax Matters (5 March 2021)

The 5 March 2021 edition of US State Tax Matters includes coverage of the following income/franchise tax developments:

- Minnesota: Department of Revenue explains state conformity with federal business expensing rules under Internal Revenue Code section 179

- New Jersey: Tax Court addresses prior year NOL carryovers, extensions, and suspension period

- New Jersey: Division addresses NOLs and post-allocation NOLs with certain mergers and acquisitions

- New York: Metropolitan Transportation Authority surcharge rate for Article 9-A taxpayers is increased under updated rule

- Oregon: Temporary revised corporate activity tax rule addresses unitary group filing

- West Virginia: New law updates state conformity to Internal Revenue Code
- Wisconsin: Appellate court affirms deduction for dividends received from affiliated foreign entity

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

- Minnesota: State Supreme Court denies bad debt deductions on sales made via private label credit cards
- New York: Fine art purchased in co-ownership and then leased to co-owner is not an exempt resale
- South Dakota: Department of Revenue reminds that internet access is no longer taxed and addresses related services
- Washington: Department of Revenue extends emergency amendments to post-*Wayfair* remote seller economic nexus rules

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

- Texas: Harris County Appraisal District reminds property owners of potential disaster exemption

United States

State Tax Matters (12 March 2021)

The 12 March 2021 edition of US State Tax Matters includes coverage of the following income/franchise tax developments:

- California: Draft proposed rule changes on alternative apportionment petitions move forward
- Connecticut: New law expands credit for telecommuters and provides nexus relief during pandemic
- Kansas: New law creates loan interest income deduction for some financial institutions
- Massachusetts: Department of Revenue adopts permanent sourcing rule on pandemic-related telecommuting
- New Hampshire: Adopted rules implement business profits tax (BPT) and business enterprise tax (BET) market-based sourcing rules
- Texas: Comptroller addresses cost of goods sold (COGS) deduction pertaining to research expenses

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

- Maryland: Comptroller explains new law taxing digital products and says that software as a service (SaaS) is taxable
- Missouri: State high court disallows resale exemption based on terms of aircraft reuse agreement
- Tennessee: Department of Revenue reminds that nexus thresholds involving marketplaces do not apply to franchise tax

Finally, the newsletter features a recent Multistate Tax Alert: “North Carolina’s Transfer Pricing Initiative nets $100 million: Will other states follow?”

United States

State Tax Matters (19 March 2021)

The 19 March 2021 edition of US State Tax Matters includes coverage of the following income/franchise tax developments:

- Arkansas: New law establishes annual election to pay tax at passthrough entity level
- Georgia: New law generally updates state conformity to Internal Revenue Code
- Iowa: Department of Revenue posts new guidance on state reporting of administrative adjustment requests (AARs) and federal income tax changes
- New Jersey: Division of Taxation addresses conformity to federal consolidated return rules for combined returns
- Oregon: Department of Revenue extends nexus relief timeframe for COVID-19 pandemic-related telecommuting
- Virginia: New law updates state conformity to Internal Revenue Code and addresses CARES Act

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

- Iowa: Proposed rules implement law changes involving bundled transactions and digital products
- Maryland: Comptroller announces filing extensions and waivers for some filers due to law changes

United States

State Tax Matters (26 March 2021)

The 26 March 2021 edition of US State Tax Matters includes coverage of the following income/franchise tax developments:

- Federal: Mobile Workforce State Income Tax Simplification bill remains pending in US House of Representatives
- Federal: Protecting Retirement Savers and Everyday Investors bill introduced in US House of Representatives
- Delaware: Division of Revenue addresses pandemic-related telecommuting and treatment of wage income
- District of Columbia: New emergency legislation allows deduction for apportioned net operating loss carryover
- Idaho: New law addresses CARES Act excess loss limitations for noncorporate taxpayers

- Maine: New law updates state conformity to federal Internal Revenue Code, addresses CARES Act provisions and global intangible low-taxed income (GILTI)
- New Jersey: Updated combined reporting guidance explains sharing of tax credits and carryovers
- New Mexico: Adopted rules reflect mandatory combined reporting regime and market-based sourcing
- New York: Taxpayer must include royalty payments received from foreign affiliates in tax base
- Rhode Island: Duration of emergency withholding rules for pandemic-related telecommuting extended
- Utah: New law revises provisions involving net operating losses, global intangible low-taxed income (GILTI), foreign-derived intangible income (FDII), and repatriated dividends

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

- Washington: Department of Revenue releases draft rule on marketplace facilitator tax collection and reporting

Finally, the newsletter features recent Multistate Tax Alerts:

- "2021 North Carolina county development tier designations and average wages"

"South Carolina 2021 county tier rankings"

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