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## **REPORT ON THE OUTCOME OF THE CONSULTATION ON "INTRODUCTION OF A MECHANISM FOR ELIMINATING DOUBLE IMPOSITION OF VAT IN INDIVIDUAL CASES"**

### **1. THE CONSULTATION AND ITS MAIN ELEMENTS**

The Directorate General for Taxation and Customs Union launched on 5th January 2007 an on-line consultation at the TAXUD website. The consultation period ended on 31.05.2007, but contributions received after that date were also taken into account.

The public consultation had two main goals:

- To gather information about the range of cases where double imposition of VAT occurs in practice.
- To discuss possible ways of eliminating individual cases of double taxation.

As for the first of these goals the Commission was particularly interested in receiving specific examples of double VAT charging, along with the magnitude of the sums involved and steps taken to eliminate the problem. The main objective here was to assess the range of such situations.

The second part of the consultation was aimed at potential solutions to the problem of double VAT charging, should the magnitude of the phenomenon be considerable. The Commission presented an outline of a possible system to eliminate these situations.

In general terms this proposed system would introduce a temporary measure to suspend recovery of second charged tax, along with a mechanism to eliminate the double taxation through a mutual agreement procedure, followed by arbitration if this fails. The public were invited to comment and to suggest possible improvements.

In point 1 of the consultation paper, three different situations leading to double taxation were presented. These were through:

1.1 differing interpretations of a provision of the legislation contained in the VAT Directive 2006/112/EC,

1.2 differing interpretations of the particular situation by the tax administrations of the Member States,

1.3 the difference in assessment of the legal description given to a particular operation by separate national laws.

It should be noted that in the opinion of the Commission, the proposed mechanism for eliminating double taxation should only include situations occurring under points 1.2 and 1.3, as the reasons they occur arise mainly from a lack of communication between the tax administrations of the Member States concerned.

For situations arising under point 1.1, reasons for double taxation are of a different nature and should therefore be excluded from the mechanism. The ECJ has the competence to insure a common interpretation of the EU law, and to include these cases in the proposed mechanism would run the risk of duplication and contradictory decisions in similar cases.

## **2. REPRESENTATIONS**

The Commission received 22 contributions in relation to the public consultation. Only 13 of them were relevant for the subject.

The contributions received had the following origin: 2 papers from multinational companies and 2 from the law society and an institute located in the United Kingdom. The remaining 9 were from different organisations (federations, an association, tax and commerce chambers, a law firm) operating at a national and/or EU level. Among them 5 were sent from Germany and 4 from Belgium.

## **3. OUTCOME OF THE CONSULTATION**

### **Double taxation – scope and examples**

In general terms, participants of the consultation see double taxation as an existing and difficult problem.

It was noted that double taxation creates a burden for business in certain situations. In this respect SME's were mentioned by several contributors as being especially encumbered by this problem. However monetary values were not mentioned in most these cases.

Regarding the sources from which double taxation arises, some participants of the public consultation could not distinguish the differences between the three situations outlined in paragraph 1. Others noted the practical difficulties in making such distinctions. Two parties suggested that cases of double taxation caused by differing interpretations of a provision of the EU VAT legislation should not be excluded from the proposed mechanism for solving this kind of problem.

During the public consultation the Commission received a number of examples of the double imposition of VAT.

However, many of these were in fact describing situations of double taxation caused by differing interpretations of a provision of the EU VAT legislation.

Most frequently mentioned were problems concerning the correct identification of the place of supply of services where two Member States classify the same service differently. One taxes a given activity in the place where supplier is established (in accordance with art 43 of the VAT Directive) and the other in the place where the customer is established (in accordance with art 56 of the VAT Directive). Such situations take place, for example, in relation to accountancy, management and lobbying services.

Similar problems arise with the services linked to immovable property (Conflicting application of art 45 or 56 of the VAT Directive).

In addition, the place of supply of services in the field of the clinical research causes problems (in this case there are three articles - art 43, 52 and 56- of the VAT Directive which can be applied by different Member States).

Other situations leading to the imposition of double VAT occur because of varying national legislation adopted in accordance with art 58 of the VAT Directive, which allows for the shifting of the place of supply of certain services in the light of the criteria of effective use and enjoyment. For example mobile phones calls made within the pre-pay scheme may be charged twice if the traveller is moving from one country to another.

Nevertheless, a certain number of contributions pointed out examples of cases of double imposition of VAT which mainly derived from different national laws (other than VAT) or different appreciation of the facts.

For example, article 44 of VAT Directive states the location of taxation of the supply of services by an intermediary acting in the name and on behalf of another person. This leads to problems of double taxation because of a different understanding of the concept of "acting in the name and on behalf of" by various Member States. While some interpret it strictly according to civil law others have more flexible approach.

Another situation concerns the leasing contract of movable tangible property (mostly cars and planes). The VAT treatment of this kind of contract (whether it is a supply of goods or of services) changes depending on the country. As a result the same transaction may be treated in one country as a supply of rental services and in the other as an intra-Community purchase.

Also mentioned in the contributions were problems with differing interpretations of fixed establishment and the practical implications connected to the use of the VAT identification number in relation to the place of supply of intra-community transport services as outlined in art 47 of the VAT Directive.

Taxable persons have also difficulties with two successive supplies of the same goods for consideration. After the judgment EMAG Handel Eder OHG C-245/04 we know that such a situation "*... gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax under the first subparagraph of Article 28c (A)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 ...*". We have learnt however from the consultation that in practice Member States vary when deciding which of the two transactions should be exempt.

It should be noted that not a great many of the responses were presented in sufficient detail to allow them to be taken them into consideration without further questions. Regrettably many were ill developed, not specifying how in practice the double taxation

takes place and a few referred only to the internal legislation of one Member State. This proves that it is technically difficult to identify the real cause of a double taxation when it is experienced by businesses or final consumers who are not tax experts and are confronted with having to pay twice VAT for reasons they do not really understand.

### **Possible ways of the elimination of double taxation**

All of the contributing parties welcomed the introduction of a mechanism for eliminating the double imposition of VAT in individual cases. In particular, the fact that the VAT has to be paid twice, due to a divergence between 2 national tax administrations is considered as highly problematic for the businesses/consumers concerned.

It was underlined that only the introduction of a smooth, harmonised, simple procedure, which is accessible for business and works in practice made sense.

There is a general consensus that the mechanism should consist of both of the elements presented in the Commission's consultation paper: the suspended recovery of the second tax until dispute is resolved; and the mutual agreement procedure followed by the arbitration if the first does not resolve the problem.

As for the suspended recovery of the second tax, several points were raised.

- In practice it might be difficult to distinguish clearly which Member State charged the tax first and therefore which is the one obliged to suspend the second tax.
- Some contributors agreed that in a situation where the rate of the first charged tax is lower (eg 15%) than the second tax (eg 20%), the remaining difference (ie.5%) should be paid together with the first duty. It was, however, noted that a more complicated system may raise practical problems concerning the collection and, when the procedure is finished, the redistribution of the tax between Member States.
- On the other hand it was suggested that as a rule the suspending country could be the one to which the taxpayer reports. At the same time that country would have the right to start the mutual agreement procedure.
- There should be no interests and penalties imposed on the late payment in the situation when, after closing the dispute, the taxable person is obliged to pay tax in the second, suspending recovery, Member State.

The main points concerning the mutual agreement procedure and arbitration were the following.

- Both procedures should lead to quick solutions and have fixed time limits (between 6 months and 1.5 years).
- It was underlined that effective arbitration is essential for the mechanism to work.
- Many argued that the arbitration would only work if it was carried out at the EU level, and the creation of a European Board was suggested. One idea was that the VAT Committee should be involved in the arbitration.

- It was proposed that, if the mechanism should be introduced, a widely accessible data base of all resolved cases should be created with the aim of reducing the numbers of such cases in the future.

One contributing party suggested that the possible mechanism for eliminating double taxation should be sought within the Council Regulation 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax, as they felt that this regulation was the existing and well accepted basis for the Member States to exchange information and cooperate with each other.

#### **4. CONCLUSIONS**

The consultation on "Introduction of a mechanism for eliminating double imposition of VAT in individual cases" has brought important aspects of the problem to the attention of the Commission.

The Commission is grateful to all those who took the time to make a submission. It is clear from the responses that the area deserves our further deliberation.

All the respondents confirmed that the issue of double imposition of VAT causes problems and in practice is very difficult to tackle. In addition the taxpayer has to bear the double tax, which is clearly against the neutrality of the VAT and a proper functioning of the Internal Market.

Many comments were submitted on the mechanism aimed at the removing double imposition of tax, presented in the Commission's consultation paper.

All these elements will be taken into consideration by the Commission during its ongoing and future planning.